# 1NC vs Gonzaga

## OFF

### 1NC – Private Enforcement PIC

#### Text: The United States federal government should allow relevant agencies to sue to enjoin practices by the private sector that artificially centralize public blockchain infrastructure and recover single damages.

#### The CP avoids private enforcement—private suits are an inextricable part of antitrust liability—public enforcement is sufficient

McCarthy et al., GC & Chief Legal Officer of Womble Bond Dickinson (US) LLP, ‘07

(Eric, Allyson Maltas, Matteo Bay and Javier Ruiz-Calzado, “Litigation culture versus enforcement culture A comparison of US and EU plaintiff recovery actions in antitrust cases,” <https://www.lw.com/upload/pubContent/_pdf/pub1675_1.pdf>)

In comparison, in the European Union, private enforcement actions are rare and play less of a role than public enforcement in the fight against anti-competitive behaviour. Several obstacles hinder actions for damages in member state national courts, including a plaintiff’s limited access to evidence, the unavailability of class actions and the potential that the plaintiff may have to pay the defendants’ costs if the plaintiff loses the case. To address these obstacles and the great diversity of damages actions among the member states, the European Commission recently published a green paper on Damages Actions for Breach of the EC Antitrust Rules.3 The green paper examines those aspects of EU litigation practice that have led to a pronounced underdevelopment of private damages actions in the EU. Since its publication in December 2005, the green paper has sparked significant debate within the international antitrust community about the role of private enforcement of EC Treaty competition law and about damages actions in particular. The general expectation is that private damages actions will emerge (albeit slowly) in the European Union. This article compares the state of plaintiff recovery actions in antitrust cases in the US with that of the EU and explores why the United States is more litigious than the EU.

Private antitrust damages actions in the US

Rightly or wrongly, the United States has earned the reputation of having a ‘litigation culture’ that permeates its entire legal system.4 If that is true, it certainly earned its stripes this past year in the area of antitrust litigation. Although the number of civil cases filed in the United States dropped by 10 per cent from 2004 to 2005, the number of antitrust civil filings, almost all of which were initiated by private plaintiffs, rose by 8.8 per cent.5 In the first six months of 2006, the number of antitrust class actions doubled over the same period in 2005.6 Some experts speculate that “[h]ard-charging regulators, a more aggressive plaintiffs[’] bar, and the implementation of [CAFA]” may contribute to the increase in antitrust litigation.7 But in all likelihood, the explanation is far more elementary. As discussed in greater detail below, the pot of treble damages available to plaintiffs in the United States, as well as pro-plaintiff discovery and procedural rules, make private damages extremely easy and attractive to pursue.

The treble damages remedy

In 1914, the US Congress passed the Clayton Act, codified at 15 USC sections 12-27. Section 4 of the Act extends the Sherman Act’s prohibitions on anti-competitive behaviour and, most notably, allows “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws” to sue for and “recover threefold the damages by him sustained”.8 Treble damages were designed to deter illegal conduct, deprive antitrust violators of the “fruits of their illegal activities” and provide compensation to victims of wrongdoing.9

The Clayton Act’s treble damages provision is not without its critics.10 Many practitioners and policy makers contend that trebling damages creates too great an incentive for plaintiffs to sue. Additionally, they argue, treble damages actions can result in a windfall to plaintiffs. Furthermore, some believe that large fines and the potential for criminal penalties create just as much of a deterrent against violations, without the need for treble damages.11 Nonetheless, the ability of a US private plaintiff to recover treble damages is so sacred and well protected that earlier this year the First Circuit held in Kristian v Comcast Corp12 that, although Comcast could contract with its subscribers to arbitrate antitrust claims, the arbitration agreements could not bar treble damages because “the award of treble damages under the federal antitrust statutes cannot be waived”.13

Although exceptions to the treble damages provision remain few and far between, congress enacted the Criminal Penalty Enhancement and Reform Act (CPERA) in June 2004. CPERA eliminates the treble damages remedy for corporations that qualify for amnesty under the Department of Justice’s Amnesty Programme.14 Under CPERA, a corporation must report its own anti-competitive behaviour to the DoJ and enter into the Corporate Leniency Programme.15 If a private plaintiff sues the corporation for the same behaviour, the civil court may assess single damages against the participating corporation, but only if the judge in the civil action determines that the corporate defendant is cooperating with the civil claimant by providing a full account of the conduct, furnishing all potentially relevant documents, and securing testimony, depositions and interviews from employees.16

Discovery and evidence

Plaintiffs enjoy broad discovery rights in the United States under the Federal Rules of Civil Procedure. These rules provide significant incentives for plaintiffs to file damages suits, even if they have very little factual bases for the underlying claims. At the outset of a case, the parties are obliged to make certain disclosures to one another, including the name of each individual “likely to have discoverable information” and a description by category and location of all documents in the party’s possession or control that it may use to support its claims or defences.17 Thereafter, during the fact-finding or discovery period, plaintiffs may seek a defendant’s business documents through written requests18 as well as answers to questions through written interrogatories.19 Plaintiffs may also ask questions of a defendant’s employees (regardless of seniority), who must sit for depositions and testify under oath.20 Moreover, plaintiffs may seek documents and testimony from non-parties with relative ease.21

Armed with such easy access to a defendant’s or non-party’s documents and employees, plaintiffs with limited evidentiary bases for their lawsuits may be inclined to sue and go on ‘fishing expeditions’ to discover facts to support their case.

Contingent fees

Plaintiffs that file antitrust damages actions in the United States routinely do so on a contingent fee basis. Under such an arrangement with counsel, the plaintiff client does not pay any fees to his or her attorney unless and until the plaintiff collects damages either by settling with the defendant or prevailing at trial. Typically, plaintiffs’ attorneys demand 33 per cent of the recovery as the fee.22 The result is a win for both client and attorney. The fee arrangements allow plaintiffs with limited funds the freedom to pursue their lawsuits without having to fund the litigation along the way. The plaintiffs’ attorney, on the other hand, is attracted to the prospect of treble damages, and thus a larger fee, and therefore is willing to front the litigation costs in the hopes of earning a sizeable fee at the conclusion of the suit.

Class actions

Class actions are the procedural device that enable one or more plaintiff members of a proposed class to sue on behalf of all similarly situated members of the same proposed class.23 Courts in the US have recognised that class actions can be appropriate mechanisms for promoting private enforcement of the antitrust laws.24 In this way, large numbers of potential claimants can prosecute their claims in a cost-efficient manner.25 The objective of any class action lawyer is to get the class certified. To do so, the court must find that the proposed class is “so numerous that joinder of all members is impracticable”, that there are “questions of law or fact common to the class”, that the “claims or defenses of the representative parties are typical of the claims or defenses of the class” and that the proposed class representatives “will fairly and adequately protect the interests of the class”.26 In addition, in most antitrust cases, the court must determine that the “questions of law or fact common to the members of the class predominate over any questions affecting only individual members” and that “a class action is superior to other available methods for the fair and efficient adjudication of the controversy.”27 Under rule 23, proposed class members are afforded the opportunity to decline to join or to ‘opt out’ of the class. But if the class is certified, all class members who do not affirmatively opt out are bound by the decision in the case and cannot pursue their claims individually. Class actions remain a popular means among plaintiffs’ lawyers to litigate antitrust conspiracy claims because they are regularly certified.

State indirect purchaser actions

In Illinois Brick Co v Illinois,28 the US Supreme Court held that, in order to maintain a claim for damages under section 4 of the Clayton Act, a plaintiff must have purchased the product in question directly from the alleged defendant-antitrust violator. The landmark decision thus precludes plaintiffs in a federal court from seeking alleged damages that were ‘passed through’ from the defendant down the chain of distribution in the form of overcharges. In direct response to Illinois Brick, many US state legislatures passed antitrust statutes that permit indirect consumers (ie, below the direct purchaser in the distribution chain) to sue the alleged violator. Today, 29 states permit such suits, or, alternatively, allow the state attorney general to pursue antitrust claims on behalf of indirect consumers.29 In these ‘Illinois Brick repealer’ states, as they are known, defendants face the real prospect of defending against lawsuits that mirror direct purchaser lawsuits pending against them in a federal court.

Huge jury verdicts and settlements

One natural result of the ease with which plaintiffs can pursue treble damages actions in the United States is huge jury verdicts in private antitrust cases. In Conwood v US Tobacco, the plaintiff manufacturer of moist smokeless tobacco (snuff) sued a competitor, the manufacturer of Copenhagen and Skoal, for unlawful monopolisation in violation of section 2 of the Sherman Act, among other claims.30

The jury awarded plaintiffs approximately US$350 million in damages, which, when trebled, resulted in an award that exceeded US$1 billion. The award is thought to be the largest antitrust jury verdict ever recorded.31

Additionally, the several aspects of US litigation highlighted above are a catalyst to settlement. Even before discovery begins, some defendants, confronted with the promise of invasive and expensive discovery, will choose to settle with plaintiffs in order to spare their employees from intrusive discovery and to save on exorbitant legal fees. Plaintiffs routinely extract large settlements from defendants after gaining access to corporate documents and information that, although not dispositive of any wrongdoing, are damaging or embarrassing enough to justify settlement. Similarly, class actions may contribute to settlement of private damages actions because, if certified, defendants do not want to risk losing at trial and therefore pay treble damages. The same is true for state indirect purchaser actions. Defendants often settle these suits in order to avoid duplicative litigation costs.32 Settlement is also preferable for many defendants in this situation who rightly fear the application of collateral estoppel if they are adjudicated liable in even one state.33

The ultimate risk of large jury verdicts inspire settlements even if the defendants litigate the cases for years and at great expense. In 1998, in In re NASDAQ Market-Makers Antitrust Litigation, MDL Docket No. 1023, plaintiffs settled with 37 defendants for a total of US$1.027 billion.34 And in 2003, on the eve of trial, defendant Visa USA settled with plaintiffs in In re Visa Check/Mastermoney Antitrust Litigation, 297 F Supp 2d 503, 506-508 (EDNY 2003) for approximately US$2 billion. Two days later, defendant MasterCard settled for approximately US$1 billion. The combined US$3.05 billion settlement has been described as “the largest antitrust settlement ever”.35 Private damages actions in the EU

In stark contrast to the United States, private damages actions in the EU are few in number and have never played much of an antitrust enforcement role. Although the European Court of Justice (ECJ) in 2001 explicitly recognised a right to damages for breaches of EC competition law,36 plaintiffs have pursued very few damages claims for violations of competition rules. According to a 2004 study (the Ashurst Study), private damages actions based on the violation of either EU or national antitrust rules are in a state of “total underdevelopment” due to various obstacles in bringing such lawsuits.37

To address these obstacles, the EC recently published a green paper, in which the Commission has sparked significant discussion on the present and future role of private enforcement in the EU. This section explores that role.

EU antitrust laws and enforcement

In the EU, there are two levels of antitrust laws and enforcement. The Commission enforces EU antitrust rules at the EU level, which is limited to public enforcement. At the member state level, however, national antitrust authorities and national courts apply both EU and national antitrust laws. Member states permit private enforcement, including damages actions, through national courts.38 Within this two-tiered system, national antitrust authorities and national courts may apply both EU and national antitrust laws, though substantively there is often little difference between the two.

Articles 81 and 82 of the European Community Treaty govern antitrust enforcement. The ECJ long ago decided that these provisions create rights for private parties that national courts must safeguard.39 In Courage v Crehan, the ECJ held that these rights include the right to damages,40 and recently it clarified that such a right includes compensation not only for actual loss, but also for loss of profit plus interest.41 Moreover, with the adoption of Regulation 1/2003,42 the Council of the European Union ‘modernised’ antitrust enforcement by including new procedural rules for the application of articles 81 and 82. In particular, by devoting specific provisions to national courts, the EU legislative branch has recognised the fundamental role that national courts play in the private enforcement of EU antitrust law for the first time since the inception of EU antitrust enforcement in the early 1960s.

The green paper

These developments, however, have not been sufficient to ensure an effective system of private antitrust enforcement, particularly damages actions, throughout 25 jurisdictions with very different legal traditions and markedly diverse substantive and procedural rules. According to the Ashurst Study, to date there have been only 28 successful private actions for damages for violations of the antitrust laws in the EU.43 More often than not, only single large companies that allege anti-competitive behaviour by dominant competitors have pursued private damages actions. For these well-financed plaintiffs, the damages that they seek are large enough to offset the trouble and costs of private litigation before a national court.

In light of the obstacles to private enforcement in the EU, the Commission published its green paper in 2005 to facilitate damages actions, enhance the overall effectiveness of antitrust enforcement and, ultimately, increase compliance with antitrust laws. In response to criticism from those practitioners who fear the adoption of a USstyle system that could lead to ‘excessive litigation’, the Commission has stated that the objective is that of building “an enforcement culture, not a litigation culture”, in which private enforcement would complement public enforcement.44 For each obstacle to damages actions, the green paper proposes several solutions, although the Commission has not yet indicated how it intends to implement any of these solutions (eg, by means of an EU Directive harmonising certain aspects of national law, or thorough ‘soft law’ such as Commission guidelines).

Amount of damages

Treble damages are not available in the EU. It is also not likely that they will be any time soon; the Commission notes that the US treble damages system can lead to “unmeritorious or vexatious litigation”.45 Instead, compensation is limited to the harm suffered, without the possibility of obtaining punitive or exemplary damages. Plaintiffs may thus usually recover only the loss actually incurred, as well as, in some countries, the loss of profits.46 The Ashurst Study, however, revealed that this system of limited recovery provides disincentives to private litigation.47 To provide balance, the Commission proposes to maintain the rule of single damages, while contemplating the possibility of awarding double damages in cartel actions.48 On this issue, it recognises that the addition of double damages will require the implementation of appropriate measures to avoid jeopardising the effectiveness of leniency programmes (eg, successful immunity applicants would be exposed to single damage recovery only).49

#### Expanding liability to private plaintiffs is bad—turns case and undermines solvency

Nuechterlein, JD, partner and co-leader of Sidley's Telecom and Internet Competition practice, and Muris, George Mason University Foundation Professor of Law, served from 2000-2004 as Chairman of the Federal Trade Commission, ‘21

(Jon and Timothy J., “Private Antitrust Remedies: An Argument Against Further Stacking the Deck,” March, <https://instituteforlegalreform.com/wp-content/uploads/2021/03/March-2021-Antitrust-Paper-FINAL.pdf>)

Advocates of expanding private antitrust remedies begin with the premise that “private enforcement deters anticompetitive conduct” and conclude, in the words of the Report, that legal “obstacles” to recovery by “private antitrust plaintiffs” should be eliminated to maximize deterrence.24 But even if the premise is true,25 the conclusion would not follow. The Report appears to assume that the more deterrence the law provides, the better, and that any “obstacles” to private recovery should thus be removed.26 But that position ignores the consequences of overdeterrence, including the prospect that firms will respond to the threat of draconian penalties in ways that reduce the threat of liability but that ultimately harm consumers.

Overdeterrence is a particular concern in antitrust doctrine because the line separating lawful from unlawful conduct can be blurred and much of the conduct falling on the lawful side of the line is socially beneficial. As economists William Baumol and Alan Blinder explain: One problem that haunts most antitrust litigation is that vigorous competition may look very similar to acts that undermine competition …. The resulting danger is that courts will prohibit, or the antitrust authorities will prosecute, acts that appear to be anticompetitive but that really are the opposite. The difficulty occurs because effective competition by a firm is always tough on its rivals.27

For example, excessive antitrust remedies for predatory pricing may not only deter firms from engaging in conduct that would ultimately be deemed unlawful, but also induce them to keep prices well above their costs and, in effect, hold a price umbrella over smaller, potentially litigious rivals. Such a regime would result in less competition and higher prices for consumers—the very outcomes the antitrust laws are designed to prevent.

Proposals to slap another layer of deterrence on top of existing private remedies are particularly perverse because, as discussed above, the current U.S. regime is already overdeterrent, in that it subjects firms to unusually severe liability risks even for overt conduct subject to the rule of reason. If anything, Congress should consider aligning private antitrust remedies with remedies for analogous common law torts by, for example, limiting treble damages and one-way fee-shifting to cases involving hard-core violations that may elude detection, such as price-fixing cartels. In all events, Congress should not make a bad situation worse by ratcheting up the level of overdeterrence.

### 1NC – T – “Prohibition”

#### Interp—“Expand the scope” requires broadening the range of claims that can be brought – that’s distinct from just the standard that courts apply

Barrera 96 – J.D., Wayne State University Law School

Lise A. Barrera, “Is the Courtroom the New Front for the Resolution of Publishing Disputes?,” The Wayne Law Review, Vol. 42, Summer 1996, LexisNexis

It is important to note the distinction between the expansion of the scope of section 43(a) and the standard that courts apply in granting relief to claims under this section. The scope of section 43(a) allows plaintiffs to claim the section provides them with protection and thus should grant them relief. The expansion of the scope allows a much broader range of claims to be brought legitimately under section 43(a). Once the scope of the statute allows the claim to be brought, the courts apply a standard to the claim in order to determine whether a plaintiff should be granted relief.22 The standard applied is also the product of years of judicial interpretation. While the scope of section 43(a) is expanding, however, the standard for relief seems to be becoming higher and harder to meet.

#### A prohibition requires ending something fully

Feldman 86 – Member of Procopio's Native American Law practice

Glenn M. Feldman, On Appeal from the United States Court of Appeals for the Ninth Circuit, California v. Cabazon Band of Mission Indians, 1986 U.S. S. Ct. Briefs LEXIS 1221, Supreme Court of the United States, 1986, LexisNexis

In arguing that California's bingo laws are prohibitory rat ther than regulatory, the appeallants have simply misunderstood the fundamental distinction between "prohibition" and "regulation" of conduct. As succinctly put by the Supreme Court of Washington more than 50 years ago, after noting that the prohibition and regulation of the sale of liquor are entirely different things: "To prohibit the liquor traffic implies the putting a stop to its sale as a beverage, to end it fully, completely, and indefinitely." In contrast, regulation "implies that the sale of intoxicating liquor shall go on within the bounds of certain prescribed rules, restrictions, and limitations." Ajax v. Gregory, 32 P.2d 560, 563 (Wash. 1934). Because regulation of conduct involves prescribing limitations, regulation, by definition, necessarily involves some degree of prohibition. Blumenthal v. City of Cheyenne, 186 P.2d 556, 566 (Wyo. 1947). The two concepts, however, are analytically distinct. Therefore, when courts have been faced with statutory schemes similar to California's bingo laws, they have consistently held them to be regulatory and not prohibitory.

#### “Business practice” requires a pattern of conduct---that excludes single acts like mergers.

Lucas 88 – Judge, California Supreme Court

Malcolm Millar Lucas, Cal. ex rel. Van De Kamp v. Texaco, 46 Cal. 3d 1147, Supreme Court of California, October 1988, LexisNexis

\*\* Italics in original.

The statute defines "unfair competition" to mean, as relevant here, "unlawful, unfair or fraudulent *business practice* . . . ." ( Bus. & Prof. Code, § 17200, italics added.) In so doing it effectively requires what the court variously described in the leading case of Barquis v. Merchants Collection Assn. (1972) 7 Cal.3d 94 [101 Cal.Rptr. 745, 496 P.2d 817], as "a 'pattern' . . . of conduct" ( id. at p. 108), "ongoing . . . conduct" ( id. at p. 111), "a pattern of behavior" ( id. at p. 113), and, "a course of conduct" (ibid.).

What the Attorney General challenges in this action is the Texaco-Getty merger. Under the Barquis court's construction of the statute, however, the merger itself cannot be characterized as "a 'pattern' . . . of conduct," "ongoing conduct," "a pattern of behavior," "a course of conduct," or anything relevantly similar: it is rather a single act. That the complaint, under the Attorney General's reading, alleges that Texaco engaged in certain unlawful, unfair, or fraudulent business practices in the past and may engage in other such practices in the future is simply not enough: the complaint attacks not those past or future practices, but only the merger.

#### “Expand” means to enlarge from a first to a second larger dimension.

White 07 – United States District Court, California Northern

Jeffrey S. White, Medtronic, Inc. v. W.L. Gore & Assocs., 2007 U.S. Dist. LEXIS 80038, United States District Court for the Northern District of California, October 2007, LexisNexis

8. "Expand" and variations.

Medtronic contends that the Court should construe this term, and its variations, to mean "enlarge from a first to a second larger dimension." Medtronic's proposed construction is in accord with the plain meaning of the term "expand." See, e.g., Webster's Ninth New Collegiate Dictionary at 436 ("to open up; to increase the extent, number, volume or scope of'). Gore, in contrast, argues that the Court should construe this term, and its variations, to require that the device expanded is a "low memory metal stent," which is expanded by a balloon rather than by its own resilience. For the reasons previously stated, the Court rejects Gore's proposed construction.

The Court finds further support for its conclusion from the claims of the '062 Patent, which do not contain the "balloon-expandable" limitation proposed by Gore. In contrast, dependent claim 2 of the '219 Patent does contain such a limitation, whereas independent claim 1 of that patent, does not. (See Bianrosa Decl., Ex. 6 ("219 Patent, 8:2-I 1.) Similarly, dependent claim 15 of the '828 Patent requires the use of a balloon, whereas claim 14 of the '828 Patent, from which claim 15 depends, contains no such limitation. ('828 Patent, 8:29-59.) Moreover, the use of the balloon in the dependent claims is the only meaningful distinction from the independent claims. Thus, the presumption of claim differentiation weighs against Gore's proposed construction. See SunRace Roots, 336 F.3d at 1303.

Accordingly, the Court construes the term "expand" (and its variations) to mean: "to enlarge from a first to a second larger dimension."

#### Increase means to make greater.

Merriam-Webster ND

“increase,” Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/increase

transitive verb

1: to make greater : AUGMENT

2obsolete : ENRICH

#### Vote neg—

#### A] Limits— small tweaks to AT explode neg prep burden

#### B] Ground— core DAs are based on broad prohibitions

### 1NC – Antitrust DA

#### Frenzy of deals now because Biden’s antitrust push won’t be implemented for years

David French and Sierra Jackson, Reuters, July 12, 2021, Analysis: Dealmakers see M&A rush, then chills, in Biden's antitrust crackdown

Dealmakers expect a new wave of transformative U.S. mergers and acquisitions (M&A), as companies rush to complete deals before President Joe Biden's antitrust push takes shape, to be followed by a slowdown when regulators start cracking down.

Biden signed a sweeping executive order on Friday to bolster competition within the U.S. economy. This included a call for regulatory agencies to increase scrutiny of corporate tie-ups which have left major sectors such as technology and healthcare dominated by few players. read more

The order came amid an unprecedented M&A frenzy, as companies borrow cheaply and spend mountains of cash they have accumulated on transformative deals to reposition themselves for the post-pandemic world. Almost $700 billion worth of U.S. deals were announced in the second quarter, the highest on record.

The dealmaking bonanza is set to continue, as companies seek to take advantage of the time window during which regulators frame precise rules to implement Biden's order, advisers to the companies said. The M&A slowdown will come only when regulators implement the rule changes, possibly in two years or more, they added.

"The order itself will be less likely to have a chilling effect on strategic M&A than the potential chilling effect of a significant increase in the number of prolonged investigations and merger challenges brought by the agencies," said Michael Schaper, partner at law firm Debevoise & Plimpton.

Spokespeople for the White House and the two main antitrust regulators, the Federal Trade Commission (FTC) and the U.S. Department of Justice (DoJ), did not immediately respond to requests for comment.

Dealmakers were bracing for a tougher antitrust environment under Biden even before last week's executive order. Last month, the DoJ sued to stop insurance broker Aon's (AON.N) $30 billion acquisition of peer Willis Towers Watson (WTY.F). And Biden tapped Lina Khan, an antitrust researcher who has focused her work on Big Tech's immense market power, to chair the FTC.

**Defense merger markets are opening now – that allows opportunities for firms to invest in new lines of innovation**

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Matt Aaronson, Doug Belair, Paul DeLia, Drosten Fisher, Stephen O’Bryan, and Meldon Wolfgang, "Building Beachheads in the US Defense Market Through M&A," Boston Consulting Group, 7-23-2020, <https://www.bcg.com/publications/2020/building-beachheads-us-defense-market-through-mergers-acquisitions>

Despite the serious economic pain that the coronavirus pandemic has created for some defense companies—sapping their ability to undertake acquisitions—**all is not lost**. Defense M&As are **still an option**. Historically, industry **consolidation** occurs when US defense spending is on the decline, and, given the trajectory of such spending today, the industry could well be on the **cusp** of another **period of consolidation.**

Of course, some formidable challenges await companies that want to tap into the enormous US defense market, as well as for companies that hope to expand an established presence. A wave of consolidation over the past decade has cemented positions, leaving a relatively small number of large players that would be logistically difficult to acquire. Any major deal would surely face careful regulatory scrutiny. With those caveats in mind, companies should plan now for how they could seize opportunities to establish new platforms and beachheads in the US defense market.

The Next Consolidation Wave?

US defense spending tends to go in waves, and we may be about to enter **another downturn** with **aggressive cuts** similar to those proposed by the Budget Control Act in 2011. (See Exhibit 1.) While the President’s FY21 defense budget requests an annual 2% increase, our modeling suggests an increase is **unlikely**, given the size of the **stimulus package** to counter COVID-19. We forecast a range of scenarios, with the best case being essentially a flat budget, and the worst being a steep decline. If the worst case occurs, it’s likely that new programs will be postponed, R&D cut for all but the most strategic efforts, and current procurements will slip. There could also be pressure to keep existing programs in service longer than planned—which could increase their sustainment costs and modernization requirements.

[[figure omitted]]

Such downturns have historically been **periods of consolidation** in the industry, a chance for **stronger companies** to buy firms in financial distress and either **establish a beachhead** in the US or **expand their presence**. (See Exhibit 2.) This presents a **near-term opportunity** for companies—whether they are foreign firms, domestic commercial aerospace companies, private equity investors, or existing players looking to create new platforms.

[[figure omitted]]

For example, BAE Systems took advantage of the downturn in the 1990s to acquire the Sanders electronics business from Lockheed Martin. This put BAE on the path to building a $12 billion business in the US, accounting for 50% of the group’s revenue and making it a major prime contractor. The Sanders acquisition helped BAE establish a Special Security Agreement with the US Department of Defense (DOD), which eventually regarded the company’s US business as a domestic company. Using this as a foundation, BAE went on to acquire United Defense and the Bradley Fighting Vehicle franchise in 2005. The company followed up this acquisition in 2007 with the purchase of Armor Holdings a provider of tactical vehicle and soldier protection equipment. The land vehicle acquisitions proved highly lucrative in the Iraq and Afghanistan wars.

While it’s true that few companies have the financial resources of a BAE, or the risk appetite for multibillion dollar acquisitions, we still see **many opportunities** to create **custom plays**—to **assemble** what a company wants in a **few steps** instead of one fell swoop—and at a **lower cost** than buying a large firm (and with less regulatory scrutiny).

Become A **Conduit Of Innovation**

It’s important to understand that while the prime contractors (aka, “the primes”) are huge, their R&D budgets are **relatively constrained**—typically **just 2%** or so of revenue. They tend to focus on winning new programs and developing existing programs but **not pure innovation**. As a result, their “cash cows” can sometimes get shortchanged on the R&D front. The primes still value these programs, but they must prioritize and often **cannot spare the resources** to upgrade them.

This **creates opportunities** for others. A prime might **happily divest** a seemingly stagnant component business (in order, hypothetically, to focus on system integration) but would be very interested if the new owner of that component business **pursued R&D** and did the **necessary conversion work** to help extend the life of the prime’s existing system integration program. In addition, the Pentagon is looking to **diversify its sourcing** to more creative and flexible vendors who will assume more of the financial risk of system **modification and development.**

With that mind, we believe that **ambitious companies** should consider **M&A strategies** that help them become “**conduits of innovation**” for the main players. The aspiring company may need to **acquire several subunits** from existing players to build a **cohesive whole**, then marry **industry knowledge** (such as where to find certain expertise or anchor capabilities) together with an **analytical understanding** of where the leading edge of the industry is trending. This approach requires a coherent vision for what a successful player will look like in three to five years. (See the sidebar, “Six M&A Success Factors.”)

**Increased antitrust scope sends chills throughout the industry – changes in substantive antitrust deter defense mergers**

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John D. Carroll, "How a New Era in Antitrust Enforcement May Impact Government Contractors," The National Law Review, 2-24-2021, https://www.natlawreview.com/article/how-new-era-antitrust-enforcement-may-impact-government-contractors

With a new presidential administration promising vigorous antitrust enforcement, and a new Democratic majority in Congress seeking to make **drastic changes** to U.S. **antitrust laws**, the technology and healthcare industries have found themselves the main targets of increased antitrust scrutiny. Though companies engaging in government contracting, particularly in the **aerospace and defense industries**, already have had to deal with a **range of antitrust issues** – for example, the Department of Justice, Antitrust Division (the “DOJ”) launched the Procurement Collusion Strike Force (“PCSF”) in 2019 (discussed in more detail here), which focused on “deterring, detecting, investigating and prosecuting antitrust crimes … in government procurement, grant and program funding” – they may find themselves subject to **increased antitrust enforcement** in 2021. In fact, on February 23, 2021 PCSF Director Daniel Glad confirmed he is “focus[ed] on three things in 2021: expanding our platform with PCSF building out our data analytics program; and bringing investigations to the recommendation/disposition stage.”

Antitrust enforcement is not typically a “hot button” issue in modern American politics, nor is it at the top of agendas for new administrations’ enforcement priorities. In fact, historically antitrust enforcement has not changed materially when new presidential administrations or Congressional majorities have come into power, even when those administrations or majorities are from a different political party. Recently, however, antitrust has become a prominent issue, as there has been a growing concern among academics, practitioners, and elected officials that U.S. antitrust enforcement is not adequately addressing competition issues and needs major changes.

While it only has been a month since the 117th Congress and the Biden administration have come into power, and many key antitrust positions at the DOJ and Federal Trade Commission (“FTC”) have yet to be filled, the government already has suspended Early Termination (“ET”) for all mergers and acquisitions reportable under the Hart-Scott-Rodino Act, over the objections of two FTC Commissioners – meaning that all such deals now must undergo the full 30 calendar waiting period. In Congress, Senator Amy Klobuchar (D-MN), the Chair of the Antitrust Subcommittee of the Judiciary Committee, introduced the Competition and Antitrust law Enforcement Reform Act on February 4, 2021, that seeks to overhaul U.S. antitrust enforcement, by among other things, placing significant restrictions on businesses that have more than 50% market share in their relevant markets.

Given concerns by some regarding increased concentration in certain aerospace and defense industries – after all, in January 2021, the Pentagon raised concerns about “drastic consolidation” in the defense sector in its annual Industrial Capabilities report to Congress – companies may find their **transactions and personnel practices** under **even more scrutiny** by the DOJ and FTC.

With respect to transactions, companies’ proposed mergers or acquisitions of competitors have received close looks by the government in recent years, especially in concentrated industries, with the Department of Defense (“DOD”) playing a crucial role in determining the scope and result of review by the FTC or DOJ. **Teaming agreements,** which the DOD and antitrust enforcement agencies recognize **can be pro-competitive**, may be **even more closely examined** by government, and it is possible that the **current guidance** from the government regarding its antitrust evaluation of such agreements **could be changed**.

Because government contractors often operate in industries where there is a **limited supply of potential employees** with the necessary skills and credentials, they should be especially careful about **restrictive provisions** in their transaction and employment agreements, such as non-competes and non-solicits. Also, government contractors should be wary about engaging in discussions or **sharing** confidential compensation information sharing with competitors, particularly in light of the government’s recent **criminal antitrust actions** against “**no poach” agreements** entered into between competitors.

Though it is early, it is clear that the Biden administration is going to make antitrust enforcement a priority, and we can expect they may be enforcing **new, more rigorous laws** passed by Congress. Government contractors should therefore **be prepared** to face increased scrutiny of their operations. Antitrust enforcement can have **profound consequences** on a company’s business, as it can place **limitations on transaction strategy** and potentially **expose a company** to **significant** civil or even criminal **liability**.

**That causes global war – defense mergers are critical to maintaining the US’s advantage over Russia and China**

**Marks 19** – Former Senior Policy Advisor to the Under Secretary for Security Assistance, Science and Technology at the U.S. Department of State

Michael Marks, "Strengthen US industry to counter national security challenges," American Military News, 10-10-2019, https://americanmilitarynews.com/2019/10/strengthen-us-industry-to-counter-national-security-challenges/

While U.S. defense budgets have recently been on the rise, it is likely that we will see a spending decline in the coming years as competition for non-defense federal budget dollars increases and deficits grow. The United States, therefore, must **take action** to ensure that we **maintain our technological edge** against our adversaries by **empowering the private sector** to provide cost-effective **innovation** for America’s defense.

Since the end of the Second World War the U.S. has relied on **qualitative superiority** over its potential adversaries, especially those like the Soviet Union/**Russia and China**, who enjoyed comparative quantitative advantages. These qualitative advantages were **vital** to maintaining **global stability** and helped enable our nation to become the preeminent **global economy**, but they have been eroded over the last few decades.

In 1960, the U.S. share of global research and development (R&D) spending stood at 69%. U.S. defense-related R&D alone accounted for 36% of total global expenditures. Soon thereafter other nations recognized the need to increase their R&D expenditures and build their own defense industrial bases to compete with the United States. From 2000-2016, China’s share of global R&D rose from 4.9% to 25.1% while the U.S. share of global R&D dropped to 28%. U.S. defense-related R&D meanwhile now makes up a **mere 4%** of global R&D spending.

There can be no doubt that Russia and China are **determined** **to challenge America’s qualitative advantage**. From the rebirth of Russian military power under Vladimir Putin to the ever-growing Chinese military prowess across the board, their efforts show **no sign** of slowing down.

Russia has been and continues to undergo a **major modernization** of its armed forces. For example, they are in the midst of a ten-year program to build hundreds of **new nuclear missiles** and have set a goal of modernizing 70% of the Russian Ground Force’s equipment by 2020.

One of the most frightening examples of Russia’s resurgence is its development of a **hypersonic missile** that could be ready for combat as early as 2020. Worryingly, the US is currently **unable to defend** against this type of missile. To accompany these developments came the emergence in 2017 of Russia as the world’s second-largest arms producer, ready and able to support nations hostile to US interests.

China, on the other hand, used to be a country that only manufactured cheap products and knockoffs, but that is no longer true. **Technology development** and **innovation** figure prominently in all of China’s national planning goals, with plans to make the country the **global leader** in science and innovation and the preeminent **technological and manufacturing power** by 2049, the 100th anniversary of the Chinese communist revolution.

This, of course, has huge implications for China’s military capability. The country now has the second-largest national defense budget behind the U.S. and wants to be Asia’s preeminent military power. Beijing is developing next-generation **fighter jets, ICBMs** and shorter-range **ballistic missiles**, as well as advanced naval vessels.

The People’s Liberation Army has reached a **critical point of confidence** and now feel they can **match competitors** like the United States in combat. This has implications for the **security of Taiwan, Japan, other US allies** in the region as well as to America itself. To make matters worse, there are a growing number of experts that see China developing **asymmetric technologies**, combined with **conventional and nuclear systems** that could create an **existential threat** to the U.S. pacific based assets.

It is in the wake of these growing threats to our national security American industry will likely be expected to shoulder an even **larger responsibility** concerning investment in **defense-related R&D**.

One of the ways we can empower companies to make these additional investments and lead next-generation defense innovation is to **allow commonsense mergers** between important defense and aerospace companies. Horizontal consolidation **eliminates the redundancy** of enormous fixed costs, **leading to savings** passed down to customers. Mergers can also create **economies of scale** and **existing synergies** that help the combined company realize access to **larger numbers** of engineers and innovators, while keeping cos**ts low** and **improving the timeline** for taking a product from concept to development.

A recent example of how this can work is the proposed Raytheon and United Technologies merger. The two parties project that the new combined company will employ more than **60,000 engineers**, hold over **38,000 patents** and invest approximately **$8 billion per year** in research and development. This will allow the development of **new, critical technologies** more quickly and efficiently than either company could **on its own**. Such private sector investments in innovation will be **critical** in the face of the **growing challenges** to American **military dominance**.

America’s **R&D advantage**, crucial to **maintaining military superiority**, is increasingly **at risk**. As China and Russia continue to challenge America’s military dominance and pressures on the defense budget continue to mount, the federal government will likely turn more and more to contractors and commercial companies to develop **next-generation defense capabilities**. Strengthening U.S. industry, therefore, will be **critical** to countering our **national security challenges.**

### 1NC – Antidomination K

#### The Affirmative forwards a political imaginary centered on technocratic tweaks to antitrust law —That’s a political choice rooted in and perpetuating neoliberal technocracy—Reject it in favor of an alternative politics that views the role of antitrust and government as preventing domination of citizens

Vaheesan 18 – Policy Counsel at the Open Markets Institute. Former regulations counsel at the Consumer Financial Protections Bureau

Sandeep Vaheesan, “The Twilight of the Technocrats’ Monopoly on Antitrust?,” The Yale Law Journal Forum, 6/4/18, https://www.yalelawjournal.org/pdf/Vaheesan\_ir9dchg8.pdf

Over the past forty years, technocrats have dominated antitrust law.44 Leadership at the Department of Justice and Federal Trade Commission as well as Supreme Court Justices have rewritten much of antitrust law.45 They have ignored or distorted the legislative histories of the antitrust laws and have even overridden Congress’s legislative judgments.46 By restricting private antitrust enforcement, the Supreme Court has also limited the ability of ordinary Ameri- cans to influence the content of antitrust law.47

While the antitrust technocrats have been on the march, Congress has been dormant. Its antitrust activities have been confined to secondary issues.48 This combination of technocratic hyperactivism and legislative lethargy has created, in the words of Harry First and Spencer Waller, “an antitrust system captured by lawyers and economists advancing their own self-referential goals, free of political control and economic accountability.”49 Although proponents of technocratic antitrust may characterize it as “pure” or “scientific,” the reality is quite different as big business interests and their representatives dominate debate within this cloistered enterprise.50

This congressional indifference to antitrust is not inevitable. Despite pro- longed quietude, Congress could become an active player in antitrust again. Some members of Congress are showing a renewed awareness of the field and an interest in reasserting control over the content of the antitrust statutes.51 The most democratically accountable branch of the federal government may be poised to take the lead on antitrust in the coming years, reclaiming authority over a technocracy that has not answered to the public in decades.

iii. the consumer welfare model is not anchored in congressional intent and reflects a narrow conception of monopoly and oligopoly

Given that consumer welfare antitrust is a political choice, this model can be evaluated against alternatives on a level playing field. Consumer welfare is not “above politics.” It is a political construct that features at least two serious deficiencies. First, the consumer welfare model contradicts the legislative histories of the principal antitrust statutes; the courts and federal antitrust agencies have instead substituted their own political judgments for those of Congress. Second, the consumer welfare model represents an impoverished understanding of corporate power. It focuses principally on one aspect of business power—power over consumers—and ignores other critical manifestations.

Congress’s original vision for the antitrust laws, one that recognizes both the economic and the political impacts of monopoly, is a superior alternative to the consumer welfare philosophy. As the enforcers and interpreters of statutory law in a democratic polity, federal antitrust officials and judges should follow the congressional intent underlying the antitrust laws. Furthermore, commentators, legislators, and policymakers should recognize that controlling the power of large businesses over not only consumers but also competitors, workers, producers, and citizens is essential for preserving at least a modicum of economic and political equality in a democratic society.

#### Elite capture locks in civilizational collapse – try or die to put political and economic power in the hands of the citizens

MacKay 18 – Professor of Sociology, Mohawk College

Kevin MacKay, also a union activist & executive director of a sustainable community development cooperative, The Ecological Crisis is a Political Crisis, 2018, https://www.resilience.org/stories/2018-09-25/the-ecological-crisis-is-a-political-crisis/

With each passing day, reports on global climate change become increasingly bleak. Recent research has affirmed that the glaciers are melting faster than anticipated1, and that acidification, with its catastrophic effect on ocean ecosystems, is also proceeding faster than feared2. As the concentration of atmospheric carbon continues to rise, so does the likelihood we’ve passed the tipping point for irreversible climate change.3

When one looks at other critical earth ecosystems, the danger is equally apparent. Soil is being destroyed.4 Fresh water shortages are wracking several continents and leaving billions of people without reliable access to clean drinking water.5 Fish stocks are plummeting.6 Oceans are clogged with plastic garbage.7 Biodiversity is disappearing at an alarming rate.8 In the face of this full-spectrum ecological assault, a growing number of scientists have been saying that the collapse of civilization is now unavoidable.9

Stopping the destructive effects of industrial, capitalist civilization has now become the defining challenge of our age. If we don’t radically change our society’s course within the next 30 years, then a deep collapse and protracted Dark Age are all but assured. In order to confront this challenge, we need to understand what is causing civilization’s crisis, and most importantly, how the crisis can be resolved. At stake is nothing less than a viable future on this planet.

The Five Horsemen of the Modern Day Apocalypse

In my book, Radical Transformation: Oligarchy, Collapse, and the Crisis of Civilization, I argue that industrial civilization is being driven toward collapse by five key forces – related to terminal dysfunction within its ecological, economic, socio-cultural, and political sub-systems:

Dissociation: globalized production and distribution systems disrupt people’s ability to put their own actions, and the actions of elites, into a coherent causal and ethical framework. Actions by individuals, institutions, and systems of governance are therefore disconnected from their effect on the natural world and on other peoples. Without this critical feedback, even well-intentioned actors can’t make rational and ethical choices regarding their behaviour.

Complexity: the world-spanning nature of industrial capitalist civilization, and the massive number of interrelationships it represents, make predicting the effect of any given change on the system as a whole devilishly difficult. Disastrous tipping points loom in several of civilization’s systems – from the collapse of ocean ecology to the threat of nuclear war. In addition, because the crisis cannot be contained in one part of the globe, the dysfunctions can’t be dealt with in isolation.

Stratification: a profoundly unequal distribution of wealth – both globally and within nations – leads to mass human poverty, displacement, and to premature death through disease and continuous warfare. Stratification also leads to political instability, eroding a society’s social cohesion and undermining decision-making structures.

Overshoot: the economic practices of industrial capitalism are exceeding ecological limits. Our civilization is critically degrading the biosphere, burning through non-renewable energy sources, and shifting the entire climatic balance.

Oligarchy: in states worldwide, political decision-making is controlled by a numerically small, wealthy elite. This form of government serves to lock in patterns of conflict, oppression, and ecological destruction.

Societies as Decision-Making Systems

Each of the horsemen presents a significant threat to civilization’s viability. However, oligarchy is particularly important as it deals with a society’s decision-making systems. In his 2005 book Collapse: How Societies Choose to Fail or to Succeed, geographer Jared Diamond argued that many past civilizations have collapsed due to their inability to make correct decisions in the face of existential threats.10 Diamond drew on the work of archaeologist Joseph Tainter, who in his 1998 book The Collapse of Complex Societies, argued that civilizations fail due to a constellation of factors.11

To Tainter, the ultimate mistake failed civilizations made was to continually solve problems by adding social complexity, and as a result, increasing the society’s energy needs. Eventually, Tainter argued that civilizations encounter a “thermodynamic crisis” in which they are unable to sustain an energy-intensive level of complexity. The result is collapse – ecological devastation, political upheaval, and mass population die-off.

The tendency for societies to collapse under excessive energy demands is an important insight. However, what Tainter and Diamond failed to appreciate is how oligarchy is an even more fundamental cause of civilization collapse.

Oligarchic control compromises a society’s ability to make correct decisions in the face of existential threats. This explains a seeming paradox in which past civilizations have collapsed despite possessing the cultural and technological know-how needed to resolve their crises. The problem wasn’t that they didn’t understand the source of the threat or the way to avert it. The problem was that societal elites benefitted from the system’s dysfunctions and prevented available solutions.

Oligarchic Control in “Democratic” States

Citizens in countries such as Canada, the United States, Australia, or the Eurozone members, would generally consider themselves to be living in democratic societies. However, when the political systems of Western democracies are scrutinized, clear and pervasive signs of oligarchy emerge.

A 2014 study by American political scientists Martin Gilens and Benjamin Page revealed that the great majority of political decisions made in the United States reflect the interests of elites. After studying nearly 1,800 policy decisions passed between 1981 and 2002, the researchers argued that “both individual economic elites and organized interest groups (including corporations, largely owned and controlled by wealthy elites) play a substantial part in affecting public policy, but the general public has little or no independent influence.”12

Today, oligarchic control over decision-making, and its catastrophic ecological effects, have never been clearer. In the U.S., Donald Trump and his billionaire-dominated cabinet are seeking to dismantle the Environmental Protection Agency13, to question climate science14, and to pursue a policy of “American energy dominance” that will dramatically expand production of fossil fuels.15

U.S. energy companies are also having a profound impact on domestic energy policy by accelerating the development of hard-to-access fuel sources through hydraulic fracturing, deep-sea oil drilling, and mountain-top removal coal mining.16 At the same time, fossil fuel oligarchs are working overtime to dismantle green energy initiatives, such as the Koch brothers’ war on the solar industry in Florida, and in other cities across the continent.17

In Canada, often thought of as more progressive than its southern neighbor, the situation hasn’t been much different. Under prime minister Stephen Harper’s two terms, the Canadian state became an unapologetic cheerleader for extracting some of the world’s dirtiest oil –Tar Sands bitumen. Harper accelerated Tar Sands production, leading to the clear-cutting of thousands of acres of boreal forest, the diversion of millions of gallons of freshwater, and the creation of miles of toxic tailings ponds, filled with water contaminated by the bitumen extraction process.18

Like the Trump administration, the Harper government silenced federal climate scientists.19 The government also targeted environmental charities and non-profits, using funding cuts and the threat of audits to undermine climate advocacy.20 When a movement of national outrage swept Harper from power in 2015, Canadians were hopeful that climate change would once more be taken seriously. However, the new government of Justin Trudeau, while embracing the international discourse on global warming, has shown a continued allegiance to the fossil-fuel oligarchy by committing over $7 billion in federal funds to purchase the failing Kinder-Morgan Trans Mountain pipeline.21

What is To Be Done?

To create a sustainable future, we must first learn the lessons of the past, and what archaeological research shows is that throughout history, civilizations that have been captive to the interests of an oligarchic elite have all collapsed.22 Today’s industrial, capitalist civilization is trapped in this same deadly cycle.

As long as a self-interested elite controls decision-making in modern states, we will be far too late to avoid the effects of steadily contracting ecological limits. In addition, we will be unable to avert the downward spiral of economic crisis, conflict, and warfare that will result as oligarchs scramble to maintain their wealth and power in the face of dwindling resources and mounting crisis.23

Breaking free from this destructive pattern will require us to take political and economic power back from the 1% and return it to the hands of citizens. This means that advocates for ecological sustainability must move far beyond individual actions, lobbying, or reform of existing political and economic institutions. If we are to have a chance, we must ensure that governments make decisions based on the public good, not on private profit.

Radically transforming industrial, capitalist civilization won’t be easy. It will require movements for environmental sustainability, social justice, and economic fairness to come together, and to realize their common interest in dismantling the system of oligarchy and building a democratic, eco-socialist society.24 This “movement of movements” must put aside sectarian squabbles, and finally realize that the goals of economic justice, human rights, and ecological sustainability are all intrinsically linked.

Such changes may seem like a tall order, but hope can be found in the deepening struggle being waged to protect our fragile ecosystems. First Nations groups are leading this charge and beginning to win some important victories. The inspiring Water Protectors of Standing Rock were able to disrupt the Dakota Access Pipeline in the face of intense government oppression.25 In Canada, Several British Columbia First Nations recently won an impressive court victory in their opposition to the Trans Mountain pipeline.26

If successful grassroots struggles can be linked with equally hopeful movements for real political change, then there is hope for the future. However, if we continue on with “business as usual” – hoping that change will come from lifestyle choices and the interchangeable representatives of elite political parties, then the future looks grim indeed.

### 1NC – States CP

#### Text: The fifty states and all relevant United States territories should prohibit anti-competitive business practices by the private sector that artificially centralize public blockchain infrastructure.

#### States have the right to enforce federal antitrust law and enact and enforce their own antitrust laws---those state-level laws are not inherently Congressionally preempted.

HLR 20 – Harvard Law Review

“Note: Antitrust Federalism, Preemption, and Judge-Made Law,” Harvard Law Review, Vol. 133, June 2020, LexisNexis

I. THE ANTITRUST FEDERALISM LANDSCAPE

Antitrust federalism, meaning the space carved out for the states in the more generally federal antitrust arena, can be thought of as made up of two "swords" -- the first the states' ability to bring suit under federal antitrust law and the second their ability to enact and enforce their own state antitrust laws -- and one "shield" -- immunity from federal antitrust law for state actions. The swords allow states to attack antitrust offenders, while the shield allows states to defend against federal antitrust action.

All three elements of antitrust federalism find their roots in congressional action or the courts' interpretation of congressional inaction. The power to enforce federal antitrust law as parens patriae for full treble damages -- the first sword -- was granted to the states by Congress in Hart-Scott-Rodino. On the judicial front, the Supreme Court acknowledged state immunity from federal antitrust actions -- the shield -- in Parker v. Brown, noting that the Sherman Act did not explicitly mention its application to state action. Finally, when the Court confirmed that states' ability to make their own antitrust laws -- the second sword and the one discussed in this Note -- was not preempted in California v. ARC America Corp., it considered the same Sherman Act silence.

### 1NC – Section 5 CP

#### The Federal Trade Commission should:

**PLANK 1**

--determine that “unfair methods of competition” pursuant to section 5 of the FTC act to prohibit anti-competitive business practices by the private sector that artificially centralize public blockchain infrastructure and bring associative enforcement actions

**PLANK 2**

--issue cease and desist letters to companies engaging in conduct that artificially centralizes public blockchain infrastructure, stating that their practice violates the core antitrust laws

#### Congress granted the FTC broad authority to regulate anticompetitive practices under section 5 – the CP prevents a slew of anticompetitive practices

Vaheesan 17 – Regulations Counsel, Consumer Financial Protections Bureau.

Sandeep Vaheesan, May 11 2017, “RESURRECTING “A COMPREHENSIVE CHARTER OF ECONOMIC LIBERTY”: THE LATENT POWER OF THE FEDERAL TRADE COMMISSION,” UPenn Journal of Business Law, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1548&context=jbl

Under progressive leadership, one federal agency, the FTC, could resurrect antitrust law as “a comprehensive charter of economic liberty.”22 Modern administrative law and Congressional delegation of policymaking authority grant the FTC expansive power to interpret the antitrust provision of Section 5 of the FTC Act.23 In enacting this statute, Congress articulated a grand progressive-populist vision of antitrust. It wanted the FTC to police “unfair methods of competition” that injure consumers, prevent rivals from competing on the merits, and allow large corporations to dominate our political system.24 Congress intended the FTC’s antitrust authority to encompass more than the prohibitions in the Sherman and Clayton Acts and to nip anticompetitive problems in the embryonic stage before corporations gained undue power over consumers, small suppliers, competitors, and the American political system.25

Since the early 1980s, the FTC has championed antitrust law centered on economic efficiency. In 2015, the FTC codified this approach in a Statement of Enforcement Principles laying out its interpretation of Section 5’s prohibition on unfair methods of competition.26 The FTC stated that it would use its Section 5 authority to advance “consumer welfare,” which is functionally similar to the allocative efficiency goal, and apply the rule of reason framework.27 In articulating this narrow interpretation of Section 5, the FTC contradicted Congress’s political economic vision in 1914, which sought to prevent not only short-term injuries to consumers, but also exclusionary practices by large businesses and the accumulation of private political power. And in making the rule of reason the centerpiece of its analytical framework, the FTC adopted a convoluted test that cannot advance the Congressional vision underlying Section 5.

Despite being a champion of the efficiency paradigm since 1981, the FTC under progressive leadership in the future could still change course and be true to the Congressional intent from when the agency was created more than a century ago. In setting out an interpretation of Section 5, whether through enforcement actions or rulemakings, the FTC should anchor Section 5 in the expansive political economic vision of Congress. By enacting the FTC Act, Congress sought to prevent—rather than remedy after the fact—three principal harms from concentrated economic power: wealth transfers from consumers and producers to monopolies, oligopolies, and cartels; private blockades against entry and competition in markets; and the accumulation of economic and political power in corporate hands. To advance Congress’s antitrust vision, the FTC should adopt presumptions of illegality for a variety of competitively suspicious conduct, such as mergers in concentrated industries, exclusionary practices by firms with market dominance or near-dominance, and restraints on retail competition; and challenge monopolies and oligopolies that inflict significant harm on the public. When seeking to preserve or restore competitive market structures, the FTC should pursue simple structural remedies over complicated behavioral fixes.

**Section 5 expansion and clarification is critical to preventing international protectionism**

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1. Interpretive Latitude in the FTC Act

A dearth of clarity on standards and criteria has been part and parcel of the FTC Act’s considerable normative influence abroad,66 especially with respect to areas of regulator discretion in enforcement. Within two years of the statute’s enactment, President Wilson would confess candidly of the new FTC: “It is hard to describe the functions of [the] [C]ommission. All I can say is that it has transformed the Government of the United States from being an antagonist of business into being a friend of business.”67 While Wilson may have been referring to the FTC as a shield for business owners against monopolies and dominant competitors, his inability to easily condense the mandate of the Commission spoke to its versatility and breadth. The FTC Act’s purview over any “unfair methods of competition”68 per its Section 5 granted the agency wide berth in pursuing both ongoing and incipient antitrust violations beyond the Sherman Act’s reach, instead of limiting the FTC to codified standards and prescriptions for a generally defined set of antitrust violations. According to Winerman, “then, as now, the agency combined formal powers to investigate [and] formal powers to prosecute,” while permitting dialogues “with business to facilitate compliance with the law (those emphasized by Wilson).”69 As discussed, there existed a strong predilection in the FTC Act’s originators towards favoring cooperation with big business over heavy-handed policing and resultant debilitation of the national economy. The inferred use of discretion prevalent throughout the statute proved conducive to this aim.

Section 5 proceeds to state that a person, partnership, or corporation believed culpable of antitrust violations by the FTC will be issued a complaint and a notice of a hearing if “it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public.”70 This invocation of the public interest without further elaboration has left open a sizable margin for interpretive license,71 not the least a presumption that the public referenced is the domestic public. Certainly the public interest varies from country to country and is not a fixed concept. Even within a single domestic polity, different interest groups may be at odds regarding its intuitive definition. Former FTC Chairman William Kovacic noted that “in the 1950s and the 1970s, Commission efforts to use Section 5 litigation elicited strong political backlash from the Congress. The very breadth of Section 5 creates political risks in its application.”72 Whether manifestations of checks and balances or politicized affairs, such historical developments contributed to extralegal U.S. regulatory norms in antitrust enforcement that foreign competition regimes could not transplant and adapt in the same manner that they did American competition laws.

Section 5 also states “in determining whether an act or practice is unfair, the Commission may consider established public policies as evidence,” with the qualifier that “[s]uch public policy considerations may not serve as a primary basis for such determination.”73 Befitting the FTC Act’s elastic mandate, no specific examples of any such public policies are offered. Furthermore, the FTC may find unlawful only the unfair method of competition that “causes or is likely to cause substantial injury to consumers not outweighed by countervailing benefits to consumers or to competition.”74 Without further elaboration on countervailing benefits, the statute cedes to the Commission the leeway to finesse its responses to complex antitrust violations. While guidance to fill these descriptive gaps has been supplied domestically by over a century of successive judicial decisions, alongside evolving conventions accounting for legislative as well as private sector interests, most foreign competition regimes lack a comparable array of participant actors beyond the executive branch.75 When acting in a relative vacuum of precedent and checks, protectionist administrations abroad encounter less resistance to their justifications for selective antitrust enforcement in the name of public policy and/or countervailing national economic benefits.

Section 5 is not explicit regarding openness to presidential control, but Section 6 includes direct mention of presidential prerogative: “The Commission shall also have power. . . [u]pon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.”76 Wilson was quick to rely on Section 6,77 and even as the notion of FTC autonomy later became entrenched in the U.S., this portion of the FTC Act was left unamended. Today, the language easily could be construed overseas as an affirmation of the FTC’s subservience to the executive branch. In the event that foreign readers of the Act fail or do not choose to connect the historical dots, they would be unable to find any undergirding support for agency independence in Section 5 or 6. Indeed, novel expansions of FTC autonomy in Section 5 cases still risk political crossfire for “going beyond established principles of antitrust doctrine—principles set in the resolution of Clayton or Sherman Act disputes creat[ing] immediate opportunities to scold the Commission for taking ‘unprecedented’ measures or entering ‘uncharted’ territory,” per Kovacic.78 The originators of the legislation would not have had it any other way.

**Protectionism causes global wars**

**Palen 17** – historian at the University of Exeter

Marc-William Palen, "Protectionism 100 years ago helped ignite a world war. Could it happen again?," The Washington Post, 6-30-2017, https://www.washingtonpost.com/news/made-by-history/wp/2017/06/30/protectionism-100-years-ago-helped-ignite-a-world-war-could-it-happen-again/

The liberal economic order that defined the post-1945 era is disintegrating.

Globalization’s foremost champions have become the first to signal the retreat in the wake of the Great Recession. Economic nationalism, historically popular in times of economic crisis, is once again on the rise in Britain, France and the United States. We are witnessing a return to the antagonistic protectionist politics that defined a bygone era that ended with World War I — suggesting that today’s protectionist revival threatens not just the global economy, but world stability and peace.

Leading liberal democracies have turned their back on free trade. Britain, through Brexit, announced its retreat from European market integration. Before the parliamentary elections, British Prime Minister Theresa May announced a new Industrial Strategy, which includes state subsidization of select industries and stringent immigration restrictions on foreign workers at “every sector and every skill level.” Despite her post-election collapse in support, May continues to move forward with leaving the European Union single market thanks to an unholy alliance with the Democratic Unionist Party, Northern Ireland’s far-right supporters of Brexit.

Likewise, in the recent French presidential elections the vast majority of candidates ran on a platform of “patriotisme économique.” Marine Le Pen, leader of the French far-right National Front party, made a strong bid for the French presidency through a campaign that combined a condemnation of globalization alongside the promise of extreme economic nationalist legislation and an end to immigration into France. President-elect Emmanuel Macron is now pushing hard for a “Buy European Act” to placate French anti-globalization forces.

But nowhere has the anti-trade turn been more marked than in the United States, where “globalism” has become a dirty word. “Free trade’s no good” for the United States, as Donald Trump put it in 2015. President Trump has threatened to shred the North American Free Trade Agreement and to impose protective tariffs on imports from Mexico and China, two of America’s largest trading partners.

In January, a paranoid Trump pulled the United States out of the Trans-Pacific Partnership negotiations — a massive free-trade deal that included a dozen countries in the Asia Pacific — because he believed that the Chinese were secretly plotting to use it to take advantage of the U.S. market.

And in April, Trump signed a “Buy American, Hire American” executive order that forces U.S. government agencies to purchase domestically made products and limits the immigration of foreign skilled workers.

This widespread fear of the global marketplace and the looming threat of tit-for-tat trade wars herald a return to late 19th-century geopolitics. Then, too, many of the leading economies of the day took shelter behind high tariff walls to halt the forces of globalization. Following the onset of an economic depression in the early 1870s, one industrializing country after another turned against trade liberalization. Trade wars, colonialism and closed markets became the name of the geopolitical game.

In stark contrast to today, back then only Britain stuck to free trade with “all the world.” Yet even free-trade bastion Britain was not without its domestic economic nationalist enemies.

In response to the late 19th-century turn to protectionism among Britain’s competitors, formidable right-wing British organizations like the Fair Trade League and the Tariff Reform League emerged to champion retaliatory tariffs and an imperial trade preference system. And the political leader of the turn-of-the-century British imperial protectionist movement was none other than Joseph Chamberlain, Theresa May’s “political hero.”

“Fortress France” turned away from free trade in 1892, the culmination of a decade-long “protectionist backlash” to the ongoing economic depression. The protectionist measure exacerbated the Franco-Italian trade war, which Italy had started with its turn to protectionism in the mid-1880s. Trade between these countries fell considerably, pushing Italy ever closer to Austria-Hungary and Germany — the Triple Alliance — in the years before the First World War.

The United States, however, topped the list of protectionist states. The political and ideological power of protectionism in late 19th-century America — the Gilded Age — was palpable. The Republican Party, formed as the party of antislavery in the 1850s, fast remade itself as the party of protectionism following the Civil War.

Hoping to protect U.S. industries from the unpredictable gales of unfettered global market competition, the ultranationalist party tacked its sails to the “American System” of high tariffs and government subsidization of domestic industries.

More than a century before Trump’s “America first” policy, slogans like “America for Americans — No Free Trade” filled Republican Party convention halls.

For paranoid Gilded Age Republican protectionists, free trade became tantamount to conspiracy.

The GOP’s lead spokesman on the tariff at that time was a short, cigar-smoking politician from Ohio named William McKinley. “The Napoleon of Protection,” as he was dubbed, had well earned the moniker by the time he entered the White House in 1897.

Like the Trump administration today, McKinley viewed free trade with suspicion, although the target of McKinley’s free-trade conspiracy theories was the industrial powerhouse of Britain instead of Trump’s China. McKinley, throughout his long Republican career, charged his pro-free-trade political opponents with being part of a vast British conspiracy that sought to sap America’s high tariff walls and undermine infant American industries. The conspiracy, he argued, included “free trade leaders in the United States and the statesmen and ruling classes of Great Britain”; American free traders were pawns, agents of “the manufacturers and the traders of England, who want the American market.”

Countering Republican conspiracy theorists, late 19th-century U.S. free traders argued that trade liberalization fostered international stability and peace, and that, by contrast, the era’s global uptick in imperialism and war only illustrated how protectionism fomented geopolitical rivalry and conflict.

Trump, tapping into long-standing Republican fears of free trade, is knowingly returning the GOP to its paranoid protectionist roots — a move against globalization that is also building up populist momentum in Britain and France.

The protectionist resurgence among the leaders of post-1945 globalization — be it Brexit, patriotisme économique, or “America first” — holds dire consequences for the liberal economic order by pitting nations against one another and breeding suspicion, distrust and conspiratorial thinking. The ultranationalism, militarism and tariff wars of the late 19th century spilled over into the 20th century, and ended in world war — suggesting a return to the protectionism of old could damage far more than national economies.

#### The FTC can use non-respondent liability to deter anticompetitive action without modifying antitrust laws

Hoofnagle et al 19 – Chris Jay Hoofnagle is an American professor at the University of California, Berkeley who teaches information privacy law, computer crime law, regulation of online privacy, internet law, and seminars on new technology. Woodrow Hartzog is Professor of Law and Computer Science at Northeastern University. Daniel J. Solove is a professor of law at the George Washington University Law School.

Chris Hoofnagle, Woodrow Hartzog and Daniel Solove, August 8 2019, “The FTC can rise to the privacy challenge, but not without help from Congress,” Brookings, https://www.brookings.edu/blog/techtank/2019/08/08/the-ftc-can-rise-to-the-privacy-challenge-but-not-without-help-from-congress/

The FTC also could **achieve greater deterrence** by leveraging an obscure power known as “non-respondent liability.” In cases where the FTC has a fully-adjudicated matter concerning some business practice, the agency can **use that precedent to issue civil penalties** to others engaging in the same activity. The power is limited to instances of actual knowledge of a closely-matching precedent by the new defendant, but **this can be established** by sending that company notice of its wrongdoing and the relevant previous order. If we think about recent privacy wrongs—poor data security, selling data despite promising not to, and so on—many are widespread, recurring practices. If the FTC were willing to adjudicate **just one cas**e involving information “sale,” changing users’ settings, or even storing passwords in plain text, hundreds of companies could inherit exposure to civil penalty liability though this mechanism.

### 1NC – FTC Tradeoff DA

The United States federal government should substantially increase funding and hiring for the Federal Trade Commission.

#### The plan forces tradeoffs in FTC enforcement efforts – they’re in a merger tsunami and barely staying afloat, but the plan drowns them

Rose ’19 - Department Head and Charles P. Kindleberger Professor of Applied Economics in the MIT Economics Department. She served as Deputy Assistant Attorney General for Economic Analysis in the Antitrust Division of the DOJ from 2014 to 2016, and was the director of the National Bureau of Economic Research Program in Industrial Organization from 1991 to 2014.

Nancy Rose, FTC Hearing #13: Merger Retrospectives, April 12, 2019, <https://www.ftc.gov/news-events/events-calendar/ftc-hearing-14-merger-retrospectives>

So I want to start with the last question that was on the set that Dan and Bruce circulated for this panel. Should the FTC devote more resources to retrospectives, even at the cost of current enforcement? And I was delighted to see Commissioner Slaughter be so passionate in her defense of the need for more resources. This goes to what I feel is the most significant, and yet still largely invisible message, in the ongoing debate over competition policy, which is that antitrust enforcement in the United States is chronically and substantially underfunded.

For years, the appropriation requests have been modest in their increases. Oversight hearings and interactions with the Hill have too often featured the mantra, “when business picks up, our talented and hardworking staff just do more with less.” I will say I think the career staff at both the FTC and the DOJ Antitrust Division are among the most dedicated, highly-skilled, and hardest-working professionals.

It was my great privilege to work with a number of them at DOJ, and I know that colleagues who have worked at the FTC feel the same way. They deserve our greatest appreciation and applause and not just from those of us who work in antitrust policy, but from the entire American public, on whose behalf they tirelessly work.

But there is a limit to the number of hours in a day and the number of days in a week and the well below market compensation for the lawyers and economists who work in the agencies, which is another significant problem, is insufficient to demand that staff give up all rights to leave their buildings, occasionally see their families, or catch up on sleep.

So I think it’s inevitable that if we’re asking agencies to reflect on the effectiveness of their decision-making through programs like retrospective programs, it is going to come out of someplace else. And I fear that given the ongoing intensity of the merger wave, that’s going to come out of enforcement.

We are amid an ongoing sustained, what’s been called by some, tsunami of mergers. Each year there are thousands of mergers noticed to the agencies and thousands more below the HSR thresholds, that work by Thomas Wollmann at the University of Chicago suggests, skate through to consummation with practically no probability of review or action, the occasional consummated merger enforcement action notwithstanding.

The dollar volume of mergers is at historic levels and that suggests that there are a lot of mega mergers competing for enforcement resources. In addition, litigation costs continue to climb, both for challenging mergers or bringing Section actions, especially as parties with especially deep pockets escalate litigation defenses, correctly calculating that even adding some tens of millions of dollars in antitrust litigation costs would be just rounding error in their merger financing.

And, finally, I would say it’s inconceivable to me that there are not at least some counsel that are advising parties that a good time to bring marginal mergers forward is when the agencies are stretched thin by major investigations or multiple litigations.

#### Despite short resources, FTC is effectively regulating hospital mergers – the plan halts that progress

Muris ’20 – Professor of Law at George Mason, former Chairman of FTC, Senior Counsel at Sidney Austin LLP, JD from UCLA,

Timothy Muris, “Response to Subcommittee on Antitrust, Commercial, and Administrative Law Committee on The Judiciary U. S. House of Representatives” April 17, 2020, <https://judiciary.house.gov/uploadedfiles/submission_from_tim_muris.pdf>

Finally, the Committee asks about agency resources and performance. The last section below briefly addresses the continual need for the antitrust agencies to address business practices as they evolve, as well as their own performance record. Such evaluation is necessary: ever a UCLA Bruin, I remain devoted to legendary coach John Wooden‘s maxim that “when you are through learning, you are through.” The section thus offers multiple examples of successful and bipartisan FTC efforts to improve enforcement to the benefit of consumers. In the key healthcare sector, American consumers continue to benefit from the FTC’s hard work. After losing seven consecutive hospital merger challenges before I arrived, upon my direction the FTC worked to devise a new enforcement plan by incorporating fresh economic thinking and issuing retrospective case studies showing that several hospital mergers had indeed harmed consumers. This plan resulted in a successful challenge to a consummated hospital merger that served as a template for future enforcement, leading to Obama administration victories in three separate courts of appeal endorsing the FTC’s approach. Such success did not require abandonment of the consumer welfare standard, nor a dramatic increase in agency resources. Indeed, as discussed below, my predecessor as FTC chairman, Bob Pitofsky, did much more for American consumers using the consumer welfare standard with just 1,000 staff than did the agency in the 1970s when it had far greater resources (1,800 staff by the turn of the decade), but was motivated by an antitrust policy that was, instead, at war with itself.

#### Long term per-person healthcare costs will collapse the economy from a bubble burst or terminal budget overstretch – no alt causes – restoring competition in hospital markets is key to reduce costs

Evan Horowitz, Fivethirtyeight, January 11, 2018, The GOP Plan To Overhaul Entitlements Misses The Real Problem, <https://fivethirtyeight.com/features/to-cut-the-debt-the-gop-should-focus-on-health-care-costs/>

There is no wide-reaching entitlement funding crisis, no deep-rooted connection between runaway debts and the broad suite of pension and social welfare programs that usually get called entitlements. The problem is linked to entitlements, but it’s much narrower: If the U.S. budget collapses after hemorrhaging too much red ink, the main culprit will be rising health care costs.

Aside from health care, entitlement spending actually looks relatively manageable. Social Security will get a little more expensive over the next 30 years; welfare and anti-poverty programs will get a little cheaper. But costs for programs like Medicare and Medicaid are expected to climb from the merely unaffordable to truly catastrophic.

Part of that has to do with our aging population, but age isn’t the biggest issue. In a hypothetical world where the population of seniors citizens didn’t increase, entitlement-related health spending would still soar to unprecedented heights — thanks to the relentlessly accelerating cost of medical treatments for people of all ages.1

What’s needed, then, is something far more focused than entitlement reform: an aggressive effort to slow the growth of per-person health care costs. Or — if that’s not possible — some way to ensure that the economy grows at least as fast as the cost of health care does.

Diagnosing the debt: It’s not about demographics

America’s long-term budget problem is very real. Already, the federal government has a pile of publicly held debts amounting to around $15 trillion, or about 75 percent of the country’s entire gross domestic product. That’s the highest level since the 1940s, yet the debt burden is expected to double by 2047 and reach 150 percent of the GDP, according to the Congressional Budget Office.2

It makes sense to list entitlement spending among the culprits for the growing national debt, given that these programs have grown from costing less than 10 percent of the GDP in 2000 to a projected 18 percent in 2047. Part of this is simple demographics: As America ages, more of us become eligible for Social Security and Medicare, thus driving up expenses.3

But there’s a crack in this demographic explanation: It only makes sense for the next 10 to 15 years. That’s the period of rapid transition when graying baby boomers will boost the population of seniors from around 50 million to more than 70 million. A change like that should indeed produce a surge in entitlement spending as those millions submit their enrollment forms.

By 2030, however, this wave will start to ebb, leaving the elderly share of the population at a roughly stable 20 to 21 percent all the way through 2060, based on the size of the population following the boomers and slower-moving forces like lengthening lifespans.

But think what this should mean for entitlement spending. As the population of seniors levels out in those later years, costs should naturally stabilize — at least, if demographics were really the driving factor.

This is exactly what you see for Social Security. The CBO expects total Social Security spending to leap up over the next decade but then settle at just over 6 percent of the GDP, at which point it will cease to be a major contributor to rising entitlement spending or growing debts. Social Security is thus a minor player in our long-term budget drama; if you cut the program to the bone, shrinking future payouts so that they won’t add a penny to the deficit, the federal debt would still reach 111 percent of the GDP in 2047.4

Likewise, cuts to welfare and poverty-related entitlements like food stamps and unemployment insurance are unlikely to improve the debt forecast. In fact, spending on these entitlements has been dropping since the high-need years around the Great Recession and is expected to shrink further in the decades ahead — partly because payouts aren’t adjusted to keep up with economic growth, and partly because the birth rate has been falling and several programs are geared to families with children.5

But the scale of the problem is totally different when you turn to health care. Spending on entitlement-related health programs — including Medicare, Medicaid and subsidies required by the Affordable Care Act — will never shrink or stabilize, according to projections. The CBO predicts these costs will grow over 65 percent between now and 2047 — and then go right on growing after that, heedless of the fact that the percentage of the population that’s over 65 should no longer be increasing.

Why is health care eating the budget? Per-person costs

Demographics aren’t responsible for the projected explosion in health care costs. More important than the growing number of elderly Americans is the growing cost per patient — the rising expense of treating each individual

The CBO found that the lion’s share — 60 percent — of the projected increase in health spending comes from costs that would continue to increase even if our population weren’t getting older.

The reasons for this are many, including the rising cost of prescription drugs and the fact that hospital mergers have reduced competition. But since 2000, per capita health costs in the U.S. have, on average, grown faster than the GDP. And while these costs rose more slowly after the Great Recession and the implementation of the Affordable Care Act, analysis from the Centers for Medicare and Medicaid Services suggests this slower growth rate won’t last.

Which is bad news for these programs, because if the problem were demographic, it’d be easier to solve. By mixing the kind of program cuts Republicans generally support with targeted tax increases favored by some Democrats, you could meet the short-term challenge posed by retiring baby boomers and raise enough money to cover the larger — but stabilizing — population of eligible seniors. But with ever-rising costs, there is no stable future to prepare for. To keep these programs funded, you’d need a wholly different approach — indeed a whole new perspective on mounting federal debt and the role of entitlements.

The future is a race between rising health care costs and economic growth, a race that the economy is losing. Each time health costs outpace the GDP, it creates what the CBO calls “excess cost growth,” which feeds the federal debt. If the government could close this gap, the long-term budget outlook would be a lot rosier.

There are two ways to solve this issue: Either contain health care costs — say through price regulation or more competitive markets — or boost economic growth enough to pay for this expensive health care. Success on either front would make health care spending look more manageable over future decades and lighten the debt load.

Entitlement reform needs health care reform to work

Few of the proposals that commonly fall under the heading of entitlement reform target the health care cost problem, which limits their ability to reduce the long-term debt.

Even when they do address health care, often the result is to shift — rather than solve — the problem. Say lawmakers decide to dramatically cut Medicare. That would indeed ease the government’s debt problem. But the underlying dynamic — the race between health costs and the GDP — wouldn’t really change. Seniors would still need health care, and per-person costs would likely still grow (maybe even faster, since Medicare is a relatively efficient program).

On top of all this, there’s also a deep-seated political barrier: It’s no good if one party picks its favored solution only to watch the other party dismantle it when they next take over. You need political consensus to make changes stick, and America is notably short on consensus right now.

In the end, though, it won’t do to just throw up our hands. Absent some workable solution, spending on health care will sink the federal budget, generating levels of debt that would hold back the economy and potentially spark a global crisis of confidence in the United States’ ability to borrow.

#### Sustained economic depression triggers world war

Walt 20 – Stephen M. Walt is a columnist at Foreign Policy and the Robert and Renée Belfer professor of international relations at Harvard University.

Stephen Walt, May 13 2020, “Will a Global Depression Trigger Another World War?” Foreign Policy, https://foreignpolicy.com/2020/05/13/coronavirus-pandemic-depression-economy-world-war/

If one takes a longer-term perspective, however, a sustained economic depression could make war more likely by strengthening fascist or xenophobic political movements, fueling protectionism and hypernationalism, and making it more difficult for countries to reach mutually acceptable bargains with each other. The history of the 1930s shows where such trends can lead, although the economic effects of the Depression are hardly the only reason world politics took such a deadly turn in the 1930s. Nationalism, xenophobia, and authoritarian rule were making a comeback well before COVID-19 struck, but the economic misery now occurring in every corner of the world could intensify these trends and leave us in a more war-prone condition when fear of the virus has diminished.

### 1NC – Ex Ante CP

#### Text: The United States federal government should:

-substantially increase prohibitions on private sector that artificially centralize public blockchain infrastructure by imposing ex-ante regulations prohibitions.

-substantially increase investment in AI R&D

-restrict occupational licensing requirements

-repeal laws restricting dumping, export subsidies, and violation of U.S. companies’ intellectual property rights

-repeal all international tariffs imposed by the Trump administration

-establish mechanisms that allow government agencies and laboratories to work directly with private start-ups, including co-development and technology-licensing agreements

#### Ex-ante regulation creates clarity and deters violations before they occur – that means the counterplan solves without requiring frequent enforcement proceedings.

Posner 10 – Judge in the U.S. Court of Appeals for the Seventh Circuit, Senior Lecturer at the University of Chicago Law School

Richard A. Posner, “Regulation (Agencies) versus Litigation (Courts): An Analytical Framework,” Regulation vs. Litigation: Perspectives from Economics and Law, National Bureau of Economic Research, Inc., 2010, https://ideas.repec.org/h/nbr/nberch/11956.html

Ex ante regulation can, as I said, be judicial as well as administrative, as in preventive detention, injunctions, and regulatory decrees, and ex post regulation can be administered by agencies as well as courts, such as the Federal Trade Commission and the National Labor Relations Board, which operate mainly by trial-type proceedings conducted after a violation of the laws administered by the agency has occurred.

Ex ante: pros. The ex ante approach promotes clarity of legal obligation and therefore presumably better compliance (fewer inadvertent violations) by laying down rules in advance of the regulated activities. Ex ante regulation is activated before there is a loss, unlike a lawsuit; it can be centrally designed and imposed (for example, by a single agency such as the Food and Drug Administration, as opposed to a decentralized judicial system); and it is enforceable by means of light penalties, because the optimal penalty for creating a mere risk of injury is normally lighter than the optimal penalty for causing an actual injury. This means, however, that ex ante and ex post regulation actually are inseparable; because compliance with rules is never 100 percent, there must be a machinery for punishing violators, though the machinery may involve penalties meted out by the regulatory agency itself, with judicial involvement limited to judicial review of the penalty proceeding. But while rules involve heavy fixed costs (i.e., designing the rule in the first place), if they are very clear and carry heavy penalties compliance may be achieved without frequent enforcement proceedings, so marginal costs may be low. Rules are therefore attractive when the alternative would be vague standards, resulting in frequent actual or arguable violations and hence frequent enforcement proceedings.

As this discussion shows, ex ante regulation and rules have an affinity. Ex ante regulation enables exploitation of the economizing properties of rules as preventives. With vague standards, the regulatory emphasis shifts to seeking deterrence by proceedings to punish violators.

#### Solves competition without relying on antitrust enforcement

Litan 18 – Nonresident senior fellow in the economic studies program at the Brookings Institution. Former senior fellow, director of the economic studies program, and vice president at Brookings.

Robert Litan, “A Scalpel, Not an Axe: Updating Antitrust and Data Laws to Spur Competition and Innovation,” *Progressive Policy Institute*, September 2018, pp. 46-47, https://www.progressivepolicy.org/wp-content/uploads/2018/09/PPI\_AntitrustandDataLaws\_2018.pdf.

OTHER WAYS TO PROMOTE COMPETITION

Robust economic competition does not and should not rest entirely on effective antitrust enforcement. Other policies can also make the economy more competitive.

First, it is important that unnecessary occupational licensing requirements – which now cover almost 30 percent of the workforce, up from just 5 percent in the 1970s – be pruned and eliminated. As Professor Morris Kleiner of the University of Minnesota concludes, “There is little evidence to show that the licensing of many different occupations has improved the quality of services received by consumers; although, in many cases, it has increased prices and limited economic output.”96

A federal law preempting unnecessary state and local licensures, benefitting from a federal commission identifying which occupations no longer should have a license, would be the easiest solution to this problem, substantively. Politically, however, it is almost surely a nonstarter. Congress is unlikely to enact a statute that takes away protections benefitting almost one-third of the workforce, even if many of these protections hurt consumers.

An alternative, less sweeping federal solution would be to require reciprocity among the states; namely, if someone has a license to be a nurse, doctor, or hairdresser in one state, he or she would be able to have license to the same thing in any other state. This would greatly enhance worker mobility – a central problem affecting millions of Americans displaced or threatened with displacement in rural areas and smaller cities who would like to move to places offering greater opportunities, but currently can’t without going through retraining and recertification elsewhere.

Many states would be likely to object to a reciprocity mandate, however, fearing a “race to the bottom” in certification qualifications – even if those qualifications objectively are anti-competitive and unnecessary to protect health and safety. Furthermore, the Supreme Court’s recent decision in Murphy v. NCAA, allowing sports gambling, contains quite explicit language condemning as unconstitutional (in violation of the 10th Amendment) federal laws requiring states to act: “Congress cannot issue direct orders to state legislatures.” This language could be invoked to invalidate a federal law mandating reciprocal recognition of other states’ licensing regimes as an unconstitutional “direct order” to a state.

If reciprocity is ruled out – politically or constitutionally – then the only other way to eliminate unnecessary licenses is through state legislative action. This will be a painstaking process, requiring not only that each of the states mount a politically difficult effort, but also one that presents the substantively difficult challenge of going through all currently mandated licenses and removing the ones that aren’t required to protect the public. Nebraska has approached this problem by requiring its legislature to review 20 percent of its required licenses each year. An alternative approach is for each state to appoint a commission – modeled after the federal government’s base closing commission – and then for the commission’s list of suggested license eliminations to be given an up-or-down vote in a state’s legislature. Other states should experiment with either of these approaches, or perhaps others.

Second, foreign competition is not often thought of as part of the regime for protecting U.S. consumers and the competitive process; but, in an increasingly global economy, companies abroad – selling products and services here – are an essential part of the competitive ecosystem. Foreign competition can discipline any price-setting power dominant firms or firms in concentrated industries in the U.S. may otherwise have. It can also encourage domestic companies to be more innovative.

At the same time, however, U.S. law has special rules for foreign competitors, consistent with international rules of the World Trade Organization, which are designed to prohibit or offset the effects of three specific “unfair” trade practices (“dumping,” export subsidies, and violations of intellectual property rights of U.S. companies) but which also can insulate U.S. firms from foreign competition in ways that do not apply to domestic firms.98 In addition, upon a finding that certain imports from specific countries are harming U.S. industries, the President (under Section 201 of the Trade Law of 1974) can impose temporary “safeguard” tariffs on those goods. Also, under Section 232 of the same trade law, upon a finding by the Commerce Department that certain imports are threatening national security, the President can impose more lasting duties on those imports, as the Trump Administration has done for aluminum and steel imports from several countries and has threatened to do on foreign automobiles.

The price increases generated by the tariffs imposed by the Trump Administration on steel and aluminum, however, could easily swamp any increases due to collusion of domestic competitors, which the tariffs make more likely. Supporters of vigorous antitrust enforcement to benefit consumers must also, if they are to be philosophically consistent, oppose the turn toward protectionism of the current Administration, and instead support a return to pre-Trump era efforts of all other administrations since the end of the World War II at removing remaining trade barriers. At the same time, free trade advocates should also support a more generous and effective system for assisting workers displaced by trade, outsourcing, and automation to transition to other jobs and careers.99 As a society, we are paying the price for not doing a good job at this in years past. The result, at least in part, is the extreme political divisiveness we now see and lament.

#### Rigorous, peer-reviewed research proves the CP solves – increases the survival rate of startups and improves

Surana et al 20 – Assistant research professor at the Center for Global Sustainability, School of Public Policy at the University of Maryland College Park. She previously worked at the Harvard Kennedy School and the World Bank.

Kavita Surana, Claudia Doblinger, and Laura Diaz Anadon, “Collaboration Between Start-Ups and Federal Agencies: A Surprising Solution for Energy Innovation,” *Information Technology & Innovation Foundation*, August 2020, pp. 1, https://itif.org/sites/default/files/2020-clean-tech-start-ups.pdf.

Despite their potential to bridge the gap between RD&D and deployment, climate-tech start-ups face fierce headwinds. To be sure, all start-ups, regardless of sector, face barriers, and only around half of them survive beyond five years. 2 In climate tech, the challenges facing start-ups are amplified. In some cases, climate-tech innovation may require decades of investment in human, technological, and financial resources before bearing fruit. In others, technology deployment might interface or compete with incumbent utilities and businesses that can be resistant to change, having already built carbon-intensive infrastructures and business models over decades.

Consequently, despite their promise from a societal and environmental perspective, climate-tech start-ups are often perceived to be unattractive from a financial perspective. In the early 2010s, VCs invested in climate-tech firms without adequately accounting for these challenges. Thus, instead of making quick returns and a big upside, many lost much of their investment.

The perceived risks of climate-tech start-ups still linger. The infamous commercialization “valley of death” claims a higher proportion of climate-tech start-ups than information or medical technology start-ups, which receive the lion’s share of VC funding. 3 Yet some climate-tech startups make it through. Identifying approaches that help ease barriers faced by climate-tech startups can ultimately catalyze their role in accelerating clean energy innovation.

One solution to improve the chances of climate-tech start-up survival is particularly surprising: collaboration with federal agencies and laboratories. By collaboration, we mean mechanisms that allow agencies and government laboratories to work directly with start-ups, such as co-development and technology-licensing agreements. We do not include grants and loans. Entrepreneurs and agencies may seem like an unlikely match, but our rigorous, peer-reviewed research found them to be compatible. Indeed, collaborations between climate-tech start-ups and federal agencies yield better results than their collaborations with universities or other firms, as measured by patents received and follow-on financing.

## Innovation Adv

### 1NC – Squo Solves

Squo solves blockchain concerns – if large firms are exclusionary towards smaller firms developing blockchain infrastructure, current antitrust would prohibit that

### 1NC 2NC – blockchain impact

#### Tech giants will expand into the finance now

Jones and Ozcan 21 – Head of Finance, Strategy and Planning at retirement FinTech; Smart, headquartered in London, Professor of Entrepreneurship and Innovation at Saïd Business School, Oxford University

Ryan Jones and Pinar Ozcan, "Rise of BigTech platforms in banking," Saïd Business School at the University of Oxford, Industry Paper 1, 2021, <https://www.sbs.ox.ac.uk/sites/default/files/2021-02/Rise%20of%20BigTech%20Platforms%20in%20Banking%20-%20Oxford%20White%20Paper%20Final%20%28002%29.pdf>

Banks, and in particular current accounts, can be viewed in many ways as a platform model of the 20th century. Incumbents, who provide free current account services to consumers, have long boasted of their number of products per customer (PPC) – quoted as high as 6 for premier account customers of leading UK banks. This has been fostered by a relationship built around the current account platform from which additional services are bundled to create both economies of scale and scope. This in turn has **become the expectation** of consumers who want a **one-stopshop** for financial needs, creating a barrier for new entrants. This barrier has proven hard to navigate for FinTechs whose innovation focuses in one area of the banking ecosystem.

While all informants agree that the traditional disruptive path is significantly constrained and reshaped by the regulatory context, it is also clear that a platform business model is particularly suitable for financial services.

Having seen the impact of BigTech in other industries, the banking industry is understandably keeping an eye on the **potential for BigTech** to deploy their platforms in banking. Amongst our informants, some saw this as a matter of time, whilst others doubted it would happen at all, with the cost of regulation commonly cited as the largest barrier. Interestingly, even among those who saw entry as a certainty, **none considered that it was already happening** – this is supported by the fact that no BigTech company has yet acquired a full banking license in the UK. However, **this should not fool anyone**. Over recent years there has been **significant activity** from BigTech players in **banking-related services**, resurfacing and reiterating the question of where banking **starts and ends.**

As shown in the table above, BigTech are **actively broadening** their platforms into a **number of areas** of the financial ecosystem, in particular payments. This may partly be due to the lower regulatory burden of payments; as one insider put it – e-money license holders can ‘zip around like bugs’ compared with more heavily regulated deposit-takers. Another potential reason is datafication. Access to the payments network provides a vast amount of new data on consumer preferences and buying habits, which can be coupled with existing platform data to enrich BigTech’s understanding of its customers and create new opportunities for monetisation and lock-in.

As well as acquiring new sources of data, activity in financial services to date is also offering BigTech the opportunity to **further monetise** their existing data stacks. Amazon’s extension of credit to businesses on the platform via Amazon Lending, launched in the US in 2012 and in the UK in 2015, is a prime example. Amazon already has **unrivalled access to data** on its seller community. As the sole source distributor for many of its merchants, Amazon already knows product type, quantity and, importantly, revenue generation of each seller per month. This information can be used to profile sellers’ ability to pay and extend credit on a targeted basis, **far better** than a bank could without access to similar data. From this advantage, Amazon can begin to use this data to learn more about risk modelling and other core areas of banking. The same dynamics are true of Facebook and the social media platforms, who capture **swathes of data** on individuals that can be collated with payments and other financial data to create new and innovative bankingproducts.

Entry into these, perhaps peripheral, areas of the banking bundle could be the extent of BigTech’s ambitions in banking. However, they appear to be the start of a **broader envelopment**. While troubled in its execution, Facebook’s closed libra ecosystem has the mission to ‘enable a simple global payment system and financial infrastructure that empowers billions of people’3 . It has since attracted a significant amount of debate and regulatory attention from both the Federal Reserve Bank and the Bank of England, among others. Similarly, Google has announced it ambitions to enter the US ‘checking account’ market with an anticipated consumer launch during 2021. This **gradual participation** in banking services in many ways **mirrors the classic disruptive path** described by the innovator’s dilemma (Christensen, 2003). BigTech’s acquisition of elements of the banks’ bundle could represent a **similar path to market domination**. Ceding markets that they previously dominated may leave incumbents open to a fuller platform envelopment by BigTech in their most profitable services, such as mortgages and consumer credit. This trend is also evident in the table above by the number of lending and credit services already offered by BigTech.

#### Antitrust scrutiny deters investment in finance

Pedersen 20 – Brendan Pedersen covers federal bank regulation and fintech policy for American Banker

Brendan Pedersen, "Congress's scrutiny of tech giants could be blessing and curse for banks," American Banker, 10-13-2020, https://www.americanbanker.com/news/congresss-scrutiny-of-amazon-google-could-be-blessing-curse-for-banks

WASHINGTON — A Democratic proposal to reform antitrust law to limit the reach of the largest technology firms may hearten banks, but analysts say the financial services sector is not immune from a revived focus on breaking up megacompanies.

In the sweeping 400-page report by the House Judiciary Committee’s antitrust law subcommittee, lawmakers laid out a sweeping case for reforming laws that allow the colossal growth of just a handful of tech giants: Amazon, Apple, Facebook and Google.

“To put it simply, companies that once were scrappy, underdog startups that challenged the status quo have become the kinds of monopolies we last saw in the era of oil barons and railroad tycoons,” the report said, adding later that “the totality of the evidence produced during this investigation demonstrates the pressing need for legislative action and reform.”

The U.S. banking industry has long worried about the financial ambitions of leading tech firms and even the possibility that one of the four Big Tech giants could charter or acquire a bank with significant competitive advantages at the expense of traditional financial services firms. While none of the four companies have applied for banking powers, past reports have circulated of Google and Amazon being among those having engaged with bank regulators.

The report authored by subcommittee staff did not specifically focus on the tech giants' financial services aims, but rather on how their global reach and impact on sectors like the news media could threaten democratic norms.

But observers said tighter restrictions on acquisitions by tech leaders could put them on more equal footing with banks and even discourage their potential interest in acquiring financial technology startups. The report also appears to validate the regulatory regime for bank parents as a potential model for reining in growth of the tech sector.

“A more aggressive antitrust stance would reduce the likelihood that those companies get even deeper into financial services, so it protects some turf for banks that don't have to compete with a Bank of Amazon or an Apple Bank,” said Jeremy Kress, an associate professor of business law at the University of Michigan.

### 1NC – Stuff

#### No internal link – U.S. tech leadership isn’t key to soft power – other factors outweigh

#### Trump tariffs pound trade – disproves the impact

### 1NC – tech competition robust

#### The Big Four have increased innovation

**Litan 18** – B.S. in Economics, the Wharton School; J.D., Yale Law School; Ph.D., Yale University. Non-Resident Senior Fellow at the Brookings Institution; previously Vice President and Director of Economic Studies

(Robert Litan, “A Scalpel, Not an Axe: Updating Antitrust and Data Laws to Spur Competition and Innovation, September 2018, <https://www.progressivepolicy.org/wp-content/uploads/2018/09/PPI_AntitrustandDataLaws_2018.pdf>)

Nonetheless, fears have been expressed from across the political spectrum about the growing power of the major tech platforms – especially The Four – for stifling innovation. It is important in assessing any such claims to distinguish between the factors that have led to tech platform successes, and subsequent activities of certain platforms once they have gained some measure of market power or influence.

As for their success, there is no evidence – nor do I detect any serious argument – for the proposition that any of the major tech platforms earned their positions through anti-competitive means. Even when the Department of Justice twice sued Microsoft in the 1990s – initially for abusive licensing practices in 1994, which was settled by a consent decree, and then again in 1998 for unlawfully maintaining its Windows operating systems (OS) monopoly for personal computers, ending in certain restrictions on Microsoft’s behavior – the Department never argued that the company achieved its OS monopoly unlawfully. Likewise, each of The Four has achieved its success through superior products or services that consumers or users clearly want (shortly, I address arguments that the success of Facebook and Google is attributable, at least in part, to mergers that should not have been approved).

Moreover, in each of these cases, the tech platforms have taken advantage of economies of scale given the high fixed costs (but low to zero marginal costs) of serving additional users/ customers, or “network effects” arising from the fact that the value of their networks or platforms increases with the number of users, or both. Put differently, tech platform markets (for perfectly legitimate and well-understood reasons) tend toward monopoly – “winner take all” – or at least a high degree of market concentration.8

Competition has not somehow been “lessened” when successful platforms invent a product or service that did not previously exist. Furthermore, despite their dominance in one market or sector (which may not constitute a “relevant market” for antitrust purposes) – social media (Facebook), online commerce (Amazon), Internet search (Google), premium smartphones (Apple) – the platforms are invading each other’s turf and, in turn, creating new kinds of competition against each other. Witness Facebook’s competition with Google for online ads, which Apple is just joining. Likewise, while Google may dominate general Internet searches, its chief competitor for product searches is Amazon.

Speaking of Amazon, though businesses in various parts of the economy are fearful of that company’s business model, recent research documents that online commerce, which Amazon has pioneered, has kept consumer product inflation in check – and, in many cases, helped drive prices downward. This clearly benefits consumers.9 The Chairman of the Federal Reserve Board, Jerome Powell, has pointed to the “Amazon effect” as potentially a major reason the overall inflation rate has not accelerated even as the unemployment rate has fallen to historic lows.10 It is hard to square these developments with claims that competition has weakened in consumer product markets. All of this is good for consumers and workers since, other things being equal, less inflation at any given level of unemployment enables the Fed to permit the economy to run “hotter,” with less unemployment, than might otherwise be the case.

Amazon, Apple and Alphabet also have entered the entertainment business, joining another tech platform, Netflix, and the traditional Hollywood studios – in the process, providing much stronger competition in the content generation market. Significantly, the tech companies’ entry into content is de novo, or from scratch, rather than through acquisition of existing firms, except for Alphabet’s acquisition of YouTube – a content site Google (later Alphabet) beefed up after it was acquired.11

Each of the tech platforms already has entered (or is looking to enter) other lines of business – either creating new markets or adding to competition in existing ones. Examples include Alphabet’s Waymo division that is working hard to commercialize driverless vehicles, and Amazon’s apparent intention to enter the transportation market – not only to make the company independent of third-party transporters such as FedEx, UPS and the U.S. Postal Service, but eventually to compete directly against them, potentially bringing down transportation costs as Amazon has done in other markets it has entered.

### 1NC – antitrust can’t solve

#### Antitrust is the wrong instrument for tech regulation

**Rosoff 21** – Matt Rosoff, Editorial Director, Digital at CNBC

Matt Rosoff, “Op-ed: This week showed how the Big Tech antitrust campaign is totally misguided,” June 30, 2021, CNBC, <https://www.cnbc.com/2021/06/30/op-ed-antitrust-crusade-against-big-tech-is-misguided.html>

On Wednesday, the tech industry saw five companies debut on public stock markets. One of them, Chinese ride-hailing giant Didi, is worth nearly $70 billion. Two others, Taboola and Integral Ad Science, compete in the online advertising industry -- one of the markets that has supposedly been ruined by Alphabet (in particular) and Facebook.

More generally, this year has seen the hottest IPO market in years, and investors continue to pile into start-ups at a record pace -- Q1 saw more than $64 billion in venture funding, a record.

This does not look like a deserted wasteland of stifled innovation and broken dreams.

Meanwhile, the general public doesn’t see tech power as a particularly pressing issue. In a survey funded by a tech industry group, 44% of respondents ranked tech industry regulations as the lowest priority on a list of five options, behind the economy, public health, climate change and infrastructure. Yes, 53% of the respondents thought some legislation was a good idea. But that does not mean the public wants Congress and the courts to aim the antitrust cannon at these giants.

As I wrote four years ago, antitrust is the wrong approach here.

None of these companies have monopolies over meaningfully defined relevant markets -- you really have to stretch and squeeze the market definitions for their dominance to come into clear view. The real state of the tech industry is an all-out business war between the five giants, a constantly shifting landscape of rivalries and backbiting -- think Great Powers Europe before World War I -- with numerous well-funded competitors of all sizes waiting to seize any opportunity and fill any gap they leave open.

For instance:

Google dominates search and Facebook is the biggest social media company by far. But the main source of their revenues is online advertising, and they compete bitterly for every available online ad dollar, with Amazon coming quickly up behind. And yet, there’s still enough space for TikTok, Twitter, Snap and a dozen small ad-tech competitors to build sustainable, thriving ad-supported businesses.

Amazon, Microsoft and Google are locked in a hard-knocking three-way war for supremacy in cloud computing infrastructure. And yet, there are dozens of companies delivering thriving cloud services on top of or alongside these platforms, including Snowflake, which debuted last year and is now worth more than $70 billion, and Zoom, which went public in 2019, and is worth almost $115 billion.

Facebook hates Apple and complains about its control over iPhone apps every chance it gets -- except, Mark Zuckerberg now admits that Facebook might actually be stronger after Apple’s recent privacy changes to the iPhone. Meanwhile, Apple’s iOS is actually a minority competitor, as Google’s Android operating system is the dominant mobile platform in the world -- and Microsoft just signed a deal with Amazon to support Android apps on Windows.

To be perfectly clear: Yes, it is in the public interest to regulate these tech giants more strictly.

For instance, Facebook and Google’s YouTube exercise an enormous amount of influence over public discourse and politics by allowing misinformation to spread almost unchecked.

Amazon and Apple control extremely valuable marketplaces that reach hundreds of millions of people, and can use this control to pit suppliers against each other and extract arguably onerous fees.

Union advocates allege Amazon illegally interfered in a recent attempt to unionize in Alabama, and many workers have complained about working conditions in warehouses and delivery vehicles.

All of the companies have used acquisitions to enter adjacent markets and, arguably, to stifle potential competitors before they got too big -- a tactic also used by companies outside the Big Five, such as Oracle in past years and Salesforce more recently.

Several of their founders are now centi-billionaires, a perfect example of the runaway income inequality that many progressives believe must be curbed.

But all of these activities can be addressed with targeted regulations or stricter enforcement of existing laws. Antitrust is a blunt instrument meant to address major market distortions created by true monopolists. Being big, in itself, is not illegal. Applying antitrust law to these companies is misguided, wrong, and will not have the desired effect of curbing their power in meaningful ways.

### 1NC – AT: big four hurt startups

#### Big tech is the single largest host for startups and sustains productivity growth – solves decentralization via small firm innovation

**Litan 18** – B.S. in Economics, the Wharton School; J.D., Yale Law School; Ph.D., Yale University. Non-Resident Senior Fellow at the Brookings Institution; previously Vice President and Director of Economic Studies

(Robert Litan, “A Scalpel, Not an Axe: Updating Antitrust and Data Laws to Spur Competition and Innovation, September 2018, <https://www.progressivepolicy.org/wp-content/uploads/2018/09/PPI_AntitrustandDataLaws_2018.pdf>)

But what about the market power of the tech platforms? Don’t they inhibit competitors – new and existing companies – from challenging them? A recent article in The Economist warns that the tech platforms have become so powerful and threatening that they have established “kill zones” around their markets – arenas where startups know they will be squashed if they try to compete with the existing platforms, and thus can only sell out to them. “Ninety percent of the startups I see are built for sale, not for scale,”12 one venture capitalist told the magazine. In addition, the article worries about the absence of new platforms to challenge (and ideally disrupt) the incumbents.

There are several responses to this critique. First, each of the major tech platform companies acts as a host for startups and smaller existing businesses – creating markets for their services or products where none may have existed before, or extending their reach far beyond where they may be physically located. As already noted, **Amazon hosts more than 1 million businesses** selling all kinds of goods on its platform, including used books and other items that compete with Amazon’s own offerings. Indeed, more than 50 percent of the non-food items sold on the Amazon platform are derived from independent merchants’ sales.13 Apple and Google collectively host millions of applications on their mobile platforms (iPhone and Android). Facebook’s advertising model, despite the criticism it has drawn, has spawned a whole industry of advisers on social media advertising and marketing to companies, large and small.

Second, the pattern of the decline in startups is also inconsistent with the rise of the tech platforms being the villain in the overall startup decline. As a recent Brookings study documents, the drop of startup activity is spread across all major industry categories14 and is not concentrated in tech, as one would expect to see if the tech platforms were principally to blame for the overall drop in startup activity.

Third, my own research with Ian Hathaway, which documents the decline in the startup rate (the percentage of the total number of firms that are less than five years old) in all but one of the roughly 350 metropolitan areas in the United States, identifies two other potential explanatory factors that are statistically related to startup trends. The decline in startup rates is steeper in metro areas where population has not been growing (suggesting both supply and demand factors at work), and where the concentration of firms at the local level regardless of industry is relatively high.15

In other work, we also found – as did the later Brookings study just noted – that firms are “aging” in America, with a greater percentage of firms being at least 15 years old.16 We did not find the age increase to be related to measures of local business consolidation, and we didn’t have the data to link it at that time to measures of industry concentration. Nonetheless, the aging of the firm structure in the economy could help explain some of the decline in productivity growth about which many economists have worried – and which I discuss in the next section – in at least two ways.

Firms may be like individuals, being less innovative as they grow older (past a certain point) – reflecting the stifling effects of growing bureaucracy, with multiple approvals and associated delays and second-guessing of anything new. In addition, the increasing share of businesses represented by older firms may reflect advantages of incumbency, which may have resulted from superior efficiency, but may also reflect the fact that the growing numbers and compliance costs of local, state and federal rules put a disproportionate burden on newer firms – historically the source of much disruptive innovation.

President Obama’s Council of Economic Advisers has pointed to similar factors in its attempt to explain the decline in startup activity:

“The reasons for declining firm entry rates are not well understood, but a partial explanation is that barriers to entry may have increased in many industries. These barriers could be in the form of federal, state, or local licenses or permits, including occupational licenses … While such regulations serve a valuable role in protecting public well-being, they can also add fixed costs to an entrepreneur wanting to open a new business. Barriers to entry may be related to various advantages that have accrued to incumbent firms over time. For example, economies of scale may mean that incumbent costs are far below those of new entrants, making it difficult for entrants to compete. Or demand-side network effects may tip the market to a single provider of the network good. But incumbent advantages could also be political in nature; for example, if existing firms successfully lobby for rules protecting them from new entrants.”17

Fourth, whatever impacts the tech platforms may be having in their markets, they do not appear to have adversely affected annual venture capital funding, which, by 2017, had almost tripled from levels before the dot-com crash (from $55 billion to $150 billion).18 It may be true that the power of tech platforms has diverted VC funding into spaces away from platforms and their surrounding markets (though the launch of companies for “sale” rather than “scale” is inconsistent with that claim), and toward other unrelated markets, such as electric vehicles, blockchain apps, e-sports, robotics, or synthetic biology. But this redirection of venture money is not necessarily a bad thing. It may portend breakthrough innovations in other markets of greater potential value to the economy and society that may never have occurred – at least, not as rapidly – had VC money continued to fund more Web-based platform companies.

Finally, even if the tech platforms are using their “kill zones” to deter or buy new competitors, that doesn’t warrant their breakup. It does, however, call for a change in merger law that will tilt the existing platforms to entering new markets on their own rather than through acquisition, which should encourage innovation by the platform companies

## Digital Adv

### 1NC – Turn

#### Immediately expanding scope of antitrust liability brings that to a halt—undermines dynamism and global competitiveness

Thierer 21– Adam Thierer is a senior research fellow with the Mercatus Center at George Mason University. Author of several books on antitrust law; former president of the Progress & Freedom Foundation, director of Telecommunications Studies at the Cato Institute, and a senior fellow at the Heritage Foundation.

(Adam Thierer, 2-25-2021, "Open-ended antitrust is an innovation killer," TheHill, https://thehill.com/opinion/technology/540391-open-ended-antitrust-is-an-innovation-killer)

Antitrust reform is a hot bipartisan item today, with Democrats and Republicans floating proposals to significantly expand federal control over the marketplace. Much of this activity is driven by growing concern about some of the nation’s largest digital technology companies, including Facebook, Google, Amazon and Apple.

Unfortunately, the calls for more bureaucracy and regulation emanating from all corners of the political world could have an unintended consequence: discouraging the sort of vibrant innovation and consumer choice that made America’s tech companies household names across the globe.

Sen. Amy Klobuchar (D-Minn.) is leading one charge. Klobuchar, who chairs the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, recently introduced the “Competition and Antitrust Law Enforcement Reform Act.” This sweeping measure seeks to expand the powers and budgets of antitrust regulators at the Federal Trade Commission and the Department of Justice. It also includes new filing requirements and potentially hefty civil fines.

The most important feature is the proposed change to the legal standard by which regulators approve business deals. It would allow the government to stop any deal that creates an “appreciable risk of materially lessening competition,” and it also defines exclusionary behavior as, “conduct that materially disadvantages one or more actual or potential competitors.”

These may sound like simple, semantic tweaks, but – much like some of the other policy ideas currently circulating – they would upend decades of settled law and create a sea change in U.S. antitrust enforcement. This change could undermine business dynamism, innovation and investment in ways that inhibit the global competitiveness of U.S. businesses.

Critics of merger and acquisition (M&A) activity by large tech firms include not only Sen. Klobuchar but also Republicans such as Sen. Josh Hawley (R-Mo.). Hawley recent offered an amendment to a budget bill that would preemptively prohibit mergers and acquisitions by dominant online firms. Klobuchar and Hawley believe that M&A skews the market in favor of today’s largest firms, entrenching their market power and discouraging innovation.

History teaches a different lesson. Consider DirecTV and Skype, both once considered innovative market leaders in their respective fields of satellite TV and internet telephony. Both firms stumbled, however, and they might not even be with us today without creative business deals. DirecTV has been partially or fully controlled by Hughes Electronics, News Corp., Liberty Media and now AT&T. Skype has swapped hands multiple times, moving from eBay, to a private investment firm and now to Microsoft.

These were complex deals, and some didn’t work, leading to divestitures. But each was a learning experience that illustrated how dynamic media and technology markets can be with firms constantly searching for value-added arrangements that serve their customers and shareholders. If we make this type of activity presumptively illegal, we’re imagining that government bureaucrats are better suited to make these calls than businesspeople and the consumers who choose whether or not to buy the product.

Worse yet, legal tests like those Klobuchar proposes – “conduct that materially disadvantages potential competitors” – are remarkably open-ended and could be easily abused. The system will be gamed by opponents of deals for business reasons. They will claim that their own failure to attract investors or customers must all be the fault of more creative rivals. That’s a recipe for cronyism and economic stagnation.

Those who worry about today’s largest tech giants becoming supposedly unassailable monopolies should consider how similar fears were expressed not so long ago about other tech titans, many of which we laugh about today. Just 14 years ago, headlines proclaimed that “MySpace Is a Natural Monopoly,” and asked, “Will MySpace Ever Lose Its Monopoly?” We all know how that “monopoly” ceased to exist.

At the same time, pundits insisted “Apple should pull the plug on the iPhone,” since “there is no likelihood that Apple can be successful in a business this competitive.” The smartphone market of that era was viewed as completely under the control of BlackBerry, Palm, Motorola and Nokia. A few years prior to that, critics lambasted the merger of AOL and TimeWarner as a new corporate “Big Brother” that would decimate digital diversity and online competition.

GOP divided over bills targeting tech giants

Today, we know these tales of the apocalypse ended up instead becoming case studies in the continuing power of “creative destruction.” New innovations and players emerged from many unexpected quarters, decimating whatever dreams of continued domination the old giants once had.

Today’s biggest players face similar pressures, and it’s better to let rivalry and innovation emerge organically, not through the wrecking ball of heavy-handed antitrust regulation.

#### Internal link goes one way—large-firm dynamism is the only way to maintain tech leadership vis-à-vis china—key to competitiveness and AI

Lee, senior lecturer at the University of Hong Kong Faculty of Business and Economics, ‘19

(David S., “Antitrust action risks holding back US tech giants in competition with China,” <https://asia.nikkei.com/Opinion/Antitrust-action-risks-holding-back-US-tech-giants-in-competition-with-China>)

But the administration should not forget the law of unintended consequences -- effective antitrust measures could stifle the ability of American tech companies to compete with their Chinese challengers. Presumably, that is the last thing the America First president wants to see.

While antitrust has been used to regulate technology companies before, perhaps most notably Microsoft two decades ago, its application against Amazon.com, Facebook, and Google seems different.

For the last half-century or so, U.S. antitrust law has been underpinned by the concept of maximizing consumer welfare, frequently measured by price to consumers. In regulating big technology companies today, however, a new paradigm has emerged, dubbed "hipster antitrust."

Hipster antitrust looks beyond traditional economic harm and includes wider effects such as wage inequality, data privacy intrusions, and sheer size as grounds to invoke the law.

But the wider the antitrust authorities reach, the more likely they are to damage the tech giants' global competitiveness. This applies especially in the key field of artificial intelligence, where the U.S. and China are world leaders.

AI is the engine powering the Fourth Industrial Revolution and the fuel for that engine is data, lots of data. Such data can only be collected at scale, which conflicts with hipster antitrust notions of size. If American antitrust measures compel large technology companies to shrink or in the extreme, to break up, then the U.S. will find itself at a disadvantage to China.

The idea of size is one of many fundamental differences separating Chinese and American technology ecosystems. Chinese government leaders have clearly grasped that scale matters for the technologies they want to dominate, such as artificial intelligence, as well as for the type of digital governance Beijing is striving to implement.

In the U.S., however, the economic value attached to scale is offset by deep-rooted concerns about privacy, bullying behavior and unfair political and social influence. Senator Elizabeth Warren of Massachusetts, a popular Democratic Party candidate for the 2020 presidential election, wrote: "Today's big tech companies have too much power -- too much power over our economy, our society and our democracy."

But in China this is not a hot-button political issue. In a recent fintech course I helped lead comprised of students from different countries, mainland Chinese students considered privacy differently than peers elsewhere. Though aspects of privacy are important to Chinese users, many readily understand there are trade-offs in operating on technology platforms.

Chinese technology platforms such as Alibaba and Meituan have developed so-called "super apps" that serve the same functions that users in the West might find by going to different applications on their devices.

Super apps are designed to be convenient to users so they can handle everything from ride hailing, shopping, food purchases, and payment, all without leaving the digital confines of a single app. This has become the dominant way Chinese citizens consume online. With the most internet users in the world, approximately 750 million, super apps also provide Chinese technology companies an incredible amount of data.

In his book, "AI Superpowers: China, Silicon Valley, and the New World Order," technology executive and investor, Kai-Fu Lee outlined four factors necessary to win the AI race: talent, computing speed, data, and government policy. Though the U.S. has an advantage in many areas, that lead is shrinking, and if China does overtake the U.S. in artificial intelligence, it will likely be a result of advantages in data and government policy.

This combination of data and government policy is perhaps best exemplified by SenseTime, widely considered the world's most valuable artificial intelligence startup. SenseTime boasts world leading facial recognition, which is enhanced because it reportedly has access to Chinese government databases, a rich source of data to further develop models.

Chinese companies like SenseTime have excelled in facial recognition, with some reports estimating that there are almost ten times as many Chinese facial recognition patents filed as American. Chinese surveillance technology is already used in the U.S., including New York City.

This widening gap will have broader implications beyond surveillance, security, and policing. Facial recognition technology will also serve as a biometric identifier for finance, retail, and health. With China moving forward aggressively both domestically and abroad in its use of such technologies, American competitors who are pursuing facial recognition, such as Amazon and Google, may not be able to close the growing competitive chasm.

So while American politicians may see antitrust investigations into large technology companies as necessary, there could be a significant impact on America's ability to compete with China.

Google's former CEO, Eric Schmidt forecast last year that China and the United States would lead the bifurcation of the internet into two spheres. Evidence of this splintering is already apparent. What remains undetermined, however, is which of those spheres will dominate.

Large Chinese technology companies, for example Alibaba Group Holding, are already setting-up far-flung outposts by partnering with and investing in local, non-Chinese technology companies around the world. This form of Chinese technological expansion allows Chinese big tech to shape user privacy norms, establish global networks, and attract more users into their ecosystems, all of which leads to increased user activity and ultimately more data.

While China aggressively expands its technological reach and hones its ability through mining evermore data, it is important that U.S. regulators understand that aggressive antitrust sanctions would risk inhibiting American companies from maintaining the scale necessary to compete with their Chinese rivals.

AI supremacy will be a defining feature of superpower status. And if future researchers one day examine how the U.S. lost the war for artificial intelligence, the hindsight of history may show that the current antitrust debate was the fatal turning point.

### 1NC – Cyber

No escalation from attacks on infrastructure – empirically denied

# Block

## Private PIC

### 2NC – solvency o/v

#### Public enforcement with SINGLE damages is enough

Italianer, Director-General for Competition, European Commission, ‘13

(Alexander, “Fighting cartels in Europe and the US: different systems, common goals,” October 9, <https://ec.europa.eu/competition/speeches/text/sp2013_09_en.pdf>)

Since the first cartel decision of 1969, the Commission has imposed a total of over €19 billion in fines to 820 companies. A question we often get from members of the public is: why are your fines so large? To this I always respond: what is large? Beauty is in the eye of the beholder. Are the fines still large when compared to, for instance, the annual turnover of the company in question? Under the 2006 fining guidelines, around twelve per cent of companies received the maximum fine of ten per cent of turnover. But fifty per cent of the fines amounted to less than one per cent of turnover.

Are the sums still large when we look at private enforcement? In the US, courts can award treble damages to victims in antitrust cases. Such damages are generally seen in the US as a form of deterrence. If damages are awarded in Europe, courts generally award single damages, in other words, compensation for harm suffered.

Our proposal for a directive on private enforcement of antitrust damages is based on the principle of full compensation, which has been recognised in the case-law of the Court of Justice. Damages actions before civil courts are, in our view, are about compensation. Deterrence is achieved through public enforcement proceedings, in which fines can be imposed.

#### That achieves optimal deterrence because agencies can sue to stop bad stuff, without creating huge liability, the only function of private suits is to compensate

Juška, PhD candidate, Leiden Law School, Leiden University, Leiden, ‘18

(Žygimantas, “The Effectiveness of Antitrust Collective Litigation in the European Union: A Study of the Principle of Full Compensation,” IIC - International Review of Intellectual Property and Competition Law volume 49, pages63–93)

The deterrent function is pursued through the imposition of competition fines, which punish the infringer (in other words, specific deterrence). It also deters other persons from engaging in or continuing behaviour contrary to competition rules (in other words, general deterrence).Footnote9 According to the EU, public enforcement is considered to have sufficient means for achieving deterrence.Footnote10 In this respect, it must be borne in mind that EU competition law focuses exclusively on imposing fines on infringing businesses, but Member States are given space to introduce other types of penalties.Footnote11 In order to combat cartels, a majority of EU Member States have incorporated criminal sanctions on individuals (such as imprisonment or criminal fines) in their antitrust enforcement schemes.Footnote12 However, these sanctions have very rarely been imposed in practice.Footnote13 Therefore, public authorities in the EU jurisdictions have failed in setting an example for criminal penalties being effectively utilized in public enforcement.

Achieve Corrective Justice When the Infringement Has Taken Place

This goal can be pursued if two conditions are met.Footnote14 First, corrective justice is achieved if the monetary remedy deprives the wrongdoer of any benefit gained from illegal conduct. This measure may be used when public enforcers impose a sub-optimal fine. As such, the enforcement may be reinforced by imposing additional fines on the wrongdoer in order to fully remedy the anti-competitive situation. Second, corrective justice is achieved when victims are compensated for the harm suffered. According to the Directive on damages actions, the objective of compensation is fulfilled when victims effectively exercise the right to claim and to obtain full compensation for the harm suffered. However, this objective should not lead to overcompensation of the claimants, whether by means of punitive, multiple or other kinds of damages.Footnote15 For this reason, the enforcement of the first condition may not comply with the principle of full compensation, as additional fines (besides damages on fully compensating victims) may be required to ensure corrective justice. As a consequence, only the second condition will be further discussed in this paper.

### 2NC – private enforcement bad

#### Private enforcement is net bad for a litany of reasons:

#### 1. Margins—no reason the aff is net better—the system is already overdeterrent, adding another layer only has downside for innovation

Nuechterlein, JD, partner and co-leader of Sidley's Telecom and Internet Competition practice, and Muris, George Mason University Foundation Professor of Law, served from 2000-2004 as Chairman of the Federal Trade Commission, ‘21

(Jon and Timothy J., “Private Antitrust Remedies: An Argument Against Further Stacking the Deck,” March, <https://instituteforlegalreform.com/wp-content/uploads/2021/03/March-2021-Antitrust-Paper-FINAL.pdf>)

A defendant’s conduct in such cases generally lacks the features that could possibly justify punitive damages. In most, there was nothing surreptitious about the defendant’s conduct; indeed, it may have been common knowledge to everyone in the relevant business community. Like defendants in many negligence cases, defendants in rule-of-reason antitrust cases could not have predicted with any reasonable degree of certainty that their conduct would later be deemed unlawful. “The line between winning and losing may be exceedingly fine in such cases,”16 but “no matter how close the case, the winner gets a bounty and the loser gets a penalty” in the form of treble damages.17

The leading antitrust treatise describes that outcome as “an embarrassment to antitrust policy,” given “the law’s usual discomfort with imposing unforeseen liability.”18 Moreover, “[t]he practical effect of mandatory trebling is to tilt the settlement process in the plaintiff’s favor because mandatory trebling so inflates the defendant’s cost of losing and the plaintiff’s value of a victory in a rule of reason case.”19

#### 2. “Toxic cocktail” of procedural benefits—magnifies unpredictable negative effects

Briggs, partner in the law firm of Axinn, Veltrop & Harkrider, and co-chair of the firm’s Antitrust and Competition Group, Managing Partner of the firm's Washington, DC office, and an Adjunct Professor of International Competition Law at The George Washington University Law School. He is also a former Chair of the American Bar Association's Section of Antitrust Law, ‘18

(John Deq., “Re-Designing the American Antitrust Machine Part I: Treble Damages, Contribution and Claim Reduction,” <http://awa2018.concurrences.com/IMG/pdf/re-designing_the_american_antitrust_machine.pdf>)

Other regimes, most notably the Chinese, the United Kingdom and the Europeans (through the European Commission) have spent years3 studying these matters and have tended to come to relatively clear points of view that are not consistent with the American approach, which itself was the product of a very different time when the Sherman Act was a misdemeanor, the maximum fine was $5,000, no funds were budgeted for enforcement of the antitrust laws and public enforcement was toothless in various ways and focusing often in fact on labor unions as unlawful combinations. 4 Since the advent of this century, most of the world’s governments have addressed the matters above and more. In doing so, they have fled from many of the most familiar features of the American antitrust machine. Indeed, when the European Commission was deeply focused on encouraging private actions, many of the papers and speeches expressed a desire to create a viable damages remedy without the “excesses” of the American system5 and without the “toxic cocktail”6 of procedural benefits that flow to the claimants, and perhaps often to an even greater extent, their lawyers. The principal elements of this “toxic cocktail” seem to refer to many features of the American legal system, but especially:

The mandatory award of one-way attorneys’ fees for plaintiffs, but not for prevailing defendants, which is wholly inconsistent with the applicable rule in most all other countries. The wide open, expensive and extraterritorial documentary and deposition discovery available in cases brought in the courts of the United States, but not generally elsewhere; along with the openness of US courts to exercise vast extraterritorial jurisdictional discovery against foreign persons and companies even before any jurisdiction is established.7

The existence of joint and several liability without any right of contribution or meaningful claim reduction.

The fact that federal clearance of transactions or conduct does not preempt or preclude any or all of the individual states, or any individual, from attacking those transactions or conduct that have been approved or cleared at the federal level.

The policy chaos that has ensued in the wake of the Supreme Court’s decision in Illinois Brick, 8 which generated state legislative or judicial repealers such that indirect purchaser actions prohibited under the Sherman Act are nonetheless available under the laws of more than half of the states and are pursued in federal courts alongside the direct purchaser claims by virtue of diversity jurisdiction.9

Whether taken wholly together, in small clusters, or even individually, these uniquely American procedural features of our competition system have a powerful impact on the companies everywhere and also on the economy of the United States. The wealth transfers generated by this system are enormous. One result is that the lawyers have come to have a truly outsized role in the American economy, a role unlike and far grander than the role they play outside the United States. The purpose of this modest paper is to put some focus upon those features of private damage litigation that seem to be an essential component of any rethinking of American antitrust and competition law and policy. This paper will address these issues at a relatively high policy level while bearing in mind the far larger context set forth in these introductory pages.

#### 3. Settlements—private suits lead to tons of costly settlements, but don’t result in judgements which means companies can keep doing the bad practice

McCarthy et al., GC & Chief Legal Officer of Womble Bond Dickinson (US) LLP, ‘07

(Eric, Allyson Maltas, Matteo Bay and Javier Ruiz-Calzado, “Litigation culture versus enforcement culture A comparison of US and EU plaintiff recovery actions in antitrust cases,” <https://www.lw.com/upload/pubContent/_pdf/pub1675_1.pdf>)

Additionally, the several aspects of US litigation highlighted above are a catalyst to settlement. Even before discovery begins, some defendants, confronted with the promise of invasive and expensive discovery, will choose to settle with plaintiffs in order to spare their employees from intrusive discovery and to save on exorbitant legal fees. Plaintiffs routinely extract large settlements from defendants after gaining access to corporate documents and information that, although not dispositive of any wrongdoing, are damaging or embarrassing enough to justify settlement. Similarly, class actions may contribute to settlement of private damages actions because, if certified, defendants do not want to risk losing at trial and therefore pay treble damages. The same is true for state indirect purchaser actions. Defendants often settle these suits in order to avoid duplicative litigation costs.32 Settlement is also preferable for many defendants in this situation who rightly fear the application of collateral estoppel if they are adjudicated liable in even one state.33

#### 4. Kills solvency—private litigation conflicts with and undermines public enforcement so both fail

Crane, Frederick Paul Furth Sr. Professor of Law, Michigan Law, ‘19

(Daniel A., “Toward a Realistic Comparative Assessment of Private Antitrust Enforcement,”

*In Reconciling Efficiency and Equity: A Global Challenge for Competition Policy*, edited by Damien Gerard, and Ioannis Lianos, 341-54. Cambridge: Cambridge University Press, 2019)

The private-injunction action, like the treble-damage action under s 4 of the Act, supplements Government enforcement of the antitrust laws; but it is the Attorney General and the United States district attorneys who are primarily charged by Congress with the duty of protecting the public interest under these laws. The Government seeks its injunctive remedies on behalf of the general public; the private plaintiff, though his remedy is made available pursuant to public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served. These private and public actions were designed to be cumulative, not mutually exclusive.30

The EU Directive also shows sensitivity to the relationship between public and private enforcement, asserting the need for “coordination of these two forms of enforcement in a coherent manner,”31 and proposing mechanisms for preventing private enforcement from undermining public enforcement, such as limiting private access to self-incriminating materials received as part of leniency applications.32 The reality, however, is that private enforcement cannot help but have spillover effects on public enforcement – not all in the direction of making public enforcement more effective. To the contrary, the US experience shows that a swell of private enforcement can subtly undermine public enforcement, or even choke it off altogether.33 Particularly if private enforcement in particular areas comes to significantly outstrip public enforcement in frequency, with the governing liability norms being predominantly created in private litigation, public litigation can become laden with the baggage of private litigation to the point if ineffectiveness or practical disappearance.

US monopolization law is a case in point. Historically, public antitrust enforcement of s. 2 of the Sherman Act has declined since a high in the 1970s, when the agencies were bringing over three cases a year,34 to the last several administrations where very few monopolization cases have been brought. Over the eight years of the Bush administration, the Justice Department filed no monopolization cases. While running for office in 2007, Senator Barak Obama singled out this ostensibly weak enforcement record for condemnation, characterizing the failure to pursue monopolization cases as “lax enforcement” that harmed consumer interests.35 His Antitrust Division immediately withdrew a report on monopolization offenses disseminated by the Bush administration and promised that the Justice department would be “aggressively pursuing” monopolization cases.36 But, then, over seven and a half years, the Justice Department brought only one monopolization case. The case, against United Regional Health Care System of Wichita, Texas, was hardly a blockbuster antimonopoly action of the earlier Standard Oil, IBM, AT&T, or Microsoft variety. The Justice Department alleged that the relevant market was for the sale of inpatient hospital services to insurance companies in a geographic area “no larger than the Wichita Falls Metropolitan Statistical Area.”37 The government’s theory – that United had a 90% market share in acute inpatient services and used exclusive dealing contracts with insurance companies to stifle competitors – broke no new theoretical or practical ground.

What happened to public enforcement against monopolization? Among the several contributing factors is the dramatic rise of private monopolization actions in the later part of the twentieth century. Figure 17.2 below provides a statistical summary of public and private monopolization cases in the federal appellate courts in the post-war period. From the 1950s to the 1970s, the federal agencies filed a modest number of monopolization cases during each five-year period – far fewer than private monopolization cases, but still enough to make a significant impact on the formation of legal norms and market circumstances. But, as private monopolization litigation skyrocketed from the mid 1970s to the early 1990s, public monopolization enforcement receded, both proportionally and absolutely. With a few notable exceptions such as the DC Circuit’s en banc Microsoft decision, the monopolization law made from the 1970s forward was made in the context of private litigation. As the courts reacted to the dramatic rise of private monopolization cases by announcing new restrictions on a variety of exclusion theories – from predatory pricing, to tying, to duties to deal – private monopolization cases began to recede, reaching an apparently stable equilibrium at about half of their peak levels for the last two decades. This dramatic rise and then significant reduction of private monopolization litigation left in its wake public monopolization enforcement, which all but disappeared.

#### 5. Frivolous litigation—private companies stick their competitors with the cost, turns case

Dorsey et al., Associate at Wilson Sonsini Goodrich, ‘18

(Elyse, Rosati. Jan M. Rybnicek is a Senior Associate at Freshfields Bruckhaus Deringer, and Joshua D. Wright, JD, PhD, University Professor and the Executive Director, Global Antitrust

Institute, Scalia Law School at George Mason University, Former FTC Commissioner, “Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent Seeking,” CPI Antitrust Chronicle, April)

Additionally, the incredibly costly nature of antitrust proceedings exacerbates its vulnerability to rent seeking.39 Antitrust cases and investigations can drag on for years, entail the collecting, processing, and production of millions of documents, and involve tremendous attorneys’ fees. Remedies (or consent terms) can be invasive, last for years, and impair a defendant’s ability to adapt to changing circumstances and thus to remain competitively viable. Looming in the background is the possibility of trebled damages at the end of the day. Consider that an unhappy competitor could embroil a rival in an antitrust quagmire via its own litigation, or by complaining to a government agency and potentially triggering an investigation, that would divert significant amounts of that rival’s resources for years — thereby crippling a rival and diminishing the amount of competition it faces. With so much at stake, conditions are ripe for actors to engage in just such rent-seeking activities in an attempt to appropriate some of this vast wealth for themselves. The empirical evidence and historical record of antitrust actions — particularly during the era when antitrust was explicitly governed by a vague, multi-faceted standard — provide ample support for public choice theory and the economic theory of regulation, while tending to reject the public interest account of regulatory behavior.40

Finally, given this reality, what can be done to mitigate rent seeking? Public choice economics instructs that rent seeking opportunities are diminished when agencies have less discretion (e.g. when rules are clearer) and when another body (e.g. the public, a court, Congress) can more easily hold them accountable for their actions — factors that tend to go hand-in-hand.41 The rule of law thus diminishes incentives for rent seeking and corruption. When these constraining factors are in place, agencies have lowered ability to depart from what is required of them or to otherwise manipulate outcomes to respond to rent-seeking incentives. As such, what antitrust enforcement craves is a clear, well-established standard by which the public and the courts can evaluate agency decisions and identify and correct any deviations that undermine consumer outcomes.

### 2NC – plan is worse/takes out solvency

#### Only judgements really matter for actually stopping bad action—the plan just results in huge costs

Crane, Frederick Paul Furth Sr. Professor of Law, Michigan Law, ‘10

(Daniel A., “Optimizing Private Antitrust Enforcement,” 63 Vand. L. Rev. 675)

There are two other ways that private antitrust lawsuits might mete out negative sanctions on corporate managers prior to judgment day. First, antitrust litigation is extremely expensive and the costs are often borne disproportionately by defendants. 100 CEOs, CFOs, and particularly general counsels care a great deal about legal fees, but the divisional managers who often make the decisions that ensnare a firm in an antitrust suit may not care. A divisional manager typically seeks to maximize the reported profitability of her own business unit, not necessarily the value of her firm as a whole.' 0' For accounting purposes, legal fees are often treated as operating expenses of the firm as a whole. Therefore, legal fees may not come directly out of a divisional manager's budget or count against her revenues for the purposes of divisional financial reporting and incentive compensation. The threat of having to pay legal fees during a protracted and expensive lawsuit may have relatively little deterrent effect on the key decisionmakers who consider whether to engage in anticompetitive tactics.

A second way that private antitrust lawsuits could provide an early deterrent shock is through large settlement payouts, which are a sort of privately negotiated and accelerated judgment day. But with the exception of government case tag-along suits, which are discussed below, large settlement payouts in private cases usually do not occur until the eve of trial. Corporate managers and boards are usually unwilling to open up their coffers for more than nuisance value settlements until the threat of an adverse judgment is imminent. Thus, private settlements may accelerate judgment day by shortcircuiting appeals, but the average time from the planning of anticompetitive conduct to the payment of any substantial settlement amount still probably exceeds five years.

#### Takes too long to create a clear signal

Crane, Frederick Paul Furth Sr. Professor of Law, Michigan Law, ‘10

(Daniel A., “Optimizing Private Antitrust Enforcement,” 63 Vand. L. Rev. 675)

Given all of the above factors, it is implausible that the threat of future private litigation does much to deter anticompetitive behavior. The author's own experience in a private antitrust case is illustrative. By the time the case settled during an appeal, it had been nine years since the lawsuit was filed and fifteen years since the alleged misconduct began. Only a handful of personnel who were with the company during the relevant events were still employed by the firm at the time of settlement. Since the underlying conduct occurred, the company had witnessed multiple generations of senior management come and go. The company's capital structure had changed multiple times, too. First, it was part of a corporate conglomerate, then it was spun off as an independent, publicly traded company, then it was acquired by another conglomerate, and shortly afterwards it was taken private. The managers and shareholders who had reaped the gains from any unlawful conduct-assuming that there was any-had long since moved on.

#### Treble damages undermines industry dealmaking

Delrahim, JD, former Assistant Attorney General for the Antitrust Division of the United States Department of Justice, ‘20

(Makan, “Assistant Attorney General Makan Delrahim Delivers Remarks at IAM’s Patent Licensing Conference in San Francisco,” September 18, <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-iam-s-patent-licensing>)

More fundamentally, recognizing a Section 2 cause of action for violations of a FRAND commitment would create an unacceptable risk of “false positive” condemnations of pro-competitive conduct by licensees. The prospect of antitrust liability and treble damages for breaching a potentially vague FRAND term—or allegedly “misrepresenting” one’s intentions to offer some FRAND rate—threatens to chill incentives for innovators to develop new technologies that fuel dynamic competition.

Where contract law remedies exist to remedy and deter breaches of a FRAND commitment, the additional deterrence that Sherman Act remedies offer could deter lawful, pro-competitive conduct—that is, research and development by innovators who make careful cost-benefit calculations as to how much to invest in technologies that may not pay off. Demanding a high price for one’s patented technology is permissible, and expected, conduct in a free market negotiation. A Section 2 cause of action would skew the patent licensing bargain away from the bargaining outcome that a free market dictates.

In particular, where the parties have a subjective disagreement over the meaning of an incomplete contract term, a Section 2 remedy threatens the patent holder with the risk of enormously costly litigation and a possible treble damages award. Bargaining in the shadow of litigation, a patent holder would be wary that a high license demand could be penalized by a significant damages award, whereas a prospective licensee’s low-ball offer would do no such thing. Such a remedy would bestow any putative licensee with disproportionate negotiating power. In turn, the cost-benefit calculation for innovators would change and the prospect of additional dynamic competition likely would decline.

### 2NC – AT: PCP

#### Severance—antitrust laws require private liability, that’s McCarthy—makes the aff a moving target, justifies aff conditionality which undermines neg strategy.

#### Expansion of the antitrust laws necessarily allows for private suits—CP is germane because it’s a distinct model

Kenneth Ewing, JD, Steptoe & Johnson LLP, Private anti-trust remedies under

US law, 2007, <https://www.steptoe.com/images/content/1/7/v1/1731/2804.pdf>

One of the most important features of anti-trust enforcement in the US is the large and complicated role played by private remedies. Unlike most jurisdictions around the world, in which only governmental enforcement must be considered, the US grants private parties (and all state governments, acting on behalf of their citizens) a wholly independent right to seek:

Monetary damages.

Court injunctions to order potentially far-reaching changes in anti-trust defendants’ conduct.

In addition, special rules, such as the automatic trebling of damages, award of attorneys’ fees and costs, and aggregation of hundreds to thousands or more claims within a single action on behalf of a class of similarly placed claimants, dramatically increase both the attractiveness of bringing private claims and the stakes for defendants.

## Adv CP

### 2NC – new stuff

#### Solves better than the aff. Clarity in response and deterrence is key.

**Paul 18** – Christopher Paul, Senior Social Scientist; Professor, Pardee RAND Graduate School

Paul, Christopher, 1-10-18, "How the Pentagon Should Deter Cyber Attacks," RAND, https://www.rand.org/blog/2018/01/how-the-pentagon-should-deter-cyber-attacks.html

The most important lesson from Russia's involvement in the 2016 presidential election may be this: foreign hackers and propagandists are not afraid to launch attacks against the United States in and through cyberspace that they would not dare risk in a real theater of war. So as cyber aggression gets worse and more brazen every year, it's crucial that the Department of Defense figures out how to deter foreign actors in cyberspace as effectively as in nuclear and conventional warfare. The Pentagon can take five steps to better deter foreign cyber attacks.

The Department of Defense should clarify and narrow the scope of how “cyber” is used and conceived.

First, the Department of Defense should clarify and narrow the scope of how “cyber” is used and conceived. Right now, the term is applied too inclusively; just because some activity or capability transits the cyberspace domain does not necessarily make it a cyber activity or capability. The department should allow capabilities that traditionally function outside of cyberspace to use their existing authorities for actions through the Internet without insisting that doing so makes them cyber. For example, counterintelligence is a traditional military activity that predates the existence of cyberspace and seeks to protect U.S. military forces from the espionage, sabotage, or other intelligence activities of foreign powers. Counterintelligence personnel have the authority to observe and thwart the activities and communications of foreign spies and saboteurs. Such authorities should clearly extend to foreign activities in and through cyberspace without counterintelligence becoming a cyber activity or requiring special cyber authorities. Once traditionally spatial domain capabilities using the internet as a mode or medium are excused from the cyber tent, then the capabilities left in the tent will be smaller in scope, more manageable, and more amenable to bounding and definition.

After narrowing the scope of cyber, the Department of Defense should take the elements that remain and more carefully and clearly categorize and define them, so that appropriate authorities and approval processes can be matched to distinct capabilities. Under the current model, cyber capabilities are too often viewed as being uniform in their character, quality, and the level of risk associated with their use. Rather than operating under the assumption that anything cyber is similar and high-risk and thus requires the highest levels of approval, the Department of Defense should be able to tease out different categories of capabilities and identify which should continue to require high-level approval and which are more pedestrian, and can have authorities delegated and accelerated. As a hypothetical example, unleashing malicious code to destroy or disable adversary computer networks can and should require approval from the highest levels because of the risk of spread to non-adversarial networks, the risks of threat actors learning from and duplicating the tools used, and concerns about proportionality. Still hypothetically, accessing adversary computer networks using captured or inferred passwords and then exploiting those systems using software that is already part of those networks might require authorities and approvals at a much lower level, as the risks are lower.

Second, having narrowed and clarified the scope of cyber, the Department of Defense should make use of cyber for more than just cyber. Effects generated in cyberspace can also have effects in the physical domains, and cyber capabilities could be used to support and enable a wide range of other capabilities and activities (including some of those that we recommended be carved off from being considered part of cyber in our first insight). Make the partnerships; increase the complementarity and integration between cyber and other capabilities that is the hallmark of combined arms. We want to hear all about “Cyber enabled <fill in the blank>,” where the blank filled in might be a wide range of things that the Department of Defense does or contributes to: deterrence, military deception, military information support operations, to name a few examples.

Deterrence does not take place in vacuum, but in a culturally and historically nuanced context.

Third, the Department of Defense should treat deterrence explicitly as a form of influence. Whether deterring cyber aggression, using cyber-enabled efforts to contribute to broader deterrence, or seeking to deter with no reference to cyber, deterrence is about getting someone (usually a state-level actor, but not always) to do or not do some action or range of actions. That is influence. Effective deterrence and effective influence depend on the perceptions, calculations, preferences, opinions, cognitions, decisions, and will of the potential aggressor. Deterrence is not just about displaying U.S. capabilities or demonstrating U.S. resolve, but is also about how those actions are perceived and interpreted by others. Considered as an influence issue, deterrence could include an enhanced focus on how actions might be perceived and understood. This also suggests that planners should adjust U.S. actions so that they are perceived and understood in a way that contributes to deterrence and that planners consider broader efforts to change the way potential aggressors make their decisions, the range of options they are considering, how they receive and process information, and the content of their cognitions and calculations. Deterrence does not take place in vacuum, but in a culturally and historically nuanced context, and deterrent actions are not the only things that can be changed within that context.

Fourth, Department of Defense conversations about deterrence could consider the relationship between norms and deterrence. The U.S. should demonstrate its resolve by being clear about what should be normatively prohibited in cyberspace,

not doing those things itself, and punishing those who chose to do those things. Demonstrations of resolve are essential to deterrence, and become more powerful when clearly connected to norms. When other actors see an aggressor getting noticeably punished for an action or behavior, those other actors might be deterred from similar actions or behaviors. That deterrence is even more likely if framed by and clearly connected to an established set of cyberspace norms.

Finally, planners should increase specificity to improve deterrence, whether deterring against or through cyber, or other means. In other words, the U.S. could be more specific about who it wants to not do what, and what the consequences of doing these things will be. Such specificity is critical in planning and strategizing deterrence. Specificity can also help in the public statements accompanying deterrent posture and actions, though not without risk. Telling a potential aggressor exactly where a “red line” is might be effective in keeping them from crossing that red line, but might inadvertently be an invitation to undertake aggression right up to the boundary of that red line.

### 2NC – S – T/L

#### Best solves price regulation and access rights.

Kobayashi & Wright 20 – Paige V. and Henry N. Butler Chair in Law and Economics at the Antonin Scalia Law School at George Mason; University Professor and the Executive Director of the Global Antitrust Institute at Scalia Law School at George Mason University, holds a courtesy appointment in the Department of Economics, former Commissioner at the Federal Trade Commission

Bruce H. Kobayashi, Joshua D. Wright, “Antitrust and Ex-Ante Sector Regulation,” Report on the Digital Economy, Section III, Global Antitrust Institute, 2020, https://gaidigitalreport.com/2020/10/04/ex-ante-regulation-versus-ex-post-antitrust-enforcement/#\_ftn29

Because detailed and specific knowledge is required to engage in price setting through regulation, such tasks are generally allocated to specialist sector regulators administering sector specific regulations.[44] The historical use of sector regulation and sector regulators to administer price setting and duties to deal is consistent with an ex-ante choice of regulation over antitrust based on comparative advantage.[45] Because of this focus, regulatory regimes have often focused on network industries that exhibit economies of scale and issues relating to access rights and interconnection duties. While such sector specific regulatory regimes may be better suited to regulating price and interconnection duties in theory, in practice these regimes are imperfectly carried out and have often proven to be costly and ineffective. The use of industry specific regulators can result in the regulators being captured by the agencies,[46] and legislation to enact a regulatory regime often reflects the preferences of those being regulated rather than an attempt to maximize consumer welfare.[47] The result of ineffective sector regulation has often been deregulation,[48] and a return to the market and the protection of the competitive process through antitrust law.[49]

### 2NC – Antitrust Bad – T/L

#### Antitrust is a bad mechanism –

#### a – Process – generalist judges have zero expertise – that’s especially true from price setting and establishing duties to deal.

Kobayashi & Wright 20 – Paige V. and Henry N. Butler Chair in Law and Economics at the Antonin Scalia Law School at George Mason; University Professor and the Executive Director of the Global Antitrust Institute at Scalia Law School at George Mason University, holds a courtesy appointment in the Department of Economics, former Commissioner at the Federal Trade Commission

Bruce H. Kobayashi, Joshua D. Wright, “Antitrust and Ex-Ante Sector Regulation,” Report on the Digital Economy, Section III, Global Antitrust Institute, 2020, https://gaidigitalreport.com/2020/10/04/ex-ante-regulation-versus-ex-post-antitrust-enforcement/#\_ftn29

The evolution of the merger guidelines highlights the importance of institutional competence and fit in determining both the bounds of a regulatory approach as well as the allocation of tasks between approaches. Indeed, these institutional structures have been used to explain features of ex-ante sector regulation that are not commonly found in the antitrust laws. In particular, the antitrust laws are based on generally applicable standards (e.g., to insure the proper functioning of markets in order to protect the competitive process and maximize consumer welfare).[39] Because the common law of antitrust is produced by generalist judges with limited specific industry knowledge and expertise, they are ill suited to effectively supervise and administer price regulations, especially in dynamic industries.[40] [FOOTNOTE 40 STARTS] As the Court noted in Trinko: “Allegations of violations of [interconnection] duties are difficult for antitrust courts to evaluate, not only because they are highly technical, but also because they are likely to be extremely numerous, given the incessant, complex, and constantly changing interaction of competitive and incumbent LECs implementing the sharing and interconnection obligations.” Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) [FOOTNOTE 40 ENDS] In light of this, the antitrust laws in the U.S., with a few notable exceptions,[41] have maintained a strict separation between antitrust law and price regulation.[42] A corollary of this separation is a cautious and limited approach to antitrust duties to deal, which would require a specification of the price at which the involuntary transaction would take place.[43] [FOOTNOTE 43 STARTS] See Carlton & Picker, supra note 5, at 26 (“[A]ntitrust is a poor framework for price setting or for establishing affirmative duties toward rivals.”). [FOOTNOTE 43 ENDS]

#### b – Error costs and decision costs.

Lambert 17 – Wall Chair in Corporate Law and Governance and Professor of Law, University of Missouri

Thomas A. Lambert, “How to Regulate: A Guide for Policymakers,” Cambridge University Press, August 2017

But antitrust’s flexibility – or, stated more pejoratively, its indeterminateness – also creates difficulties. As explained above, antitrust analysis usually requires some sort of reasonableness inquiry (e.g., Is the agreement an unreasonable restraint of trade? Does the conduct at issue unreasonably exclude competitors?). This inquiry is often quite costly, requiring the decisionmaker to define the market and to assess such complex matters as the ease with which competitors could enter the market and the magnitude of any efficiencies the conduct at issue is likely to create. Business planners must make this costly inquiry prior to embarking upon any course of conduct involving cooperation with rivals or potential harm to competitors; courts must do so if the conduct is challenged. There are thus significant ex ante and ex post costs in simply reaching a decision about the legality of novel business practices. These are antitrust’s decision costs.

### 2NC – AT: PDB

#### Antitrust’s unusually broad scope is the core of our link – that doesn’t apply to the counterplan’s rule-based and industry-specific approach.

Lambert 17 – Wall Chair in Corporate Law and Governance and Professor of Law, University of Missouri

Thomas A. Lambert, “How to Regulate: A Guide for Policymakers,” Cambridge University Press, August 2017

Taken together, then, the difficulty of evaluating the competitive effects of business practices (decision costs) and the inevitability of mistakes (error costs) limit what antitrust can accomplish. Perfection is impossible, and efforts to achieve it are likely to be wasteful. Of course, as Chapter 2 explains, the same can be said for all efforts to regulate mixed-bag behavior. The point is most salient with antitrust, though, because antitrust’s scope is unusually broad (i.e., it is the residual regulator of all business behavior), and the behaviors it regularly restricts – trade-restraining agreements and business methods that may injure rivals – are particularly likely to involve ambiguous welfare effects.

## Antitrust DA

### Impact O/V – Must read

#### It outweighs on timeframe –immediate implementation is bad—it undermines the economic recovery—turns case

Jan Rybnicek is Counsel in the antitrust practice of Freshfields Bruckhaus Deringer and a Senior Fellow at the Global Antitrust Institute at Antonin Scalia Law School at George Mason University, February 12, 2021, Op-ed: Recent antitrust proposals could ‘throw sand in the gears’ of economic recovery by stalling M&A, https://www.cnbc.com/2021/02/12/op-ed-recent-antitrust-proposals-add-friction-to-ma-at-wrong-time.html

Last year, some in Congress called for a merger moratorium banning all M&A during the pandemic. Then, in a surprise announcement, the FTC — over the objection of two commissioners — said it would no longer quickly approve the vast majority of transactions notified to the government that cannot plausibly reduce competition. Most recently, Senator Amy Klobuchar, D-Minn., introduced antitrust reform legislation that would give the government even greater power to block M&A it deems problematic.

While these proposals are well-intentioned, they threaten to throw sand in the gears of the economy and to do far more harm than good. Adding friction to M&A activity has the potential to stall capital markets, reduce innovation and investment, and frustrate economic growth. And it does so at precisely the wrong time — when the nation is attempting an economic recovery during an ongoing global pandemic that has upended how we work.

Antitrust has seized lawmakers’ interest like no other time in modern memory. Senator Klobuchar’s legislation is the most ambitious attempt to reform the antitrust laws in nearly half a century. A key focus of the bill is to make it even easier for the federal antitrust authorities — the Federal Trade Commission (FTC) and the Department of Justice (DOJ) — to intervene in private parties’ dealings by blocking M&A that they decide will harm competition.

Under existing law, the antitrust agencies must convince a judge that a deal is likely to substantially lessen competition in order to obtain an injunction preventing the transaction. The agencies bear the burden in proving their case. That typically has not been too tall an order. While reviewing a government challenge to a small grocery store merger and lamenting the internal contradictions in antitrust law, Supreme Court Justice Potter Stewart once observed that the only thing consistent about merger litigation is that the government always wins.

Over the last several decades, antitrust has become a more principled body of law through the incorporation of economics and a focus on promoting consumer welfare, but one thing has not changed: the government still nearly always wins.

Reform advocates would have you believe that the FTC and DOJ show up in court on a wing and a prayer and rarely are able to convert the power and credibility of the federal government into merger litigation victories. But reality is far different. The government has no problem blocking mergers it believes are problematic. Over the last 20 years the DOJ and FTC have prevailed in nearly 85% of merger challenges. That is a record any litigator would envy. And the government’s win-rate only improves when looking at more recent cases. In fact, after the DOJ or FTC challenge a merger, companies more often than not abandon their deal before trial because the legal standard is so favorable to the government. This even includes successful challenges against deals involving the acquisition of a nascent firm that does not compete against the acquirer today but, in the government’s view, could in the future, such as the DOJ’s recent success in blocking Visa’s purchase of fintech upstart Plaid.

Senator Klobuchar’s legislation would put the thumb on the scale even more in favor of the government. It would lower the legal standard and allow the government to stop any deal that raises even an “appreciable risk of materially lessening competition.” It also would create presumptions against large deals that do not even involve competitors. Most significantly, the legislation flips the traditional burdens of proof on their head and requires defendants to prove that their deal should be allowed to close. In light of the disadvantages companies already face when confronted with government opposition, such changes are unwarranted, unless you believe the government is infallible and should win 100% of its cases.

Giving the government greater discretion to intervene in deals would add unnecessary friction to the M&A market and reduce the types of investments that have fueled U.S. economic growth, including in the many startups whose founders and investors develop new and innovative products in part due to the prospect of exit through M&A.

### AT: Aff Solves Innovation

#### Antitrust liability is uniquely chilling to firms—treble damages increase the potential cost of all conduct and undermines industry dealmaking

Delrahim, JD, former Assistant Attorney General for the Antitrust Division of the United States Department of Justice, ‘20

(Makan, “Assistant Attorney General Makan Delrahim Delivers Remarks at IAM’s Patent Licensing Conference in San Francisco,” September 18, <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-iam-s-patent-licensing>)

It can be a serious mistake for a court to allow either type of claim to proceed under the Sherman Act. To understand why that is the case, one should consider the policies underlying Section 2 of the Sherman Act.

One crucial element in establishing any claim of unlawful monopolization under Section 2 is a showing that a defendant acquired, enhanced, or maintained monopoly power in the relevant market through anticompetitive conduct that is “exclusionary” or “predatory” in nature. I will focus on so-called “exclusionary” conduct—the umbrella concept often invoked by licensees bringing Section 2 claims premised on FRAND violations.

The term exclusionary conduct in antitrust law is potentially misleading because there is a difference under the Sherman Act between “lawful” and “unlawful” conduct that results in exclusion of a competitive alternative. In market economies, every rational business wants to exclude and defeat its competitors, and indeed antitrust law encourages fierce competition among companies aiming for as high a market share as they can achieve. That is why courts applying Section 2 are careful not to condemn “exclusionary” conduct that is driven by competition on the merits such as innovation. Most obviously, legitimate competition on the merits can be “exclusionary” in the sense that consumers choose a superior product or service. That conduct does not violate Section 2. By comparison, conduct that “excludes” a competitor by hindering its ability to offer a superior product or service, without offering any benefit to competition, likely would constitute a Section 2 violation.

When courts police the line between lawful and unlawful “exclusionary” conduct, a few themes emerge.

First, courts have recognized that not every type of conduct that may enhance a business’s market power is actionable, such as when the application of Section 2 would impose a duty that contravenes the policies of the antitrust laws themselves. For example, in Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, the plaintiff alleged that Verizon refused to deal with a rival in order to limit competitive entry, thereby enhancing its monopoly position. The Supreme Court held that the claim did not satisfy Section 2 as a matter of law. That is because the claim would condemn a monopolist’s refusal to share its resources and effectively would create an antitrust duty to help a competitor. Such a duty, the Court explained, is in “tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.” The Court applied a legal rule, rather than a fact-specific rule, to protect conduct that may have an exclusionary, monopoly-enhancing effect.

Second, the Supreme Court has cautioned against antitrust standards that would create an unacceptable risk of “false positives” or condemnations of lawful pro-competitive conduct. As the Court has explained, “Mistaken inferences and the resulting false condemnations ‘are especially costly, because they chill the very conduct the antitrust laws are designed to protect.’” Judge Robert Bork, in his famous Antitrust Paradox, highlighted the same risk in the application of Section 2 theories, explaining with respect to exclusive dealing that “[t]he real danger for the law is less that predation will be missed than that normal competitive behavior will be wrongly classified as predatory and suppressed.”

This backdrop helps frame the question whether a unilateral refusal to license a lawful patent on “FRAND” terms after committing to do so constitutes a form of unlawful exclusionary conduct. A unilateral violation of a FRAND commitment should not give rise to a cause of action under Section 2 of the Sherman Act, even if a patent holder is alleged to have misled or deceived a standard-setting organization with respect to its licensing intentions. Applying Section 2 to this sort of unilateral conduct would contravene the underlying policies of the antitrust laws. This conduct may warrant remedies under contract law, but the important difference is that contract remedies do not involve the threat of treble damages that can deter lawful, pro-competitive conduct.

In the context of legitimate standard setting, the collective decision to incorporate a patented technology into a standard necessarily involves the “exclusion” of rival technologies. Moreover, as a result of having its technology incorporated into a standard, a patent holder may gain incremental market power beyond any power that holding a patent would already convey. By voluntarily participating in the standard setting process, however, owners of rival technologies and prospective licensees assume the risk that the outcome of that process may have an exclusionary effect where there are patents covering the “winning” technology. Simply winning selection by a standard setting process does not constitute unlawful exclusionary conduct under the antitrust laws. This is because that selection, regardless the reason for it, contributes to unification around a single standard, which creates interoperability benefits for consumers that could not be achieved without unification.

This form of lawful and pro-competitive exclusionary conduct should not be condemned as unlawful under the Sherman Act when a licensee believes that a patent-holder opportunistically has reneged on its commitment to license on “FRAND” terms and engaged in so-called “hold-up.” That is also true even where a patent holder never allegedly intended to license on the terms that a court ultimately determines are “FRAND.” I will explain why.

There is no duty under the antitrust laws for a patent holder to license on FRAND terms, even after having committed to do so. A FRAND commitment is a contractual representation that a patent holder will license on “fair,” “reasonable,” and “non-discriminatory” terms. It is not the same as a promise to pay a specific price in a final contract. Indeed, commentators have noted that by failing to specify a specific price, a FRAND commitment is an incomplete contract term.

To be clear, a FRAND commitment may create a duty under contract law to fulfill that obligation, and courts may be tasked with determining the relevant FRAND rate where parties disagree over this contract term. Section 2, however, is agnostic to the price that a patent-holder seeks to charge after committing to such a term. Breaking down “FRAND” by its component terms makes clear why this is so.

First, the Sherman Act does not police “fair” prices or competition; it protects the competitive process. Judge Easterbrook once asked, “Who says that competition is supposed to be fair, that we judge the behavior of the marketplace by the ethics of the courtroom? . . . When economic pressure must give way to fair conduct . . . rivals will trim their sails”; introducing conceptions of “fairness” into the Sherman Act “is to turn antitrust law on its head.”

Second, having undertaken a contractual duty to charge “nondiscriminatory” rates, the Sherman Act does not compel a patent-holder to abide by this promise. The Sherman Act is indifferent to price discrimination; indeed, in some circumstances price discrimination may be pro-competitive.

Third, the Sherman Act does not authorize courts to determine “reasonable” licensing rates. The Supreme Court has emphasized repeatedly that antitrust law does not recognize a cause of action that would “require[] antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited.”

It, therefore, would be a mistake to infer that a contractual FRAND commitment somehow establishes a duty under the antitrust laws to license on terms demanded by a licensee or that violations of an ambiguous FRAND term become an antitrust violation. Transforming such a contract obligation into an antitrust duty would undermine the purpose of the antitrust laws and the patent laws themselves, both of which serve the same goal of increasing dynamic competition by fostering greater investment in research and development, and ultimately in innovation.

Making the duty to license on FRAND terms enforceable under the antitrust laws would contravene the policies of the Sherman Act. As the Supreme Court recognized in Trinko, a business has no antitrust duty to deal with another company, and only in limited circumstances will a refusal to deal give rise to a potential antitrust claim. As then-Tenth Circuit Judge Neil Gorsuch explained in Novell v. Microsoft, following Trinko, a monopolist’s refusal to license its intellectual property is actionable under the antitrust laws only if it terminates a “presumably profitable course of dealing between the monopolist and the rival” and that termination is “irrational but for its anticompetitive effect.”

I would note that then-Judge Gorsuch’s standard echoes what the United States and FTC advocated to the Supreme Court in its amicus brief in the Trinko case. The brief stated:

Where, as here, the plaintiff asserts that the defendant was under a duty to assist a rival, the inquiry into whether conduct is “exclusionary” or “predatory” requires a sharper focus. In that context, conduct is not exclusionary or predatory unless it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition.

That narrow window for a refusal to deal claim is irreconcilable with the broader contention that Section 2 obligates an SEP-holder subject to a contractual FRAND commitment to license its technology to any comer—much less on FRAND terms. An antitrust duty to license on FRAND terms would also contravene the patent laws’ policy of promoting innovation by offering incentives for holders of valid patents to seek the greatest rewards possible for their inventions.

To be clear, contract law may very well require an SEP-holder to deal with any willing licensee, but the Sherman Act does not convert FRAND commitments into a compulsory licensing scheme. It logically follows that there is no antitrust liability for proposing to deal at terms that are above FRAND rates.

Nor should an antitrust duty spring into being if a patent holder allegedly “deceives” an SSO when it commits to license on FRAND terms and its participants rely on that representation in deciding to adopt the technology. That is because Section 2 should not condemn a patent holder’s profit-maximizing intentions or aspirations at the time it makes a FRAND commitment, particularly where remedies are already available to an unhappy licensee or SSO participant.

Suppose that, hypothetically, the holder of a standard-essential patent knew upfront precisely what price would satisfy the vague definition of “FRAND” and planned to demand a much higher price after the SSO incorporated its technology into a standard. By making a legally binding commitment, a patent-holder acknowledges that it will be required under contract law to license at a rate determined by a court if a disagreement over that rate arises later. A licensee, for its part, understands that it can bring suit if a price does not fit its own subjective understanding of “FRAND.” Because both patent-holders and licensees participating in a standard-setting process recognize that the proper “FRAND” rate will be determined after the fact—in court, if necessary—there is therefore no meaningful ex ante “deception” that should give rise to an antitrust claim.

To be sure, having one’s technology incorporated into a standard, in some circumstances, may increase a patent-holder’s market power. The same could be said, of course, about a monopolist’s refusal to deal with a rival who might gain market share if it had access to the monopolist’s inputs. Even if this occurs as a result of a patent holder’s so-called “deception” about its licensing obligations, this is not the sort of market-power-enhancing conduct that Section 2 should reach because a cause of action for treble damages would impede the policies underlying the Sherman Act. Even worse, such a cause of action would “require[] the court to assume the day-to-day controls characteristic of a regulatory agency.”

More fundamentally, recognizing a Section 2 cause of action for violations of a FRAND commitment would create an unacceptable risk of “false positive” condemnations of pro-competitive conduct by licensees. The prospect of antitrust liability and treble damages for breaching a potentially vague FRAND term—or allegedly “misrepresenting” one’s intentions to offer some FRAND rate—threatens to chill incentives for innovators to develop new technologies that fuel dynamic competition.

Where contract law remedies exist to remedy and deter breaches of a FRAND commitment, the additional deterrence that Sherman Act remedies offer could deter lawful, pro-competitive conduct—that is, research and development by innovators who make careful cost-benefit calculations as to how much to invest in technologies that may not pay off. Demanding a high price for one’s patented technology is permissible, and expected, conduct in a free market negotiation. A Section 2 cause of action would skew the patent licensing bargain away from the bargaining outcome that a free market dictates.

In particular, where the parties have a subjective disagreement over the meaning of an incomplete contract term, a Section 2 remedy threatens the patent holder with the risk of enormously costly litigation and a possible treble damages award. Bargaining in the shadow of litigation, a patent holder would be wary that a high license demand could be penalized by a significant damages award, whereas a prospective licensee’s low-ball offer would do no such thing. Such a remedy would bestow any putative licensee with disproportionate negotiating power. In turn, the cost-benefit calculation for innovators would change and the prospect of additional dynamic competition likely would decline.

#### Plan is the first and only statutory change in over 50 years—even minor changes signal to courts that they have to favor plaintiffs

Tracy 21– Ryan Tracy and Brent Kendall, tech and legal reporters, respectively, in WSJ’s Washington Bureau

(Ryan Tracy and Brent Kendall, 3-12-2021, "Antitrust Law: What Is It and Why Does Congress Want to Change It? ," WSJ, <https://www.wsj.com/articles/antitrust-law-what-is-it-and-why-does-congress-want-to-change-it-11615554000>)

U.S. antitrust laws date back more than 130 years and affect every part of the economy. Democrats and Republicans are now considering the most significant changes in decades. Here's what you need to know about what might be coming:

What is antitrust law?

Antitrust laws are designed to protect and promote competition, guided by the principle that consumers are better off when companies battle for their business by offering better services and prices.

The laws date to the 1890 Sherman Antitrust Act, when powerful monopolies (then known as "trusts") in industries such as oil and railroads exercised huge influence over American trade. These laws bar price-fixing, market-rigging, monopolistic practices and mergers that pose a substantial threat to competition.

Why does Congress want to update the laws now?

Both political parties have been galvanized by concern that the nation's giant tech companies -- including Alphabet Inc.'s Google, Amazon.com Inc., Apple Inc. and Facebook Inc. -- hold unchecked power over the economy and American society, and don't have any true rivals in the sectors they dominate.

Are Democrats and Republicans in agreement?

To a degree, but they have different perspectives.

Democrats say the tech giants are a symptom of a broader disease, pointing to studies showing many U.S. industries have grown more concentrated. With fewer competitors, they say, big companies are tilting the scales in favor of the rich and powerful by, for example, paying their workers less or shutting off a path to startups that could offer better products.

Republicans generally aren't convinced concentration is a problem in and of itself, pointing out that operating at a large scale can allow big companies to cut prices. But they do worry about it in some industries. In social media, many in the GOP say, a lack of competition for Facebook, Google's YouTube and Twitter Inc. empowers those platforms to treat conservatives unfairly. (The companies deny political bias.) Republicans also see increased antitrust enforcement as a better approach than direct government regulation of the marketplace.

What changes are they considering?

Some of the proposals are relatively modest, including bigger budgets and new civil penalty power for antitrust enforcers at the Federal Trade Commission and the Justice Department.

Lawmakers have also proposed changes to legal standards to make it easier for enforcers to halt proposed mergers and business practices that threaten competition. And some have called for moving some of the FTC's enforcement authority into the Justice Department, rather than having the agencies share power.

There is also a bipartisan proposal to allow local news outlets to join to negotiate with dominant platforms such as Google and Facebook.

What are some of the tougher proposals?

Some lawmakers are calling for measures that would force technology companies to break apart widely used digital platforms from other business lines. This could force Amazon to separate its online marketplace, or Google to split off its search engine. Both companies operate many other businesses.

Existing lawsuits by the FTC, Justice Department and states could result in similar consequences for Google, and could force Facebook to shed its Instagram and WhatsApp units, but those remedies are years away at a minimum.

I've read about something called self-preferencing. What is that?

That is a practice in which companies such as Amazon and Google use proprietary platforms to promote their own products and services over those offered by competitors.

While Republicans generally aren’t in favor of breaking up big companies, a handful of GOP lawmakers say they are so concerned about the conduct of big tech platforms that they would be open to restricting self-preferencing.

That could mean a mandatory separation of certain business lines, such as Amazon dividing its e-marketplace from Amazon-made retail products or Google splitting its search engine from maps or travel.

Are the tech companies fighting back?

Yes. The tech giants and other big businesses are poised to fight many of the measures, which they see as threats to their bottom lines. Facebook and Amazon spent more on lobbying in 2020 than any other U.S. corporations, seeking to influence legislation on antitrust and other matters. The tech giants say that they face vigorous competition forcing them to constantly innovate, and that they have acquired large market shares because consumers love their products—arguments that they are now making in court.

Supporters of existing antitrust law say the current rules are sufficiently flexible for addressing the challenges presented by evolving technologies and other developments in the modern marketplace. They also say the current approach strikes a fair balance between policing markets and giving companies significant room to maneuver in the rough-and-tumble business world.

So what might happen?

Members of both parties support larger enforcement budgets and the news-industry proposal. In concept, both sides agree there might be a need for so-called interoperability and data portability rules to create more competition in the tech sector. These would allow consumers to move more easily between competing online platforms by, for instance, posting on multiple social-media sites at once or moving their shopping histories from one marketplace to another.

Some Republicans have also said they would join Democrats in supporting changes to legal standards—especially if they are targeted at the tech sector. In addition to self-preferencing, one potential area for compromise between the parties is a proposal to raise the legal burden for mergers by companies with 50% or greater market share.

Republicans would support a consolidation of enforcement agencies, but Democrats don’t appear interested.

What would the changes mean?

Even if Congress acts on only a couple of middle-of-the-road proposals, it could mark the biggest substantive changes in decades, as courts have been reading current antitrust laws more narrowly. Very large companies could have trouble getting deals approved. Tech giants could have to divest themselves of certain business lines.

If lawmakers, for example, make slight changes to reinforce broad government authority to successfully challenge mergers that threaten consumers, “that would signal to the courts that merger enforcement is important and that doubts should not always be resolved in favor of defendants,” said Wayne State University law professor Stephen Calkins.

#### Any change has ripple effects throughout antitrust doctrine

Pearlstein 20 – former business and economics columnist for The Washington Post and the Robinson professor of public affairs at George Mason University

Steven Pearlstein, "Facebook and Google cases are our last chance to save the economy from monopolization," The Washington Post, 12-18-2020, <https://www.washingtonpost.com/business/2020/12/18/google-facebook-antitrust-lawsuit/>

Keeping a close eye on both the antitrust cases and the legislative debate will be the members of the Supreme Court, including six conservative justices who have a well-documented hostility to government regulation of business. The century-old Sherman and Clayton acts are remarkably spare and concise statutes, which has meant that most antitrust law has been judge-made, based on the precedents laid down in individual cases. Any antitrust reform that might come out of Congress, however, is certain to be much more detailed and prescriptive than those earlier laws. Not only would such legislation erode the power and discretion of the court, but it would also likely overturn a number of recent precedents that have made it much more difficult for regulators to limit the size and business practices of dominant firms.

All that could well be playing out in Congress just as the court considers the inevitable appeals in the cases of U.S. v. Google and FTC v. Facebook. And it would hardly be unprecedented if some members of the Supreme Court were to consider the political and legislative consequences as they decide the fate of two companies with whom most Americans interact on a daily basis.

A similar dilemma faced Judge Learned Hand of the U.S. Court of Appeals in 1945 as he considered U.S. v. Alcoa. After the longest federal trial in history — two years — a district court judge had ruled against the government’s request to break up Alcoa, declaring that the company had legally obtained its 90 percent share of the aluminum market. Hand himself was an antitrust skeptic. But in a memo to his fellow appeals court judges, Hand recognized that the public would not accept a highly technical ruling that any such monopoly was benign.

“If we hold that [Alcoa] is not a monopoly, deliberately planned and maintained,” Hand wrote, “everyone who does not get entangled in the legal niceties … will quite rightly, I think, write us down as asses.”

In the end, the appeals court ruled that Alcoa had illegally monopolized the market for aluminum, and Hand’s opinion became one of the most influential, and controversial, in the history of antitrust. The cases against Google and Facebook will be no less consequential or contentious.

#### Plan’s change spills over to other sectors--

#### Substantive legal focus—new substantive changes signal a trend throughout the economy

Crowell & Moring 20 – Contributions from: Shawn R. Johnson, partner and co-chair of Crowell & Moring's Antitrust & Competition Group; Wm. Randolph Smith, partner in (and former chair of) the firm's Antitrust & Competition Group; Jeane A. Thomas, partner in Crowell & Moring's Antitrust & Competition and Privacy & Cybersecurity Groups, and co-chair of the firm's E-Discovery & Information Management Practice; Andrew I. Gavil, senior of counsel in Crowell & Moring’s Washington, D.C., office and is a member of the firm’s Antitrust & Competition Group; Gail D. Zirkelbach, partner in Crowell & Moring's Government Contracts and Investigations groups; Alexis J. Gilman, partner in Crowell & Moring’s Antitrust & Competition Group; Jason C. Murray, co-chair of the firm's Antitrust & Competition Group; Lisa Kimmel, senior counsel in Crowell & Moring's Antitrust & Competition Group; Thomas De Meese, co-managing partner of the firm's Brussels office.

Crowell & Moring, "Antitrust in the Digital Age: How Antitrust Investigations into Big Tech Impact Companies in Every Industry," Regulatory Forecast 2020, 2-26-2020, <https://www.crowell.com/files/Regulatory-Forecast-2020-Antitrust-Cover-Story-Crowell-Moring.pdf>

“The antitrust world hasn’t seen an issue this large in decades. Unlike every major antitrust development of the past, a look into Big Tech involves companies that may not charge customers anything and whose assets involve private consumer data that may not be able to be transferred as part of a remedy,” says Shawn Johnson, a partner at Crowell & Moring and co-chair of its Antitrust Group in Washington, D.C. “And this is not just about Big Tech. In the end, all companies are becoming digital. From how we view the role of data privacy to so-called killer acquisitions, these investigations are going to impact a wide range of businesses for years to come.”

While an imminent breakup of any Big Tech firm is unlikely, the increased attention to antitrust issues has implications far beyond the handful of companies that dominate the news. These new developments could affect mergers, acquisitions, and business practices in virtually every sector. That’s because competitive advantage today is often reliant upon access to key data, to online platforms, and to cutting-edge technologies—and antitrust legal and regulatory action sets the rules for such access.

“This is a megatrend,” says Wm. Randolph Smith, a partner at Crowell & Moring in Washington, D.C., former chair of the firm’s Antitrust Group, and a former executive assistant to the chairman of the FTC. “A confluence of events, including political philosophy, economic impact, and missteps on issues like privacy, is creating a shift in antitrust focus and thinking that could reverberate into other sectors.”

So Big. So What?

Big Tech platforms stand accused of a multitude of sins: invasion of privacy; lax data security; unfair treatment of labor, content, or merchandise suppliers; bias against competitors; failing to vet dangerous products or content; and the acquisition of incipient competitors in an effort to squelch future competition, a phenomenon some have labeled killer acquisitions.

Many of these platforms have prospered because they provide a superior service at a lower cost, or for free. But they also have benefited from the “network effects” that tend to favor technology incumbents. Along the way they’ve collected vast quantities of data about customers or users that critics contend entrench their dominance. “Antitrust enforcers are struggling to figure out how to define and police the amount of market power these platforms have amassed, particularly with respect to the collection and use of personal data,” says Jeane Thomas, a Washington, D.C.-based partner in Crowell & Moring’s Antitrust and Privacy & Cybersecurity groups.

Within antitrust circles, a debate has emerged about whether current law and legal precedent suffice to address the alleged challenges presented by Big Tech platforms. For nearly 40 years, antitrust law has been dominated by the idea that consumer welfare is the ultimate goal of antitrust enforcement. Some critics have vigorously challenged that standard, especially when it comes to mergers and dominant-firm conduct, and blame what they view as weak antitrust enforcement for increased market concentration and market power. Others have sought to defend the standard, while still others are actively seeking to define a new middle ground that is at once economically grounded yet acknowledges that increased antitrust enforcement is warranted, notes Crowell & Moring senior counsel Andrew Gavil, a former director of the FTC’s Office of Policy Planning and a member of the firm’s Antitrust Group in Washington, D.C.

Yet the source of Big Tech’s alleged dominance may lie less in legal doctrine than in missed opportunities for more aggressive antitrust enforcement. Many important acquisitions by Big Tech companies in recent years have flown under the radar from an antitrust perspective, notes Johnson. Antitrust enforcers haven’t challenged these deals, likely because the acquired company was viewed as operating in an adjacent or differentiated space. But with the benefit of hindsight, it is likely that some of these companies would have developed into potential competitors, such that a killer acquisition had occurred. “The platforms are thinking 10 years ahead,” Johnson says.

“The current wave of concern about Big Tech mirrors previous eras when antitrust was in the spotlight, such as when supermarkets and shopping malls were hurting Main Streets across America,” says Smith. Beyond acquisitions, big company behavior can raise competitive concerns when the companies take measures to hold onto the power they already have. Or as Smith puts it, “It’s often not what you do to become king of the hill, it’s what you do to stay there” that attracts antitrust attention.

It’s far from clear, however, whether antitrust enforcement is the answer to the problems ascribed to Big Tech. A prime example is concern about the protection of privacy. “Traditionally, privacy concerns have played virtually no role in antitrust enforcement,” says Thomas. “But the platforms have grown so large that some users want, and to some extent need, to be on these platforms so much so that they feel forced to give up significant privacy in exchange.” Some markets might benefit from competitors that would do a better job protecting privacy.

“Privacy protection and competition protection are on a collision course,” Thomas says. If platforms are leveraging customer data to foreclose competition, a typical antitrust solution would be to require them to make that data available to competitors. But this might mean the sharing of personal data, which would be unacceptable to most people. One prominent platform has already withheld information from advertisers about how viewers are interacting with their ads— creating anticompetitive concerns—by saying it must conform with European and California privacy laws. “Regulators are going to have to make some policy choices to say whether or not we’re willing to trade off harm to competition to protect personal data,” Thomas says. “In any case, privacy protection may be better addressed through consumer protection laws, for example by forbidding platforms from collecting certain information or from using it in certain ways.”

Guidelines Ahead

With so many investigations underway, it might seem to some that the era of Big Tech is coming to an end. In reality, experts say, the course of change in 2020 is likely to be slow and incremental—though a change in the political balance of power in Washington could open the door to new legislation that would upend existing judicial precedent.

In January, the DOJ and the FTC jointly released new draft guidelines governing vertical mergers. The FTC has also said that it is developing additional digital platform enforcement guidelines as well as an addendum to 2006 horizontal merger guidelines that would address nascent competition and how the agency analyzes non-price effects of mergers. “Agency guidelines are significant for many reasons,” says Alexis Gilman, an antitrust partner at Crowell & Moring in Washington, D.C., and former head of the Mergers IV Division at the FTC. “They’re a useful road map of the agencies’ own analyses, which make them an important cue for companies that want to understand how the agencies might react to proposed deals. But they also influence how courts analyze issues, especially given the relative paucity of case law.”

But any litigants that choose to pursue an antitrust remedy in the courts—whether agencies, states, or private entities—will run into legal doctrines that have set a very high bar for plaintiffs, particularly standards relating to exclusion and the duty to deal with rivals, says Lisa Kimmel, a senior counsel in Crowell & Moring’s Antitrust Group in Washington, D.C., who formerly served as FTC attorney advisor on antitrust and competition policy matters for then-chairwoman Edith Ramirez. “The case law has been very defense-friendly for many years, especially for monopolization cases. Novel theories are unlikely to prevail under the existing state of antitrust law, which means there may be a disconnect between what U.S. enforcers want to do and what they can actually get done absent legislation that alters the status quo in the courts.”

With the courts and long-standing precedent acting as a backstop, a sea change in antitrust will likely require new laws from Congress. And substantive new laws are unlikely unless a bipartisan consensus coalesces around specific reforms or this year’s election results in single-party control of Congress and the White House, Gavil believes.

Ripple Effects

Regardless of whether this new wave of antitrust investigations results in a major change in law or legal doctrine, it could still have a significant effect on business well beyond Big Tech. That’s because it could impact the robust markets for data and disruptive technology that drive the economy in this era of digital transformation.

“The mere fact of the investigations is already affecting the market,” Gavil says. “It influences investors, venture capitalists, and innovators.” Potential competitors to the Big Tech platforms have been emboldened, the big platforms are more cautious, and some innovators who were looking forward to having their companies bought “could be disappointed.” The likely sources and shape of innovation may well change as a result.

#### Agency leverage—enforcers manipulate any new change to the max

Delrahim, Assistant Attorney General, Antitrust Division, United States Department of

Justice, ‘20

(Makan, “The Future of Antitrust: New Challenges to the Consumer Welfare Paradigm and Legislative Proposals,” 69 Cath. U. L. Rev. 657)

What does the future hold for consumer welfare standard? That’s up to us. No policy, no matter how sound, is immune to calls for change. Throughout history, when reformers fail in the legislative arena, they will turn to existing laws and regulations and try to manipulate them in ways never previously seen. I won’t mention specific examples, but we have seen this playbook when federal courts interpret or, more accurately, rewrite the law in head scratching ways and when agencies issue new regulations that strain the statutory text. Some reformers now seek to bring this playbook to the domain of antitrust law, which, if read broadly, could wield tremendous power over the economy. Unbridled, this power could do significant damage to the economic impulses that drive innovation, gains, and efficiency, and other pro-competitive outcomes for consumers.

Antitrust law may be particularly vulnerable to hasty change given its common law status and evolution in light of advancements and economic thinking. We will see in our lifetimes whether the pendulum will swing back and unravel the progress the field has made. What can practitioners, academics, judges, and enforcers do if they want to preserve the consumer welfare standard? First and foremost, we should not be complacent. Many deride the latest reform movement as “hipster” antitrust because advocates for abandoning the consumer welfare standard invoked a decades-old trust-busting era that we now consider antiquated and economically misguided. Labeling one’s opponents only go so far.

Winning the economic debate goes further, but not far enough. The modern antitrust reform movement is less concerned about economic soundness than it is about results. That means we must demonstrate to observers that we will pursue effective results whenever we find anticompetitive conduct. We must be vigilant to ensure that the biggest companies are minding the guardrails of competition. If we don’t act swiftly and certainly, then we risk looking impotent next to those who would punish monopolists just for being big. That approach, of course, is an axe where a scalpel is needed. If we don’t use our scalpel, we

shouldn’t be surprised to see the reformers sharpening their axes.

#### Overdeterrence—aff blurs the line of what is and is not allowed

Muris, George Mason University Foundation Professor of Law, served from 2000-2004 as Chairman of the Federal Trade Commission, ‘21

(Timothy J., “Private Antitrust Remedies: An Argument Against Further Stacking the Deck,” <https://instituteforlegalreform.com/research/private-antitrust-remedies-an-argument-against-further-stacking-the-deck/>)

Overdeterrence is a particular concern in antitrust doctrine because the line separating lawful from unlawful conduct can be blurred and much of the conduct falling on the lawful side of the line is socially beneficial. As economists William Baumol and Alan Blinder explain: One problem that haunts most antitrust litigation is that vigorous competition may look very similar to acts that undermine competition …. The resulting danger is that courts will prohibit, or the antitrust authorities will prosecute, acts that appear to be anticompetitive but that really are the opposite. The difficulty occurs because effective competition by a firm is always tough on its rivals.27

For example, excessive antitrust remedies for predatory pricing may not only deter firms from engaging in conduct that would ultimately be deemed unlawful, but also induce them to keep prices well above their costs and, in effect, hold a price umbrella over smaller, potentially litigious rivals. Such a regime would result in less competition and higher prices for consumers—the very outcomes the antitrust laws are designed to prevent. Proposals to slap another layer of deterrence on top of existing private remedies are particularly perverse because, as discussed above, the current U.S.

### ---FTC Deference

#### 2] – FTC Deference – DoD recommendations historically have trumped FTC antitrust concerns – recent executive action has preserved that dynamic, but future changes tilt the scales toward the FTC

**Eichelberger 21** – Curtis Eichelberger covers mergers and acquisitions for MLex in Washington DC

Curtis Eichelberger, "Confluence of government actors likely to place Lockheed-Aerojet deal under greater US scrutiny," MLex Market Insight, FTC Watch, 8-9-2021, https://www.mlexwatch.com/articles/12982/print?section=ftcwatch

The DOD and FTC each perform an **antitrust analysis** of defense-related mergers. But since the Pentagon is usually the **sole customer** of US defense contractors, **if it supports a merger**, the FTC will be **hard-pressed** **to convince a court** that the **merger is harmful**. So when the DOD finds that a deal **benefits national security**, the FTC **tends to defer** **even if** it regards a deal as **anticompetitive**.

The **FTC’s concerns** about the **DOD’s outsized influence** have been illustrated by comments and analysis from past FTC executives and commissioners.

Will the Biden administration **continue** to let the DOD have its way, or will it **prioritize competition**? Biden issued an executive order July 9 calling for a government-wide effort to improve competition in all sectors of the economy, suggesting a change **might** be coming.

“The Congress frequently has created overlapping agency jurisdiction in the policing of anticompetitive conduct and the oversight of mergers,” the executive order says. “Where there is overlapping jurisdiction over particular cases, conduct, transactions, or industries, agencies are encouraged to coordinate their efforts, as appropriate and consistent with applicable law … in the case of major transactions, soliciting and giving significant consideration to the views of the Attorney General or the Chair of the FTC, as applicable.”

The president also ordered the Secretary of Defense to submit a review of the state of competition within the defense industrial base, including areas where a lack of competition may be of concern.

This would **seem** **to signal** where the administration will **land in conflicts** between the FTC and DOD, **though for now**, **how much weight these words will carry isn’t clear.**

**New antitrust rules and theories disrupt FTC deference to the DoD – that collapses the industry’s ability to innovate**

**Kazianis 21** – Senior Director at the Center for the National Interest

Harry J. Kazianis, "National Security Experts, Not Lawyers, Should Decide Fate of Defense Mergers & Acquisitions," The National Interest, 9-1-2021, https://nationalinterest.org/feature/national-security-experts-not-lawyers-should-decide-fate-defense-mergers-acquisitions-192868

The U.S. defense industrial base is a **unique sector** of the American economy. It’s the **foundation for the technological edge** that gives our warfighters the **best possible tools** to prevail in any potential **future conflict**. Indeed, future military advantage in competition with China and Russia relies upon the **technology and innovation** that comes from this **critical industry**. And yet, the Federal Trade Commission’s new lead Commissioner, Lina Khan, has begun her tenure by **considering an experiment** to break up successful enterprises and let **academic theory biased against vertical mergers** in the defense industry **guide the FTC’s early decision making** as it considers acquisition proposals such as Lockheed Martin’s acquisition of Aerojet Rocketdyne. The stakes are **too high** to not give the Defense Department the primary voice in any acquisition approval decision that could impact **national security** and our **future competitiveness** with China and Russia in the crucial rocket propulsion sector.

What History Tells Us

When evaluating mergers and acquisitions in the defense industrial base, such as the pending Lockheed Martin acquisition of rocket manufacturer Aerojet Rocketdyne, it’s important to consider the historical context, the evolution of the defense industrial base, and consider its inherently collaborative nature.

Prior to World War II, America relied on an arsenal system, where the government designed and produced most weapons and munitions. Our entry into World War I required rapid mobilization, but there was no way to quickly accelerate production.

We learned from the shortcomings of the arsenal system in World War II, with America fully engaged as the “Arsenal of Democracy.” The U.S. industrial base churned out weapons and munitions at a dizzying rate to help win the war.

Since then, this model of collaboration and necessary consolidation among the defense industrial base and the Department of Defense has endured, resulting in **continuous innovations** that have given the American warfighter the **technological edge**, while keeping the specialized requirements in the sector affordable for taxpayers.

We see the fruit of this collaboration all around us, such as GPS, Aegis phased-array radar systems, Patriot missiles, stealth aircraft, and unmanned aerial vehicles. That same collaboration is now **surmounting the challenge** of developing and fielding the next generation of weapon platforms and advanced technologies, such as hypersonics, directed energy, artificial intelligence, and more, to maintain and extend America’s **technological edge over potential adversaries.**

In all these endeavors, the government has held great sway over industry by virtue of its status as sole buyer and through underwriting research and development efforts and sharing forecasts about future needs.

The defense industry differs from much of the economy in the way it interacts with government, and in how competitors frequently collaborate with one another in support of national security. The industry is distinct from the likes of Apple and Google. Prime contractors often collaborate on one project while competing fiercely on others. All of the major contractors **depend on one another** for the supply of critical sub-systems and components. Competitors supplying and depending on one another is a **common feature** of today’s defense industrial base.

General Dynamics and Huntington Ingalls Industries, for example, are known as fierce competitors for shipbuilding contracts. Yet when our nation needed submarines to be developed and produced, they collaborated on building the next-generation attack submarine, the Virginia-class, and have worked together on the new Columbia-class submarine.

The current defense industrial base model originated ten years ago, when then-Undersecretary of Defense for Acquisition, Technology, and Logistics Ashton B. Carter laid out how the Defense Department would work with a scaled-down, post-Cold War defense industry.

He prioritized “**long-term innovation**, efficiency, profitability, and productivity growth,” and emphasized that we must rely on “**normal market forces** to make the most efficient adjustments to the defense industrial base.”

This system is largely transparent, open, and fair, notwithstanding the expressions of concern that some companies voice when new mergers or acquisitions in the sector are proposed.

With the handful of remaining primes today, the government neither needs nor wants consolidation at the top tier of the defense industrial base. But there are thousands of defense industrial base suppliers, mostly small and medium-sized specialty producers. For those companies, mergers and acquisitions can **result in a win-win** for government and the economy.

These consolidations can create **greater efficiency and innovation**, assure the enduring health of key American suppliers and manufacturers of critical defense products and technologies, and promote strong balance sheets. Such transactions **should be welcomed.**

What Happens Now?

Such is the case with the proposed Lockheed Martin acquisition of Aerojet Rocketdyne, a merger that would not alter the competitive landscape in any appreciable way. In fact, it enhances and restores a competitive playing field in the crucial rocket propulsion sector that has tilted dramatically towards well-financed vertically integrated primes such as NG-OATK, SpaceX, and Blue Origin. LM and AJRD have virtually no overlap in terms of market position or the types of systems and services they offer, and the number of rocket propulsion providers would not change.

If the transaction is approved, Aerojet Rocketdyne would benefit from greater stability and would be able to pour more resources into technology, research and innovation. Post-acquisition, Aerojet Rocketdyne’s products will still be available on the open market the same as if the company remained an independent merchant rocket manufacturer. Strong oversight mechanisms available to the Defense Department and the FTC such as consent decrees and 3rd party monitoring have been used to great effect in the Defense industry for decades. That’s good for the taxpayer and the entire defense industrial base. It is also in **complete alignment** with the goals of the President’s recent **executive order** on competition in the economy.

Academic Theory or Common Sense?

Now is **not the time** to apply **academic antitrust theory** to vertical mergers and acquisitions in **the defense sector without deference** to the deep expertise of the **Defense Department** in these matters. Especially when the Russians and Chinese are threatening to **leap ahead technologically**. The **rules of the road** were laid down years ago, and the defense sector has **dutifully followed** them with a formula that works. Let’s focus on the competition and collaboration among defense contractors demanded by our **national security as the prime consideration.**

### Turn

#### Big tech in finance is key to widespread blockchain adoption

Pejic 17 – author of "Blockchain Babel," a strategy guide to blockchain based on management theory and scientific research. He was voted by McKinsey and the Financial Times as one of three finalists in the Bracken Bower Prize for his work on blockchain in 2016

Igor Pejic, "Tech giants will not be silent about blockchain for long," American Banker, 5-18-2017, https://www.americanbanker.com/opinion/tech-giants-will-not-be-silent-about-blockchain-for-long

The hunt for the killer blockchain application is in full swing. The emergence of the technology saw something akin to a Cambrian explosion for blockchain startups. Now, more than 300 of them are vying to be the global economy’s “next best thing,” posing an obvious competitive threat to traditional financial institutions.

Banks, payment processors and credit card companies worry that brainy entrepreneurs, who transform high IQs into billions of dollars, could cast a pall over their core business. But **it is not fintechs** they should be worried about. It’s the **tech titans** in Silicon Valley that should keep them up at night.

Management theory makes the distinction between de novo market entrants and diversifying market entrants. The former are complete newcomers; they include fintech companies. But diversifying market entrants are firms that have been successful in other arenas. In most technological shifts, it is diversifying entrants that grab market share because they are experts in capabilities that suddenly become relevant to the new product or service generation. And unlike startups, they come with legions of experts, a global network and stuffed pockets. When the camera maker Polaroid failed, it was not de novo entrants that took over. Rather, it was Canon and Nikon that brought to the table their experience with optoelectronics. But how do you spot diversifying entrants in advance? A good start is to identify which competencies will become central once the blockchain hits the market.

For example, a technology like blockchain, challenging one of the world’s largest industries, needs more than just programmers and algorithms. The storage, archiving, communication and file serving needed to run distributed ledgers **gobble up** hard-drive space at **unprecedented speeds**. Moreover, blockchains have an end of life. When they go out of business, they still need to be accessible.

These requirements call out for the capabilities of the cloud-computing giants, such as Amazon, Microsoft and IBM. Banks must not underestimate what these companies can contribute to the blockchain; they offer more than just raw server resources.

At the same time, pure cloud companies will never be able to cut into banks’ core business; they are too far away from the end customer. The really dangerous diversifying entrants will come from somewhere else: **internet giants** such as Google, Apple and Facebook, which already collect massive amounts of data.

Globally dominating data-collecting companies — search platforms, social networks, e-commerce giants — are neglected in the discussion about blockchain. Internet firms haven’t shown a lot of interest in lowering the blockchain gauntlet onto the banking world. **But they will**.

Data behemoths are pointedly silent about the new technological development. Yet their core competencies will be crucial in a blockchain-based banking world. According to a Finextra Research report, companies such as Google and Facebook are **perfectly suited** to outdo banks in driving blockchain mass adoption (particularly in payments) due to their large global customer base. Already, large data collectors are entering payments with Android or Apple Pay and the companies are positioning themselves where they are the strongest: at the front end.

The likes of Google know what we search, what we write in emails, with whom we interact, and which places we frequent. And they know how to turn that data into dollars. Blockchain technology **trims transaction costs to the bone**, and financial services can be offered for free. This model p**lays into the hands of data behemoths**, whose business models are already geared to making money out of free services. Selling highly accurate personalized advertising in two-sided platforms is in their DNA.

Secondly, globally recognizable and trusted brands are another major asset of the tech titans. Google, Apple, and Amazon have been at the pinnacle of global brand valuation lists for years. The gap between these top three and other brands is stunning. Their brands are worth, respectively, $109 billion, $108 billion and $106 billion. People spend hours staring at their logos while checking emails, searching the web, chatting with friends or shopping online. AT&T comes in fourth with “only” $87 billion.

Silicon Valley’s behemoths are also competing to place their brands on payment interfaces.

To be sure, banks are likely to stay on top of global finance for some time to come. But, as it is the painful case with most technological leaps, the **barriers to entry** for nonbank competitors **will eventually disappear**. By how much will depend on identifying the right challengers on time and fending them off. Banks are well advised to keep a close eye on the blockchain activities of data behemoths.

#### Forces adoption of blockchain

Vives 20 – professor of Economics and Finance, Abertis Chair of Regulation, Competition and Public Policy, and academic director of the Public-Private Research Center at IESE Business School

Xavier Vives, "Digital Disruption in Banking and its Impact on Competition," Organisation for Economic Co-operation and Development, 2020, https://www.oecd.org/daf/competition/digital-disruption-in-banking-and-its-impact-on-competition-2020.pdf

The **digital disruption** of banking promises to lead to a general **increase in efficiency** and service by helping to overcome information asymmetries (using **big data** and **AI/ML techniques** and **blockchain** technology), providing a user-friendly consumer interface and a higher standard of service, and ultimately **replacing obsolete technology**. Banking will thus move to a customer-centric platform-based model. All these changes present **formidable challenges** to incumbents, since they will have to update their **technological platforms** (moving from relatively rigid mainframes to the more flexible cloud), reduce branch overcapacity in the current low-profitability environment (particularly in Europe and Japan, where there are still legacy assets to dispose of), and try to reach the new standard of service by competing with the new entrants that are encroaching on the most profitable lines of business. Incumbents will have to restructure, and consolidation will occur. Incumbents will also face heavy regulatory scrutiny and compliance duties and will have to overcome the tremendous damage to their reputation caused by the 2007-2009 financial crisis. They will face the dilemma of whether to compete head-to-head or cooperate with entrants. In the case of FinTech, this dilemma will be resolved by acquisition or partnership.

With BigTech firms, however, the challenge posed for incumbents is greater. The main threat to incumbents is that BigTech firms will try to control the consumer interface by using their superior data, acting as gatekeepers to the distribution of financial products. If this were to happen, incumbent banks would be relegated to product providers on platforms they do not control: Their businesses would be commoditised. Some banks have already perceived this threat and either are offering open platforms that may incorporate products from other financial providers or are forming partnerships with BigTech firms. In any case, incumbents have some strengths that they can leverage, such as customers’ trust that their data will be kept secure as well as accumulated knowledge on how to deal with complexity and intrusive regulatory environments. Incumbents that will perform well will have managed to transition **from the mainframe to the cloud**, be lean in bricks but heavy on human capital, and either **become digital platforms** to keep the interface with the client or have unique products to feed the platforms that will distribute the products to the customers.

#### Big tech is key to bringing blockchain to finance

Finance Magnates Staff 20

Finance Magnates Staff, "Big Tech Is Making Cryptocurrency More Accessible Than Ever," Finance Magnates, 10-20-2020, https://www.financemagnates.com/thought-leadership/big-tech-is-making-cryptocurrency-more-accessible-than-ever/

Apple, Google, and Facebook have **all demonstrated** an interest in **blockchain technology** and its applications, but **only Amazon** has so far transitioned to the next step to **offer blockchain services**, with Amazon Managed Blockchain.

This is a platform that allows enterprise clients to easily launch their own blockchains on top of popular open-source frameworks, like Ethereum and IBM’s Hyperledger Fabric.

Amazon also offers its own **blockchain-like platform**, known as Amazon Quantum Ledger Database (QLDB), which is a cryptographically secure, albeit centralized database that can be applied to a **huge range** of use-cases, **including banking**, supply chain, and digital identity applications.

Despite launching just last year, Amazon QLDB is already being used by some big names, including the UK’s Driver and Vehicle Licensing Agency who are exploring how QLDB can be used for storing and processing public and private data registers, and Klarna — the Swedish bank that offers the popular Klarna buy now pay later services.

Though Amazon was the first to launch its own blockchain products, Facebook **also plans** to launch its own cryptocurrency project known as Libra, sometime in 2021. While Google has reportedly been **developing its own blockchain platform** since 2018, it has yet to release any substantial blockchain products.

### --Solves Impact

#### Innovation solves adv 2 – Blockchain increases security, which solves attacks, but innovation is key

Sharma 18 – Blockchain Researcher, Developer & Consultant, part of the Forbes Asia 30 Under 30 Enterprise Tech List in 2018

Toshendra Kumar Sharma, "Blockchain – A Healing to Financial Crisis," Blockchain Council, 2018, <https://www.blockchain-council.org/blockchain/blockchain-healing-to-financial-crisis/>

\*\*edits denoted in brackets\*\*

How can Blockchain heal the Financial Crisis?

Well, to understand how blockchain can be helpful in healing or preventing the financial crisis we first need to analyze the key features of this technology which can prove to be helpful for the banks and other financial institutions. In 2008 the world witnessed the biggest bankruptcies **of all time**. Lehman Sachs declared bankruptcy, and it **spread like wildfire** across the globe. Most of the nation’s economy was disrupted leaving to the high rate of attrition and closure of companies. So, can blockchain help in preventing this? This is the biggest question that the companies might be eyeing at the moment.

Let’s admit the fact that one of the **primary reason[s**] for bankruptcy is **lack of transparency**. Since blockchain offers **transparency** and ea**sy traceability**, many banking, financial and auditing companies are looking forward to this technology. We all know that the financial crisis of 2008 had a huge impact on the economy of the world and one of the primary reason[s] for this was lack of transparency. Blockchain can prove to be **beneficial** in this aspect. Since this platform is **highly transparent**, it can help the authorities to **trace the cash flow** easily and also find out areas of **discrepancies** to avoid any problems.

What are the key features of Blockchain that can prove to be beneficial for financial institutions?

Before heading further, let’s understand the key areas on which the financial institutions and blockchain experts should start working to avoid repetition of the financial crisis of 2008 :

* Decentralization– This is the key aspect of blockchain and can prove to be beneficial for the people to skip the approval period of banking and financial institutions and transact directly.
* Transparency– We know that blockchain is a transparent system which allows the people in the network to **easily view** the entries in this ledger thus making **tracking and tracing easy**.
* Time Stamping– The information in the DLT or Distributed Ledger Technology is present in chronological[.] Thus, **any change** or alteration can be **easily deciphered**.

Let’s understand how these features can be explored on the ground level:

* Ensuring **financial security**– So this is the first area of interest for everyone, from an ordinary man to the banking authorities. If the authorities have a **clear picture** of the cash flow and they **know what is happening** in the system, they can easily **gauge any discrepancies** if there are any. Tracking of cash flow **ensures** that the authorities know if there are any **faulty policies** or operations functioning I[n] the system and thus they can work upon it. The authorities can also get to know if there is a need for a **monetary policy** that can improve the efficiency of the system. They will also get an insight into whether they should increase or decrease the **lending rate**.
* Prevention of fraud to **avoid financial crisis**- One of the most talked about feature of blockchain is cryptography. All the information present on blockchain is stored using cryptography. If someone wants to access this information they must have the key for the same. The fact of the matter is that the key is with the owner of the information. Even then, if the hacker tries to breach the system, then the person has to violate **the entire system** connected on the network since the data is distributed to the nodes. Thus, reducing the probability of hacking or alteration of information.
* Smart Contracts– This is yet another key aspect of the These are an electronic agreement between two parties which automatically executes when the pre-defined conditions are met. In the case of banking and financial institutions, they can use it to file a deal or agreement between the parties. Thus it reduces the need to gauge the entire process every time. Once the set conditions are met the payment will be released directly to the parties.

Secondly, the digital identities can be used to **avoid loan frauds**. The banking and financial institutions can introduce the digital identities to **check** if the customers are **trustworthy**. Moreover, with the information of the customer present on the ledger, the banks, and financial institutions can **directly see the track record** of the customer and based on it they can grant the loan.

Thus, we see that the blockchain offers **myriads of options** to make the banking and financial system **foolproof** and thus **avoiding the surge** **of the financial crisis** that has happened previously. However, an important point to note here is that these processes are **still at a nascent stage** and we need to work on Blockchain to improvise the areas of improvement.

#### Financial blockchain usage prevents financial collapses---forces transparency which prevents risky expenditures in CLO-like investments

Bryanov 18 – Ph.D. in political communication, researches effects of emerging technology on society and politics

Kirill Bryanov, "Will Blockchain Protect the World Economy from Financial Crises?," Cointelegraph, 7-31-2018, https://cointelegraph.com/news/will-blockchain-protect-the-world-economy-from-financial-crises

A part of the foundational narrative is the idea that the crisis wouldn’t have happened had blockchain been around at the time. Correspondingly, distributed ledger technology (DLT), if **widely deployed in finance in the near future**, could **save us** from the next **Great Depression**. At least that’s what many crypto visionaries and financial experts often claim — the latest being Pang Huadong, the former vice president of North American investment banking for J.P. Morgan Chase.

The ex-Wall Street executive offered little detail beyond his observation that blockchain is capable of **reducing global financial risks** and **establishing trust** at a low cost. In order to pin down Huadong’s argument, it wouldn’t go amiss to review how other influential crypto thinkers have reflected on the relationship between financial crises and blockchain technology.

The crisis of trust

In the recently published The Truth Machine, fintech journalists Michael Casey and Paul Vigna invoke the story of the Lehman Brothers’ collapse to illustrate one of the overarching ideas of their book — that of trust as a **vital social resource**. They maintain that, while many in the world of finance still view the events of 2008 as a crisis of short-term liquidity, this evaluation is fundamentally superficial. The **root cause** of what happened during the subprime mortgage bubble and then carried over to the whole global banking system was, in fact, **society’s unquestioning faith** in financial institutions and the **integrity** of their **record-keeping systems** and practices. This **unbending faith** empowered bankers to **manipulate their ledgers**, accumulating and reselling assets that had little to no value for years.

The fact that the investment bank Lehman Brothers had posted record earnings of $4.2 billion just nine month before folding at the height of the crisis suggests that the firm’s financial statements were **not quite indicative** of reality. Even the notion of some **undisputable ‘reality’ is precarious** in this context — as Casey and Vigna argue — citing Bloomberg journalist Matt Levine — big banks’ balance sheets have grown **so complex** that even honest accounting became no more than a **series of educated guesses** about how much the bank’s assets could be worth in the market. It is **virtually impossible** for a human to know **with certainty** whether a given bank has made or lost money the previous quarter. In a certain sense, the incumbent bookkeeping system has reached its scalability limits.

Casey and Vigna point out that at the heart of bank accounting there is still the centuries-old practice of double-entry bookkeeping — the one that rests on reconciling debits and credits in the process of asset valuation. ­­­­This system has been an **integral part** of modern capitalism’s making, and as such, enjoys an enormous amount of **knee-jerk trust** that we tend to grant to entrenched ‘default options.’ Yet this trust **might have been misplaced**. In addition to inefficiency, double-entry accounting **affords ample** ground for manipulation.

While sinking in debt, the notorious Lehman Brothers employed a number of **shady tricks** to make their books look like the firm was **thriving**. One of them, according to Casey and Vigna, entailed moving vast amounts of debt off the books at the end of the quarter and temporarily storing it in repo transactions — a tool designed to provide short-term liquidity. Once the embellished quarterly report was in, the debt was returned to the balance sheets. Another scheme exploited the notion of ‘hard-to-value’ assets, as the bank’s accountants assigned random high values to such resources. Essentially, the bank was running **two parallel ledgers**: one internal, and one public-facing.

Ways out

If we accept that a lack of transparency, multiplied by a superfluous trust in banks, were the primary drivers of the 2008 crisis — and potentially of the future ones — distributing the banking sector’s ledgers looks like a **promising solution**. Once every asset’s value and ownership are **immutably recorded** in a **transparent**, shared database, corrupt practices — like those of Lehman Brothers — on behalf of individual players **will become** **impractical**. As Alex Tapscott observed in his 2016 book Blockchain Revolution, maintaining financial security via increased transparency of capital flows is one of the key areas in which blockchain technology may **play its part** in avoiding the next **big financial disaster**.

In Tapscott’s view, central banks or other regulatory bodies will **no longer** need to go to individual banks to review their operations. Access to a **shared record of transactions** will allow them to **monitor cash flows in real time**. Regulators would thus **have a clear picture** of the overall liquidity and risk distribution, along with a **capacity to track** an individual firm’s behavior. With such instruments at hand, authorities would **no longer need to make guesses** about the financial system’s health. Rather, they would have both a **macro view** of capital flows and **early information** on specific chokepoints where intervention is needed.

### AT: Tech Replaces War

**Defense innovation is critical to US deterrence – failure causes great power war**

**O'Hanlon and Miller 19** – Michael E. O'Hanlon a Director of Research for Foreign Policy, Co-Director for Center for Security, Strategy, and Technology and the Africa Security Initiative, a Senior Fellow for Foreign Policy and Center for Security, Strategy, and Technology, and the Sydney Stein, Jr. Chair; James N. Miller is the Former Under Secretary of Defense for Policy, a Senior Fellow for Harvard’s Belfer Center for Science & International Affairs, and a Senior Fellow for Johns Hopkins University’s Applied Physics Laboratory

Michael E. O'Hanlon and James N. Miller, "Why we need a more modern and ready military, not a larger one," Brookings Institution, 10-4-2019, https://www.brookings.edu/blog/order-from-chaos/2019/10/04/why-we-need-a-more-modern-and-ready-military-not-a-larger-one/

As they get their feet on the ground and look for lodestars to help manage these enormously demanding portfolios, Esper and Milley should remember one key insight from their recent Army experience: Ensuring a **high-quality** and **modernized force** is much more **important** than enlarging the U.S. military at this juncture.

Unfortunately, the Air Force and Navy have not yet accepted this basic message; each service aspires to grow its combat force structure by roughly 25% in the years ahead. This is a mistake. Even though the 2020 national defense budget will approach $750 billion, substantially above the Cold-War average in inflation-adjusted dollars, there will not be enough money to do everything. Moreover, President Trump himself projects flat defense budgets in the years ahead, and a number of the Democratic presidential hopefuls promise cuts. All the more reason that the Pentagon must prioritize.

According to official policy, the Navy wants to increase the size of its fleet from some 285 ships to 355. In fairness, that latter goal dates back to the latter Obama years, so it is not a Trump administration creation. The Air Force came out with a plan last fall to increase its own force structure from 312 operational squadrons to 386 (of all types of aircraft combined, and including the Air National Guard and Air Force Reserve). Even the Army wants to grow, it must be acknowledged — but in a much more measured and restrained way, to about 500,000 active-duty soldiers from the current 480,000.

There are good reasons for the services to want larger forces. Our soldiers, sailors, Marines, and airmen are often fatigued and stressed from extended deployments. And we have been asking a lot of their equipment as well. The solution, however, is not a larger force, but a more consistently funded and **more modern one**. For all its problems, **readiness is strained but not broken**, and many of the fundamentals of the force are sound.

Better management of existing forces by the military services would help a great deal, too. The Army is overworked partly because it maintains deployments of several thousand soldiers in South Korea and Poland through frequent rotations of multiple units, rather than the more efficient approach of permanently stationing individual brigades in these locations. The Air Force could consider similar changes in how it maintains key units in parts of the Middle East. Several fighter squadrons could, for example, be based in Gulf states rather than rotated in and out. The Navy still focuses too rigidly on maintaining permanent presence in the broader Persian Gulf and Western Pacific regions. More flexible and unpredictable deployments can ease strain on the force without giving adversaries any solace. The Navy can also consider crew swaps while ships remain at sea, rather than bringing crews and ships home from deployment together every six to eight months as is now the norm. With these kinds of adaptations, and improved readiness resulting from more consistent budgets, the size of today’s force can prove adequate to the tasks at hand.

By contrast, **quality must improve**, and **modernization must intensify**. That is not because the U.S. military is obsolescent. Rather, the **pace of innovation** in key areas of military technology, and the way in which vulnerabilities in our existing military **could be exploited** by Russia or China, **require it**. If we fail to make the U.S. military **more modern, resilient, lethal, and survivable**, the perception could grow that relative American combat **power was fading** — or that the American military had **developed systemic vulnerabilities** that an enemy could exploit to **produce catastrophic failure**. Deterrence could weaken. **War could result.** And we could quite possibly **even lose** such a war.

The years 2020-40 seem likely to see even more change in the technologies, and the character, of warfare than have recent decades. For the years 2000-20, revolutionary technological change occurred mainly in various aspects of computers and robotics. For the next two decades, those areas will **remain fast-moving**, and they will be joined by **various breakthroughs** in artificial intelligence (AI) including the use of big data. The battlefield implications in domains such as swarms of robotic systems usable as both sensors and weapons may truly come of age. In addition, **progress** in laser weapons, reusable rockets, hypersonic missiles, unmanned submarines, biological pathogens, and nanomaterials may **occur rapidly**. The sum total may or may not add up to a revolution. But the potential **cannot be dismissed**.

The **rise of China** and the **return of Russia** supercharge the competition and **raise the strategic stakes**. The marriage of **rapid technological progress** with **hegemonic change** could prove **especially potent**. The return of **great-power competition** during an era of rapid progress in science and technology could **reward innovators** and expose vulnerabilities, much more than has been the case in the 21st century to date.

Not every existing Department of Defense weapons program is equally defensible, of course. Some programs should be reassessed, or delayed, in order to make room for more survivable and effective systems — for example, reducing procurement of surface ships in favor of attack submarines and unmanned undersea vehicles for the Navy, and emphasizing longer-range aircraft more than fighters for the Air Force as well as the Navy. On balance, however, in broad strokes and in overall resource requirements, the Pentagon agenda for modernization makes sense. It is important to **prioritize**, **and preserve**, it.

Today’s already-excellent American military is big enough to meet the reasonable requirements of ongoing commitments and great power competition — provided, that is, that **it improves further**. It needs to **repair readiness**. Most of all, it must be **modernized** for **greater lethality**, and made more **resilient and survivable** against the kinds of precision-strike, cyber, anti-satellite, and other asymmetric attacks future adversaries would be sure to employ. We need to keep our eye focused clearly on the ball, and our resource allocations focused clearly on the strategy. We need a more **modern and ready force**, not a larger one.

**Only way to make deterrence stable**

**NDIA 19** – The National Defense Industrial Association drives strategic dialogue in national security by identifying key issues and leveraging the knowledge and experience of its military, government, industry, and academic members to address them

NDIA, "Defense Industry at the Heart of Innovation," National Defense Industrial Association, 10-17-2019, https://www.ndia.org/policy/recent-posts/2019/10/17/defense-industry-at-the-heart-of-innovation

The defense industry is often lauded as the **originator of innovations** that increase the capabilities and lethality of the modern warfighter. **Technological superiority** on the battlefield gives our U.S. servicemen and women the **necessary advantage** to take on and win against any foe. These technologies, however, are often not considered outside of the defense ecosystem. Civilians go unaware of these advances and the defense industry’s reputation is not commonly tied to innovation. Members of the defense industrial base and those that advocate its importance must make a more directed effort at changing the industry’s perception and more clearly communicate its role in **developing and deploying new technologies**.

At a time of increasing global competition and rising tensions, **the need** for a robust defense industrial base **is clear**. To maintain robustness, industry must seek new ways to build trust and stature among non-defense-oriented Americans. Innovation helps demonstrate the importance of the defense industry to the public. Today, the defense industry is the anchor of multiple regional technology hubs, remaining **second to none** as a **source of innovation**. Although Silicon Valley is viewed as the epicenter of private, consumer-focused U.S. innovation, its roots in developing military technology are often forgotten

Today’s defense innovation often occurs in a classified environment that prevents industry from publicly touting new developments. The secret nature of these innovations prevent most people from realizing the civilian uses of these technologies. There are numerous examples, however, of how technologies initially developed by the defense industry for military purposes have made their way into the everyday life of Americans.

Satellites originally developed for military tracking and communications are now at the center of the network that supports the ability for cell phones to make calls and provide directions. Financial transactions owe their security to defense industry developed processes. Computers, advanced manufacturing materials, and the internet all rest on Cold War era innovations. Modern life relies on innovations that were initially developed with a military application in mind and took billions of dollars in research and development over decades to reach the point we are at today. Silicon Valley’s schedule of app updates or the next iteration of iPhone gloss over the foundation built by the defense industry.

While consumers frequently look to Silicon Valley for clever apps and news ways to connect online, the American defense industrial base is pushing innovation forward in areas like high-end manufacturing, material science, and systems engineering. The ongoing development of **hypersonic technology** is evidence of the defense industrial base **driving innovation** to meet technological demands. The ability to deploy a projectile at five times the speed of sound through the atmosphere requires **cutting-edge** heat-resistant materials, **new propulsion technologies** and **complex simulations** of hypersonic shockwaves. Developments that will make these new hypersonic systems possible have untold applications across a range of other non-defense related industries.

The defense industrial base is also investing in basic science research to **extend the frontier** of future **defense capabilities**. Defense companies large and small are responsible for new advances in the use of gallium nitride for advanced radars, which will likely replace silicon chips used in modern smartphones and data centers. Cold fusion tech being developed to reshape the nuclear triad may one day provide cheap, clean, and safe energy to replace fossil fuels. Defense contractors are spending millions to make these technologies a reality despite the absence of immediate direct commercial applications.

**Innovation** by the defense industry is **essential** to maintaining our **security and technological superiority**. Without the research and development effort and dollars from defense firms, the U.S. will **fall behind** on the battlefield. There is no handbook for innovation and future successes will rely on the foundation of **knowhow and experience** built on decades of persistent focus by the defense industry. More consciously branding defense firms as technology-focused businesses will go a long way in building the broad spread support necessary to continue to remain at the forefront of military and commercial innovation.

#### Unintended escalation is especially likely with Chinese autonomous weapons

Vincent 19– Senior Reporter at The Verge

James Vincent, 2-6-2019, "China is worried an AI arms race could lead to accidental war," The Verge, https://www.theverge.com/2019/2/6/18213476/china-us-ai-arms-race-artificial-intelligence-automated-warfare-military-conflict

Experts and politicians in China are worried that a rush to integrate artificial intelligence into weapons and military equipment could accidentally lead to war between nations.

According to a new report published by US national security think tank Center for a New American Security (CNAS), Chinese officials increasingly see an “arms race” dynamic in AI as a threat to global peace. As countries scramble to reap the benefits of artificial intelligence in various domains, including the military, the fear is that international norms shaping how countries communicate will become outdated, leading to confusion and potential conflict.

“The specific scenario described to me [by one anonymous Chinese official] is unintentional escalation related to the use of a drone,” Gregory C. Allen, an adjunct senior fellow at CNAS and author of the new report, tells The Verge.

As Allen explains, the operation of drones both large and small has become increasingly automated in recent years. In the US, drones are capable of basic autopilot, performing simple tasks like flying in a circle around a target. But China is being “more aggressive about introducing greater levels of autonomy closer to lethal use of force,” he says. One example is the Blowfish A2 drone, which China exports internationally and which, says Allen, is advertised as being capable of “full autonomy all the way up to targeted strikes.”

Because drones are controlled remotely, militaries tend to be more cavalier about their use. With no risk of human casualties, they’re more willing to shoot them down, but also deploy them into contested airspaces in the first place. This attitude can also be seen in cyberwarfare, where countries will intrude in ways they wouldn’t necessarily risk if humans were involved.

“The point made to me was that it’s not clear how either side will interpret certain behaviors [involving autonomous equipment],” says Allen. “The side sending out an autonomous drone will think it’s not a big deal because there’s no casualty risk, while the other side could shoot it down for the same reason. But there’s no agreed framework on what message is being sent by either sides’ behavior.”

The risks in such a scenario become greater when factoring in advanced autonomy. If a drone or robot fires a warning shot at enemy troops, for example, how will that action be interpreted? Will the troops understand it as an automated response, or will they think it’s the decision of a human commander? How would they know in either case?

In essence, says Allen, countries around the world have yet to define “the norms of armed conflict” for autonomous systems. And the longer that continues, the greater the risk for “unintentional escalation.”

“I think that’s a real and legitimate threat,” says Allen.

The rest of the CNAS report, titled “Understanding China’s AI Strategy: Clues to Chinese Strategic Thinking on Artificial Intelligence and National Security,” notes a number of other high-level concerns and attitudes in China’s government-led AI strategy.

Chinese officials recognize, for example, that it and America are the only two viable AI superpowers. Both countries have the talent, the funding, and the bustling tech sectors needed to push this technology further, though each nation also has its own particular strengths and weaknesses. China has access to more data, for example, and has the potential to leapfrog Western technology. (Many Chinese citizens went from having no phone to a mobile phone, without getting a landline in between, for example). America, meanwhile, has a significant lead in the development of chip technology — a vital component in processing the huge datasets that power AI applications.

CNAS’s report notes that China is particularly keen to close this important gap. Chinese firms like Baidu, Alibaba, and Huawei have established new projects to develop AI accelerator hardware; government money is pouring into these initiatives; and the industry is trying other methods to get a hold of foreign expertise. These include the recent proposed acquisition of US chip designer Qualcomm by Singapore firm Broadcom, which was blocked by President Trump on national security grounds.

While a certain amount of competition between China and the US is to be expected, Allen says cooperation is also needed — especially when it comes to these military questions.

He notes that while Chinese officials he spoke to had a good grasp of contemporary US thinking on issues like autonomous warfare, American officials tend to be less well-briefed about their Chinese counterparts, partly because many Chinese policy documents are never translated into English. Without properly understanding different nations’ strategies in these domains, says Allen, the chances of misunderstanding and conflict increase.