# NEG DOC – NDT R5 – GEORGETOWN GL

# 1NC

## Off Case

### 1

First off is T – no exemptions

**Scope refers to the extent of activity**

**Merriam-Webster 22**

Merriam-Webster, "Definition of Scope," Merriam-Webster, 3-21-2022, https://www.merriam-webster.com/dictionary/scope#:~:text=(Entry%201%20of%204),of%20treatment%2C%20activity%2C%20or%20influence

Definition of scope (Entry 1 of 4)

1: INTENTION, OBJECT

2: space or opportunity for unhampered motion, activity, or thought

3: extent of treatment, activity, or influence

#### To “expand” requires a change in law

Hatter 90 – United States District Court, California Central

Terry J. Hatter, Jr., In re Eastport Assoc., 114 B.R. 686, United States District Court for the Central District of California, March 1990, LexisNexis

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

**The core antitrust laws only include the Sherman and Clayton Acts**

**ATR 07** – Law enforcement agency that enforces the U.S. antitrust laws

“Antitrust Division Statement Regarding the Release of the Antitrust Modernization Commission Report,” The Antitrust Division, Department of Justice, April 2007, https://www.justice.gov/archive/atr/public/press\_releases/2007/222344.htm

The AMC has made many specific recommendations in its report, and the Division is in the process of reviewing all of them. The Division commends the AMC for its three primary conclusions:

Free-market competition should remain the touchstone of United States' economic policy. The Commission's conclusion in this regard is a fundamental starting point for policy makers. Over a century of experience has shown that robust competition among businesses, each striving to be increasingly successful, leads to better quality products and services, lower prices, and higher levels of innovation.

The **core antitrust laws**—**Sherman Act sections 1 and 2** and **Clayton Act section 7**—and their application by the courts and federal enforcement agencies are sound and appropriately safeguard the competitiveness of the U.S. economy.

New or different rules are not needed for industries in which innovation, intellectual property, and technological innovation are central features. Unlike some other areas of the law, the core antitrust laws are **general in nature** and have been **applied to many different industries** to protect free-market competition successfully over a long period of time despite changes in the economy and the increasing pace of technological advancement. One of the great benefits of the Sherman and Clayton Acts is their **adaptability** to **new economic conditions** without sacrificing their ability to protect competition.

**Violation: the core antitrust laws already cover the aff’s targeted conduct---exemptions are distinct**

**Abrams et al. 14** – Baker & Hostetler LLP

Robert G. Abrams, Gregory J. Commins, and Danyll W. Foix, "US: Private Antitrust Litigation - Exemptions and Immunities," Global Competition Review, 8-22-2014, https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/the-antitrust-review-of-the-americas-2015/article/us-private-antitrust-litigation-exemptions-and-immunities

In addition, federal courts have recognised a number of exemptions from antitrust laws, which are usually established for the purpose of avoiding conflicts with principles of federalism or of effectuating legislation enacted by Congress.7 These judicially created exemptions can be as wide-ranging as statutory exemptions, but the most common include: the ‘state action’ immunity for certain actions taken by states or pursuant to their laws;8 the ‘implied immunity’ exemption for conduct to effectuate a regulatory scheme;9 the ‘filed rate’ immunity from antitrust damages actions based on rates or prices set with federal or state regulators;10 and the Noerr-Pennington immunity for certain conduct of private actors in petitioning the government.11 Although these exemptions may appear broad, they are narrowly construed by courts because the Sherman Act itself provides no exceptions12 and they generally are contrary to the fundamental values of ‘free enterprise and economic competition that are embodied in the federal antitrust laws.’13

[[Begin FN 12]]

See Goldfarb v Va State Bar, 421 US 773 (1975).

[[End FN 12]]

Of all these immunities and exemptions, the Supreme Court’s ongoing consideration of state action immunity is perhaps the most significant because of its potential to alter how many government entities function.

#### Vote neg---

#### [1]---Limits---there are dozens of exemptions, including hog farmers and soft drink companies, that the aff can make minor tweaks to

#### [2]---Ground---forcing affs to change the legal application of Sherman or Clayton represents a major shift in jurisprudence that ensures link uniqueness

#### Independently, it’s extra T – requiring that health care providers identify abortion services is beyond the scope of the resolution

### 2

Next is the RICO CP

#### The United States federal government should expand the scope of the civil RICO statute to prohibit practices that restrict access to abortion.

#### CP solves—it prohibits the same conduct via civil RICO—that avoids legal antitrust barriers but carries the effect because civil RICO mirrors antitrust treble damages remedies

Kennedy, Council Member of the Section of Antitrust Law, Ohio Bar, ‘86

(James P., “Civil RICO in the Antitrust Context,” *Antitrust Law Journal*, Vol. 55, No. 2, 34th Annual Meeting, pp. 463-498)

II. POTENTIAL USE OF CIVIL RICO IN THE ANTITRUST CONTEXT

With the large number of offenses which qualify as "racketeering activities" under the statute,22 particularly mail and wire fraud, it that many fact patterns which give rise to liability under the antitrust laws would also be found to violate civil RICO. This is illustrated use of RICO in various cases involving anticompetitive conduct, alleged horizontal and vertical price-fixing,23 monopolization attempts, anticompetitive mergers,25 Robinson-Patman Act violations,26 and other forms of unfair competition.27 When the alleged antitrust violation is firmly grounded on the traditionally established antitrust theories recovery, RICO provides few discernible benefits to the plaintiff of the remedies available although it may be easier to proceed under RICO.28 The principal advantage, however, of RICO's civil remedies—mandatory treble damages and attorneys' fees—is particularly inviting to plaintiffs who are facing one or more barriers such as standing problems, substantive deficiencies in their antitrust claims, or exemptions under the antitrust laws, obstacles which might not be present in private civil actions under RICO. In these flawed antitrust cases, RICO provides the would-be plaintiffs with another option for treble damages might not otherwise have been available.

A. Circumventing Standing Barriers in Antitrust Law through Civil RICO

Under its seminal decision in Illinois Brick Co. v. Illinois,29 the Supreme Court undertook to limit the ripple effect of anticompetitive injury held that only those directly injured in their business have standing to pursue an action for treble damages Conversely, plaintiffs suffering only indirect to pursue antitrust theories of recovery.

The literal terms of RICO do not require direct no uniform judicial application of the principles to civil RICO actions. For example, the Eighth Association, Inc. v. Terre Du Lac9 Inc.,51 pronounced allege a "racketeering injury" does not destroy to bring suit under RICO even where the plaintiff injury.32

Likewise, the Supreme Court in Sedima, although it did not expressly consider the degree of injury required, did not impose any distinction between direct and indirect injury but concluded that a "plaintiff . . . has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation."33

The Seventh Circuit, however, reached a contrary finding in Carter v. Berger,54 where certain taxpayers pursued a RICO claim against an in- dividual who had bribed county tax assessors for his own personal benefit. The court held that the county was the proper plaintiff, not the taxpayers, based upon the principles of Illinois Brick.

A similar result was reached in Rand v. Anaconda-Ericsson.55 In that case, Ericsson was the chief supplier of telephone equipment to Teltronics and also its principal creditor. Teltronics financed equipment purchases through the issuance of notes to the defendant banks. Ericsson guar- anteed payment on the notes, in return for which it held a security interest in revenues generated by Teltronics' lease of equipment.

Plaintiffs, shareholders of Teltronics, alleged that Ericsson led Tel- tronics to believe that it need not make interest payments on the loans until the end of February, 1979. When Teltronics failed to make such payments, however, they were declared in default and the loans were accelerated forcing Teltronics into involuntary bankruptcy. Plaintiffs brought suit alleging both antitrust (Sherman Act) and RICO claims. The court granted summary judgment for the defendant on both counts for lack of standing, on the ground that the legal corporation, Teltronics, and not to the individual shareholders.

The Carter and Rand decisions provide a basis for defendants to challenge the standing of RICO plaintiffs who have suffered injury, on the same policy considerations upon which founded. Success, however, is by no means assured, the viability of the Illinois Brick doctrine is not firmly cases.

The Supreme Court, however, has clearly eliminated another barrier which is firmly entrenched in antitrust law - the "antitrust requirement articulated in Brunswick Corp. v. Pueblo Bowl-There, the Supreme Court recognized that in a competitive market certain entities inevitably will not survive or will be damaged and that the antitrust laws were not designed to protect petitors per se. Rather, the Court reasoned that the purpose antitrust laws was much broader in nature so as to protect not competitors, and if no injury to competition can be antitrust action can be maintained. The Court defined "antitrust as that which is "more than [an] injury causally linked to an illegal presence in the market" and which "flows from that which makes acts unlawful."37

Prior to Sedima, several courts analogized Brunswick's "antitrust to RICO claims and required plaintiffs to demonstrate a injury" beyond that which resulted from the alleged predicate also caused by activity RICO was designed to deter.38 In Sedima, the Supreme Court struck down this contention and held from the pattern of racketeering activities, i.e., the predicate selves, suffice to confer standing under civil RICO.39 The on to state "there is no room in the statutory language for amorphous 'racketeering injury' requirement."40 Hence, the court rejected in RICO cases its own special injury requirement antitrust cases. Accordingly, those claims which would failed under antitrust laws because the plaintiff did not allege an “anti- trust injury" remain potentially viable assuming the other essential elements of RICO claims have been met.

B. Use Of Civil RICO To Bypass Substantive Provisions Under the Antitrust Laws

In many situations, parties injured by anticompetitive conduct face jurisdictional and substantive barriers which forestall recovery under the antitrust laws. With increasing frequency, plaintiffs in these flawed anti- trust actions are using RICO as a viable alternative to subvert the limitations on causes of action under traditional antitrust theories.

1. The Intracorporate Conspiracy Doctrine

A violation under Section 1 of the Sherman Act requires a showing of unlawful concerted activity among the defendants. However, certain parties, by virtue of their intracorporate status, do not constitute multiple perpetrators engaged in concerted activities as contemplated under the Sherman Act. This theory was adopted by the Supreme Court in Cop- perweld Corp. v. Independence Tube Corp.41 In that case, the plaintiff maintained that an alleged conspiracy between a corporation and its wholly- owned subsidiary, was actionable under the antitrust laws. The Court disagreed, finding that an agreement or conspiracy among officers, em- ployees, or wholly-owned subsidiaries of the same corporate entity, does not give rise to the unlawful concerted activity against which the Sherman Act is intended to protect. Hence, the anticompetitive conduct of a single firm, although arguably equivalent in effect to the conduct of two sep- arate corporate entities, is nonetheless outside the reach of Section I.42

With the exception of Section 1962(d), violations under civil RICO, unlike the antitrust laws, are not predicated upon conspiring activity. Accordingly, a RICO plaintiff may allege that a parent corporation is the culpable "person" engaged in the proscribed racketeering activity and its subsidiary is the "enterprise" or vice versa.43 Hence, the Copperweld doctrine has no application in a RICO context.44

RICO plaintiffs may also be able to avoid the pitfalls of the Copperweld doctrine by labelling the parent corporation as both the "enterprise" and the "person" under Section 1962(c). At least one circuit theory.45 However, the majority position is that under "the corporate entity may not be simultaneously the 'person' who conducts the affairs of the enterprise through racketeering activity," but must be distinct entities.46 Civil may be able to sidestep this requirement by pursuing 1962(a) rather than Section 1962(c). Some courts "person" and the "enterprise" as the same entity under Section 1962(a).

2. Using Civil RICO to Bypass the Competitive Impact Element to Antitrust Actions

As previously discussed, the sine qua non of conduct antitrust laws is its deleterious impact on competition, whether such impact be expressly demonstrated, presumed to exist, or otherwise shown to be imminent. There is no such market effect required under RICO so that cases not otherwise cognizable under the antitrust laws for failure to establish the necessary impact on competition through market share, conspiracy, or otherwise, may meet a much different fate under civil RICO. For example, a party injured by the predatory acts of a single competitor may not seek relief under the antitrust laws absent evidence that the predator occupied a share of the market sufficient to create a dangerous probability of success in attaining monopolization. However, by properly asserting the requisite predicate acts of racketeering predictably mail or wire fraud, the injured party may recover under RICO treble the damages sustained as a result of the unlawful attempt to monopolize.

Such a scenario was presented in Gregoris Motors v. Nissan Motor Corporation USA.4S In that case, plaintiff, the owner of a Nissan dealership, alleged that four other dealerships had submitted false sale documents to the American branch manufacturer of Nissan vehicles and bribed certain officials to increase their allotment of new cars in an attempt to monopolize the Nissan market in the area. The plaintiff further alleged that the manufacturer acquiesced in or abetted the activities. Plaintiff brought suit under Sections 1 and 2 of the Sherman Patman Act, and RICO.

The court dismissed the Section 1 violation noting there was no evidence that plaintiff's existence was in peril and failed to establish the necessary anticompetitive claim met with similar demise because plaintiff that the defendant wielded the requisite monopoly sufficient market command to control or restrict competition in the area.

Another example where a RICO claim could be used to salvage an action that failed under antitrust laws for lack of competitive impact is seen in Summerwood v. Cado Systems.50 There, Summerwood agreed to purchase from Small Business Computers, Inc. (“SBC”), a distributor of Cado, a computer hardware and software package particularly designed for its fast food business. Summerwood claimed that while it desired only the software package, it was forced to purchase the hardware as well. Dissatisfied with SBC's performance under the agreement, Sum- merwood brought suit alleging inter alia, a Section 1 violation of the Sherman Act, a Clayton Act violation, and a RICO claim.

The court dismissed the Section 1 claim finding that the complaint failed to allege a conspiracy adequately. Moreover, the court dismissed the claim under the Clayton Act because there was no explicit tie-in agreement and no showing of individual coercion. The court disposed of the RICO claim as well, with leave to amend, principally because the plaintiff did not state which provision of Section 1962 the defendant violated. However, given the substantive deficiencies noted by the court with respect to the antitrust claim (failure to allege an injurious impact on competition through conspiracy), as opposed to the merely technical insufficiency stated in connection with the RICO claim, it is reasonable to assume that upon amendment of the complaint specifying the particular subsection of Section 1962 which was violated, the RICO claim would survive while the antitrust claims would not.

In addition to the areas discussed above, commentators have predicted that that determined plaintiffs will forge similar inroads into other areas of antitrust law by asserting RICO violations in lieu of antitrust claims. For instance, it was suggested that plaintiffs might bring suit under RICO to contest mergers having insufficient anticompetitive effect to invoke Section 7 of the Clayton Act.51 Moreover, a plaintiff injured by discimination in delivery of commodities, although unable to bring suit under Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, because it prohibits discrimination only in "service or facilities," could conceivably challenge the delivery practices under RICO by simply alleging mail and wire fraud or any other predicate act.53

#### Expanding civil RICO to competition-related cases is key to address regulatory fraud and financial misrepresentations that drive crises

Gleiser, JD, St. Louis University Law School, ‘10

(Ephraim Samuel, “A Bridge to Somewhere: How a Bolder Causal Analysis Can Shape

Civil Rico into the Ideal Free Market Safeguard,” 54 St. Louis U. L.J. 609)

Nearly a year later, on June 19, 2008, a month after Bear Steams' collapse, two former Bear Steams managers, Matthew Tannin and Ralph Cioffi, became the first executives of many to be charged criminally in the wake of the current subprime market crisis. 5 Following a federal investigation, both men were indicted for securities and wire fraud.6 Over three months later, with markets plummeting, Christopher Cox, head of the Securities and Exchange Commission (SEC), testified before the Senate banking panel, conceding the SEC's performance in monitoring Bear Steams was "fundamentally flawed."7

Although from widely disparate industries, Merck and Bear Steams both faced allegations of misleading federal regulators and extracting market advantage in the process. The stories of these two corporate giants illustrate the vulnerability and inefficacy of regulatory agencies. Merck's settlement was the result of thousands of private claims for damages caused by its drug. 8

Such private claims provide disincentive[s] for companies willing to deceive government regulators. Yet, the future availability of these claims is far from certain. In a 2008 decision, Riegel v. Medtronic, Inc.,9 the Supreme Court held that because the FDA's pre-market approval process contained federal requirements, FDA approval of medical devices preempted state common-law claims of negligence, strict liability, and implied warranty against the manufacturer of a faulty medical device.' 0 More recently, in Wyeth v. Levine," the Court held that the FDA's approval of the defendant-drug manufacturer's label did not preempt an injured consumer's failure to warn claim.12 The Court focused on the manufacturer's post-FDA approval duty to inform consumers of new risks.' 3 This means claims based on pre-FDA approval actions remain subject to preemption. 14 The larger question still looms: to what extent the public must rely on regulatory bodies in a post-Wyeth landscape.

What if the same free market forces that led these actors astray could be redirected in a way to entice companies to keep industry competitors honest? What if businesses had to play by the rules because failing to do so would mean giving up market share and filling the coffers of competitors? Do honest businesses have a viable and powerful cause of action against competing businesses that attain economic advantage through misleading behavior? The answers to these anticipated questions lie within the Supreme Court decision, Bridge v. Phoenix Bond & Indemnity Co.,15 which has the potential to transform civil RICO from an unwieldy weapon into a powerful corporate instrument for maintaining industry-wide honesty.6

In Bridge, the Supreme Court unanimously held that a plaintiff raising a claim based on mail fraud under the Racketeer Influenced and Corrupt Organizations Act (RICO) 18 U.S.C. § 1964 is not required to demonstrate reliance on the defendant's alleged misrepresentations.17 RICO provides a private right of action for treble damages to "[a]ny person injured in his business or property by reason of a violation" of the Act.' 8 In Bridge, each year the Cook County, Illinois, Treasurer's Office auctioned tax liens acquired

on the property of delinquent taxpayers. 19 These liens proved to be smart investments, since many property holders would be unable to redeem their property, and thus allowed the purchasers of the liens to acquire the property and collect significant gains. 2 0 The auction proved so lucrative that the County began limiting the number of bidders through its "Single, Simultaneous Bidder Rule." 21 The plaintiff, a regular customer at the auction (along with the defendant), brought suit under RICO against the defendant alleging the defendant company filed false attestations that it was in compliance with the County's rule.22

The issue decided in Bridge, "whether first-party reliance is an element of a civil RICO claim predicated on mail fraud, 23 exists within the proximate cause requirement first established in Holmes v. Securities Investor Protection Corp.,24 and later affirmed in Anza v. Ideal Steel Supply Corp.25 Since Holmes, decided in 1992, the Court has read a proximate cause requirement 26 into the language of § 1964. At the same time, the Court has continually recognized that "[p]roximate cause... is a flexible concept that does not lend itself to 'a black-letter rule that will dictate the result in every case.', 27 Despite this flexibility, Anza incorporated a "directness" element into the civil RICO proximate cause requirement that limits recovery only to the "immediate" 28 victims of a predicate act. Often, the most immediate victims of consumer fraud are injured consumers. Yet, the effect of legislative and judicial "tort reform" efforts have left injured consumers without the ability to seek damages from corporate wrongdoers. 29 Given the inability of consumers to recover damages, corporate wrongdoers are able to take advantage of imperfect regulatory oversight in order to gain the market share of its competitors.

This comment proposes the Court address this problem by reshaping its proximate cause analysis to recognize the intended victims of corporate fraud: honest competitors that have lost market share due to fraud, deception, and misrepresentation. The Court must allow honest corporations, injured by a competitor's wrong, to bring civil RICO claims based on the wrongdoer's intended outcome, as determined using a means-end analysis. Doing so means filling the gap left by individual consumers unable to act as private attorneys general. The following hypothetical may help to illustrate how a corporation may invoke civil RICO that will, perhaps, invite the Court to directly address this very issue in the future.

Suppose ABC Corp. and XYZ Corp. are competing pharmaceutical device companies. Both are engaged in a fierce competition to begin marketing their own versions of an insulin delivery device. Both companies also began the FDA's pre-market approval process almost simultaneously. And nearly a year later, FDA granted full approval to ABC's insulin delivery device Apulert and to XYZ for its equivalent, Exulert.

Following the approval of both drugs, advertising became heated. In fact, XYZ produced marketing materials received by physicians that flaunted what it claimed were "superior trial results." A few weeks later, evidence arose that XYZ had withheld information from federal regulators, fabricating a large portion of its trials. A resulting investigation revealed the fabrication began five months prior to Exulert's release.

Following the evidentiary disclosure, patients who used Exulert began complaining of harmful side effects. These individuals seeking relief through the courts were dismayed by the the plaintiffs' firms hesitance and often outright refusal to agree to provide representation. Prior to refusing, attorneys explain that individuals harmed by Exulert are unable to invoke state consumer fraud acts. With these tort reform measures in place, attorneys are reluctant to invest the massive resources needed for pursuing individual claims, much less bringing mass action of individual claims.

Moreover, although FDA representatives promise closer scrutiny, the public is wary to rely yet again on a regulation process that allowed Exulert onto the market. So, what prevents corporate actors like XYZ from cutting corners in the future? More immediately, how helpful is the causal analysis from Holmes, Anza, and Bridge? Who, if anyone, is in the best position to right the wrong caused by XYZ?

This Comment explores the future benefits Bridge may provide to corporations and society at large. This exploration will begin with a brief introduction to the legislative inception and judicial expansion and contraction of RICO. While doing so, the comment will lay out the causal analysis set out in Holmes and affirmed in Anza. Next, the Comment will discuss Justice Thomas' causation analysis, which, while excising reliance as an element, leaves room for further helpful direction involving future invocations of RICO in civil actions. Finally, the Comment examines the significance of the Court's decision amidst political pressure to remove RICO as a tool for civil litigators. The Court's adoption of proximate causation suggests civil RICO can be tailored in a way that creates a powerful instrument for businesses injured by third party misrepresentations and that will keep businesses honest and compensate business for damages caused by deceptive, fraudulent, and dishonest competitors.

#### Regulatory fraud collapses the economy and society—unique given structural vulnerability from COVID

Partnoy, Law professor at UC Berkeley, international research fellow at Oxford University, member of the Financial Economists Roundtable, ‘20

(Frank, "Will the Banks Collapse?," The Atlantic, July/August, <https://www.theatlantic.com/magazine/archive/2020/07/coronavirus-banks-collapse/612247/>)

After months of living with the coronavirus pandemic, American citizens are well aware of the toll it has taken on the economy: broken supply chains, record unemployment, failing small businesses. All of these factors are serious and could mire the United States in a deep, prolonged recession. But there’s another threat to the economy, too. It lurks on the balance sheets of the big banks, and it could be cataclysmic. Imagine if, in addition to all the uncertainty surrounding the pandemic, you woke up one morning to find that the financial sector had collapsed.

You may think that such a crisis is unlikely, with memories of the 2008 crash still so fresh. But banks learned few lessons from that calamity, and new laws intended to keep them from taking on too much risk have failed to do so. As a result, we could be on the precipice of another crash, one different from 2008 less in kind than in degree. This one could be worse.

The financial crisis of 2008 was about home mortgages. Hundreds of billions of dollars in loans to home buyers were repackaged into securities called collateralized debt obligations, known as CDOs. In theory, CDOs were intended to shift risk away from banks, which lend money to home buyers. In practice, the same banks that issued home loans also bet heavily on CDOs, often using complex techniques hidden from investors and regulators. When the housing market took a hit, these banks were doubly affected. In late 2007, banks began disclosing tens of billions of dollars of subprime-CDO losses. The next year, Lehman Brothers went under, taking the economy with it.

The federal government stepped in to rescue the other big banks and forestall a panic. The intervention worked—though its success did not seem assured at the time—and the system righted itself. Of course, many Americans suffered as a result of the crash, losing homes, jobs, and wealth. An already troubling gap between America’s haves and have-nots grew wider still. Yet by March 2009, the economy was on the upswing, and the longest bull market in history had begun.

To prevent the next crisis, Congress in 2010 passed the Dodd-Frank Act. Under the new rules, banks were supposed to borrow less, make fewer long-shot bets, and be more transparent about their holdings. The Federal Reserve began conducting “stress tests” to keep the banks in line. Congress also tried to reform the credit-rating agencies, which were widely blamed for enabling the meltdown by giving high marks to dubious CDOs, many of which were larded with subprime loans given to unqualified borrowers. Over the course of the crisis, more than 13,000 CDO investments that were rated AAA—the highest possible rating—defaulted.

The reforms were well intentioned, but, as we’ll see, they haven’t kept the banks from falling back into old, bad habits. After the housing crisis, subprime CDOs naturally fell out of favor. Demand shifted to a similar—and similarly risky—instrument, one that even has a similar name: the CLO, or collateralized loan obligation. A CLO walks and talks like a CDO, but in place of loans made to home buyers are loans made to businesses—specifically, troubled businesses. CLOs bundle together so-called leveraged loans, the subprime mortgages of the corporate world. These are loans made to companies that have maxed out their borrowing and can no longer sell bonds directly to investors or qualify for a traditional bank loan. There are more than $1 trillion worth of leveraged loans currently outstanding. The majority are held in CLOs.

I was part of the group that structured and sold CDOs and CLOs at Morgan Stanley in the 1990s. The two securities are remarkably alike. Like a CDO, a CLO has multiple layers, which are sold separately. The bottom layer is the riskiest, the top the safest. If just a few of the loans in a CLO default, the bottom layer will suffer a loss and the other layers will remain safe. If the defaults increase, the bottom layer will lose even more, and the pain will start to work its way up the layers. The top layer, however, remains protected: It loses money only after the lower layers have been wiped out.

Unless you work in finance, you probably haven’t heard of CLOs, but according to many estimates, the CLO market is bigger than the subprime-mortgage CDO market was in its heyday. The Bank for International Settlements, which helps central banks pursue financial stability, has estimated the overall size of the CDO market in 2007 at $640 billion; it estimated the overall size of the CLO market in 2018 at $750 billion. More than $130 billion worth of CLOs have been created since then, some even in recent months. Just as easy mortgages fueled economic growth in the 2000s, cheap corporate debt has done so in the past decade, and many companies have binged on it.

Despite their obvious resemblance to the villain of the last crash, CLOs have been praised by Federal Reserve Chair Jerome Powell and Treasury Secretary Steven Mnuchin for moving the risk of leveraged loans outside the banking system. Like former Fed Chair Alan Greenspan, who downplayed the risks posed by subprime mortgages, Powell and Mnuchin have downplayed any trouble CLOs could pose for banks, arguing that the risk is contained within the CLOs themselves.

These sanguine views are hard to square with reality. The Bank for International Settlements estimates that, across the globe, banks held at least $250 billion worth of CLOs at the end of 2018. Last July, one month after Powell declared in a press conference that “the risk isn’t in the banks,” two economists from the Federal Reserve reported that U.S. depository institutions and their holding companies owned more than $110 billion worth of CLOs issued out of the Cayman Islands alone. A more complete picture is hard to come by, in part because banks have been inconsistent about reporting their CLO holdings. The Financial Stability Board, which monitors the global financial system, warned in December that 14 percent of CLOs—more than $100 billion worth—are unaccounted for.

I have a checking account and a home mortgage with Wells Fargo; I decided to see how heavily invested my bank is in CLOs. I had to dig deep into the footnotes of the bank’s most recent annual report, all the way to page 144. Listed there are its “available for sale” accounts. These are investments a bank plans to sell at some point, though not necessarily right away. The list contains the categories of safe assets you might expect: U.S. Treasury bonds, municipal bonds, and so on. Nestled among them is an item called “collateralized loan and other obligations”—CLOs. I ran my finger across the page to see the total for these investments, investments that Powell and Mnuchin have asserted are “outside the banking system.”

The total is $29.7 billion. It is a massive number. And it is inside the bank.

Since 2008, banks have kept more capital on hand to protect against a downturn, and their balance sheets are less leveraged now than they were in 2007. And not every bank has loaded up on CLOs. But in December, the Financial Stability Board estimated that, for the 30 “global systemically important banks,” the average exposure to leveraged loans and CLOs was roughly 60 percent of capital on hand. Citigroup reported $20 billion worth of CLOs as of March 31; JPMorgan Chase reported $35 billion (along with an unrealized loss on CLOs of $2 billion). A couple of midsize banks—Banc of California, Stifel Financial—have CLOs totaling more than 100 percent of their capital. If the leveraged-loan market imploded, their liabilities could quickly become greater than their assets.

How can these banks justify gambling so much money on what looks like such a risky bet? Defenders of CLOs say they aren’t, in fact, a gamble—on the contrary, they are as sure a thing as you can hope for. That’s because the banks mostly own the least risky, top layer of CLOs. Since the mid-1990s, the highest annual default rate on leveraged loans was about 10 percent, during the previous financial crisis. If 10 percent of a CLO’s loans default, the bottom layers will suffer, but if you own the top layer, you might not even notice. Three times as many loans could default and you’d still be protected, because the lower layers would bear the loss. The securities are structured such that investors with a high tolerance for risk, like hedge funds and private-equity firms, buy the bottom layers hoping to win the lottery. The big banks settle for smaller returns and the security of the top layer. As of this writing, no AAA‑rated layer of a CLO has ever lost principal.

But that AAA rating is deceiving. The credit-rating agencies grade CLOs and their underlying debt separately. You might assume that a CLO must contain AAA debt if its top layer is rated AAA. Far from it. Remember: CLOs are made up of loans to businesses that are already in trouble.

So what sort of debt do you find in a CLO? Fitch Ratings has estimated that as of April, more than 67 percent of the 1,745 borrowers in its leveraged-loan database had a B rating. That might not sound bad, but B-rated debt is lousy debt. According to the rating agencies’ definitions, a B-rated borrower’s ability to repay a loan is likely to be impaired in adverse business or economic conditions. In other words, two-thirds of those leveraged loans are likely to lose money in economic conditions like the ones we’re presently experiencing. According to Fitch, 15 percent of companies with leveraged loans are rated lower still, at CCC or below. These borrowers are on the cusp of default.

So while the banks restrict their CLO investments mostly to AAA‑rated layers, what they really own is exposure to tens of billions of dollars of high-risk debt. In those highly rated CLOs, you won’t find a single loan rated AAA, AA, or even A.

How can the credit-rating agencies get away with this? The answer is “default correlation,” a measure of the likelihood of loans defaulting at the same time. The main reason CLOs have been so safe is the same reason CDOs seemed safe before 2008. Back then, the underlying loans were risky too, and everyone knew that some of them would default. But it seemed unlikely that many of them would default at the same time. The loans were spread across the entire country and among many lenders. Real-estate markets were thought to be local, not national, and the factors that typically lead people to default on their home loans—job loss, divorce, poor health—don’t all move in the same direction at the same time. Then housing prices fell 30 percent across the board and defaults skyrocketed.

For CLOs, the rating agencies determine the grades of the various layers by assessing both the risks of the leveraged loans and their default correlation. Even during a recession, different sectors of the economy, such as entertainment, health care, and retail, don’t necessarily move in lockstep. In theory, CLOs are constructed in such a way as to minimize the chances that all of the loans will be affected by a single event or chain of events. The rating agencies award high ratings to those layers that seem sufficiently diversified across industry and geography.

Banks do not publicly report which CLOs they hold, so we can’t know precisely which leveraged loans a given institution might be exposed to. But all you have to do is look at a list of leveraged borrowers to see the potential for trouble. Among the dozens of companies Fitch added to its list of “loans of concern” in April were AMC Entertainment, Bob’s Discount Furniture, California Pizza Kitchen, the Container Store, Lands’ End, Men’s Wearhouse, and Party City. These are all companies hard hit by the sort of belt-tightening that accompanies a conventional downturn.

We are not in the midst of a conventional downturn. The two companies with the largest amount of outstanding debt on Fitch’s April list were Envision Healthcare, a medical-staffing company that, among other things, helps hospitals administer emergency-room care, and Intelsat, which provides satellite broadband access. Also added to the list was Hoffmaster, which makes products used by restaurants to package food for takeout. Companies you might have expected to weather the present economic storm are among those suffering most acutely as consumers not only tighten their belts, but also redefine what they consider necessary.

Loan defaults are already happening. There were more in April than ever before. It will only get worse from here.

Even before the pandemic struck, the credit-rating agencies may have been underestimating how vulnerable unrelated industries could be to the same economic forces. A 2017 article by John Griffin, of the University of Texas, and Jordan Nickerson, of Boston College, demonstrated that the default-correlation assumptions used to create a group of 136 CLOs should have been three to four times higher than they were, and the miscalculations resulted in much higher ratings than were warranted. “I’ve been concerned about AAA CLOs failing in the next crisis for several years,” Griffin told me in May. “This crisis is more horrifying than I anticipated.”

Under current conditions, the outlook for leveraged loans in a range of industries is truly grim. Companies such as AMC (nearly $2 billion of debt spread across 224 CLOs) and Party City ($719 million of debt in 183 CLOs) were in dire straits before social distancing. Now moviegoing and party-throwing are paused indefinitely—and may never come back to their pre-pandemic levels.

The prices of AAA-rated CLO layers tumbled in March, before the Federal Reserve announced that its additional $2.3 trillion of lending would include loans to CLOs. (The program is controversial: Is the Fed really willing to prop up CLOs when so many previously healthy small businesses are struggling to pay their debts? As of mid-May, no such loans had been made.) Far from scaring off the big banks, the tumble inspired several of them to buy low: Citigroup acquired $2 billion of AAA CLOs during the dip, which it flipped for a $100 million profit when prices bounced back. Other banks, including Bank of America, reportedly bought lower layers of CLOs in May for about 20 cents on the dollar.

Meanwhile, loan defaults are already happening. There were more in April than ever before. Several experts told me they expect more record-breaking months this summer. It will only get worse from there.

If leveraged-loan defaults continue, how badly could they damage the larger economy? What, precisely, is the worst-case scenario?

For the moment, the financial system seems relatively stable. Banks can still pay their debts and pass their regulatory capital tests. But recall that the previous crash took more than a year to unfold. The present is analogous not to the fall of 2008, when the U.S. was in full-blown crisis, but to the summer of 2007, when some securities were going underwater but no one yet knew what the upshot would be.

What I’m about to describe is necessarily speculative, but it is rooted in the experience of the previous crash and in what we know about current bank holdings. The purpose of laying out this worst-case scenario isn’t to say that it will necessarily come to pass. The purpose is to show that it could. That alone should scare us all—and inform the way we think about the next year and beyond.

Later this summer, leveraged-loan defaults will increase significantly as the economic effects of the pandemic fully register. Bankruptcy courts will very likely buckle under the weight of new filings. (During a two-week period in May, J.Crew, Neiman Marcus, and J. C. Penney all filed for bankruptcy.) We already know that a significant majority of the loans in CLOs have weak covenants that offer investors only minimal legal protection; in industry parlance, they are “cov lite.” The holders of leveraged loans will thus be fortunate to get pennies on the dollar as companies default—nothing close to the 70 cents that has been standard in the past.

As the banks begin to feel the pain of these defaults, the public will learn that they were hardly the only institutions to bet big on CLOs. The insurance giant AIG—which had massive investments in CDOs in 2008—is now exposed to more than $9 billion in CLOs. U.S. life-insurance companies as a group in 2018 had an estimated one-fifth of their capital tied up in these same instruments. Pension funds, mutual funds, and exchange-traded funds (popular among retail investors) are also heavily invested in leveraged loans and CLOs.

The banks themselves may reveal that their CLO investments are larger than was previously understood. In fact, we’re already seeing this happen. On May 5, Wells Fargo disclosed $7.7 billion worth of CLOs in a different corner of its balance sheet than the $29.7 billion I’d found in its annual report. As defaults pile up, the Mnuchin-Powell view that leveraged loans can’t harm the financial system will be exposed as wishful thinking.

Thus far, I’ve focused on CLOs because they are the most troubling assets held by the banks. But they are also emblematic of other complex and artificial products that banks have stashed on—and off—their balance sheets. Later this year, banks may very well report quarterly losses that are much worse than anticipated. The details will include a dizzying array of transactions that will recall not only the housing crisis, but the Enron scandal of the early 2000s. Remember all those subsidiaries Enron created (many of them infamously named after Star Wars characters) to keep risky bets off the energy firm’s financial statements? The big banks use similar structures, called “variable interest entities”—companies established largely to hold off-the-books positions. Wells Fargo has more than $1 trillion of VIE assets, about which we currently know very little, because reporting requirements are opaque. But one popular investment held in VIEs is securities backed by commercial mortgages, such as loans to shopping malls and office parks—two categories of borrowers experiencing severe strain as a result of the pandemic.

The early losses from CLOs will not on their own erase the capital reserves required by Dodd-Frank. And some of the most irresponsible gambles from the last crisis—the speculative derivatives and credit-default swaps you may remember reading about in 2008—are less common today, experts told me. But the losses from CLOs, combined with losses from other troubled assets like those commercial-mortgage-backed securities, will lead to serious deficiencies in capital. Meanwhile, the same economic forces buffeting CLOs will hit other parts of the banks’ balance sheets hard; as the recession drags on, their traditional sources of revenue will also dry up. For some, the erosion of capital could approach the levels Lehman Brothers and Citigroup suffered in 2008. Banks with insufficient cash reserves will be forced to sell assets into a dour market, and the proceeds will be dismal. The prices of leveraged loans, and by extension CLOs, will spiral downward.

You can perhaps guess much of the rest: At some point, rumors will circulate that one major bank is near collapse. Overnight lending, which keeps the American economy running, will seize up. The Federal Reserve will try to arrange a bank bailout. All of that happened last time, too.

But this time, the bailout proposal will likely face stiffer opposition, from both parties. Since 2008, populists on the left and the right in American politics have grown suspicious of handouts to the big banks. Already irate that banks were inadequately punished for their malfeasance leading up to the last crash, critics will be outraged to learn that they so egregiously flouted the spirit of the post-2008 reforms. Some members of Congress will question whether the Federal Reserve has the authority to buy risky investments to prop up the financial sector, as it did in 2008. (Dodd-Frank limited the Fed’s ability to target specific companies, and precluded loans to failing or insolvent institutions.) Government officials will hold frantic meetings, but to no avail. The faltering bank will fail, with others lined up behind it.

And then, sometime in the next year, we will all stare into the financial abyss. At that point, we will be well beyond the scope of the previous recession, and we will have either exhausted the remedies that spared the system last time or found that they won’t work this time around. What then?

Until recently, at least, the U.S. was rightly focused on finding ways to emerge from the coronavirus pandemic that prioritize the health of American citizens. And economic health cannot be restored until people feel safe going about their daily business. But health risks and economic risks must be considered together. In calculating the risks of reopening the economy, we must understand the true costs of remaining closed. At some point, they will become more than the country can bear.

The financial sector isn’t like other sectors. If it fails, fundamental aspects of modern life could fail with it. We could lose the ability to get loans to buy a house or a car, or to pay for college. Without reliable credit, many Americans might struggle to pay for their daily needs. This is why, in 2008, then–Treasury Secretary Henry Paulson went so far as to get down on one knee to beg Nancy Pelosi for her help sparing the system. He understood the alternative.

#### Quick 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.

### 3

Next, abortion access CP

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

-provide free access to reproductive, maternal, and family planning healthcare and associated treatments, at least including access to abortion treatments. Funding for these treatments should be allocated on an equitable basis, directing funds to those who currently lack requisite resources.

-mandate healthcare workers to participate in comprehensive training programs addressing biases about reproductive healthcare

-repeal the Hyde amendment

-declare that abortion constitutes interstate commerce

-in the case of Dobbs v. Jackson Women's Health Organization establish a constitutional right to abortion

-establish that religious freedom cannot supersede the right to access abortion

#### Free coverage solves the case far better than the aff – they do nothing to address economic and structural inequities that block access to care

Dennis, 14

Amanda—DrPH, MBE, Ruth Manski—BA, Kelly Blanchard—MsC, "Does Medicaid Coverage Matter? A Qualitative Multi- State Study of Abortion Affordability for Low- income Women,"  [Journal of Health Care for the Poor and Underserved](https://search.proquest.com/pubidlinkhandler/sng/pubtitle/Journal+of+Health+Care+for+the+Poor+and+Underserved/$N/30234/DocView/1630024810/fulltext/816B1A3DE22C4EFBPQ/1?accountid=11091); Baltimore[Vol. 25, Iss. 4,](https://search.proquest.com/indexingvolumeissuelinkhandler/30234/Journal+of+Health+Care+for+the+Poor+and+Underserved/02014Y11Y01$23Nov+2014$3b++Vol.+25+$284$29/25/4?accountid=11091) (Nov 2014): 1571-85.

Discussion

Our findings suggest that policies regarding Medicaid coverage of abortion affect the lives of women and their families in numerous ways. Restrictive coverage policies appear to **force women** **to take measures to raise money for an abortion** that may put their health and wellbeing at risk, **promote short and longer-term financial instability**, **and** **increase the difficulty of implementing an abortion decision**, thereby interfering with women's reproductive life plans. **Restrictive Medicaid coverage policies** also appear to have ripple effects **on children, partners, and parents of wo men seeking abortion services**.

Full coverage of abortion in the Medicaid program eliminates most of the above challenges. When coverage is available, there is little to no need for women or others in their lives to make financial sacrifices, and there is rarely a scramble for money that provokes feelings of indignity or delays abortion care. However, gaps in access to affordable abortion care were present in states where Medicaid coverage was avail- able. **Women unable to enroll in Medicaid in a timely manner were forced to pay out- of-pocket for care.** Presumptive eligibility for Medicaid for pregnant women **helped resolve this access barrier**. Additionally, some women did not use their Medicaid due to privacy concerns. State-level insurance statutes and regulations could help mediate the barrier to confidential care.17

Other important themes emerged from states where coverage of abortion was available. First, women reported that staff at abortion facilities directed them to enroll in Medicaid. This suggests that **these staff and facilities are an underutilized resource** for helping pregnant women enroll in public or subsidized insurance programs. **Staff members' roles as facilitators** in the enrollment process may become even more criti- cal under the Affordable Care Act (ACA), when millions of women of reproductive age become eligible for insurance.18 This finding has practice implications for abortion facilities as under the ACA it will be paramount that front-line staff be well educated about new insurance coverage policies regarding abortion. We speculate that providing this information may be challenging under the ACA as more women are insured and more insurers emerge in the marketplace. This speculation is supported by research conducted in Massachusetts where after state-level reform health care providers reported limited knowledge about the specifics of abortion coverage in the then new health care landscape.19

Next, women in Massachusetts, New York, and Oregon reported **comfort talk- ing with their primary health care providers** about their abortion care needs. This suggests that in states where Medicaid coverage of abortion is available discussions about abortion **are not isolated to the abortion provision setting**. It also suggests that there are a range of health care providers in these states **providing pregnancy options counseling**, **offering information about costs and coverage**, **and directing women to abortion clinics**. The referrals seen in this study in Medicaid coverage states-where staff at abortion facilities refer women to Medicaid and where primary care providers refer women to abortion providers-indicate a health system responding to women's comprehensive health needs.

Our results are consistent with prior research illuminating the harmful effects **on women when Medicaid coverage of abortion is restricted**.10-11 There is no identifiable research highlighting the benefits of providing Medicaid coverage of abortion to women, though prior research has shown that the existence of state-level Medicaid coverage of abortion does not always lead to access to coverage because of delays enrolling in Medicaid.14

#### Repealing Hyde is necessary to solve the aff – it’s the only way of guaranteeing financial access to abortion for low income women

NWLC, 17

"THE HYDE AMENDMENT CREATES AN UNACCEPTABLE BARRIER TO WOMEN GETTING ABORTIONS," National Women's Law Center, Fact Sheet, April 2017

POLITICIANS ENACTED THE HYDE AMENDMENT TO KEEP WOMEN FROM GETTING ABORTIONS In 1973, Roe v. Wade legalized abortion for all women. Women in the Medicaid program – the joint federal-state program that provides low-income individuals with basic healthcare services – were able to access abortions just like other health care services. Just three years after Roe, however, Congress passed a prohibition on covering abortion in Medicaid. The prohibition – known as the Hyde Amendment – became effective in 1977 and has been reauthorized every year by Congress as part of budget appropriations for the Department of Health and Human Services.1 The Hyde Amendment treats abortion differently than other services in the Medicaid program, and limits coverage of abortion to limited circumstances.

**The Hyde Amendment was created to make it impossible for women to get abortions**. Representative Henry Hyde, the amendment’s main proponent, stated very clearly that this was the goal: “I would certainly like to prevent, if I could legally, anybody having an abortion: a rich woman, a middle class woman, or a poor woman. Unfortunately, the only vehicle available is the… Medicaid bill.”2 It is wrong for politicians to withhold insurance coverage just because they do not want women getting abortions.

THE HYDE AMENDMENT WITHHOLDS EXISTING RESOURCES FROM QUALIFIED WOMEN Although the language of the Hyde Amendment has changed over the years, it currently prohibits federal Medicaid coverage of abortion unless the pregnancy is the result of rape or incest or the woman’s life is in danger.3 Although states can go beyond the Hyde Amendment, and cover medically necessary abortions for qualified women with their own state funds, only 17 states do so.4 **This means that the vast majority of low-income women in the U.S. who receive coverage of their health care needs through Medicaid** are denied coverage of abortion.

THE HYDE AMENDMENT ENDANGERS WOMEN’S HEALTH **The Hyde Amendment does not cover abortion when** a woman’s health is in jeopardy. In Florida, for example, Medicaid refused to cover the abortion of a woman with cancer who needed chemotherapy but could not receive treatment because she was pregnant. **Although delaying chemotherapy would likely cause her death**, death was not considered “imminent,” so her case did not fit within the narrow life exception.5

**THE HYDE AMENDMENT CREATES ECONOMIC BARRIERS** **AND HEALTH CONCERNS** FOR LOW-INCOME WOMEN Low-income women denied abortion coverage under the Hyde Amendment **may have to postpone paying for other basic needs like food, rent, heating, and utilities** in order to save the money needed for an abortion. Moreover, because of the high cost of the procedure, **low-income women are** often **forced to delay obtaining an abortion** **because they need time to raise the money**. In one study, more than one-third of women that had an abortion in the second trimester stated that they would have preferred to have the procedure earlier but could not because they needed to raise money.6 **The greater the delay in obtaining an abortion**, the more expensive and less safe the procedure becomes, catching poor women in a vicious cycle. In a 2011 study, women paid an average of $397 for a first trimester abortion but $854 for a second trimester abortion.7

Women who cannot pay for an abortion may resort to ending her pregnancy in unsafe and ineffective ways, including receiving care from untrained, unlicensed practitioners.8 Rosie Jimenez, a Latina college student who was unable to pay for a legal abortion, became the first woman to die from a back alley abortion after the passage of the Hyde Amendment.9 Providing insurance coverage ensures that she will be able to see a licensed, quality health provider. **Other women may be forced to carry an unwanted pregnancy to term, which could harm their future well-being**. For example, one study showed that one year after attempting to obtain an abortion, women denied an abortion were more likely to live below the federal poverty level **and** receive public assistance than those who received an abortion.10 Being forced to forego an abortion could push more women and their families closer to poverty and others deeper into the poverty they endure.

THE HYDE AMENDMENT PARTICULARLY BURDENS WOMEN OF COLOR Restrictions on Medicaid coverage of abortion disproportionately affect women of color. In 2012, 20 percent of Medicaid enrollees were African-American, 29 percent were Hispanic, and 9 percent were Asian-American, Native Hawaiian, Pacific Islander, American Indian, Aleutian or Eskimo.11 African-American and Latina women are more likely than White women to rely on Medicaid for coverage of family planning services, and they are also more likely than White women to face financial barriers when seeking abortions.12 Furthermore, women of color are more likely to experience unintended pregnancy, due to racial, ethnic, gender, and economic healthcare inequalities.13

RESTRICTIONS ON ABORTION EXTEND TO OTHER WOMEN RECEIVING COVERAGE THROUGH THE FEDERAL GOVERNMENT Congress has similarly restricted abortion coverage for other women who rely on the federal government for insurance coverage. **These restrictions reach more than** 20 million women, such as those women serving in the U.S. military and Peace Corps, residents of the District of Columbia, women in federal prisons, women covered by the Indian Health Service, and teens from low-income families under the age of 19 who rely on the State Children’s Health Insurance Program (S-CHIP).14

### 4

Next is the public enforcement CP

#### Text: The United States federal government should allow relevant agencies to sue to enjoin practices that restrict access to abortion and recover single damages.

#### Counterplan 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 – private litigants will set terrible precedent that hamstrings public enforcement – turns case

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.

### 5

Next is the Judicial economics DA

#### The plan and perm are rooted in a new antitrust “theory of harm” bereft of “limiting principles”. That spills over because it “provides cover” for massive “doctrinal distortion”—But the counterplans avoid it.

--\*Italics in original

Ohlhausen 15 – Commissioner, FTC

Maureen K. Ohlhausen, Federal Trade Commission, and Alexander P. Okuliar, Attorney Advisor to Commissioner Ohlhausen, COMPETITION, CONSUMER PROTECTION, AND THE RIGHT [APPROACH] TO PRIVACY, 80 *Antitrust Law Journal* No. 1 (2015), <https://www.ftc.gov/system/files/documents/public_statements/686541/ohlhausenokuliaralj.pdf>

B. CHOOSING THE RIGHT APPROACH Rather than expanding antitrust law as some have proposed, we instead recommend applying three screens to discern the best body of law to handle a potential privacy issue. First, we suggest that the type of harm should continue to guide the choice of law, as set out by Congress and developed by the agencies and courts for decades. That is, the application of competition law is appropriate only where the potential harm is grounded in the actual or potential diminution of economic efficiency. If there is likely no efficiency loss because of the conduct or transaction, another legal avenue for enforcement is more appropriate and efficient. Second, the scope of the potential harm also should aid in the choice of law. Antitrust laws are focused on broader macroeconomic harms, mainly the maintenance of efficient price discovery in the markets, whereas the consumer protection laws are preoccupied with ensuring the integrity of each specific contractual bargain. These are complementary, but discrete, enforcement goals. Third, and finally, the available remedies must be able to address effectively the potential harm. Enjoining a merger may do little to prevent a privacy violation if the parties can simply share the same consumer information under a contractual arrangement. 1. Focus on the Type of Harm John Locke noted, “The great and chief end [ ] of . . . government, is the preservation of [citizens’] property,” which includes their “lives, liberties, and estates.”146 As we have shown, the government has over time pursued specific laws narrowly tailored to address particular harms. This trend to more nuanced and sophisticated legal mechanisms has allowed for deepened expertise and greater analytical precision in both competition and consumer protection. Splicing them together again, and using the modern antitrust laws, which are empirically focused on economic efficiency, to remedy harms relating to normative concerns about informational privacy contradicts the specialized nature of these laws and risks distorting them in ways that would leave both the law and consumers worse off. The better approach would be to continue the measured improvement of precise legal tools directed to specific harms. A blended approach to antitrust that encompasses normative privacy concerns also would provide cover for the injection of other noncompetition factors into the analysis. As a normative matter, privacy is conceptually unsettled and, depending on who you ask, could include other rights, like property rights or human dignity.147 The introduction of these factors could shift antitrust law’s focus away from efficiency and alter its relatively predictable and transparent application. Arguments in response to this concern about doctrinal distortion posit that, for example, the merged entity will have an increased incentive to break privacy promises it made to consumers when it collected the information, making the issue cognizable under the antitrust laws.148 [Footnote 148] 148 While the Clayton Act allows for the pursuit of certain prospective violations of the law, the issues that it confronts, for example supracompetitive pricing resulting from an undue concentration of suppliers, are fundamentally different than what the consumer protection laws contemplate. Whereas the Clayton Act is quantitative and agnostic in its characterization of a merger as a violation of law, the consumer protection standards are qualitative, requiring that an “act or practice” be either deceptive or both unfair and cause substantial harm to the consumer. [End FN] Or that the aggregation of consumer data represents a reduction in quality, diminution in consumer choice, or a heightened barrier to entry.149 Although these concerns could be relevant where privacy is an actual dimension of competition, a substantial body of literature challenges application of these arguments more broadly by pointing out the lack of limiting principles for theories of harm tethered to reductions of choice and the heterogeneous consumer demand for privacy.150 But, for our purposes, perhaps the most important point is that attempting to distort the antitrust laws to pursue subjective noncompetition harms is *unnecessary* and would take us back to a less sophisticated approach to law enforcement.

#### That obliterates the U.S. economy and innovation—The key is what theories of competitive harm are legally cognizable

COC 21 – U.S. Chamber of Commerce

The Role & Responsibility of Antitrust: What antitrust is and what it is not, September 20, 2021, https://www.uschamber.com/regulations/the-role-responsibility-of-antitrust

The economic success of the United States is built on the fact that the market, not the government, maximizes economic efficiency for the benefit of consumers.

Antitrust therefore relies on competitive forces to police the market, and avoids picking winners and losers, and only acts to ensure competitive conditions. It is not a form of regulation designed to deliver a particular outcome in the market.

Antitrust IS NOT a tool for political change

Concerns over jobs, speech, income inequality, corporate political power, and other social interests, are political conversations, not antitrust matters. Antitrust does not play a role, nor do we really want antitrust playing a role.

Antitrust can protect competitive markets, but it is not designed to address the concerns above. Instead, we should look to legislatures to pass separate laws that specifically address these concerns.

Antitrust IS about protecting competition and consumers

Consumers are the sole concern of antitrust. Consumers win when there is robust competition in the market. When alleged anti-competitive activity is linked to price going up, or output going down without any counter weighting pro-competitive benefit the economics are very straight forward.

Antitrust analysis is also well suited to evaluating other forms of non-price competition such as quality, innovation, or consumer choice. Though some have claimed that antitrust is too focused on price and output, a long history of antitrust enforcement involving various forms of non-price competition shows otherwise.

Antitrust IS NOT about fairness or competitors

“Fairness” is not a legal standard. What is fair can often be highly subjective. The role of economic analysis and the consumer welfare standard in antitrust are central to making enforcement decision as objective as possible. For this reason competitor’s complaints of “unfairness” are met with skepticism by antitrust enforcers for good reason.

Inefficient competitors often attempt to seek protection from a more efficient competitor rather than competing on the merits. Where competitor complaints are turned away by enforcers, those competitors have often sought a political audience or friendlier foreign jurisdictions that conflate these complaints with market failure or seek to use antitrust enforcement as a tool for industrial policy.

Antitrust IS highly technical

Antitrust cannot be divorced from sound economic analysis. Economics is a highly technical trade that is not easily suited to the amateur enthusiast. Theories of competitive harm rise and fall on supporting economic analysis, which requires careful analysis of the market, reams of discovery, and a careful type of cost-benefit analysis, commonly known as the rule of reason.

Just because one can point to an anti-competitive harm, doesn’t mean there are not pro-competitive justifications that outweigh that harm. Economic analysis weighs these factors and only where the harms clearly outweighs the benefits does an enforcer feel the need to act.

Antitrust IS NOT political

Antitrust is not well-suited for armchair quarterbacking, rooting for the underdog, or speaking in 30 second sound bites. It is a form of law enforcement and should be conducted in a highly professional manner with due process.

Sadly, efforts to politicize antitrust efforts are all too common in foreign jurisdictions. The U.S. has had a long and proud history of largely steering clear from efforts to politicize enforcement. This tradition is well worth keeping.

Antitrust IS highly fact-specific and evidence driven (rule of reason)

Some antitrust cases can be close calls, economic analysis might not always produce a clear answer, and judgements will need to be made. This is why we have courts. Just because some cases one may or may not agree with, one should not abandon the role of economics or circumvent the rule of reason.

Antitrust does not punish those that build a successful business – even a monopoly – through competition on the merits.

#### U.S. failure to grow risks great power war

Brands 21 – Professor of Global Affairs, JHU SAIS

Hal Brands, Henry Kissinger distinguished professor of global affairs at Johns Hopkins University’s School of Advanced International Studies and a resident scholar at the American Enterprise Institute, and Michael Beckley is an associate professor of political science at Tufts University and a Jeane Kirkpatrick visiting scholar at the American Enterprise Institute, China Is a Declining Power—and That’s the Problem: The United States needs to prepare for a major war, not because its rival is rising but because of the opposite., 24 September 2021, *Foreign Policy*, https://foreignpolicy.com/2021/09/24/china-great-power-united-states/

Over the past 150 years, peaking powers—great powers that had been growing dramatically faster than the world average and then suffered a severe, prolonged slowdown—usually don’t fade away quietly. Rather, they become brash and aggressive. They suppress dissent at home and try to regain economic momentum by creating exclusive spheres of influence abroad. They pour money into their militaries and use force to expand their influence. This behavior commonly provokes great-power tensions. In some cases, it touches disastrous wars.

This shouldn’t be surprising. Eras of rapid growth supercharge a country’s ambitions, raise its people’s expectations, and make its rivals nervous. During a sustained economic boom, businesses enjoy rising profits and citizens get used to living large. The country becomes a bigger player on the global stage. Then stagnation strikes.

Slowing growth makes it harder for leaders to keep the public happy. Economic underperformance weakens the country against its rivals. Fearing upheaval, leaders crack down on dissent. They maneuver desperately to keep geopolitical enemies at bay. Expansion seems like a solution—a way of grabbing economic resources and markets, making nationalism a crutch for a wounded regime, and beating back foreign threats.

Many countries have followed this path. When the United States’ long post-Civil War economic surge ended, Washington violently suppressed strikes and unrest at home, built a powerful blue-water Navy, and engaged in a fit of belligerence and imperial expansion during the 1890s. After a fast-rising imperial Russia fell into a deep slump at the turn of the 20th century, the tsarist government cracked down hard while also enlarging its military, seeking colonial gains in East Asia and sending around 170,000 soldiers to occupy Manchuria. These moves backfired spectacularly: They antagonized Japan, which beat Russia in the first great-power war of the 20th century.

A century later, Russia became aggressive under similar circumstances. Facing a severe, post-2008 economic slowdown, Russian President Vladimir Putin invaded two neighboring countries, sought to create a new Eurasian economic bloc, staked Moscow’s claim to a resource-rich Arctic, and steered Russia deeper into dictatorship. Even democratic France engaged in anxious aggrandizement after the end of its postwar economic expansion in the 1970s. It tried to rebuild its old sphere of influence in Africa, deploying 14,000 troops to its former colonies and undertaking a dozen military interventions over the next two decades.

All of these cases were complicated, yet the pattern is clear. If a rapid rise gives countries the means to act boldly, the fear of decline serves up a powerful motive for rasher, more urgent expansion. The same thing often happens when fast-rising powers cause their own containment by a hostile coalition. In fact, some of history’s most gruesome wars have come when revisionist powers concluded their path to glory was about to be blocked.

### 6

Next is states

#### Text: The fifty states and all relevant United States territories should augment core antitrust legislation by requiring:

#### Proposed private health care provider consolidations must clearly, with verifiable data, identify abortion services lost as a result.

#### Per se illegality should serve as the operating test for any proposal which would restrict or interfere with the ability to receive abortion regardless of state action immunity claims.

#### 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.

### 7

Next is M&A

#### There’s a wave of M&A now – companies doubt rule changes will affect them now

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.

**The aff signals a new era with a substantive shift in antitrust application---that chills biopharma mergers and decks efficient pharmaceutical innovation**

**Abbott 2/21** – senior research fellow with the Mercatus Center at George Mason University and a law and economics research fellow with the Scalia Law School. He formerly served as the Federal Trade Commission’s general counsel

Alden Abbott, "The FTC Should Keep Its Hands Off Innovative Biopharma Mergers," National Review, 2-21-2022, https://www.nationalreview.com/2022/02/the-ftc-should-keep-its-hands-off-innovative-biopharma-mergers/

Our nation’s biopharmaceutical companies are a great American success story. They are the world leaders in discovering the drugs and vaccines that are generating the cures and treatments for diseases that plague humanity. Strong U.S. government protection for patents and less-intrusive regulation than is found overseas have sparked the massive volume of R&D that has brought forth this bounty. What’s more, the biopharma sector is responsible for more than 4 million good American jobs and contributes over $1.1 trillion annually to the U.S. economy.

The “warp speed” development in 2020 of Covid-19 vaccines and the imminent release of effective Covid antiviral drugs are just two of the many path-finding achievements by American biopharma firms. But a government crackdown on biopharma mergers led by the Federal Trade Commission (FTC) could undermine future accomplishments, harming the American economy and American (and foreign) patients alike.

Biopharma Merger Review in a Nutshell

While the FTC and the Department of Justice share authority over antitrust enforcement, the FTC is primarily responsible for overseeing pharma-industry business practices, including mergers. It reviews all biopharma merger proposals with an eye on preventing acquisitions that would substantially reduce competition among drugmakers.

Biopharma mergers are particularly good at facilitating new-product introductions that advance medical science. They do this in two ways:

First, they allow for the scaling up of remedies that are developed by small biotechnology and research firms. Small entities that specialize in the initial R&D that yields innovative cures cannot scale up efficiently. Larger acquiring firms have the capabilities to undertake the trials, regulatory work, and marketing that speed up the release and broad dissemination of innovative drugs.

Second, they create synergies. Proprietary data and intellectual property brought together by a merger give the new entity access to greater pools of technically important information, laying the groundwork for innovations without spending increases. This new information resource may improve the quality of product-related research, thereby raising the probability of new-product breakthroughs without increasing risk.

Until very recently, the FTC invoked general merger guidelines applicable to all industries (jointly issued with DOJ) in assessing biopharma consolidations. Reviews of Biopharma mergers proceeded in a manner that was well understood by the private sector. But recent FTC policy changes may threaten these socially desirable mergers.

The FTC Is Jettisoning Sound Merger Policy

Last March, the FTC set up an interagency working group (including the DOJ and foreign and state antitrust agencies) to “build a new approach” to biopharma mergers. The FTC’s press release stressed an interest in “going beyond” traditional merger analysis and exploring “new or expanded theories of [merger-related] harm.” And a recent FTC challenge to a vertical merger shows that the risks these changes pose to good biopharma acquisitions are real, not just theoretical.

Illumina is a leader in “next generation sequencing” (NGS) platforms used to support genetic-testing programs that it and other companies develop. In 2015, it established and then later spun off Grail, a small firm dedicated to developing a blood test for the very early detection of cancer. The spinoff helped Grail attract capital and great management, a key to its successful creation of a unique “liquid biopsy” test that detects up to 50 cancers before symptoms appear.

In September 2020, Illumina sought to reacquire Grail. This would allow rapid scaling up and distribution of the new test and cost reductions in marketing it. These undoubted efficiencies echo the benefits of biopharma mergers that involve the acquisition of small R&D-specialist firms.

But in March 2021, the FTC sued to block the merger, claiming a theoretical threat to competition in some future market for “multi-cancer early detection tests.” Such purely speculative concern about a market that does not yet even exist is at odds with accepted antitrust norms, which focus on likely harm in actual markets. It also gives short shrift to the clear benefits of the transaction.

A former FTC chair and chief economist together condemned this lawsuit. They explained that “it would be tragic if the FTC’s misapplication of the appropriate standards for evaluating a vertical merger were to delay the American people[’s] access to such an important lifesaving breakthrough in cancer treatment for the benefit of a hypothetical future competition.” Their words serve as a dire warning applicable to future biopharma mergers.

Conclusion

Uncertainty generated by the FTC’s new threat to beneficial mergers threatens to reduce U.S. biopharma R&D, slowing the creation of breakthrough drugs and vaccines. This will undermine American leadership in producing the cures of the future, which is vital to our nation and to millions of people around the world.

The solution is simple. The FTC should back off its recent threats against innovative biopharma mergers by publicly and explicitly restoring pre-2021 merger policies. If it does not, Congress should consider stepping in.

**Continued pharmaceutical innovation is key to survival---COVID was only the first warning shot**

EID = Emerging Infectious Disease

**Excler et al. 21** – Jean-Louis Excler, International Vaccine Institute, Seoul, Republic of Korea; Melanie Saville, Coalition for Epidemic Preparedness Innovations (CEPI), London, UK; Seth Berkley, Gavi, the Vaccine Alliance, Geneva, Switzerland; Jerome H. Kim, International Vaccine Institute, Seoul, Republic of Korea

Jean-Louis Excler, Melanie Saville, Seth Berkley, and Jerome H. Kim, "Vaccine development for emerging infectious diseases," Nat Med 27, 591–600, 4-12-2021, <https://www.nature.com/articles/s41591-021-01301-0>

**Newly emerging** and **reemerging infectious viral diseases** have **threatened humanity** throughout history. Several **interlaced** and **synergistic factors** including **demographic trends** and high-density **urbanization**, modernization favoring **high mobility** of people by all modes of transportation, **large gatherings**, altered human behaviors, **environmental changes** with modification of ecosystems and **inadequate global public health** mechanisms have **accelerated** both the **emergence** **and** **spread of animal viruses** as **existential human threats**. In 1918, at the time of the ‘Spanish flu’, the world population was estimated at 1.8 billion. It is projected to reach 9.9 billion by 2050, an increase of more than 25% from the current 2020 population of 7.8 billion (https://www.worldometers.info). The novel severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) responsible for the coronavirus disease 2019 (COVID-19) pandemic1,2,3 engulfed the entire world in less than 6 months, with high mortality in the elderly and those with associated comorbidities. The pandemic has severely disrupted the world economy. Short of lockdowns, the only means of control have been limited to series of mitigation measures such as self-distancing, wearing masks, travel restrictions and avoiding gatherings, all imperfect and constraining. Now with more than 100 million people infected and more than 2 million deaths, it seems that the addition of **vaccine(s)** to existing countermeasures **holds the best hope** for pandemic control. Taken together, these reasons compel researchers and policymakers to be vigilant, reexamine the approach to surveillance and management of **emerging infectious disease threats**, and revisit global mechanisms for the control of pandemic disease4,5.

Emerging and reemerging infectious diseases

The appearance of new infectious diseases has been recognized for millennia, well before the discovery of causative infectious agents. Despite advances in development of countermeasures (diagnostics, therapeutics and vaccines), **world travel** and **increased global interdependence** have added **layers of complexity** to containing these infectious diseases. **Emerging infectious diseases** (EIDs) **are threats to human health and global stability6**,7. A review of emerging pandemic diseases throughout history offers a perspective on the emergence and characteristics of coronavirus epidemics, with emphasis on the SARS-CoV-2 pandemic8,9. As human societies grow in **size and complexity**, an **endless variety of opportunities** **is created** **for infectious agents to emerge** into the unfilled ecologic niches we continue to create. To illustrate this constant vulnerability of populations to emerging and reemerging pathogens and their respective risks to rapidly evolve into devastating outbreaks and pandemics, a partial list of emerging viral infectious diseases that occurred between 1900 and 2020 is shown in Table 1.

### 8

Next is ptx

#### Negotiated China competitiveness bill with massive semiconductor investment will pass, but it’s a delicate balancing act to maintain bipartisan support – swift action and being perceived as tough on China is key to the coalition

Meyer 3/23/2022 – national political reporter for The Washington Post and a co-author of the Early 202 newsletter

Theoderic, Jacqueline Alemany is the author of The Early 202, “Time is running out for a deal on the China competitiveness bill” Washington Post, <https://www.washingtonpost.com/politics/2022/03/23/time-is-running-out-deal-china-competitiveness-bill/>

Congress has tied itself into a Gordian knot over one of President Biden’s top legislative priorities: a bill to bolster American semiconductor manufacturing and help the country compete economically with China.

It's Commerce Secretary Gina Raimondo’s job to help cut it — but time is running out.

Raimondo is working to help lawmakers reach an agreement, which would give Democrats another achievement in the midterms. She told reporters in January that Congress “can’t wait until April, May” to pass the bill — a timeline that is now impossible to meet.

In an interview, Raimondo told The Early she thought the bill could be done by Memorial Day — maybe sooner.

“There’s no deadline, per se,” Raimondo said. “We just have stay focused on it and do the work — sit at the table and do the work to reconcile the differences.”

“I'm going to work on this and talk to members of Congress every single day until it does pass,” she added.

While the bill is a top priority for the White House, Senate Majority Leader Chuck Schumer (D-N.Y.) and House Speaker Nancy Pelosi (D-Calif.) to help improve Democrats' standing ahead of the midterms, the negotiations also serve as a political opportunity for Raimondo. The former Rhode Island governor could burnish her reputation as a leading moderate in the party by showing she can help negotiate a deal with Republicans at a time when bitter partisanship reigns.

“One of the most impressive things about Secretary Raimondo is that she is as comfortable, willing and happy to call a progressive member from California as a Republican senator from a deep-red state,” said Scott Mulhauser, who worked as a senior adviser to Raimondo for several months last year before returning to his consulting firm.

Some Republicans have praised Raimondo's work trying to hash out a compromise.

“Amongst many of the Senate Republican staff that I’ve spoken with on this matter, she has been very helpful,” said Ari Zimmerman, a Republican lobbyist at Brownstein Hyatt Farber Schreck who's lobbied on the bill. “She understands the problem in and out.”

But it's still unclear whether a deal will actually come together.

A tough deal

Congress has been laboring to pass the bill for most of Biden's presidency. The Senate cleared its version in June with 19 Republican voters; the House passed its own bill last month with the support of only a single Republican, Rep. Adam Kinzinger (Ill.).

The challenge facing Raimondo and Democratic congressional leaders now is how to strike a deal that keeps at least 10 Senate Republicans on board and still wins the support of wary House Democrats. That task grows harder each day as the midterms approach and Republicans lose any incentive to make compromises that would allow for passage of a bill Democrats could tout ahead of November's elections.

Raimondo insists there is a deal to be had and argued that there’s already bipartisan agreement on “the bones of the bill” — a $52 billion program to combat a global shortage of computer chips by subsidizing manufacturing in the United States.

But lawmakers are at odds over provisions that fall “outside of the core innovation package,” as she put it, such as climate change, financial services and human trafficking. The biggest gap between the two bills is on trade, according to Raimondo as well as several lobbyists tracking the legislation.

“That’s really where the two sides are the farthest apart,” said Brian Pomper, a Democratic lobbyist at Akin Gump Strauss Hauer & Feld who has lobbied on the bill. “And, I mean, they are universes apart.”

Republicans and Democrats are preparing to hash out the differences between the two bills in a conference committee. If negotiations falter, though, Pomper said lawmakers might push to scrap the trade provisions and pass a more limited bill.

“If you really get jammed up on the trade title, I think you’re going to see some members starting to say, ‘Well, why don’t we just ditch the trade title? And let’s do the rest of this bill, which is going to be a lot easier to figure out,” he said.

Not giving up without a fight

But stripping out the trade provisions could alienate Senate Republicans whose votes Democrats need to overcome a filibuster.

The trade language in the Senate bill “was the linchpin that was needed” to pass it last year, said Clete Willems, a former trade negotiator in Donald Trump’s White House who is now a lobbyist tracking the bill. “So I think it’s going to be ultimately included.”

House Democrats who spent months pushing to pass their version of the bill, meanwhile, aren't likely to give up without a fight.

“The things that we're proposing are good for American manufacturing,” said Rep. Earl Blumenauer (D-Ore.), who backed the trade provisions in the House bill. “They're good for the American consumer. Many of my Republican friends are violently opposed to giving special concessions to China. I wouldn't think this would be a heavy lift.”

The China bill, Blumenauer added, is likely the only chance to pass these trade measures before the midterms.

“This is one of the few trains leaving the station,” he said.

#### Plan is perceived as soft on China – sparks backlash from Republicans and moderate Dems

Mills Rodrigo 2/23/2022 – staff writer at the Hill, former Georgetown debater

KARL EVERS-HILLSTROM AND CHRIS MILLS RODRIGO, “Big Tech allies point to China, Russia threat in push to squash antitrust bill” The Hill, 2/23/2022, <https://thehill.com/policy/technology/595414-big-tech-allies-point-to-china-russia-threat-in-push-to-squash-antitrust/>

Big Tech’s numerous allies in Washington are repeating a similar message as they lobby lawmakers to abandon antitrust legislation: The U.S. needs tech giants at full strength to counter China, Russia and other threats to national security.

The last-ditch effort comes as the Senate gears up to consider the American Innovation and Choice Online Act, a bipartisan bill that would prevent dominant digital platforms from favoring their own services and empower antitrust enforcers to scrutinize the largest tech firms.

Despite making it out of the Senate Judiciary Committee by a bipartisan 16-6 vote, the legislation targeting America’s largest tech companies faces an uphill battle.

Many lawmakers who gave the legislation a thumbs-up on the panel cautioned that they would be unlikely to vote “yes” on the floor unless major changes are made.

A handful of those lawmakers specifically expressed concern that stopping tech giants from self-preferencing could unintentionally advantage America’s adversaries.

Russian aggression in Ukraine has only reinforced those industry talking points among lawmakers who are fearful of impending cyber conflicts with Russia and China, according to tech allies.

“When you’re talking about a geopolitical conflict, all of a sudden the terms of the debate change, both for the Democrats and the Republicans. There’s an ongoing shift as people grapple with the magnitude of the global tensions,” said Michael Mandel, chief economist at the Amazon- and Meta-backed Progressive Policy Institute, which opposes the antitrust bill. “You don’t want to be in a position of disassembling your strongest tech companies at the same time you’re fighting a tech war.”

The argument that antitrust enforcement weakens national security is by no means new. AT&T deployed a similar defense of its power in the 1980s.

But tech giants’ hawkish stance on China is a more recent development. Industry lobbyists and tech-backed advocacy groups on both the right and left have inundated lawmakers with calls, emails, op-eds and political ads warning that the antitrust proposal will give Beijing the upper hand in the technological arms race.

The shift from portraying themselves as national champions to a hedge against the Chinese Communist Party has come despite many major tech companies’ big presence in China.

Apple has shifted much of its production to China over the last decade and has established itself as a domestic seller. Meta’s Mark Zuckerberg courted China for years before decrying the Chinese internet model. Google was working to build a censored search engine that could operate in China as recently as 2017. Amazon was chastised by lawmakers last year over a contract with a Chinese company that claimed it could track Uyghurs in real time.

But their current argument began shortly after the House Judiciary Committee published its wide-ranging report on digital marketplace competition and posits that weakening American tech companies would cut into U.S. technology leadership.

The U.S. Chamber of Commerce, which seats Meta and Microsoft executives on its board, argued in a report published last week that legislative proposals under consideration would require affected companies to compete against Chinese government-backed companies such as Huawei and TikTok’s parent company ByteDance “with one hand tied behind their backs.”

The Computer and Communications Industry Association, which represents the big four tech companies, argues that the bill would require U.S. tech giants to share data with foreign competitors and weaken their research and development capabilities while leaving Chinese tech firms untouched.

“Given the current geopolitical environment, now more than ever policymakers need to be aware of the risks of undermining the U.S. competitive advantage in technology products and services,” said Matt Schruers, the tech group’s president.

Most tech giants ramped up their lobbying presence amid the antitrust fight. Amazon and Meta each shelled out more than $20 million on federal lobbying last year, dwarfing the spending of all other companies, according to research group OpenSecrets.

But those figures only scratch the surface of tech giants’ influence.

Meta has disclosed funding more than 100 Washington-centric organizations, including a host of liberal and conservative lobbying groups and influential think tanks such as the American Enterprise Institute and the Brookings Institution.

Amazon backs dozens of groups ranging from nonpartisan groups like the National Security Institute to the liberal Chamber of Progress and the right-wing Taxpayers Protection Alliance, which is running ads warning that the tech bill will “help China win in the end.”

While Apple and Google are less active in backing Washington groups, their CEOs personally met with senators in recent months to lobby against antitrust bills.

“With direct financial ties to the Chinese Communist Party, many Chinese companies present threats to America’s national security,” read a recent ad from the Meta-backed American Edge Project nonprofit. “But some Washington politicians are pushing for new laws that will empower Chinese companies at the expense of America’s tech innovators.”

In September, a dozen former high-ranking national security officials, including former Defense Secretary Leon Panetta and former Director of National Intelligence Dan Coats, penned a letter to lawmakers warning that antitrust proposals would empower China to become the global leader in technological innovation.

The ex-officials echoed industry groups, calling on lawmakers to study the national security impacts of regulating Big Tech before moving forward with the bill. All of those officials sported ties to tech giants in one way or another, Politico reported.

According to two K Street lobbyists with big tech clients, the industry is carrying out a tried-and-true strategy: stalling the bill in an attempt to wait out the clock until the midterm elections, which could usher in a divided and likely dysfunctional government.

Lobbyists noted that the nomination process for Supreme Court Justice Stephen Breyer’s replacement will sap up a chunk of the Senate’s remaining schedule. Resolving the various issues that lawmakers have with the bill will also take time.

Sens. Thom Tillis (R-N.C.) and Ted Cruz (R-Texas) both floated several amendments, although the Texas lawmaker ultimately voted to advance the bill through the committee.

Some Democrats also appeared less than convinced despite reporting the bill favorably. Both members of California’s Senate delegation, Dianne Feinstein (D) and Alex Padilla (D), raised concerns about targeting companies based in their state.

Sen. Chris Coons (D-Del.), a top Biden ally, expressed concerns last month about “potentially unintended consequences on the competitiveness globally of our digital democracy principles on the world stage.”

Proponents of the legislation have pushed back on the national security argument in reports and letters to congressional leadership, countering that monopolies are actually hamstringing innovation more than breaking them up would.

“You have five companies, Google, Facebook, Amazon, Apple and Microsoft, sitting on trillions of dollars of assets and massive amounts of talent,” said Matt Stoller, director of research at the American Economic Liberties Project, contrasting that with the early software industry.

“We are running this monopoly-heavy, top-heavy industrial strategy based on consolidating wealth and power, which doesn’t make any sense because now you only have five companies doing any innovation instead of hundreds or thousands.”

#### Competitiveness bills key to cybersecurity

Montgomery ’22 – Retired Rear Admiral, senior adviser to the Cyberspace Solarium Commission senior fellow at the Foundation for Defense of Democracies, senior director of FDD’s Center on Cyber and Technology Innovation

Evan, “Reconciliation of China bills in Congress could produce big cybersecurity wins” The Hill, March 14, 2022. <https://thehill.com/opinion/cybersecurity/598066-reconciliation-of-china-bills-in-congress-could-produce-big/>

Congress deserves mixed grades for its recent efforts to strengthen the nation’s cybersecurity and improve the resilience of its critical infrastructure. If Republicans and Democrats can find a path forward to integrate the Senate’s U.S. Innovation and Competition Act (USICA) with the House’s America COMPETES Act, Congress could make substantial, long-term investments in America’s technology future.

The two bills would build upon important but insufficient cybersecurity provisions in recent legislation. The Infrastructure Investment and Jobs Act, which President Biden signed into law in November, contained $1 billion to enhance the cybersecurity of state and local governments and established a Response and Recovery Fund for major cyber incidents. Yet that law’s support to specific critical infrastructure sectors was inconsistent and missed some glaring weaknesses, such as those of the water sector.

Similarly, the National Defense Authorization Act (NDAA) for Fiscal Year 2022, which the president signed into law in December, had 40 cybersecurity-specific authorizations. But during conference, Congress dropped some of the most significant provisions, such as mandatory incident reporting.

Now, lawmakers get another bite at the cybersecurity apple as Congress sets up its conference committee to adjudicate USICA (which passed on a bipartisan basis last June) and the COMPETES Act (which passed last week on a nearly partly-line vote).

House and Senate lawmakers have a $52 billion starting point: Both bills contain $52 billion in funding for the CHIPS Act, which establishes a grant program to support domestic semiconductor production. Congress passed the CHIPS Act on a bipartisan basis as part of the FY2021 NDAA.

CHIPS funding is the most headline grabbing (and expensive) single issue in the two bills, but it is by no means the only important cybersecurity and critical infrastructure provision. The USICA and COMPETES bills have similar cybersecurity provisions in three arenas that House and Senate members can easily reconcile and embrace.

First, both bills seek to rectify dramatic shortages in the federal cyber workforce. They invest in STEM education and create rotational cybersecurity positions giving federal employees the flexibility to gain experience and skills. The House bill also expands “CyberCorps: Scholarship for Service,” a critical, ROTC-like program for the federal cybersecurity workforce, from its current $60 million annual budget to $90 million by fiscal year 2026. This will increase both the number of students (future federal employees) and the number of universities and community colleges involved. Such a provision would likely receive bipartisan support in the Senate.

Second, both bills invest in U.S. leadership in international technical standards-setting bodies like the International Telecommunication Union. This arena has become a crucial battlefront in the contest between Western values of a free and open internet and the authoritarian push for ever-greater state control and censorship. Beijing has aggressively sought to gain leadership positions and promote technically flawed proposals in these forums in order to distort and weaponize the bodies against the interests of America and its partners. Both bills thus strive to improve America’s response to Chinese maneuvering.

Third, both bills increase funding for the State Department’s Global Engagement Center, an important agency for battling foreign disinformation campaigns.

Next, the conference members should work to reach agreement in several other areas tackled only in one chamber’s bill.

The House bill, importantly, requires the executive branch to develop a strategy for “information and communication technology critical to the economic competitiveness of the United States.” Such a strategy would ensure that America is not dependent on untrusted vendors beholden to foreign powers or who otherwise have lax security.

Three other provisions of note: the House bill 1) designates “Critical Technology Security Centers to evaluate and test the security of technologies essential to national critical functions,” 2) creates international capacity-building programs to improve the cybersecurity of U.S. allies and partners, and 3) supports the software security and digital privacy work of the National Institute of Standards and Technology.

Meanwhile, the most significant provision unique to the Senate bill creates a National Risk Management Cycle to “identify, assess, and prioritize cyber and physical risks to critical infrastructure.” Understanding these risks is the foundational step to properly resourcing U.S. government efforts to defend against, mitigate, and deter these threats. In its comprehensive March 2020 report on U.S. cyber strategy, the Cyberspace Solarium Commission noted that the U.S. government “lacks a rigorous, codified, and routinely exercised process” for identifying risk. Even where the government has identified critical infrastructure risks, a lack of sustained funding has limited the mitigation and management of the risks over time. A National Risk Management Cycle would begin to rectify this problem.

The Senate version also includes provisions to create regional technology hubs built on partnerships among industry, academia, and workforce groups to support domestic high-tech job growth in areas of the country that have not been historic innovation centers.

A successful bipartisan conference should result in numerous meaningful cybersecurity provisions enacted into law. While not as flashy as CHIPS, they collectively lead to more effective cybersecurity and more resilient critical infrastructure.

#### Cyberattacks go nuclear

Sagan and Weiner ’21 – Stanford Professors [Scott D.; Caroline S.G. Monroe professor of political science and senior fellow at the Center for International Security and the Freeman Spogli Institute at Stanford University; Allen S.; senior lecturer in law and director of the program in international and comparative law at Stanford Law School; 7-9-2021; "The U.S. says it can answer cyberattacks with nuclear weapons. That’s lunacy."; The Washington Post; https://www.washingtonpost.com/outlook/2021/07/09/cyberattack-ransomware-nuclear-war/; accessed 8-15-2021]

Over the July 4 weekend, the Russian-based cybercriminal organization REvil claimed credit for hacking into as many as 1,500 companies in what has been called the largest ransomware attack to date. In May, another cybercriminal group, DarkSide, also apparently located mainly in Russia, shut down most of the operations of Colonial Pipeline, which supplies nearly half the diesel, gasoline and other fuels used on the East Coast — setting off a round of panic buying that ended only when the company handed over a ransom. These incidents were bad enough. But imagine a much worse cyberattack, one that not only disabled pipelines but turned off the power at hundreds of U.S. hospitals, wreaked havoc on air-traffic-control systems and shut down the electrical grid in major cities in the dead of winter. The grisly cost might be counted not just in lost dollars but in the deaths of many thousands of people.

Under current U.S. nuclear doctrine, developed during the Trump administration, the president would be given the military option to launch nuclear weapons at Russia, China or North Korea if that country was determined to be behind such an attack.

That’s because in 2018, the Trump administration expanded the role of nuclear weapons by declaring for the first time that the United States would consider nuclear retaliation in the case of “significant non-nuclear strategic attacks,” including “attacks on the U.S., allied, or partner civilian population or infrastructure.” The same principle could also be used to justify a nuclear response to a devastating biological weapons strike.

But our analysis suggests that using nuclear weapons in response to biological or cyberattacks would be illegal under international law in virtually all circumstances. Threatening an illegal nuclear response weakens deterrence because the threat lacks inherent credibility. Perversely, this policy could also wind up committing a president to a nuclear attack if deterrence fails. While the American public would indeed be likely to want vengeance after a destructive enemy assault, the law of armed conflict requires that some military options be taken off the table. Nuclear retaliation for “significant non-nuclear strategic attacks” is one of them.

The Biden administration is now conducting its own review of the U.S. nuclear posture. The 2018 Trump change is an urgent candidate for reevaluation, but people have generally ignored it up to now. As officials work on this process, they have the chance to take full account of what could be called the “nuclear law revolution” — a growing recognition that international-law restrictions on warfare, and especially those that protect civilians, apply even to nuclear war.

## Framing

### Consequentialism Key

#### Prefer consequentialism

Chandler, Professor of International Relations and Director of the Centre for the Study of Democracy at the Department of Politics and International Relations, University of Westminster, ‘14

(David, “Beyond good and evil: Ethics in a world of complexity,” International Politics Vol. 51, 4, 441–457)

In an age of political complexity, when it is ‘easier to imagine the end of the world than the end of capitalism’ (Jameson, 2003; Žižek, 2011), responsibility is recast or internalized, displacing capitalism as the problem through vicariously seeing ourselves as responsible. Thus, capitalism is understood as merely a complex emergent process of exchanges in which we are to differing extents embedded and therefore indirectly responsible. In an age where the overthrow of capitalism seems unimaginable, capitalism is transformed as the sociological vehicle of connection, displacing the conscious and direct chains of public political connection. In fact, a substitute sense of community and of social interconnection is gained through socially reimagining market relations as empowering: enabling self-reflexive agency to operate in a complex world. It is precisely through this shift of political responsibility, from social structures and political frameworks external to ourselves, to the recognition of our own indirect social or societal responsibility, as complicit through our own choices and actions, that onto-ethics operates.

**Self-reflexive ethics redistribute responsibility and emphasize the** indirect, unintended **and relational networks of** complex causation. Collective problems are reconceived ontologically: as constitutive of communities and of political purpose. This is why many radical and critical voices in the West are drawn to the problems of ‘side effects’, of ‘second-order’ consequences – of a lack of knowledge of the emergent causality at play in the complex interconnections of the global world. The more these interconnections are revealed, though the work of self-reflexivity and self-reflection, **the more ethical authority can be regained by governments and other agents of governance**. We learn and learn again that we are responsible for the world, not because of our conscious choices or because our actions lacked the right ethical intention, **but because the world’s complexity is beyond our capacity to know and understand in advance**. The unknowability of the outcomes of our action does not remove our ethical responsibility for our actions, **it, in fact,** heightens our responsibilityfor these second-order consequences or side effects. In a complex and interconnected world, few events or problems evade appropriation within this framing, providing an opportunity for recasting responsibility in these ways.

### Death O/W

#### Biological death is distinct because it is the permanent ontological extinction of the subject and the foreclosure of all possibility

Paterson 3 – Department of Philosophy, Providence College, Rhode Island (Craig, “A Life Not Worth Living?”, Studies in Christian Ethics, <http://sce.sagepub.com>)

Contrary to those accounts, I would argue that it is death per se that is really the objective evil for us, not because it deprives us of a prospective future of overall good judged better than the alter- native of non-being. It cannot be about harm to a former person who has ceased to exist, for no person actually suffers from the sub-sequent non-participation. Rather, death in itself is an evil to us because it ontologically destroys the current existent subject — it is the ultimate in metaphysical lightening strikes.80 The evil of death is truly an ontological evil borne by the person who already exists, independently of calculations about better or worse possible lives. Such an evil need not be consciously experienced in order to be an evil for the kind of being a human person is. Death is an evil because of the change in kind it brings about, a change that is destructive of the type of entity that we essentially are. Anything, whether caused naturally or caused by human intervention (intentional or unintentional) that drastically interferes in the process of maintaining the person in existence is an objective evil for the person. What is crucially at stake here, and is dialectically supportive of the self-evidency of the basic good of human life, is that death is a radical interference with the current life process of the kind of being that we are. In consequence, death itself can be credibly thought of as a ‘primitive evil’ for all persons, regardless of the extent to which they are currently or prospectively capable of participating in a full array of the goods of life.81 In conclusion, concerning willed human actions, it is justifiable to state that any intentional rejection of human life itself cannot therefore be warranted since it is an expression of an ultimate disvalue for the subject, namely, the destruction of the present person; a radical ontological good that we cannot begin to weigh objectively against the travails of life in a rational manner. To deal with the sources of disvalue (pain, suffering, etc.) we should not seek to irrationally destroy the person, the very source and condition of all human possibility.82

### AT: Scheper-Hughes

#### Scheper-Hughes is wrong about causality, AND studying war and its impacts is critical.

--Link between everyday suffering and genocide is misplaced – study of war and its impacts is still crucial

Hannah Bradby, PhD, Warwick University, and, Gillian Lewando Hundt, Professor of Social Sciences in Health. She is Co-Director of the Institute of Health, University of Warwick, ‘10

(*Global Perspectives on War, Gender and Health: The Sociology and Anthropology of Suffering*, Introduction)

Far from being a uniquely horrific activity Scheper-Hughes (2002) views genocide as an extension of the dehumanising processes identifiable in many daily interactions. Drawing on analysis of the holocaust as the outcome of the general features of modernity, **Scheper-Hughes posits a 'genocidal continuum'** that connects daily, routine suffering and concomitant insults to a person's humanity with genocide (Scheper-Hughes 2002: 371). The institutional 'destruction of personhood', as seen in the withdrawal of humane empathy from the poor or the elderly, creates the conditions which eventually make genocide possible.

The argument that conditions of modernity including western rational legal metaphysics facilitate genocide has been criticised as too unifying and as conferring 'super-eminence' on the holocaust (Rose 1996: 11). The holocaust has become a crucial emblem through which we have sought to understand subsequent violence, wars and genocides. But the centrality of the holocaust in developing European thinking around conflict and suffering has made the resultant theoretical perspectives difficult to apply in non-European settings and in instances where conflict is less focussed around a clash of ideology. While the scale of the death toll of the holocaust should continue to shock, as should the organised nature of the attempted destruction of Jews, Roma, Gays and the disabled, **there is very little to be gained in comparing scales or forms of suffering**. It should be possible to use the study of the holocaust to inform understanding of other genocides in the context of other wars, to interrogate the link between war and suffering and to think through gendered perspectives without essentialising gender or making it the only explanatory variable.

This collection does not primarily seek to add to the discussion of the role of the holocaust in theories of human suffering. Our chapters are, however, an unfortunate witness to the fact that despite contemporary hopes and the scale of combatant and non-combatants deaths, the two World Wars were not the wars to end all wars. Rather wars, and their associated suffering, have been ongoing ever since, both in Europe and beyond.

War and Medicine

While structural approaches can problematise a division between intentional and unintentional suffering, intentionality **is nonetheless crucial to the contradictory relationship** that war and medicine have with suffering. War is an organised conflict between two military groups and armed conflict is bound to be accompanied by suffering. Although 'rules of engagement' and the rhetoric of 'targeted interventions' deploying 'surgical strikes' suggest **that 'unnecessary' blood shed can be avoided, war entails suffering, even if this is restricted to combatants.** A limited, or targeted war is an oxymoron since war tends to be found in company with the other horsemen of the apocalypse, **that is, pestilence, famine and death**. Moreover, while the effect of war on soldiers is closely monitored by both sides, the disproportionate way in which the apocalyptic horsemen affect non-combatants and particularly those who are already disempowered such as women, the old and the young, has been less subject to scrutiny.

## Solvency

### 1NC – Circumvention

#### Circumvention—courts interpret the plan in the narrowest possible way to favor dominant industry

Crane, Frederick Paul Furth, Sr. Professor of Law, University of Michigan, ‘21

(Daniel A., “Antitrust Antitextualism,” 96 Notre Dame L. Rev. 1205)

This view is so widely entrenched in the legal profession’s understanding of the antitrust laws—including, it must be admitted, this author’s—that it seems presumptuous to claim that the conventional wisdom is wrong, or at least significantly overstated. But it is. While the antitrust statutes may be lacking in some important particulars, they present a readily discernable meaning on many others. As Daniel Farber and Brett McDonnell have argued, “For the conscientious textualist, the statutory texts [of the antitrust laws] have considerably more specific meaning than the conventional wisdom would suggest.”5 And it is not simply the case that the meaning of the statutory texts could be rendered through ordinary methods of statutory interpretation but the courts have failed to see it. Rather, the courts frequently acknowledge that the statutory texts have a plain meaning, and then refuse to follow it.

But it gets worse. The courts have not merely abandoned statutory textualism or other modes of faithful interpretation out of a commitment to a dynamic common-law process. Rather, they have departed from text and original meaning in one consistent direction—toward reading down the antitrust statutes in favor of big business. As detailed in this Article, this unilateral process began almost immediately upon the promulgation of the Sherman Act and continues to this day. In brief: within their first decade of antitrust jurisprudence, the courts read an atextual rule of reason into section 1 of the Sherman Act to transform an absolute prohibition on agreements restraining trade into a flexible standard often invoked to bless large business combinations; after Congress passed two reform statutes in 1914, the courts incrementally read much of the textual distinctiveness out of the statutes to lessen their anticorporate bite; the courts have read the 1936 Robinson-Patman Act almost out of existence; and the Celler-Kefauver Amendments of 1950, faithfully followed in the years immediately after their promulgation, have been watered down to textually unrecognizable levels by judicial interpretation and agency practice. It is no exaggeration to say that not one of the principal substantive antitrust statutes has been consistently interpreted by the courts in a way faithful to its text or legislative intent, and that the arc of antitrust antitexualism has bent always in favor of capital.

## Access

#### Religious freedom is entrenched – federal judiciary is filled with right-wing extremists, they’d circumvent the plan by applying religious freedom restrictions in creative ways

#### Alt causes to abortion access – poverty, parental consent

#### State-level restrictions thump

**Turn – cracking down on hospital M&A causes rural hospitals to close, which destroys access**

**Kaufman 20** – chair of Kaufman, Hall & Associates LLC

Ken Kaufman, "Removing Antitrust Barriers to Solve the Rural Health Care Crisis," Morning Consult, 1-2-2020, https://morningconsult.com/opinions/removing-antitrust-barriers-solve-rural-health-care-crisis/

Almost 120 rural hospitals have closed since 2010, and an estimated **21 percent** of rural hospitals are at **high risk of closure**.

The high number of financially stressed hospitals is creating a **crisis of access** for rural communities and a potential **crisis of quality** and patient safety, as these hospitals **struggle to secure** **sufficient** clinical and technological **resources**. These struggles can be even more difficult in towns that could once support two hospitals but can **no longer do so**.

A **solution** to the rural health crisis that promotes **partnerships** with larger health systems addresses two critical needs. First, it enables a **rational, equitable approach** to a fundamental restructuring of rural health care resources. Second, it provides **access to sufficient financial resources** to ensure that rural communities are able to benefit from the same resources available elsewhere.

Antitrust impediments to a system-based approach

Current **antitrust law makes it difficult** for individual hospitals or health systems to **collaborate on efforts** to restructure delivery of essential services within a rural health care market. These efforts can, however, be pursued among facilities owned by a **single health system**, enabling a rational and equitable distribution of services across the health system’s network of facilities and the communities they serve.

The Federal Trade Commission and Department of Justice have themselves acknowledged the **value** of a **system-based approach** to rural health. In their 1996 “Statements of Antitrust Enforcement Policy in Health Care,” the agencies created a **safe zone** for mergers of certain hospitals with a low bed size and low patient census with other hospitals.

The agencies recognized that these hospitals often “will be the only hospital in the relevant market” and that “mergers involving such hospitals are **unlikely** to **reduce competition substantially**.” They also recognized that “rural hospitals … are unlikely to achieve the efficiencies that larger hospitals enjoy. Some of these cost-saving **efficiencies** may be **realized** … **through a merger**.”

The situation becomes **more difficult** when a community has two hospitals that do not fall within the safe zone and it can **no longer support both**. Such markets will be considered highly concentrated, and an attempt to merge the hospitals **likely will be challenged** by the federal agencies.

Several states have tried to overcome the likelihood of an antitrust challenge by granting certificates of public advantage to health systems that want to come together to more effectively pool resources and rationalize services within a rural market. But these efforts also are being challenged by the federal agencies.

The **threat** of **antitrust enforcement** actions **throws a chill** over health system-led efforts to make the **rural health care** delivery system **more rational**, economically viable and equitable. For example, the systems that combined to form Ballad Health went through a two-year process to secure the COPA that ultimately allowed their merger.

They willingly accepted state oversight of their efforts to rationalize health care delivery. Yet, they now face an order by the FTC to provide extensive information for a study on the impact of COPAs, even though long-term benefits will not be apparent just a year after the merger. The effort and **ongoing scrutiny** these systems take on certainly might **dissuade other health systems** from pursuing a **similar route**.

Rethinking competition in rural health care markets

The FTC and DOJ must revisit an approach that prioritizes competition over access to care and the quality and financial sustainability of the rural health care delivery system. The agencies have themselves acknowledged that competition among hospitals may not be a **practical reality** in rural communities.

The rural health care crisis is **happening now**; there is not time for multiyear studies of the impact of efforts to rationalize and improve rural health care. Health systems that **understand** and **are willing** to take on the challenges of rural health care markets should be **given the opportunity** to do so.

# 2NC

## ADV CP

### 2NC – Advantage CP

#### The aff is insufficient and only the CP solves – disadvantaged groups still cant afford abortion coverage post plan – lack of training means access is discriminatory

CRR et. al. ‘14 (2014. Center for Reproductive Rights, National Latina Institute for Reproductive Health, SisterSong Women of Color Reproductive Justice Coalition. “Reproductive Injustice: Racial and Gender Discrimination in U.S. Healthcare,” <https://www.hivlawandpolicy.org/sites/default/files/Reproductive%20Injustice.pdf>)

When it ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the United States committed to ensure the right to health care free from all forms of racial discrimination to all within its borders. Yet, as the U.S. prepares to report to the U.N. expert body charged with monitoring U.S. progress on implementation of these commitments, discrimination in health care remains entrenched. This report evaluates the U.S. record on addressing racial and gender discrimination in sexual and reproductive health care. Recognizing that discrimination exists in both law and fact, we focus on the need for policy change as well as proactive measures to address the structural forms of discrimination that inhibit the ability of women of color and immigrant women to exercise their human right to health.

RACIAL DISPARITIES IN MATERNAL MORTALITY

Maternal mortality is a human rights crisis in the United States. Between 1990 and 2013, as the overwhelming majority of countries dramatically reduced the incidence of maternal mortality, the maternal mortality ratio in the U.S. more than doubled from 12 to 28 maternal deaths out of every 100,000 live births. Racial disparities fuel this crisis. For the last four decades, Black women have been dying in childbirth at a rate three to four times their White counterparts. Cities and states with a high African American population also have the highest rates of maternal mortality in the country; in some areas of Mississippi, for example, the rate of maternal death for women of color exceeds that of Sub-Saharan Africa, while the number of White women who die in childbirth is too insignificant to report.

In addition to race, drivers of maternal mortality in the U.S. include social determinants of health such as poverty and lack of health insurance. Women of color are much more likely than White women to live in poverty and to lack health insurance. Because of these barriers to health care access, women of color are far more likely to exhibit risk factors for maternal death, such as diabetes and heart disease. Disparities in quality of care also persist for women of color and poor women and, in some cases, are growing worse—the U.S. Department of Health and Human Services identified maternal mortality as one of the most rapidly deteriorating areas of health quality over the past three years.

In its 2008 Concluding Observations, the Committee on the Elimination of Racial Discrimination (Committee) expressed concern about persistent disparities in sexual and reproductive health, including maternal mortality. It recommended the U.S. increase efforts to expand health insurance coverage, facilitate access to maternal health care and family planning, and improve sexuality education and information. The U.S. government has taken some steps to improve coverage, primarily through passage of the Affordable Care Act. However, political resistance to this law—especially in states with the highest rates of uninsured, people living in poverty, and maternal mortality—threaten to undermine the goals of the legislation to increase access to health care and reduce health disparities.

In May 2014, the Center for Reproductive Rights and SisterSong Women of Color Reproductive Justice Collective gathered first-hand accounts of Black women living in the South in order to better understand the role of racial and gender discrimination in their reproductive and sexual lives. The narratives, analyzed for the first time in this report, show that the U.S. government has failed to implement the Committee’s recommendations. Women living in Georgia and Mississippi—two states with the highest rates of maternal death in the country— shared their experiences with the health care system from the time of their first sexual activity through childbirth. Their stories reveal key inequalities in the health care system for women of color, including: Ÿ lack of information about sexuality and sexual health; Ÿ discrimination in the health care system; Ÿ lack of access to sexual and reproductive health care; and Ÿ poor quality of sexual and reproductive health information and services.

Policy change is necessary, but these stories demand much more. Eliminating disparities in reproductive health care, including maternal mortality, will require proactive steps by the U.S. government to: increase both general and pregnancy related coverage of uninsured women; improve access to contraceptive services and maternal health care; train healthcare providers to avoid racial stereotypes and provide high quality care to all women; ensure comprehensive sexuality education and information; and provide adequate social supports for recent parents, including paid parental leave. In addition, the U.S. should strengthen monitoring and accountability measures for maternal mortality in line with human rights standards.

DISCRIMINATION AGAINST NON-CITIZEN WOMEN IN ACCESS TO HEALTH CARE

U.S. policy excludes large groups of immigrants from eligibility for public health insurance, thereby greatly restricting the ability of immigrants to access health care. The Affordable Care Act incorporated restrictions set in place in 1996 that require non-citizens who are lawfully present in the U.S. to wait five years before they can enroll in Medicaid (although some states, including those with large immigrant populations like Texas, do not allow lawfully residing immigrants to enroll even after completion of the waiting period). Moreover, undocumented immigrants are completely barred from Medicaid, and the Affordable Care Act prohibits this group from purchasing private insurance on the newly developed health insurance exchanges, even with their own money.

These restrictions exacerbate existing barriers to coverage for immigrant women. Immigrants are more likely to work in low-wage jobs that lack employer-based insurance, and immigrant women of reproductive age are approximately 70% more likely than their U.S.-born peers to lack health insurance. These barriers to public and private insurance mean they are often unable to receive the preventive reproductive health care they need, including contraception, prenatal care, screenings for breast and cervical cancer, and tests for HIV/AIDS and other sexually transmitted infections.

Meanwhile, the reproductive health safety net that provides family planning services to low-income women who do not qualify for Medicaid has come under attack at the federal and state level. Funding for the Title X family planning program has been cut to below 2008 levels, even as the population in need of its services has grown. Latinas represent the fastest growing group in need of publicly funded contraception, with a growth of 47% in the decade between 2000 and 2010 compared to a 4% growth in need among White women.

In addition, states are slashing their own family planning budgets and passing ideologically motivated policies to further restrict access to preventive reproductive health care. For example, a combination of funding cuts and other restrictions on family planning has most severely impacted low-income Latinas and immigrants living in the Lower Rio Grande Valley of Texas. As documented in a recent report by the Center for Reproductive Rights and the National Latina Institute for Reproductive Health – Nuestra Voz, Nuestra Salud, Nuestro Texas: The Fight for Reproductive Health in the Rio Grande Valley – the loss of family planning services in one of the most medically underserved areas of the country has created a health crisis for immigrant women and their families. Now without any source of affordable health care, they are facing numerous consequences to their health: cervical and breast cancer that could have been detected and treated early, chronic pain from untreated reproductive health conditions, and unintended pregnancies from the inability to access affordable contraception.

This Committee has made it clear that the right to non-discrimination in the exercise of the right to health applies to all regardless of citizenship status. Any differential treatment between non-citizens and citizens must not amount to discrimination on the basis of citizenship status, race, ethnicity, or other grounds. U.S. policy excluding qualified immigrants from eligibility for Medicaid and undocumented immigrants from participation in the ACA’s health insurance exchanges fulfills no legitimate aim and is incompatible with government obligations under the Convention. In addition to repealing these exclusions, the government should maximize sexual and reproductive health access by allocating health resources on an equitable basis, prioritizing the needs of the most marginalized populations, including immigrants, low-income, and rural women.

#### That’s comparatively better than the plan, post affirmative hospitals can deny access because of payment only funding solves and their cards don’t rise to the level to say they do

Kay ’94 (January 1, 1994. Julie Kay, Brooklyn Law School. “If Men Could Get Pregnant: An Equal Protection Model for Federal Funding of Abortion Under a National Health Care Plan,” Brooklyn Law Review, Volume 60, Issue 1, <http://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1942&context=blr>)

Debate over the proposed national health care plan will inevitably include discussion of abortion services and funding. The combination of a dramatic reorganization of health care and the polarization of the abortion debate offers an occasion for Congress to reconsider the issue of abortion funding. The national health care plan presents an chance to secure full reproductive health care and to "redress serious biases in the existing system that prejudice true freedom of choice in childbearing."69 Any proposed federal health care plan should include coverage of abortion services.

In the legislature and on the grass-roots level, advocates may take advantage of the increased attention on health care to restructure the abortion issue so as to include low-income women. The proponents of access to abortion services must eradicate the financial barriers that prevent equal access to abortion for low-income women. These barriers include funding bans, physician shortages and the costs related to abortion. Expanding the content and the context of the abortion debate can make abortion part of a broader agenda for greater reproductive rights-and an essential element of gender equality for all women.

The focus of the debate should be on the continuum of factors that restrict access to abortion for all women and, in effect, deny low-income women the right to choose abortion. To facilitate genuine reproductive freedom, Congress should reject the current form of the abortion debate which positions women in opposition to fetuses. A model for providing reproductive health care must include a range of preventative services to reduce unwanted pregnancy and sexually transmitted diseases. Such care must also include pre-natal care or abortion services, and should facilitate conditions that allow a woman to make a genuine choice.

The costs associated with obtaining abortion services create just as difficult an obstacle for low-income women as the costs of the abortion service itself. These costs include transportation, access to a telephone, child care provisions and missed hours at work.17° Any national health care plan that hopes to provide all Americans with genuine health care must not only abolish obstacles to services for those living in poverty, but must take affirmative steps to ensure the availability of reproductive health services.

Financial inequity is one such obstacle. Women in poverty are at a great disadvantage when abortion services are less available. Not surprisingly, women who can afford to travel greater distances or pay for private care have greater access to abortion. The Court must recognize this when it considers whether restrictions place an undue burden on access to abortion and should reject the idea that it is permissible to use government funding to coerce recipients into choosing a particular type of care.

So too, a national health care system should reject abortion restrictions such as those in Webster, which reduce the number of providers and public hospital services. The need is great for hospital services for abortion, particularly in rural areas. Low-income women use public hospitals more than wealthier women, in part because of discrimination in health care. 7' The Court's decision in Webster allowing individual hospitals to refuse to provide women with these services creates even more barricades to health-care access for low-income women.

A hospital's decision not to provide abortion services has a broad negative effect on women's health care. Reproductive health services are often the only way for a hospital to make initial contact with women who may need general health care but would not otherwise approach a hospital. Furthermore, it is inappropriate to allow a hospital to make a decision as to whether women in the community will have access to abortion services. Any individual physician who is personally opposed to abortion could be excused from performing them-for instance, through a "conscience clause" provision. But to place such a decision in the hands of an individual hospital further deprives women of decision-making power about their own reproductive health care and impedes the exercise of a constitutional right. Therefore, the proposed national health care plan should facilitate patient care without allowing a patchwork delivery of services based upon hospital politics.

A national system of health care delivery should diminish the power of individual hospitals to determine what services would be available to women. If the government is responsible for the provision of health care services, individual hospitals would not be able to mandate that they will not make abortion services available. While individual doctors may opt out of providing abortion services, a hospital itself could be required to provide a full range of reproductive health care services.

The types of abortion regulation upheld in the Webster decision contribute to the shortage of abortion providers, an issue of vital importance to accessing abortion, particularly for low-income women. As a result of anti-abortion pressures, the number of physicians willing and able to provide abortion services has decreased dramatically.72 This shortage is not simply due to physicians' career choices, but is a result of several policy decisions within the medical profession. Many medical schools no longer require nor even offer their students training in abortion procedures.' Many students now attending medical school grew up in a post-Roe era and, as a result, assume that access to legal abortion will always exist. In addition, because of the current state of the abortion debate, young doctors decline to become abortion providers. In a profession which is so revered by society, many people are unwilling to commit to an area of health care that has become so stigmatized. 4

Finally, with the increase in violence and harassment against abortion providers and clinic staff, many physicians are no longer willing to remain in a profession in which they are subject to such "pro-life" behavior.' The national health care plan must acknowledge this shortage of abortion providers and the resulting denial of reproductive health care choices for women. The plan should seek to remedy the shortage by offering incentives to encourage physicians to provide abortion services. To ensure women's access to abortion, the government must also work to protect the rights of physicians against threats and harassment by abortion opponents.'

As the Webster decision shows, the Supreme Court cannot be relied upon to ensure that medical providers do not abandon the provision of abortion services. The Court's reasoning in Webster and Casey indicates that it will not consider cases on the basis of the impact its rulings will have on women's equality. Webster echoed the Court's stated belief in Harris that the government does not owe women access to health care and, therefore, if a woman lacks health care services it is the fault of her own poverty and cannot be blamed on the government. The Court's rationale fails once the government begins providing health care on a national basis. If all Americans are covered by a single form of health care-regardless of what plan this coverage ultimately follows-it will be more difficult to treat low-income people's health care needs differently. Under a single system of health care, the stigma of Medicaid will no longer facilitate a distinct two-tiered system of health care services.

Even if the Court expands its Harris rationale-that since the government is not required to provide any health care services it may choose which ones it .will provide-this opinion is unlikely to be acceptable to most Americans. Although Americans may expect recipients of public assistance to be satisfied no matter how minimal the services provided are, once the government begins to provide a service for the entire nation, expectations will increase dramatically. Once the government becomes involved in the provision of all health care services, it is unlikely that individuals will accept harsh limitations on the types of services provided. Furthermore, since ninety percent of all private health care insurance currently provides abortion coverage, women will have an expectation of continued coverage. 1 " ' If the government is presenting a plan which accepts responsibility for providing all health care services, then it cannot single out a particular necessary procedure and deny women coverage nor create a separate private market for this service.

## RICO

### 2NC – Top

#### Which makes the counterplan’s prohibition have the same effect since RICO is a carbon copy

Sullivan, President Emeritus and Professor of Law and Political Science at the University of Vermont, and Harrison, Emeritus Professor of Law at the University of Florida's Levin College of Law, ‘14

(E. Thomas and Jeffrey L., *Understanding Antitrust and Its Economic Implications*, Lexis)

In *Holmes v. Securities Investor Protection Corp*.,34 the Court perpetuated the holding in *Associated General* by interpreting RICO’s provision for civil actions, which is actually a near carbon copy of § 4 to incorporate the concept of proximate cause. The Court denied standing to SPIC in its attempt to recover funds paid to discharge brokerage debts to customers which were lost through alleged fraudulent handling of stock held by the brokerages. The Court found SPIC’s injuries too indirect.

#### That is true in substance—they use the exact same deterrence mechanism, which means it both sends a signal to regulators and prohibits conduct which stifles innovation

Goldsmith, Professor of Law, Brigham Young University, and Rinne, Member of the Utah Bar, currently in private practice, ‘89

(Michael and Vicki, “Civil RICO, Foreign Defendants, and ‘ET,’” 73 Minnesota Law Review. 1957)

This Article considers potential barriers to civil RICO litigation 'against foreign defendants and provides a framework for analyzing the extraterritorial application of RICO. In large part, this framework draws on current practice under other United States statutes applied to foreign conduct.39

[begin fn39]

39. For example, United States antitrust laws have been applied extraterritorially for more than 40 years. See, ag., United States v. Aluminum Co. of Am., 148 F.2d 416, 444 (2d Cir. 1945) (stating that alleged foreign "agreements would clearly have been unlawful, had they been made within the United States; and it follows ... that both were unlawful, though made abroad, if they were intended to affect imports and did affect them"); see also J. ATWOOD & K. BREWSTER, supra note 5, §§ 2.01-.16 (discussing history of antitrust extraterritoriality). Federal securities laws also have a history of extraterritorial application. See, e.g., Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968) (en banc) (stating that even though challenged transactions were effected outside United States, "Congress intended the Exchange Act to have extraterritorial application"), cert. denied, 395 U.S. 906 (1969); see generally Thomas, Extraterritorial Application of the United States Securities Laws: The Need for a Balanced Policy, 7 J. CORP. L. 189 (1982) (discussing foreign application of United States securities law).

RICO's link to antitrust and securities laws provides a sound basis for borrowing solutions to extraterritorial problems. Professor G. Robert Blakey, judicial drafter of the statute, has noted that RICO was modeled on both of these statutory schemes. Blakey, supra note 34, at 26. In addition, all three statutes share parallel public and private, and criminal and civil, enforcement mechanisms. Id Indeed, RICO's history establishes the government's intent to use antitrust approaches in dealing with organized crime. See generally Blakey, supra note 7, at 249-80 (noting that Department of Justice attempted to combat organized crime by using antitrust theories imaginatively). At one time, the Department of Justice attacked the criminal infiltration of various unions by using antitrust theories. See, e.g., Los Angeles Meat & Provision Drivers Union v. United States, 371 U.S. 94, 103 (1962) (affirming finding of Sherman Act violations by union); United States v. Pennsylvania Refuse Removal Ass'n, 357 F.2d 806, 807 (3d Cir. 1966) (affirming finding of Sherman Act violations by association of refuse firms), cert denied, 384 U.S. 961 (1966). Later, as Congress drafted RICO, Senator Hruska observed: "The bill is innovative in the sense that it vitalizes procedures which have been tried and proved in the antitrust field and applies them into the organized crime field where they have been seldom used before." Blakey, supra note 7, at 261 n.65 (citing 115 CONG. REC. 6993 (1969)). Senator McClellan noted that RICO "draws heavily upon the remedies developed in the field of antitrust... The many references to antitrust cases are necessary because the particular equitable remedies desired have been brought to their greatest development in this field, and in many instance they are the primary precedents for the remedies in this bill." Id. at 263 n.71 (citing 115 CONG. REc. 9567 (1969)). The Supreme Court recently traced the similarities between RICO and the antitrust laws. See Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 107 S. Ct. 2759 (1987). In Malley-Duff, the Court held that all treble damage RICO actions would be governed by the four-year statute of limitations found in the Clayton Act. Id. at 2767. The Court borrowed from the Clayton Act because RICO's civil provisions were expressly patterned on this antitrust statute and because both statutes remedy economic injury by providing for the recovery of treble damages, costs, and attorneys' fees. Id. at 2765. The Court stressed that "we believe that [the Clayton Act] offers the closest analogy to civil RICO." Id. at 2764. See also Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 241 (1987) (stating that "'clearest current in [RICO] history is reliance on the Clayton Act model!" (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 489 (1985))); see generally Nathan, Opinion, 6 RICO L. REP. 658 (Nov. 1987) (discussing Malley-Duff and McMahon as providing evidence that antitrust precedent applies to civil RICO analysis).

In addition to the antitrust and securities statutes, federal drug control laws also have been extended extraterritorially. For example, in 1970 Congress enacted the Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified at 21 U.S.C. § 801 (1982)), several provisions of which apply specifically to conduct outside the United States. Thus, 21 U.S.C. § 959 makes it unlawful to manufacture or distribute controlled substances intending or knowing that they will be imported unlawfully into the United States. 21 U.S.C. § 959 (1982). Section 959 states: "This section is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States." Ida; see, e.g., United States v. Winter, 509 F.2d 975, 990-91 (5th Cir.) (affirming finding of jurisdiction over Jamaican nationals charged with conspiring to import controlled substance), cert denied, 423 U.S. 825 (1975); see generally N. ABRAMs, FEDERAL CRII NAL LAw AND ITS ENFORCEMENT 352-407 (1986) (discussing extraterritorial jurisdiction under § 959). Federal drug control laws and RICO alike are aimed at eradicating criminal activity; indeed, the Drug Enforcement Agency relies on RICO as a valuable tool in combating drug traffickers. See 8 CoNTEMP. DRUG PROBLEMS 291, 299 (1979) (citing COMPrROLLER GENERAL OF THE U.S., 1979 REPORT TO CONGRESS) ("DEA believes that traffickers' financial resources can be attacked through effective use of... the RICO statute .... ").

[end fn39]

To the degree that existing extraterritorial jurisprudence does not address these problems adequately, however, this Article proposes legislative solutions that go well beyond current law. Part I reviews the nature and structure of RICO. Part II sets out jurisdictional barriers to the extraterritorial application of RICO and offers solutions drawn from other laws that have been applied extraterritorially. Finally, Part Ill examines the extraterritorial provisions in recent RICO reform proposals and offers new solutions for consideration.

#### And RICO is developed through judicial precedent which is exactly how antitrust is molded

Gordon, Ph.D. Edinburgh (Law); Ph.D. Kansas (English). Executive Professor, School of Law and Department of History, and Faculty Fellow, School of Innovation, Texas A&M University; Office Managing Partner (Dallas), Duane Morris, LLP, ‘21

(Randy D., “RICO Had a Birthday! A Fifty-Year Retrospective of Questions

Answered and Open,” 105 Marq. L. Rev. 131)

Although RICO's ambiguities and vagaries are well documented and have been decried for most of its history, Congress has shown scant inclination to do anything about the situation. Indeed, the most significant Congressional collar placed on RICO in the last twenty-five years-the preemption provision of the PSLRA-appeared as part of a more general attempt to tamp down securities litigation, not as an assault on civil RICO per se. With this history as a guide, we can safely predict that clarifications of RICO will come from judges-not legislators-which means that clarifications will emerge not at a stroke but at the speed of the common law, which is to say glacially and incrementally. But that's not necessarily a bad thing. A similar process has unfolded under the antitrust laws, which have exhibited both resilience and flexibility in the face of massive technological and social change. So, we-like A. A. Milne's river-must wait patiently under the realization that "We shall get there some day." 229

#### Perm severs—RICO is a distinct statute, so perm cannot expand the scope antitrust laws—that makes aff a moving target, justifies aff conditionality, and makes it impossible to garner stable offense

Wray, JD, Partner at ZEK, former federal prosecutor and Independent Counsel for the Whitewater investigation, ‘84

(Robert W., “A Day of Reckoning Is Near: RICO, Treble Damages, and Securities Fraud,” 41 Wash. & Lee L. Rev. 1089)

Two circuit courts recently have considered whether Congress intended section 1964(c) of RICO to remedy only commercial or competitive injuries caused by a defendant.I3 The Eighth Circuit in Bennett v. Berg 32 considered the commercial and competitive injury limitations to RICO as one issue since the defendants argued that the plaintiffs failed to allege an injury to property affecting the plaintiffs' commercial or competitive interests. ' 33 The Eighth Circuit concluded that an allegation of commercial or competitive injury is not a prerequisite to recovery under civil RICO.'" The Bennett court cited legislative history indicating that Congress passed RICO to attack the property interests of organized crime notwithstanding the type of business or property injury alleged.'" In determining that restrictive standing requirements applicable in the antitrust field are not consistent with the business or property language of RICO, the Eighth Circuit noted that Congress did not intend to limit RICO to the antitrust goal of preventing interference with free trade.'36 The Seventh Circuit in Schacht v. Brown' 37 considered defendants' argument that civil RICO applies only to those injured as competitors of the defendants.'38 According to the defendants in Schacht, Congress patterned section 1964(c) of RICO after section 4 of the Clayton Act which provides treble damages and attorneys fees to private plaintiffs who prevail in antitrust actions.'" While conceding the obvious similarities between section 1964(c) and section 4 of the Clayton Act, the Seventh Circuit nevertheless held that neither the plain language nor the legislative history of RICO warrants restricting section 1964(c) to competitive injures.' 40 The Schacht court emphasized that Congress enacted RICO to attack organized crime and not restraints on competition.'' In support of the Seventh Circuit's view that RICO is not the equivalent of an amendment to the antitrust laws, the Schacht court noted that prior to enacting RICO Congress considered but rejected a bill that would have amended the antitrust laws to cover organized criminal activity.' 42 The Schacht court, therefore, concluded that Congress enacted RICO as a separate tool to combat organized crime. 143

#### The core antitrust laws are only sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act.

The Antitrust Division 07 – Law enforcement agency that enforces the U.S. antitrust laws

“Antitrust Division Statement Regarding the Release of the Antitrust Modernization Commission Report,” The Antitrust Division, Department of Justice, April 2007, https://www.justice.gov/archive/atr/public/press\_releases/2007/222344.htm

The AMC has made many specific recommendations in its report, and the Division is in the process of reviewing all of them. The Division commends the AMC for its three primary conclusions:

Free-market competition should remain the touchstone of United States' economic policy. The Commission's conclusion in this regard is a fundamental starting point for policy makers. Over a century of experience has shown that robust competition among businesses, each striving to be increasingly successful, leads to better quality products and services, lower prices, and higher levels of innovation.

The core antitrust laws—Sherman Act sections 1 and 2 and Clayton Act section 7—and their application by the courts and federal enforcement agencies are sound and appropriately safeguard the competitiveness of the U.S. economy.

New or different rules are not needed for industries in which innovation, intellectual property, and technological innovation are central features. Unlike some other areas of the law, the core antitrust laws are general in nature and have been applied to many different industries to protect free-market competition successfully over a long period of time despite changes in the economy and the increasing pace of technological advancement. One of the great benefits of the Sherman and Clayton Acts is their adaptability to new economic conditions without sacrificing their ability to protect competition.

### 2NC – AT: Uncert/Prec

#### Civil RICO is guided by and reinforces antitrust precedent—statutory similarity means

Nathan, Formerly Deputy Assistant Attorney General for Enforcement in the Criminal Division

of the United States Department of Justice, ‘83

(Irvin B., “Doubling the Treble Damage Option: What an Antitrust Practitioner Needs to Know about RICO,” 52 Antitrust L.J. 327)

Where a civil RICO claim has been filed, litigators invoking the statute and those defending against its use must consider the extent to which the substantive and procedural precedents developed under the antitrust laws are binding or at least persuasive to resolve contested issues. To date, courts, commentators and counsel have been inconsistent on this topic. Those favorable to RICO have seized on expansive antitrust doctrines to bolster a liberal interpretation of RICO, while at the same time claiming that restrictive antitrust doctrines are not applicable to civil RICO actions. On the other hand, some which are antagonistic to civil RICO have attempted to limit such actions by restricting them to cases which tend to vindicate interests served by the antitrust laws. Neither approach seems to accord with the plain language and legislative history of RICO's private civil remedies.

As noted, RICO's private treble damage remedy was patterned directly on Section 4 of the Clayton Act. The language of the RICO statute, permitting "any person injured in his business or property" to sue in a federal district court for treble damages and attorney's fees, was taken word for word from the Clayton Act. The legislative history reveals the deliberate intent by Congress to utilize the same basic private civil "machinery" to enhance the criminal enforcement of RICO as had been used for the prior 80 years under the antitrust laws.

As originally introduced in both the House and the Senate, the RICO bills contained only criminal sanctions and did not authorize any private right of action. 136 Thereafter, in the Senate, Senator Hruska introduced a separate bill providing for treble damage remedies for violation of the anti-racketeering. laws. 1 37 He urged that his bill be considered at the same time as the RICO bills. While the matters were considered simultaneously, the bill reported by the Senate Judiciary Committee in the 91st Congress, considered the precursor of RICO, did not contain any priv ate right of action. One court has found that the reason for the decision to omit any private right of action was the inability of the Senate Judiciary Committee to resolve the "complex legal issues such as standing to sue [and] proximate cause. '

In the House, the Department of Justice and the American Bar Association recommended an amendment "to include the additional civil remedy of authorizing private [treble] damage suits based on the concept of Section 4 of the Clayton Act."' 39 Two of the leading sponsors in the House were Congressman Poff, who endorsed the "adaptation of the machinery used in the antitrust field,"'' 40 and Congressman Railsback, who said that the RICO bill "[made] available antitrust case sanctions of a civil nature to remove organized crime from legitimate organizations."' 4 ' As amended by the House Judiciary Committee adding the private treble damage action, the RICO bill passed the House; and the amendment was thereafter passed in the Senate without debate.

This legislative history suggests that Congress, to the extent that it adverted to the issue, intended that the language and precedents of the antitrust laws generally would be the principal source of guidance for interpreting unresolved issues under civil RICO. It is hardly likely that Congress would have intended for the identical language in one statute to be interpreted differently from the same language used in a second statute, which had been directly copied from the first. To date, however, the courts have given divergent interpretations to the legislative history and have inconsistently applied antitrust precedents to civil RICO actions. In Cenco v. Seidman and Seidman,'42 a panel of the Seventh Circuit derided analogies to the Clayton Act as "forced" and of no use in interpreting civil RICO's civil provisions. In marked contrast, another court has stated that "in order to properly construe the [civil RICO] provisions at issue ... it is necessary to turn to the antitrust provisions and the cases construing them."' 43

#### But it is not constrained by overly restrictive precedent

Nathan, Formerly Deputy Assistant Attorney General for Enforcement in the Criminal Division

of the United States Department of Justice, ‘83

(Irvin B., “Doubling the Treble Damage Option: What an Antitrust Practitioner Needs to Know about RICO,” 52 Antitrust L.J. 327)

At the same time, it is clear that slavish adherence to antitrust jurisprudence in civil RICO cases is inappropriate. Two district courts, in Van Schaick v. Church of Scientology and North Barrington Development, Inc. v. Fanslow, have dismissed civil RICO actions because they would not further the purposes of the antitrust laws.' 4 6 In dismissing civil RICO actions, these courts held that the plaintiffs had failed to allege or prove a "competitive injury" from the alleged RICO violation. These courts reasoned that since § 1964(c) was patterned after Section 4 of the Clayton Antitrust Act, the identical requirements applicable in antitrust cases should be binding in civil RICO cases. In further support of this position, some have noted Senator Hruska's statements that his proposed treble damage remedy was "intended for use by the honest businessman who has been damaged by unfair competition from the racketeer businessman." The Senator also said that it was "the businessman competing with organized crime" who needed additional civil remedies.'47 These advocates have argued from these isolated quotes from a Senator whose bill did not pass that only competitors should be permitted to sue under civil RICO.

The result in Van Schaick and North Barrington Development as well as the contentions that only competitors may sue under civil RICO seems unwarranted because the RICO statute and the antitrust laws are designed to promote different interests. The antitrust laws are designed to promote competition. RICO laws are designed to combat organized crime and to remedy its deleterious effects on legitimate businesses. While RICO is aimed in part at preserving honest competition, that is not the entirety of its goals, and the statute expressly states that "any person injured" may sue, not simply competitors. Accordingly, most courts and commentators have declined to follow this approach.'4 8

Although the substantive policies of the two statutes diverge, the basic remedial purposes of the two statutes are sufficiently similar that it would appear appropriate for the same basic principles to apply to both. Both statutes are designed to provide compensation to victims of violations of federal law and to give the victims and their counsel an incentive to sue by authorizing treble damages and attorney's fees. Thus, in ruling on a basic, preliminary question in Ingram Corp. v. J. Ray McDermott & Co., 149 the court found that the "same policy considerations" dictated the identical result on both the antitrust and civil RICO claims. In that case, the question was whether releases executed in favor of defendants who were allegedly fraudulently concealing antitrust and RICO violations should be binding against the plaintiffs. The court held that the releases were not binding to prevent suit under either the antitrust or RICO laws. This parity of results seems appropriate.

For the same reason, the disparate treatment in State Farm Fire & Casualty Co. v. Estate of Caton, 5 1 seems inappropriate. As earlier noted, in the State Farm case, the court held that while the death of a wrongdoer would abate a treble damage remedy under the antitrust laws, it did not abate a treble damage claim under civil RICO. The court essentially concluded that the treble damage remedy in the Clayton Act was "penal" or "punitive" but that the treble damage remedy under RICO was "remedial." The court put a great deal of reliance on the fact that Congress opted not to amend the Clayton Act to add a civil remedy under RICO but decided to enact a separate, free-standing statute providing for treble damages under RICO. The court found that while civil RICO was "modeled after Section 4 of the Clayton Act, it was ... cast as a separate statute intentionally to avoid the restrictive precedents of antitrust jurisprudence."' The court thus concluded that "to burden RICO with restrictive antitrust precedents would be contrary to the express legislative history." 1 52

#### And the CP’s approach provides legal certainty

Nathan, Formerly Deputy Assistant Attorney General for Enforcement in the Criminal Division

of the United States Department of Justice, ‘83

(Irvin B., “Doubling the Treble Damage Option: What an Antitrust Practitioner Needs to Know about RICO,” 52 Antitrust L.J. 327)

Based on the origins of the language used in civil RICO and its legislative history, I believe that antitrust precedents should guide the interpretation of civil RICO on most substantive and procedural issues, except to the limited extent that the issue relates to a legislative purpose which is not common to both RICO and the antitrust statutes. As noted, the application of antitrust precedents in civil RICO actions will not uniformly favor either the plaintiff or the defendant. Certain expansive concepts, such as jurisdictional requirements, will favor plaintiffs, while restrictive concepts, such as standing to sue and proximate cause, will presumably favor defendants. However, a basic uniformity in approach would seem fair to all concerned, eliminate the temptation to cast the same set of facts under one statute as opposed to the other, and would be consistent with RICO's legislative history. Further, utilizing the precedents that have evolved over almost a century under the antitrust laws would allow counsel and parties to predict with more certainty the course of civil RICO litigation. Finally, a consistent application of antitrust precedents would reduce the result-oriented approach which appears to have dominated much civil RICO litigation.

### 2NC – AT: Perm DB

#### 1. They say its alternative holdings— but that confuses *both* doctrines and prevents spillover

Leval, judge of the United States Court of Appeals for the Second Circuit, ‘06

(Pierre N., “Judging Under the Constitution: Dicta About Dicta,” 81 N.Y.U. L. REV. 1249)

I do not mean to imply that in all cases it is easy, or even possible, to reach a confident conclusion whether a statement should be considered dictum or holding. At times a proposition advanced by the court will support the court's decision to grant judgment to the plaintiff or defendant, but indirectly or remotely. There is no line demarcating a clear boundary between holding and dictum. What separates holding from dictum is better seen as a zone, within which no confident determination can be made whether the proposition should be considered holding or dictum. 23

[begin fn23

23 As to utterances falling within this zone, it is unclear to what degree a future court should consider itself bound by them. When the statement forms a part of the line of reasoning supporting the judgment, but a remote or tangential part, subsequent rulings are less clearly bound to adhere to it than to a statement that lies at the core of the court's reasoning. The same may be true when the court relies on two or more lines of reasoning to support judgment, so that the judgment would be the same regardless of the second line of reasoning. Courts often give less careful attention to propositions uttered in support of unnecessary alternative holdings. Conversely, the closer an assertion comes to the court's justification for its ruling, the less easily it may be avoided, even if it can, with arguable justification, be considered dictum.

[end fn23]

Nonetheless, to say that the distinction between holding and dictum is sometimes murky does not mean that it is always murky. In many instances there can be no doubt that the proposition in question played no role in the court's justification of its judgment. Court opinions today are crammed full of such superfluous declarations of law. The remarks in this lecture are directed primarily to these vast deposits of dictum in contemporary jurisprudence.

#### That undermines aff and CP solvency—does not create a clear legal rule and lets future courts distinguish the perm’s precedent as inapplicable

Stinson, Clinical Professor of Law, Sandra Day O’Connor College of Law at Arizona

State University, ‘10

(Judith M., “Why Dicta Becomes Holding and Why it Matters,” 76 Brook. L. Rev. 219)

Furthermore, courts exceed their judicial authority when they take advantage of the confusion surrounding the holding/dicta distinction. That confusion creates opportunities for courts and counsel to behave disingenuously;54 the preferred result can be reached by adjusting the level of deference due a prior opinion. When judges want to reach a particular result, even when it has not yet been held by a higher court or the same court, they can rely on dicta and, labeling it as holding, declare they are “bound” to follow the earlier case.55 Because it is substantially more difficult to overrule a case than to decide a case of first impression (and impossible for a lower court to do so),56 an unfair and insurmountable burden has been imposed by characterizing dicta as binding precedent.57 It is true that counsel can, and often do, spend countless hours debating whether a particular statement is in fact holding or dicta.58 But the lack of clarity in defining holding in the first place makes the task far more difficult and far more likely to yield illogical and potentially unfair results. Similarly, when confronted with binding authority that arguably answers the question, counsel and courts often evade the effect of that law by using the label “dicta”59 and declaring the authority inapplicable to the case at hand.60

#### 2. Parens patriae—civil RICO doesn’t allow state AGs sue under federal law

Ranlett, JD, partner in Mayer Brown’s Supreme Court & Appellate and Consumer Litigation & Class Actions practices, ‘13

(Kevin, “What’s Next for the Class Action Plaintiffs’ Bar? Getting Deputized by State Attorneys General,” January 22, https://www.classdefenseblog.com/2013/01/whats-next-for-the-class-action-plaintiffs-bar-getting-deputized-by-state-attorneys-general/)

State AGs may lack standing to sue parens patriae if they’re merely suing on behalf of individual citizens, rather than vindicating a “sovereign or quasi-sovereign interest” in the health or safety of their citizens. Pennsylvania v. New Jersey, 426 U.S. 660, 666 (1976).

Statutory remedial schemes may preempt parens patriae lawsuits. For example, because the federal antitrust laws limit standing to direct purchasers, suits by states arguably are barred. And RICO and ERISA forbid parens patriae suits. See, e.g., Illinois v. Life of Mid-Am. Ins. Co., 805 F2d 763, 766 (7th Cir. 1986) (RICO); Conn. v. Physicians Health Servs. of Conn., Inc., 287 F3d 110, 120-21 (2d Cir. 2002) (ERISA).

#### That undermines aff solvency—states derail federal enforcement to favor political and economic interests

Posner, Judge, U.S. Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School, ‘04

(Richard A., “Federalism and the Enforcement of Antitrust Laws by State Attorneys General,” 2 Georgetown Journal of Law and Public Policy 5)

The coalescence of these factors suggests a strategy for a state attorney general that is in fact observed. The strategy consists in bringing high-profile lawsuits that attract publicity to the attorney general and that promote the interests of politically influential state residents, including corporations that have headquarters or extensive operations in the state, at the expense of nonresidents, including nonresident competitors of resident enterprises.5 The strategy is constrained, however, by the fact that the resources available for such litigation are likely to be very limited unless the litigation has a realistic prospect of generating a large monetary judgment or settlement for the state, or unless several states join in the litigation, as they frequently do,6 enabling a pooling of resources. The latter is often the more feasible method of economizing on litigation expenses even when damages are the relief sought. The reason is that judgments or settlements obtained in parens patriae litigation are generally distributed to the state residents on whose behalf the suit was brought, and, if there is money left over, to charities designated by the state attorney general,7 although the court may award attorney's fees to him.

It is easy to see why antitrust parens patriae suits might be attractive to state attorneys general. Firms headquartered or operating within the state are likely to face competition from nonresidents and they will be grateful if the state's attorney general incurs the expense of suing those competitors. A state attorney general may also have somewhat greater credibility with the courts than would a competitor plaintiff. And major antitrust violations are likely to have effects in multiple states, facilitating joint action and, therefore, resource pooling by state attorneys general. What is more, as shown by the Microsoft case, if the U.S. Department of Justice brings an antitrust suit, the state attorneys general may be able to take a free ride on the Department's investment in the litigation, by bringing parallel suits that are then consolidated with the Justice Department's suit.8

The antitrust strategy of state attorneys general that I have just sketched obviously has a potential to generate socially perverse consequences. The use of the antitrust laws to harass competitors is an old story but a true one, and given the political incentives of state attorneys general, the risk is great that in deciding whether to bring an antitrust suit against a competitor of a resident enterprise, a state attorney general will not be scrupulous in the exercise of his enforcement discretion and will bring and press the suit even if unconvinced of its merit. This is a form of protectionism. In addition, I worry that state attorneys general will try to channel the moneys recovered in their suits to charitable uses that advance their political agendas.

### 2NC – RICO K2 Solve

#### Only the CP solves—there needs to be a competitive remedy

Gleiser, JD, St. Louis University Law School, ‘10

(Ephraim Samuel, “A Bridge to Somewhere: How a Bolder Causal Analysis Can Shape

Civil Rico into the Ideal Free Market Safeguard,” 54 St. Louis U. L.J. 609)

With "tort reform" measures and federal statutory preemption, consumers are left without remedy. They are left to rely only on the efficacy of regulators, despite the failure of regulators to regulate and provide for protection. The predicament leaves consumers, the "directly injured," unable to "be counted on to vindicate the law as private attorneys general. ''20 3 As a result, consumers have lost the potentially powerful force of the private attorney general as a safeguard for them against the failures of regulatory bodies.

The "directness inquiry" should acknowledge the reality that direct victims cannot always be counted upon to vindicate the wrongs committed against them. Instead, the Court must shape its proximate causation analysis in a way that takes stock of situations like those presented by the Vioxx example and illustrated by the ABC hypothetical. Given the power of the free market, corporations are well situated to fill the void left by the removal of the remedy brought by an individual consumer.

In applying the Holmes factors, courts must acknowledge this predicament. Using intent as a guiding factor, injured companies would be allowed to "vindicate the law as private attorneys general" when they are injured in the marketplace. 2 04 In doing so, the companies that have fallen victim to corporate misconduct-indeed, society as a whole-will benefit from a broader, more effective paradigm of jurisprudence that mandates corporate accountability. Creating this more effective paradigm does not require expanding causation to include indirect victims.

And yet, consider that a dishonest corporate entity that has misled regulators must have intended to appropriate the market share of its competitor. If the effort to mislead regulators serves as the means of the dishonest corporation, then the ends sought are weakening its competitor's standing in the market. Employing a means-end analysis, using intent as a guidepost, courts can effectuate justice between the honest corporate actor and the dishonest competitor. By divorcing the Holmes principles from surrounding context, Bridge, like Anza before it, employs a causal analysis that invites inconsistent outcomes. Anza viewed the State of New York as the direct victim, while viewing the resulting injury to the wronged company as a 205 side effect of the fraudulent action. Moreover, Justice Thomas' causal analysis from Bridge has the counterintuitive effect of simultaneously expanding civil RICO causation by excising a showing of reliance, while limiting the prospect of a successful invocation of civil RICO to a very limited set of facts.20 6

By emphasizing a means-end analysis instead, civil RICO will be available to the intended victims of regulatory fraud-the honest competitor. Such an analysis extends beyond recognizing just those collaterally injured (such as the victims of XYZ's Exulert), whose access to justice is blocked by forces such as federal regulatory preemption. By adopting this causal analysis, compliant corporations are provided an avenue of recourse that extends societal benefit beyond the boardroom and to the consumer.

### 2NC – Crisis Collapses Econ/Causes War

**Sparks global world war---no possibility for a recovery**

**Sundaram and Popov 19** – former economics professor, was United Nations Assistant Secretary-General for Economic Development, and received the Wassily Leontief Prize for Advancing the Frontiers of Economic Thought in 2007; former senior economics researcher in the Soviet Union, Russia and the United Nations Secretariat, is now Research Director at the Dialogue of Civilizations Research Institute in Berlin

Jomo Kwame Sundaram and Vladimir Popov, "Economic Crisis Can Trigger World War," Inter Press Service, 2-12-2019, http://www.ipsnews.net/2019/02/economic-crisis-can-trigger-world-war/

KUALA LUMPUR and BERLIN, Feb 12 2019 (IPS) - Economic recovery efforts since the 2008-2009 global financial crisis have mainly depended on unconventional monetary policies. As fears rise of yet another **international financial crisis**, there are **growing concerns** about the increased possibility of **large-scale military conflict.**

More worryingly, in the current political landscape, **prolonged economic crisis**, combined with rising economic inequality, chauvinistic ethno-populism as well as aggressive jingoist rhetoric, including threats, could **easily spin out of control** and ‘morph’ into **military conflict**, and worse, **world war**.

Crisis responses limited

The 2008-2009 global financial crisis almost ‘**bankrupted’ governments** and caused **systemic collapse**. Policymakers managed to pull the world economy **from the brink**, but soon switched from counter-cyclical fiscal efforts to **unconventional monetary measures**, primarily ‘quantitative easing’ and very low, if not negative real interest rates.

But while these monetary interventions averted realization of the worst fears at the time by turning the US economy around, they did little to address **underlying economic weaknesses**, largely due to the ascendance of finance in recent decades at the expense of the real economy. Since then, despite promising to do so, policymakers have not seriously pursued, let alone achieved, such needed reforms.

Instead, ostensible structural reformers have taken advantage of the crisis to pursue largely irrelevant efforts to further ‘casualize’ labour markets. This **lack of structural reform** has meant that the **unprecedented liquidity** central banks **injected into economies** has not been well allocated to **stimulate resurgence of the real economy**.

From bust to bubble

Instead, easy credit raised asset prices to levels even higher than those prevailing before 2008. US house prices are now 8% more than at the peak of the property bubble in 2006, while its price-to-earnings ratio in late 2018 was even higher than in 2008 and in 1929, when the Wall Street Crash precipitated the Great Depression.

As monetary tightening checks asset price bubbles, **another economic crisis** — possibly **more severe** than the last, as the economy has become **less responsive** to such blunt **monetary interventions** — is **considered likely**. A decade of such unconventional monetary policies, with very low interest rates, has **greatly depleted their ability to revive the economy**.

## Case

#### New statutory instruction fails—courts brazenly misinterpret clear commands—1nc says that’s true empirically, and it’s inevitable

Crane, Frederick Paul Furth, Sr. Professor of Law, University of Michigan, ‘21

(Daniel A., “Antitrust Antitextualism,” 96 Notre Dame L. Rev. 1205)

This Article has shown that, historically, the judiciary has treated the antitrust statutes as broad delegations to the courts to create a pragmatic common law of competition, even when the statutes plainly said something more specifically prohibitory. What, then, are the strategies available to a reformist Congress seeking to rein in business power through remedial antitrust legislation?

The one strategy that does not seem especially promising is simply writing clearer statutes. The antitrust statutes that the courts wrote down in favor of big business did not suffer from a lack of clarity or, if they did, not in the textual implications the courts chose to ignore. Strikingly, the courts continue to insist that the antitrust statutes are indeterminate delegations of common-law power, even while admitting in candor that they have simply chosen to ignore the statutes’ plain meaning in favor of a common method of deciding antitrust cases. For instance, in Professional Engineers, Justice Stevens remarked for the Court that “the language of § 1 of the Sherman Act . . . cannot mean what it says” and therefore that Congress must not have intended “the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations,” thus justifying the courts in shaping the “statute’s broad mandate by drawing on common-law tradition.”255 Given over a century’s tradition of interpreting antitrust statutes as invitations to continue a common-law process whatever else is suggested by the statute’s text, it is difficult to see how simply accumulating stern new language in new texts would lead to a different result.

#### Their view of ethics incentivizes ideological irresponsibility. You can’t eschew responsibility for consequences you didn’t intend to cause, that absolves anyone of any guilt and makes debate impossible because the aff will always win they wanted to do good!

Greene, experimental psychologist, neuroscientist, and philosopher, Professor of Psychology at Harvard University, and director of Harvard's Moral Cognition Lab, ‘08

(Joshua, “The Secret Joke of Kant’s Soul,” Moral Psychology, Vol. 3)

What turn-of-the-millennium science is telling us is that **human moral judgment is not a pristine rational enterprise**, that our moral judgments are driven by a hodgepodge of emotional dispositions, which themselves were shaped by a hodgepodge of evolutionary forces, both biological and cultural. Because of this, **it is** exceedingly unlikely that there is any rationally coherent normative moral theory that can accommodate our moral intuitions. Moreover, anyone who claims to have such a theory, or even part of one, **almost certainly doesn’t**.

Instead, what that person probably **has is a moral rationalization**. It seems then, that we have somehow crossed the infamous “is”-“ought” divide.14 How did this happen? Didn’t Hume (Hume, 1978) and Moore (Moore, 1966) warn us against trying to derive an “ought” from and “is?” How did we go from descriptive scientific theories concerning moral psychology to skepticism about a whole class of normative moral theories? The answer is that we did not, as Hume and Moore anticipated, attempt to derive an “ought” from and “is.” That is, our method has been inductive rather than deductive. We have inferred on the basis of the available evidence that the phenomenon of rationalist deontological philosophy is best explained as a rationalization of evolved emotional intuition (Harman, 1977).

Missing the Deontological Point

I suspect that rationalist deontologists will remain unmoved by the arguments presented here. Instead, I suspect, they will insist that I have simply misunderstood what Kant and like-minded deontologists are all about. Deontology, they will say, isn’t about this intuition or that intuition. It’s not defined by its normative differences with consequentialism. Rather, deontology is about taking humanity seriously. Above all else, it’s about respect for persons. It’s about treating others as fellow rational creatures rather than as mere objects, about acting for reasons rational beings can share. And so on (Korsgaard, 1996a; Korsgaard, 1996b).

This is, no doubt, how many deontologists see deontology. But this insider’s view, as I’ve suggested, may be misleading. The problem, more specifically, is that it defines deontology in terms of values that are not distinctively deontological, though they may appear to be from the inside.

Consider the following analogy with religion. When one asks a religious person to explain the essence of his religion, one often gets an answer like this: “It’s about love, really. It’s about looking out for other people, looking beyond oneself. It’s about community, being part of something larger than oneself.” This sort of answer accurately captures the phenomenology of many people’s religion, **but it’s nevertheless** inadequate **for distinguishing religion from other things.** This is because many, if not most, non-religious people aspire to love deeply, look out for other people, avoid self-absorption, have a sense of a community, and be connected to things larger than themselves. In other words, secular humanists and atheists can assent to most of what many religious people think religion is all about. From a secular humanist’s point of view, in contrast, what’s distinctive about religion is its commitment to the existence of supernatural entities as well as formal religious institutions and doctrines. And they’re right. These things really do distinguish religious from non-religious practices, though they may appear to be secondary to many people operating from within a religious point of view.

In the same way, I believe that most of the standard deontological/**Kantian self-characterizatons fail to** distinguish **deontology from other approaches to ethics.** (See also Kagan (Kagan, 1997, pp. 70-78.) on the difficulty of defining deontology.) It seems to me that consequentialists, as much as anyone else, **have respect for persons, are** against treating people as mere objects, **wish to act for reasons that rational creatures can share, etc.** A consequentialist respects other persons, and refrains from treating them as mere objects, **by counting** every person’s well-being **in the decision-making process**. Likewise, a consequentialist attempts to act according to reasons that rational creatures can share by acting according to principles that **give equal weight to everyone’s interests,** i.e. that are impartial. This is not to say that consequentialists and deontologists don’t differ. They do. It’s just that the real differences may not be what deontologists often take them to be.

What, then, distinguishes deontology from other kinds of moral thought? A good strategy for answering this question is to start with concrete disagreements between deontologists and others (such as consequentialists) and then work backward in search of deeper principles. This is what I've attempted to do with the trolley and footbridge cases, and other instances in which deontologists and consequentialists disagree. If you ask a deontologically-minded person why it's wrong to push someone in front of speeding trolley in order to save five others, you will get characteristically deontological answers. Some will be tautological: "Because it's murder!" Others will be more sophisticated: "The ends don't justify the means." "You have to respect people's rights." But, as we know, these answers don't really explain anything, because if you give the same people (on different occasions) the trolley case or the loop case (See above), they'll make the opposite judgment, even though their initial explanation concerning the footbridge case applies equally well to one or both of these cases. Talk about rights, respect for persons, and reasons we can share are natural attempts to explain, in "cognitive" terms, what we feel when we find ourselves having emotionally driven intuitions that are odds with the cold calculus of consequentialism. Although these explanations are inevitably incomplete, there seems to be "something deeply right" about them because they give voice to powerful moral emotions. But, as with many religious people's accounts of what's essential to religion, they don't really explain what's distinctive about the philosophy in question.

#### Root cause claims are academic garbage

Levy and Thompson 13

Jack S. Levy is Board of Governors' Professor of Political Science at Rutgers University, and Affiliate at the Saltzman Institute of War and Peace Studies at Columbia University, and William R. Thompson is Rogers Professor of Political Science at Indiana University and Managing Editor of International Studies Quarterly, "The Decline of War? Multiple Trajectories and Diverging Trends", International Studies Review, 2013, 15, pp. 396-419

If true, we would have a unified theory of violence. Pinker subsequently steps back from this expansive claim. He notes that some other forms of violence— including homicides, lynchings, domestic violence, and rapes—do not fit a power law model, suggesting that the mechanisms driving these practices differ from those driving international war. Still, there are others who have insisted on a unified theory of violence. Examples might include Freud’s psychoanalytic theory of aggressive instincts as a root cause of war (Einstein and Freud 1933), frustration-aggression theory (Durbin and Bowlby 1939), and contemporary rational choice theories.

We are highly skeptical. We fear that any theory broad enough to explain violence at the levels of the individual, family, neighborhood, communal group, state, and international system would be too general and too indiscriminating to capture variations in violence within each level, which is a prerequisite for any satisfactory theoretical explanation. It is difficult to imagine an explanation for great power war, or interstate war more generally, that does not include system-level structures of power and wealth, dyadic-level rivalries, and domestic institutions and processes. All but the latter contribute little if anything to an explanation of homicides and domestic violence.

It is not even clear whether **different kinds of organized warfare**—hegemonic wars, interstate wars, colonial wars, and civil wars—can be explained with a single theory. In fact, the theoretical literature on interstate war and civil war remains for the most part two distinct literatures, with little overlap in their respective analyses of the causes of war.9 Exceptions include the concept of the security dilemma (Posen 1993; Snyder and Jervis 1999) and the increasingly influential bargaining model of war (Fearon 1995), which cut across both literatures.

International relations scholars are even divided on the question of whether **different kinds of interstate wars** can be subsumed under a single theory. A 1990 symposium addressed the questions of whether big wars and small wars had similar causes and whether a single theory could account for both.10 Whereas Bueno de Mesquita (1990) argued that an expected utility framework can explain all kinds of wars, Thompson (1990) argued that system-level structures of power and wealth differentiate big wars from small wars.11 The closely related question of whether the outbreak and spread (expansion) of war are driven by the same or different variables and processes was the subject of another recent symposium (Vasquez, Diehl, Flint, and Scheffran 2011).

Our skepticism about the utility of a unified theory of violence or war is reinforced by the systematic and rigorous evidence Pinker provides about the trends in different forms of violence over time. As his detailed and informative graphs make clear, different forms of human violence began to decline at different times and proceeded at different rates.12 Many of the trends are not monotonic and sometimes point in different directions. The gradual decline in the frequency of great power war was interrupted in the first half of the twentieth century but then continued from 1950s to the present, while the frequency of civil wars began to increase significantly after 1960 before beginning an uneven decline by 1990 that included an uptick in the early 2000s. It is clear that great power wars and civil wars follow different trajectories,13 undercutting any claim that a single process could drive these different patterns (unless those processes are defined so generally as to lose their analytic utility).

#### It also is clearly categorically distinct from sexual violence – both are important but conflating the two is actively unhelpful

Quester 89

International-Security Criticisms of Peace ResearchAuthor(s): George H. QuesterReviewed work(s):Source: Annals of the American Academy of Political and Social Science, Vol. 504, PeaceStudies: Past and Future (Jul., 1989), pp. 98-105Published

George H. Quester is the J.B. and Maurice C. Shapiro Visiting Professor of International Affairs at The George Washington University's Elliott School of International Affairs. He is one of the most distinguished scholars in the field of international security studies, having published a dozen single-authored books and ten edited books and textbooks over the course of his career. He is especially noted for his work on nuclear weapons and arms control. Professor Quester has held appointments at Harvard University, Cornell University, the National War College, the United States Naval Academy, and the Center for Advanced Study in the Behavioral Sciences at Stanford University. Most recently, he was Professor of Government and Politics at the University of Maryland in College Park. Professor Quester's publications include: Deterrence Before Hiroshima (1966, reissued 1986), The Politics of Nuclear Proliferation (1973), The Future of Nuclear Deterrence (1986), Nuclear Monopoly (2000), Offense and Defense in the International System (2003, 3rd ed.), Nuclear First Strike: Consequences of a Broken Taboo (2005), and Preemption, Prevention and Proliferation: the Threat and Use of Weapons In History (2009). He is currently working on a book project, The Last Time We Were at Global-Zero, funded by the Smith Richardson Foundation for 2010-11

MISSPECIFICATIONS OF PEACE A third major problem to be raised about some forms of peace research and peace studies, again related to what we have already discussed, arises in the tendency to define peace as much more than an absence of the organized violence of warfare, to define it indeed as the elimination also of **poverty** and injustice and of prejudice and tyranny, and so on-namely, to define peace simply as a synonym for what is good, for what an economist would call utility. Sometimes **we are thus told that an opposition to violence must include an opposition to "structural violence**,"7 with the latter phrase presumably meaning any organizational or power relationships that violate the moral standards of the beholder, **or we are also told that we must be in favor of "positive peace,"** which will include all of these good things, accomplished somehow simultaneously, rather than being content with a "negative peace," limited merely to an absence of warfare. Surely there is a great deal that is lost from all of these definitional innovations, but what is there to be gained? If someone assumed, as noted previously, that consciousnesses somehow have to be raised, then it may well seem important. as an educational and motivational vehicle, to insist that peace includes an end to poverty or racism. If one assumes that there can never be an avoidance of war unless one simultaneously has an avoidance of poverty. Such an approach can apparently be traced to Johan Galtung. See his Peace and Social Structure (Copenhagen: Christian Eljiers, 1978). erty or racism or other social evils, then this causal link will also suggest a definitional link. But, if there is indeed no such one-to-one link in causal relationships and if motivation is not the entirety of the problem of war and peace, then we surely will have thrown away a great deal of clarity if we insist on calling everything bad "war" or "violence" and if we insist on referring to everything we favor as "peace." This would be a little **like telling the American Cancer Society that every disease now has to be referred to as "cancer,"** including heart disease and cholera and meningitis. **Can medicine make any progress at all if it is not allowed to use different words for different ailments?** Is it really true that to use different words for war and dictatorship and poverty is to weaken our motivation or to accept the inevitability of some evils or actually to favor the existence of such evils? If one goes far enough in accepting the definitional innovations produced by some peace studies curricula, it becomes possible then to define violent attacks as peaceful, as long as they are intended to eliminate racism or injustice, because these attacks are to oppose "structural violence." At the worst, – is kind of redefinition is deliberately misleading, as war and violence are defined as being inappropriate for any cause except one's own ()

th. At a less duplicitous level, we simply have some needless confusion brought into the process, by some relatively honest and well-meaning people. THE SEARCH FOR ULTIMATE SOLUTIONS Advocates of peace research sometimes justify their approach by asserting that they alone are addressing the ultimate or root causes of conflict. Unless one eliminates injustice or racism or prejudice or tyranny, they contend, there can never be a real peace or positive peace. This argument runs the risk, however, of becoming a play on words. Real peace can mean that we approve of every step of the causal chain, going back as far as it can be traced, which might indeed be ideal; but **this might hardly be so essential for someone caught in the crossfire of Beirut, someone who is merely pleading and praying that the shooting might stop.** **To imply that a termination of conventional war and an avoidance of nuclear war and an abatement of terrorism are not somehow real would be to blur our understanding** of a great deal of what most men and women indeed care about. Similarly, **to refer to such an absence of warfare as "negative peace"-**as compared with something more positive in "positive peace"-is to use these words of our English language in a manner that substantially underrates the human priority of eliminating warfare, whatever its causes and whatever the remedy. Critics of peace studies would thus come back to argue that these ultimate and genuine reforms of human arrangements for which peace researchers claim such priority are all well and good, but that these may not be capable of being attained in anything less than several centuries. Rather than eliminating all ideological suspicions between Marxists and non-Marxists or eliminating all ethnic dislikes between Greeks and Turks, would it not be a major accomplishment **in the meantime** to eliminate those kinds of weapons that tend to **make wars between such contending factions more likely,** and to stress instead the defensive types that discourage military forces from launching attacks? Peace researchers then often reply that any such resignation to intermediate and proximate improvements implies a welcoming of permanent conflict or even a relishing of it or at least an assumption that conflict and hostility are in the natural order of things. But the real issue is surely much more one of whether certain kinds of improvements can be made over certain ranges of time.

# 1NR

## Judicial Economics DA

### Turns Case

#### DA turns the case at every level – first, enforcement – new theories of antitrust based in nonecon considerations destroy trust in antitrust as a doctrine, decking enforcement

Shapiro 21 – Professor of the Graduate School, UC-Berkeley

Carl Shapiro, prepared for the Chair's Showcase at the ABA Antitrust Law Section Spring Meeting, ANTITRUST: WHAT WENT WRONG AND HOW TO FIX IT, Reporter, 35 Antitrust ABA 33 (Summer, 2021), Nexis

Many people look to antitrust to reverse these changes in the structure of the American economy. After all, the body of law intended to control monopolies is a natural place to look to solve problems caused by concentrated private power. Looking to antitrust is all the more tempting once one recognizes that these problems have noticeably worsened over the past 30 to 40 years, roughly the period during which antitrust law shifted markedly in favor of antitrust defendants. However, antitrust is not a cure-all. For example, while stronger antitrust enforcement tends to lessen income inequality, the primary policies for that purpose are the tax system and government programs that help lower-income households obtain various goods and services, including nutrition, education, and health care. Those who over-promise what antitrust can realistically deliver are doing a disservice to the very people they profess they are trying to help. They also threaten to breed skepticism regarding the value of antitrust policy and enforcement if antitrust fails to deliver the broader social and economic transformation that has been promised.

#### Second, conflicting objectives mean it will be unreliable and ineffective—guarantees circumvention and unwillingness to apply the aff’s standard

Melamed 20 – Professor of the Practice, Stanford Law

A.Douglas Melamed, Antitrust Law and its Critics, *Antitrust Law Journal* Vol. 83 (2020), <https://www-cdn.law.stanford.edu/wp-content/uploads/2021/11/A.-Douglas-Melamed-Antitrust-Law-and-Its-Critics-83-ANTITRUST-L.J.-269-2020.pdf>

Perhaps more important, the institutions of antitrust law are not well suited to address multiple and often conflicting objectives. Antitrust law is enforced on a case-by-case basis. Were antitrust law to serve multiple objectives, it would need criteria to guide decisions in the many instances when those objectives would conflict. There is, however, no algorithm for weighing inequality or political power, on the one hand, against economic welfare, on the other.98 There is not even a common metric for measuring them. Absent such a metric or algorithm, antitrust decisions would necessarily be arbitrary and perceived as arbitrary. That would have three serious costs. First, if antitrust decisions are perceived as arbitrary, the widespread legitimacy of antitrust law would erode. The antitrust laws were first passed in 1890, and the most important statutory provisions are more than 100 years old. It is not an accident that populist critics have expressed their concerns largely in antitrust terms. The perpetuation of that legitimacy cannot be taken for granted.

#### That either zeroes the case or triggers our impacts

Melamed 20 – Professor of the Practice, Stanford Law

A.Douglas Melamed, Antitrust Law and its Critics, *Antitrust Law Journal* Vol. 83 (2020), <https://www-cdn.law.stanford.edu/wp-content/uploads/2021/11/A.-Douglas-Melamed-Antitrust-Law-and-Its-Critics-83-ANTITRUST-L.J.-269-2020.pdf>

If antitrust law is perceived as arbitrary, it will provide a far less certain guide to business conduct. The effect might be disregard of antitrust law in circumstances in which it seems unpredictable. More likely, the effect will be excessive caution by businesses uncertain about the consequences of aggressive or novel forms of competition. The effectiveness of antitrust law in promoting competition and economic welfare will be seriously impaired.

#### AND—It’s literally likely to cause *net-harm*.

Schrepel 20 – Professor of Law, Utrecht & Professor of Sciences, Po Paris

Dr. Thibault Schrepel, Assistant Professor at Utrecht University School of Law, Associate Researcher at University of Paris Panthéon-Sorbonne and Invited Professor at Sciences Po Paris, ARTICLE: Antitrust Without Romance, 13 NYU J.L. & Liberty 326 (2020), Nexis Uni

The Legal Vagueness Surrounding Moral Concepts. The second risk created by the moralization of antitrust law is the creation of legal errors, whether type I or II. 250 More broadly, it risks the destabilization of all antitrust rules. Indeed, as I have argued above, antitrust law is ineffective and counterproductive when it does not pursue objectives that can be quantified and assessed. The same goes [\*392] when it is enforced to protect a morality whose outlines are necessarily drawn from personal experience. 251 In other words, moralizing antitrust law leads to more damage, through government failures, than it solves by addressing market failures, because such moralization prevents data from getting in the way of a good story. 252

#### Third, our impact turns theirs – war causes and worsens structural violence, not the other way around

John Horgan, Director of the Center for Science Writings at the Stevens Institute of Technology, 2012, The End of War, Chapter 5, Kindle p. 1600-1659

Throughout this book, I’ve examined attempts by scholars to identify factors especially conducive for peace. But there seem to be no conditions that, in and of themselves, inoculate a society against militarism. Not small government nor big government. Not democracy, socialism, capitalism, Christianity, Islam, Buddhism, nor secularism. Not giving equal rights to women or minorities nor reducing poverty. The contagion of war can infect any kind of society.

Some scholars, like the political scientist Joshua Goldstein, find this conclusion dispiriting. Early in his career Goldstein investigated economic theories of war, including those of Marx and Malthus. He concluded that war causes economic inequality and scarcity of resources as much as it stems from them. Goldstein, a self-described “pro-feminist,” then set out to test whether macho, patriarchal attitudes caused armed violence. He felt so strongly about this thesis that he and his wife limited their son’s exposure to violent media and contact sports.

But by the time he finished writing his 522-page book War and Gender in 2001, Goldstein had rejected the thesis. He questioned many of his initial assumptions about the causes of war. He never gave credence to explanations involving innate male aggression—war breaks out too sporadically for that—but he saw no clear-cut evidence for non-biological factors either. “War is not a product of capitalism, imperialism, gender, innate aggression, or any other single cause, although all of these influence wars’ outbreaks and outcomes,” Goldstein writes. “Rather, war has in part fueled and sustained these and other injustices.” He admits that all his research has left him “somewhat more pessimistic about how quickly or easily war may end.”

But here is the upside of this insight: if there are no conditions that in and of themselves prevent war, there are none that make peace impossible, either. This is the source of John Mueller’s optimism, and mine. If we want peace badly enough, we can have it, no matter what kind of society we live in. The choice is ours. And once we have escaped from the shadow of war, we will have more resources to devote to other problems that plague us, like economic injustice, poor health, and environmental destruction, which war often exacerbates.

The Waorani, whose abandonment of war led to increased trade and intermarriage, are a case in point. So is Costa Rica. In 2010, this Central American country was ranked number one out of 148 nations in a “World Database of Happiness” compiled by Dutch sociologists, who gathered information on the self-reported happiness of people around the world. Costa Rica also received the highest score in another “happiness” survey, carried out by an American think tank, that factored in the nation’s impact on the environment. The United States was ranked twentieth and 114th, respectively, on the surveys. Instead of spending on arms, over the past half century Costa Rica’s government invested in education, as well as healthcare, environmental conservation, and tourism, all of which helped make the country more prosperous, healthy, and happy. There is no single way to peace, but peace is the way to solve many other problems.

The research of Mueller, Goldstein, Forsberg, and other scholars yields one essential lesson. Those of us who want to make the world a better place—more democratic, equitable, healthier, cleaner—should make abolishing the invention of war our priority, because peace can help bring about many of the other changes we seek**.** This formula turns on its head the old social activists’ slogan: “If you want peace, work for justice.” I say instead, “If you want justice, work for peace.” If you want less pollution, more money for healthcare and education, an improved legal and political system—work for peace.

### AT: Hospital Consolidation Bad

#### DOesn’t implicate the DA – the CWS can solve hospital consolidation!

Melamed 20 – Professor of the Practice, Stanford Law

A.Douglas Melamed, Antitrust Law and its Critics, *Antitrust Law Journal* Vol. 83 (2020), <https://www-cdn.law.stanford.edu/wp-content/uploads/2021/11/A.-Douglas-Melamed-Antitrust-Law-and-Its-Critics-83-ANTITRUST-L.J.-269-2020.pdf>

Antitrust law should retain its singular focus on economic welfare. To do so

effectively, it must remain faithful to its common law-like tradition of adapting in light of new learning and new experience. Antitrust law, and the executive and judicial institutions that enforce it, must grapple seriously with

worthy and empirically based ideas of the mainstream progressives; those of

the conservatives; and, to the extent they are focused on promoting competition and economic welfare, those of the populists as well.

#### Years of experience prove that kind of evolutionary updating will solve. Their authors make bankrupt assumptions—AND any reasons it wouldn’t the plan does not fix.

Melamed 20 – Professor of the Practice, Stanford Law

A.Douglas Melamed, Antitrust Law and its Critics, *Antitrust Law Journal* Vol. 83 (2020), <https://www-cdn.law.stanford.edu/wp-content/uploads/2021/11/A.-Douglas-Melamed-Antitrust-Law-and-Its-Critics-83-ANTITRUST-L.J.-269-2020.pdf>

On the surface, the populist critics, like the conservatives and mainstream progressives, are talking at least in part about whether antitrust law is well suited to promote its economic-welfare objective. They argue, in particular, that the "consumer-welfare standard" that has defined contemporary antitrust law is much narrower than suggested above and that it prevents antitrust law from effectively promoting economic welfare. They say, for example, that the consumer-welfare standard requires courts to pursue outcomes, a task for which they are not well-suited, instead of calling balls and strikes; 79 confines antitrust law to a singular focus on consumer prices; 80 is not able to address conduct that reduces innovation; 81 and focuses solely on consumers and ignores harm to suppliers.8 2 Nicolas Petit and I have argued elsewhere that each of these criticisms is incorrect. 83 In brief, antitrust is about proscribing anticompetitive conduct and does not call upon courts to measure or regulate welfare outcomes. Antitrust law has in the past effectively addressed harms to innovation; harms to suppliers, including in labor markets; and anticompetitive conduct that had nothing to do with prices and involved products sold for a zero monetary price. The common focus on pricing data and other perceived problems reflect limitations on available data and difficult problems of proof, not any conceptual restrictions arising from the consumer-welfare standard. These limitations and problems have been, and no doubt will continue to be, ameliorated by advances in economists' toolkit and legal doctrine.

### 1NR – Link

#### However they want they want to try and distinguish the plan its irrelevant. ANY shift away from a consumer welfare analysis undermines stable application

Brennan 18 – Surrey Professor of Law, Harvard and Professor of Public Policy & Economics, UMD

Timothy J. Brennan, Ph.D. & A.M. in Mathematics from Harvard & JD from Harvard Law, and Senior Fellow, Resources for the Future, his research uses mathematical tools and financial economic theory to analyze tax law and develop ideas for tax policy reform, former Visiting Professor of Law at Columbia Law School, Professor of Law at Northwestern University School of Law, where he also held a courtesy appointment and taught in the Finance Department at the Kellogg School of Management, and Visiting Scholar at the MIT Sloan School of Management, where he was part of the Laboratory for Financial Engineering, Should Antitrust Go Beyond “Antitrust”?, *The Antitrust Bulletin* 63(1): 49-64, 2018, https://doi.org/10.1177/0003603X18756143

Nevertheless, the idea that something other than static economic efficiency is and should be the motive for antitrust enforcement has been around for some time. Robert Bork advocated the view that economic efficiency was the motivation for antitrust, but not without objection from Robert Lande, who viewed antitrust as preventing “theft” from consumers when firms exploit their market power to raise price.11 Decades before, Richard Hofstadter articulated the view that the purpose of antitrust enforcement was to limit the political power that would otherwise accrue to large businesses.12 Objections to that static view have not necessarily been in the direction of more active antitrust enforcement. Going back at least to Joseph Schumpeter, one view has been that antitrust should be guided and perhaps tempered by the view that dynamic efficiency, that is, innovation, is driven by the prospect of monopoly profit.13 On the other hand, others take the view that competition, not monopoly profit, encourages innovation.14

Within the last few years, however, the idea that currently unorthodox considerations should be incorporated into antitrust enforcement has become widespread. Including what has been mentioned above, my dozen considerations—some seemingly similar but with important differences—include:

Fairness15

Inequality16

Labor share of income17

Jobs18

Effect on competition (apart from consumer welfare)19

Consumer choice20

Promoting democracy; concentration of political power21

Anti-globalization; domestic control over resources22

Media veracity23

Environmental protection24

Managerial competence25

Mitigating consumer error26

This list does not include regarding innovation and dynamic efficiency as a potential counter to promoting static efficiency through increased competition.27

This is an impressive list of options. Although different factors come into play in assessing each of them, some generic arguments against their incorporation into antitrust policy apply to all of them. Those generic arguments will be described more fully in the subsequent section; following that will be a discussion of factors specific to each of these alternatives to the efficiency approach. Before getting to that, however, it is crucial to note that, by and large, this critique is not based on the merits of these concerns. Reducing equality, promoting democracy, employment opportunity, and environmental protection, among others on this list, are all worthy policy objectives. The question is not so much whether they are meritorious policy goals, but whether they should be objectives of antitrust enforcers and relevant considerations for antitrust courts.

This last point is crucial. It is one thing to say that antitrust enforcement should be stronger because it would lead to these other benefits. It is another to say that the decision in any individual case should change because these other considerations should be taken into account. However, if individual case decisions do not change, then the effects of antitrust enforcement do not change, regardless of the power of these platitudes. Those who believe antitrust should reflect these other considerations need to propose ways in which judges in antitrust cases should apply a standard other than, if perhaps along with, economic efficiency, in deciding when a merger should be blocked or a practice be proscribed. That principle colors the discussion to come.

#### Even just a single case not based on the spillover will spill over

--Tethers every individual case to econometric analysis—Plan disrupts that, spills over, and facilitates arbitrary and politically motivated enforcement

Wright 18 – former FTC Commissioner; now University Professor & Executive Director of the Global Antitrust Institute, Scalia Law School

Joshua Wright, Elyse Dorsey, Attorney Advisor to Commissioner Noah Phillips, United States Federal Trade Commission, Jonathan Klick, Professor of Law, University of Pennsylvania, and Jan M. Rybniek, Senior Associate, Freshfields, Bruckahus Deringer LLP, Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust, 2018, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249524>

The adoption of the consumer welfare standard as antitrust’s lodestar has come with numerous benefits that have reoriented antitrust jurisprudence over the last 50 years to more effectively protect competition. At its core, the consumer welfare standard provides a coherent, workable, and objective framework to replace the multiple, and often contradictory, vague social and political goals that governed antitrust prior to the modern era. By providing a disciplined framework for antitrust analysis, unified under a singular objective, the consumer welfare model fosters the rule of law and helps prevent arbitrary or politically motivated enforcement decisions. Similarly, promoting the use of the consumer welfare approach by competition authorities worldwide reduces the opportunity for enforcers to use their domestic competition laws to pursue non-economic objectives, including a protectionist agenda that targets U.S. and other foreign businesses.215

But if clarity and consistency were the only virtues offered by the consumer welfare standard we could identify any number of plausible alternatives. The most significant feature of the consumer welfare standard thus is that it tethers competition analysis, and therefore the outcome in any particular antitrust case, to modern economic learning and evidence. In doing so, the consumer welfare approach rejects the simplistic focus on market structure and concentration as a proxy for identifying anticompetitive effects. Indeed, courts and enforcers today use a broad set of economic tools to examine a variety of factors in assessing whether a specific transaction or business arrangement is likely to harm consumers. Despite claims by opponents to the contrary, consumer welfare analysis is robust and scrutinizes market factors beyond just a narrow focus on short-term price effects, including quality and innovation. The consumer welfare model also has the added benefit of allowing antitrust analysis to evolve alongside developments in economics to address new types of business models and emerging industries. As our understanding of the economics of a business arrangement improves, so too does the antitrust analysis.

#### We control uniqueness—Consumer welfare approach is universal now, and provides clear brightlines—Injecting new socio-political objectives scrambles that

Litan 18 – Vice President & Director of Economic Studies, the Brookings Institution

Dr. Robert Litan, Visiting Senior Policy Scholar, Center for Business & Public Policy at Georgetown University, Ph.D. in Economics from Yale, over 40 years’ experience as an economist and practicing attorney, specializing in complex antitrust litigation, practicing att’y as a shareholder of Berger Montague, served during the first term of the Clinton administration as principal deputy assistant attorney general in the Antitrust Division of the Justice Department, where he oversaw civil non-merger litigation and the Department’s positions on regulatory matters, primarily in telecommunications, served as vice president for research and policy at the Kauffman Foundation and also the director of research at Bloomberg Government, currently serves on the advisory board of the American Antitrust Institute, is a consulting economist with Econ One, A Scalpel, Not an Axe: Updating Antitrust and Data Laws to Spur Competition and Innovation, The Progressive Policy Institute, September 2018, <https://www.progressivepolicy.org/wp-content/uploads/2018/09/PPI_AntitrustandDataLaws_2018-1-1.pdf>

Over the past four decades, the consumer welfare approach has become the established way all federal courts, from the Supreme Court down to the federal district court level, have interpreted the antitrust laws. In my view, this happened largely because the approach had a theoretical structure that gave more-or-less clear answers to whether the behavior or acquisitions on trial were permissible. In contrast, the “small business school” of antitrust – or those who argue the antitrust laws have broader social and political objectives, such as promoting democracy and/or democratic capitalism –had and still has no established, non-arbitrary methods for drawing bright lines between permissible and impermissible behavior.

#### Plan breaks with 50 years of precedent insisting on static economic efficiency through the rule of reason as the only theory of harm

COC 9/20 – U.S. Chamber of Commerce

The Dangers of Upending Decades of Supreme Court Precedent, 20 September 2021, https://www.uschamber.com/regulations/the-dangers-of-upending-decades-of-supreme-court-precedent

Antitrust critics have signaled their interest to radically change existing U.S. antitrust law. Their ideas often seek to overturn decades of Supreme Court precedent (over 50 years in some cases), risking the very harms the Court sought to prevent.

Proposed changes look to abandon the Court’s insistence that antitrust law be grounded in the rule of reason and adhere to economic evidence, rejecting shortcuts used to reach findings of harm.

#### That’s the camel’s nose under the tent—No limiting principle to “public interest” litigation

**Wright**, PhD, University Professor and Executive Director, Global Antitrust Institute at Scalia Law School, former FTC Commissioner, **and** **Rybnicek**, JD, Counsel, Antitrust, competition and trade, Freshfields LLP, **‘20**

(Joshua D. and Jan, “A Time for Choosing: The Conservative Case Against Weaponizing Antitrust,” <https://nationalaffairs.com/time-choosing-conservative-case-against-weaponizing-antitrust>)

None of this means that the tech sector should be immune from antitrust scrutiny, that there are not serious economic issues facing American businesses and workers, or that certain tech platforms have shown an unmistakable bias against conservative viewpoints. Where anticompetitive conduct exists, it can and should be challenged under the **existing antitrust laws and legal doctrines**, which are more than capable of protecting competition in the digital economy. And the antitrust agencies are right to be vigilant against potential anticompetitive behavior by the major U.S. tech companies given their significant presence across key parts of the US economy.

But conservatives should be skeptical of attempts by politicians and bureaucrats **to reorder economies** simply to **appease current animosity against tech firms** and put at risk the substantial benefits they have brought to American consumers and workers. And that is **precisely what recent radical proposals would do**. These proposals **include abandoning the consumer welfare standard** that has helped make antitrust a coherent and principled body of law. Liberals instead seek **to untether antitrust** from the **rule of law** and return it to its **Stone Age** by reintroducing **vague** new “**public interest” tests** with multiple conflicting goals or by reestablishing arbitrary and obsolete market share thresholds—either of which would serve only to **increase government discretion**. Others have called to overturn unanimous and supermajority judicial precedent that are the foundations of the modern economic approach to antitrust. Still others seek to abandon the principle that it is the government and not business firms that bears the burden of proof of demonstrating the legality of free enterprise. These proposals require businesses to affirmatively prove to regulatory bodies that commercial conduct is not only not harmful but also that it is beneficial—beneficial to whom exactly is still unclear. And, of course, there have been calls to ban nearly all mergers, even those like Amazon’s acquisition of Whole Foods, which did not consolidate two rival companies and has brought customers lower prices and better services. **These efforts inevitably will only be the starting point**; **and with no limiting principle will increase the government's authority to substitute its own judgement for those of entrepreneurs**.

Conservatives long have believed in competition, markets, and the rule of law. The late Justice Scalia famously noted that antitrust’s signature statute, the Sherman Act, is “indeed the ‘Magna Carta of free enterprise’ … but it does not give judges carte blanche to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition.” The force of Justice Scalia’s admonition that the antitrust laws are not an appropriate vehicle for tinkering with the inner workings of private firms is even stronger when the tinkering is **not even in furtherance of greater competition**, **but for political ends.** Those core principles should not hastily be sacrificed now to **achieve transient political satisfaction** against America’s **largest tech companies**.

The tech sector is a **centerpiece of the modern U.S. economy**. America’s tech firms have innovated countless new products, created millions of U.S. jobs, and now are simultaneously envied and attacked by our counterparts abroad. As Ronald Reagan observed in 1964, the government rarely does anything as well or as economically as the private sector. And when the government does seek to control the economy it invariably does so through force or coercion of the people. An invitation to allow politicians and bureaucrats to use antitrust law to break up tech companies, to redesign digital products, or to moderate content for the “greater good” will end like most attempts at **introducing just a little bit of liberal orthodoxy**: the government’s discretion will grow and the people’s **ability to check it will fade overtime until it is a figment of its former self**. **It is the camel’s nose under the tent**. Now is the time for conservatives to choose whether they have a newfound faith in central planning or if they will recommit to principles of limited government and free markets.

### AT: We’re Only One Sector

#### a. 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.

#### b. 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.

#### c. 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.