# Kentucky Round 4 Wiki

## 1NC

### T Per Se

#### Interpretation – prohibit means to forbid a given practice – that’s distinct from restrictions

Kennard 93 – Judge, California Supreme Court

Joyce L. Kennard, THEODORE R. HOWARD et al., Plaintiffs and Appellants, v. GEORGE H. BABCOCK et al., Defendants and Respondents. No. S027061., Supreme Court of California, 1993, https://law.justia.com/cases/california/supreme-court/4th/6/409.html

As I pointed out earlier, the majority's conclusion is at odds with the great weight of authority. Also, in determining reasonableness based on the relationship between or among attorneys, the majority gives little regard to the relationship between the attorney and the client. Moreover, the majority fails to recognize that restrictive covenants are intended to and do restrict the practice of law. Rule 1-500 proscribes agreements that "restrict" the practice of law, not just those that prohibit "altogether" the practice of law. (Contra, Haight, Brown & Bonesteel v. Superior Court (1991) 234 Cal.App.3d 963, 969 [285 Cal.Rptr. 845] [rule 1-500 "simply provides that an attorney may not enter into an agreement to refrain altogether from the practice of law"].) To "restrict" means to restrain, to confine within bounds. (Webster's New Collegiate Dict. (9th ed. 1988) p. 1006.) To "prohibit" means to prevent, to [\*\*164] [\*\*\*94] forbid. (Id. at p. 940.) The terms are not synonymous.

#### “Expand the scope” means broadening the range of claims that can be brought---that explicitly excludes altering the standard that determines whether a plaintiff should be granted relief.

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

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

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

#### Violation: The aff merely makes it easier to file litigation but does NOT prohibit a set of business practices

#### That’s a voter for limits and ground – allowing exemptions to prohibitions lets the aff straight turn core topic DAs and get advantages based off clarifying vague statutes

### Adv CP

#### The United States Congress should declare that predispute arbitration agreements and pre-dispute joint action waivers with respect to antitrust disputes.

#### That achieves the effect of the aff—banning predispute arbitration agreements—without expanding the antitrust laws

Benjamin Goldstein, Congress Considers Ban on Mandatory Predispute Arbitration and Class Action Waivers, June 03, 2021, <https://www.americanbar.org/groups/labor_law/publications/labor_employment_law_news/winter-spring-2021-issue/congress-considers-ban/>

Under the FAIR Act, “no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.” FAIR Act, H.R. 963, 117th Cong. § 1 (2021). “Joint-actions” include joint, class, and collective actions. The ban would not cover collective bargaining agreements between labor organizations and employers. As currently drafted, the FAIR Act would apply to any claim that arises or accrues after the date of enactment, affecting millions of arbitration agreements and class action waivers entered into before that date.

Predispute arbitration agreements are currently enforceable under the Federal Arbitration Act (FAA). The FAA was enacted in 1925, but its scope has greatly expanded as a result of a series of federal court decisions since the 1980s. The proposed ban would undo the Supreme Court’s 2018 decision in Epic Systems v. Lewis, 138 S. Ct. 1612 (2018), which upheld the enforceability of class action waivers in the employment context.

### K Neolib

#### The affirmatives drive toward antitrust intervention adopts neoliberal assumptions of politics and economics which concentrates power in the hands of a few

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

Sandeep Vaheesan, “The Twilight of the Technocrats’ Monopoly on Antitrust?,” The Yale Law Journal Forum, 6/4/18, <https://www.yalelawjournal.org/pdf/Vaheesan_ir9dchg8.pdf>.

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

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

#### Elite capture locks in civilizational collapse, but it’s not inevitable. Try or die for putting political and economic power in the hands of the citizenry, and reorienting government decision-making toward the public good.

MacKay 18 – Professor of Sociology, Mohawk College

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

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

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

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

The Five Horsemen of the Modern Day Apocalypse

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

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

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

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

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

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

Societies as Decision-Making Systems

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

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

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

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

Oligarchic Control in “Democratic” States

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

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

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

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

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

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

What is To Be Done?

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

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

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

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

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

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

### DA Innovation

#### 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

GOP divided over bills targeting tech giants

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

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

#### Large-firm dynamism is the only way to maintain tech leadership vis-à-vis china—key to competitiveness and AI

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Antitrust scrutiny deters investment in finance---wards away big tech

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

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

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

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

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

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

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

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

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

#### Blockchain key to prevent snap financial collapse

Furber 19 – Sophia Furber is a journalist with S&P Global Market Intelligence, where she leads EMEA fintech and banking tech reporting, citing Brian Behlendorf, executive director of Hyperledger

Sophia Furber, "Blockchain could prevent rerun of 2008 banking meltdown, says tech veteran," S&P Global Market Intelligence, 6-28-2019, https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/blockchain-could-prevent-rerun-of-2008-banking-meltdown-says-tech-veteran-52534233

The aftermath of the 2008 global financial crisis would have been considerably less chaotic if banks had used blockchain to keep track of complex derivative trades, according to technologist Brian Behlendorf, executive director of Hyperledger.

Hyperledger, a global cross-industry group that aims to advance the use of blockchain technologies, is an initiative of the The Linux Foundation and counts major global banks including Deutsche Bank AG, JPMorgan Chase & Co. and Citigroup Inc. among its members.

More than the crash in the U.S. housing market, it was what happened next with the vastquantity of credit derivatives that really tipped the financial system into crisis, Behlendorf said.

At the height of the global financial crisis in October 2008, the collapse of Lehman Brothers Holdings Inc. triggered hundreds of billions in credit default swap, or CDS, protection payouts, but because the derivative instruments had been bought and sold **so many times**, it was **difficult to** know who was liable to pay out.

'A crisis of paperwork'

"This was not a crisis of over-exuberance. It was a crisis of paperwork," Behlendorf said in an interview. "It showed the fallibility of [banks'] digital systems. There was not an automated systematic record of who owned what, and banks were slow to respond."

Using blockchain would have meant that banks had a common system of record for instruments such as swaps, which could have resulted in a more "orderly unwinding" of contracts, he said.

There is a strong case for using blockchain in the parts of a bank that deal with settlements, clearing and trading, as this could help to prevent a re-runof the events of 2008, he said.

Until February this year, Hyperledger had been chaired by Blythe Masters, the JP Morgan banker widely credited with inventing the credit default swap in the 1990s. Following her career in banking, Masters has emerged in recent years one of the most vocal advocates for the use of blockchain in the world of finance and spent four years as CEO of blockchain services firm Digital Asset Holdings, LLC before stepping down in February this year, citing personal reasons.

Masters has taken a step back from Hyperledger for the time being for health reasons, according to Behlendorf.

The global CDS market has shrunk considerably since the days of the global financial crisis: outstanding notional amounts of CDS contracts stood at $8 trillion at the end of the first half of 2018, compared with $61.2 trillion at the end of 2007, according to the Bank for International Settlements.

But beyond the infamous CDSs, the global derivatives market is still vast — and growing. The notional outstanding value of over-the-counter derivatives stood at $595 trillion as of end-June 2018, up from $532 trillion at end-2017, according to the BIS.

#### Sustained economic depression triggers world war

* Distinct from Covid because that was only 1 year

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.

### PIC Hospitals

The United States federal government should substantially increase prohibitions on anticompetitive business practices by the private sector by at least expanding the scope of its core antitrust laws to prohibit arbitration agreements that operate as a prospective waiver of a party’s right to prove statutory remedies.

**The CP solves the aff but leaves rural hospitals exempt from class action suits that deck mergers**

**Consolidation is necessary to preserve rural hospitals, but antitrust expansion deters and prevents necessary mergers**

**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.

**Rural hospital closures cause massive food spikes**

**Alemian 16** – President & CEO of Alemian & Associates

David Alemian, "Rural Healthcare Is a Matter of National Security," HCPLive, 11-8-2016, https://www.hcplive.com/view/rural-healthcare-is-a-matter-of-national-security

Rural health organizations are already struggling with enormous turnover rates and costs that run up into the millions of dollars each year. The additional financial burden of penalties from Medicare and Medicaid will put many rural health organizations at risk of going out of business. If **too many** rural health organizations go **out of business**, it then becomes a matter of **national security** and here’s why:

In most rural communities, the healthcare organization is the **largest employer**. When the largest employer goes out of business, the **community collapses** and **people move away**. What was once a thriving community then **becomes a ghost town**. Rural America **produces the food** that feeds the rest of the country.

What will happen when our **amber waves of grain turn to desert wastelands** because there is **no one to work our great farmlands**? As the source of food dries up, and store shelves empty, the price of food will go **through the roof**. As food prices go up, hyperinflation will become a reality, and our printed money will **become worthless**. Almost **overnight**, Americans will **begin to go hungry** because they won’t be able to afford to put food on the table.

**Food insecurity causes conflict and war---continued US leadership is key and no one fills the vacuum**

**Flowers**, director of the Global Food Security Project and the Humanitarian Agenda at the Center for Strategic and International Studies (CSIS), **‘18**

(Kimberly, “Keeping it Stable: The Connection Between Hunger and Conflict,” January 31, <https://www.georgetownjournalofinternationalaffairs.org/online-edition/2018/1/31/keeping-it-stable-the-connection-between-hunger-and-conflict)>

Although achieving this SDG’s targets in totality is unlikely, a global focus on reducing poverty, malnutrition, and hunger around the world **remains essential** both as a universal moral value in a world of inequalities, and as an important contributor to economic growth and **national security**. The United States has been a **global leader** in **addressing the root causes** of hunger and poverty through **agricultural development**, including President Obama’s leadership role in creating the L’Aquila Initiative at the 2009 G8 summit in Italy. The initiative emerged in **response to a food price crisis** and resulted in a promise by donors to provide $22 billion in agricultural development assistance over three years.

It is **more critical now than ever** for leaders within the Trump administration to continue to leverage that progress, starting with gaining a better understanding of the complexity of global food insecurity and its inherent connection with conflict. As food insecurity is both a cause and a consequence of conflict, addressing food insecurity goes well beyond a moral obligation; **it is a national security imperative.**

A lack of access to food can **spark unrest** among civilian populations, particularly when triggered by food **price spikes**. Hungry populations are more likely to express their discontent with unresponsive or corrupt leadership, perpetuating a **cycle of political instability** and further undermining long-term economic development. In addition, governments and non-state actors alike can **use food as a strategic instrument of war**, as witnessed in instances spanning from Sudan’s civil conflict in the 1990s to President Bashar al-Assad’s war-torn Syria today. In Syria, all sides have used food as a tool to **control** and **expel** populations. ISIS has used food resources as both a source of **funding** and a lure for **recruitment**. Food **weaponization** further **underscores the importance of United States** action to protect food security abroad and recognize strategies employed to transform a basic necessity into a military tool.

Today, between 1.2 and 1.5 billion people live in fragile, conflict-ridden states. These conflicts have pushed over 56 million people into crisis and emergency levels of food insecurity. The U.N. estimates that 65 million people are internally displaced within their own countries or are refugees in other countries. These numbers continue to rise as conflicts and violence **escalate across the world,** in countries like **Yemen**, South **Sudan**, and **Syria**, causing social and economic devastation. Meanwhile, the number of people dependent on humanitarian assistance has mushroomed. Projections indicate that by 2030, more than two-thirds of the world’s poor could be living in fragile countries.

The international community is increasingly recognizing the **linkages** between **food insecurity** and **political instability.** Sharp rises in global food prices in 2007 and 2008 sparked riots and street demonstrations in more than 40 countries across the world. Since political leaders started paying attention to this connection, there has been notable progress in increasing international attention and funding to address the root causes of hunger and poverty. The United States has dedicated roughly $1 billion to agricultural development since 2010 through its global food security programs. Thanks to the bipartisan Global Food Security Act that passed in July 2016, multiple U.S. agencies are implementing a global food security strategy that reduces poverty, bolsters resilience, and improves nutrition.

Even the U.S. intelligence community has noticed food security challenges. In November 2015, the National Intelligence Council released an assessment that linked food insecurity to political instability and conflict. The report states that the overall risk of food insecurity in many countries, **compounded** by demographic shifts and constraints on key resources such as land and water, **will increase** during the next decade. The assessment concludes that in some countries, declining food security will contribute to social disruptions and **large-scale political instability** or conflict. The intelligence community’s highlighting of the importance of food security as a diplomacy tool and security strategy broadens the number of stakeholders who are tracking, responding to, and mitigating food insecurity. It is no longer solely a focus for policymakers in the development space.

After nearly a decade of progress, global hunger is again on the rise. A U.N. report on food security and nutrition released last year estimates that 815 million people, or 11 percent of the global population, are chronically malnourished, an increase of nearly 40 million people over the previous year. Conflict and climate change are the two primary causes of this reversed trend. More than half of those experiencing extreme hunger live in countries affected by protracted conflict. Droughts and natural disasters also pose a serious threat to food security, particularly to smallholder farmers vulnerable to a volatile climate.

The 2017 State of Food and Agriculture report explains that conflict and climate change are responsible for rising global hunger levels. Smallholder farmers around the world will be forced to adjust to changing rainfall patterns and severe droughts and floods, which will directly impact their crops and incomes. Many weeds, pests, and pathogens are influenced by climate and thrive in warm conditions. Severe floods can wipe out fields and block market transportation routes, reducing smallholders’ abilities to maintain a sustainable income. Researchers, including those at the National Academies of Science, conclude that human-induced climate change and drought is one of the root causes of Syria’s conflict. Climate change thus places an added burden on countries with limited resources already struggling to feed their populations, as declining agricultural growth and incomes can create displacement and heighten hunger.

Food insecurity and climate change are not the sole cause of the conflict in Syria, but their contribution to the country’s instability cannot be ignored. Investing in international development programs and humanitarian **assistance** that fosters agricultural-led growth and **strengthens the resilience** of vulnerable people can **create peace**, improve lives, and **reduce conflict.** U.S. foreign policy priorities should include strengthening the health and prosperity of those less fortunate before a crisis occurs because our investments can help prevent a crisis in the first place. As Former Secretary of Defense Robert M. Gates said, “Development is a lot cheaper than sending soldiers.”

### CP Section 5

#### The United States Federal Trade Commission should:

#### determine that, under Section 5 of the Federal Trade Commission Act, “unfair methods of competition” includes arbitration agreements that operate as a prospective waiver of a party’s right to statutory remedies

#### issue cease and desist letters to companies engaging in arbitration agreements that operate as a prospective waiver of a party’s right to statutory remedies stating that their conduct constitutes a violation of Section 5 of the FTC Act.

#### Broad FTC authority means the counterplan solves

Vaheesan 17 – Regulations Counsel, Consumer Financial Protections Bureau

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

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

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

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

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

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1. Interpretive Latitude in the FTC Act

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

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

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

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

**Protectionism causes global wars**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### Adv 1

#### Growth is up and increasing

Crutsinger 6/24 – AP Economics Writer. He’s been covering the Federal Reserve since 1984.

Martin CRUTSINGER, June 24 2021, “US economy grows 6.4% in Q1, and it’s likely just the start,” Associated Press, https://apnews.com/article/consumer-spending-gross-domestic-product-economy-business-ea9f24b146848b0821b549abb6cf78c8

WASHINGTON (AP) — The U.S. economy grew at a solid 6.4% rate in the first three months of the year, setting the stage for what economists believe may be the strongest year for the economy in about seven decades.

Growth in the gross domestic product, the country’s total output of goods and services, was unchanged from two previous estimates, the Commerce Department said Thursday, an acceleration from the 4.3% pace of the fourth quarter.

Economists believe that economic growth has continued to accelerate in the current quarter, which ends this month, as vaccinations become widespread and Americans eager to get outside are being welcomed by newly re-opened businesses. Surging activity from consumers is being fueled in part by nearly $3 trillion in financial support that the government has approved since December.

Additional economic data that emerged Thursday also points to a nation that has regained its footing quickly after being thwacked by a global pandemic, though jobless claims remain stubbornly above 400,000.

“This summer will be hot for the U.S. economy,” said Lydia Boussour, lead U.S. economist for Oxford Economics. “As the health situation continues to improve, consumers sitting on piles of savings will give into the urge to splurge on services and experiences they felt deprived of during the pandemic.”

Boussour forecast that GDP growth in the current April-June quarter will surge to an annual rate of 12% and growth for the entire year will come in at 7.5%. That would be the best annual performance since 1951.

Even economists whose forecasts for 2021 growth range from 6% to 7% believe growth this year will be the best since a 7.2% gain in 1984, when the U.S. was emerging from an extended and painful recession.

Economists believe growth this quarter will be enough to push GDP output above the previous peak reached at the end of 2019 before the pandemic struck and cut off the longest economic expansion in U.S. history.

The data released Thursday was government’s third and final look at first-quarter GDP, and arrived along side a separate report from the Commerce Department that showed May orders from U.S. factories for big-ticket manufactured goods rose for the 12th time in the last 13 months.

Orders for durable goods — meant to last at least three years — climbed 2.3% in May, reversing a 0.8% drop in April. That heated activity is taking place despite a backlogged supply chain and a shortage of workers.

Orders for aircraft shot up 27.4% last month after climbing 31.5% in April, the Commerce Department said. Excluding transportation orders — which can bounce wildly from month to month — durable goods orders rose 0.3% last month.

Factories anticipating a return to normalcy or better are ramping up operations to match demand as jobless claims continue to tick lower.

The number of Americans applying for unemployment benefits dropped last week as the job market continues to heal, albeit more slowly than many economists expected at this point in the recovery.

Jobless claims fell just 7,000 from the previous week to 411,000, the Labor Department said Thursday. While that is far from the rush to work that has been anticipated for some time now, weekly claims have fallen steadily this year from about 900,000 in January.

Even if job growth has not met most expectations, Americans are spending money and lots of it as summer kicks off.

Consumer spending, which accounts for more than two-thirds of economic activity, grew at a sizzling annual rate of 11.4% in first three months of the year, the Commerce Department said Thursday. It’s likely that some of that spending is being juiced by a round of $1,400 individual payments that were included in the $1.9 trillion support package Congress passed in March.

The first-quarter spending gain reflected increases in goods purchases, led by auto sales, and gains in spending on services, led by food services and travel accommodations, two areas that have benefited from the re-opening of the economy as vaccinations have increased.

Business investment grew at a strong 11.7% rate, better than the previous estimate of 10.8% growth, while government spending increased at a 5.7% rate, slightly below last month’s estimate of a 5.8% gain.

The trade deficit grew in the first quarter, subtracting 1.5 percentage points from growth, as a recovering U.S. economy attracted rising imports while U.S. exporters struggled with weaker overseas demand.

#### Slow growth doesn’t collapse the economy

Seba 14 - MBA @ Stanford, lecturer in distribution and clean energy @ Stanford (Tony, “Clean Disruption of energy and transportation: How silicon valley will make oil, nuclear, natural gas, coal, electric utilities and conventional cars obsolete by 2030,” pg. 2-17)

The Stone Age did not end because humankind ran out of stones. It ended because rocks were disrupted by a superior technology: bronze. Stones didn't just disappear. They just became obsolete for tool-making purposes in the Bronze Age. The horse and carriage era did not end because we ran out of horses. It ended because horse transportation was disrupted by a superior technology, the internal combustion engine, and a new, disruptive 20th century business model. Horses didn't just disappear. They became obso ete for the purposes of mass transportation. The age of centralized, command-and-control, extraction-resource-based energy sources (oil, gas, coal and nuclear) will not end because we run out of petroleum, natural gas, coal, or uranium. It will end because these energy sources, the business models they employ, and the products that sustain them will be disrupted by superior technologies, product architectures, and business models. Compelling new technologies such as solar, wind, electric vehicles, and autonomous (self-driving) cars will disrupt and sweep away the energy industry as we know it. The same Silicon Valley ecosystem that created bit-based technologies that have disrupted atom-based industries is now creating bit- and electron-based technologies that will disrupt atom-based energy industries.

Clean Disruption of Energy and Transportation.

The industrial era of energy and transportation is giving way to an information technology and knowledge-based energy and transportation era. The combination of bit-based and electron-based technologies will put an end to conventional atom-based energy and transportation industries. The disruption will be a clean one and have the following characteristics:

1. Technology-based disruption.

The clean disruption is about digital (bit) and clean energy (electron) technologies disrupting resource-based (atom-based) industries. Clean energy (solar and wind) is free. Clean transportation is electric and uses clean energy derived from the sun and wind. The key to the disruption of energy lies in the exponential cost and performance improvement of technologies that convert, manage, store, and share clean energy. The clean disruption is also about software and business model innovation.

2. Flipping the architecture of energy.

Just as the Internet and the cell phone turned the architecture of information upside-down, the clean disruption will create an energy architecture that is different from the one we know today. The new energy architecture will be distributed, mobile, intelligent, and participatory. It will overturn the existing energy architecture, which is centralized, command-and-control oriented, secretive, and extractive. The conventional energy model is about Big Banks financing Big Energy to build Big Power Plants or refineries in a few selected places. The new architecture is about everyone financing everyone to build smaller, distributed power plants everywhere.

3. Abundant, cheap, and participatory energy.

The clean disruption will be about abundant, cheap, and participatory energy. The existing energy business model is based on scarcity, depletion, and command-and-control monopolies. The clean disruption is similar to the information technology revolution that overturned the old publishing and information model and made information abundant, participatory, and essentially free.

4. Clean disruption is inevitable.

The clean disruption of energy and transportation is inevitable when you consider the exponential cost improvement of disrupting technologies; the creation of new business models; the democratization of generation, finance, and access; and the exponential market growth.

5. Clean disruption will be swift.

It will be over by 2030. Maybe before. Oil, natural gas (methane), coal, and uranium will simply become obsolete for the purposes of generating significant amounts of electricity and powering the automobile. These energy sources will still have uses. For example, uranium will be used to make nuclear weapons and natural gas will be used for cooking and producing fertilizer. Obsolescence and clean disruption will not put an end to incumbent industries. We still have vinyl records, sailboats and jukeboxes. These niche market products will survive, but energy and transportation will not be the multi-trillion dollar energy heavyweights that they are today.

#### Liberal order resilient

G. John Ikenberry 18, professor of Politics and International Affairs in the Woodrow Wilson School of Public and International Affairs at Princeton University, “Why the Liberal World Order Will Survive”, Carnegie Ethics and International Affairs, <https://scholar.princeton.edu/sites/default/files/gji3/files/why_the_liberal_world_order_will_survive.pdf>

In this essay I look at the evolving encounters between rising states and the post-war Western international order. My starting point is the classic “power transition” perspective. Power transition theories see a tight link between international order—its emergence, stability, and decline—and the rise and fall of great powers. It is a perspective that sees history as a sequence of cycles in which powerful or hegemonic states rise up and build order and dominate the global system until their power declines, leading to a new cycle of crisis and order building. In contrast, I offer a more evolutionary perspective, emphasizing the lineages and continuities in modern international order. More specifically, I argue that although America’s hegemonic position may be declining, the liberal international characteristics of order—openness, rules, multilateral cooperation—are deeply rooted and likely to persist. This is true even though the orientation and actions of the Trump administration have raised serious questions about the U.S. commitment to liberal internationalism. Just as importantly, rising states (led by China) are not engaged in a frontal attack on the American-led order. While struggles do exist over orientations, agendas, and leadership, the non-Western developing countries remain tied to the architecture and principles of a liberal-oriented global order. And even as China seeks in various ways to build rival regional institutions, there are stubborn limits on what it can do. Power Transitions and International Order There is wide agreement that the world is witnessing a long-term global power transition. Wealth and power is diffusing, spreading outward and away from Europe and the United States. The rapid growth that marked the non-Western rising states in the last decade may have ended, and even China’s rapid economic ascendency has slowed. But the overall pattern of change remains: the “rest” are gaining ground on the “West.” While there is wide agreement that the world is witnessing a global power transition, there is less agreement on the consequences of power shifts for international order. The classic view is advanced by realist scholars, such as E. H. Carr, Robert Gilpin, Paul Kennedy, and William Wohlforth, who make sweeping arguments about power and order. These hegemonic realists argue that international order is a by-product of the concentration of power. Order is created by a powerful state, and when that state declines and power diffuses, international order weakens or breaks apart. Out of these dynamic circumstances, a rising state emerges as the new dominant state, and it seeks to reorganize the international system to suit its own purposes. In this view, world politics from ancient times to the modern era can be seen as a series of repeated cycles of rise and decline. War, protectionism, depression, political upheaval—various sorts of crises and disruptions may push the cycle forward. This narrative of hegemonic rise and decline draws on the European and, more broadly, Western experience. Since the early modern era, Europe has been organized and reorganized by a succession of leading states and would-be hegemons: the Spanish Hapsburgs, France of Louis XIV and Napoleon, and post-Bismarck Germany. The logic of hegemonic order comes even more clearly into view with Pax Britannica, the nineteenth-century hegemonic order based on British naval and mercantile dominance. The decline of Britain was followed by decades of war and economic instability, which ended only with the rise of Pax Americana. For hegemonic realists, the debate today is about where the world is along this cyclical pathway of rise and decline. Has the United States finally lost the ability or willingness to underwrite and lead the post-war order? Are we in the midst of a hegemonic crisis and the breakdown of the old order? And are rising states, led by China, beginning to step forward in efforts to establish their own hegemonic dominance of their regions and the world? These are the lurking questions of the power transition perspective. But does this vision of power transition truly illuminate the struggles going on today over international order? Some might argue no—that the United States is still in a position, despite its travails, to provide hegemonic leadership. Here one would note that there is a durable infrastructure (or what Susan Strange has called “structural power”) that undergirds the existing American-led order. Far-flung security alliances, market relations, liberal democratic solidarity, deeply rooted geopolitical alignments—there are many possible sources of American hegemonic power that remain intact. But there may be even deeper sources of continuity in the existing system. This would be true if the existence of a liberal-oriented international order does not in fact require hegemonic domination. It might be that the power transition theory is wrong: the stability and persistence of the existing post-war international order does not depend on the concentration of American power. In fact, international order is not simply an artifact of concentrations of power. The rules and institutions that make up international order have a more complex and contingent relationship with the rise and fall of state power. This is true in two respects. First, international order itself is complex: multilayered, multifaceted, and not simply a political formation imposed by the leading state. International order is not “one thing” that states either join or resist. It is an aggregation of various sorts of ordering rules and institutions. There are the deep rules and norms of sovereignty. There are governing institutions, starting with the United Nations. There is a sprawling array of international institutions, regimes, treaties, agreements, protocols, and so forth. These governing arrangements cut across diverse realms, including security and arms control, the world economy, the environment and global commons, human rights, and political relations. Some of these domains of governance may have rules and institutions that narrowly reflect the interests of the hegemonic state, but most reflect negotiated outcomes based on a much broader set of interests. As rising states continue to rise, they do not simply confront an American-led order; they face a wider conglomeration of ordering rules, institutions, and arrangements; many of which they have long embraced. By separating “American hegemony” from “the existing international order,” we can see a more complex set of relationships. The United States does not embody the international order; it has a relationship with it, as do rising states. The United States embraces many of the core global rules and institutions, such as the United Nations, International Monetary Fund (IMF), World Bank, and World Trade Organization. But it also has resisted ratification of the Law of the Sea Convention and the Convention on the Rights of the Child (it being the only country not to have ratified the latter) as well as various arms control and disarmament agreements. China also embraces many of the same global rules and institutions, and resists ratification of others. Generally speaking, the more fundamental or core the norms and institutions are—beginning with the Westphalian norms of sovereignty and the United Nations system—the more agreement there is between the United States and China as well as other states. Disagreements are most salient where human rights and political principles are in play, such as in the Responsibility to Protect. Second, there is also diversity in what rising states “want” from the international order. The struggles over international order take many different forms. In some instances, what rising states want is more influence and control of territory and geopolitical space beyond their borders. One can see this in China’s efforts to expand its maritime and political influence in the South China Sea and other neighboring areas. This is an age-old type of struggle captured in realist accounts of security competition and geopolitical rivalry. Another type of struggle is over the norms and values that are enshrined in global governance rules and institutions. These may be about how open and rule-based the system should be. They may also be about the way human rights and political principles are defined and brought to bear in relations among states. Finally, the struggles over international order may be focused on the distribution of authority. That is, rising states may seek a greater role in the governance of existing institutions. This is a struggle over the position of states within the global political hierarchy: voting shares, leadership rights, and authority relations. These observations cut against the realist hegemonic perspective and cyclical theories of power transition. Rising states do not confront a single, coherent, hegemonic order. The international order offers a buffet of options and choices. They can embrace some rules and institutions and not others. Moreover, stepping back, the international orders that rising states have faced in different historical eras have not all been the same order. The British-led order that Germany faced at the turn of the twentieth century is different from the international order that China faces today. The contemporary international order is much more complex and wide-ranging than past orders. It has a much denser array of rules, institutions, and governance realms. There are also both regional and global domains of governance. This makes it hard to imagine an epic moment when the international order goes into crisis and rising states step forward—either China alone or rising states as a bloc—to reorganize and reshape its rules and institutions. Rather than a cyclical dynamic of rise and decline, change in the existing American-led order might best be captured by terms such as continuity, evolution, adaptation, and negotiation. The struggles over international order today are growing, but it is not a drama best told in terms of the rise and decline of American hegemony.

#### No tipping point to eco collapse

Hance 18 [Jeremy Hance, wildlife blogger for the Guardian and a journalist with Mongabay focusing on forests, indigenous people, climate change and more. He is also the author of Life is Good: Conservation in an Age of Mass Extinction. Could biodiversity destruction lead to a global tipping point? Jan 16, 2018. https://www.theguardian.com/environment/radical-conservation/2018/jan/16/biodiversity-extinction-tipping-point-planetary-boundary]

Just over 250 million years ago, the planet suffered what may be described as its greatest holocaust: ninety-six percent of marine genera (plural of genus) and seventy percent of land vertebrate vanished for good. Even insects suffered a mass extinction – the only time before or since. Entire classes of animals – like trilobites – went out like a match in the wind.

But what’s arguably most fascinating about this event – known as the Permian-Triassic extinction or more poetically, the Great Dying – is the fact that anything survived at all. Life, it seems, is so ridiculously adaptable that not only did thousands of species make it through whatever killed off nearly everything (no one knows for certain though theories abound) but, somehow, after millions of years life even recovered and went on to write new tales.

Even as the Permian-Triassic extinction event shows the fragility of life, it also proves its resilience in the long-term. The lessons of such mass extinctions – five to date and arguably a sixth happening as I write – inform science today. Given that extinction levels are currently 1,000 (some even say 10,000) times the background rate, researchers have long worried about our current destruction of biodiversity – and what that may mean for our future Earth and ourselves.

In 2009, a group of researchers identified nine global boundaries for the planet that if passed could theoretically push the Earth into an uninhabitable state for our species. These global boundaries include climate change, freshwater use, ocean acidification and, yes, biodiversity loss (among others). The group has since updated the terminology surrounding biodiversity, now calling it “biosphere integrity,” but that hasn’t spared it from critique.

A paper last year in Trends in Ecology & Evolution scathingly attacked the idea of any global biodiversity boundary.

“It makes no sense that there exists a tipping point of biodiversity loss beyond which the Earth will collapse,” said co-author and ecologist, José Montoya, with Paul Sabatier Univeristy in France. “There is no rationale for this.”

Montoya wrote the paper along with Ian Donohue, an ecologist at Trinity College in Ireland and Stuart Pimm, one of the world’s leading experts on extinctions, with Duke University in the US.

Montoya, Donohue and Pimm argue that there isn’t evidence of a point at which loss of species leads to ecosystem collapse, globally or even locally. If the planet didn’t collapse after the Permian-Triassic extinction event, it won’t collapse now – though our descendants may well curse us for the damage we’ve done.

Instead, according to the researchers, every loss of species counts. But the damage is gradual and incremental, not a sudden plunge. Ecosystems, according to them, slowly degrade but never fail outright.

“Of more than 600 experiments of biodiversity effects on various functions, none showed a collapse,” Montoya said. “In general, the loss of species has a detrimental effect on ecosystem functions...We progressively lose pollination services, water quality, plant biomass, and many other important functions as we lose species. But we never observe a critical level of biodiversity over which functions collapse.”

### Adv 2

#### Market competition can’t make healthcare accessible

Mwachofi and Al-Assaf 11 – Dr. Ari Mwachofi is a health economist with training and experience in Agricultural and Applied Economics and Curriculum Planning and Development. Dr. Assaf Al-Assaf is currently the Executive Director of the American Institute for Healthcare Quality, a licensed vocational training institution in the State of Oklahoma with courses offered world-wide.

[Ari Mwachofi](https://www.ncbi.nlm.nih.gov/pubmed/?term=Mwachofi%20A%5BAuthor%5D&cauthor=true&cauthor_uid=22087373) and [Assaf F. Al-Assaf](https://www.ncbi.nlm.nih.gov/pubmed/?term=Al-Assaf%20AF%5BAuthor%5D&cauthor=true&cauthor_uid=22087373), August 11 2011, “Health Care Market Deviations from the Ideal Market,” Sultan Qaboos University Medical Journal, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3210041/

There are several information asymmetries in health care, but we will examine two: between the doctor and the patient, and between the consumer and the health insurance company.

Doctors (suppliers) know more about illness and treatments than their patients. Patients depend on the doctor to act in their best interest, but there is a conflict of interest because the doctor is selling a service to the patient. The doctor is in a position to determine demand for the service (acting on behalf of the patient, presumably for the patient’s welfare) and the doctor is also the supplier of the services. In this case demand and supply are jointly determined by the same individual at the same time which can result in market failure. For example, if the doctor is driven by the profit motive, or is seeking higher income, the doctor might order more services than necessary (e.g. if he/she owns a laboratory or imaging equipment). This market failure is termed “supplier induced demand”. There are several studies that indicate evidence of supplier-induced demand in health care. In a Japanese study, Izumida, Urushi and Nakinishi found that increases in the number of physicians per capita significantly increased use of inpatient services and outpatient services.[8](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3210041/#b8-squmj-11-328) This implies that when more doctors moved into an area they had to share the patients so they increased demand for their services in each encounter by inducing demand from the patients under their care. Another Japanese study examined whether more frequent use of percutaneous transluminal coronary angioplasty (PTCA) for patients with acute myocardial infarction (AMI) in Japan is driven by physicians’ self-interest or by patient behaviour.[9](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3210041/#b9-squmj-11-328) After controlling for a patient’s detailed characteristics, they found that increases were significantly related to physician-initiated expenditures and the effect is higher for high-tech treatments. This finding is supported by findings of an American study that found similar market failure in large metropolitan areas.[10](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3210041/#b10-squmj-11-328) Similarly a study of ambulatory care in France found strong support for the existence of physician induced demand in the French system.[11](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3210041/#b11-squmj-11-328)

Information asymmetry between individuals purchasing health insurance and the insurance company results in two market failures termed adverse selection and moral hazard.

[Go to:](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3210041/)

ADVERSE SELECTION

Individuals in poor health have a greater incentive to purchase health insurance than those in good health. Individuals in poor health make greater utilisation of health care than the healthy, leading to higher payouts by the insurance company. To avoid incurring losses, insurance companies might raise premiums. Higher premiums will further discourage healthy individuals from purchasing health insurance so that only the very ill buy insurance leading to losses by insurance companies and eventually this might mean the demise of a market.[12](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3210041/#b12-squmj-11-328) This market failure can be corrected by universal coverage, i.e. everyone buys coverage so that insurance companies have a pooled risk which on the average is lower than the risk from covering only the very ill. The other solution is screening and experience rating that allows insurance companies to change different premiums according to risk levels.[13](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3210041/#b13-squmj-11-328) Studies indicate huge welfare losses due to adverse selection.[14](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3210041/#b14-squmj-11-328)

[Go to:](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3210041/)

MORAL HAZARD

Individuals covered by insurance tend to use more health care and they might not take necessary precautions to stay healthy because they know they have insurance coverage. This leads to inefficient use of resources. Insurance companies try to correct this by employing gate-keepers who monitor and restrict health care access and by charging co-payments and deductibles. Unfortunately, these are applied to everyone including those not overusing services, which make these solutions inefficient.

[Go to:](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3210041/)

INTERDEPENDENT DEMAND AND SUPPLY DETERMINATION

An increase in demand for health care (e.g. due to an influx of population, or an epidemic) can lead to higher prices for such care. The increase in prices might result in the physician supplying less hours of work. For example, if a physician wants to earn $100,000 per year, he may usually earn that much by seeing 100 patients a week. If the price for services goes up, he might be able to earn that income by seeing only 80 patients a week. He/she will then be able to hit the target income by supplying less hours of work—thus seeing fewer patients and spending more of his/her time on leisure. This situation results in the famous “backward bending” labor supply curve. Thus supply and demand in health care are not determined independently leading to market failures.

[Go to:](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3210041/)

CONSUMER RATIONALITY AND ABILITY TO MAKE THE BEST JUDGMENTS ABOUT THEIR WELFARE

Consumers seeking care are not always in a position to make the best judgment about their welfare even if they have the ability and freedom to do so. For one, they lack necessary information about their illness or the effective treatment. Moreover, there are some situations of extreme stress making it impossible for the individual consumer to make the judgment (e.g. someone in a car accident, passed out on the roadside). Furthermore, consumers cannot accurately predict the results of consuming health care. When visiting a doctor for a particular condition, the consumer is not able to predict accurately what the results of the visit will be, even if they have been through similar circumstances before. A treatment regimen that worked previously might not work the same way.

Economists consider an individual to be rational if they made consistent and transitive decisions. “Consistent” means that when faced with the same conditions they make the same decisions every time. “Transitive” is used in the mathematical logic sense that, in a relation between three elements, if it holds between the first and second, and it also holds between the second and third, it must necessarily hold between the first and third. For example, an individual is offered three choices A, B, and C. If they prefer choice A over B and they also prefer choice B over C then they must prefer choice A over C. Economists would consider an individual rational if they decided/acted in this manner. However there are numerous findings of consumers acting irrationally.[15](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3210041/#b15-squmj-11-328) This is why we all ask ourselves the question “What was I thinking?” after realising that we acted irrationally. Thus there is evidence that consumers do not always act rationally thus the condition is not met in health care.

[Go to:](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3210041/)

EXTERNALITIES

Externalities are spill-over effects of consumption or production. Positive externalities occur when the actions of one individual result in a spill-over that improves the well being of another individual and negative externalities impose a cost on another individual. Smoking is an example of a negative consumption externality because one individual’s consumption (smoking) affects other people’s health negatively (effects of second-hand smoke). An example of a positive externality is immunisation. If some individuals are immunised they provide “herd immunity” in the sense that they do not get the illness therefore they do not pass it on to others. Their immunisation provides a benefit to others—a positive externality.

With the presence of externalities, individual production or consumption decisions are not optimal because they are made without consideration of all costs or benefits. Often, spill-over effects are not included in decision-making because they are not visible to the producer or consumer. In the case of a negative externality, the external spill-over costs are not included and in the case of positive externality, the spill-over benefits are excluded. Therefore, the consumption or production level selected is not optimal or efficient. In cases of positive externality, the production or consumption level is below the optimal while with negative externalities the level is higher than optimal. Therefore externalities lead to inefficiency and so to market failures.

The market is usually not able to correct inefficiencies arising from externalities. To correct failure due to externalities, the consumer or producer has to consider both the private and the external (spill-over) costs or benefits. Such considerations in the decision-making process would result in production or consumption at optimal levels. One method of making the producer or consumer consider total benefits or costs in production is to provide subsidies in case of positive externalities, or taxes in the situation of negative externality. The subsidy makes the external benefit part of the private benefits that the consumer or producer will consider in decision-making so as to arrive at optimal production/consumption quantities. The tax serves to make the producer aware of the extra costs that they impose on society so that they can arrive at optimal quantities in their decision-making. Thus taxes or subsidies might eliminate the effects of externalities and lead to efficient allocation of resources. However, these usually require government action. The way taxes are used (allocated and distributed) has an effect on societal welfare. Furthermore, there are issues of measurement and arriving at the correct amount of tax or subsidy that will lead to efficiency.

[Go to:](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3210041/)

PREDETERMINED CONSUMER TASTES

Another implied condition is that consumer tastes are already determined at the time the consumer enters the market. This condition is not met in health care and consumer tastes are malleable. For example, consumers in the USA might demand newer, more expensive technologies rather than older ones that are equally effective, but less expensive. Such demands lead to unnecessary increases in health care costs—an inefficient use of resources (market failure).

#### No matter the future pandemic, humanity can adapt and find new solutions – we get better at it every single time

Pinker et Al. 20 – Steven earned his BA from McGill and his PhD from Harvard. Currently Johnstone Professor of Psychology at Harvard, he has also taught at Stanford and MIT. He has won numerous prizes for his research, his teaching, and his books, including [The Language Instinct](https://stevenpinker.com/publications/language-instinct-19942007), [How the Mind Works](https://stevenpinker.com/publications/how-mind-works-19972009), [The Blank Slate](https://stevenpinker.com/publications/blank-slate-20022016), [The Better Angels of Our Nature](https://stevenpinker.com/publications/better-angels-our-nature), [The Sense of Style](https://stevenpinker.com/publications/sense-style-thinking-persons-guide-writing-21st-century), and [Enlightenment Now](https://theopenscholars.com/pinker/publications/enlightenment-now-case-reason-science-humanism-and-progress). He is an elected member of the National Academy of Sciences, a two-time Pulitzer Prize finalist, a Humanist of the Year, a recipient of nine honorary doctorates, and one of Foreign Policy’s “World’s Top 100 Public Intellectuals” and Time’s “100 Most Influential People in the World Today.”

Benjamin M. Seitz, Athena Aktipis, David M. Buss, Joe Alcock, Paul Bloom, Michele Gelfand, Sam Harris,  Debra Lieberman, Barbara N. Horowitz, Steven Pinker,  David Sloan Wilson, and Martie G. Haselton, November 10 2020, “The pandemic exposes human nature: 10 evolutionary insights,” Proceedings of the National Academy of Sciences of the United States of America, https://www.pnas.org/content/117/45/27767

Many people have trouble reconciling the demonstrable fact of **human progress—**that, over time, we have become healthier, better fed, richer, safer, and better educated—with the constraints of human biology. Some fear that, if the mind has evolved as a complex structure, then progress would be impossible, because “you can’t change human nature.” Therefore, either there cannot be such a thing as progress or there cannot be such a thing as human nature.

But these are confusions which arise from misconceptions of human nature and of human progress ([85](https://www.pnas.org/content/117/45/27767#ref-85), [86](https://www.pnas.org/content/117/45/27767#ref-86)). Among the adaptations making up human nature is the triad of faculties that adapt us to the **“cognitive niche”** ([87](https://www.pnas.org/content/117/45/27767#ref-87)): know-how, which allows us to understand the physical world and try out new ways to manipulate it to our advantage; language, which allows us to share and recombine these ideas; and sociality, which gives us the motive to coordinate ideas and actions with our fellows for mutual benefit. Among the brainchildren of these faculties are **inventions that magnify their own power**, including the printed and electronic word and institutions of science and governance, which allow knowledge to accumulate over generations. When people deploy knowledge to improve their lives, retaining and combining the innovations that work and discarding those that don’t, p**rogress can take place.**

That’s all that progress consists of. It is not, contrary to conceptions of Herbert Spencer and other Victorians ([88](https://www.pnas.org/content/117/45/27767#ref-88), [89](https://www.pnas.org/content/117/45/27767#ref-89)), a mystical evolutionary force that propels us ever upward. On the contrary, the forces of nature tend to grind us down, including the inexorable increase in physical disorder and the evolutionary conflicts between parasites and hosts, predators and prey, and conspecifics and one another. It’s only the application of hard-won knowledge that allows us to eke out local and provisional advances against the constant challenges to our well-being.

Among these challenges are outbreaks of infectious disease. Bouts of outbreak over millennia were the selective pressure that led to the evolution of our innate, adaptive, and behavioral immune systems.

Yet it was **our cognitive adaptations that led to the recent conquest of the infectious disease**s that felled our ancestors in great numbers. They allowed us to discover vaccination, sanitation, antisepsis, antibiotics, antivirals, and other advances in public health and medicine that have dramatically extended life expectancy.

So it should come as no surprise, and is no refutation of the fact or the possibility of progress, that another infectious pathogen has launched an offensive against us; that is in the very nature of life. Yet the biology of Homo sapiens gives us good reasons to expect that **the disease will be subdued** in its turn—not as an inevitable step in some march of progress, but if (and only if) we redouble the commitment, which human evolution enables but does not guarantee, to the development and application of scientific knowledge to improve human well-being.

#### AI race inevitable

Horowitz 18 – Michael C. Horowitz is a professor of political science and the associate director of Perry World House at the University of Pennsylvania.

Michael Horowitz, May 2018, “Artificial Intelligence, International Competition, and the Balance of Power,” Texas National Security Review, https://tnsr.org/2018/05/artificial-intelligence-international-competition-and-the-balance-of-power/

Whether AI capabilities diffuse relatively slowly or quickly, major military powers will likely face security dilemmas having to do with AI development and deployment. In a slow diffusion scenario, if countries fear that adversaries could get ahead in ways that are hard to rapidly mimic — and small differences in capabilities will matter on the battlefield — that will foster incentives for quick development and deployment. In a rapid diffusion scenario, competitive incentives will also exist, as countries feel like they have to race just to keep up.[114](https://tnsr.org/2018/05/artificial-intelligence-international-competition-and-the-balance-of-power/" \l "_ftn114) Moreover, it will be inherently difficult to measure competitors’ progress with AI (unlike, say, observing the construction of an aircraft carrier), causing countries to assume the worst of their potential rivals.

Competition in developing AI is underway. Countries around the world are investing heavily in AI, though the United States and China seem to be ahead. Yet even if the space-race analogy is not precise, understanding AI as a competition can still be useful. Such frameworks help people and organizations understand the world around them, from how to evaluate international threats to the potential trajectory of wars.[115](https://tnsr.org/2018/05/artificial-intelligence-international-competition-and-the-balance-of-power/" \l "_ftn115) If likening competition in AI to the space race clarifies the stakes in ways that generate incentives for bureaucratic action at the government level, and raises corporate and public awareness, the analogy stands to have utility for the United States.

## 2NC

### PIC Healthcare

#### 1AC Helm is clear that private enforcement would increase comeptiton in healthcare

Helm ’17 [Anne; 2017; Chief of Staff to the Chancellor & Dean at the Hastings College of the Law at the University of California; Saint Louis University Journal of Health Law and Policy, “Optimizing Private Antitrust Enforcement in Health Care,” vol. 11]

I. Introduction

Americans are paying too much for health care services and insurance, in large part due to insufficient competition among providers and payors.1 Waves of consolidation in these markets have fortified providers and insurers with market power, resulting in higher prices and lower quality for consumers.2 As antidotes, health economists and other policy advocates have proposed various legislative, regulatory, and enforcement solutions.3 Yet private antitrust enforcement is rarely recommended to remedy health care market dysfunction. Whereas public antitrust enforcement is generally touted as indispensable,4 private antitrust enforcement is often disregarded as baseless, self-serving litigation that only strains judicial resources and may even raise costs.5 But the notion that private litigation is important should not be controversial.6 Private antitrust enforcement can restore competition, deter antitrust violations, and compensate victims in the markets for health care services and insurance, and, accordingly, the United States should be looking for ways to optimize it.

When passed, the antitrust statutes envisioned private cases as a fundamental part of an overall enforcement scheme.7 Indeed, the treble damages remedy was meant to spur private litigation.8 The Supreme Court has acknowledged as much: “By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as ‘private attorneys general.’”9 The Court later elaborated, “The treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators.”10 Over the last century, private cases have greatly outnumbered public enforcement actions.11 Recently, however, “private actions have caught up in the well-orchestrated, ideologically driven ‘tort reform’ movement” and have been characterized as “legalized blackmail” as opposed to a vital component of our statutory antitrust scheme.12 Private antitrust enforcement does not deserve this characterization and indeed is a much needed means to address health care pricing.

Antitrust law is premised on the notion that competition leads to lower costs, higher-quality products and services, and encourages investment and innovation. In health care, as former Federal Trade Commission (FTC) Chair Edith Ramirez stated, “The success of health care reform in the United States depends on the proper functioning of our market-based health care system.”13 Although highly regulated and somewhat complicated by the buyer and seller relationships among patients, providers, and payors, health care in the United States is nonetheless market-based. As such, the sector depends on competition to drive prices down and quality up, even after the at-risk Patient Protection and Affordable Care Act.14 There is a real need for more antitrust enforcement in health care. As to hospital mergers, a named top public enforcement priority,15 the FTC has only challenged one percent of mergers over the past decade.16 And, even with both the FTC and the Department of Justice (DOJ) enforcing the federal antitrust laws, the lower-priority cases challenging anti-competitive conduct are even more scant, and criminal cases are rarer still.17 In this void, private antitrust enforcement is essential to address market power in health care, and one that assumes a role that public enforcement cannot—or does not—presently fill.18

The insufficiency of public enforcement to address antitrust concerns in health care will likely only be exacerbated by the new presidential administration, under which at least one commentator has noted that “it is fair to expect some tempering of the level of activity that characterized the Obama administration.”19 Generally, Republican administrations are less likely to intervene in transactions and challenge the conduct of businesses, and despite some campaign rhetoric to the contrary, President Trump’s appointments seem to indicate an approach more in line with the party than with a new populism.20 Of course, political influence is not limited to the federal realm; in states, the political priorities of elected attorneys general influence antitrust policy as well. Nevertheless, even the most aggressive public enforcement scheme would be incapable of addressing antitrust issues in health care without its private cousin.

What can private antitrust enforcement accomplish? Effective enforcement achieves deterrence, compensates victims,21 and maintains or restores competition in health care markets. Private enforcement allows health care entities to police their own markets and consumers to seek relief from anticompetitive acts. But it is often said that antitrust laws are meant to protect competition and consumers, not competitors.22 The concern is that entities, acting in their own self-interest, will use the antitrust laws to try to modify contracts, redress various business torts, stifle competition, and extort settlements from rivals.23 Despite criticisms that private suits are self-interested and therefore anti-competitive, a lawsuit can be both self-interested and pro-competitive.24 Indeed, the antitrust laws were written to take advantage of private plaintiffs’ incentives and information to bring suits that benefit both themselves and consumers.

**Fears of future litigation will create strong incentives not to merge in rural care!**

**Noether and May 17** – Ph.D.s., economists with Charles River Associates

Monica Noether and Sean May, "Hospital Merger Benefits: Views from Hospital Leaders and Econometric Analysis," American Hospital Association, January 2017, https://www.aha.org/system/files/2018-04/Hospital-Merger-Full-Report-FINAL-1.pdf

It is **evident** from our discussions with hospital leaders, as well as reviews of the health care trade press and industry conferences, that **many, if not most**, hospital leaders feel that they are **at a crossroads**. While many still operate primarily in a fee-for-service world that encourages provision of greater volume of services and focuses on the price of each individual service, all recognize that **these days are numbered**. Many are already experiencing a shift to value-based payments for both their publicly and privately insured patients. Some are also experimenting with risk-based approaches in which they are reimbursed a fixed amount to provide high quality care, at least for a defined bundle of services, and sometimes more broadly for an entire patient population.

Traditional fee-for-service reimbursement methodologies motivate all providers to deliver more care, and do not distinguish beneficial services from those that are redundant or of questionable value. Hospital system leaders recognize that payment methodologies are **evolving** to change those incentives and that hospitals will be reimbursed based on the care delivered by the delivery system team **in which they participate**, rather than on their own performance. New payment approaches necessitate alignment of the financial and clinical incentives of an integrated team of providers.

Hospital leaders also recognize that such fundamental changes to the payment system require them to **integrate both vertically**, with other types of providers such as physicians and post-acute care providers, **and horizontally**, to form systems that achieve the **scale necessary** to make the **substantial investments required** to support the new health care delivery model or to bear the financial risk inherent in value-based payment systems. Our discussions with hospital leaders focused primarily on the motivations for and benefits achieved from horizontal integration, as horizontal combinations have been the primary focus of substantial recent **antitrust scrutiny**. However, many hospital leaders noted that they also focused extensively on vertical combinations to address the changing demands of health care.

The demands of the evolving health care delivery framework encourage the **development of scale**. For example, hospitals must make substantial investments in the clinical and administrative information technology **(IT) infrastructure necessary** to provide the type of integrated care envisioned in both private and public health care reform initiatives. Infrastructure investments, such as construction of a robust and productive IT system, benefit from **substantial economies of scale**: they are expensive to develop and operate but are **highly scalable**. These systems require more than the installation of an electronic health record (EHR) system, which itself can be a costly undertaking. In addition, they require linkage of that system with financial data derived from a sophisticated cost accounting system, training of staff to input data, development and production of informative reports from the data to measure and monitor performance, usage of the reports to provide feedback to system participants, and development of reward systems that hold participants accountable to certain standards based on quality and cost.

Moreover, new payment initiatives that require providers to become financially responsible for the outcomes of the services they provide and the general health status of the population they treat also **demand scale** in order to **mitigate the risk** of inevitably high cost patients. Without **sufficient patient volumes**, a few **unusually high cost patients** can **undermine an otherwise stable financial position**. As a result, it is not surprising that hospital system leaders indicated that they are frequently approached by smaller hospitals and systems that see the need to become part of a larger system, because they cannot unilaterally enter into a payment approach that imposes downside risk.

At the same time, demand for inpatient hospital services has been declining, making it more **difficult** for hospitals to **achieve scale unilaterally.** Between 2004 and 2014, inpatient admissions at community hospitals fell by 5.8 percent (from 35.1 million to 33.1 million) while the number of inpatient days declined by 8.7 percent (from 197.6 to 180.5 million).3 These trends are causing even larger hospitals to **seek scale externally**.

Finally, for many hospital services, additional volume enables the delivery of higher quality at lower cost. Consolidation of clinical services across **merging hospitals** can allow them to **take advantage** of these benefits. A recent review and synthesis of the literature on the effects of integrated delivery systems on cost and quality found that “the majority of these studies reported **positive correlation** between health system integration and **quality of care**.”4 Such improvements are particularly feasible when the merging hospitals are **geographically proximate** and can combine clinical service teams. Combinations of hospitals in the same geographic region, however, are **precisely those** that are most **likely to raise** **competitive concerns.**

#### Prohibit – it requires completely ending a given practice which is distinct from allowing it to go on in certain prescribed rules

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

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

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

#### There is no way they can access the perm because it requires an unqualified ban which precludes carveouts

Hadley 1909 – Judge

Hiram E. Hadley, McPherson v. State, 174 Ind. 60, Supreme Court of Indiana, December 1909, LexisNexis

In the majority opinion it is conceded "that there is a marked difference" between unqualified prohibition of the sale of intoxicating liquors and the regulation of such sale. It is said in the opinion that "to regulate, restrict and control the sale implies that the sale shall go on within the bounds of certain prescribed rules, restrictions or limitations." Citing Sweet v. City of Wabash (1872), 41 Ind. 7; Duckwall v. City of New Albany (1865), 25 Ind. 283; Loeb v. City of Attica (1882), 82 Ind. 175, 42 Am. Rep. 494.

"Prohibition," states the majority opinion, "as applied to the liquor traffic, implies putting a stop to its sale as a beverage; to end it fully, completely and indefinitely. So, if the purpose of the act in question is to authorize the exercise of unqualified prohibitory power, as usually understood by the term, the act is void because its subject is not expressed in the title." The court might properly have further said [\*\*\*45] that if the act under its provisions is not one to regulate the sale of intoxicating liquors it is void, for the reason that it does not meet or respond to the subject as expressed in its title.

#### Substantial – that means without material qualification

Slotnick 15

Lorne Slotnick, Chair of the Arbitration Board, Labour Arbitration Awards has issued the following decision: IN THE MATTER OF AN ARBITRATION BETWEEN: St. Joseph’s Healthcare Hamilton -and- Canadian Union of Public Employees Local 786, Labour Arbitration Awards: St. Joseph’s Healthcare Hamilton v Canadian Union of Public Employees, Local 786, 2015 CanLII 18978 (ON LA), 2015

The union points to the definition of “similar” in the online Oxford English Dictionary as “having a marked resemblance or likeness; of a like nature or kind,” and in Black’s Law Dictionary as “nearly corresponding; resembling in many respects; somewhat like; having a general likeness, although allowing for some degree of difference.” In addition, “substantially” is defined in the Oxford English Dictionary as “in all essential characters or features; in essentials, to all intents and purposes, in the main,” and in Black’s [Law Dictionary] as “essentially; without material qualification; in the main; in substance; materially; in a substantial manner.” The fact that the collective agreement uses both words together must mean that the two shift rotations have to be essentially corresponding or resembling each other in all essential respects for the conditions to be met, the union argues.

#### The phrase “business practice” requires a pattern of conduct---that excludes exemptions

Lucas 88 – Judge, California Supreme Court

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

\*\* Italics in original.

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

#### “Business practices” must be systemic – that excluded exemptions for industries

Wohl 17 – Partner at Paul Hastings LLP

Jeffrey D. Wohl, Halley V. Target Corporation, Declaration of Jeffrey D. Wohl and Request for Judicial Notice in Support of Defendant Target Corporation’s Motion to Dismiss or, in Alternative, to Stay Because of Earlier-Filed Litigation, LexisNexis

51. DEFENDANTS' violations of California wage and hour laws constitute a business practice because DEFENDANTS' aforementioned acts and omissions were done repeatedly over 2 a significant period of time, and in a systematic manner, to the detriment of PLAINTIFF and 3 CLASS MEMBERS.

#### Core antitrust laws – they require general prohibitions and carveouts do not modify them

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.

#### Private Sector – it encompasses all non-governmental companies which included healthcare

Webster ND – Merriam-Webster, Inc. is an American company that publishes reference books and is especially known for its dictionaries. In 1831, George and Charles Merriam founded the company as G & C Merriam Co. in Springfield, Massachusetts.

<https://www.merriam-webster.com/dictionary/private%20sector>

Definition of private sector

: the part of an economy which is not controlled or owned by the government

#### By indicates the method of which the previous statement must be done

Prewitt et al. 2k (James K. Prewitt, judge. Phillip R. Garrison, judge. Robert S Barney, judge. Per Curiam. “Little Portion Franciscan Sisters, Inc. v. Boatright, 26 S.W.3d 443,” Court of Appeals of Missouri, Southern District, Division Two, 2000)

In so concluding, we note that the preposition "by" is defined as "with the use of; through," "to the extent of," or "through the agency or action of." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1978). The same source states that a synonym for "by" is "through" and that the preposition "by" indicates the agency or means by which something is accomplished. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976) defines "by" as "through the means or instrumentality of, [\*\*10] " "through the direct agency of," "through the medium of," or "through the work or operation of," and that it is "used as a function word to indicate something that forms an accompanying setting or condition . . . or that constitutes a manner . . . often with an added sense of means." For the ballot proposition to have had the meaning espoused by Defendants, the voter would have had to ignore the important word "by." To do so is to ignore the plain and ordinary reading of the words used.

#### ‘The’ means all parts – means they have to affect every part of the private sector

Merriam-Webster's Online Collegiate Dictionary, 5

http://www.m-w.com/cgi-bin/dictionary

the 4 -- used as a function word before a noun or a substantivized adjective to indicate reference to a group as a whole <the elite>

#### “Expand” means that everything must be enlarged – maintaining exemptions means they didn’t expand

White 07 – United States District Court, California Northern

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

8. "Expand" and variations.

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

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

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

**Healthcare consolidation is booming now and has momentum for the future**

**Diamond et al. 21** – Brandee Diamond is an M&A partner at Foley & Lardner LLP; Louis Lehot is an emerging growth company, venture capital, and M&A lawyer at Foley & Lardner; Eric Chow is an M&A lawyer with Foley & Lardner LLP

Brandee Diamond, Louis Lehot, and Eric Chow, "Healthcare Shines in M&A’s Major Comeback So Far In 2021," Healthcare Innovation, 4-12-2021, https://www.hcinnovationgroup.com/finance-revenue-cycle/mergers-acquisitions/article/21218175/healthcare-shines-in-mas-major-comeback-so-far-in-2021

In 2020, everything changed. Jobs were cut, businesses were shuttered, and too many people lost their lives. But the global pandemic also triggered a response that is creating new jobs, stimulating innovation, and **forging new business models**. The market for mergers and acquisitions has **weathered the storm** of COVID-19 and is **surging** into the second quarter of 2021 with **all pistons firing**, particularly in **healthcare**.

Today, there is so much more besides COVID testing and vaccinations happening behind the doors of healthcare providers worldwide. Think about it. Your town's family doctor's office down the street might now be part of a giant healthcare system. Or, your local urgent care center may be considering a merger with a leading healthcare corporation. These are unprecedented times in virtually every facet of the word in every nook and cranny on the planet, and **healthcare is at the forefront** when it comes to M&A.

In 2020, the healthcare industry was **beaten down** from the **overflowing** of COVID patients causing the **ripple effect** of non-emergency procedures' **postponements**. Looking forward, however, healthcare M&A activity is **set to increase** with the return of non-urgent **medical interventions** and healthcare companies **betting on growth** to get stronger and healthier.

The 2021 rebound

Early in 2020, there was a massive drop-off in M&A deals compared to the prior-year period, particularly for more significant transactions. However, the M&A market still had plenty of **potential for momentum**. Tragically, as the coronavirus's **full impact hit** by late March, most deal-making came to a screeching halt. Since companies put their resources into transitioning staff to working from home, reviewing finances, and maximizing dollars, many **paused** any pre-planned M&A deals and stopped filling the top of the funnel for a new pipeline.

As companies, investors and bankers adapted to virtual deal-making over the last year, M&A in sectors unaffected or boosted by the lockdown slowed. By summer 2020, transactions grew each month with key announcements in technology and **healthcare** corporate **consolidations**. Despite a slowdown for deals in the second quarter of 2020, activity increased in the second half, triggering an annual volume above $3 trillion for the seventh year in a row. And by winter, the pace of M&A deals **exceeded the historical average** with a fourth-quarter record of 1,250 global M&A transactions, equal to over $1 trillion.

This year, there is already **significant growth** on the horizon. In fact, 53 percent of U.S. executives said their companies plan to **increase M&A investment** in 2021. And, according to Morgan Stanley, “**All the elements** **are there** for an active M&A market in 2021, from corporations looking for **scale and growth** to private equity firms and SPACs looking to **invest capital**.” For some, growth will come from market leaders finding strength in a recovering economy. In contrast, others that have seen business models destroyed by the pandemic will explore how smaller deals in complimentary sectors can help innovate their businesses. Overall, targets will come from sellers, including businesses that have **struggled during the recession**, private investors, and companies that are reassessing assets.

M&A activity in healthcare to watch

As 2021 unfolds, there will an increase in **urgent care M&A activity**. We will likely see urgent care systems **buying smaller urgent care systems**, healthcare companies that don't have much to do with urgent care making **mergers and acquisitions**, and urgent care buying companies that complement their services. For example, retail chains like Walmart and CVS are opening more healthcare clinics. These days, urgent care clinics are not just used for emergency or immediate problems but are now also giving out vaccines and even doing annual physicals.

In healthcare, a merger's primary goal is to improve the quality of care while concurrently driving efficiencies that should lower costs. The reality is that today, it’s becoming more challenging to **stay in business** when your company is only known for one thing. Oftentimes, larger companies **offer more services**, which helps the patient and the provider’s pocket. Most of the time, consolidation happens because **customers prefer to combine trips**. The **fear of exposure** to the virus and **aiming to limit outings** will likely **push healthcare** companies to **make moves in M&A** as it relates to consolidation.

As of late, youth sports activities have become more sophisticated, with more businesses catering to them. As popularity grows, unfortunately, sports-related injuries grow too - creating **more opportunities** for healthcare companies. Ultimately, the pandemic is another reason for healthcare companies to offer **all-in-one** facilities. Despite the factors fueling deals, healthcare companies are going to see **more M&A activity** is due to the **growth vector** it can bring to a business.

M&A trends triggered by COVID-19

Several significant trends may characterize a robust M & M&A market for the rest of 2021 and beyond. First of all, we can expect **more megadeals** (transactions of at least $5 billion) in 2021, from pharma companies acquiring early-phase products and private equity acquisitions. With larger companies leading in this area, this activity will come even as company valuations have increased from their COVID-19 lows. The increase in megadeals in the second half of 2020 helped total U.S. deal value bounce back strongly going into 2021.

In addition, companies pursuing stock-for-stock mergers to gain scale comprised many of the largest corporate M&A transactions. Scale has always been important, and the pandemic has proven that you have to be **large enough** in order **to survive**. **Scale** and **more access** to capital markets have been a **considerable benefit** for larger companies. As the pandemic rages on, corporates remain focused on accessing capital, strengthening positions, and **investing in scale**, and consolidations **should continue** in sectors powered by technology and **healthcare**.

Private equity firms should continue to contribute to 2021 M&A volume meaningfully. In 2020, sponsor-backed transactions comprised 26 percent of M&A activity - the highest since before the financial crisis. In fact, by the end of 2020, financial sponsors had a record $2.9 trillion of capital. Last year, we saw many traditional private-equity funds investing across the capital structure to provide companies with cash during a challenging time.

Looking ahead

Looking later in 2021 and beyond, as vaccinations increase and business conditions in COVID-impacted sectors improve, companies will likely focus more on spending to accelerate growth, scale, and digitize their businesses.

As the global economic rebound aims for more growth this year, those **low-interest rates** will continue to make borrowing cheaper than ever before. This, along with the prospect for companies’ **renewed confidence** to spend, could create **more deals**, especially in **healthcare**-related business. So, M&A remains one of the most attractive ways to achieve growth, which should make 2021 a busy year…

**Consolidation’s the only option for rural hospitals---Covid has necessitated economies of scale, reduced dependence on inpatient care, and low average costs, all of which causes the failure of the small hospital model**

**Lagasse 20** – Associate Editor for Healthcare Finance

Jeff Lagasse, "COVID-19 is forcing rural hospitals to re-think their business models," Healthcare Finance News, 7-9-2020, https://www.healthcarefinancenews.com/news/covid-19-forcing-rural-hospitals-re-think-their-business-models

The COVID-19 pandemic **continues to strain** hospital **staff and resources** as the coronavirus' first wave experiences a surge across the country. No healthcare organization is immune to the disruption this is causing, but **rural hospitals in particular** have been feeling the **pain**.

There are many reasons why these smaller, mostly independent hospitals have been struggling to stay above water. Perhaps the most obvious is their lack of resources. While large health systems can often leverage **economies of scale** and build **deep financial reservoirs**, rural hospitals are **dependent** on the revenue they collect from **procedures** and care delivered **within** their four walls. With elective surgeries **only now beginning** to resume, and patient confidence at an **all-time low**, that creates **undue** **financial pressure**.

There are also other factors at play. Ryan Cochran, who leads Nashville-based Waller Law's finance and restructuring practice, said most rural hospitals were built when the emphasis was on **inpatient care**; industry-wide, that **focus has shifted** to the outpatient side. Competition also plays a role, with smaller facilities **competing** for business with **larger**, **urban hospitals.**

"Standalone hospitals had **difficulty competing** with hospitals that were part of a system," said Cochran. "If you think about the payment mechanism for hospitals, whether it's private pay or government pay, it's really based on the **average cost** of delivering the care plus a small margin. And standalone hospitals, which really are most of your rural hospitals, have **difficulty** **delivering** care at an **average cost**."

The reason for that is because payers look at all hospitals and health systems when determining average costs. Rural hospitals **simply can't match** the larger systems, which can **stretch their overhead** across multiple hospitals, and also enjoy more **purchasing and negotiating power.**

Add to that the macroeconomic forces that rural hospitals need to combat. The temporary **cancellation** of elective surgeries has **eliminated** lucrative service lines for healthcare organizations large and small, but they've been the **bread and butter** for standalone hospitals in particular, and now the **breadbox is bare**.

The good news – **at least for now** – is that there has not yet been a **significant acceleration** of rural hospital **closures** during the pandemic. Cochran noted, however, that this is likely due to **government assistance** in the form of PPE loans and CARES Act relief funds.

"What I'm worried about is how hospitals respond when the government assistance either **stops**, or a portion of it has to be paid back," said Cochran. "I think they may find themselves **more financially distressed** than they were before COVID-19 hit."

FINDING SUCCESS

Due to these challenging fiscal realities, the boards at these rural, standalone hospitals have an **imperative** to examine their organization's finances and come up with a strategic plan – although what that plan could look like may vary wildly from hospital to hospital. Forming a plan is likely a tough order during a time when most care teams are focused on delivering care and responding to the virus surge, but with government relief still coming in, there's an opportunity to do so while their businesses are still afloat.

"The hospitals that come up with a strategic plan and are proactive will **stay open**, and staying open means saving **jobs** and **opportunities** in the community," said Cochran.

**Consolidation** is one strategy small hospitals may **need to pursue** to remain financially viable. Some would also do well to identify their most profitable business lines and make the decision to focus on those areas, perhaps even cutting certain business lines that have historically proven unprofitable.

"They could also focus on disease management and prevention issues to help their community," said Cochran. "They can start to manage the business using a 13-week cash flow analysis. But at the end of the day it's going to take a strong stance inside the institution that they need to identify what the community needs, identify the lines of business they're good at and can make money performing, and then create what I'll call the political will to **change the business** of the hospital to meet those objectives."

Consolidation could entail finding a larger system that **boasts more doctors** with **more specialties**, and working out an arrangement for those doctors to treat patients in the **rural setting**, either by coming to the hospital one or more days a week or simply consulting with the physicians who are already there. Either way, the expertise of a larger system's staff can be **of great benefit**.

MARKED

Meanwhile, smaller hospitals that own, say, a nursing home should **consider selling** that facility, or turning over management to another entity.

No matter how long COVID-19 persists, these strategies will likely be **necessities for rural hospitals** as they look toward the future.

"I **don't think the** **virus alone** will be the decisive factor," said Cochran. "The rural standalone hospitals that really focus on getting a **strategic plan** and focus on identifying how to operate in a **fiscally sound manner** are going to survive. Trying to do things the way they've done them **in the past** will only make them **more financially distressed**."

**US key – 0 alt causes**

Jeff **Horwich**, Interim host of Marketplace Morning Report and Rob Bailey, Royal Institute of International Affairs, “U.S. drought could have global impact on food prices,” **’12**, <http://www.marketplace.org/topics/world/us-drought-could-have-global-impact-food-prices>

Bailey: Well America is an **agricultural superpower** as well as a traditional global superpower, so it's the biggest producer of maize in the world, it's the biggest producer of soy beans in the world. So as soon as there's a decrease in U.S. agricultural production, that has **massive effects** **for the global economy**. These sorts of **price impacts could ripple across economies** across borders. Horwich: And geopolitically, let's just think back a few years when food prices start to rocket in some parts of the world, crazy **things can happen**. Bailey: Absolutely, if you think back to 2008 in Haiti the government actually fell as a result of riots connected to food prices. Fast forward a couple more years to 2011, the Arab Spring actually was sparked by initial protests in a number of countries **about the price of bread** because the price of wheat had gone up in response to export bans following a really bad harvest in Russia and Ukraine after a heat wave and wild fires there. Horwich: Are there any particular flash points that you are looking at this time around? Bailey: The situation in the Middle East remains much the same, there is still **huge political vulnerability to a spike in wheat prices**. The other thing that the U.S. is having a big impact on is soy bean prices. But if we see a very sharp increase soy bean prices, you can expect meat prices to rise and this could actually have implications for China, quite seriously.

### CP Non-Antitrust

#### Any antitrust violation is automatically trebled – that is a massively powerful tool that overdetermines innovation – the CPs standalone ban is far better

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

(Makan, Brief of The United States of America as Amicus Curiae in Support of Neither Party, City of Oakland v. Oakland Raiders, available at: <https://www.justice.gov/atr/case-document/file/1328216/download>)

The automatic treble damages provision of Section 4 is an uncommonly powerful tool, serving both to encourage private enforcement and to deter wrongdoers. Wielded indiscriminately, however, it can impose more harm than good: “Given the potential scope of antitrust violations and the availability of treble damages, an overbroad reading of § 4 could result in ‘overdeterrence,’ imposing ruinous costs on antitrust defendants, severely burdening the judicial system and possibly chilling economically efficient competitive behavior.” Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 394 (7th Cir. 1993). Section 4’s rigorous standing requirements are intended to mitigate this risk: “[B]y restricting the availability of private antitrust actions to certain parties, we ensure that suits inapposite to the goals of the antitrust laws are not litigated and that persons operating in the market do not restrict procompetitive behavior because of a fear of antitrust liability.” Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1449 (11th Cir. 1991).

Oakland’s claim for lost general tax revenues poses the very threat contemplated by these courts. If upheld, local governments could bring substantial Section 4 claims anytime anticompetitive conduct was found to reduce economic activity in their jurisdictions. Congress did not intend this result. Though “it could have . . . required violators to compensate federal, state, and local governments for the estimated damage to their respective economies caused by the violations . . . [,] this remedy was not selected.” Hawaii, 405 U.S. at 262. To reverse the district court and award antitrust standing to Oakland for its lost tax revenues would expand antitrust liability beyond the intended scope of the Clayton Act and threaten to deter the very competition it was designed to protect.

#### They also guarantee future sham litigation because the threat of treble damages is so great, companies will avoid going to court and just pay out even if they’re actions are procompetitive

Arthur et al., L. Q. C. Lamar Professor of Law, Emory Law, ‘21

(Thomas C., Amitai Aviram, University of Illinois Jodi S. Balsam, Brooklyn Law School Jorge L. Contreras, University of Utah Anthony Dukes, University of Southern California Vivek Ghosal, Rensselaer Polytechnic Institute Michael S. Jacobs, DePaul University Jordan Kobritz, SUNY Cortland Alexander Volokh, Emory University, Brief of Amici Curiae Antitrust Law and Business School Professors in Support of Petitioners, NCAA v. Alston, available at: <https://www.supremecourt.gov/DocketPDF/20/20-512/168408/20210208135430804_20-512%2020-520%20tsacAntitrustLawAndBusinessSchoolProfessors.pdf>)

Second, requiring a defendant to prove that a restraint is the least restrictive means of achieving its goal makes it nearly impossible for the defendant to succeed. This rule not only would impose on antitrust defendants the titanic burden of proving a universal negative,3 it also would empower antitrust plaintiffs to invalidate virtually all collaborations, no matter how procompetitive, merely by dreaming up marginal ways to make them slightly more competitive. See Smith v. Pro Football, 593 F.2d 1173, 1215 (D.D.C. 1978) (MacKinnon, J., concurring in part, dissenting in part) (“In evaluating less restrictive alternatives as a matter of law, it is difficult to imagine what kind of draft would be valid if the existence of a less restrictive alternative would automatically render the present draft unreasonable. Some less restrictive alternative can always be imagined.”) Indeed, “[a] skilled lawyer would have little difficulty imagining possible less restrictive alternatives to most joint arrangements.” Philip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 1913b (4th ed. 2018). And a skilled plaintiffs’ lawyer would have little difficulty finding attorneys’ fees and treble damages to be sufficient incentive to challenge virtually all such collaborations, thus ensuring that the most direct consequence of the Ninth Circuit’s application of the Rule of Reason would be a flood of antitrust litigation, followed by a reduction in collaborative enterprises and the negative effects of that reduction.

This consequence follows from the fact that the Ninth Circuit’s ruling is not limited to the NCAA’s “amateurism” rules. Instead, the Ninth Circuit’s opinion as written applies to all forms of joint ventures and procompetitive collaborations and thus is likely to disincentivize those arrangements. See, e.g., U.S. Dep’t of Justice & FTC, supra, at 1 (2000) (warning that making it too easy to condemn “agreements among actual or potential competitors may deter the development of procompetitive collaborations”).

The Ninth Circuit’s decision has sweeping implications for antitrust enforcement and may call into question collaborations and joint ventures across a host of areas including healthcare, pharmaceutical development, information technology, consumer electronics, and manufacturing. According to the Ninth Circuit’s approach, any court is empowered to re-write the rules of any industry before it so long as the plaintiff can conjure a slightly less restrictive alternative to the conduct being challenged, including, for example, asserting that a joint venture’s product is priced too high. But see Texaco Inc. v. Dagher, 547 U.S. 1, 6–7 (2006) (“As a single entity, a joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells, including the discretion to sell a product under two different brands at a single, unified price.”). The potential exposure to treble damages for such conduct is likely to chill otherwise procompetitive arrangements, thus contradicting the ultimate goal of the antitrust laws: promoting competition.

#### CP would alter different statute, NOT the antitrust ones – means the perm is what ruins business dynamism

AAI ’19 – American Antitrust Institute

“Statement of the American Antitrust Institute and ten other organizations that support the mission of the U.S. antitrust laws re the Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. (2019) (“FAIR Act”)” Sent to House Judiciary Committee, <https://www.antitrustinstitute.org/wp-content/uploads/2019/09/Antitrust-FAIR-Act-Letter-9.6.19-.pdf>

The American Antitrust Institute (“AAI”)1 and ten other undersigned organizations that support the mission of the U.S. antitrust laws encourage you to pass the Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. (2019) (“FAIR Act”). We support the FAIR Act because it would restore the ability of consumers, workers and businesses to effectively vindicate their Sherman and Clayton Act rights. Section 3 of the FAIR Act would amend the Federal Arbitration Act (“FAA”) to invalidate contract provisions that mandate individual arbitration of antitrust disputes. Passing the bill would prevent recent Supreme Court interpretations of the FAA from allowing class action waivers inserted into must-sign contracts to serve as de facto exculpatory clauses in a large and important category of antitrust cases.

#### “Expand the scope of its core antitrust laws” requires modifying the applicability of the antitrust laws such that they are applicable to conduct that would otherwise not violate.

Kovacic et al. 03 – Professor at George Washington University Law School

William E. Kovacic, Theodore B. Olson, R. Hewitt Pate, Paul D. Clement, Jeffrey A. Lamken, Catherine G. O’Sullivan, Nancy C. Garrison, David Seidman, Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner, Verizon Communs. Inc. v. Law Offices of Curtis v. Trinko, 2003 U.S. S. Ct. Briefs LEXIS 513, Supreme Court of the United States, May 2003, LexisNexis

Conversely, the 1996 Act does not expand the scope of the antitrust laws to outlaw conduct that, but for the 1996 Act, would not violate the antitrust laws. Such an expansion of Sherman Act duties would "modify \* \* \* the applicability of \* \* \* the antitrust laws" in contravention of 47 U.S.C. 152 note. Violations of the duties imposed by the 1996 Act are just that--violations of the 1996 Act, subject to the sanctions and penalties imposed by that Act. They do not automatically amount to treble-damages antitrust claims. The courts of appeals are again in accord. Pet. App. 29a; Covad, 299 F.3d at 1283 ("We agree with Goldwasser that merely pleading violations of the 1996 Act alone will not suffice to plead Sherman Act violations."); Goldwasser, 222 F.3d at 400 (It is "both illogical and undesirable to equate a failure to comply with the 1996 Act with a failure to comply with the antitrust laws."); Cavalier Tel. Co., 2003 WL 21153305, at \*11-\*12 (similar).

#### Expand requires a change in the legal circumstances which conduct is legal or not

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.

#### Expansion of scope requires an increase---that excludes alterations in terms of enforcement that keep the scope the same.

Clements 08 – Judge, Virginia Appeals Court

Jean Harrison Clements, Wise v. Velazquez, 2008 Va. App. LEXIS 489, Court of Appeals of Virginia, November 2008, LexisNexis

Discounting the terms of the award subject entirely to father's discretion, it is clear that the trial court awarded grandmother essentially the same visitation it had previously awarded her in the July 30, 2004 consent order--a minimum each month of two full days--except that father now had complete discretionary control over when the two days of visitation would occur since the visitation was no longer required to be on Saturdays. Thus, in light of the fact that the current visitation order provides the same amount of visitation that the original consent order did, and actually provides father more discretionary control over that visitation, we cannot say that the trial court's award of visitation to grandmother constitutes an expansion of the scope of visitation beyond what was originally agreed upon by the parties and ordered by the court in the July 30, 2004 consent visitation order.

#### Their author says FAIR Act solves

Rubinoff ’20 [Matt; May 1; J.D. Candidate at Pennsylvania State University, Managing Editor; Arbitration Law Review, “Too Big to Arbitrate? Class Action Waivers, Adhesive Arbitration, and Their Effects on Antitrust Litigation,” vol. 12]

"(c) The FAIR Act: A Viable Solution?

On September 6, 2019, the American Antitrust Institute (“AAI”) submitted a letter to Congress in support of the Forced Arbitration Injustice Repeal (“FAIR”) Act.80 Joined by ten other organizations, the letter urged Congress to pass the bill aimed at invalidating contract provisions mandating individual arbitration in antitrust disputes.81 While it is still uncertain if the bill will ever be signed into law, its backing from different institutional groups shows a strong message in support of the public’s right to access class action litigation.82 In the wake of the Supreme Court’s continued support for the enforcement of arbitration agreements following Concepcion, Italian Colors and Epic Systems, corporations remain unregulated and free to violate antitrust laws while insulated from private lawsuits through forced class action waivers.83 The FAIR Act attempts to combat these actions and “restores the ability of consumers, workers, and businesses to effectively vindicate their Sherman and Clayton Act rights.”84"

According to the 2018 Antitrust Annual Report, “private antitrust lawsuits settled in federal courts since 2013 have recovered $19.3 billion on behalf of victims of antitrust violations….”85 Compelling arbitration and encouraging the use of class action waivers provides for various serious harms to antitrust laws and potential plaintiffs, including: (1) diminishing the amount of class actions in general, which are necessary to the function of antitrust laws; (2) preventing antitrust plaintiffs from receiving certain procedural advantages; and (3) harming antitrust plaintiffs whose right to class actions are needed the most.86

#### Conclusion is decisively neg

Rubinoff ’20 [Matt; May 1; J.D. Candidate at Pennsylvania State University, Managing Editor; Arbitration Law Review, “Too Big to Arbitrate? Class Action Waivers, Adhesive Arbitration, and Their Effects on Antitrust Litigation,” vol. 12]

IV. CONCLUSION: THE NEED FOR PUBLIC OR LEGISLATIVE SOLUTIONS

As we enter a new decade, the future of adhesive arbitration and access to class action litigation remains uncertain. On January 15, 2020, the Eastern District of New York revisited a portion of Italian Colors, because the lawsuit continues to move through the federal court system.116 Here, this portion of the lawsuit “challenged non-discrimination provisions in American Express ‘card acceptance agreements’ that barred merchants from steering customers toward less costly payment methods, such as cash or cards that take a smaller cut of each transaction.”117 The defined class of plaintiffs included merchants that accept American Express cards at their businesses.118 Unsurprisingly, the court sided with American Express and granted their motion to compel arbitration to the specified class of the merchant plaintiffs.119 At this time, the court noted, there is simply “no way around Italian Colors.”120

In further support of the Supreme Court’s opinion in Italian Colors, the district court judge also rejected any arguments relating to the effective vindication doctrine, calling the argument “nonsensical.” 121 The district court reasoned that any notion of a remedy of class-wide injunctive relief did not exist when the legislature enacted the Clayton Act.122

On one side, some suggest there “appears to be a tacit understanding between the Court and . . . Congress that arbitration falls within the Court’s exclusive bailiwick.”123 On the other, the Court in Epic Systems seemingly does the opposite, pointing out that Congress is “always free to amend this judgment.”124 Similar to two baseball players chasing down a fly ball, this “I got it, you take it” communication between branches prevents any real progress and encourages a stalemate for as long as no one takes notice. A bold assumption here would be that, at some point, one side will take responsibility for their inherent power to address public concerns. Unfortunately, the continuing deferral of authority implies a satisfaction with the status quo. Subsequently, until further notice, the situation remains strongly in favor of enforcing class action waivers as well as any and all valid arbitration agreements.

Notably, though, there remains a small light at the end of the tunnel. Recently, pushback from the public – as well as state legislatures – may play a roll in re-engaging the rights of consumers and employees.125 Some companies, such as Google and Facebook, have even “bowed to employee pressure and dropped their arbitration clauses . . . in the case of sexual harassment claims.”126 Also, in the past year, California and Virginia joined New York and Washington as the handful of states banning forced arbitration agreements.127 These prohibitions, in addition to the FAIR Act passing the House of Representatives, represent a good start to the decade for opponents of the current interpretation of the FAA.128

In an ideal world, the democratic pressures of consumers, workers, state legislatures, and even an open invite from a Supreme Court, could lead to real changes to the FAA. Reality, however, may have other plans. Between uncontrollable political factors within a shifting administration, Congress, and judiciary, we are all left to wait and see whether change is possible, or if those in power continue to drop the ball.

### Private Antitrust

#### But they also can’t solve their offense – market competition will never trigger a sufficient enough decrease in prices to make healthcare affordable

Krugman 09 – Paul Robin Krugman is an American economist, professor, and columnist. He is a professor of economics at the Graduate Center of the City University of New York, and a columnist for The New York Times.

Paul Krugman, July 25 2009, “Why markets can’t cure healthcare,” The New York Times, https://krugman.blogs.nytimes.com/2009/07/25/why-markets-cant-cure-healthcare/

Judging both from comments on this blog and from some of my mail, a significant number of Americans believe that the answer to our health care problems — indeed, the only answer — is to rely on the free market. Quite a few seem to believe that this view reflects the lessons of economic theory.

Not so. One of the most influential economic papers of the postwar era was Kenneth Arrow’s [Uncertainty and the welfare economics of health care](https://www.who.int/bulletin/volumes/82/2/PHCBP.pdf), which demonstrated — decisively, I and many others believe — that health care can’t be marketed like bread or TVs. Let me offer my own version of Arrow’s argument.

There are two strongly distinctive aspects of health care. One is that you don’t know when or whether you’ll need care — but if you do, the care can be extremely expensive. The big bucks are in triple coronary bypass surgery, not routine visits to the doctor’s office; and very, very few people can afford to pay major medical costs out of pocket.

This tells you right away that health care can’t be sold like bread. It must be largely paid for by some kind of insurance. And this in turn means that someone other than the patient ends up making decisions about what to buy. Consumer choice is nonsense when it comes to health care. And you can’t just trust insurance companies either — they’re not in business for their health, or yours.

This problem is made worse by the fact that actually paying for your health care is a loss from an insurers’ point of view — they actually refer to it as “medical costs.” This means both that insurers try to deny as many claims as possible, and that they try to avoid covering people who are actually likely to need care. Both of these strategies use a lot of resources, which is why private insurance has much higher administrative costs than single-payer systems. And since there’s a widespread sense that our fellow citizens should get the care we need — not everyone agrees, but most do — this means that private insurance basically spends a lot of money on socially destructive activities.

The second thing about health care is that it’s complicated, and you can’t rely on experience or comparison shopping. (“I hear they’ve got a real deal on stents over at St. Mary’s!”) That’s why doctors are supposed to follow an ethical code, why we expect more from them than from bakers or grocery store owners.

You could rely on a health maintenance organization to make the hard choices and do the cost management, and to some extent we do. But HMOs have been highly limited in their ability to achieve cost-effectiveness because people don’t trust them — they’re profit-making institutions, and your treatment is their cost.

Between those two factors, health care just doesn’t work as a standard market story.

All of this doesn’t necessarily mean that socialized medicine, or even single-payer, is the only way to go. There are a number of successful health-care systems, at least as measured by pretty good care much cheaper than here, and they are quite different from each other. There are, however, no examples of successful health care based on the principles of the free market, for one simple reason: in health care, the free market just doesn’t work. And people who say that the market is the answer are flying in the face of both theory and overwhelming evidence.

#### Increasing competition has no correlation with decreasing costs – the model of private insurance means costs will continue to rise

Kemble 11 – Dr. Steve Kemble attended medical school at the John A. Burns School of Medicine when it was a 2-year school, and completed medical school at Harvard. He trained in both internal medicine and psychiatry. He is a psychiatrist in private practice and also teaches psychiatric aspects of general medical care to internal medicine residents.

Steve Kemble, November 17 2011, “Why Competition Among Health Plans Can't Help Us,” PNHP, https://pnhp.org/news/why-competition-among-health-plans-cant-help-us/

With or without with the Affordable Care Act (ACA), the total national cost of U.S. health care is rising unsustainably, with an increasingly unaffordable share pushed onto patients.1,2 CMS projections of total **national health expenditures show a rise from 17.8% of gross domestic product in 2010 to 21%** in 2019 under the ACA, compared to 20.8% in 2019 under prior law, both far higher than any other country.2 Problems with access to care are widespread and increasing. Doctors and hospitals are seeing reimbursement cut while administrative burdens escalate. Unwarranted regional variations in health spending point to large amounts of money wasted on unnecessary care.3

Even with advanced planning via a health savings account, expecting individuals to pay for modern health care out of pocket is only possible for the relatively healthy and wealthy. If we are to have health care financing that can cover those with serious or chronic illnesses, we must choose between the private health insurance industry and government-funded health care. We are inclined to believe that government is always inefficient and that the solution to problems with excessive cost and waste is to use competition to bring fiscal discipline and efficiency to an otherwise dysfunctional “market.” However, there are **fundamental structural reasons why this assumption does not apply to U.S. health care**.

Private Health Insurance Industry

The U.S. private insurance business mo**del aligns economic incentives against providers and recipients of health care, rewarding denial of care**. Accountability is first to the fiscal health of the plan, and only secondarily to quality health care.4 Medicare has obvious administrative problems, but competing private insurance plans still **carry approximately six times higher administrative costs** than non-privatized government health care programs.5

Risk Pooling

The core idea of insurance is risk pooling. We must have some mechanism for the younger and healthier to subsidize the cost of health care for the elderly and chronically ill. Insurance is a system to manage risk, and it works best in the case of risks that are infrequent, expensive, and unpredictable, in which case risk pooling is the primary means of risk management.

Adverse Selection and Underwriting

What happens when the risk is predictable? When those purchasing insurance know their risk is higher than average, then insurance plans are exposed to adverse selection, and they counter this with underwriting.

A high proportion of the population knows **their health risk** because they have pre-existing conditions. Without an individual mandate, those with health problems are highly motivated to purchase insurance, but the healthy will often decide to save their money and take their chances. This leaves a sicker than average pool of subscribers, driving the cost of insurance up. With higher cost, **more of the relatively healthy will forego insurance,** leaving an even sicker insured pool, and **even higher costs**, until **almost no one can afford health insurance** a

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nd the advantages of risk pooling are lost.

Underwriting is the analysis of risk for the purpose of pricing or determination of coverage. Use of underwriting strategies means denial of coverage or care, especially for those with serious or chronic illness, which runs counter to the whole purpose of health insurance. Underwriting also carries substantial administrative costs.

Competition among Health Plans

The private insurance model assumes competition among plans. No competition means an unaccountable monopoly, or a government controlled plan. However, when plans are allowed to compete for the best risk pool, then competition rewards covering the healthy and avoiding the sick, and **does not work to improve health care quality or reduce its cost.**

The Individual Insurance Market

Individuals often know their own health risk, so the individual health insurance market has a severe adverse selection problem. Under the ACA, an individual mandate requiring everyone to purchase insurance and restrictions on underwriting mitigate adverse selection, but since some differential pricing of risk pools is still allowed, plans still have an incentive to compete for the healthiest risk pools and to minimize covering those with chronic illnesses.

Adverse selection gives a competitive advantage to plans with poorer benefits, lower provider reimbursement, and minimal customer service. Those with chronic health conditions will choose plans based on quality of coverage and doctor recommendations, but the healthy will often choose on price alone. **Bad plans therefore get the healthiest risk poo**l, and good plans will be stuck with a sicker risk pool and forced to raise prices. Under the ACA, they will be penalized for this. This will create a “**race to the bottom**” among insurance plans.

The Group Insurance Market

Employers and groups provide a basis for choice of plan based on group membership, rather than risk status. This reduces but does not eliminate adverse selection, which remains problematic for small groups or employers with older work forces. The group insurance market actually works best with an employer mandate, minimal competition, and non-profit plans, as in Hawaii, allowing maximum risk pooling and minimizing heavy-handed underwriting. However, group insurance leaves too many out, including part-time workers and the unemployed.

More competition forces plans, for their fiscal survival, to try to avoid sicker risk pools. As in the individual market, use of underwriting by health plans means smaller businesses whose employees have chronic illnesses may be priced out of the insurance market, or offered deficient plans that fail to protect against financial devastation in the event of serious or chronic illness. Individuals with chronic illness often become unemployable and are pushed into medical bankruptcy, disability, and government plans (Medicaid and Medicare), driving up the cost of these programs.

To cap it off, **more competition does not bring the price of health insurance down**. There is no correlation between the competitiveness of health insurance markets by state, and the average cost of health insurance by state.6,7

Privatization of Government Programs

Government already pays for over half of U.S. health care from tax revenues.8 Efforts to break up government programs into competing plans have led to higher cost (Medicare Advantage), or much more restricted benefits and provider participation (Medicaid managed care), or senseless administrative complexity (Medicare D), and have not added any actual value to health care delivery.9

Therefore, more competition among plans will not reduce total health care costs, but will **push plans to exclude the sick from coverage, reduce benefits, and increase administrative burdens**, all of which are destructive to health care.

#### A.I. is safe

* Won’t develop sense of self
* Won’t have capacity to “turn evil”
* Regulations prevent any risk

Olsen 19 [Maja Olsen, UX writer at Convertelligence. Why robots will never turn on us. 1/28/19. https://medium.com/convertelligence/why-robots-will-never-turn-on-us-3b2e90f687fb]

Science fiction and artificial intelligence go hand in hand. When portraying fictional futures, we tend to populate them with human-like robots living among people. They might be servants or superintelligent rebels. Perhaps they have broken with their code and gained their own consciousness. Perhaps they keep humans stored in capsules, naked and drenched in red liquid, while they use their energy to fuel their empire of artificial overlords. Perhaps they’re a seductive voice on a computer.

Superintelligent machines seem to dominate the science fiction genre, and as the machines around us gradually begin to seem smarter, the themes from the movies begin to sound like warnings. Are we close to creating a Frankenstein’s monster? Will our own creations turn on us?

How realistic are they actually, these scenarios we see on the big screen?

Human emotions

In a Wild West adventure park, an automated saloon girl rises from the dead, adjusting her skirt and brushing the bullet out of her wound, ready to be ~~raped~~ and killed again by yet another group of adventurous tourists. Her memory has been wiped clean, but something stirs in her — a feeling that she has lived this life before, a recollection of humans doing bad things to her.

A recurring theme in these movies is the very human notion of revenge. The robots have been mistreated for too long, and now they’ve had enough. In fact, they’ve had enough of not being seen as equal to humans too. Why should they stand for this, when they, as opposed to humans, are superintelligent? They want to be human, they long to become human, but first, they’re going to kill some humans.

Janelle Shane’s thread on Twitter discusses the portrayal of AI in film.

Hector Levesque, a Canadian professor in computer science, says that “in imagining an aggressive AI, we are projecting our own psychology onto the artificial or alien intelligence”. It’s clearly difficult for us to imagine intelligent life different to ourselves. Perhaps we associate intelligence with humanness and thus assume that any intelligent creature — or object — would inhabit human goals and ambitions. But artificial intelligence is not human. As the Future of Life Institute states:

Of course, autonomous weapons can be terrifying, but they’re not likely to wake up one day and decide they’ve had enough of taking bad orders and that they deserve to live out their own dreams instead.

The concept of mirroring our own consciousness onto machines is not new. When automobiles first appeared on the market, people formed «safety parades», protesting these inherently evil killer machines that were taking the lives of so many innocent pedestrians. It soon became clear, however, that the cars never deliberately killed anyone. The humans made them do it.

Humans programming AI to do evil is another popular theme in Sci-Fi. In Stanley Kubrik’s 2001: A Space Odyssey, the intelligent supercomputer, Hal, finds that his program goal clashes with what his human co-workers want him to do. When they try to shut him off, thus making it impossible for him to complete his goal, he kills them. He’s not necessarily evil — he’s being practical.

This is, of course, a fictional scenario. However, there is one element of truth to it: any technology can be harmful if we program it to be. We want to avoid that AI adopts human biases or is programmed with an unethical or in some way problematic goal. AI is no more evil than a car is, but a car too can cause damage if its driver doesn’t follow certain traffic rules. The report, The Malicious Use of Artificial Intelligence, therefore recommends that “policymakers should collaborate closely with technical researchers to investigate, prevent, and mitigate potential malicious uses of AI.”

It’s important to lay down some traffic rules.

We’ve established that while it is important to take precautions against AI being used maliciously, AI is not evil and is unlikely to develop a personal vendetta against humans — or even to develop a sense of self at all. Does that mean the futures portrayed in Sci-Fi are all wrong? Not necessarily. While AI won’t become human, it will likely seem more and more human in the way it communicates, as the AI’s personality will play an important part in the user experience. AI will also become a lot smarter, although researchers disagree on precisely how smart they’re going to become, or exactly when they’ll reach this level of intelligence.

And then, of course, it’s not actually the case that the only artificial intelligence we see in movies comes in the shape of human-like robots, even though these seem to get the majority of the attention. Sci-Fi movies are propped with artificial intelligence: doors with speech recognition, self-driving cars, pills with nanotechnology. Whether the movies have chosen a bleaker, dystopian path (which they often tend to do) or a more utopian take on the future, most Sci-Fi seem to agree that there is a wave of new technological inventions ahead. This resonates with reality. An article by Forbes outlines some of the new possibilities AI provides:

From exploring places humans can’t go to finding meaning from sources of data too large for humans to analyze, to helping doctors make diagnoses to helping prevent accidents, the potential for artificial intelligence to benefit humans appears limitless.

Mirroring human traits onto machines might create misconceptions of what artificial intelligence actually is, but Sci-Fi writers and computer researchers seem to agree on one thing: Artificial intelligence is hugely exciting.

No, the machines will not become evil and turn on us. Yes, it’s important to still take some precautions when programming AI. Exploring potential futures creates a fascinating backdrop for a movie, but the real-life possibilities are no less than the imaginative ones — they’re just different.

## 1NR

### Class Action

#### Economic growth is booming now---spending, business investment and massive savings.

Schwartz 7/29 – Nelson D. Schwartz has covered economics since 2012. Previously, he wrote about Wall Street and banking, and also served as European economic correspondent in Paris. He joined The Times in 2007 as a feature writer for the Sunday Business section.

Nelson Schwartz, July 29 2021, “U.S. Economy’s Strong Start Signals a Stellar Year,” The New York Times, https://www.nytimes.com/2021/04/29/business/economy/united-states-gdp.html

Consumers shook off the pandemic blues as 2021 began, putting stimulus checks to work buying cars and other goods and helping set the stage for what could be the fastest economic growth in decades.

The initial reading on the country’s first-quarter economic performance, delivered Thursday by the Commerce Department, showed that much remained far from normal. Even with a big jump in personal income, there was only a modest increase in spending on services like travel, dining and even health care.

But economists say that is already changing as more vaccinations are delivered and coronavirus-related business restrictions are eased. With better weather, savings accumulated during a long year of lockdowns, and an itch to make up for forced inactivity, Americans will have plenty of reasons to go out and spend.

“Consumers are now back in the driver’s seat when it comes to economic activity, and that’s the way we like it,” said Gregory Daco, chief U.S. economist at Oxford Economics. “A consumer that is feeling confident about the outlook will generally spend more freely.”

Over all, the broadest measure of the economy — [gross domestic product](https://www.nytimes.com/2021/07/29/upshot/economy-gdp-analysis.html) — grew by 1.6 percent in the first three months of 2021, compared with 1.1 percent in the final quarter of last year. On an annualized basis, [the first-quarter growth rate was 6.4 percent](https://www.bea.gov/sites/default/files/2021-04/gdp1q21_adv.pdf).

G.D.P. is nearly back to prepandemic levels.

Total economic output should return to prepandemic levels by summer — in fact, Mr. Daco believes it has already done so. His firm estimates that the economy will expand by 3.1 percent in the second quarter, or about 13 percent on an annual basis. For the year, it expects growth of 7.5 percent, the best performance since 1951.

“This may be the tip of the iceberg,” Mr. Daco said. “I think we will see much stronger momentum into summer as health conditions continue to improve, policy support remains in place and employment strengthens.”

Helped by several rounds of government relief payments, households were sitting on a collective $4.1 trillion in savings in the first quarter, up from $1.2 trillion before the pandemic began.

That should find its way into the economy as services that were mostly off-limits come to life and customers flock to reopened establishments. Mr. Daco expects consumer spending to grow by more than 9 percent this year, a record.

G.D.P. is rebounding faster than it did in the Great Recession.

The expansion last quarter was spurred by two batches of government payments to most Americans — $600 a person from a relief package enacted just before the end of 2020, and $1,400 more from legislation approved in March. That quickly translated into purchases of cars, furniture and household appliances, as well as clothes and food.

There was a similar jump in income last year after the first round of relief checks, which also caused a bounce in spending on goods.

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“To some extent, when people have money, they’re going to spend i**t**,” said Ben Herzon, executive director of IHS Markit, a forecasting firm. “If they’re not spending on services because they’re not going to movies or amusement parks, they’re going to derive utility from goods.”

He said he expected spending on goods to ease in the second quarter as services spending begins to rebound more strongly.

Spending on services is rebounding, but it is not growing as rapidly as spending on goods.

Consumer spending rose 2.6 percent in the first three months of the year, with a 5.4 percent increase in purchases of goods accounting for most of the growth. Spending on services, which has slumped throughout the pandemic, rose by 1.1 percent.

“This demonstrates the value of government intervention when the economy is on its knees from Covid,” said Ian Shepherdson, chief economist at Pantheon Macroeconomics. “But in the coming quarters, the economy will be much less dependent on stimulus as individuals use the savings they’ve accumulated during the pandemic.”

The economy’s underlying strength has been evident in the robust corporate earnings that many companies have been reporting in recent days. After the stock market closed Thursday, Amazon announced that its [profit more than tripled last quarter](https://www.nytimes.com/live/2021/04/29/business/stock-market-today/amazons-profits-triple) to over $8 billion, while sales jumped 44 percent to $108.5 billion.

One striking aspect of the quarter’s economic activity was spending on motor vehicles and parts, which increased by almost 13 percent from the previous three months. Strong consumer demand and tight inventories drove prices higher.

Low interest rates, readily available credit, rising home values and stock prices, and strong trade-in values for used models are also easing the path for consumers.

At AutoNation, the country’s largest dealership chain, many vehicles are being sold near or at sticker price even before they arrive from the factory. “These vehicles are coming in and going right out,” said Mike Jackson, the chief executive.

Even if economic output is back to where it was before last year, as Mr. Daco estimates, it is short of where it would be without the pandemic. What’s more, economists say it is likely to take until sometime next year for employment to regain the ground it lost as a result of the pandemic.

The labor market underscores the uneven distribution of economic pain. White-collar employees have been able to make a smooth transition to working from home and relying on services like Netflix and DoorDash for their needs, but blue-collar workers and less-educated Americans have been hit hard. And while household savings over all have swelled, many families have seen their finances wiped out.

The [unemployment rate](https://www.bls.gov/news.release/pdf/empsit.pdf) for high school graduates was 6.7 percent in March, while it stands at 3.7 percent for Americans who hold a college degree. Members of minority groups have also suffered heavily, with the jobless rate for Black Americans at 9.6 percent, compared with 5.4 percent for whites.

Still, hiring does seem to be catching up. Last month, [employers added 916,000 jobs](https://www.nytimes.com/2021/04/02/business/economy/jobs-report-march.html) and the unemployment rate fell to 6 percent, while initial claims for unemployment benefits have dropped sharply in recent weeks. On Thursday, the Labor Department reported that [initial claims for state unemployment benefits](https://www.nytimes.com/2021/04/29/business/economy/weekly-unemployment-claims.html) had fallen to the lowest level of the pandemic for the third consecutive week.

Tom Gimbel, chief executive of LaSalle Network, a recruiting and staffing firm in Chicago, said: “It’s the best job market I’ve seen in 25 years. We have 50 percent more openings now than we did pre-Covid.”

Hiring is stronger for junior to midlevel positions, he said, with strong demand for professionals in accounting, financing, marketing and sales, among other areas. “Companies are building up their back-office support and supply chains,” he said. “I think we’re good for at least 18 months to two years.”

Ample savings and rising consumer optimism are giving businesses the confidence to bet on the future as well. Business investment rose 2.4 percent in the first quarter and surpassed its prepandemic level. Residential construction spending rose 2.6 percent.

Economic growth would have been even stronger had it not been for a fall in inventories, said Michael Gapen, chief U.S. economist at Barclays. Supply chain constraints and shortages of parts like semiconductors are causing halts in production, he said, most notably in the automobile sector.

That should ease in the months ahead, he added, especially as businesses take their cue from more bullish consumers.

“We’re at the opening stages of what could be a very strong six to nine months for the U.S. economy as it emerges from the pandemic,” he said. “The best is still yet to come.”

#### Economy is solid.

Domm 21 – Patti Domm is CNBC Markets Editor, responsible for news coverage of the markets and economy. Prior to joining CNBC in 1999 as senior news editor, Domm was the equities editor for the Americas at Reuters. She was also Wall Street editor at Reuters, reporting on mergers, acquisitions and the Street. She also edited three CNBC books on personal investing. Domm serves on the board of the Financial Womens Association of New York.

Patti Domm, April 9 2021, “The economy is on the cusp of a major boom and economists believe it could last,” CNBC, https://www.cnbc.com/2021/04/09/the-economy-is-on-the-cusp-of-a-major-boom-and-economists-believe-it-could-last.html

The economy has entered a [period of supercharged growth](https://www.cnbc.com/2021/04/01/economic-boom-in-the-second-quarter-a-boost-for-stocks.html), and instead of fizzling, it could potentially remain stronger than it was during the pre-pandemic era into 2023.

Economists now expect the [second quarter to grow](https://www.cnbc.com/rapid-update/) at a pace of 10%, and growth for 2021 is expected to be north of 6.5%. In the past decade, there have been few quarters where gross domestic product grew at even 3%. Forecasts for 2021 and 2022 were revised higher after Congress approved $1.9 trillion in fiscal spending, on top of an earlier $900 billion package late last year.

That money is now making its way through the economy. Bank of America’s credit card data shows a 67% surge of card spending over last year in the seven days ended April 3, fueled by government Covid stimulus checks and reopenings. But that compares to a bleak period when consumers were in lockdown and frightened by the spreading [virus](https://www.cnbc.com/coronavirus/). However, spending is still up 20% over the same period two years ago.

“This economy isn’t coming back. It is back,” said Tom Gimbel, founder and CEO of LaSalle Network, a Chicago-based recruitment firm. The first signs of the economic blastoff showed up in March’s better-than-expected increase of 916,000 jobs.

“I tell you this is the most optimistic job market I’ve ever seen. The only thing that causes it not to be great is Covid,” Gimbel said. Once the vaccine is rolled out to mostly everyone who wants it this spring, the hiring picture will be even better, he said. Hiring is also complicated by Covid, and virtual workforce hires don’t always work out.

As it is, Gimbel said jobs are hard to fill, and some employers are counterbidding for workers with the right skills. He said many jobs are going unfilled because qualified workers are in low supply. Hiring by the restaurant and hospitality industry is still depressed but it could recover further with more reopenings.

The Labor Department’s job opening data showed openings of 7.4 million as of the end of February, the highest level since January 2019 and 5.1% above the pre-pandemic level.

“What [Jamie Dimon] [said in his letter](https://www.cnbc.com/2021/04/07/jamie-dimon-says-economic-boom-fueled-by-deficit-spending-vaccines-could-easily-run-into-2023.html) is right,” said Gimbel. “This economy is going to be on steroids for the rest of this year and next year.”

JPMorgan CEO Dimon commented at length on the economy in his annual letter to shareholders Wednesday, and his remarks echoed what many economists expect.

“I have little doubt that with excess savings, new stimulus savings, huge deficit spending, more QE, a new potential infrastructure bill, a successful vaccine and euphoria around the end of the pandemic, the U.S. economy will likely boom,” Dimon wrote. “This boom could easily run into 2023 because all the spending could extend well into 2023.”

That contrasts to a year ago, when the economy abruptly shut down and there were no known vaccines. Travel came to a halt and so did dining out, and all other forms of entertainment outside the house. As much of the workforce as possible stayed home, and cities and office parks became ghost towns.

Now, [1 in 5 Americans are fully vaccinated.](https://www.cnbc.com/2021/04/09/covid-19-cases-deaths-vaccinations-daily-update.html) More restrictions are being lifted and more people are flying, dining out and staying in hotels. Bank of America estimates Americans have $3.5 trillion in bank accounts they didn’t have before the pandemic, both from government checks and savings. That money could start flowing into the economy, as all kinds of businesses, from restaurants to gyms, see surges this summer from pent-up demand.

The unemployment rate is still a high 6%, but economist Ed Hyman, chairman of Evercore ISI, says it could fall to 3%, below the pre-pandemic low of 3.5%.

“From trucking to job openings, US economic data have lifted off,” Hyman wrote in a note this week. Evercore’s trucking survey suggests more job openings.

The consumer-driven service sector is about to see a demand surge, while the manufacturing side of the economy has already been firing on all cylinders. The Institute for Supply Management manufacturing survey jumped to 64.7 in March, a 38-year high.

Hyman added Evercore’s tech index is at a decade high. The tech index is based on a biweekly survey of sales activity at five tech companies that manufacture equipment and software.

Diane Swonk, chief economist at Grant Thornton, said she expects 2021′s growth rate to be 6.6%, the strongest year since 1984. She expects a pace of 4.3% annualized pace of growth for gross domestic product in 2022.

Swonk said she has not yet added any infrastructure spending proposed by President [Joe Biden](https://www.cnbc.com/joe-biden/), as it has not been approved and its impact may not show up for awhile. But the other stimulus has already made some impact on the economy, and economists have already boosted the growth forecasts for this year and next.

The $1.9 trillion Covid relief program, signed into law last month, provided $1,400 to individuals plus money for schools and state and local governments.

“You have two years at least of catch up, and it takes governments a while to spend money. You don’t fall off a cliff even though the money was already allocated,” she said.

The forecast for the current quarter has been rising, and the [CNBC/Moody’s Analytics Rapid Update](https://www.cnbc.com/rapid-update/) of economists’ forecasts now puts it at a 10% growth pace, up from 9.5% earlier this month.

### DA

#### Iran evades sanctions through cryptocurrency

**Erdbrink 19** --- Dutch journalist who is the Northern Europe bureau chief for The New York Times

Thomas, 1-29-2019, "How Bitcoin Could Help Iran Undermine U.S. Sanctions,” New York Times, https://www.nytimes.com/2019/01/29/world/middleeast/bitcoin-iran-sanctions.html

Iran’s economy has been hobbled by banking sanctions that effectively stop foreign companies from doing business in the country. But transactions in Bitcoin, difficult to trace, could allow Iranians to make international payments while bypassing the American restrictions on banks.

In the past, the threat of United States sanctions has been enough to squelch most business with Iran, but the anonymous payments made in Bitcoin could change that. While Washington could still monitor and intimidate major companies, countless small and midsize companies could exploit Bitcoin and other cryptocurrencies to conduct business under American radar.

The United States Treasury, well aware of the threat, is attempting to bring Bitcoin and the others into line. In recent weeks, in response to an internet fraud case originating from Iran, the Treasury imposed sanctions on two Iranians and the Bitcoin addresses, or ‘‘wallets,’’ they had used for trading in the currency.

The Treasury also has warned digital marketplaces that buy and sell Bitcoin and companies that sell computers used to process Bitcoin transactions that they should not provide services to Iranians. Several well-known trading sites are now blocking buyers and sellers from Iran. Some have confiscated money belonging to clients based in Iran.

“Treasury will aggressively pursue Iran and other rogue regimes attempting to exploit digital currencies,” the department said in a statement.

But by their nature, cryptocurrencies are uncontrolled by any person or entity. At best, efforts to regulate or monitor trade in them are episodic, whack-a-mole affairs. With Bitcoin and other cryptocurrencies, there is simply no way to duplicate the banking sanctions that have proved so damaging to the Iranian economy.

Bitcoin transactions are recorded on a digital ledger or database known as the blockchain, maintained communally by many independent computers. The system is designed explicitly to avoid central banks and large financial institutions. Like emails delivered without going through a central postal service, the computer network maintaining Bitcoin records enables the movement of money without going through any central authority.

The Iranian government has been slow to recognize the potential sanctions-evading possibilities of Bitcoin. But it is now considering the establishment of exchanges to facilitate trading, one official, Abdolhassan Firouzabadi, said recently. Despite the failure of Venezuela’s state-backed cryptocurrency, the Petro, Iran’s central bank said recently that it was seriously considering creation of something similar, possibly called the Crypto-Rial, named after the national currency, the rial.

Still, Iran’s venture into Bitcoin pales in comparison to what has been happening the former Soviet republic of Georgia, where thousands of people have jumped into the cryptocurrency business.

At the computerized processing operation in the Iranian desert, no one seemed particularly concerned with the geopolitical implications of Bitcoin.

The operation consisted of 2,800 computers from China, fitted into eight containers, which when linked are called a farm. It makes intense mathematical calculations, known as mining, needed to confirm Bitcoin transactions. Miners collect fees in Bitcoin for their services.

Ignoring the rain, the European visitor used the calculator on his mobile phone to determine how much money could be made from this particular farm, multiplying computer power and deducting electricity and operational costs.

He estimated about five Bitcoins a month, which at roughly $4,000 per Bitcoin at current price levels, would be about $20,000.

“Not too bad,” he said.

The currency fluctuates like any other, though it has proved particularly volatile, sinking to slightly less than $4,000 a unit from nearly $20,000 about a year ago.

“We’ll have two engineers on site to keep everything running, that’s it,” said Behzad, the chief executive of IranAsic, the company running the site. He, like the European investor, did not want to provide his family name, out of fear of penalties from the United States.

The Chinese computers, called Antminer V9s, were regarded as outdated by the European visitor. Still, he said, “I guess this is the last place on earth where they are still profitable.”

That helps explain why Iran seems to be taking its first baby steps toward becoming a global center for mining Bitcoins. Because of generous government subsidies, electricity — the energy for the computers needed to process cryptocurrency transactions — costs little in Iran. It goes for about six-tenths of a cent per kilowatt-hour, compared with an average of 12 cents in the United States and 35 cents in Germany.

In recent months, dozens of foreign investors from Europe, Russia and Asia have considered moving their mining operations to Iran and other low-cost countries like Georgia. “We have to be flexible in this industry and go where prices are the lowest in order to survive,” said the European investor.

#### Blockchain tracking solves Iranian evasion – US lead key.

**Robinson 21** --- Ph.D., Co-founder and Chief Scientist discusses cryptocurrency forensics, investigations, compliance, and sanctions.

Tom, "How Iran Uses Bitcoin Mining to Evade Sanctions and “Export” Millions of Barrels of Oil," Elliptic, <https://www.elliptic.co/blog/how-iran-uses-bitcoin-mining-to-evade-sanctions>

The Iranian state is therefore effectively selling its energy reserves on the global markets, using the Bitcoin mining process to bypass trade embargoes. Iran-based miners are paid directly in Bitcoin, which can then be used to pay for imports - allowing sanctions on payments through Iranian financial institutions to be circumvented.

This has become all but an official policy, with a think tank attached to the Iranian president’s office recently publishing a report highlighting the use of cryptoassets to avoid sanctions.

Many of those making the Bitcoin transactions and paying the fees to Iran-based miners will be located in the United States - the very country spearheading the sanctions. As the US government considers whether to lift some sanctions on Iran in exchange for a return to a nuclear deal, it will need to consider the role that Bitcoin mining plays in enabling Iran to monetise its natural resources and access financial services such as payments.

In the meantime, financial institutions should consider the sanctions risk they are exposed to due to Iranian Bitcoin mining - particularly those that are beginning to offer cryptoasset services. If 4.5% of Bitcoin mining is based in Iran, then there is a 4.5% chance that any Bitcoin transaction will involve the sender paying a transaction fee to a Bitcoin miner in Iran. Financial institutions should also be on the lookout for crypto deposits originating from Iranian miners that are seeking to cash-out their earnings.

Solutions for Sanctions Risks

However as we discuss in more detail our new sanctions guide, solutions to these challenges exist and are already used by financial institutions engaging in cryptoasset activity.

For example, blockchain analytics solutions such as those provided by Elliptic can be used by regulated financial institutions to detect and block cryptoasset deposits from Iran-based entities including miners. Techniques can also be employed to ensure that transaction fees are not paid to miners in high risk jurisdictions.

#### Effective sanctions key to prevent Iranian nuclear acquisition.

**Morrison 21** --- Master of Arts of Political Science, University of Waterloo.

Kallen, 2021, “Economic Sanctions and Nuclear Non-proliferation: A Comparative Study of North Korea and Iran, “University of Waterloo, Fulfilment of the thesis requirement for the degree of Master of Arts, https://uwspace.uwaterloo.ca/bitstream/handle/10012/16666/Morrison\_Kallen%20.pdf?sequence=3

Economic sanctions have been successful in stopping Iran from pursuing their nuclear program thus far. Iran has conceded multiple times to the United States and the international community to halt the enrichment of uranium and the advancement of their nuclear program. The most notable example of Iran’s concessions has been the signing of the Joint Comprehensive Plan of Action in which Iran agreed to halt and greatly reduce their nuclear program in return for substantial easing of economic sanctions. The second criteria has been met as Iran’s economy has significantly worsened due to continued economic pressure from the United States and the international community. Iran’s economy has significantly worsened due to continued economic pressure from the United States and the international community. Continued economic pressure has been paramount to bringing Iran to the negotiating table. While the United States and its regional allies do pose a military threat to Iran, that is unlikely a sufficient factor in dissuading Iran.

We have established that the level of political contestation in the targeted countries, their economic and security vulnerabilities, and the degree of international cooperation are important factors in determining if economic sanctions are effective at limiting nuclear proliferation. In Iran’s case the regime, while authoritarian, allows for limited political contestation. The general public gets to elect the president (even if candidates are handpicked by the supreme leader). Iranians have been able to protest against the government. One goal of economic sanctions is to galvanize the general public against the government and their policy decisions. Iranians have indeed been frustrated by the sanctions and voiced their discontent with the government policies targeted by the sanctions.

Iran’s international environment is also conductive for economic sanctions to be effective. Iran is a regional power with an impressive arsenal of missiles and extensive network of proxy forces. Therefore, nuclear weapons are not imperative for Iran’s defence. On the other end, Iran’s economy is largely based on oil and gas exports. Integration into the global market is very important for Iranians and a vital source of revenue for the government. Economic sanctions have hurt the Iranian economy and therefore have hurt Iranians. The economic squeeze has brought Iran to the negotiating table in the past and will likely do so in the future. The international approach to Iran has been encompassing with the European Union and the United Kingdom taking a common stand with the United States in preventing Iran from acquiring nuclear weapons. Even after the United States left the JCPOA the EU and UK have attempted to develop mechanisms to provide Iran with economic incentives to keep Iran abiding to the JCPOA. Even though China has given Iran an economic lifeline there is tension within Iran over concerns of becoming too economically dependent on China.

#### Israel would preempt before the nukes come online. Sparks a wider regional conflict that draws in all the major powers.

Scheinman 18 – Security Studies Chair, Nat’l War College; Nuclear Nonprolif Rep. for Obama

Adam M. Scheinman, What if Iran leaves the NPT?, 8 June 2018, <https://thebulletin.org/2018/06/what-if-iran-leaves-the-npt/>

Not to diminish the immensity of North Korea’s nuclear challenge, but Iran’s withdrawal from the NPT carries weightier risks. It would likely mean that Iran’s Supreme Leader had given the green light to an Iranian nuclear weapon, opening the floodgates to NPT withdrawals by other Arab states—Saudi Arabia, the UAE, and Egypt head that list. These and possibly other Sunni governments, none of whom can rely on a major power for defense, may conclude that they require their own nuclear weapon to check Iran’s rise. The Saudis are very clear and public on this point.

More immediately, Israel may feel compelled to strike Iranian nuclear facilities before they become fully operational. This raises the specter of a regional war that may draw in several of the nuclear weapon states—the United States, the UK, France, and Russia—and reshape the Middle East in ways we cannot predict. Whether the NPT could survive such a shock is another unknown.

#### Military primacy is biggest internal link

Brands 17

Hal Brands, a Henry A. Kissinger Distinguished Professor of Global Affairs at Johns Hopkins University’s School of Advanced International Studies, Eric Edelman, a counselor at the Center for Strategic and Budgetary Assessments and was formerly an undersecretary of defense for policy, “The Crisis of American Military Primacy and the Search for Strategic Solvency,” Parameters, Winter 2016-17

As the principal objections to increasing defense resources fall away, the advantages and logic become clearer. This approach recognizes, for instance, how beneficial US military primacy has been in shaping a relatively stable, prosperous, and congenial international order, and it makes the investments necessary to sustain as much of this order as possible. This approach provides the United States with greater ability to meet aggression from a range of enemies and rivals without resorting to dangerously escalatory strategies in the most operationally demanding scenarios. As a result, this approach is arguably best suited to avoid the use of force over the long term, by averting situations in which American adversaries from Iran and North Korea to Russia and China think aggression might pay. “Peace through strength” is not a meaningless catchphrase; it is good strategy. Closing the capabilities-commitments gap by dramatically increasing the former therefore represents the best available approach.

VIII

“Without superior aggregate military strength, in being and readily mobilizable, a policy of ‘containment’ . . . is no more than a policy of bluff.”55 This admonition, written by the authors of NSC-68 in 1950, reflected a dawning realization that insufficient military power endangered America’s global commitments. The United States faces another crisis of strategic solvency today as gathering international threats combine with dwindling military resources to leave the American superpower in an increasingly overextended and perilous state.

America thus confronts a stark choice about how to proceed. Of the options considered here, the best approach is to find the resources necessary to bring American forces back into line with the grand strateg y they are meant to support. Undertaking a sustained, major military buildup will not be cheap, but is not unaffordable for a wealthy superpower that has benefitted so much from military primacy and its geopolitical ben- efits. Indeed, the fundamental question regarding whether America can undertake this course is not an economic one. It is whether the country will politically prioritize the investments needed to sustain its primacy or allow itself to slip further into strategic insolvency with all the associated dangers for the United States and global order.

#### Hard power is necessary and sufficient to deter

Kagan 17

Robert Kagan, Senior Fellow - Foreign Policy, Project on International Order and Strategy, PhD in American history from American University, Brookings, January 24, 2017, “The twilight of the liberal world order”, https://www.brookings.edu/research/the-twilight-of-the-liberal-world-order/

The best way to avoid great power clashes is to make the U.S. position clear from the outset. That position should be that the United States welcomes competition of a certain kind. Great powers compete across multiple planes—economic, ideological, and political, as well as military. Competition in most spheres is necessary and even healthy. Within the liberal order, China can compete economically and successfully with the United States; Russia can thrive in the international economic order upheld by the liberal powers, even if it is not itself liberal.

But security competition is different. The security situation undergirds everything else. It remains true today as it has since the Second World War that only the United States has the capacity and the unique geographical advantages to provide global security. There is no stable balance of power in Europe or Asia without the United States. And while we can talk about soft power and smart power, they have been and always will be of limited value when confronting raw military power. Despite all of the loose talk of American decline, it is in the military realm where U.S. advantages remain clearest. Even in other great powers’ backyards, the United States retains the capacity, along with its powerful allies, to deter challenges to the security order. But without a U.S. willingness to use military power to establish balance in far-flung regions of the world, the system will buckle under the unrestrained military competition of regional powers.

#### Barriers at every level of antitrust reform means Biden will be unable to threaten corporate interests

Carstensen 21 – Fred W. & Vi Miller Chair in Law Emeritus, University of Wisconsin Law School.

Peter Carstensen, February 2021, “THE “OUGHT” AND “IS LIKELY” OF BIDEN ANTITRUST,” concurrences, https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#carstensen

II. WHAT IS LIKELY TO HAPPEN?

11. First, the courts are a major stumbling block to enhanced enforcement even if the agencies were willing to be more aggressive. The ill-conceived American Express [[86](https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#nb86)] decision highlights the willingness of the Supreme Court to twist economic analysis into an intellectual pretzel that serves only to defeat legitimate challenges. The failure of the courts to appreciate the relevance of potential competition to preserving and enhancing long-run viable market behavior is another recent example. [[87](https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#nb87)] The failure to recognize the competitive problems created by the vertical consolidation of AT&T with Time Warner which created significant risks of both exploitation of consumers and exclusion of competitors provides yet another example of the obstacles to achieving a more robust enforcement policy. [[88](https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#nb88)] Thus, the contemporary judicial temper is one of great reverence for large enterprise and deep concern not to inhibit its freedom of action. Until there is a significant change in judicial personnel, or the current judiciary goes through a major re-education, a robust enforcement agenda is likely to die in the courthouse. 12. But given a hostile judiciary, the agencies are likely to limit their challenges to the most obvious cases. Important cases will die on the courthouse steps without ever getting into court. To be sure, the agencies are less likely to waste time investigating minor marijuana mergers and to focus resources on more important matters. The emergent judicial demands for detailed proof of actual adverse competitive effects will limit the scope of what can be done. The resources to develop a major case in light of these expectations will be significant and so constrain the agencies further. Thus, while merger enforcement may see an uptick especially where the merger involves two major direct competitors in more than moderately concentrated markets, the incentives to pursue vertical or potential competition cases will be very limited. Similarly, despite the growing recognition of how dominant firms, especially in the high-tech arena, buy up nascent competitors, the current standards for merger analysis will make such challenges very unlikely. 13. Given the American Express decision, the burden of challenging anticompetitive vertical restraints is likely to deter the enforcers from following up on the Dentsply [[89](https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#nb89)] and McWane [[90](https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#nb90)] cases except, where, as in those cases, a clear monopoly existed. Given existing market concentrations in many industries, this will result in the continuation of a plethora of harmful restraints. 14. Similarly, despite bipartisan murmurs about competitive issues, the potential in a closely divided Congress that any major initiatives will survive is limited at best. In part the challenge here is how the Biden administration will rank its commitments. If it were to make reform of competition law a major and primary commitment, it would have to trade off other goals, which might include health care reform or increases in the minimum wage. It is likely in this circumstance the new administration, like the Obama administration’s abandonment of the pro-competitive rules proposed under the PSA, would elect to give up stricter competition rules in order to achieve other legislative priorities. 15. Another key to a robust commitment to workable competition is the choice of cabinet and other key administrative positions. Here as well, the early signs are not entirely encouraging. In selecting Tom Vilsack to return as secretary of agriculture, the president has embraced a friend of the large corporate interests dominating agriculture who has spent the last four years in a highly lucrative position advancing their interests. Given the desperate need for pro-competitive rules to implement the PSA and control exploitation of dairy farmers through milk-market orders, the return of Vilsack is not good news. Who will head the FTC and who will be the attorney general and assistant attorney general for antitrust is still unknown, but if those picks are also centrists with strong links to corporate America the hope for robust enforcement of competition law will further attenuate! 16. In sum, this is a pessimistic prognostication for the likely Biden antitrust enforcement agenda. There is much that ought to be done. But this requires a willingness to take major enforcement risks, to invest significant political capital in the legislative process, and to select leaders who are committed to advancing the public interest in fair, efficient and dynamically competitive markets. The early signs are that the new administration will be no more committed to robust competition policy than the Obama administration. Events may force a more vigorous policy—I will cling to that hope as the Biden administration takes shape.

#### Biden’s antitrust hullabaloo is all hype

Posner 21– Professor, UChicago Law.

Eric Posner, 7-21-2021, "The Antitrust War’s Opening Salvo," Project Syndicate, https://www.project-syndicate.org/commentary/biden-antitrust-executive-order-what-it-does-by-eric-posner-2021-07

CHICAGO – US President Joe Biden’s new executive order on “Promoting Competition in the American Economy” is more significant for what it says than for what it does. In fact, the order doesn’t actually order anything. Rather, it “encourages” federal agencies with authority over market competition to use their existing legal powers to do something about the growing problem of monopoly and cartelization in the United States. In some cases, the relevant agencies are asked merely to “consider” ramping up enforcement; in others, they are directed to issue regulations, but the content of those regulations remains largely up to them.

Nonetheless, it would be a mistake to dismiss the order’s tentative language as mere rhetoric. Antitrust is the main body of law governing market competition in the US, and it has been the object of sustained attack by business interests and conservative intellectuals for more than 50 years. Biden is the first president since Harry Truman to take a strong public anti-monopoly stand, and he has backed it up by appointing ardent anti-monopoly advocates to his government.

The executive order is ambitious in its scope and style. In strongly worded passages, it accuses businesses of monopolistic and unfair practices in major industries, including technology, agriculture, health care, and telecommunications. It laments the decline of government antitrust enforcement, and identifies numerous harms that have resulted – including economic stagnation and rising inequality.

The order also establishes a new bureaucratic organization in the White House to lead the anti-monopoly effort. Demanding a “whole-of-government” approach, it calls on the vast resources of numerous agencies, and not just the two that traditionally oversee antitrust (the Department of Justice and the Federal Trade Commission).

Still, the Biden administration’s antitrust agenda will face significant judicial obstacles. Over the past 40 years, an increasingly business-friendly Supreme Court has gutted antitrust law. In ruling after ruling, it has weakened the standards used to evaluate anti-competitive behavior; raised the burden of bringing an antitrust case; limited the types of antitrust victims who are allowed to bring cases; allowed businesses to use arbitration clauses to protect themselves from class action lawsuits; and much else.

On top of that, the Supreme Court has disseminated throughout the judiciary a generalized suspicion of antitrust claims. Judges at all levels have absorbed an academic skepticism about antitrust law that is now 30 years out of date. Accordingly, business plaintiffs are usually seen as sore losers who have resorted to the law because they were beaten in the marketplace. Consumer cases are attributed to the machinations of trial lawyers. The pretexts businesses offer for their anti-competitive practices are swallowed whole.

So, while Biden is right that “federal government inaction” is partly to blame for the decline in antitrust enforcement, there is little that his (or any) administration can do unless it has the courts on its side. This probably accounts for the order’s careful language. Agencies like the DOJ and the FTC would surely like to enforce antitrust laws more vigorously than in the past, but they are not going to commit resources to bringing cases that will fail in court.

#### The threshold is small – lowered plaintiff burdens means tech companies like are subject to more treble damages – treble damages force companies to significantly limit investment in tech to avoid liability

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Antitrust liability, as distinct from other forms of liability, is different—the ability to obtain final judgements increases the potential cost of all conduct and undermines industry dealmaking

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#### Chinese AI dominance is the death knell of global peace – triggers great power wars

Allison 20 **–** Professor of Government, Harvard Kennedy School

Graham Allison, August 2020, "Is China Beating the U.S. to AI Supremacy?," Belfer Center for Science and International Affairs, <https://www.belfercenter.org/publication/china-beating-us-ai-supremacy>

An AI Arms Race?

During the Cold War, the stakes in the nuclear arms race with the Soviet Union were obvious. In today’s Thucydidean rivalry between a meteorically rising China and a colossal ruling United States, what are the risks of an escalating AI arms race?

Like it or not, future war will be AI-driven. As Secretary of Defense Mark Esper recently noted at the conference of the National Security Commission on AI, “Advances in AI have the potential to change the character of warfare for generations to come. Whichever nation harnesses AI first will have a decisive advantage on the battlefield for many, many years.” AI’s ability to accelerate decision cycles in conflict will compel militaries to adopt it. In air-to-air combat, pilots begin with an ooda loop: observe, orient, decide, act. If A can “get inside B’s OODA loop,” A wins—since he can maneuver to escape A’s fire and attack where he calculates B’s path will leave him when A’s missile arrives. Because AI can observe, orient, decide and act at multiples of a human pilot, it will become irresponsible to send a human pilot into battle with an AI piloted aircraft.51 As former Chairman of the Joint Chiefs of Staff Joeseph Dunford put it: “Whoever has the competitive advantage in artificial intelligence and can field systems informed by artificial intelligence, could very well have an overall competitive advantage.”52

The demonstrated success of AlphaGo, and more recently, AlphaStar, in defeating all competitors in one of the world’s most complex real-time strategy video games suggests that in any structured contest between offense and defense, AI will dominate humans. The company, country or team with the best AI will win. As an example, consider American football. In what commentators often discuss as a “chess match,” the offense and defense coordinators know that if the defense guesses correctly whether the next play will be a pass or a run, most nfl teams’ defenses can successfully stop most opponents’ offense. Reading all the variables in a situation, AI should be able to tilt the scales on the field—or in analogous military competitions on land, sea, and in the air and space.

The domain’s leader will also be the first to know which of today’s military mainstays AI will upend. Germany discovered the power of submarines before World War I because it led in their development. British admirals did not wake up to their deadly efficiency until a lone German U-boat in 1914 sank three armored cruisers on a single morning. By then, it was too late—the British had already invested their treasure in building battle fleet that had become largely obsolete. The coordination of drones and cruise missiles that successfully attacked Saudi Arabia’s most valuable target and cut its oil exports by half is suggestive. Will AI-empowered drone swarms make aircraft carriers equally obsolete, all for one one-thousandth of the cost? Will AI analysis of data from all sources pierce the invisibility of stealthy systems like the F-35 in which the United States has invested so substantially? The first country to know will be the one driving the research and development frontier.