**R2 UK Neg vs Trinity NM Disclosure**

**1NC**

**Off**

**1NC---T**

T---Prohibit

**Prohibition is distinct from regulation – it requires ending something fully, which excludes regulating within the bounds of 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.

**Violation---the aff allows all business practices, so long as they meet certain rules of accumulation of size---that’s regulation**

**Vote neg---**

**[A]---Limits---they allow minor tweaks in the way that antitrust law is enforced because they don’t change the amount of business practices allowed.**

**[B]---Grounds---NEG links are based on perception and large scale shifts from the status quo.**

**1NC---CP**

Section 5 Counterplan---

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

* **determine that, under Section 5 of the Federal Trade Commission Act, “unfair methods of competition” includes domestic, private sector financial institutions amassing liabilities greater than five percent of the Federal Deposit Insurance Corporation’s Deposit Insurance Fund.**
* **issue cease and desist letters to companies engaging in the aforementioned conduct, 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.**

**Maintains incentives for innovation**

**Dagen 10** – Special Counsel to the Director, Bureau of Competition, Federal Trade Commission.

Richard Dagen, August 2010, “RAMBUS, INNOVATION EFFICIENCY, AND SECTION 5 OF THE FTC ACT,” Boston University Law Review, http://www.bu.edu/law/journals-archive/bulr/documents/dagen.pdf

d. Efficiency Considerations Weigh in Favor of **Use of Section 5 Enforcement, but Not Sherman Act**

Critics might argue that Section 5 enforcement has resulted in at least one firm leaving a standard-setting organization. Rambus’s counsel advised Rambus of the risks of equitable estoppel well before the Dell decision, yet Rambus continued to participate in JEDEC.260 It was very soon after Dell that Rambus withdrew from JEDEC.261 Thus, if the FTC enforces equitable estoppel principles, a firm with an intent to engage in “bad” conduct may leave.262 But this is **not an undesirable thing** – particularly in the case of Rambus, which gained valuable information during SSO deliberations but provided none.

Section 5 enforcement might increase the likelihood that potential hold-up victims participate in standard setting. Enforcement would **encourage “innocent” firms to participate** because they would be less likely to suffer from opportunistic behavior. The net would be an increase in standard setting.

Conversely, finding the negligent IP holder liable for treble damages under Section 2 could **significantly deter firms from participating in standard setting** or cause overinvestment in patent tracking. Treble damages for negligence (over and above an injunction) will generally exceed any patent law remedy.

If treble damages were available, unintentional conduct could be penalized significantly more than under laches. Rather than risking treble damages in addition to the loss of IP, firms **might choose not to participate** in standard setting.

In summary, monopoly gained through conduct that is within the control of the monopolist and not on the merits resembles monopolization, as the term is used by courts and in common parlance, rather than historic accident or luck. Such conduct is proscribed by patent law defenses and other external norms. Where external norms already exist, the incentive to engage in that conduct is already affected. The existence of a **patent law defense**, in conjunction with relief that is similar in nature to the patent law defense, **mitigates any risk of harm to incentives**. Using these defenses as one potential limiting principle ensures that no skill, foresight, or business acumen is involved. The deadweight social welfare loss associated with monopoly can be **eliminated with minimal concern for false positives**. The **use of Section 5 in this way is consistent with** Supreme **Court precedent**.263

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

**Nam 18** – Distinguished Practitioner, Center for East Asian Studies, Stanford University; former Visiting Professor of Law at UC Davis School of Law; former Visiting Fellow at Columbia Business School Center on Japanese Economy and Business; former antitrust attorney at Jones Day

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**.

**1NC---CP**

CFBP CP---

**Text: the United States federal government should make it illegal for private sector financial institutions** **amassing liabilities greater than five percent of the Federal Deposit Insurance Corporation’s Deposit Insurance Fund without expanding the scope of its core antitrust laws. The United States federal government empower and direct the Consumer Financial Protection Bureau to enforce said law.**

**CP solves---their ev---yellow**

**1AC Macey & Holdcroft 11** (Jonathan R. Macey is Sam Harris Professor of Corporate Law, Corporate Finance, and Securities Law, Yale Law School. James P. Holdcroft, Jr. is Chief Legal Officer, CLS Group. <KEN> “Failure Is an Option: An Ersatz-Antitrust Approach to Financial Regulation,” *The Yale Law Journal*. Volume 120, No. 6. April 2011. <https://www.yalelawjournal.org/feature/failure-is-an-option-an-ersatz-antitrust-approach-to-financial-regulation>)

Second, because our proposed approach applies only to financial institutions, we do not view it as a new antitrust law so much as we view it as a new law for financial institutions. And there can be no disagreement with the point that financial stability is a central focus, if not the central focus, of the law of financial institutions. Therefore, while we think that it might be **preferable** to have the **Antitrust Division** of the **D**epartment **o**f **J**ustice or the Federal Trade Commission **enforce** the regulatory regime that we advocate, this regime could also be implemented by financial institutions’ regulators (subject, of course, to the **not-insignificant problem** of **regulatory capture** by the financial institutions of their various regulators72).

**1NC---DA**

Innovation DA---

**Frenzy of M&A now because Biden’s executive order won’t be implemented for years**

David **French and** Sierra **Jackson**, Reuters, July 12, 20**21**, Analysis: Dealmakers see M&A rush, then chills, in Biden's antitrust crackdown, https://www.reuters.com/business/dealmakers-see-ma-rush-then-chills-bidens-antitrust-crackdown-2021-07-12/

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.

**Immediately expanding scope of antitrust liability brings mergers to a halt---undermines dynamism and global competitiveness**

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

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

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

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

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

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

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

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

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

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

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

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

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

GOP divided over bills targeting tech giants

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

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

**Internal link goes one way---large-firm dynamism is the only way to maintain tech leadership**

**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**.

**Tech innovation prevents nuclear conflict---US leadership is key**

**Kroenig and Gopalaswamy 18** – Associate Professor of Government and Foreign Service at Georgetown University and Deputy Director for Strategy in the Scowcroft Center for Strategy and Security at the Atlantic Council; Director of the South Asia Center at the Atlantic Council

Matthew Kroenig and Bharath Gopalaswamy, "Will disruptive technology cause nuclear war?," Bulletin of the Atomic Scientists, 11-12-2018, <https://thebulletin.org/2018/11/will-disruptive-technology-cause-nuclear-war/>

Rather, we should think **more broadly** about how **new technology** might affect global politics, and, for this, it is helpful to turn to scholarly international relations theory. The dominant theory of the causes of war in the academy is the “bargaining model of war.” This theory identifies **rapid shifts** in the balance of power as a **primary cause of conflict**.

International politics often presents states with conflicts that they can settle through **peaceful bargaining**, but when bargaining **breaks down, war results**. **Shifts** in the balance of power are **problematic** because they **undermine effective bargaining**. After all, why agree to a deal today if your bargaining position will be stronger tomorrow? And, a clear understanding of the **military balance of power** can contribute to **peace**. (Why start a war you are likely to lose?) But shifts in the balance of power **muddy understandings** of which states have the advantage.

You may see where this is going. New technologies threaten to create potentially **destabilizing shifts** in the balance of power.

For decades, stability in Europe and Asia has been supported by US military power. In recent years, however, the balance of power in Asia has begun to shift, as China has increased its military capabilities. Already, Beijing has become **more assertive** in the region, claiming contested territory in the South China Sea. And the results of Russia’s **military modernization** have been on **full display** in its ongoing intervention in Ukraine.

Moreover, China **may have the lead** over the United States in **emerging technologies** that **could be decisive** for the future of military acquisitions and warfare, including 3D **printing**, **hypersonic** missiles, **quantum** computing, **5G** wireless connectivity, and **a**rtificial **i**ntelligence (AI). And Russian President Vladimir Putin is building new unmanned vehicles while ominously declaring, “Whoever leads in AI will rule the world.”

If China or Russia are able to **incorporate new technologies** into their militaries **before the United States**, then this could lead to the kind of **rapid shift** in the balance of power that **often causes war.**

If Beijing believes emerging technologies provide it with a **newfound, local military advantage** over the United States, for example, it may be **more willing** than previously to **initiate conflict over Taiwan**. And if Putin thinks new tech has **strengthened his hand**, he may be more tempted to launch a Ukraine-style **invasion of a NATO member**.

Either scenario could bring these **nuclear powers into direct conflict** with the United States, and once nuclear armed states are at war, there is an **inherent risk of nuclear conflict** through limited nuclear war strategies, nuclear brinkmanship, or simple accident or inadvertent escalation.

This framing of the problem leads to a different set of policy implications. The concern is not simply technologies that threaten to undermine nuclear second-strike capabilities directly, but, rather, any technologies that can result in a meaningful shift in the broader balance of power. And the solution is not to preserve second-strike capabilities, but to **preserve prevailing power balances** more broadly.

When it comes to new technology, this means that the United States should seek to **maintain an innovation edge**. Washington should also work with other states, including its nuclear-armed rivals, to develop a new set of arms control and nonproliferation agreements and export controls to deny these newer and potentially destabilizing technologies to potentially hostile states.

These are no easy tasks, but the consequences of Washington **losing the race** for technological superiority to its autocratic challengers just might mean **nuclear Armageddon**.

**1NC---K**

Neolib K---

**The 1AC’s neoliberal application of antitrust naturalizes corporate domination and confines the government’s role to course correcting markets**

**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>.

ii. **antitrust law is not and cannot be “apolitical”**

Antitrust law is unavoidably political. Of course, the enforcement of antitrust law should not be political in the popular sense: the President and the heads of the Department of Justice Antitrust Division and Federal Trade Commission should not employ the antitrust laws to reward their friends and punish their enemies.22 Rather, antitrust is political in its content. In designing a body of law, Congress, federal agencies, and the courts must answer the **basic questions** of **whom the law benefits** and to what end. Answering these questions inherently requires moral and political judgments. These fundamental questions do not have a single “correct” answer and cannot be resolved through “neutral” methods or decided with an “apolitical” answer.23

Antitrust regulates state-enabled markets, which cannot be separated from politics. The history of antitrust law shows competing visions of both the law’s aims and its methods, suggesting there is no “apolitical,” universal concept of antitrust. Rather than aspire for an impossible utopia of “apolitical” antitrust, we must decide who should determine the political content of the field—democratically-elected representatives or unelected executive branch officials and judges.

A. Markets Cannot Be Divorced from Politics

A market economy is the product of extensive state action and so is inevitably political. The **conception of the market as a “spontaneous order”** is a useful construct for **defenders of the status quo** because it lends **legitimacy to the current order** and **suggests that intervention is futile**.24 This model, however, is a **myth** and **bears no correspondence to actual markets**. Most fundamentally, state action supports a market economy through the creation and protection of property rights25 and the enforcement of contracts.26 As sociologist Greta Krippner writes, “there can be no such excavation of politics from the economy, as this is the sub- stratum on which all market activity—even ‘free’ markets—rests.”27 In addition to property and contract law, examples of state action necessary for the contemporary U.S. economy to function include corporate and tort law (typically established and enforced by state governments), intellectual property, protection of interstate commerce, banking regulation, and monetary policy (generally con- ducted at the federal level).

Antitrust law, therefore, is a governmental action that shapes the power of state-chartered corporations and the scope of their state-enforced property and contractual rights. This regulation of state-enabled markets makes antitrust inherently political. Moreover, in formulating antitrust rules, lawmakers must determine whom the law seeks to protect. Antitrust law could conceivably protect consumers, small businesses, retailers, producers, citizens, or large businesses. But even identifying the protected group or groups does not fully resolve the question. For instance, if consumers are antitrust law’s sole protected group, how should the law protect consumers? Antitrust could protect consumers’ short- term interest in low prices or their long-term interests in product innovation or product variety, just to name a few possibilities.28

Given the foundational role of state action—and therefore politics—in a market economy, the choice of objective in antitrust law is not between intervention and nonintervention. Rather, antitrust law must choose between **different con- figurations of state action** and **different sets of beneficiaries**.29 More concretely, we must decide, openly or otherwise, whose interests antitrust law should protect.

B. The History of Antitrust Law Reveals the Unavoidability of Politics

The history of antitrust law further demonstrates the political nature of the field. Although Congress has not modified the antitrust statutes significantly since 1950,30 the content of antitrust has changed dramatically since then. Even the consumer welfare model has not banished political values from the field. While the range of debate within the community of antitrust specialists is narrow, the continuing disagreement over the interpretation of consumer welfare reveals the inescapability of political judgment.

Antitrust law today is **qualitatively different** from antitrust law fifty years ago. In the 1950s and 1960s, the courts and agencies interpreted antitrust law to advance a variety of objectives. The Supreme Court held that the antitrust laws promoted consumers’ interest in competitively-priced goods,31 freedom for small proprietors,32 and dispersal of private power.33 The Court held that business conduct injurious to competitors could give rise to antitrust violations, irrespective of the effects on consumers.34 It also interpreted congressional intent to be that a decentralized industrial structure should override possible economies of scale gained from greater consolidation of economic power.35 Recognizing this **goal of decentralization**, the federal judiciary adopted strict limits on business conduct with anticompetitive potential, including mergers36 and exclusionary practices.37

Since the late 1970s, however, the Supreme Court, along with the Department of Justice and Federal Trade Commission, has reduced the scope of the antitrust laws. With a **rightward shift** in the composition of the Supreme Court under the Nixon Administration and in the leadership at the federal antitrust agencies under the Reagan Administration,38 these institutions **curtailed the reach of antitrust law**, scaling back its objectives39 and **rewriting legal doctrine** to preserve the autonomy of powerful businesses—all in the name of protecting consumers.40

Even the adoption of the consumer welfare model has not somehow banished politics from antitrust. Instead, it has underscored the unavoidability of politics in the field. Despite being the prevailing goal of antitrust for nearly four decades now, the **meaning of consumer welfare is still not settled**. The two primary schools of thought on consumer welfare disagree on a fundamental question—who are the beneficiaries of antitrust law? One holds that actual consumers, as understood in the popular sense, should be the principal beneficiaries of antitrust law.41 The rival camp holds that both consumers and businesses should be the beneficiaries of antitrust law, and that whether a dollar of economic sur- plus goes to a consumer or a monopolistic business should be of no concern to the federal antitrust agencies and courts.42 C. Who Should Decide the Political Content of Antitrust?

Because the objective of antitrust law is thus bound up with political judgments and values, seeking an **“apolitical” antitrust jurisprudence** is **futile at best** and a **cynical effort to conceal political choices at worst.** The choice is not be- tween “apolitical” antitrust and “political” antitrust; rather, lawmakers must decide between different political objectives. Once the inevitably political valence of antitrust law has been acknowledged, we can turn to the key question of whether unelected officials at the antitrust agencies and federal judges (collectively “the technocrats”) or democratically-elected members of Congress should decide this political content.43

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

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

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

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

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

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

A. In Passing the Antitrust Laws, Congress Expressed Aims Much Broader than Consumer Welfare

The consumer welfare model of antitrust is **not true to the intent of Congress**. An extensive body of careful research has shown that Congress had several objectives when it passed the Sherman, Clayton, and Federal Trade Commission Acts.52 The Congresses that passed these landmark statutes recognized that eco- nomics and politics are inseparable. Congress originally sought to structure markets to **advance the interests of ordinary Americans in multiple capacities, not just as consumers**. Consumer welfare antitrust reflects, at best, a **selective reading** of this legislative history and, at worst, an **intentional distortion of this historical record**. Contrary to Robert Bork’s historical analysis, the legislative histories show no congressional awareness, let alone support, for interpreting consumer welfare as the economic efficiency model of antitrust, one nominally indifferent toward distributional effects.53

In passing the antitrust statutes, Congress aimed to protect consumers and sellers from monopolies, oligopolies, and cartels, as well as defend businesses against the exclusionary practices of powerful rivals.54 Key members of the House and Senate condemned the prices that powerful corporations charged consumers as “robbery”55 and “extortion.”56 The debates reveal similar solicitude for farmers and other producers who received lower prices for their products thanks to powerful corporate buyers.57 In addition to consumers and producers, Congress aimed to protect another important group of market participants: competitors. In enacting the antitrust statutes, Congress sought to restrain large businesses from using their power to exclude rivals.58 Congress recognized the political power of large corporations and aimed to curtail it through strong federal restraints. Indeed, the political power of these corporations represents a running theme in the legislative histories of the anti- trust laws. A number of speakers in the course of the debates pointed to the power wielded by these big businesses over government at all levels.59 In the debate over the Clayton Act, one Congressman declared that the trusts were commandeering ostensibly democratic political institutions.60 Senator John Sherman warned his colleagues that “[i]f we will not endure a king as a political power[,] we should not endure a king over the production, transportation, and sale of any of the necessaries of life.”61

B. **The Consumer Welfare Model Reflects an Impoverished Understanding of Corporate Power**

Focusing solely on harms to consumers and sellers, the consumer welfare model embodies an **emaciated conception of corporate power**. With its foundation in neoclassical economics, the consumer welfare model **privileges short- term consumer interests**. The neoclassical representation of the market—commonly known through supply-and-demand diagrams—presents a static picture of a market and **does not account for long-term dynamics**. As the default analytical guide for consumer welfare antitrust, the neoclassical model, with its focus on quantification, **prizes short-term price harms** to consumers and sellers and **discounts longer-term injuries**.62

Furthermore, the consumer welfare model **legitimizes the existing distribution of resources** by focusing on change to the status quo. Current antitrust law measures consumer welfare by changes in prices paid; what a person can pay, though, depends on both her willingness-to-pay for goods and services and her existing wealth. By this definition, a rich person who pays more for a luxury good due to a cartel suffers an antitrust harm, but a poor person who has no income and is unable to afford necessities cannot suffer antitrust harm from a monopoly. A we**althy consumer commands power in the market**; a **poor consumer**, in comparison, has **little or no clout** in the market.63

The consumer welfare model, moreover, affords li**ttle or no importance to corporations’ ability to dictate the development of entire markets**. Antitrust practitioners and scholars are wont to remind each other and critics that the antitrust laws “protect[] competition, not competitors.”64 Although the expression is arguably empty,65 it is taken to mean that harm to actual and prospective competitors alone is of no import to the antitrust laws. This doctrinal cornerstone is a political choice,66 which gives monopolists and oligopolists the power to dictate who participates in a market and on what terms.67 Under consumer welfare antitrust, businesses can use their muscle to **exclude rivals** and **strangle economic opportunity** so long as this exclusion is not likely to injure consumers. In practical terms, **consumer welfare antitrust grants big businesses broad latitude to engage in private industrial planning**. 68

For the consumer welfare school, the hegemonic power of large corporations is also of no consequence. Monopolistic and oligopolistic businesses across the economy use their power to seek and win favorable political and regulatory de- cisions.69 The ongoing—and frenzied—contest between states and cities to at- tract Amazon’s second headquarters is indicative of a giant business’s weight. In recent years, the concentrated financial sector has offered a vivid example of corporate political power in action.71 Leading banks helped trigger a worldwide economic crisis through their fraud and reckless speculation, and yet they defeated subsequent political efforts to control their size and structure and man- aged to preserve their institutional power.72 An influential analysis of congressional decision making suggests that the United States today is closer to an oligarchy than a democracy—the wealthy and large businesses wield tremendous political clout, whereas most ordinary people have little or no influence.73 Large businesses also set the parameters of political debate through control of the me- dia,74 sponsorship of supportive figures and organizations,75 and marginalization of critical voices.76 Consumer welfare antitrust itself is, at least in part, a **product of big business’s reaction** against the relatively vigorous antitrust pro- gram of the postwar decades.77

With its **narrow analytical frame**, the consumer welfare model of antitrust **accepts and legitimizes many forms of state-supported corporate power.** Under consumer welfare antitrust, large corporations have the freedom to enhance their power through mergers and monopolistic practices that **hurt competitors and citizens**. Viewed as part of the overall landscape of state-enabled markets, consumer welfare antitrust is **not an apolitical choice**, but a **charter of liberty** for dominant businesses.

**Neoliberalism causes cyclical economic collapses, widespread environmental destruction, and democracy collapse**

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Robert Kuttner, “Neoliberalism: Political Success, Economic Failure,” The American Prospect, 6/25/19, https://prospect.org/economy/neoliberalism-political-success-economic-failure/

Since the late 1970s, we've had a grand experiment to test the claim that free markets really do work best. This resurrection occurred despite the practical failure of laissez-faire in the 1930s, the resulting humiliation of free-market theory, and the contrasting success of managed capitalism during the three-decade postwar boom.

Yet when growth faltered in the 1970s, libertarian economic theory got another turn at bat. This revival proved extremely convenient for the conservatives who came to power in the 1980s. The **neoliberal counterrevolution**, in theory and policy, has reversed or **undermined** nearly every aspect of **managed capitalism**—from progressive taxation, welfare transfers, and **antitrust**, to the empowerment of workers and the **regulation** of banks and other major industries.

Neoliberalism's premise is that free markets can regulate themselves; that government is inherently incompetent, captive to special interests, and an intrusion on the efficiency of the market; that in distributive terms, market outcomes are basically deserved; and that redistribution creates perverse incentives by punishing the economy's winners and rewarding its losers. So government should get out of the market's way.

By the 1990s, even moderate liberals had been converted to the belief that social objectives can be achieved by harnessing the power of markets. Intermittent periods of governance by Democratic presidents slowed but did not reverse the slide to neoliberal policy and doctrine. The corporate wing of the Democratic Party approved.

Now, after nearly half a century, the verdict is in. Virtually **every one of these policies has failed**, even on their own terms. Enterprise has been richly rewarded, taxes have been cut, and **regulation reduced** or privatized. The **economy is vastly more unequal**, yet **economic growth is slower** and more chaotic than during the era of managed capitalism. Deregulation has produced not salutary competition, but **market concentration**. Economic power has resulted in feedback loops of political power, in which elites make rules that bolster further concentration.

The **culprit isn't just “markets”**—some impersonal force that somehow got loose again. This is a **story of power using theory**. The mixed economy was undone by economic elites, who revised rules for their own benefit. They invested heavily in friendly theorists to bless this shift as sound and necessary economics, and friendly politicians to put those theories into practice.

Recent years have seen two **spectacular cases of market mispricing** with **devastating consequences**: the near-**depression of 2008** and **irreversible climate change**. The economic collapse of 2008 was the result of the **deregulation of finance**. It cost the real U.S. economy upwards of **$15 trillion** (and vastly more globally), depending on how you count, far more than any conceivable efficiency gain that might be credited to financial innovation. Free-market theory presumes that innovation is necessarily benign. But much of the **financial engineering** of the deregulatory era was self-**serving, opaque, and corrupt**—the **opposite of an efficient and transparent market.**

The **existential threat of global climate change** reflects the **incompetence of markets** to accurately price carbon and the escalating costs of pollution. The British economist Nicholas Stern has aptly termed the **worsening climate catastrophe** **history's greatest case of market failure**. Here again, this is not just the result of failed theory. The entrenched political power of extractive industries and their political allies influences the rules and the market price of carbon. This is less an invisible hand than a **thumb on the scale**. The premise of efficient markets provides useful cover.

The grand neoliberal experiment of the past 40 years has demonstrated that **markets in fact do not regulate themselves. Managed markets turn out to be more equitable and more efficient.** Yet the theory and practical influence of neoliberalism marches splendidly on, because it is so useful to society’s most powerful people—as a scholarly veneer to what would otherwise be a raw power grab. The British political economist Colin Crouch captured this anomaly in a book nicely titled The Strange Non-Death of Neoliberalism. Why did neoliberalism not die? As Crouch observed, neoliberalism failed both as theory and as policy, but succeeded superbly as power politics for economic elites.

The neoliberal ascendance has had another **calamitous cost—to democratic legitimacy**. As government ceased to buffer market forces, daily life has become more of a **struggle for ordinary people**. The elements of a decent middle-class life are elusive—reliable jobs and careers, adequate pensions, secure medical care, affordable housing, and college that doesn't require a lifetime of debt. Meanwhile, life has become ever **sweeter for economic** elites, whose income and wealth have pulled away and whose loyalty to place, neighbor, and nation has become more contingent and less reliable.

Large numbers of people, in turn, have given up on the promise of affirmative government, and on democracy itself. After the Berlin Wall came down in 1989, ours was widely billed as an era when triumphant liberal capitalism would march hand in hand with liberal democracy. But in a few brief decades, the ostensibly secure regime of **liberal democracy has collapsed** in nation after nation, with echoes of the 1930s.

As the great political historian Karl Polanyi warned, when **markets overwhelm society**, ordinary people often turn to **tyrants**. In regimes that border on neofascist, klepto-capitalists get along just fine with dictators, undermining the neoliberal premise of capitalism and democracy as complements. Several authoritarian thugs, playing on tribal nationalism as the antidote to capitalist cosmopolitanism, are surprisingly popular.

It's also important to appreciate that neoliberalism is **not laissez-faire**. Classically, the premise of a “free market” is that government simply gets out of the way. This is **nonsensical**, since all **markets are creatures of rules**, most fundamentally rules defining property, but also rules defining credit, debt, and bankruptcy; rules defining patents, trademarks, and copyrights; rules defining terms of labor; and so on. Even deregulation requires rules. In Polanyi's words, “laissez-faire was planned.”

The political question is who gets to make the rules, and for whose benefit. The neoliberalism of Friedrich Hayek and Milton Friedman invoked free markets, but in practice the neoliberal regime has promoted rules created by and for private owners of capital, to keep democratic government from asserting rules of fair competition or countervailing social interests. The regime has rules protecting pharmaceutical giants from the right of consumers to import prescription drugs or to benefit from generics. The rules of **competition** and intellectual property generally have been **tilted to protect incumbents**. Rules of bankruptcy have been tilted in favor of creditors. Deceptive mortgages require elaborate rules, written by the financial sector and then enforced by government. Patent rules have allowed agribusiness and giant chemical companies like Monsanto to take over much of agriculture—the opposite of open markets. Industry has invented rules requiring employees and consumers to submit to binding arbitration and to relinquish a range of statutory and common-law rights.

**Anti-domination counters neoclassical assumptions and judicial supremacy---that restores agency flexibility to democratically check existential threats**

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Kate Jackson, “All the Sovereign’s Agents: The Constitutional Credentials of Administration,” *William & Mary Bill of Rights Journal*, 8 July 2021, pp. 2-7, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3813904.

We face no less than **four urgent crises**: an ongoing **pandemic1**; **racial injustice** and its consequent civil unrest2; an **economic depression** approaching the pain inflicted in 1929; and the accumulating, existential threat of **climate change**.4 **Citizens must rely on their state** to tackle these burning perils.5 Yet critics both left 6 and right 7 would tear down its institutional capacity to do so. Some denounce the exercise of administrative power as illiberal, unconstitutional and obnoxious to the rule of law.8 Others impugn it as undemocratic, paternalistic, and corrupt.9 Yet without some kind of **agent to carry out collective solutions**, these perils may very well **proceed unabated.**

Pushing an anti-administravist agenda, libertarians continue their “long war”11 against government agencies by insisting that they are an unconstitutional fourth branch of government. For them, administration is a kind of “absolutism”12 that violates the separation of powers and defies the principle of limited government.13 They contend that agencies’ discretionary rulemaking offends the liberal commitment to the rule of law. 14 Accordingly, they would punt agencies’ responsibility for social, economic, and environmental problems to courts and legislatures. 15 Regulation would thus be placed at the mercy of an undemocratic judiciary who increasingly “weaponizes” the First Amendment in favor of big business16 – or of a Congress whose already inefficient decision-making is crippled by hyperpolarization17 and distorted by the kind of material inequalities that the welfare state is meant to ameliorate. 18

Conservatives with a more authoritarian inflection seek to recall administration from its constitutional exile by subsuming it under presidential power. 19 Such critics would lend administration some democratic credentials by bootstrapping them to the president’s electoral accountability. Yet ridding agencies of their independence by placing them under the discretion of the president grants the president personal control over agency policymaking and adjudication without the checks provided by Congress, the courts, or an independent civil service.20 It thus, arguably, solves a separation-of-powers problem by introducing a new one.21 More ominously, empowering the president with the patina of democratic legitimacy emits a strong whiff of Schmittian politics.22 The prospect of a largely unbound executive officer claiming a popular mandate to hire and fire civil servants on a whim should alarm any that followed the Trump Administration’s treatment of refugees, civil protestors, polluters, and political cronies.

Agency power likewise fares poorly in the hands of the left. 23 They blame administrative technocracy for a variety of social and political ailments: the reification of social differences and the juridification of human nature24; corruption, privatization and regulatory capture25; the depoliticization of economic issues and the subsidization of globalized financial capitalism26 and, ultimately, the constellation of conspiratorial populist politics currently threatening liberal democratic states.27 Their preferred solutions include democratizing agency decision-making28 and constraining Congress’ capacity to delegate its lawmaking function. 29 While their interventions are welcome, they may deprive government of the nimble expertise necessary to address environmental and economic crises.30 Moreover, as illustrated by the president’s extraordinary powers to shape national immigration policy despite its “notoriously complex and detailed statutory structure,” increasing the amount of formal legislation may only expand agencies’ enforcement discretion.31 Agency democratization, furthermore, risks reproducing, perhaps under the cover of ostensible public consensus, the same social, economic and political inequalities that distort Congressional lawmaking. 32

In this essay, I contend that this **multi-pronged anti-administravist attack** stands upon **shaky conceptual foundations**. Each builds atop a theory of constitutionalism that embraces a **too-literal conception of popular sovereignty.**33 It is a conception that posits that there is, in fact, a “people” with a sovereign “will.” It is a “will” that can be clearly identified (through elections); straightforwardly transcribed (through lawmaking); mechanically applied (by administrators) and constrained (by judges). 34 But in a country of hundreds of millions, the diverse multiplicity of citizens could never find a common will.35 It is even more impossible that it could ever be accurately expressed through the lawmaking of elected representatives.36 As a result, critics of administration often grant statutory lawmaking more democratic credentials than it deserves. 37 The non-delegation doctrine purports to prevent the delegation of something that simply may not exist.

**Critics** commit another mistake when they invoke a theory of constitutionalism that analytically divides functions that cannot, as either a moral or empirical matter, be disentangled. First, they **incorrectly posit** two separate, **autonomous processes**: the collective **formation of ends** (lawmaking) and the **implementation** (execution) and application (adjudication) of those ends. 38 But we cannot presume that judges and administrators can mechanically apply and enforce the law without importing into the process their own value-laden, and therefore **political, judgments.**39 “They who will the end will the means” is a naïve argument that occludes the power wielded by unelected actors.40 It is also a mistake to presume that the legislative branch concerns itself only with value-laden final ends, and not with the means required to execute them.41 Indeed, most of our most bitter political fights are fights conducted precisely over means: how best to grow the economy; how best to care for the sick; how best to mitigate climate change, etc. 42 As a result, the theories overemphasize and distort the purpose of separating powers.43

Critics commit yet another mistake when they divorce the constitutional functions of (1) protecting rights and limiting government power, and (2) providing the decision-making procedures necessary for democratic will-formation. 44 They isolate elections and lawmaking from the process of enforcing rights and the rule of law – as if they have nothing to do with one another. Yet quarantining rights from democracy requires reliance on an outsourced moral order external to the political system itself – a reliance inappropriate for contemporary secular polities.45 They therefore lend judges too many liberal credentials while denying any to mechanisms of popular feedback.

Rather than critiquing agencies for violating the separation of powers, for their over-reliance on unelected technocrats, or for their indifference to universalizable legal principles, I argue that **administration does indeed carry constitutional liberal democratic credentials** – credentials borne out by political theory’s “representative turn.”46 By understanding agencies as embedded in a **system of representative democracy** that aims to **set the conditions by which citizens can relate to each other as political equals**, we can assess the legitimacy of government agencies without any “idolatrous”47 commitments to a fictitious popular sovereign or legal formalism. I suggest that agency institutions should be measured against the notion that popular sovereignty demands not consensus and consent, but instead institutions that permit citizens to understand themselves as co-equal **participants in the collective decision-making process.**

This essay will proceed as follows. Part I situates administrative agencies in an understanding of liberal democratic constitutionalism that (A) eschews outmoded notions of popular sovereignty and (B) natural law. It will then (C) explain how adequately conceived notions of the separation of powers and the rule of law cannot serve as indefeasible objections to administration. Part II makes a positive case for agency authority by drawing from the insights gained from political theory’s representative turn. It will first (A) define this important intellectual development and then (B) explain how administrative agencies might fit comfortably within a representative system. The essay (C) concludes by showing how theories of representation can inform some enduring debates in administrative law and suggesting some changes that might enhance the legitimacy of agency action.

PART I: ADMINISTRATION, POPULAR SOVEREIGNTY AND RIGHTS

Democracy promises the rule of “we the people.”48 Democratic citizens, possessing inalienable rights, are to come together, deliberate,49 and jointly create the laws that bind them. The administrative agency, with its unaccountable expert technocrats, policymaking autonomy, and immunity from micromanaging judicial review, looks like an unwelcome uncle at the constitutional dinner table.

Intuitively, these knee-jerk objections cannot be quite correct. Agencies carry some obviously democratic credentials. As Adrian Vermeule points out, they are, after all, the creation of statutory lawmaking.50 At least as early as 1798, Congress has delegated coercive rule-making power to Federal bureaucracy on matters as diverse as tax inspections, territorial governance, veterans’ pensions, mail delivery, intellectual property, and the payment of public debts.51 In McCullough v. Maryland,52 the U.S. Supreme Court interpreted the “necessary and proper” clause53 to anticipate Congress’ desire to create such agencies – in this case, a national bank. Bruce Ackerman,54 in his seminal work, argues that our contemporary agencies carry Constitutional credentials. Many were birthed through multiple hyperpolitical elections and constitutional challenges within the courts. Further, from their very inception, agencies struggled internally to accommodate their actions to constitutional requirements.55 The Administrative Procedure Act56 (“APA”), for example, imposes upon agencies principles of due process and the rule of law.57

Regardless, **if democratic lawmaking is to shape the community of those that make it, there must be some kind of agent or instrumentality to carry it out**.58 A Congressional decision to levy a tax is meaningless without an Internal Revenue Service to collect it.59 Yet it is impossible to imagine that such agencies might operate like mindless, loyal robots. Whether performed by court or administrator, the application of laws will inevitably involve controversial policy judgments.60 Lawmaking is, by its nature, always more abstract than we would like. Such “general propositions do not,” noted Justice Holmes, Jr. in his influential Lochner v. New York61 dissent, “decide concrete cases.” The required elaboration almost always imports values that are not clearly and unambiguously identified in any statutory text.62 The task of accommodating administration to constitutional democracy cannot, therefore, aim at eliminating the agency costs implicit in the application of law. It can only seek to understand how they might comfortably fit within a constitutional order.

The next two sections will elaborate upon these intuitions. Many **objections to agency power** presume **antiquated conceptions** of sovereignty and rights. They juxtapose the will of a powerful organ-body sovereign63 against a governed mass of subjects who hold an array of pre-political liberties that require judicial protection. This all-powerful body is thought to be represented by Congress64 as the commissioned agent (or embodiment?) of the popular sovereign. To preserve citizens’ natural, pre-political liberties, this agent of the popular sovereign is constrained by a separation of powers, checks and balances, a Bill of Rights, etc. – each policed by independent courts capable of identifying and enforcing citizens’ inalienable liberties.65 If this is indeed the rubric of the liberal democratic constitutional state, it is difficult to see how agencies pass constitutional muster. They are not Congress – and so their policymaking cannot be legitimate expressions of the popular will. They often avoid substantial judicial review, and so they might violate natural liberties with impunity. Fortunately, this rubric is wrong.

A. The Mind and Body of the Democratic Sovereign

True, for much of modern Western history, sovereignty, understood as the supreme, absolute and indivisible power to make law, was thought to be held by a specific body: the one wearing the crown.66 To constitute and justify public power, Hobbes, for example, imagined a state of nature full of individuals authorizing and relinquishing their natural liberties to a “Mortall God,”67 i.e., the modern corporate state, represented (or re-presented) in the flesh-and-blood bodies of the king or legislature.68 During the democratic revolutions, radical69 theorists merged the monarch with her subjects.70 They imagined “the people” not only replacing the king as sovereign, but also governing itself as a subject, thereby creating an identity between ruler and ruled. Rousseau’s volonté générale71 serves as a model for this kind of logic.72 Montesquieu, whose thinking influenced the American founders,73 likewise held that the “people as a body have sovereign power” in a republic.74 Even A.V. Dicey, despite his fame as a rule of law scholar, believed that a representative legislature would “produce coincidence between the wishes of the sovereign and the wishes of the subjects.”75 It is a sovereign-subject hat trick: the ruled become the ruler, the democratic “people,” understood as a body, a “unitary macro-subject,”76 come to occupy what was once occupied by the body of the king. Carl Schmitt likewise endorsed a scrupulous identity between governed and governor - with homogenizing and fascist implications.77 For Schmitt, it was impossible to imagine a leader speaking with the voice of the people unless the people themselves first sang in perfect harmony.

There are flaws in this equation. The “people,” understood literally, cannot rule. They do not possess a primordial collective will existing outside and independent of their political institutions.78 Moreover, the entire population of a diverse community of hundreds of millions cannot be present within those institutions. Nor can that population ever find a unanimous general will, a non-controversial understanding of the common good, no matter how constrained and qualified their public reasoning or how universal and general its aspirations.79 Thus, no coherent popular will can obtain even after undertaking the decision-making processes of political institutions.80 Just as the contractual “meeting of the minds” is a legal fiction of private law,81 a popular “meeting of the minds” is a political fiction of public law. As a result, despite the democratic revolutions, the old gap between ruler and ruled remains.82 In other words, the merger between governed and governor attempted by the democratic revolutions did not remove the danger of heteronomy,83 even if the offices of government might be staffed by elected representatives and even as constitutional systems split powers and limited legal authority.84 Some (body) would wield public power, and the rest would be subject to its rules. Even Rousseau downgraded the popular sovereign to a silent, passive actor that left the actual business of governing to functionaries.85 Like the client of a travel agent, Rousseau’s democratic citizen was meant only to approve or disapprove the prepackaged plans presented by ministers.86

Lawmaking under constitutional liberal democracy is thus **not a question of ascertaining the existence of some non-existent popular “will”** to be left in the hands of loyal fiduciaries in government87 to carry out like mindless automatons. Nor is it comprised of the dictates of a caesarist leader purporting to speak with the unified voice of the sovereign people.88 Instead, it a **question of developing transparent and accessible collective decision**- making procedures that ensure that **all citizens can understand themselves as equal participants** in their collective ordering; that **ordinary people are involved in public life** and have a say in their collective destiny.89 They do not rule. Rather, they are **equal players in the game of representative democracy.**90

Thus, although contemporary notions of constitutional liberal democracy ascribe the highest legitimate source of authority to “the people,” they do not understand “the people” as a reified, homogenous whole with an identifiable will that pre-exists whatever governing apparatus might be laid atop it. Though “popular sovereignty” is a political fiction, it is a useful one – at least if it is used as a standard of justification and critique, not as a proper noun. It is an aspirational, regulative idea intended to depersonalize and distribute public power in a way that serves the entire community.91 It is a Kantian “as if” principle.92 Namely, if we try to think like a popular sovereign might think, if such a thing could ever exist, **we will orient our public reasoning not towards our individual self-interest alone, but in terms of inclusivity**, human equality and the public good.93 Because if the sovereign is a “we,” then **governing involves more than the interests and preferences of single individuals**. We will therefore demand that political institutions remain **accountable and accessible** to popular complaints. We will adopt a Weberian politics of responsibility, remembering that our decisions might inflict unforeseen costs upon others.94

This figurative idea of popular sovereignty also **unlocks the closed doors of power** and **forces the inclusion of voices** previously ignored.95 Whosoever happens to be governing at any given time, that person is not “the people” precisely because “the people” cannot ever be present. As a result, anyone denied an audience can appeal to popular sovereignty as they seek admission to political decision-making. Importantly, popular sovereignty demands, as French philosopher Claude Lefort96 notes, that this **place of power remain an empty one** – or at least one with a revolving door – where no body at all is permitted to rule permanently. For to fill that void would allow for a part to speak on behalf of the whole. “We the People” might become, as political theorist Nadia Urbinati notes, “Me the People.”97 It would thus force homogeneity upon plural societies as leaders with controversial viewpoints purport to represent everyone as they make and implement policy. Moreover, the usurpation of this space would undermine the depersonalization of power inherent in the idea of a fictional popular sovereign and, importantly, the rule of law and not of men.98 If the place of power remains empty because **all citizens contribute** in some way to lawmaking, then we can credibly claim that it is law, not our politicians, who rule.

As a result, it can be no objection to agency policymaking that it usurps authority from the popular sovereign. Because if we take popular sovereignty literally, so, too, do elected representatives. They likewise cannot logically or credibly speak with the voice of the sovereign people.99 Thus, insofar as theories of non-delegation and legislative primacy rely on an organ-body theory of popular sovereignty,100 they are misplaced. Attacks against the “technocratic” power wielded by administrative officers may likewise overstate the democratic credentials of the Congressional legislation against which such power is compared – and found wanting. Indeed, it is at least possible that **administrative agencies can be made consistent with the requirements of constitutional popular sovereignty**.101 Namely, the question is whether and to what extent they operate according to procedures that allow citizens to understand themselves as **co-equal participants** in shaping agency action. Finally, that independent administration is “headless” is not, as feared by contemporary New Deal critics, fascist or totalitarian.102 It may in fact be a necessary precondition for liberal democracy. A Leviathan with a single head with a single mouth, purporting to speak for all, can be monstrous indeed.

**Adv 1**

**Regional bank consolidation by large banks is increasing now, but the aff prevents it**

**Nylen 21** – covers antitrust and investigations for Politico Pro

Leah Nylen, "Bank mergers come into Democrats’ antitrust crosshairs," Politico, 4-19-2021, https://www.politico.com/news/2021/04/19/progressives-biden-bank-merger-threat-483183

The last time the Justice Department challenged a bank merger was in 1985, around the time that compact discs and New Coke debuted.

In the 36 years since, the U.S. has shed roughly 10,000 banks — some from bank failures, but most through acquisitions that regulators and antitrust prosecutors at the Justice Department have blessed. Critics say that has led to higher fees for consumers, reduced access to banking services and increased concerns about risk to the financial system.

Now, as Democrats in Congress push for an antitrust overhaul to restrain corporate power in tech, health care and agriculture, progressive lawmakers and economists also want the Biden administration to crack down on mergers in the banking sector. It’s setting up a clash with the industry, which has been lobbying for even easier merger scrutiny.

The issue is taking on greater urgency as some of the country’s biggest regional banks — PNC of Pittsburgh, Huntington Bank of Columbus, Ohio and M&T Bank of Buffalo, New York — pursue major deals.

“Bank regulators are playing with matches while wrecking the fire department,” said Senate Banking Chair Sherrod Brown (D-Ohio). “The Wall Street megabanks are so large and powerful that banks across the country feel pressured to get bigger and riskier. These mergers are a symptom of a bigger problem — deregulation has left us with Wall Street banks that are too big and that take too many risks.”

The campaign is threatening to drag big banks into a high-stakes antitrust debate even as they warn they need help from Washington to compete with financial technology upstarts. It comes as progressives play an increasingly influential role in Biden’s economic policy.

“Regulators have served as a rubber stamp for bank mergers for too long,” said Rep. Chuy García (D-Ill.), who with Sen. Elizabeth Warren (D-Mass.) has proposed legislation to overhaul how bank deals are considered. “These mergers have negative consequences for our communities. They mean more Wells Fargos and fewer local bank branches.”

The regional bank mergers at issue accelerated after moderate Democrats joined forces with Republicans in 2018 to ease lending regulations that Congress enacted after the 2008 global financial crisis.

Wall Street analysts are now predicting a merger wave, particularly after SunTrust’s easy combination with BB&T in 2019 to form Truist, the nation’s sixth-largest commercial bank.

The deal boom was delayed by the pandemic. But an increasing number of regional lenders are now planning mergers to better position themselves against the biggest banks, like JPMorgan Chase and Bank of America, whose assets in the trillions of dollars will continue to dwarf the smaller competitors even after they consolidate.

The expected M&A rush may run into antitrust headwinds as top congressional Democrats turn their sights to industries like banking where many players are already considered “too big.”

**That’s key for regional banks to gain sufficient resources to invest in cyber-defenses---small banks are fundamentally vulnerable**

**Mendelson 18** – U.S. president and CEO of Bank Leumi

Avner Mendelson, "Survival strategy: Cut the number of banks in half," American Banker, 1-30-2018, https://www.americanbanker.com/opinion/survival-strategy-cut-the-number-of-banks-in-half#:~:text=Consolidation%20can%20actually%20help%20smaller,regulatory%20burden%20that%20accompanies%20growth.&text=Thus%2C%20as%20banks%20expand%2C%20there,for%20profitable%20growth%20over%20time.

It’s no secret that the banking industry has been consolidating for the last 30 years — the number of bank charters has fallen from 14,000 in 1985, to close to 8,500 in 2000, to 4,938 at the end of 2017 — a remarkable 64% drop, most of which happened during the '90s and after the financial crisis. New bank formation also virtually stopped, from a rate of nearly 100 per year up until 2008 to fewer than two per year now.

But while that reduction is remarkable, it’s not necessarily a bad thing.

Some of the post-crisis decline can be attributed to bank failure and the lack of de novo banks, but a significant amount is due to an uptick in M&A activity — particularly among smaller banks — driven by increased regulatory and technology standards that incentivize scale.

Over the past few years, there have been well over 200 M&A deals per year among community banks, those with less than $10 billion in assets, almost double the amount of such activity in the crisis years of 2008 and 2009, according to the S&P Global Market Intelligence.

Going forward, the trend of consolidation is likely to continue, and it’s possible that a healthy 2,000 to 3,000 institutions would serve the U.S. even better than the current number. The goal should be to maintain competition without creating concentration.

Further consolidation makes sense because the bar at which a bank can remain profitable has risen. The fixed costs of running a bank, both opening it for business and maintaining it for the long haul, continue to grow: These costs run the gamut from keeping up with compliance, anti-money-laundering and other standards to having a program and resources in place to attract talent. Now more than ever, technology is a major cost center. Banks must invest in their tech infrastructure to meet customer expectations, keep up with competitors and steel themselves against cyberattacks.

Consolidation can actually help smaller banks stay profitable, while managing the increased regulatory burden that accompanies growth. The regulatory requirements for banks vary by asset size, and the vast majority of U.S. banks have less than $10 billion in assets, the first major regulatory threshold. What often happens is that smaller players — those under the $10 billion mark— join together to surpass that first threshold by a wide margin. Once these banks reach $20 billion or $30 billion in assets, they can become attractive acquisition targets for banks in the $100 to $250 billion range, well above the $50 billion threshold that triggers even greater oversight from regulators. Thus, as banks expand, there is even more incentive for consolidation and mergers to reach scale to allow for profitable growth over time.

This is not to say that small banks don’t have their place in the ecosystem. In rural areas, regional and community banks fill an important social and economic role by bringing banking services to otherwise underbanked communities. These institutions deliver a product offering that is relevant to their customers and beneficial to the entire local community. As long as these smaller banks have a business proposition that truly justifies their size, there will always be room for them. I would even advocate that the industry, as a whole, should ensure these banks are properly incentivized and encouraged to exist. But in large urban markets like New York, Chicago and Los Angeles — where bigger players abound and where there is no shortage of competition — consolidation is the most logical path forward.

At the same time, there is still room for new entrants — but these select few newcomers will need to innovate and fill gaps, not just replicate the status quo. A handful of new banking charters will likely come from fintech startups with banking capabilities. Yet these, too, will eventually be ripe for acquisition by larger banks that need to build out their technology. Thus, the trend toward further consolidation will continue.

Community bank executives, especially those heading the very smallest banks, must continue to explore ways to be more competitive and more resilient. In doing so, they can’t ignore the fact that selling to or merging with another bank may benefit shareholders and customers alike.

**Cyberattacks against small banks collapse the US financial system---they’re uniquely vulnerable**

**Harner et al. 20** – Chris Harner is managing director of the cyber risk solutions practice at Milliman, an actuarial and consulting firm; Chris Beck is an executive risk consultant within the practice; Blake Fleisher is a senior cyber risk analyst in the practice

Chris Harner, Chris Beck, and Blake Fleisher, "Cyberattacks Could Cripple Major U.S. Banks," CFO, 3-11-2020, https://www.cfo.com/cyber-security-technology/2020/03/cyberattacks-could-cripple-u-s-banking-system/

In the 21st century, first-order, single-point failures with profound second- and third-order effects are especially common in cyberattacks against complex systems. For one, the U.S. financial system is complex and highly interconnected, making it very vulnerable to a cyberattack.

The Federal Reserve Bank of New York (FRBNY) recently epitomized this interconnectivity in a report, arguing that a cyberattack could impair a bank’s ability to service creditors. More specifically, impairment of any of the five most active U.S. banks could result in significant spillovers to other banks, with 38% of the network affected on average.

Perhaps even more concerning, the FRBNY identified a subset of smaller banks that, if impaired, could threaten the solvency of a top-five institution. In particular, the FRBNY estimated it would take the financial distress of six small banks, each below $10 billion in assets, or just one institution with between $10 billion and $50 billion in assets.

More than 80 U.S. banks fall into the midsize bank category, with aggregate assets of approximately $1.8 trillion, while there are about 4,440 small banks, with cumulative assets of around $4.7 trillion. Combined, the midsize and small banks account for about 36% of all commercial banking assets. This indicates that the complexity of the U.S. banking system may not be driven solely by the “megabanks.”

A cyberattack on these banks, which appear benign in isolation and have simpler balance sheets, could ultimately cause a cascading failure of interbank funding, leading to a tipping point for a broader systemic liquidity crisis.

At a glance, when viewed with typical “first-order thinking,” this is deeply troubling, because larger banks tend to have more resources and invest more in building robust cybersecurity than smaller banks. Even if a large bank puts in place a proper cybersecurity policy with the right controls for its own protection, which it absolutely needs to do, it may not be enough.

The issue is not just building a bigger cybersecurity “moat and castle.” Instead, financial institutions need to understand the interconnectedness of their entire ecosystem, integrating cyber risk, vendors, liquidity sources, off-balance-sheet exposures, etc.

More thoughtful analysis, using second- and third-order thinking, indicates that cyberattacks by their very nature know no physical boundaries and can spread rapidly across the globe. We know this from the infamous NotPetya attack in 2017, when a worm planted in Ukrainian tax software managed to infect not just Ukrainian critical infrastructure, but also the largest global shipper, A.P. Moller-Maersk, and the big pharmaceutical company Merck as well as a chocolate factory in Australia.

In a system like banking that is already highly interconnected in its own right, one would expect the overall impact on the U.S. financial system to be even greater. The FRBNY’s paper is a very important illustration of how an operational risk can rapidly lead to grave financial risk.

**No econ collapse---structural barriers prevent an entire shutdown**

**Amadeo 21** – expert on U.S. and world economies and investing, with over 20 years of experience in economic analysis and business strategy, and president of World Money Watch

Kimberly Amadeo, "US Economy Collapse: What Would Happen?," The Balance, 2-4-2021, https://www.thebalance.com/u-s-economy-collapse-what-will-happen-how-to-prepare-3305690

The U.S. economy's size makes it **resilient**. It is **highly unlikely** that even the **most dire events** would lead to a **collapse**. If the U.S. economy were to collapse, it would happen **quickly**, because the surprise factor is a one of the likely causes of a potential collapse. The signs of imminent failure are difficult for most people to see.

Most recently, the U.S. economy almost collapsed on September 16, 2008. That's the day the Reserve Primary Fund “broke the buck”—the value of the fund’s holdings dropped below $1 per share.﻿﻿ Panicked investors withdrew billions from money market accounts where businesses keep cash to fund day-to-day operations.﻿﻿ If withdrawals had gone on for even a week, and if the Fed and the U.S. government had not stepped in to shore up the financial sector, the entire economy would likely have ground to a halt. Trucks would have stopped rolling, grocery stores would have run out of food, and businesses would have been forced to shut down. That's how close the U.S. economy came to a real collapse—and how vulnerable it is to another one.

A U.S. economy collapse **is unlikely**. When necessary, the government can **act quickly** to **avoid a total collapse.**

For example, the Federal Reserve can use its **contractionary monetary tools** to **tame hyperinflation**, or it can work with the Treasury to **provide liquidity**, as during the **2008** financial crisis. The Federal Deposit Insurance Corporation insures banks, so there is **little chance** of a **banking collapse** similar to that in the 1930s.

The president can **release Strategic Oil Reserves** to offset an oil embargo. Homeland Security can **address a cyber threat**. The U.S. military can respond to a **terrorist attack, transportation stoppage, or rioting** and civic unrest. In other words, the federal government has **many tools and resources to prevent an economic collapse**.

**Econ decline causes peace – multiple warrants**

**Clary 15** – Christopher Clary, PhD in Political Science from MIT, M.A. in National Security Affairs, Postdoctoral Fellow, Watson Institute for International Studies, Brown University, 2015 (“Economic Stress and International Cooperation: Evidence from International Rivalries,” April 25th, Available Online via SSRN Subscription,)

Economic crises lead to conciliatory behavior through five primary channels. (1) Economic crises lead to **austerity pressures**, which in turn incent leaders to search for ways to **cut defense expenditures**. (2) Economic crises also encourage **strategic reassessment**, so that leaders can argue to their peers and their publics that **defense spending can be arrested** **without endangering the state**. This can lead to **threat deflation**, where elites attempt to **downplay the seriousness of the threat** posed by a former rival. (3) If a state faces multiple threats, economic crises provoke elites to consider threat prioritization, a process that is postponed during periods of economic normalcy. (4) Economic crises increase the **political** and **economic benefit** from **international economic cooperation**. Leaders seek **foreign aid**, **enhanced trade**, and **increased investment** from abroad during periods of economic trouble. This search is **made easier if tensions are reduced** with historic rivals. (5) Finally, during crises, elites are more prone to **select leaders** who are perceived as capable of **resolving economic difficulties**, permitting the emergence of leaders who hold **heterodox foreign policy views**. Collectively, these mechanisms make it much more likely that a leader will prefer conciliatory policies compared to during periods of economic normalcy. This section reviews this causal logic in greater detail, while also providing historical examples that these mechanisms recur in practice.

**EU is resilient**

**Tiersky 15**

Ronald Tiersky is the Eastman Professor of Political Science at Amherst College, Real Clear World, October 9, 2015, “The EU Will Survive”, <http://www.realclearworld.com/blog/2015/10/the_eu_will_survive_111495.html>

A few months ago, at the height of the Greek debt crisis, I wrote in this space that the lesson of history is that **the EU is a survivor**. In other words, Europe's integration process was not going to collapse, no matter the outcome of negotiations. The eurozone countries would find a way to keep Greece in the currency area, or the country would leave the eurozone, willingly or otherwise. Breaking the taboo on temporary or permanent exit would lead to consequences that might even increase the eurozone's integrity, because other governments would take note. When anti-austerity Prime Minister Alexis Tsipras gave in to the inevitable and accepted harsh terms for a new bailout for Greece, the way was open for EU political economy-as-usual: all-night meetings, ambiguous implementation plans, plenty of wiggle room, and the potential for political resurrection.

Tsipras, having fought the good fight for his country and maintained Greece's dignity, won a snap parliamentary election. The problem of Greece's huge debt remains to be resolved over the long term, **but no one doubts that**, along with that country, **the eurozone and** the slow roll of European **integration have been rescued. Greece's travails are** not only off the front pages, they're **hardly even newsworthy right now.**

**The same** general **pattern will play out as Europe addresses the** sudden, massive **influx of refugees**, asylum seekers, and economic migrants. **European integration as a historical process has crossed the point of no return.** The degree of integration, determined in the clash of national sovereignty versus European decision-making, will wax and wane; certain structures or functions of EU life may go on life support. One or more countries may exit the eurozone, while the Schengen Area of internal border-free travel may falter. Perhaps a country will even opt out of the European Union -- British membership is at stake in a referendum to be held sometime before 2017. **But even then not all ties with the European Union would be broken.** For example, access to the Common Market could be set up for a departing country under some new framework. Several possible frameworks already exist: association agreements and neighborhood agreements link a variety of countries such as Turkey, Israel, Jordan, and even Algeria and Libya, to the European Union. Brexit would not mean a complete divorce overnight, and the British would find that divorce is more painful for them than for the Continent. Indeed they might rethink such a choice. Brexit would be the start of a long negotiating process ending in another British special relationship.

When the Greek crisis broke, **media commentators rushed to outshout each other**: It was the deepest crisis in EU history; the Eurozone couldn't survive, and without the euro all was lost. Surprisingly, the refugee crisis brought even veteran observers to similar views. Camino Mortera, an EU specialist at the Centre for European Reform in Brussels, said, "Schengen is the essence of the European Union ... if Schengen were to collapse it could mean the whole idea of the EU is no longer valid." German Chancellor Angela Merkel, as usual, intoned the language of responsibility: The refugee issue is a deeper problem for the European Union and will take longer to resolve than the Greek debt crisis. Among other things, this crisis puts the Greek crisis into perspective.

Europe's internal relationships are under severe stress as its leaders figure out what to do with and how to absorb the refugees and would-be migrants. The first issue is attending adequately to their daily lives. In the process, issues of human rights, of sovereignty versus solidarity, and of practical organization, must be resolved. The outcome -- the lives refugees will live after the crisis has receded -- is uncertain. What is certain is that the refugees will not be allowed to starve and will be settled (some economic migrants may be sent back) in a reasonably humanitarian way, although not without conflict and controversy with local populations in some places. EU member states have conflicting views and plans over what to do, and European integration as a whole may advance or recede as a result. **But the E**uropean **U**nion **is unlikely to collapse**. **It will adapt** and continue to muddle through toward some ill-defined end point.

**The E**uropean **U**nion **is just too important for European civilization, its integration too structurally and functionally elaborate, and its performance too successful in various respects, for Europeans to let it go.** Europe will survive the current rise of ugly political populism in certain EU member countries. It will absorb a large number of new arrivals and carry on.

**EU influence fails**

**Dempsey, 11**

Judy Dempsey, Int'l Herald Tribune Europe Senior Correspondent, 9/28/11, The Failure of Soft Power, carnegieeurope.eu/publications/?fa=45617

Europeans have long believed soft power to be the best instrument to promote their values and their security. They have a strong sense of moral superiority about it, particularly when looking at hard, or military, power. Military action is something that the Europeans leave to the United States, Britain, and France. Even if it wanted to, the European Union cannot do it. It lacks the basic capabilities, such as heavy airlift and logistics. It lacks an integrated defense policy for armament procurement. It also lacks a security strategy that includes the use of hard power as an option. The soft power instruments Europeans have used over the years consist of development aid and civilian assistance, such as training the police and judiciary in some countries. The Europeans also sometimes couple soft power with trade incentives or with sanctions. Above all, they pride themselves on basing their actions on the defense of human rights which are, at least officially, at the core of Europe’s value system. But Europe’s record in making soft power the cornerstone of its security strategy has been patchy. It has been worked incredibly well in Eastern Europe. Enlargement with its plethora of promises and incentives is soft power at its most powerful. But Europe cannot enlarge to the rest of the world. That is where Europe’s soft power policies have had so little, if any success. Take Iran. Years of negotiations with Iran to get it to abandon its nuclear ambitions have gotten the Europeans nowhere. Promises of technical assistance and closer economic cooperation have had no impact on the regime in Teheran, even though some of the sanctions are biting. The reason why the Europeans have failed is because Iranian President Mahmoud Ahmadinejad is just too stubborn. He seems determined to develop a nuclear military capability for Iran’s own geo-strategic interests no matter what the cost to his people. Soft power can find no grip there. Bosnia-Herzegovina is another case where the instrument has failed. Fifteen years after the Dayton accords that ended the civil war in the former Yugoslavia, Bosnia is mired in corruption and misrule. This is despite the presence of a large EU police force, not to mention the billions of euros the European taxpayer has poured into this tiny country. The state that the EU is trying to build has never really been accepted by the ethnic communities living there. And the EU is not prepared to stop the bullying and separatist tactics of the Bosnian Serbs in particular. Afghanistan is another stain on the EU’s soft power record. There, the Europeans have done too little and too late, wasting the initial good will of the Afghan people after the Taliban regime was overthrown in 2001. While the U.S. and its coalition forces were distracted by the war in Iraq, the Europeans did little to fill the gap left in Afghanistan. Europe’s most abject failure is its police-train ing mission there. It is still under-financed and under-staffed. What a shame for what should have been a stellar example of the EU’s use of soft power.

**Adv 2**

**The only example their card cites is China!**

**Cribb 17** (Julian Cribb – author, journalist, editor and science communicator. He is principal of Julian Cribb & Associates who provide specialist consultancy in the communication of science, agriculture, food, mining, energy and the environment. His career includes appointments as newspaper editor, scientific editor for The Pic credit: J. Carl Ganter Australian newspaper, director of national awareness for Australia’s science agency CSIRO, member of numerous scientific boards and advisory panels, and president of national professional bodies for agricultural journalism and science communication. His published work includes over 8000 articles, 3000 media releases and eight books. He has received 32 awards for journalism. His internationally-acclaimed book, The Coming Famine explores the question of whether we can feed humanity through the mid-century peak in numbers and food demand. <KEN> “The Urbanite (Homo Urbanus).” Surviving the 21st Century. Springer. doi:10.1007/978-3-319-41270-2\_8.)

By the **mid-twenty-first century** the world’s cities will be home to approaching **eight billion inhabitants** and will carpet an area of the planet’s surface **the size of China**. Several megacities will have 20, 30, and even 40 million people. **The largest city on Earth will be Guangzhou-Shenzen, which already has an estimated 120 million citizens crowded into in its greater metropolitan area** (Vidal 2010 ).

By the **2050**s these colossal conurbations will absorb **4.5 trillion tonnes** of fresh water for domestic, urban and industrial purposes, and consume around **75 billion tonnes of metals**, materials and resources every year. Their very **existence** will depend on the preservation of a **precarious balance** between the **essential resources** they need for **survival** and growth—and the **capacity of the Earth** to supply them. Furthermore, they will generate equally phenomenal volumes of waste, reaching an alpine 2.2 billion tonnes by 2025 ( World Bank )—an average of six million tonnes a day—and probably doubling again by the 2050s, in line with economic demand for material goods and food. In the words of the Global Footprint Network “The **global effort** for sustainability will be **won, or lost**, in the world’s cities” (Global Footprint Network 2015).

As we have seen in the case of food (Chap. 7), these giant cities exist on a **razor’s edge**, at risk of **resource crises** for which none of them are fully- prepared. They are potential targets for weapons of mass destruction (Chap. 4). They are humicribs for emerging pandemic diseases, breeding grounds for crime and hatcheries for unregulated advances in biotechnology, nanoscience, chemistry and artificial intelligence.

**Vast majority of urbanization issues are NOT about the U.S. --- they solve nothing.**

**UN 14**, 7-10-2014, "World’s population increasingly urban with more than half living in urban areas," UN, https://www.un.org/en/development/desa/news/population/world-urbanization-prospects-2014.html

The 2014 revision of the World Urbanization Prospects by UN DESA’s Population Division notes that t**he largest urban growth will take place in India, China and Nigeria**. These three countries will account for **37 per cent of the projected growth** of the world’s urban population between 2014 and 2050. By 2050, India is projected to add 404 million urban dwellers, China 292 million and Nigeria 212 million.

With nearly 38 million people, Tokyo tops UN’s ranking of most populous cities followed by Delhi, Shanghai, Mexico City, São Paulo and Mumbai

The urban population of the world has grown rapidly from 746 million in 1950 to 3.9 billion in 2014. Asia, despite its lower level of urbanization, is home to 53 per cent of the world’s urban population, followed by Europe with 14 per cent and Latin America and the Caribbean with 13 per cent.

The world’s urban population is expected to surpass six billion by 2045.  Much of the expected urban growth will take place in countries of the developing regions, particularly Africa. As a result, these countries will face numerous challenges in meeting the needs of their growing urban populations, including for housing, infrastructure, transportation, energy and employment, as well as for basic services such as education and health care.

**2NC**

**CFPB CP**

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

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

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

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

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

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

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

**Solves regulatory capture**

**Shapiro 12** – University Chair in Law, Wake Forest University

Sidney A. Shapiro, "The Complexity of Regulatory Capture: Diagnosis, Causality and Remediation," Roger Williams University Law Review, Vol. 102, No. 1, 3-2- 2012, https://www.americanbar.org/content/dam/aba/events/administrative\_law/2016/12/08\_new\_concerns\_about\_rulemaking\_capture.pdf

A. Make Agencies More Resistant to Capture

When the political will to act exists, there are a number of ways that Congress can make agencies more resistant to capture. Rachel Barkow recommends permitting agencies to submit their own budgets to Congress (making them less susceptible to White House political pressure on behalf of business interests);139 establishing qualifications for administrators (limiting the President’s ability to appoint administrators based solely on their anti-regulatory ideology);140 establishing agencies with broad jurisdictions (making them more likely to resist political pressure from any one set of interests);141 eliminating statutory conflicts of interest (which require agencies to promote and regulate an industry);142 limiting preemption (allowing state regulators to fill regulatory gaps);143 and making wider use of public advocates (who represent otherwise unrepresented citizens in regulatory proceedings).144

Lawrence Baxter also suggests how we might make agencies more resistant to capture.145 We could finance weaker interest groups or have them represented by state attorney generals or other surrogates (making the regulatory process more pluralistic);146 revive the concept of private attorney generals (ensuring citizens can challenge captured agencies in court);147 rotate key officials (to decrease their susceptibility to capture);148 establish stronger ethical rules (to forbid post-government employment that leads to capture);149 and rely more on Inspector Generals or similar private, independent entities (to spot and reveal capture).150

**Adv 1**

**Expense of security and lack of dedicated employees creates a structural weakness for small banks that hackers will exploit**

**Schaberg 17** – head of the U.S. Financial Institutions and co-head of the FinTech groups at Hogan Lovells

Richard Schaberg, "2017 Resolutions for Community Banks: A Focus on Cybersecurity," JD Supra, 1-13-2017, https://www.jdsupra.com/legalnews/2017-resolutions-for-community-banks-a-36428/

In December 2016, Thomas Curry, the Comptroller of the Currency, stated that cybersecurity was the single greatest systemic threat to our financial system. He was not being hyperbolic.

Cybersecurity should be on everyone’s mind. Businesses, politicians, and regulators have all recently paid lip service to the importance of cybersecurity and paid dearly for gaps in their own policies and procedures. Given the nature of financial services, the need is very acute. At a recent dinner, the general counsels of the Office of the Comptroller of the Currency (“OCC”), the Federal Deposit Insurance Corporation (“FDIC”), the Board of Governors of the Federal Reserve System (“Federal Reserve”), the National Credit Union Administration (“NCUA”), and the Consumer Financial Protection Bureau (“CFPB”) all declared that cybersecurity was a top priority in terms of guidance and compliance. Now is the time for bank boards and senior management to review the new, pending and existing rules and regulations regarding their cybersecurity responsibilities, and perhaps ways to be proactive in protecting their banks from known and potential cyber threats.

Despite the very real consequences of a cyberattack, creating and maintaining an up-to-date cybersecurity policy remains a big challenge at most community banks, in part due to the expense of setting up a robust system and the lack of dedicated employees or departments focusing on this issue. The prudential regulators have put increased pressure on the boards of directors of community banks to ensure their institutions are ready to detect and deter any cyberattacks. This increased burden on bank boards is exacerbated by the increased regulatory focus on board accountability with respect to bank relationships with third parties. See e.g. OCC Bulletin 2013-29.

The Gramm-Leach-Bliley Act (“GLBA”) required regulatory implementation of information security standards and the OCC, the Federal Reserve, and the FDIC issued Interagency Guidelines Establishing Information Security Standards, establishing the standards on how banks must protect customer information. A bank’s information security policy and procedures must, like all other policies and procedures, be commensurate with the bank’s risk level. Today, however, all banks large and small are at risk from hackers--the only difference is that the hacker might target a community bank over a larger bank on the assumption its protective measures are weaker. All banks, no matter the size, must develop internal controls to keep up with the ever-evolving world of cybercriminals.

**Small bank cyberattacks are an imminent threat to the financial system---they’re uniquely at risk due to lack of infrastructure, and they have direct financial connections to the overall system**

**Harner et al. 20** – Chris Harner is managing director of the cyber risk solutions practice at Milliman, an actuarial and consulting firm; Chris Beck is an executive risk consultant within the practice; Blake Fleisher is a senior cyber risk analyst in the practice

Chris Harner, Chris Beck, and Blake Fleisher, "Cyberattacks Could Cripple Major U.S. Banks," CFO, 3-11-2020, https://www.cfo.com/cyber-security-technology/2020/03/cyberattacks-could-cripple-u-s-banking-system/

Sources of financial fragility: After the 2008 global financial crisis there are fewer large banks, but they have even larger balance sheets than before. However, the fragility of the banking system is not just driven by the failure of a top-five bank.

In addition, the impairment of two midsized banks ($10 billion to $50 billion in assets) can trigger a liquidity crisis. The model shows both the direct and well understood path from the failure of a large bank to a financial crisis and, just as importantly, the more complex path from the failure of two midsized banks. In this regard, risk professionals need to look beyond the “usual suspects” for vulnerability in a highly connected financial system.

Multiple paths to failure: While the attack scenario for a midsized and a large bank are principally the same, the set of triggers that lead to a market catastrophe are not.

For a large bank the path is fairly direct. A cyberattack that impacts one of the largest banks in the United States would create a direct effect on the fundamental elements of the economy and significantly raise the probability of a financial crisis. Impairment of a midsized bank would also be direct, but the impact on the system overall would be more complex and less obvious. The failure of a single midsized bank would lead to a deterioration of funding markets and the ability to clear transactions.

These consequences would lead to a loss of confidence in midsized banks and the eventual failure of a second midsized bank. That second failure could be the tipping point to financial crisis, similar to that of an illiquid large bank.

Concealed risk in plain sight: More astonishingly, if six small banks (less than $10 billion in assets) became impaired, putting stress on wholesale funding, the model indicates that there is a path to systemic failure. Although it’s not self-evident, the small banking sector can pose a significant risk to the safety and soundness of financial markets overall.

The path from a failure of one small bank to a financial crisis is direct. Not only do six small banks pose a risk equivalent to the direct failure of one large bank, but their abilities to prepare for and defend against a cyberattack are significantly less.

Small banks functionally rely on confidence in the small banking sector based on the assumption that the system can absorb a bankruptcy. However, a small number of simultaneous impairments (six or more), due to a cyberattack, could damage confidence in the sector to the point that fear and risk aversion trigger a sequence of liquidity events that cascade into a broader financial crisis.

**Goes nuclear**

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

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

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

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

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

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

**EU is structurally ineffective but won’t collapse**

**Schirach 3/5/16**

Paolo von Schirach, Professor at Georgetown’s SFS, Director of Communications and Senior Research Fellow at the Atlantic Council, Schirach Report, March 5, 2016, “There Is No European Identity”, http://schirachreport.com/2016/03/05/no-european-identity/

Lack of shared strategies

In practice, the picture is far less attractive. **Cohesion and solidarity, let alone unity of purpose among members, is rather low.** Getting to an agreement on practically anything within the EU involves an **immensely laborious process aimed at reaching a consensus among almost 30 governments.**

And **when the focus is on major policy choices**, common strategies, **the EU members find watered down unity at the lowest possible common denominator**. In simple terms, this means that whatever the EU declares, **nobody listens to it, because it is** usually **just empty rhetoric.**

Right now the EU is trying, with little success, to forge a common policy to face a major refugee and immigration crisis triggered in part by the civil war in Syria. It is obvious that there is very little common ground among member states.

Furthermore, **there is no discernible European foreign policy**; let alone security policies based on a genuine consensus on external threats and appropriate countermeasures. Threat perception in Portugal is not the same as threat perception in Greece or Poland.

Europe is not irrelevant

Do not get me wrong. I am not suggesting that the EU is inconsequential across the board. On matters of global trade, anti-trust, financial arrangements, and a lot more the EU is very consequential. And for foreign investors and exporters into the EU, the harmonization of rules within the EU, plus the existence of a pan-European market where the same norms are applied across almost 30 countries, from Finland to Croatia, is a major advantage.

No European Identity

Still, all this notwithstanding, **the EU failed in its ultimate goal: the creation of a genuine “European Identity” that successfully replaced or will soon replace national identities**. If this shift had been accomplished, then the issue of Britain leaving Europe would have never come up. Nobody would want to leave a new Super State that all citizens strongly identify with and that brought about so many advantages to all its members.

What will Britain do?

And yet, the debate about leaving the EU is going on in Great Britain. In June there will be a referendum that will allow voters to settle this issue. My hunch is that eventually the British people will decide to stay in the EU.

Still, the very fact that no one dares to predict the outcome of this referendum is an indication that Britain is deeply divided on an issue that should have been settled decades ago. Other countries that are not planning any “In or Out” vote are also deeply divided on whether EU membership is a good thing or not. (Think of Poland, Denmark, Greece, and to a lesser extent France and Italy).

EU will survive; but it will stay weak

Here is the thing. With or without Britain, **the complex inter-governmental arrangements that make up the E**uropean **U**nion **will survive**.

**But Europe will continue to be a rather weak hybrid** in which some components of national sovereignty have been delegated to EU functionaries in Brussels, while others remain under the control of national political authorities. All **these competing authorities and jurisdictions created a recipe for confusion and weakness.**

With or without quarrelsome Britain, **forget about a strong Federal Europe**. And, most of all, **forget about a strong Europe playing a decisive role in world affairs**. If the Europeans do not believe that much in Europe, why should the rest of the world take the EU seriously

**Adv 2**

# 1NR

## Adv 1

#### Zero risk of nuclear terrorism

\*Conventional attacks better serve their interests, materials are locked down, and even when they weren’t, nobody bothered to steal them

Cheryl Rofer 15, worked as a chemist at Los Alamos National Laboratory for 35 years, where she directed programs in environmental remediation and plutonium storage; CEO of Nuclear Diner, an expert blog on nuclear issues, “But What If The Terrorists Had A Nuclear Bomb?” Nov 18 2015, https://nucleardiner.wordpress.com/2015/11/18/but-what-if-the-terrorists-had-a-nuclear-bomb/

The probability of terrorists having fission weapons or RDDs is vanishingly small. The consequences could be enormous in the case of a fission weapon, much less in the case of an RDD. The fear stoked by repeated articles of this type would be the greatest consequence of an RDD. A number of people at non-governmental organizations (NGOs) dedicated to eliminating nuclear weapons spread fearful images: cities annihilated or paralyzed, tens of thousands dead. I sympathize with the ideal of eliminating nuclear weapons, but I question whether fear and exaggeration are the way to sell that ideal. I’d rather work from the facts and slog through the difficult actions that will be needed to eliminate nuclear weapons. Although I share their goal of eliminating nuclear weapons, I cannot ally myself with those groups for a number of reasons. First, they ignore the realities of physically dealing with those weapons taken out of service. Second, they ignore the international events that drive the perceived need for nuclear weapons. Third, their messaging is all wrong, starting with that fear. Even if all nuclear nations decided to eliminate nuclear weapons this afternoon, those very physical objects, something like 17,000 of them, would still exist. They contain dangerous materials that need to be handled safely, which means that physically eliminating them will take some time. The facilities in which they are now decommissioned are aging and overloaded with work. But the NGOs argue for closing down those facilities and against budgets for improving them. After Russia’s annexation of Crimea and subsequent rattling of nukes, the US can’t unilaterally say we’re removing nuclear weapons from our arsenal. It’s nice to dream of a bold move that is reciprocated by Russia, but it’s hard to believe that any of that can happen right now. The downside of such a move by the United States, both domestically and geopolitically, is much to large for any president to take it. Fear in messaging is manipulative and develops an attitude of helplessness in the people who receive it. It’s realistic to recognize the enormous destructiveness of nuclear weapons and agree that eliminating them from our future would be a good thing. Fearing that one’s city may be nuked at any time seems less conducive to taking action towards eliminating them. I would like to see the NGOs do some serious studies of what it will take to deal with the weapons taken out of service and then write and support legislation for those measures. A few successes of that kind might do a lot more to gain supporters. Focus on Terrorists The focus on terrorist RDDs and real-thing fission weapons doesn’t make much sense in relation to historical terrorist activity. Terrorists want the simplest way to get the greatest effect. Kalashnikovs and explosive vests worked quite well in Paris. Or boxcutters for 9/11. From J. M. Berger, an expert on terrorism: Al Qaeda’s love of elegance was a distraction. Terrorism is inherently improvisational. Occasionally terror groups discuss nuclear weapons internally or threaten vague horrors. None I am aware of has shown any real intention (acquiring materials, for example) of building an RDD or fission weapon. Jeffrey Lewis and Peter Zimmerman figured up what it would take for a terror group to build a fission weapon: at least 19 people. Since current estimates for the Paris attacks are as high as 20, the number to build a fission weapon is likely higher, and they would include some very specific kinds of expertise. Learning to handle a gun is much easier. Building an RDD would require less than a fission weapon, but it still needs specialized materials. International programs have been collecting the radioactive sources that would make the best RDDs. Hospitals are turning to accelerators to eliminate the radioactive sources that could be used. Although recent articles have mentioned depleted (or even enriched) uranium as a possible RDD material, neither is radioactive enough to be a threat. That’s another problem: reporters often don’t understand what they are writing about and err on the side of sensationalism. Material for a fission weapon has always been hard to obtain. Immediately after the breakup of the Soviet Union, there were concerns about the security of materials. The program sponsored by Senators Sam Nunn and Richard Lugar, authors of the latest article, has locked down much of that material. Most egregiously, chunks of plutonium metal were scattered across the Semipalatinsk Nuclear Test Site, but they have been cleaned up. During the decade they lay out on the steppe, nobody picked them up. The area is now patrolled by drones.

## Innovation DA

#### High tech warfare means defense doesn’t apply---AI escalation leads to nuclear war

Saalman, 18

Lorea Saalman, EastWest Institute Asia-Pacific Program Vice President, “"Fear of false negatives: AI and China's nuclear posture"; Bulletin of the Atomic Scientists. April 2018. https://thebulletin.org/2018/04/fear-of-false-negatives-ai-and-chinas-nuclear-posture

New pockets of excellence. In its relations with Russia and the United States, China has long contended with nuclear asymmetry. AI and autonomy, in contrast, offer Beijing the long-term potential to disrupt Washington’s traditional strengths. They open the door for swarm and other technologies that could overwhelm conventional and nuclear platforms that are larger, more cumbersome, and less agile. While China may be concerned about potential adversaries tracking its own nuclear platforms and systems, Beijing is just as likely to avail itself of these relatively inexpensive methods of disrupting US activities. Also, Chinese publications indicate that Beijing is building autonomy into its own “bolt-out-of-the-blue” systems, for example in hypersonic glide vehicles such as the DF-ZF. As China debates integration of automation via launch-on-warning, doing so with a greater range of AI and autonomy in its tool kit could lead to destabilizing trends. Again, the most sensational advances in these enabling technologies do not necessarily carry the greatest implications for China’s military and nuclear force structure. Instead, what counts is the level of AI and autonomy introduced into Beijing’s command and control structure.

When it comes to platforms, this author’s preliminary review of Chinese technical writings on AI and autonomy reveals that Beijing’s greatest emphasis, at least where the most flexible systems are concerned, is on unmanned aerial and underwater vehicles. In China’s view, these systems can be leveraged for a range of activities, including enhanced accuracy in: battlefield reconnaissance, surveillance, patrolling, electronic reconnaissance, communications, electronic interference, combat assessment, radar deception, projectile firearms, laser guidance, target indication, precision bombing, interception and launch of tactical missiles and cruise missiles, and anti-armor, anti-radiation, and anti–naval vessel capabilities; as well as nuclear, chemical, and biological detection and operations. When the topic turns to leveraging new means of warfare, Chinese writings discuss the use of swarm systems (link in Chinese) for a number of purposes, with battlefield applications focusing on anti-submarine warfare and countering integrated air defense.

AI and autonomy provide China an opportunity to exploit a new pocket of excellence, but they are hardly ends in themselves. This is one of myriad reasons that China has been reluctant to engage in arms control efforts to constrain the deployment of autonomous systems. Moreover, the amount of Chinese research already being conducted in this arena, particularly at the university level, is substantial. Research is unlikely to diminish any time soon. (Programs on AI and autonomy receive ample government support through such funds as the Laboratory of National Defense Technology for Underwater Vehicles, Project for National Key Laboratory of Underwater Information Processing and Control, National Key Basic Research and Development Program, China Aviation Science Foundation, National Science and Technology Major Project, National 973 Project, National Key Laboratory Fund, National “863” High-tech Research and Development Program, and Ministry of Communications Applied Basic Research Project, among a number of others.)

Expansive programs to turn AI and autonomy into a weaponized reality, even in challenging or illusory domains such as underwater swarms, indicate the emphasis this research receives within the hierarchy of Chinese defense planning. Whether or not China is able to achieve all of these capabilities, the vast resources and manpower allocated to these endeavors merit great attention by the United States. The direct implications of aerial and underwater swarms for larger, more lumbering US nuclear and conventional platforms remain to be seen. However, if the US Congress provides funding for the low-yield submarine-launched ballistic and cruise missiles proposed under the 2018 Nuclear Posture Review, China could deploy swarms to track and potentially intercept US dual-capable platforms. In short, whether intentionally or unintentionally, an escalatory scenario could develop.

The evolution of smaller platforms mobilized in joint formations could turn China’s nuclear asymmetrical disadvantage on its head. Much like decoys, which can be used as an inexpensive means of confusing and saturating missile defenses, low-cost swarms of unmanned aerial and underwater vehicles, along with cyber technologies, could provide a “guerilla combat–style” advantage against systems that the United States sees as providing an element of surprise, speed, and precision. Some of these platforms are already destined for deployment and will provide China with greater capability to monitor US activities in the Asia-Pacific region. However, if these platforms are turned toward actual engagement—in efforts to disrupt or confront lower-yield, smaller-scale US nuclear or dual-capable platforms—the potential for miscalculation may grow.

If China enhances its development of cruise missiles and hypersonic glide platforms by applying AI and autonomy, close-range encounters off the coast of Taiwan and in the East and South China Seas could grow even more complicated. China’s ground-launched DH-10 missile is believed to carry a conventional warhead, but indications have emerged that the air-launched CJ-10 may have both nuclear and conventional variants. Moreover, China has hedged on what kind of payload will be carried by hypersonic glide platforms such as the DF-ZF, which are designed to break through missile defenses. With the release of the 2018 Nuclear Posture Review and Vladimir Putin’s subsequent declaration that Russia has developed new nuclear weapons, the United States and Russia have engaged in a game of tit-for-tat. If China follows suit, a new set of destabilizing variables could be introduced into a region that is already tense and crowded, with freedom-of-navigation operations carried out among competing territorial claims.

From asymmetry, advantage. Within this environment, China’s integration of AI and autonomy aligns with its attempts to avoid being surprised by a false negative. Though the United States and Russia are both trending toward intentional escalation in their official doctrines, China’s response to this trend indicates a desire to avoid getting dragged into a nuclear arms race. Nonetheless, Beijing’s assumptions about US preemptory behavior have shaped its efforts to leverage its nuclear asymmetry into an advantage. One significant step in this direction comes through greater Chinese integration of AI and autonomy, meant to mitigate the risk of being caught off guard, whether by a conventional or nuclear system. While some aspects of this dynamic have stabilizing potential—as is true of enhanced situational awareness—strong indications suggest that China is engaged in other pursuits that could lead to miscalculation at the conventional and nuclear level.

#### Chinese tech lead threatens US forward deployed forces in Asia

Gertz 17

(Bill Gertz is a writer and editor for the Washington Free Beacon, “Report: China’s Advanced Weaponry Threatens U.S. Military,” Washington Free Beacon, November 17, 2017, https://freebeacon.com/national-security/report-chinas-advanced-weaponry-threatens-u-s-military/)

China is developing an array of advanced, high technology weapons designed to defeat the United States in a future conflict, according to a congressional commission report.

"China is pursuing a range of advanced weapons with disruptive military potential," says the annual report of the U.S.-China Economic and Security Review Commission.

The report outlines six types of advanced arms programs that Beijing has made a priority development in seeking "dominance" in the high-tech weapons area. They include maneuverable missile warheads, hypersonic weapons, laser and beam weapons, electromagnetic railguns, counterspace weapons, and artificial intelligence-directed robots.

China revealed two anti-ship ballistic missiles with maneuverable reentry vehicles in 2010 and 2015 and also has set up the sensors and satellites needed for striking moving targets at sea—weapons designed for use against U.S. aircraft carriers and other warships.

Beijing's hypersonic missiles are in the developmental stage but are "progressing rapidly," with seven hypersonic glide vehicle tests since 2014 and one reported scramjet engine flight test in 2015.

Directed energy weapons include work on a high-power microwave anti-missile systems this year and high-energy chemical lasers that can blind or damage satellites.

China also is developing electromagnetic rail guns capable of firing projectiles that use kinetic instead of explosive means to destroy targets.

China's space weapons include direct-ascent antisatellite missiles, ground-based directed energy weapons, and rendezvous and proximity operations for destroying or grabbing satellites.

Artificial-intelligence weapons include robotic, self-thinking cruise missiles, autonomous vehicles, and swarms of drones.

Technology advances supporting the weapons include semiconductors, supercomputing, industrial robotics, and quantum information science.

The threats to the United States from the arms include potential attacks against ships at sea, hypersonic missiles to penetrate missile defenses, targeting U.S. forces with railguns, and space arms that could block U.S. military operations in a future conflict.

China also could use unmanned artificial intelligence weapons in large numbers to saturate U.S. air defenses using swarm technologies.

"Given Beijing’s commitment to its current trajectory, and the lack of fundamental barriers to advanced weapons development beyond time and funding, the United States cannot assume it will have an enduring advantage in developing next frontier military technology," the report concluded. "In addition, current technological trends render the preservation of any advantage even more difficult."

Once characterized by decades-long development, China is moving rapidly in the area of specialized weapons in ways designed not for military parity with the United States but military supremacy.

Advanced weapons work today appears aimed at "moving from a phase of ‘catching-up' to pursuing ‘leap-ahead' technologies," the report said.

The advanced arms could produce potential intelligence surprises that pose a threat to the United States and its forward-deployed forces and regional allies.

"China's achievement of a surprise breakthrough in one of these technologies is possible, due to the secrecy surrounding these programs and the uncertain nature of advanced weapons development in general," the report said, noting, "such a breakthrough could have significant strategic implications for the United States, particularly in its potential to further existing access challenges and hold forward deployed U.S. forces at risk."

Three commissioners, in an "additional views" note in the report, warned China's advanced weapons pose a threat to the Asia Pacific region.

"There are a number of areas where the PLA could make breakthroughs that would be decisive in a conflict with the United States and its regional allies," said James M. Talent, Michael R. Wessel, and Katherine C. Tobin.

"In short, China is not just an asymmetric threat to the United States, or even a near-peer competitor. It has become, in its region, the dominant military power. That fact, more than any other, explains why China’s aggressions over the last five years have been successful."

The successes include encroachment in the South China Sea, imposition of an air defense zone in the East China Sea, aggression against Philippines, coercion of Vietnam, increasing pressure on Taiwan, harassment of Japan and other provocations, they stated.

Rick Fisher, a China military expert, said the commission should be commended for examining China's large investment in advanced military technologies.

"As in most areas of military capability, the United States is in a race with China to develop the technologies and systems that will dominate the future global military balance," he said.

Overall, the report paints a dire picture of Chinese security and economic developments that portend difficult ties with the United States in the coming years.

For example, the commission faulted "Beijing’s discriminatory treatment of U.S. companies and ongoing failure to uphold its World Trade Organization (WTO) obligations" as damaging U.S.-China relations.

The current U.S. trade deficit with China was $347 billion in 2016 and $238 billion in the first eight months of 2017.

"U.S. companies are feeling increasingly pressured by Chinese policies that demand technology transfers as a price of admission and favor domestic competitors," the report said.

Internally, high and rising debt levels pose an increasing threat to China's financial stability. Beijing's current total debt reached $27.5 trillion by the end of 2016.

China also has sharply increased investment in the United States in a bid to obtain new technologies, including information and communications technology, agriculture, and biotechnology.

The technology transfers pose risks to U.S. economic and national security interests.

On the South China Sea, the report said China has tightened its effective control of the strategic waterway by militarizing artificial islands, and pressuring states in the region to accept its illegal sovereignty claims.

China's military buildup also is continuing, with new and advanced arms and capabilities, including warships, aircraft and cyber and space weapons.

"The PLA Rocket Force continues to improve both its conventional and nuclear forces to enhance long-range strike and deterrence capabilities and is modernizing its forces to increase the reliability and effectiveness of both conventional and nuclear missile system," the report said.

The missile modernization is "eroding the United States’ ability to operate freely in the Western Pacific."

#### That’s key to deter China---extinction

Einhorn 17

(Robert Einhorn, Senior Fellow - Foreign Policy, Center for 21st Century Security and Intelligence, Arms Control and Non-Proliferation Initiative and Steven Pifer - Nonresident Senior Fellow - Foreign Policy, Center for 21st Century Security and Intelligence, Center on the United States and Europe, Arms Control and Non-Proliferation Initiative, “Meeting U.S. Deterrence Requirements Toward a Sustainable National Consensus,” Brookings, September 2017, https://www.brookings.edu/research/meeting-u-s-deterrence-requirements/)

Strategic threats to the United States are not confined to the prospect of nuclear attack against the U.S. homeland or U.S. security partners. They now include threats posed by a range of conventional and non-kinetic disruptive technologies to U.S. space assets, cyber networks, and power projection capabilities. Although the likelihood of a massive surprise nuclear attack against the United States is exceedingly remote, the possibility that an adversary will decide to initiate the use of nuclear weapons in a regional conflict—by design or as the result of miscalculation—may be increasing.

The United States has many instruments of national power to address these threats: military (nuclear, conventional, and non-kinetic weapons); political (bilateral and multilateral diplomacy, alliances, and other security partnerships); and economic (including sanctions and other forms of pressure). While all of these instruments play a role in deterring or responding to hostile behavior toward the United States and its allies—and more systematic thinking should be devoted to understanding how they can best complement one another to advance U.S. interests—this report focuses primarily on the role of military instruments and alliance relationships in deterring potential adversaries and assuring U.S. partners.

Despite worrisome changes in the security environment, there are many elements of continuity in U.S. nuclear policy that should carry forward into the 2017 NPR and beyond. In particular, U.S. strategic goals have not changed. U.S. policy still seeks to deter coercion and aggression against the United States; deter coercion and aggression against—and also assure—U.S. allies and other security partners; reduce the risk of armed conflict, especially nuclear war (whether by design, accident, or miscalculation); strengthen strategic stability with peer competitors Russia and China; prevent further nuclear proliferation and weapons of mass destruction (WMD) terrorism; and preserve an international order that upholds such norms as respect for state sovereignty and territorial integrity, the resolution of disputes by peaceful means, and freedom of navigation and overflight. To promote these goals in the current international environment, the Trump administration will need to consider what adjustments in the existing U.S. strategic posture are warranted—and which ones are not.

Additionally, the signatories of this report see no U.S. interest in reviving the Cold War or embarking on conventional or nuclear arms races. The signatories want instead to return to more stable and less confrontational strategic relationships with Moscow and Beijing in which further arms control and other stabilizing measures aimed at reducing nuclear dangers can be pursued. But getting back on a more constructive track will require the United States and its alliance partners to demonstrate that they have both the will and the capabilities to deter and thwart any aggressive actions; it will also require changes in approach on the parts of Moscow and Beijing. With the incorporation of strategically important non-nuclear technologies such as missile defenses and precision-guided conventional strike weapons, the centrality of nuclear weapons in the U.S. deterrence architecture has declined sharply since the Cold War. But continuing to reduce the salience of nuclear weapons will be difficult if a competitor such as Russia is increasing its reliance on nuclear weapons.

The signatories also support the eventual elimination of nuclear weapons globally, a goal adopted by previous Republican and Democratic administrations. But conditions for achieving that goal do not currently exist and would require major changes in the global environment over a significant period of time. Unfortunately, a world without nuclear weapons seems farther away today than it did at the time of President Obama’s Prague speech. The United States should continue to work toward the realization of conditions that would make the worldwide elimination of nuclear weapons possible. However, the U.S. government cannot make decisions about the maintenance and modernization of U.S. nuclear capabilities and infrastructure in the expectation that nuclear weapons will be eliminated in a predictable timeframe.

The main task of U.S. deterrence policy during the Cold War was to deter a Soviet nuclear or massive conventional attack. Deterring other potential adversaries received much lower priority, and the capabilities required for deterring them were assumed to be covered by the capabilities needed to deter Moscow. As recognized by previous administrations, a “one size fits all” policy does not work. The deterrence challenges posed by Russia, North Korea, China, and potentially Iran require individually tailored responses that include all forms of American political and military power. That said, a U.S. nuclear force adequate to deter Russian military aggression against U.S. allies and the United States should contain the components needed to deter other possible adversaries. And the size and shape of that force needs to reflect the multiple demands of deterrence, assurance, and strategic stability, as well as the need to hedge against uncertainties in both the security and technological environments.

During the Cold War and for much of the postCold War period, the task of ensuring effective deterrence fell heavily on the U.S. Triad of nuclear weapons delivery systems—intercontinental ballistic missiles (ICBMs), submarine-launched ballistic missiles (SLBMs) on ballistic missile-carrying submarines (SSBNs), and strategic bombers. These central strategic systems continue to play an essential role in preventing war and escalation, including escalation to the nuclear level from conventional regional conflicts or direct nuclear attacks on the U.S. homeland, allies, or deployed U.S. forces. Modernization of U.S. central systems as well as the nuclear command-and-control and infrastructure that support them is essential.

In modernizing that force, however, it is important to bear in mind that the principal challenges to deterrence today occur at the regional level—in Central and Eastern Europe, Northeast Asia, and the Western Pacific. Conventional aggression is overwhelmingly the most likely initiator of the use of nuclear weapons. It follows that shoring up deterrence in these regions will rely heavily on enhancements in conventional capabilities, including missile defenses, non-nuclear offensive strike systems, and non-kinetic tools—as well as on modernization of the Triad. It will also require steps to reinforce the credibility of the U.S. extended nuclear deterrent as well as close cooperation with U.S. regional allies and other security partners. Moreover, strengthening the “software” of deterrence (e.g., firm and consistent declaratory policies, alliance solidarity and resolve, exercises involving deterrence plans, visible demonstrations of military capabilities, reliable funding support, and political consensus) will be as important as upgrading the “hardware” of deterrence (i.e., the military programs and capabilities). Given the importance of reinforcing deterrence at the regional level, we first turn to key regional challenges. We then address issues affecting central deterrence, including the future of the Triad and related systems, force levels, nuclear weapons employment policies, missile defenses, and arms control.

Deterring Russia in Central and Eastern Europe Today the principal deterrence priority with respect to Russia is countering the threat Moscow poses to Central and Eastern Europe, especially to U.S. NATO allies in the Baltics and Poland. In seizing Crimea and continuing to support violent separatism in eastern Ukraine, Russia has demonstrated its readiness to use military force to violate international norms and obligations to upend the post-Cold War status quo. It has carried out an increasing number of provocative military exercises, including some involving simulated nuclear strikes against U.S. allies; built up its military forces opposite NATO territory; deployed cruise missiles prohibited by the 1987 Intermediate-Range Nuclear Forces (INF) Treaty; repeatedly violated NATO airspace and engaged in dangerous encounters with NATO ships and aircraft; modernized its central strategic and non-strategic (tactical) nuclear forces; beefed up military capabilities intended to impede NATO’s ability to reinforce front-line allies in a crisis; and conducted a massive propaganda and information warfare effort, including implicit and not-so-implicit nuclear threats, aimed at intimidating NATO countries and influencing their domestic affairs. Russia’s public doctrine on the use of nuclear weapons might be read as relatively benign. It says Moscow would respond with nuclear arms to an attack with nuclear or other weapons of mass destruction on Russia or a Russian ally, or in the event of a conventional attack on Russia in which the existence of the Russian state was at stake. However, Russian officials have discussed what has been called an “escalate to de-escalate” strategy in which Russia would threaten or initiate a limited nuclear strike in the midst of a conventional armed conflict—including when Russian forces had initiated conventional hostilities and the existence of the Russian state was not at stake—to shatter NATO’s unity, deny the United States the means to reinforce Europe, and compel the Western alliance to back down and allow Moscow to consolidate the gains of its conventional aggression.1 There are also disturbing signs that Russia’s most senior leaders no longer appreciate that, as Presidents Reagan and Gorbachev declared, a nuclear war cannot be won and must never be fought. We do not know what truly motivates Vladimir Putin and the Kremlin’s more assertive, nuclear-centric actions and rhetoric—whether the Kremlin actually intends, through covert or overt means, to threaten the territory of NATO members, or whether its saber-rattling is essentially posturing designed to deter what it sees as further Western efforts to encroach on Russian interests. We also do not know whether Russia would actually use nuclear weapons first during a conventional conflict or whether instead it appreciates the tremendous risks of initiating the use of nuclear weapons and is signaling a willingness to escalate to the nuclear level mainly for the purpose of undermining NATO unity and resolve to contest aggressive Russian actions in a crisis. Whatever Russia’s intentions may be, we have to take its provocative words and actions seriously. Proximity to NATO territory provides Russia certain inherent conventional force advantages at the local level, particularly in the Baltic region. NATO should, therefore, continue to strengthen the conventional deterrence and defense capabilities on its eastern front to ensure that Moscow cannot attack alliance members and expect to achieve a rapid, low-cost fait accompli. The alliance should also ensure that it has the capabilities to operate in a more challenging anti-access, area-denial environment and expeditiously reinforce the position of exposed allies in a crisis. The United States and its NATO allies must also disabuse Russia of any expectation that it could initiate the use of nuclear weapons without running unacceptable risks. Indeed, a serious potential source of instability today is that the Kremlin may underestimate the unity, resolve, and preparedness of NATO to resist intimidation and nuclear coercion. Through its own declaratory policy and military posture, the United States and the alliance must seek to prevent any such miscalculation, including by making clear to Russian leaders that any first use of nuclear weapons, even on a scale intended to be limited, would breach a threshold that has not been crossed for 70 years, opening a Pandora’s box of unpredictable and potentially catastrophic consequences. Much of the conventional and nuclear capabilities needed to deter Russia in Eastern Europe are already in train and can be built upon as necessary. At the 2014 Wales summit and the 2016 Warsaw summit—and with the strong support of the European Reassurance Initiative—NATO has enhanced its conventional capabilities. It has increased its forward military presence by deploying on a rotational basis battalion-sized task groups in each of the Baltic states and Poland; strengthened its capacity to quickly reinforce its eastern flank; stepped up military exercises; raised readiness levels; improved cyber defenses; and begun to develop a strategy to counter Russian disinformation campaigns and “hybrid warfare” threats. NATO needs to follow through with these enhancements, which would be given a boost if all members met their defense spending targets of two percent of GDP by 2024, a goal which they reaffirmed at the Wales summit. At the Warsaw summit, NATO reinforced its commitment to nuclear deterrence, issuing a warning that “any employment of nuclear weapons against NATO would fundamentally alter the nature of a conflict. … If the fundamental security of any of its members were to be threatened …, NATO has the capabilities and resolve to impose costs on an adversary that would be unacceptable and far outweigh the benefits that an adversary could hope to achieve.”2 Current U.S. and NATO plans for ensuring effective nuclear deterrence—relying on U.S. strategic forces and a limited European-based U.S. nuclear presence—appear sufficient, at least for now. However, some members of the group recommend exploring ways of reinforcing the nuclear deterrent, including by restoring the nuclear capability of the Tomahawk land-attack cruise missile for both European and East Asian contingencies (see discussion below), developing a nuclear version of the Joint Air-to-Surface Standoff Missile (JASSM), or deploying low-yield, primary-only warheads on U.S. ICBMs or SLBMs. Other members of the group oppose such ideas as unnecessary to ensure deterrence and assurance in Europe, particularly if NATO bolsters its conventional deterrence and defense capabilities. All agree here is no need to emulate Russia’s theater nuclear posture in scale or mission. Whatever its military utility, the presence in Europe of U.S. nuclear weapons deliverable by U.S. and allied aircraft remains a key element of the U.S. commitment to NATO. Accordingly, the alliance’s dual-capable aircraft (DCA) need to be modernized over the course of the next decade, with the dual-capable F-35 Joint Strike Fighter eventually becoming the backbone of NATO’s theater-based deterrent capability. The signatories encourage NATO basing countries to continue in that role and upgrade their DCA as soon as possible. The United States should complete the life extension program for the B61 nuclear weapon by 2024, as scheduled. With its accuracy, reliability, and low-yield option, the B61-12 and its F-35 delivery platform will provide a credible and discriminate capability to complement the fundamental role of U.S. central strategic systems in dissuading Russia from thinking it could initiate the use of nuclear weapons without triggering a devastating Western response. NATO also needs to upgrade its nuclear command-and-control capability. Although there is no need to deploy nuclear weapons or DCA on the territory of the newer NATO members, non-basing countries could be given a greater role in the nuclear deterrence mission in order to reinforce alliance solidarity and burden-sharing. NATO’s three nuclear-armed members—the United States, Britain, and France—must all ensure that their forces are capable of fulfilling their commitments. As the current NATO strategic concept attests, these forces are the ultimate guarantee of the sovereignty and security of alliance members. The United States and United Kingdom, and to an increasing extent France, have accepted responsibilities for their strategic forces in supporting the alliance’s deterrence strategy, and the allies should continue to cooperate toward that end. Notably, NATO’s deterrence and defense posture includes not just conventional forces and nuclear forces; it also includes cyber and space capabilities. There is also an open question (discussed later in this report) of whether and how NATO’s missile defense posture should adapt to new capabilities fielded by Russia, including especially cruise missiles. All of these capabilities are a complement to NATO’s nuclear deterrent, not a substitute—but they will be required to make an increasing contribution to NATO’s deterrence and defense strategy. While shoring up deterrence of “gray zone,” conventional, and nuclear aggression in Central and Eastern Europe is the most pressing alliance priority, the United States and its NATO allies should also look for ways to reduce tensions, strengthen stability, and avoid dangerous incidents and miscalculations. In addition to proceeding with U.S.-Russian strategic stability talks (discussed below) and resuming bilateral military-to-military contacts, NATO allies should seek to pursue a wide-ranging dialogue with Russia in which they could press Moscow to address Western concerns about provocative Russian activities, exercises, and deployments. At the same time, the allies could seek to alleviate Russian concerns that NATO’s enhanced forward presence would be used for offensive operations. The two sides should review and upgrade existing arrangements regarding the notification and observation of military exercises, the avoidance of dangerous military incidents at sea, in the air, and on land, military-to-military engagement, and communications in a crisis. Russia’s willingness to faithfully implement the Minsk II agreement regarding a settlement of the Ukraine-Russia conflict in Donbas and cease undermining Ukrainian sovereignty, something not in evidence as of August 2017, would go a long way to reduce current tensions and rebuild confidence. Deterring North Korea While the size and sophistication of Russia’s conventional and nuclear forces make it the most formidable threat now faced by the United States, North Korea—with the accelerated pace of its nuclear and missile programs, its paranoia about U.S. intentions, its declared readiness to initiate the use of nuclear weapons, and the unpredictability of its behavior in a crisis—poses the most acute, near-term threat to the United States and its Asian allies. North Korea can already attack South Korea and Japan with nuclear weapons. It also has the capability to target U.S. forces and bases in the region, including Guam—a capability apparently designed to disrupt U.S. plans to flow massive reinforcements to the Korean Peninsula in the event of a crisis. With its July 2017 flight tests of two ICBM-range missiles and its sixth and most powerful nuclear test so far on September 3, 2017, it took important steps toward acquiring the capability to strike the U.S. homeland with nuclear-armed missiles, which it presumably hopes will deter the United States from coming to the defense of its Asian allies or otherwise pursuing a policy of regime change. By developing solid-fueled missiles for deployment on mobile, land-based launchers and submarines, the North Koreans are seeking to deny the United States and its allies the ability to target and destroy their nuclear deterrent. Aside from the nuclear threat, North Korea has long had the capability to inflict massive damage on South Korea from conventionally armed artillery and rocket systems deployed within range of Seoul. North Korea’s intentions are even less knowable than Russia’s intentions. Despite the fiery rhetoric, Pyongyang may see its nuclear capability in largely defensive terms, as ensuring the survival of the regime by deterring attempts by the United States and its allies to attack or otherwise undermine it. Or it may see its nuclear forces as serving a more aggressive, revisionist agenda consistent with the regime’s long-declared goal of reunifying the Peninsula. Whatever the North’s original motivations for acquiring nuclear weapons may have been, there is a risk that its growing nuclear capabilities will give its leadership greater confidence to engage in provocative activities against South Korea at the conventional or sub-conventional level. Pyongyang may calculate that its threats to initiate the use of nuclear weapons would inhibit U.S. and allied responses to such provocations. It may even believe that, in the event of a conventional military confrontation on the Peninsula, it could conduct limited nuclear strikes aimed at compelling the United States and its allies to back down and terminate hostilities before the survival of its regime would be jeopardized. Unlike in the case of Russia and China, the United States does not accept the legitimacy of North Korea’s nuclear weapons capability, which Pyongyang acquired by violating its obligations as a party to the 1970 Nuclear Non-Proliferation Treaty (NPT). The U.S. goal remains the complete and verifiable denuclearization of North Korea. But as long as North Korea (the Democratic People’s Republic of Korea, or DPRK) retains nuclear weapons, the United States and its allies must seek to deter North Korean coercion or aggression at both at the conventional and nuclear levels and reduce the risks of miscalculation or escalated conflict that could result in the use of nuclear weapons. The United States needs to maintain the solidarity of its alliances with South Korea (the Republic of Korea, or ROK) and Japan, work with other partners in the U.N. Security Council and elsewhere to promote stability on the Peninsula, deny North Korea the prospect of conventional military gains, ensure the continued reliability and effectiveness of the U.S. extended deterrent, and pursue together with its Northeast Asian allies both missile defense and conventional strike capabilities that can protect U.S. and allied territory against North Korean missile attack. North Korean leader Kim Jong Un must fully understand that any use of nuclear weapons against the United States or its allies would be met with a response that, in the words of Secretary of Defense Jim Mattis (and Secretary of Defense Ash Carter before him), would be “effective and overwhelming.” The United States and ROK should continue to bolster conventional deterrence through further enhancement of South Korean military capabilities, including improved missile defenses and new conventional strike capabilities. A continued strong U.S. military presence in the region and on the Peninsula (including necessary prepositioning of equipment and a credible ability to reinforce Peninsula-based forces in a crisis) is essential, as are robust joint military exercises. The allies also need to strengthen the resilience of their cyber networks against North Korean threats in that domain. These military capabilities must be reinforced with clear statements of U.S. presidential intent. Each new president must express in his own way his commitment to defend U.S. allies, including especially when their most vital interests are at risk and the possibility of U.S. nuclear employment comes to the fore. Policy positions in the Nuclear Posture Review and elsewhere lay the foundation, but are much more powerful when amplified by presidential statements. A major effort should be made to reduce the coercive value of DPRK missile capabilities and the vulnerability of allied forces and populations to North Korean missile attack, whether conventional, nuclear, or chemical/biological. This involves working with South Korea and Japan on further developing a regional missile defense that includes additional Patriot missile batteries against short-range threats, Terminal High Altitude Area Defense (THAAD) batteries in Guam and South Korea (and perhaps Japan), Standard Missile-3 (SM-3) missile interceptors aboard Aegis-equipped warships, finalizing development of a new interceptor (SM-3 IIA) with Japan and proceeding to field this system in regional defenses, and an upgraded capability to defend the U.S. homeland against North Korean attack (discussed later in this report). The allies should also pursue conventional strike capabilities that could be used to pre-empt an imminent North Korean missile attack or to respond to DPRK missile strikes by seeking to destroy North Korea’s launch capabilities before Pyongyang can mount follow-on attacks. Given the challenge posed by the growing mobility of North Korean missile forces, this will require significantly enhanced intelligence, surveillance, target acquisition, and reconnaissance capabilities as well as offensive cyber tools able to disrupt North Korean missile operations. U.S. conventional precision strike systems in the region should be augmented, including by deploying a number of Virginia-class attack submarines with a new payload module (the “Virginia payload module”) capable of carrying conventionally-armed cruise missiles. The United States should also consider whether it should field more prompt conventionally-armed strike systems with ranges and in numbers tailored to credibly threaten regional challengers like North Korea. The United States should work with the ROK and Japan to ensure the credibility of the U.S. extended nuclear deterrent to prevent North Korea from miscalculating alliance resolve. Its credibility is also required to assure America’s allies that they can rely on the U.S. security guarantee and need not pursue their own nuclear weapons capabilities. U.S. central strategic systems, together with U.S. nuclear-capable fighter-bombers (currently F-15Es, F-16s, and eventually F-35s) that can be deployed to allied territory, continue to constitute an effective nuclear umbrella. U.S. nuclear weapons need not be stationed on the Peninsula, but exercising the capability to rapidly deploy them forward in a crisis would contribute to the credibility of the deterrent. Such exercises would not involve actual nuclear weapons. At present, U.S. DCA are deployed in South Korea on a rotational basis, but as the situation evolves, consideration could be given to more persistent or permanent stationing. Continued regular deployment in Guam of nuclear-capable B-52Hs and B-2s signal the critical role of U.S. strategic systems in maintaining the extended deterrent. In addition to public, high-level reaffirmations of U.S. commitment and tangible demonstrations of U.S. resolve (e.g., flyovers by U.S. strategic bombers, patrols by U.S. Navy strike groups), the administration should be responsive to the desire of the South Koreans and Japanese—as expressed in senior-level bilateral consultations with the United States—to play a more prominent role in ensuring the effectiveness of the U.S. extended nuclear deterrent. Although NATO-type burden-sharing arrangements are neither necessary nor suitable in the Northeast Asian context, significant involvement of the allies in the development of mechanisms for nuclear consultation in a crisis, the development of concepts to guide escalation and war termination, and broader integration of military operational planning outside the nuclear realm (e.g., regional missile defense operations) would be warranted. North Korea’s prioritization of regime survival above all else and its unfounded suspicion of U.S. intentions pose a unique challenge for U.S. deterrence policy. A North Korean leadership that fears that a conventional military conflict with the United States or a disarming conventional or nuclear attack by the United States could end its regime may decide in a crisis to use nuclear weapons first and run the risk of a devastating U.S. response if it figures that nuclear escalation is its only means of getting the United States and its allies to stand down, thus staving off a mortal threat to the regime. Therefore, in conducting joint military exercises with allies or pursuing military programs that the North Koreans could interpret as threatening the survival of their regime (e.g., prompt strike capabilities), the United States and its allies should seek to convey the essentially defensive nature of their actions and avoid gratuitously arousing DPRK concerns about their intentions (e.g., by talking about “decapitation”). In a crisis situation, it would be critical to signal clearly to the North that its best hope of averting regime change is to exercise restraint, that North Korean restraint would be reciprocated by the United States, and that North Korean escalation, especially to the nuclear level, would have grave consequences for the regime in Pyongyang. The administration should give high priority to seeking to persuade North Korea, through strong international pressures and engagement, to abandon its threatening nuclear and missile programs. There is no military solution to the North Korean challenge that can be achieved without running intolerable risks. Diplomacy is essential. But any prospect of an acceptable negotiated solution will depend on China’s willingness to bring to bear much greater pressure on Pyongyang than it has been prepared to exert so far, and that will require U.S. readiness to penalize Chinese entities that are facilitating DPRK nuclear and missile programs in violation of U.N. Security Council sanctions. It will also require the United States and its Northeast Asian allies to support an approach to negotiations—perhaps along the lines of the phased approach to denuclearization advanced by South Korean President Moon Jae-in— that provides reasonable incentives to induce the North to accept their requirements. But if North Korea is not prepared to negotiate seriously and insists on retaining and expanding its destabilizing capabilities, the United States and its allies would have little choice but to pursue a long-term strategy of deterrence and containment. In that event, determined efforts by the United States, South Korea, and Japan to strengthen their deterrent posture— including through significantly greater trilateral defense cooperation—would be crucial in sustaining such a strategy and defending their interests in the period ahead.

Deterring China

China poses a less acute nuclear threat than either Russia or North Korea but a more serious, long-term geostrategic challenge. Unlike Moscow or Pyongyang, Beijing does not brandish its nuclear weapons or talk about initiating their use. The focus of its ambitious nuclear modernization program has mainly been to achieve a secure retaliatory capability (and thereby reduce what it sees as its vulnerability to U.S. nuclear coercion) and to sustain that capability in the face of developments in the U.S. defensive and offensive postures. The principal challenge to the interests of the United States and its East Asian allies comes not from China’s nuclear programs but from a major buildup of its conventional forces, including its anti-access, area denial capabilities, aimed at eroding U.S. conventional military superiority in the Western Pacific an

d undermining the ability of the United States to provide security to its Asian allies. Beijing may believe that the combination of an assured second-strike nuclear capability and a robust conventional military posture will give it a freer hand to pursue more assertive policies and expand its influence in the Asia-Pacific region.

Indeed, in recent years, China has acted more aggressively in the region. To contest Japan’s claim to the Senkaku/Diaoyu islands in the East China Sea, Chinese fishing boats, “law enforcement” vessels, and aircraft have repeatedly engaged in provocative activities in waters and airspace surrounding the disputed islands administered by Tokyo. In addition, China declared an air defense identification zone over two-thirds of the East China Sea. It has engaged in a heavy-handed campaign, including through the use of economic penalties, aimed at coercing Seoul to reject the deployment in South Korea of the U.S. THAAD system. Perhaps most provocatively, Beijing asserted sovereignty over much of the South China Sea and, in defiance of the Permanent Court of Arbitration’s rejection of its claims, has engaged in an active program of land reclamation and military construction in areas claimed by various Southeast Asian countries. Moreover, it has increased the frequency of exercises and patrols aimed at extending the reach of its naval and air forces beyond the first island chain into the Western Pacific.

China is working to become a major power in world affairs and in the Asia-Pacific region. The United States has sought a constructive and mutually beneficial relationship with Beijing and recognizes that as China’s power grows, its influence will grow. The United States has no desire to impede or contain China’s rise as long as it adheres to international norms and does not encroach on the interests of the United States and its allies and partners in the region.

At the same time, the United States is committed to defending its regional allies against Chinese intimidation or attack, preventing China from illegally controlling and impeding access to vital international maritime areas and airspace, and preserving the U.S. ability to project power in East Asia in support of U.S. and allied interests.

The main challenges currently posed by China are in the non-nuclear realm, and U.S. responses to ensure effective deterrence are also primarily in the non-nuclear realm. The United States should maintain a strong military presence in the region, including by keeping roughly 50,000 military personnel in Japan, conducting more frequent port visits and rotational air and naval deployments throughout the region, engaging in regular joint military exercises with key security partners, and perhaps permanently stationing additional air and naval assets, especially in Japan and Guam. The United States should also enhance its capabilities to operate in a more challenging anti-access, area denial environment and preserve or regain key conventional military advantages, including by adequately funding and implementing the application of advanced technologies to the new operational challenges in the new environment. Given China’s demonstrated anti-satellite and cyber capabilities, Washington should also continue to ensure the resilience of its space assets and cyber networks and should explore additional means of deterring attacks on them. The Navy’s freedom of navigation operations, especially in the South China Sea, should be pursued on a regular basis to underline that the United States does not recognize Beijing’s illegal claims.

In seeking to discourage aggressive Chinese behavior, the United States should rely heavily on regional partners, especially Japan. Washington should continue to support Tokyo’s intention to play a more active role in exercising its right of collective self-defense, including by assisting U.S. forces in regional contingencies, and it should cooperate with Japan in strengthening its advanced conventional defense capabilities, including missile defenses (if Japan seeks U.S. cooperation in acquiring THAAD or Aegis Ashore) and conventional strike missiles. President Obama’s statement, reaffirmed by the Trump administration, that the U.S.-Japan security treaty applies to Japanese administration of the Senkaku Islands has been important both in reassuring Japan of the U.S. commitment and in raising the stakes for China of aggressively pressing its claims to the islands. The Trump administration should also continue to affirm the long-established U.S. position that any change in the relationship between Taiwan and China must be accomplished by peaceful means and not the use of force.

#### Blockchain solves 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.

#### They deter big tech from investing.

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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### [A]---Perception---companies do not expect immediate statutory or legal changes---enforcement only affects a small slice of deals

Zero 21 – Senior Reporter for Mergers & Acquisitions

Brandon Zero, "Antitrust Deal Scrutiny More Storm Than Fury," Mergers & Acquisitions, 8-4-2021, <https://www.themiddlemarket.com/news-analysis/threat-of-antitrust-deal-scrutiny-seen-more-storm-than-fury>

What’s the forecast for regulatory scrutiny of deals so far this year? There may be more cloud cover than storms on the M&A horizon. New antitrust scrutiny and a longer review time are potential looming threats, but they lack the lightning needed to actually block deals.

Let’s look at these twin threats and the risks they pose to dealmaking. President Biden’s executive order has spurred the Department of Justice and Federal Trade Commission to increase scrutiny of deals in a move that, “if implemented by regulators and upheld by the courts…could lead to the most robust antitrust enforcement in decades,” writes Debevoise & Plimpton lawyers in a recent note. But that’s a big ‘if.’ The attorneys write that actually intensifying competition review standards would require acts of Congress and/or litigation. Both regulatory agencies have mixed records in courts. And it’s unclear if Democrats will defy the political gravity that has historically weighed down incumbent presidents’ party performance in midterm elections to win a mandate to rewrite antitrust laws.

What about the other lingering storm cloud on the periphery? A frenetic M&A pace has overwhelmed oversight body the Federal Trade Commission to the extent that it’s warned companies the expiration of the standard 30-day waiting period is no longer an implicit approval of a deal, Bloomberg reports. That creates a threat of enforcement even after deals have closed.

Amidst the merger deluge, a few high-profile deals have been challenged, but context is king: the handful of challenged deals represent a small slice of the year’s record value of announced transactions.

For starters, some of the highest profile deals challenged by the new administration’s antitrust regime represent merger dynamics that have always drawn intense scrutiny. Aon Plc’s proposed $30 billion takeover of Willis Towers Watson (Nasdaq: WLTW), announced only five years after Willis Group’s $18 billion merger with Towers Watson, was challenged by the DOJ as taking the industry from three competitors to two. So called “3 to 2” mergers have always been a bright line for regulators. And the insurance investment bankers I’ve spoken to for a decade about industry consolidation have long steered clear of attempts to marry those players or Marsh & McLennan (NYSE: MMC) out of fear of this precise outcome.

There are wild cards that could skew my forecast. It’s true that zealous enforcement of vertical merger review guidelines has created unexpected scrutiny of some sectors, and that agencies’ evolving theories of harm could disproportionately put tech deals at risk. But on the whole, the latest policy announcements may well be more thunder than lightning**.**

#### [B]---No lasting change with sole executive change

Wright, JD, PhD, University Professor and the Executive Director, Global Antitrust Institute, Scalia Law School at George Mason University, former FTC Commissioner, ‘21

(Joshua D., “Lina Khan Is Icarus at the FTC,” July 13, WSJ)

All that has been overshadowed by an executive order aimed at competition and loaded with goodies, good intentions, new regulatory regimes and a blissful ignorance of unintended consequences (“Joe Biden, 20th Century Trustbuster,” Review & Outlook, July 10). Some of its pronouncements, like occupational-licensing reform, are to the good. But the FTC’s competition authority is about to become a free-for-all for the Biden administration to reshape the economy. One wonders how the Republicans going along with all this to “get Big Tech” are feeling right now; I’m guessing “played.” If not, they’ll catch up soon enough.

Imagining the FTC as Icarus flying without the constraints of history, economics or law is a fun thought experiment, but we’ve been here before. Ms. Khan’s initial steps are indicative of a regulatory overreach that will end with the FTC’s wings melting in the courts. This path does not lead to incremental, much less radical, change. I predict early headlines that appease a rabid base, frustration for FTC staff and a new, volatile partisanship at the agency, but actual results that leave unsatisfied the progressives aching for radical change.

#### [C]---Current antitrust victories hurt only tech startups and not big tech---invalidates their offense

Nicole Goodkind, Fortune, Lina Khan is the face of the populist antitrust moment. But how much power does the FTC chair wield? June 30, 2021, https://fortune.com/2021/06/30/ftc-chair-lina-khan-populist-antitrust-movement-what-can-she-do-federal-trade-commission/

But the question of whether Khan will be able to rouse an agency that’s been in a state of semiconsciousness for nearly half a century remains.

Detractors argue that Khan is little more than a figurehead, meant to placate progressives and antitrust populists while the FTC remains largely ineffective. This week, a federal judge struck down an FTC complaint against Facebook, brought by Khan’s predecessor, that would have forced the company to divest from Instagram and WhatsApp. Khan and the FTC now have until July 29 to file a new complaint.

Amazon also tried to make the case on Wednesday that Khan should recuse herself from any FTC enforcement decisions involving the company—including the FTC review of its $8.45 billion acquisition of movie studio MGM—because of her previous statements that the company should be broken up.

There’s a dichotomy between popular groupthink around monopolies and what’s actually going on in the courts, said Aurelien Portuese, director of antitrust and innovation policy at the Information Technology and Innovation Foundation, a D.C. think tank that is partially funded by Big Tech. “There are a lot of proposals to depart from these principles of how you define the market and market demand. I think these attempts may very well be crushed many times in courts,” he said. Khan might be effective in precautionary rulemaking, he said, but that would largely impact smaller tech upstarts, not the Big Four.

Those interruptions, he argued, would stifle innovation and American entrepreneurship, giving China an upper hand (a similar argument was made when Microsoft faced antitrust charges in 1998).

Populist antitrust sentiment, said Portuese, is a trend that will soon fade: “I don’t see radical changes in the long run, because of the inevitable judicial review that entrepreneurs are subject to.”

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

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

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

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

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

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

#### Crowell & Moring continue

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

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

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

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

Ripple Effects

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

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

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

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

Justice, ‘20

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

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

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

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

#### c. They signal courts everywhere should favor plaintiffs

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

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

What would the changes mean?

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

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

#### There’s no way to limit the plan’s scope AND firms and lawyers are risk-averse and think this is true---the result is fear of liability that scales back investment

Thomas Nachbar 19, Professor of Law at the University of Virginia School of Law, JD from the University of Chicago Law School, AB in History and Economics from the University of Illinois, “Book Review: Heroes and Villains of Antitrust”, The Antitrust Source, 18-6 Antitrust Src. 1, June 2019, Lexis

Since Adam Smith, the argument of so-called free-market intellectuals has not been that markets are perfect but rather that they are comparatively better at solving problems than governments. Part of the argument is that, in most cases, market forces will drive a firm that has adopted an inefficient practice to shift to a more efficient one, lest it lose more business than it gains from the practice. But if antitrust law outlawed a practice, there is no potential for the market to correct--the practice once outlawed would remain outlawed. n54 And because antitrust law applies to all industries, a practice outlawed for one firm or industry would be outlawed for all firms in all industries, or be interpreted as such by risk-averse firms and their risk-averse lawyers--not to mention the treble damages that the liable antitrust defendant would have to pay.

[FOOTNOTE] n55 See Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 284 (2007) ("In sum, an antitrust action in this context is accompanied by a substantial risk of injury to the securities markets and by a diminished need for antitrust enforcement to address anticompetitive conduct."); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 546 (2007) ("It is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.") Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) ("Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'") (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986)). [END FOOTNOTE]

#### Their authors concede link!

1AC Macey & Holdcroft 11 (Jonathan R. Macey is Sam Harris Professor of Corporate Law, Corporate Finance, and Securities Law, Yale Law School. James P. Holdcroft, Jr. is Chief Legal Officer, CLS Group. <KEN> “Failure Is an Option: An Ersatz-Antitrust Approach to Financial Regulation,” The Yale Law Journal. Volume 120, No. 6. April 2011. https://www.yalelawjournal.org/feature/failure-is-an-option-an-ersatz-antitrust-approach-to-financial-regulation)

As noted in the Introduction, our point is not that the recent consolidation of the financial services sector permits collusion or price-fixing among financial institutionsalthough we do observe significant evidence of such illegal activities in some parts of the sector, particularly in the credit card industry69 and in the brokerage industry.70 Rather, our view is that breaking up the banks is fully justified on the grounds that such a breakup would make the economy safer and more stable by limiting or eliminating the proclivity of regulators and elected officials to engineer massive bailouts of the largest financial institutions whenever a financial crisis appears.

We recognize, however, that our plan involves a sea change in the current U.S. approach to antitrust policy, which generally embraces the idea that the only appropriate concern of antitrust law is to promote and protect competition so that the prices paid by consumers will be as low as possible. And, clearly, antitrust law is designed to protect competition from price-fixing and other anticompetitive behavior.71

Those who subscribe to this approach to the antitrust laws might view it as inappropriate to burden antitrust with the competing goal of promoting the economic stability of financial institutions. After all, the antitrust laws were not written with stability in mind, and scholars have not tried to incorporate stability into their analyses.

#### AND, massive uncertainty alone chills R&D investments, even absent actual breakup.

**Lin et al. 21** --- School of Law, Southwestern University of Finance and Economics, Chengdu.

Yuchen, Daxin Dong, Jiaxin Wang, “The Negative Impact of Uncertainty on R&D Investment: International Evidence,” International Evidence, Sustainability 2021, 13, 2746. https://doi.org/10.3390/ su13052746

In summary, in this study, we reported a significantly negative impact of uncertainty on R&D investment at the country level. The analyses were based on a sample covering 109 countries from 1996 to 2018. It was also found that uncertainty reduced the number of annual new patent applications. The adverse impact of uncertainty on R&D was not only significant statistically, but also economically. According to the estimation results, if the uncertainty index rises by one unit (one standard deviation), the scale of R&D investment and the number of patent applications will decline by 15.6%

(2.1372%) and 22.7% (3.1099%), respectively. Further analyses demonstrated that the effect of uncertainty was not uniform across all countries. In some country groups, the effect was strong and statistically significant. However, in several country groups, the effect was moderate and insignificant. However, we always observed a negative effect. Overall, Hypothesis 1 in our study is verified, and Hypothesis 2 is contradicted.

The study results provided strong support to some previous studies which reported a negative impact of uncertainty on R&D investment, including Arif Khan et al. [5], Cho and Lee [11], Czarnitzki and Toole [8], Goel and Ram [12], Ivus and Wajda [1], Jung and Kwak [15], Nan and Han [17], Wang et al. [4], and Xu [20]. The results did not support several studies that reported a positive effect of uncertainty, such as Atanassov et al. [3], Gu et al. [13], Han et al. [14], Jiang and Liu [6], Meng and Shi [16], Ross et al. [9], Stein and Stone [18], Tajaddini and Gholipour [7], and Vo and Le [19]. Our study utilized a wide sample of more than 100 countries and examined the country-level aggregate R&D investment. This feature enabled our study to better depict the overall situation in the world, compared to most of the extant studies, which have only focused on the R&D of business corporations within one country.

The findings in this study have important policy implications. First, in order to keep abreast of the R&D investment dynamics, governments and economic agents should pay attention to the degree of uncertainty in the economy. The negative impact of uncertainty on R&D is a phenomenon that widely exists in different countries over the world, as shown by our analyses on the full sample, as well as various subsamples. If governments can effectively monitor the variations in uncertainty and evaluate the relevant market responses, they will be able to understand the current situation and forecast future tendency of aggregate R&D investment in a better way. Being more informed will facilitate governments to make proper public policies if necessary. After understanding the link between uncertainty and R&D, firms can reasonably expect that other enterprises in the industry will adjust investment accordingly when uncertainty changes. During the procedure of making their own R&D investment plans, firms should not neglect the potential responses of the competitors and partners to varying uncertainty.

Second, given the importance of innovation and technological advancement for sustainable economic and social development, it is necessary to reduce the degree of macro uncertainty. Governments should avoid frequent variations of economic policies and the abrupt implementation of substantial reforms. The communication and information sharing among governments and private sectors should be reinforced to reduce noises, mitigate misunderstanding, and enhance trust and confidence. Countries should also improve their institutional and economic infrastructure—for example, by reducing frictions in financial markets and strengthening governmental effectiveness—in order to increase the resistibility of economic system to unexpected shocks. In the case that the major origins of the uncertainty can be identified—such as the coronavirus pandemic in the current period—urgent actions should be carried out to deal with the problems

#### Err neg---risks of over-enforcement are too high---false convictions vastly outweigh false acquittals

Lambert 20

Thomas A. Lambert is the Wall Chair in Corporate Law and Governance and Professor of Law at the University of Missouri Law School; JD from UChicago Law.

(Thomas A. Lambert, "The Limits of Antitrust in the 21st Century," Summer 2020, Cato Institute, https://www.cato.org/regulation/summer-2020/limits-antitrust-21st-century)

Regulating these sorts of competitive mixed bags inevitably entails costs. First, there are the costs that result from mistaken judgments. If the law wrongly allows conduct that is, on net, anticompetitive, consumers will face higher prices and/​or reduced quality, and a deadweight loss will occur. But if the law wrongly forbids conduct that is, on balance, procompetitive, market output will be lower than it otherwise would be and, again, consumers will suffer. In addition to these so‐​called “error costs,” regulating competitive mixed bags entails significant “decision costs”—i.e., costs to business planners and courts from deciding whether contemplated or actual conduct is forbidden or permitted.

False conviction error costs, false acquittal error costs, and decision costs are intertwined. If policymakers try to reduce the risk of false conviction by making it harder for a plaintiff to establish liability or easier for a defendant to make out a defense, they will raise the risk of false acquittal. If they ease a plaintiff’s burden or cut back on available defenses to reduce false acquittals, they will increase false convictions. And if they make the rule more nuanced in an effort to condemn the bad without chilling the good, thereby reducing error costs overall, they enhance decision costs. As in a game of whack‐​a‐​mole, driving down costs in one area will cause them to rise elsewhere.

Given this unhappy situation, Easterbrook proposed an overarching goal for antitrust policies: they should be crafted so as to minimize the sum of error and decision costs. Pursuing such an objective, policymakers would not try to prevent every anticompetitive act, allow every procompetitive one, or keep antitrust rules as simple as possible. They would eschew perfection along any single dimension in favor of overall optimization.

The second key component of Easterbrook’s approach was his instruction about how antitrust tribunals should weigh the harms from false convictions versus false acquittals. If a procompetitive behavior is wrongly condemned, the adverse effect—squandered efficiencies—will persist until a subsequent judicial decision overrules the erroneous precedent. By contrast, if anticompetitive conduct is wrongly allowed to persist, the result will be the sort of monopoly pricing that invites market entry and thereby self‐​corrects. Accordingly, Easterbrook reasoned, false convictions are worse than false acquittals, which suggests that liability rules on questionable practices should be calibrated so as to err in the direction of allowing anticompetitive acts rather than banning or discouraging procompetitive ones.

# 2NR

## Innovation DA

#### Big tech intervention in finance creates forces adoption of blockchain

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

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

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