# NDT R4 Disclosure

# 1NC

**1NC**

**1NC---T**

T Expand the Scope---

**Scope refers to the extent of activity**

**Merriam-Webster 22**

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

**Definition of scope** (Entry 1 of 4)

1: INTENTION, OBJECT

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

3: **extent of treatment, activity, or influence**

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

**Hatter 90** – United States District Court, California Central

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

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

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

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

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

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

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

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

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

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

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

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

In addition, federal courts have recognised a **number of exemptions** from **antitrust laws**, which are usually established for the purpose of avoiding conflicts with principles of federalism or of effectuating legislation enacted by Congress.7 These judicially created exemptions can be as wide-ranging as statutory exemptions, but the most common include: the ‘state action’ immunity for certain actions taken by states or pursuant to their laws;8 the ‘implied immunity’ exemption for conduct to effectuate a regulatory scheme;9 the ‘filed rate’ immunity from antitrust damages actions based on rates or prices set with federal or state regulators;10 and the Noerr-Pennington immunity for certain conduct of private actors in petitioning the government.11 Although these **exemptions** may appear broad, they are narrowly construed by courts because **the Sherman Act itself provides no exceptions**12 and they generally are contrary to the fundamental values of ‘free enterprise and economic competition that are embodied in the federal antitrust laws.’13

[[Begin FN 12]]

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

[[End FN 12]]

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

**Vote neg---**

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

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

**1NC---CP**

**CP: The United States federal government should repeal religious exemption laws for religious organizations with outsized market power while maintaining religious exemptions for other religious organizations.**

**CP is an “antitrust inspired approach” BUT DOESN’T ACTUALLY ALTER ANTITRUST LAWS**

**Colombo ’18** [Ronald; Spring 2018; Professor of Law at Hofstra University, J.D. from New York University; St. John’s Law Review, “An Antitrust Approach to Corporate Free Exercise Claims,” vol. 92]

B. In Practice

**Implementation of an antitrust-inspired approach to** corporate free exercise exemptions could be accomplished via a number of ways. This Part sketches out the three most probable.

1. Regulatory

Much of the law that regulates businesses is administrative in nature. Indeed, the contraceptive mandate that precipitated the Hobby Lobby case was exactly that: a Health and Human Services regulation.2 70 Prior to promulgating their regulations, administrative agencies are ordinarily required to circulate their proposals for notice and comment.2 7 1 Properly conducted, this circulation should bring to light many-hopefully most potential problems that the proposed regulation would present to certain individuals on account of their religious beliefs and/or practices. In response to this information, **administrative agencies would** be well-advised to **craft** religious **exemptions to effectuate** the **principles** outlined **above**. Namely, **generous exemptions for firms** and businesses to the extent **that** they **lack market power**. This is completely within their power under the First Amendment, as explicitly recognized by the Supreme Court in Employment Division v. Smith.2 72

2. Legislative

Administrative agencies are beholden to their enabling legislation, and ordinarily tasked with the enforcement of certain laws passed by the legislatures of their jurisdictions. As such, **legislatures**, both state and federal, **could be more cognizant of potential conflicts** between the law and religiously grounded businesses, **and build religious exemptions**, along the lines set forth in this article, **into any newly proposed legislation.**

To the extent that RFRA and state-RFRAs are yielding unsatisfactory results, Congress and state legislatures could also consider amending these statutes. Such **amendments**, with respect to business entities, **could** both **strengthen** the **protections** afforded **to religiously grounded businesses, while** at the same time **limiting their applicability only to those businesses that lack market power**. Given that Burwell v. Hobby Lobby was a decision interpreting RFRA, and not the First Amendment per se, such an undertaking could effectively calibrate the Hobby Lobby decision as best deemed fit.

3. Judicial

Political will may not exist to propose new RFRAs or amend old RFRAs. Further, administrative agencies may lack the energy or resources to take into account all of the potential religious liberty implications of the regulations they promulgate. Consequently, if all else fails, the judiciary could readily effectuate the principles outlined in this article in their rendering of RFRA and state-RFRAs-and even the First Amendment to the extent applicable.

In all the cases appropriately brought under RFRA, as well as practically all the cases brought under state RFRAs, and in a narrow band of cases brought under the First Amendment itself,27 3 the government is put to the burden of demonstrating a "compelling government interest" in order to prevail in denying the sought-after exemption.27 4 In assessing whether this burden has been met, with regard to corporate claimants, **courts could consider the market power of said claimants**. In other words, courts could factor into their analysis the degree to which a corporate claimant wields market power. The greater a claimant's market power, the more compelling the government's interest as to that claimant if the law is one concerning access or antidiscrimination. 27 5

C. Additional Considerations

This article has illustrated a path forward in very broad strokes. The initial decision to lump together all for-profit business entities under the phrase "corporate free exercise" is, admittedly, subject to challenge. There are significant differences that characterize sole proprietorships, partnerships, and business corporations-differences that could very well impact the strength or the availability of free exercise claims. I freely recognize this, and welcome further scholarship delineating the religious liberty claims of these entities. Nevertheless, the relevancy of this article's argument persists: **in commercial contexts**, where a claimant's free exercise claim would impose costs on another party, **market power ought to factor into the exemption analysis.**

**CP solves and is distinct – only uses “insights of antitrust laws”**

**Colombo ’18** [Ronald; Spring 2018; Professor of Law at Hofstra University, J.D. from New York University; St. John’s Law Review, “An Antitrust Approach to Corporate Free Exercise Claims,” vol. 92]

**CONCLUSION**

**This article posits a way of utilizing the insights of antitrust law to help resolve the seemingly intractable dilemma of corporate religious liberty exemptions.**

**1NC---CP**

Civil RICO CP---

**The United States federal government should expand the scope of the civil RICO statute to prohibit a substantial amount of anticompetitive business practices by the private sector currently exempted from its core antitrust laws as free exercise.**

**Counterplan solves by prohibiting the same conduct via civil RICO---avoids legal antitrust barriers but carries the effect because civil RICO mirrors antitrust treble damages remedies**

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

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

II. POTENTIAL USE OF CIVIL RICO IN THE ANTITRUST CONTEXT

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

A. Circumventing Standing Barriers in Antitrust Law through Civil RICO

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

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

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

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

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

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

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

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

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

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

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

1. The Intracorporate Conspiracy Doctrine

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

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

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

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

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

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

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

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

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

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

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

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

(Ephraim Samuel, “A Bridge to Somewhere: How a Bolder Causal Analysis Can Shape Civil Rico into the Ideal Free Market Safeguard,” 54 St. Louis U. L.J. 609)

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

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

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

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

In Bridge, the Supreme Court unanimously held that a plaintiff raising a claim based on mail fraud under the Racketeer Influenced and Corrupt Organizations Act (RICO) 18 U.S.C. § 1964 is not required to demonstrate reliance on the defendant's alleged misrepresentations.17 RICO provides a private **right of action for treble damages** to "[a]ny person injured in his business or property by reason of a violation" of the Act.' 8 In Bridge, each year the Cook County, Illinois, Treasurer's Office auctioned tax liens acquired on the property of delinquent taxpayers. 19 These liens proved to be smart investments, since many property holders would be unable to redeem their property, and thus allowed the purchasers of the liens to acquire the property and collect significant gains. 2 0 The auction proved so lucrative that the County began limiting the number of bidders through its "Single, Simultaneous Bidder Rule." 21 The plaintiff, a regular customer at the auction (along with the defendant), brought suit under RICO against the defendant alleging the defendant company filed false attestations that it was in compliance with the County's rule.22

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

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

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

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

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

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

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

**Regulatory fraud is empirically most significant contributor to systemic financial crises—ex post litigation key**

**Griffin**, James A. Elkins Centennial Chair in Finance at McCombs School of Business at the University of Texas at Austin and a leading expert in Forensic Finance, **‘21**

(John M., “Ten Years of Evidence: Was Fraud a Force in the Financial Crisis?” *Journal of Economic Literature*, 59(4), 1293–1321)

A careful examination of the empirical academic evidence indicates that conflicts of interest, **misreporting**, and **fraud** were **central features** of the **securitization chain** leading up to the 2007–09 **financial crisis**. The academic evidence shows that the issues were widespread, as most firms engaged in underwriting, credit rating, originating, appraising, and CDO managing, which together facilitated massive amounts of securitization. Within origination practices there was large cross-sectional variation in the extent of fraudulent practices, and these practices, along with subprime lending more generally, strongly predict zip code level variation in both the 2003–06 boom and 2007–10 bust.

Given that securitized products facilitated a massive and costly dislocation in housing prices in the run-up, a subsequent economic recession, **and near banking meltdown in the collapse**, the unintended consequences of such practices can be **far costlier than gains from the initial activity**. While it would be difficult to estimate the total profits made from securitization in the precrisis boom, the entire combined revenue of Standard & Poor’s and Moody’s from 2003 to 2007 was $37 billion, whereas the total cost of the financial crisis is estimated to be over $22 trillion,25 or approximately 600 times that amount. Despite being difficult to detect and quantify, financial economists should not ignore the potential costs of conflicts of interest and fraud to our financial system.

Given that the statute of limitations had already passed on many legal claims by the time the specific evidences of fraud were made public in the Financial Crisis Inquiry Report (FCIC 2011), and that the $137 billion fines paid by banks led to no detectable labor market discipline of the responsible employees, policy makers may need to **reconsider enforcement**, statute of limitations length, and fines. **Tougher punishments** and **more resources for the legal system** may be necessary in a world of **increasing financial complexity** that makes detection more difficult and costly. Since regulators have historically been **largely unable to identify schemes ex ante**, increased enforcement and **larger penalties** may create **better forward-looking incentives**. Policy makers should consider the forward-looking implications of bailing out banks seemingly struggling from shortterm liquidity issues that may later be linked to wide-scale fraudulent activity. Forensic financial research may also be able to detect questionable activity in its early stages, when the cumulative spillover costs of fraud can hopefully be less severe.

Although **all of us had hoped** history would not repeat the same mistakes, the conflicts of interest regarding underwriters, rating agencies, originators, and appraisers at the heart of 2003–07 RMBS and CDO securitizations **appear to be of a similar nature** and an item of concern in **other securitized** (**collateralized loan obligation** and commercial mortgage-backed securities) and non-securitized markets **even recently**. As the financial crisis revealed serious structural issues in the prior period, the current COVID economic crisis could reveal the extent to which conflicts of interest and malfeasance have been **hiding in financial markets today**.

**Extinction--- unique given structural vulnerability from COVID**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**1NC---CP**

**All relevant states, territories, and the District of Columbia should establish that their antitrust laws prohibit a substantial amount of anticompetitive business practices by the private sector currently exempted from its core antitrust laws as free exercise. and threaten to revoke the corporate charters of entities which continue to engage in the plan’s conduct.**

**State invocation of the common law doctrine of *quo warranto* lets them threaten to revoke corporate charters—Spurs compliance that solves the case faster and more certainly**

**O’Brien 21** – JD, Wayne State

Ki Lee O'Brien, Judicial Law Clerk, US District Courts, NOTE: THE ULTRA VIRES DOCTRINE: EVALUATING QUO WARRANTO PROCEEDINGS AND THE POWER OF STATE ATTORNEYS GENERAL, 66 Wayne L. Rev. 699 (Winter 2021), Nexis

From these **cases**, a **common theme** emerges: **quo warranto challenges** that hold corporations accountable for their ultra vires actions can **force corporations to change their behavior**--**even if** the **state attorneys general decline to bring suit (**Unocal) or the **courts fail to formally act** ( Citizens Utilities). **If wielded by state attorneys general**, quo warranto actions have the **power to dissolve corporate charters and force corporations to forfeit their assets**. From challenging human rights violations to **fraudulent and deceptive practices**, ultra vires actions by state attorneys general **have the power** to **change corporate behavior** and--**as exemplified by these cases**--have a **lasting impact** for the public good.

[\*721] IV. CONCLUSION

While the use of quo warranto actions has **declined over the last century**, these actions **exist** as a powerful tool for state attorneys general to combat corporate crime through charter revocation and re-chartering. **Even if unused in practice**, it appears from recent cases that attorneys general **can** **leverage the threat** of **corporate dissolution** to **force corporations to change their practices**.

**1NC---DA**

Judicial Economics DA -

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

--\*Italics in original

**Ohlhausen 15** – Commissioner, FTC

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

B. CHOOSING THE RIGHT APPROACH

**Rather than expanding antitrust law** as some have proposed, we instead

recommend applying three screens to discern the best body of law to handle a

potential privacy issue. First, we suggest that **the type of harm** **should continue**

**to guide the choice of law, as set out** by **Congress** and developed by the **agencies** and **courts** for **decades.** That is, the **application of competition law is**

**appropriate only where the potential harm** is **grounded in** the actual or potential **diminution of economic efficiency**. If there is likely no efficiency loss

because of the conduct or transaction, **another legal avenue** for enforcement is

more appropriate and efficient. Second, the scope of the potential harm also

should aid in the choice of law. **Antitrust laws** are focused on **broader macroeconomic harms**, mainly the maintenance of efficient price discovery in

the markets, **whereas** the **consumer protection** laws are preoccupied with ensuring the **integrity** of each **specific** contractual bargain. These are complementary, but **discrete, enforcement goals**. Third, and finally, the available

remedies must be able to address effectively the potential harm. Enjoining a

merger may do little to prevent a privacy violation if the parties can simply

share the same consumer information under a contractual arrangement.

1. Focus on the Type of Harm

John Locke noted, “The great and chief end [ ] of . . . government, is the

preservation of [citizens’] property,” which includes their “lives, liberties, and

estates.”146 As we have shown, the government has **over time** pursued **specific**

laws **narrowly** tailored to address **particular harms**. This **trend** to more

**nuanced and sophisticated legal mechanisms** has allowed for deepened expertise and **greater analytical precision** in **both** competition **and** consumer protection. **Splicing them together** again, and **using the modern antitrust laws, which**

**are empirically focused on economic efficiency**, **to remedy harms relating to**

**normative concerns** about informational privacy **contradicts** the **specialized**

**nature** of these laws and **risks distorting them in ways** that would **leave** **both**

the law and consumers **worse off**. The **better approach** would be to **continue**

the measured improvement of **precise legal tools** directed to **specific harms**.

A **blended approach to antitrust** that **encompasses normative** privacy **concerns** also **would provide cover for** the **injection of other noncompetition factors into the analysis**. As a **normative** matter, privacy is **conceptually unsettled**

and, depending on who you ask, could **include other rights**, like property

rights or human dignity.147 The **introduction of these factors** could **shift antitrust law’s focus away from efficiency** and **alter** **its** relatively **predictable and**

**transparent application**.

**Arguments in response** to this concernabout **doctrinal distortion** **posit** that,

for example, the merged entity will have an increased incentive to break privacy promises it made to consumers when it collected the information, **making the issue cognizable under the antitrust laws**.148 [Footnote 148] 148 **While** the Clayton Act allows for the pursuit of **certain** prospective violations of the law, **the**

**issues that it confronts**, for example supracompetitive pricing resulting from an undue concentration of suppliers, are **fundamentally different** than **what the consumer protection laws contemplate**. Whereas the Clayton Act is **quantitative and agnostic** in its characterization of a merger as

a violation of law, the **consumer protection standards are** **qualitative**, requiring that an “act or

practice” be either **deceptive** or both **unfair** **and** cause substantial harm to the consumer. [End FN] Or that the aggregation of consumer data represents a reduction in quality, diminution in consumer

choice, or a heightened barrier to entry.149 **Although** these **concerns** could be

relevant **where** privacy is **an actual dimension of competition**, a **substantial**

**body of literature** **challenges** **application of these arguments more broadly** by

pointing out **the lack of limiting principles** for **theories of harm** **tethered** to

reductions of **choice** and the **heterogeneous** consumer demand for privacy.150

But, for our purposes, perhaps the **most important** point is that **attempting to**

**distort the antitrust laws** to **pursue** **subjective** **noncompetition harms** is ***unnecessary*** and **would take us back to a less sophisticated approach to law**

**enforcement.**

**That obliterates innovation—The key is what theories of competitive harm are legally cognizable**

**COC 21** – U.S. Chamber of Commerce

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

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

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

Antitrust IS NOT a tool for political change

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

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

Antitrust IS about protecting competition and consumers

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

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

Antitrust IS NOT about fairness or competitors

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

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

Antitrust IS highly technical

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

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

Antitrust IS NOT political

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

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

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

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

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

**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---DA**

**The court is moderating in response to public concerns over legitimacy.**

**Thomson-DeVeaux and Wiederkehr 20** – Amelia Thomson-DeVeaux is a senior writer for FiveThirtyEight. Anna Wiederkehr is a senior visual journalist for FiveThirtyEight. Citing political science professors from several universities.

Amelia Thomson-DeVeaux and Anna Wiederkehr, “The Supreme Court’s Big Rulings Were Surprisingly Mainstream This Year,” *FiveThirtyEight*, 13 July 2020, https://fivethirtyeight.com/features/the-supreme-courts-big-rulings-were-surprisingly-mainstream-this-year/.

The Supreme Court just wrapped up its first full term with two of Trump’s nominees on the bench. But **the court’s much-anticipated conservative revolution didn’t** really **happen this year**. To be sure, the last few weeks of the term were full of consequential decisions that hinged on just one vote. But even though there were some fierce disagreements among the justices, the court’s final rulings were actually not very controversial at all — at least from the perspective of most Americans.

**According to a recent survey by a group of researchers at Stanford, Harvard and the University of Texas, Austin**, which asked Americans about central issues facing the court, **the justices’ rulings were in line with public opinion in 8 out of 10 major cases**.1

There were just two exceptions. One was in a case that questioned the constitutionality of the structure of the Consumer Financial Protection Bureau; the Supreme Court ruled, contrary to a majority of Americans’ views, that the director of the CFPB was too insulated from executive branch oversight. The second was in one of the two rulings involving subpoenas seeking President Trump’s financial records. A majority of Americans said that the president should not be able to stop his financial documents from being turned over to Congress, but the Supreme Court stopped short of fully siding with the public. They didn’t entirely rule out Congress’s ability to subpoena these documents, but they did suggest there are serious limits on what Congress can demand from the president — suggesting he could block people from turning them over in some instances — and punted it back to the lower courts.

Maya Sen, a political science professor at Harvard University who helped develop the survey, said she was a little surprised to see that Americans leaned to the left on so many of the cases. “It seemed to set the stage for some potential dissonance between public opinion and how the court’s conservative majority might rule,” she said. And it certainly wasn’t hard to imagine that this term’s Supreme Court decisions would cut against the prevailing public view on issues like abortion or gay rights.

But that’s not what happened. So what does it mean that so many of the court’s high-profile rulings were also pretty mainstream? The justices are notoriously tight-lipped about how their decisions are made (and they probably aren’t using this or any other poll to guide their decisions), but **several** of the **experts** I talked with **saw this term as evidence that the Supreme Court isn’t immune to the winds of public opinion** — particularly in an election year when the possibility of court-packing and term limits for judges came up more than once.

For one thing, there’s evidence that it’s pretty rare for the Supreme Court to lurch too far from the mainstream. **Several studies have found that the court’s ideological tilt generally matches the public’s over time**. Of course, that isn’t because the justices are trying to tailor their opinions to match Americans’ views. These findings could simply indicate that the court is influenced by the same forces that shape public opinion overall.2

But it’s also possible that **the demands of public opinion** — **and concerns about institutional legitimacy** — **were weighing particularly heavily on** Chief Justice John **Roberts** this year. After all, the partisan gap in approval of the Supreme Court has widened significantly in recent years. And research by Peter K. Enns, a political science professor at Cornell University, suggests that **nonideological considerations** — **like public opinion** — **have more of an impact on the justice who casts the decisive vote in close cases**, which was a position Roberts occupied several times this year.

One explanation that came up multiple times in interviews is that Roberts may have wanted to bolster the image of the court as nonpartisan this term so it would have more freedom to release unpopular opinions in the future. “I think **Roberts in particular is** probably **concerned about tarnishing the court with the reputation of being a wildly political branch that makes decisions the public doesn’t like**,” said Tom Clark, a political scientist at Emory University who studies the Supreme Court’s relationship with public opinion. “He perhaps wants to preserve the court’s legitimacy and build up a reservoir of goodwill so they can make unpopular decisions in the future without having it blow up in their face.”

**Plan increases court legitimacy**

**Crane 21** – Professor of law at the University of Michigan.

Daniel A. Crane, “Antitrust Antitextualism,” *Notre Dame Law Review*, vol. 96, no. 3, 28 January 2021, pp. 1253-1255, https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4952&context=ndlr.

The phenomenon of antitrust antitextualism is important for understanding the U.S. antitrust system, its history, and the possibilities for its reform, but it also has significance for more general understandings of how statutes are written and how their interpretation functions or should function. Scholars have argued that Congress sometimes means statutory language to be purely expressive, indeed that it means for the courts not to give that language legal effect.262 But the story of antitrust antitextualism goes far beyond judicial excision of stray words or phrases from the antitrust statutes. **In important instances**, particularly with respect to the FTC and Robinson-Patman Acts, **the courts have entirely rewritten the textual meaning and legislative purpose of the statute**.263 **Through a chronic cycle of legislative enactment, judicial disregard, and implicit legislative acquiescence, Congress and the courts have constituted the common-law system that judges** and scholars across the political spectrum **now consider normalized** and perhaps even inevitable.

This pattern of judicial/legislative engagement (with the executive playing an enabling role) raises both analytical and normative questions for the jurisprudence of statutory interpretation. Analytically and descriptively, is antitrust law sui generis, or do other statutory domains exhibit a similar, but perhaps unrecognized, dynamic? Do the antitrust laws idiosyncratically operate in a space of equipoise between Jeffersonian idealism and Hamiltonian pragmatism, with Congress implicitly assigning itself the role of idealist orator while acquiescing as the courts provide pragmatic counterbalance? Or is this yin and yang phenomenon, disguised in the interpretive rhetoric of broad delegations and common-law method, a more general one, in maybe unappreciated ways? Once a pattern is observed in one legal domain, it tends to be observed soon in others as well. Finding a recurrence of the antitrust pattern elsewhere could provide new insights on statutory interpretation, separation of powers, and the de facto institutional roles of the legislative and judicial branches.

Normatively, **there is much to question about the democratic legitimacy of the implicit system of legislative declaration and judicial reformation** described in this Article. There seems little in it that either a committed textualist or a committed purposivist could defend, since **the system entails the courts honoring neither what Congress wrote nor what it meant**. To rehabilitate the system’s democratic legitimacy, a subtle purposivist might say that what Congress actually meant—in a deep sense—must be gathered from the norms of the system itself rather than from conventional evidence such as floor statements by members of Congress, committee reports, or other contemporaneous sources of public meaning. Perhaps members of Congress legislate against a backdrop of expectation that the courts will continue to read down new statutes to accommodate pragmatic efficiency interests, and consenting to this implicit system, the members feel liberated to express more in the statute than they actually mean as prescriptive. But if that is wholesome democratic practice, that case is yet to be made.

Finally, **if the system lacks democratic legitimacy, there is the question of how to begin unwinding it**—and whether anyone has the incentive to try. Most committed textualists are also committed economic conservatives;264 it would take abundant motivation from pure principle for the average Federalist Society judge to restore the original meaning of the Robinson-Patman Act or the Clayton Act’s incipiency presumption, much less mount a cataclysmic return to section 1’s absolutist prohibition on agreements restraining trade. **Progressive judges**, perhaps **looking** for leverage **to unwind the perceived laxity of Chicago School antitrust, might invoke statutory text or original meaning as a foil**, but they too face Pandora’s Box. To insist on taking at face value Congress’s words and ostensible purposes—words and purposes to which Congress itself might not have been fully committed—would risk considerable backlash after the long reign of moderating common law and the system’s reliance on the courts to correct Congress’s textual overstatements. So maybe it should count in favor of the system’s normative legitimacy that it has worked for 130 years without anyone complaining too much.

**They’ll overturn Roe.**

**Stohr 20** – Supreme Court reporter for Bloomberg News. JD from Harvard.

Greg Stohr, “Roberts faces moment of truth on abortion issue at Supreme Court,” *Bloomberg News*, 28 February 2020, https://www.bloomberg.com/news/articles/2020-02-28/roberts-faces-moment-of-truth-on-abortion-issue-at-supreme-court.

**For** U.S. Chief Justice John **Roberts, the moment of truth on abortion is coming.**

**The Supreme Court** on Wednesday **will hear its first abortion case since Roberts became the pivotal vote on the issue**. Four years after invalidating a Texas law requiring clinic doctors to have hospital admitting privileges, the court will consider whether to switch directions and uphold a similar law in Louisiana.

**The argument will test Roberts’s appetite for rolling back abortion-rights precedents and could foreshadow a fight over** the landmark 1973 **Roe v. Wade** ruling. The justices will rule by the end of June, potentially making abortion and the court itself central issues in the November election. President Donald Trump’s administration is supporting the Louisiana law.

Opponents say the law would leave the state with only one clinic, in New Orleans, and just one abortion doctor to serve the 10,000 women who seek to end a pregnancy every year in the state.

“Roe becomes meaningless if there is no access to abortion,” said Kathaleen Pittman, director of the Hope Medical Group for Women, a Shreveport clinic that says it would have to close if the measure took effect. “These women that we work with now do not have the means to travel, to fly out of state, to go to other places for their care.”

Conservative states have been moving to sharply restrict abortion rights in recent years. States enacted 58 new abortion restrictions alone, including a total ban by Alabama, according to the Guttmacher Institute, a research organization that backs reproductive rights. Many of those laws are on hold.

Supporters of the Louisiana measure, which carries criminal penalties, say the state is trying to protect women from unscrupulous and incompetent abortion providers. Among other arguments, they are urging the court to say that Hope and two unidentified doctors lack the legal right to challenge the law on behalf of their patients.

“We need to be listening to women, not to abortion businesses,” said Catherine Glenn Foster, president of Americans United for Life.

**Roberts** — now back at the court full-time after presiding over Trump’s impeachment trial — **dissented from the 2016 ruling that struck down the Texas rules** and gave abortion-rights supporters reason to think the issue was resolved. The 5-3 decision said the state’s law “provides few, if any, health benefits for women” and “poses a substantial obstacle to women seeking abortions.”

**That was before the court’s composition changed with the addition o**f Trump appointees Neil **Gorsuch and** Brett **Kavanaugh**. The latter succeeded Justice Anthony Kennedy, who had been the court’s swing vote on abortion and voted with the majority to throw out the Texas law.

**Those changes have left Roberts**, a 2005 appointee of Republican President George W. Bush, **squarely in the middle. Last year he joined the four Democratic-appointed justices to put the Louisiana law on hold** while the court considered whether to intervene. Kavanaugh and Gorsuch both voted to let the law take effect, hinting they were at least open to upholding it.

**Roberts’ vote might suggest he has questions about the federal appeals court ruling that upheld the Louisiana law**. The 2-1 decision said the impact wasn’t as great as in Texas, and the majority blamed Louisiana doctors for not making good-faith efforts to get the required privileges.

**But Roberts gave no explanation for his vote, and he may view the Louisiana law differently now that the court is directly considering it.**

**If he votes to throw out the Louisiana law, “it will be an indication that he wants to move slowly on abortion and does not want to expose the court to a lot of criticism**, at least at this point,” said David Strauss, a constitutional law professor at the University of Chicago Law School who signed a brief urging the court to strike down the law.

**If Roberts votes to uphold the Louisiana statute, “that will suggest that he’s willing to be more aggressive**, although a lot will depend on how the opinion is written,” Strauss said.

Roberts steered the court toward restricting abortion rights in a 2007 ruling he could use as a template. That decision, issued during Roberts’ second term as chief justice, upheld a federal ban on a rarely used late-term abortion procedure that opponents called “partial-birth abortion.”

The decision, written by Kennedy, didn’t overturn a 2000 ruling that struck down a similar Nebraska ban. Instead, Kennedy said the federal statute was clearer in describing what procedures were outlawed and how doctors could ensure they wouldn’t be prosecuted.

**Roberts is far more reluctant to overturn precedents than his conservative colleagues**. He said in his 2005 Senate confirmation hearing that overruling a precedent is a “jolt to the legal system.”

In that testimony, **he called** the 1992 **Planned Parenthood v. Casey** abortion-rights ruling **a “precedent of the court entitled to respect under principles of stare decisis**,” the policy that the court generally won’t disturb its settled rulings.

In the hospital-privileges case, abortion-rights advocates say the Texas and Louisiana rules are identical. Louisiana says there are enough differences that the court need not rule the same on both, but the state says the court should overturn the Texas ruling if necessary.

**Reproductive rights key to solve overpopulation---extinction.**

**Shanger 14** --- Zoë Schlanger is a Newsweek reporter based in New York, Elijah Wolfson is Newsweek's Senior Editor, primarily responsible for the publication's science, health and technology coverage, Newsweek, December 18, 2014, “How to Defuse the Population Bomb”, http://www.newsweek.com/2014/12/26/fixing-crowded-earth-293024.html

It’s an ancient problem, **with a very obvious solution: give women full reproductive rights, including easy access to contraception** and other family-planning options. Family planning and reproductive health are some of **the most crucial tools for reducing human suffering in a** changing and **increasingly crowded world.**

No Food, No Water

Like many Kibera residents, Akinyi moved to the city only recently—she arrived a year ago from “the upcountry.” It’s not clear how many people live in Kibera, but the Kenyan census says that at least 200,000 are crammed into this makeshift, two-square-mile shantytown. The impact of this massing of humans is like a physical blow: The land and city infrastructure can’t keep up with the people. Step between the houses of Kibera and into a back alley and you are likely to come across gulches carved into the dirt by streams of wastewater, the ad hoc sewage system here, and garbage and waste piled high.

Kenya is in the midst of a population explosion. With a high fertility rate—the average Kenyan woman has 4.5 children, compared with 2.3 worldwide—Kenya’s population of 44 million is projected to more than double to 97 million by 2050. Meanwhile, more than a quarter of Kenyan women are still unable to access the contraceptives they want. Despite over a century of family-planning aid work, it remains one of the most misunderstood aspects of international development. This is in large part because of Western efforts to apply a coercive form of population control under the guise of “family planning.”

Globally, birth rates are lower today than ever, and more women than ever before are masters of their own bodies. But **global populations are** still **on the rise**, and in many parts of the world—Africa most prominently—the problems created by a lack of reproductive rights **are getting more dire**. In 1650, there were about 500 million people on Earth. By 1804, the population had doubled to 1 billion. In just 123 years, it doubled again, to 2 billion, and it doubled yet again, to 4 billion, by 1974. The world’s population passed 7 billion in 2011. **The latest U.N. projections suggest we’ll be up to 12.3 billion by 2100, with no stabilization in sight.**

**Meanwhile the rest of Earth’s flora and fauna are being pushed aside.** We are in the midst of the biggest mass-extinction event since the dinosaurs were obliterated 65 million years ago. A recent paper in Science found that plant and animal species are now going extinct at least 1,000 times faster than they did before humanity’s arrival, due mostly to human-caused habitat destruction and climate change. Some scientists have taken to describing our current epoch as the Anthropocene, to highlight the fact that humans have irreversibly changed the ecological makeup of the planet.

In the 1970s, with the global population hovering around 4 billion, humanity began using more resources than the Earth could replenish each year, and was producing more waste than it could absorb, pushing us all deeper and deeper into “ecological overshoot,” according to California think tank Global Footprint Network. It estimates that in 2014 humans used the resources of **1.5 Earths.**

Most of the population growth is occurring in African nations. The continent hosts 15 percent of the world’s people; by 2050, the U.N. projects, that number will be closer to 25 percent. This is particularly problematic, because much of the continent is also where people are less able to adapt to the effects of overpopulation, says John Wilmoth, director of the U.N. Population Division. If the world can’t meet Africa’s need for family planning, the result will be more and more poor, and poorly educated, people, he says. Kenya, Ethiopia and Malawi, for example, are three nations where large numbers of women can’t get the contraception they need and are at high risk for climate change effects like flooding and drought.

As climate change turns more coasts into flood zones and more farmland to desert, the damage will be inextricably linked to population growth—**the more of us there are, the more water, food and energy we’ll need to survive.** In the past three years, Australia, Canada, China, Russia and the U.S. have all suffered devastating floods and droughts that severely impaired food harvests. Earlier this year, the Food and Agriculture Organization said that to feed a population of 9 billion in 2050, the world must increase its food production by an average of 60 percent or else **risk serious food shortages that could bring social unrest and civil wars. By comparison, wheat and rice production have grown at a rate of less than 1 percent for the past 20 years.**

Mark Montgomery, a scholar at the Population Council, studies how the urban population boom will cause dramatic freshwater shortages. By 2050, the U.N. projects that 70 percent of the world’s population will live in cities. Already, 150 million people in cities around the world suffer from freshwater shortages. In a recent paper, Montgomery and his colleagues found the number of urbanites with inadequate water will rise by more than 1 billion by 2050, and cities in certain regions “will struggle to find enough water for the needs of their residents.”

The Big Taboo

Roger-Mark de Souza is fed up. The director of the population, environmental security and resilience arm of the Wilson Center, a government think tank in Washington, D.C., he says most of the discussion about adapting to climate change ignores the population explosion. “If you have all of these initiatives being put in place, and you have ongoing population growth, to what end?” he asks. “If we only invest in programs that do not take into account these broader social interventions, there is a missed opportunity.”

The Green Climate Fund, perhaps the most high-profile fund helping developing countries adapt to climate change, does not say anything about population on its website. The United Nations Framework Convention on Climate Change, which manages climate-focused “national adaptation programmes of action” for the least-developed countries, devotes a section of its website to the role gender plays in climate change. Women, it explains, are more vulnerable to its ravages and must be included in adaptation efforts. But family planning and contraception aren’t on the official list of adaptation projects.

This failure has been exacerbated by the long and ugly history of wealthy, predominantly white powers manipulating family planning on the continent for several centuries. Europeans came to Africa “looking for bodies,” says Nwando Achebe, a professor of history at Michigan State University. First was the slave trade. Then came the colonist era, when Europeans settled in Africa, establishing massive farms and plantations requiring local labor. Both groups of invaders “needed a population of able-bodied Africans,” says Achebe. “They were enacting laws to make sure the population grew.”

Columbia University history professor Matthew Connelly argues that the 20th century was filled with wrong-minded approaches to family planning that have ranged from using risky contraceptives on unwitting clients—in 1967 a Ford Foundation report praised a proposal for a new technology involving “an annual application of a contraceptive aerial mist” (from a single airplane over India)—to offering cash incentives to poor people who agreed to be sterilized. Policies like these “made family planning seem like an imposition, rather than something that served clients’ own ­interests,” writes Connelly, and the backlash was ferocious. Revolutionary leaders worldwide (including Daniel Ortega in Nicaragua and Zulfikar Ali Bhutto in Pakistan) attacked family planning as a symbol of American imperialism, and the Vatican jumped on board, helping organize a global campaign against family-planning efforts, which just happened to line up with the Catholic Church’s official stance on procreation, particularly in developing countries.

In 1984, President Ronald Reagan instituted what has become known as the “global gag rule” (officially the Mexico City Policy), which stopped U.S. dollars from flowing to any international family-planning groups that provided abortions. The rule also stipulated that any organization receiving U.S. funding could not educate patients on abortion or take a stand against unsafe abortion. President Bill Clinton repealed the policy in 1993, George W. Bush reinstated it in 2001, and Barack Obama repealed it again in 2009. If a Republican takes the presidency in 2016, the gag rule will likely come back.

When the gag rule was in effect, United States Agency for International Development (USAID) funding to family-planning organizations plummeted. Clinics providing everything from condom distribution to HIV/AIDS treatment to neonatal care cut back their staff and services, and in some cases shuttered their doors entirely. In some cases, the rule backfired: Kelly Jones, a senior researcher at the International Food Policy Research Institute, found that in Ghana during gag rule periods, rural pregnancies increased by 12 percent and the rural abortion rate increased right along with it, going up by 2.3 percent.

Meanwhile, U.S. funding for family planning abroad has flatlined for several years, at about $530 million, although it would take relatively little money to make an enormous difference. For every dollar spent on family planning, USAID’s website boasts, up to $6 is saved on health care, immunization, education and other services. Put another way, every dollar not spent on family planning will cost the U.S. up to $6 more in the long run. “It’s not difficult to understand that contraceptive devices are relatively cheap compared to the cost of building roads and schools and hospitals,” Wilmoth, the head of the U.N. Population Division, says. “So it’s not for lack of money that it isn’t accomplished.”

While the West waffles on providing aid for family planning, “**Africans are asking for** [**it**],” says Faustina Fynn-Nyame, Marie Stopes’s country director for Kenya, who is from Ghana. “Africans see the importance of this. **It’s not the West telling us to do something.”**

Leaving Half the Population Behind

In 2012, the estimated number of **unintended pregnancies was 80 million** (63 million in the developing world). **World population growth? Also 80 million.** In other words, **if women all over the world had the ability to prevent the pregnancies they don’t want, the world’s population would stabilize.**

That would immediately improve both maternal and infant health. In most parts of the global south, **access to abortion is** either **extremely limited or prohibited.** In Kenya, a nurse was sentenced to death for providing abortions this past September. Any pregnancy terminations in Nairobi have to be done on the backstreets, often using DIY drugs made by chemists more concerned with sales than efficacy, says Njagi, the Marie Stopes clinic manager. That’s how Florence Akinyi ended up nearly bleeding to death in a wheelbarrow.

Worldwide, it’s estimated that 20 million women have unsafe abortions every year because they lack better options. Over 5 million of them end up needing urgent medical attention, and **47,000 die in the process**. In addition, in the developing world pregnancies are often dangerous. Every year, an estimated 358,000 women die during childbirth, and many more suffer debilitating pregnancy-related health problems. In sub-Saharan Africa, the lifetime risk of dying from pregnancy-related problems is 1 in 22. **Lower pregnancy rates and you lower those risks**—fewer pregnancies means resources don’t have to be spread dangerously thin.

Since 2011, the United Nations Population Fund (working to “ensure universal access to reproductive health, including family planning”) has been led by Dr. Babatunde Osotimehin, a Nigerian national. At the U.N. General Assembly meeting in September, Osotimehin urged the group to focus on gender equality. “We cannot advance by leaving half of the population—our women and girls—behind,” he said. At the same meeting, Bathabile Dlamini, a representative of South Africa, said her country had recently implemented policies allowing access to safe abortion services and had seen an increase in life expectancy from 54 in 2005 to 60 in 2011.

Of course, abortion is the last resort; it’s far better to help women before conception. According to research from the Guttmacher Institute, 39 percent of all pregnancies in sub-Saharan Africa—an estimated 19 million—were unintended in 2012. Of those 19 million, the institute estimates 10 million resulted in unplanned births, 3 million in miscarriages and 6 million in abortions, most performed in unsafe conditions. Providing access to contraception for every woman in sub-Saharan Africa who wanted it might prevent 5 million abortions and save the lives of 48,000 women. What’s more, 555,000 fewer newborns and infants would die, cutting infant mortality in the region by 22 percent.

Many Kenyan women would like to have power over how many children they have, and when. “**We have a high unmet need**,” says Fynn-Nyame, adding that “20.9 percent of married women say they want to control their fertility somehow but don’t have the access, money or awareness of where to go.”

**In the developing world, 222 million women want contraceptives but can’t get them.** (That is more than the population of Germany, France, Belgium, Spain and the Netherlands combined, notes a video by Population Action International.) **Meeting their needs would have prevented 54 million unwanted pregnancies**, 26 million abortions, 79,000 deaths of mothers in pregnancy or childbirth and 1.1 million infant deaths in 2012 alone.

**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.

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

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

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

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

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

Biopharma Merger Review in a Nutshell

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

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

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

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

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

The FTC Is Jettisoning Sound Merger Policy

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

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

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

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

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

Conclusion

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

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

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

EID = Emerging Infectious Disease

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

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

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

Emerging and reemerging infectious diseases

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

[[Figure Omitted]]

Although nonemerging infectious diseases (not listed in Table 1), two other major mosquito-borne viral infections are yellow fever and dengue. Yellow fever, known for centuries and an Aedes mosquito-borne disease, is endemic in more than 40 countries across Africa and South America. Since 2016, several yellow fever outbreaks have occurred in Angola, Democratic Republic of Congo, Nigeria and Brazil to cite a few10, raising major concerns about the adequacy of yellow fever vaccine supply. Four live attenuated vaccines derived from the live attenuated yellow fever strain (17D)11 and prequalified by the WHO (World Health Organization) are available12.

Dengue is an increasing global public health threat with the four dengue virus types (DENV1–4) now cocirculating in most dengue endemic areas. Population growth, an expansion of areas hospitable for Aedes mosquito species and the ease of travel have all contributed to a steady rise in dengue infections and disease. Dengue is common in more than 100 countries around the world. Each year, up to 400 million people acquire dengue. Approximately 100 million people get sick from infection, and 22,000 die from severe dengue. Most seriously affected by outbreaks are the Americas, South/Southeast Asia and the Western Pacific; Asia represents ~70% of the global burden of disease (https://www.cdc.gov/dengue). Several vaccines have been developed13. A single dengue vaccine, Sanofi Pasteur’s Dengvaxia based on the yellow fever 17D backbone, has been licensed in 20 countries, but uptake has been poor. A safety signal in dengue-seronegative vaccine recipients stimulated an international review of the vaccine performance profile, new WHO recommendations for use and controversy in the Philippines involving the government, regulatory agencies, Sanofi Pasteur, clinicians responsible for testing and administering the vaccine, and the parents of vaccinated children14.

Two bacterial diseases, old scourges of humanity, are endemic and responsible for recurrent outbreaks and are increasingly antimicrobial resistant. Cholera, caused by pathogenic strains of Vibrio cholerae, is currently in its seventh global pandemic since 1817; notably, the seventh pandemic started in 196115. Global mortality due to cholera infection remains high, mainly due to delay in rehydrating patients. The global burden of cholera is estimated to be between 1.4 and 4.3 million cases with about 21,000–143,000 deaths per year, mostly in Asia and Africa. Tragic outbreaks have occurred in Yemen and Haiti. Adding to rehydration therapy, antibiotics have been used in the treatment of cholera to shorten the duration of diarrhea and to limit bacterial spread. Over the years, antimicrobial resistance developed in Asia and Africa to many useful antibiotics including chloramphenicol, furazolidone, trimethoprim-sulfamethoxazole, nalidixic acid, tetracycline and fluoroquinolones. Several vaccines have been developed and WHO prequalified; these vaccines constitute a Gavi-supported global stockpile for rapid deployment during outbreaks16.

Typhoid fever is a severe disease caused by the Gram-negative bacterium Salmonella enterica subsp. enterica serovar Typhi (S. Typhi). Antimicrobial-resistant S. Typhi strains have become increasingly common. The first large-scale emergence and spread of a novel extensively drug-resistant (XDR) S. Typhi clone was first reported in Sindh, Pakistan17,18, and has subsequently been reported in India, Bangladesh, Nepal, the Philippines, Iraq and Guatemala19,20. The world is in a critical period as XDR S. Typhi has appeared in densely populated areas. The successful development of improved typhoid vaccines (conjugation of the Vi polysaccharide with a carrier protein) with increased immunogenicity and efficacy including in children less than 2 years of age will facilitate the control of typhoid, in particular in XDR areas by decreasing the incidence of typhoid fever cases needing antibiotic treatment21,22.

A model of vaccine development for emerging infectious diseases

The understanding of emerging infectious diseases has evolved over the past two decades. A look back at the SARS-CoV outbreak in 2002 shows that—despite a small number of deaths and infections—its high mortality and transmissibility caused significant global disruption (see Table 1). The epidemic ended as work on vaccines was initiated. Since then, the disease has not reappeared—wet markets were closed and transmission to humans from civets ceased. Consequently, work on vaccines against SARS-CoV ended and its funding was cut. Only a whole inactivated vaccine23 and a DNA vaccine24 were tested in phase 1 clinical trials.

Following a traditional research and development pipeline, it takes between 5 and 10 years to develop a vaccine for an infectious agent. This approach is not well suited for the needs imposed by the emergence of a new pathogen during an epidemic. Figure 1 shows a comparison of the epidemic curves and vaccine development timelines between the 2014 West African Ebola outbreak and COVID-19. The 2014 Ebola epidemic lasted more than 24 months with 11,325 deaths and was sufficiently prolonged to enable the development and testing of vaccines for Ebola, with efficacy being shown for one vaccine (of several) toward the end of the epidemic25,26. What makes the COVID-19 pandemic remarkable is that the whole research and development pipeline, from the first SARS-CoV-2 viral sequenced to interim analyses of vaccine efficacy trials, was accomplished in just under 300 days27. Amid increasing concerns about unmitigated transmission during the 2013–2016 Western African Ebola outbreak in mid-2014, WHO urged acceleration of the development and evaluation of candidate vaccines25. To ensure that manufacturers would take the Ebola vaccine to full development and deployment, Gavi, the Vaccine Alliance, publicly announced support of up to US$300 million for vaccine purchase and followed that announcement with an advance purchase agreement. Ironically, there had been Ebola vaccines previously developed and tested for biodefense purposes in nonhuman primates, but this previous work was neither ‘ready’ for clinical trials during the epidemic nor considered commercially attractive enough to finish development28.

[[Figure Omitted]]

From these perceived shortcomings in vaccine development during public health emergencies arose the Coalition for Epidemic Preparedness Innovations (CEPI), a not-for-profit organization dedicated to timely vaccine development capabilities in anticipation of epidemics29,30. CEPI initially focused on diseases chosen from a list of WHO priority pathogens for EIDs—Middle East respiratory syndrome (MERS), Lassa fever, Nipah, Rift Valley fever (RVF) and chikungunya. The goal of CEPI was to advance candidate vaccines through phase 2 and to prepare stockpiles of vaccine against eventual use/testing under epidemic circumstances. CEPI had also prepared for ‘disease X’ by investing in innovative rapid response platforms that could move from sequence to clinical trials in weeks rather than months or years, such as mRNA and DNA technology, platforms that were useful when COVID-19 was declared a global health emergency in January 2020, and a pandemic in March 202031,32.

CEPI has been able to fund several vaccine development efforts, among them product development by Moderna, Inovio, Oxford–AstraZeneca and Novavax. Providing upfront funding helped these groups to advance vaccine candidates to clinical trials and develop scaled manufacturing processes in parallel, minimizing financial risk to vaccine developers. The launch of the larger US-funded Operation Warp Speed33 further provided companies with funding—reducing risks associated with rapid vaccine development and securing initial commitments in vaccine doses.

Vaccine platforms and vaccines for emerging infectious diseases

**Vaccines** are the **cornerstone** of the management of **infectious disease outbreaks** and are the **surest means** to defuse pandemic and **epidemic risk**. The faster a vaccine is **deployed**, the faster an outbreak can be **controlled**. As discussed in the previous section, the standard vaccine development cycle is **not suited** to the needs of **explosive pandemics**. **New vaccine platform technologies** however may **shorten that cycle** and make it possible for multiple vaccines to be more **rapidly developed**, **tested** and **produced34**. Table 2 provides examples of the most important technical vaccine platforms for vaccines developed or under development for emerging viral infectious diseases. Two COVID-19 vaccines were developed using mRNA technology (Pfizer–BioNTech35 and Moderna36), both showing safety and high efficacy, and now with US Food and Drug Administration (FDA) emergency use authorization (EUA)37,38 and European Medicines Agency (EMA) conditional marketing authorization39,40. While innovative and encouraging for other EIDs, **it is too early to assert that mRNA vaccines represent a universal vaccine approach that could be broadly applied to other EIDs** (such as bacterial or enteric pathogens). While COVID-19 mRNA vaccines are **a useful proof of concept**, gathering lessons from their **large-scale deployment** and **effectiveness** studies still **requires more work** and time.

[[Figure Omitted]]

While several DNA vaccines are licensed for veterinary applications, and DNA vaccines have shown safety and immunogenicity in human clinical trials, no DNA vaccine has reached licensure for use in humans41. Recombinant proteins vary greatly in design for the same pathogen (for example, subunit, virus-like particles) and are often formulated with adjuvants but have longer development times. Virus-like particle-based vaccines used for hepatitis B and human papillomavirus are safe, highly immunogenic, efficacious and easy to manufacture in large quantity. The technology is also easily transferable. Whole inactivated pathogens (for example, SARS-CoV-2, polio, cholera) or live attenuated vaccines (for example, SARS-CoV-2, polio, chikungunya) are unique to each pathogen. Depending on the pathogen, these vaccines also may require biosafety level 3 manufacturing (at least for COVID-19 and polio), which may limit the possibility of technology transfer for increasing the global manufacturing capacity.

Other vaccines are based on recombinant vector platforms, subdivided into nonreplicating vectors (for example, adenovirus 5 (Ad5), Ad26, chimpanzee adenovirus-derived ChAdOx, highly attenuated vectors like modified vaccinia Ankara (MVA)) and live attenuated vectors such as the measles-based vector or the vesicular stomatitis virus (VSV) vector. Either each vector is designed with specific inserts for the pathogen targeted, or the same vector can be designed with different inserts for the same disease. The development of the Merck Ebola vaccine is an example. ERVEBO is a live attenuated, recombinant VSV-based, chimeric-vector vaccine, where the VSV envelope G protein was deleted and replaced by the envelope glycoprotein of Zaire ebolavirus. ERVEBO is safe and highly efficacious, now approved by the US FDA and the EMA, and WHO prequalified, making VSV an attractive ‘platform’ for COVID-19 and perhaps for other EID vaccines26 although the −70 °C ultracold chain storage requirement still presents a challenge.

Other equally important considerations are **speed of development**, **ease of manufacture** and **scale-up**, **ease of** **logistics** (presentation, storage conditions and administration), **technology transfer** to other manufacturers to ensure worldwide supply, and **cost of goods**. Viral vectors such as Ad5, Ad26 and MVA have been used in HIV as well as in Ebola vaccines42. Finally, regulatory authorities do not approve platforms but vaccines. Each vaccine is different. However, with each use of a specific technology, regulatory agencies may, over time, become more comfortable with underlying technology and the overall safety and efficacy of the vaccine platform, allowing expedited review and approvals in the context of a pandemic43. With COVID-19, it meant that the regulatory authorities could permit expedited review of ‘platform’ technologies, such as RNA and DNA, that had been used (for other conditions) and had safety profiles in hundreds of people.

**Adv 1**

**Polarization is inev and way too many alt causes**

**Illing 17**

Sean, Oct 13, 2017, 20 of America's top political scientists gathered to discuss our democracy. They're scared, <https://www.vox.com/2017/10/13/16431502/america-democracy-decline-liberalism>

On October 6, some of America’s top political scientists gathered at Yale University to answer these questions. And **nearly everyone agreed:** American democracy is eroding on multiple fronts — **socially, culturally, and economically**. The scholars pointed to breakdowns in social cohesion (meaning citizens are more fragmented than ever), the rise of **tribalism**, the erosion of democratic norms such as a **commitment to rule of law,** and a loss of faith in the electoral and economic systems as clear signs of democratic erosion. No one believed the end is nigh, or that it’s too late to solve America’s many problems. Scholars said that America’s institutions are where democracy has proven most resilient. So far at least, our system of checks and balances is working — the courts are checking the executive branch, the press remains free and vibrant, and Congress is (mostly) fulfilling its role as an equal branch. But there was a sense that the alarm bells are ringing. Yascha Mounk, a lecturer in government at Harvard University, summed it up well: “If current trends continue for another 20 or 30 years, **democracy will be toast.”** “Democracies don’t fall apart — they’re taken apart” Nancy Bermeo, a politics professor at Princeton and Harvard, began her talk with a jarring reminder: Democracies don’t merely collapse, as that “implies a process devoid of will.” Democracies die because of deliberate decisions made by human beings. Usually, it’s because the people in power take democratic institutions for granted. They become disconnected from the citizenry. They develop interests separate and apart from the voters. They push policies that benefit themselves and harm the broader population. Do that long enough, Bermeo says, and you’ll cultivate an angry, divided society that pulls apart at the seams. So how might this look in America? Adam Przeworski, a democratic theorist at New York University, suggested that democratic erosion in America begins with a breakdown in what he calls the “class compromise.” His point is that democracies thrive so long as people believe they can improve their lot in life. This basic belief has been “an **essential ingredient** of Western civilization during the past 200 years,” he said. But fewer and fewer Americans believe this is true. Due to **wage stagnation**, **growing inequalities**, **automation**, and a **shrinking labor market**, millions of Americans are deeply pessimistic about the future: 64 percent of people in Europe believe their children will be worse off than they were; the number is 60 percent in America. That pessimism is grounded in economic reality. In 1970, 90 percent of 30-year-olds in America were better off than their parents at the same age. In 2010, only 50 percent were. Numbers like this cause people to **lose faith** in the system. What you get is a spike in extremism and a retreat from the political center. That leads to **declines in voter turnout** and, consequently, more opportunities for fringe parties and candidates. Political polarization is an obvious problem, but researchers like Przeworski suggest something more profound is going on. Political theorists like to talk about the “social compact,” which is basically an implicit agreement among members of society to participate in a system that benefits everyone. Well, that only works if the system actually delivers on its promises. If it fails to do so, if it leads enough people to conclude that the alternative is less scary than the status quo, the system will implode from within. Is that happening here? Neither Przeworski nor anyone else went quite that far. But we know there’s a growing disconnect between productivity (how hard people work) and compensation (how much they’re paid for that work). At the same time, we’ve seen a spike in racial animus, particularly on the right. It seems likely there’s a connection here. Przeworski believes that American democracy isn’t collapsing so much as deteriorating. “Our divisions are not merely political but have **deep roots** in society,” he argues. The system has become too rigged and too unfair, and most people have **no real faith** in it. Where does that leave us? Nowhere good, Przeworski says. The best he could say is that “our current crisis will continue for the foreseeable future.” “The soft guardrails of democracy” are eroding We’ve heard a lot of chatter recently about the importance of democratic norms. These are the unwritten rules and the conventions that undergird a democracy — things like commitment to rule of law, to a free press, to the separation of powers, to the basic liberties of speech, assembly, religion, and property. Daniel Ziblatt, a politics professor at Harvard, called these norms “the soft guardrails of democracy.” Dying democracies, he argued, are always preceded by the breaking of these unwritten rules. Research conducted by Bright Line Watch, the group that organized the Yale conference, shows that Americans are not as committed to these norms as you might expect. It’s not that Americans don’t believe in democratic ideals or principles; it’s that our beliefs scale with our partisan loyalties. Vox’s Ezra Klein explained it well in a recent column: People’s opinions on democracy lie downstream from their partisan identity. If it had been Trump’s voters who had seen the Electoral College, gerrymandering, and Russia turn against them, then it would be Trump’s voters vibrating with outrage over the violation of key principles of American democracy. Hypocrisy aside, the reaction of nearly half the country to Russia’s meddling says a lot about our attachment to core democratic values like free and fair elections. Another startling finding is that many Americans are open to “alternatives” to democracy. In 1995, for example, one in 16 Americans supported Army rule; in 2014, that number increased to one in six. According to another survey cited at the conference, 18 percent of Americans think a military-led government is a “fairly good” idea. But there’s more. Ziblatt identified what he calls two “master norms.” The first is mutual toleration — whether we “accept the basic legitimacy of our opponents.” The second is institutional forbearance — whether politicians responsibly wield the power of the institutions they’re elected to control. As for mutual toleration, America is failing abysmally (more on this below). We’re hardly better on the institutional forbearance front. Most obviously, there’s **Donald Trump**, who has **dispensed with one democratic norm after another**. He’s fired an FBI director in order to undercut an investigation into his campaign’s possible collusion with Moscow; staffed his White House with family members; regularly attacked the free press; and refused to divest himself of his business interests. The Republican Party, with few exceptions, has tolerated these violations in the hope that they might advance their agenda. But it’s about a lot more than Republicans capitulating to Trump. Ziblatt points to the GOP’s **unprecedented blocking** of President Obama’s Supreme Court nominee, Judge Merrick Garland, in 2016 as an example of institutional recklessness. In 2013, Senate Democrats took a similarly dramatic step by **eliminating filibusters** for most presidential nominations. That same year, House Republicans endangered the nation’s credit rating and shut down the government over Obamacare. There are **countless other encroachments** one could cite, but the point is clear enough: American democracy is **increasingly less anchored by norms and traditions** — and history suggests that’s a sign of **democratic decay**. “We don’t trust each other” Timur Kuran, a professor of economics and politics at Duke University, argued that the real danger we face isn’t that we no longer trust the government but that we no longer trust each other. Kuran calls it the problem of “intolerant communities,” and he says there are two such communities in America today: “identitarian” activists concerned with issues like racial/gender equality, and the “nativist” coalition, people suspicious of immigration and cultural change. Each of these communities defines itself in terms of its opposition to the other. They live in different worlds, desire different things, and share almost nothing in common. There is no real basis for agreement and thus **no reason to communicate**. The practical consequence of this is a politics marred by **tribalism**. Worse, because the fault lines run so deep, every political contest becomes an intractable existential drama, with each side convinced the other is not just wrong but a mortal enemy. Consider this stat: In 1960, 5 percent of Republicans and 4 percent of Democrats objected to the idea of their children marrying across political lines. In 2010, those numbers jumped to 46 percent and 33 percent respectively. Divides like this are **eating away** at the American social fabric. A 2014 Pew Research Center study reached a similar conclusion: "In both political parties, most of those who view the other party very unfavorably say that the other side's policies 'are so misguided that they threaten the nation's well-being,'" Pew reports. "Overall, 36% of Republicans and Republican leaners say that Democratic policies threaten the nation, while 27% of Democrats and Democratic leaners view GOP policies in equally stark terms." So it’s not merely that we disagree about issues; it’s that we believe the other side is a grievous threat to the republic. According to Pew, the numbers above have more than doubled since 1994. Kuran warns that autocrats tend to exploit these divisions by pushing “policies that may seem responsive to grievances but are ultimately counterproductive.” Think of Donald Trump’s “Muslim ban” or his insistence on building a giant wall on the southern border. Neither of these policies is likely to make a significant difference in the lives of Trump’s voters, but that’s not really the point. By pandering to fears and resentments, Trump both deepens the prejudices and satisfies his base. Donald Trump and “the politics of eternity” Timothy Snyder, a Yale historian and author of the book On Tyranny, gave one of the more fascinating talks of the conference. Strangely enough, Snyder talked about time as a kind of political construct. (I know that sounds weird, but bear with me.) His thesis was that you can tell a lot about the health of a democracy based on how its leaders — and citizens — orient themselves in time. Take Trump’s “Make America Great Again” slogan. The slogan itself invokes a nostalgia for a bygone era that Trump voters believe was better than today and better than their imagined future. By speaking in this way, Snyder says, Trump is rejecting conventional politics in a subtle but significant way. Why, after all, do we strive for better policies today? Presumably it’s so that our lives can be improved tomorrow. But Trump reverses this. He anchors his discourse to a mythological past, so that voters are thinking less about the future and more about what they think they lost. “Trump isn’t after success — he’s after failure,” Snyder argued. By that, he means that Trump isn’t after what we’d typically consider success — passing good legislation that improves the lives of voters. Instead, Trump has defined the problems in such a way that they can’t be solved. We can’t be young again. We can’t go backward in time. We can’t relive some lost golden age. So these voters are condemned to perpetual disappointment. The counterargument is that Trump’s idealization of the past is, in its own way, an expression of a desire for a better future. If you’re a Trump voter, restoring some lost version of America or revamping trade policies or rebuilding the military is a way to create a better tomorrow based on a model from the past. For Snyder, though, that’s not really the point. The point is that Trump’s nostalgia is a tactic designed to distract voters from the absence of serious solutions. Trump may not be an authoritarian, Snyder warns, but this is something authoritarians typically do. They need the public to be angry, resentful, and focused on problems that can’t be remedied. Snyder calls this approach “the politics of eternity,” and he believes it’s a common sign of democratic backsliding because it tends to work only after society has fallen into disorder. My (depressing) takeaway Back in June, I interviewed political scientists Christopher Achen and Larry Bartels, authors of Democracy for Realists. They had a sobering thesis about democracy in America: Most people pay little attention to politics; when they vote, if they vote at all, they do so irrationally and for contradictory reasons. One of the recurring themes of this conference was that Americans are becoming **less committed to liberal democratic norms**. But were they ever really committed to those norms? I’m not so sure. If Achen and Bartels are to be believed, most voters don’t hold fixed principles. They have vague feelings about undefined issues, and they surrender their votes on mostly tribal grounds. So I look at the declining faith in democratic norms and think: Most people probably never cared about abstract principles like freedom of the press or the rule of law. (We stopped teaching civics to our children long ago.) But they more or less affirmed those principles as long as they felt invested in American life. But for all the reasons discussed above, people have gradually disengaged from the status quo. Something has cracked. Citizens have lost faith in the system. The social compact is broken. So now we’re left to stew in our racial and cultural resentments, which paved the way for a demagogue like Trump. Bottom line: I was already pretty cynical about the trajectory of American democracy when I arrived at the conference, and I left feeling justified in that cynicism. Our problems are deep and broad and stretch back decades, and the people who study democracy closest can only tell us what’s wrong. They can’t tell us what ought to be done. No one can, it seems.

**Constitutional crises are self-correcting**

**Posner 2/6**

Eric Posner, law prof @ Chicago, 2/6/2017, “WHAT WOULD A CONSTITUTIONAL CRISIS LOOK LIKE?”, http://ericposner.com/2320-2/

How might a constitutional crisis play out? It depends on how public officials and ordinary people react to the allegation that Trump (or other officials) have acted unconstitutionally. **There are many possible scenarios** (**public demonstrations**, **government** ~~paralysis~~ [**gridlock**], etc.), **but it seems premature to imagine them.**

It is possible to think that **constitutional crises are not bad but good**. **The crisis that led to the Civil War ended with the abolition of slavery**. **The crisis initiated by** Franklin **Roosevelt’s court-packing plan eventually placed the administrative state on a firmer constitutional footing**. What is distinctive today, putting the earlier crises in sharp relief, is that the challenge to the status quo has been brought by the forces of reaction, with liberals on the defense.

**Relations unbreakable**

Michael **Oren 11**, Israel’s ambassador to the US, “The Ultimate Ally”, June, <http://www.foreignpolicy.com/articles/2011/04/25/the_ultimate_ally?page=0,5>

Israel is the only Middle Eastern state never to oppose America on major international issues. Its fundamental interests, like its values, are America's. For the price of annual military aid equaling roughly half the cost of one Zumwalt-class destroyer, the United States helps maintain the military might of one of the few nations actively contributing to America's defense. It reinforces the only country capable of deterring Hamas and Hezbollah and impeding the spread of Iranian hegemony. According to published sources, the Israel Defense Forces is larger than the French and British armies combined. The IDF is superbly trained and, when summoned, capable of mobilizing within hours. These benefits of the U.S.-Israel relationship are of incalculable value to the United States, far outweighing any price. Americans know that Israelis have always stood by them, ready to share technology, intelligence, and innovation -- ready to aid them in conflict and to make the painful sacrifices for peace. Israel may be one of a handful of countries that fully fits the definition of ally, but its willingness to support the United States unwaveringly makes it the partner par excellence, America's ultimate ally.

**Relationship resilient**

Leo **Rennert 11**, journalist and former White House correspondent, “NY Times manufactures a crisis in U.S.-Israel relations”, February 6, <http://www.americanthinker.com/blog/2011/02/ny_times_manufactures_a_crisis.html>

With scant real evidence, but with plenty of opinions from the usual suspects, the New York Times would have its readers believe that the turmoil in Egypt has led to one of the sharpest splits in the history of U.S.-Israeli relations. The scaremongering headline reads: "Crisis in Egypt tests U.S. ties with the Israelis." In similar vein, the article, by Helene Cooper and Mark Landler, claims that the demonstrations in Egypt are "rocking a fundamental relationship with the U.S. -- its 60-year alliance with Israel." So what accounts for this "crisis" that is shaking U.S.-Israeli relations to the core? According to Cooper and Landler, the Americans were displeased with Israel's failure to adopt President Obama's stance that Egyptian President Hosni Mubarak must resign immediately. Team Obama supposedly got tired of Israeli warnings that such precipitous regime change might open the door to rule by the Muslim Brotherhood -- a replay of the 1979 Iranian revolution. Some U.S. diplomats -- not identified by the New York Times -- told their Israeli counterparts to "chill out." Determined to paint Israel in the darkest hues possible, Cooper and Landler point to "the irony of Israel, which long portrayed itself as the only democracy in its neighborhood, voicing concerns about the birth of a democracy next door." This, of course, is a patently false accusation against Israel. Prime Minister Netanyahu is not voicing concern about "the birth of a democracy next door." He is voicing concern about the possibility of a radical Islamist regime next door. But if you're determined to make trouble for U.S.-Israel relations, even a lie becomes permissible at the New York Times. The real irony is that, just as the Times fabricates a great divide between the U.S. and Israel, the views of the two allies are actually converging. The White House is moving away from Obama's bluster that Mubarak must quit immediately and instead is joining the European Union in support of a compromise cobbled together by Omar Suleiman, Egypt's new vice president, to initiate a gradual process of assembling a successor regime, leaving Mubarak in office for the time being, with Suleiman really in charge. The idea behind this plan, of course, is that it could midwife a broadly based secular regime capable of checking the Muslim Brotherhood and allay Israeli concerns about a quick, abrupt Mubarak exit amid all the current tumult. Suleiman, a former Egyptian intelligence chief, is well known in Israeli circles. And he commands a lot of respect in Netanyahu's inner circle. As Obama backtracks from his imperious demands for an immediate departure by Mubarak, whatever differences there may have been between Israel and the U.S. are fast diminishing. There was no crisis to begin with and Obama, if anything, now seems to concede that Israel's concerns about undue haste in changing regimes in Egypt actually may have been the sounder course all along.

**Adv 2**

**Litany of factors LIO is sustainable – no way religion is key.**

**Schake 19** – Deputy Director General of the International Institute for Strategic Studies

Kori Schake, served on the National Security Council and in the U.S. State Department in the George W. Bush administration, author of *Safe Passage: The Transition From British to American Hegemony*, Back to Basics: How to Make Right What Trump Gets Wrong, Foreign Affairs, May/June 2019

This is an overreaction. In truth, the **pillars of U.S. strategy** for the past 70 years—committing to the **defense of countries** that share U.S. values or interests, **expanding trade**, upholding rules-based institutions, and fostering liberal values internationally—have achieved **remarkable successes** and **will continue to** serve the country well going forward. Although some changes are certainly necessary, the biggest risk now is that the United States will in the process of making those changes scrap what is best about its foreign policy.

In his blunt and often crude way, Trump has proved brilliant at poking holes in pieties and asking pointed questions about long-standing principles. His answers to those questions, however, have been self-defeating at best and dangerous at worst. By revealing what happens when U.S. strategy becomes untethered from the ideas that built the American-led order, Trump's time in office should serve as a wake-up call—but not as a cause for fundamental change. On the contrary: as the costs of an "America first" approach become clear, advocates of a more traditional, global- minded American leadership will get another hearing. They should seize the opportunity by offering a vision of a reformed and updated U.S. foreign policy. But a new vision of the U.S. role in the world should reaffirm some core principles—namely, that the United States can best achieve its objectives through mutually beneficial outcomes that reduce the need for enforcement and encourage like-minded countries to share burdens.

YOU NEVER HAD IT SO GOOD

For all the panic and self-doubt that the political turmoil of recent years has brought, the current crisis is hardly without precedent. In fact, for **most of its history**, the United States faced **more formidable challenges** and had **fewer resources** than it does today. George Washington would have loved to negoti- ate a multilateral trade deal from a position of economic strength rather than having to bring a fledgling nation into being amid hostility from much stronger states. Abraham Lincoln would have considered banding allies together to counter a rising China an easy day's work compared with passing the 13th Amendment or preventing international recognition of the Confederacy. Franklin Roosevelt would have been right to see managing a glut of capital as less compli- cated than resuscitating the entire U.S. economy.

The United States has the most propitious geopolitical environment any country could hope for: surrounded by oceans and peaceful, cooperative neighbors. The U.S. economy generates jobs and drives technological innovation. The country's hegemony in the global balance-of-payments system is so secure that investors are indifferent to its indebtedness and Washington can impose sanctions on foreign entities and governments with impunity. The **U**nited **S**tates is a dominant power that other strong states voluntarily work to support rather than diminish—a historical anomaly. Its military is so capable that its adversaries have to operate on the margins of the conflict spectrum, in the realm of insurgency or information warfare. The country's cultural products are appealing and accessible, and its language serves as the lingua franca for international transactions.

**Middle East war won’t escalate—regional militaries are too weak**

**Rovner 14** -- \*John Goodwin Tower Distinguished Chair of International Politics and National Security, Associate Professor of Political Science, and Director of Studies at the Tower Center for Political Studies @ Southern Methodist University, \*\*Assistant Professor of Political Science and International Affairs at the George Washington University

(\*Joshua, \*\*Caitlin Talmadge, Less is More: The Future of the U.S. Military in the Persian Gulf, The George Washington University, http://twq.elliott.gwu.edu/less-more-future-us-military-persian-gulf)

Happily, however, the situation for the United States today is more like the 1950s than the 1970s. The major regional powers all suffer from serious shortcomings in conventional military power, meaning that none of them will be able to seriously threaten the balance for the foreseeable future. Iran’s military has suffered greatly from decades of war and sanctions. Iraq’s fledgling security services are almost exclusively focused on internal problems. And Saudi Arabia, the richest country in the region, seems content to rely on a dense network of defenses and proxies rather than pursue any real power projection capabilities. While there are reasons to worry about internal stability, especially given the ongoing fight against ISIS (the Islamic State of Iraq and Syria), **there is very little chance of a major interstate war**. Moreover, threats to oil shipping in the Gulf are real but not overwhelming. All of this points to a simple and optimistic conclusion: the United States can protect its core interest in the free flow of oil without having to commit to a large and enduring naval or ground presence to the Gulf.

**Mutual interest and US alliances deter escalation**

**Mead 14** – Walter Russell Mead, James Clarke Chace Professor of Foreign Affairs and Humanities at Bard College and Professor of American foreign policy at Yale University, Editor-at-Large of The American Interest magazine and a non-resident Scholar at the Hudson Institute, 2014 (“Have We Gone From a Post-War to a Pre-War World?” *Huffington Post*, July 7th, <http://www.huffingtonpost.com/walter-russell-mead/new-global-war_b_5562664.html>)

The Middle East today bears an ominous resemblance to the Balkans of that period. The contemporary Middle East has an unstable blend of ethnicities and religions uneasily coexisting within boundaries arbitrarily marked off by external empires. Ninety-five years after the French and the British first parceled out the lands of the fallen Ottoman caliphate, that arrangement is now coming to an end. Events in Iraq and Syria suggest that the Middle East could be in for **carnage and upheaval** as great as anything the Balkans saw. The great powers are losing the ability to hold their clients in check; the Middle East today is at least as explosive as the Balkan region was a century ago. GERMANS THEN, CHINESE NOW What blew the Archduke's murder up into a **catastrophic world war**, though, was not the tribal struggle in southeastern Europe. It took the hegemonic ambitions of the German Empire to turn a local conflict into a universal conflagration. Having eclipsed France as the dominant military power in Europe, Germany aimed to surpass Britain on the seas and to recast the emerging world order along lines that better suited it. Yet the rising power was also insecure, fearing that worried neighbors would gang up against it. In the crisis in the Balkans, Germany both felt a need to back its weak ally Austria and saw a chance to deal with its opponents on favorable terms. **Could something like that happen again?** China today is both rising and turning to the sea in ways that Kaiser Wilhelm would understand. Like Germany in 1914, China has emerged in the last 30 years as a major economic power, and it has chosen to invest a growing share of its growing wealth in military spending. But here the analogy begins to get complicated and even **breaks down** a bit. Neither China nor any Chinese ally is **competing** directly with the United States and its allies in the Middle East. China isn't (yet) taking a side in the Sunni-Shia dispute, and all it really wants in the **Middle East is quiet**; China wants that oil to flow as peacefully and cheaply as possible. AMERICA HAS ALL THE ALLIES And there's another difference: **alliance systems**. The Great Powers of 1914 were divided into two roughly equal military blocs: Austria, Germany, Italy and potentially the Ottoman Empire confronted Russia, France and potentially Britain. Today the **global U.S. alliance system** has no rival or peer; while China, Russia and a handful of lesser powers are disengaged from, and in some cases even hostile to, the U.S. system, the military balance isn't even close. While crises between China and U.S. allies on its periphery like the Philippines could escalate into US-China crises, we don't have anything comparable to the complex and finely balanced international system at the time of World War I. Austria-Hungary attacked Serbia and as a direct result of that Germany attacked Belgium. It's hard to see how, for example, a Turkish attack on Syria could cause China to attack Vietnam. **Today's crises are simpler**, more direct and more easily controlled by the top powers.

# 2NC

## Non-Antitrust CP

**Antitrust is worse than**

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

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

Taken together, then, the **difficulty of evaluating** the **competitive effects** of business practices (decision costs) and the **inevitability of mistakes** (error costs) **limit what antitrust can accomplish**. **Perfection is impossible**, and **efforts to achieve it** are likely to be **wasteful**. Of course, as Chapter 2 explains, the same can be said for all efforts to regulate mixed-bag behavior. The point is most salient with antitrust, though, because **antitrust’s scope is unusually broad** (i.e., it is the residual regulator of **all business behavior**), and **the behaviors it regularly restricts** – trade-restraining agreements and business methods that may injure rivals – are particularly likely to **involve ambiguous welfare effects**. It is especially important, then, that courts, in **crafting antitrust rules** and **standards**, eschew perfection and settle for optimization – that is, they should develop liability tests calculated not to catch every anticompetitive act but instead to minimize the sum of error and decision costs. Fortunately, the US Supreme Court has in recent years become far more cognizant of antitrust’s inherent limits and has generally endeavored to structure antitrust’s standards in a manner that will optimize the law’s effectiveness.18

In addition to being an inherently limited body of law, a second difficulty with antitrust as a remedy for market power is that it is poorly poised to prevent harms in markets involving “natural monopolies.” The discussion that follows examines natural monopoly conditions and the chief policy responses thereto.

Direct Regulation

As explained earlier, **antitrust** is **standard-based** and **applies** (unless displaced) **to all industries**. **Alternative market power remedies**, which we may lump together under the description “**direct regulation**,” are **generally rule-based** and **industry-specific**. They also differ from antitrust in that they tend to be **administered by expert agencies** rather than by **generalist courts**.

**The two are distinct---1AC Richman**

<<FOR REFERENCE>>

In Goldfarb v. Virginia State Bar, 1 the Supreme Court put to rest the notion that self-described “learned professionals” were exempt from the nation’s antitrust laws. Rejecting the defendant bar association’s claim that “competition is inconsistent with the practice of a profession because enhancing profit is not the goal of professional activities; the goal is to provide services necessary to the community,”2 the Court warned that carving out such an **exemption** would empower professionals “to adopt **anticompetitive practices** with impunity.” 3

Despite Goldfarb’s grave warning against permitting professionals to engage in anticompetitive collusion, there remain professionals who—in violation of the **Sherman Act**—painstakingly construct industry rules to secure for themselves a **captive market** that is subject to their exploitation and control. And despite Goldfarb’s sweeping charge to enforce the Sherman Act widely, those professionals continue to claim to be **exempted** from **antitrust scrutiny**. But instead of invoking a so-called “learned professionals exemption” to the Sherman Act, they instead hide behind the **First Amendment’s** Religion Clauses. Worse, these professionals employ the First Amendment as a **license** to suppress the very **religious expression** the Religion Clauses are designed to protect.

## RICO CP

**The language authorizing suits is a carbon copy, so it has the same effect as the plan**

* Reference Section 4 of Clayton

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

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

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

**That is true in substance---they use the exact same deterrence mechanism**

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

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

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

[begin fn39]

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

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

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

[end fn39]

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

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

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

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

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

**The core antitrust laws are only Sherman and Clayton**

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

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

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

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

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

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

**[1]---Nuclear liability—perm results in two paths for treble damages recovery—or “double liability trebled”**

Michael J. **Metzger**, Valparaiso University Law School, 19**86**, Treble Damages, Deterrence, and Their Relation to Substantive Law: Ramifications Under the Insider Trading Sanctions Act of 1984, 20 Val. U. L. Rev. 575

Three major cases under the Burger Court have had substantial impact on **restricting the availability of the treble damage award**. First, the availability of large consumer class actions for alleging an antitrust violation was severely restricted in Eisen v. Carlisle & Jacquelin,"9 when the Court held federal rule 23 required individual notice be sent to all class members who may be ascertained through reasonable effort, and that plaintiffs must bear the cost of sending this notice.150 Second, in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,5' the Court held that for plaintiffs to recover treble damages for an antitrust violation the injury complained of must be more than just "**casually linked** to an illegal presence in the market;" plaintiffs must prove "antitrust injury."'' 2 This antitrust injury test-an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful"15 3-has been interpreted as a sort of standing doctrine imposing a broad limitation on the kinds of injury for which plaintiffs may recover treble damages under antitrust law."M Third, in Illinois Brick Co. v. Illinois,'55 the Court held that indirect purchasers could not recover treble damages on the theory that overcharges paid by a direct purchaser to an alleged antitrust violator were passed on to the indirect purchaser." **The underlying threat of this** theory **was the potential for "double liability trebled**."' 5 1 If **only offensive use** of the "pass on" theory were available, **defendants would be at risk to multiple liability**. 5 '

While the treble damage provisions under antitrust law **are in many ways similar to treble damages under RICO**, 59 courts have not only **refused to draw parallels** between the substantive provisions for the two Acts,"160

**[begin fn160]**

160. E.g., Schacht v. Brown, 711 F.2d 1343, 1356-58 (7th Cir. 1983) (Congress enacted RICO to attack organized crime, not restrain competition), cert. denied, 464 U.S. 1002 (1983); Bennett v. Berg, 685 F.2d 1053, 1058-59 (8th Cir. 1982) (rejecting application of antitrust's restrictive standing, and noting Congress **did not intend to limit RICO to the antitrust goal** of preventing interference with free trade).

**[end fn160]**

but judicial treatment of the RICO provisions have generally been less restrictive.'1 Defendants have continually attempted to limit recovery by alleging several defenses, 2 most notably a causation-standing requirement similar to one under antitrust law, 3 but most have failed under the courts' liberal construction of the RICO provisions which are based on a legislative history indicating broad and flexible application.' Even with the concern that certain construction may create "a runaway treble damage bonanza for the already excessively litigious,"'" courts have generally deferred to congressional intent and construed the provisions broadly.

**That breaks the system—settlements overwhelm aff solvency and kills enforcement generally**

**Rowe**, JD, former Chair of DC Bar Section on Antitrust Law, **‘77**

(Frederick M., Testimony, Fair and Effective Enforcement of the Antitrust Laws, S. 1874: Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, Ninety-fifth Congress)

In short, each alleged antitrust violation might breed **dozens** or **scores of antitrust suits,** including class actions. In each of these actions, the plaintiffs could be entitled to any damages they could demonstrate as to themselves. But clearly, there is a serious risk that defendants, **already subject to treble damages**, **would be exposed to “double liability trebled**”8 and perhaps quadrupled or worse.

Judicial resolution of multiple claims in one consolidated omnibus proceeding would provide **limited protection**. Even if all the parties could somehow be joined together in one action, the practical problems of management would be immense. A critical problem would be the multiplicity of conflicts among the various “claimants,” conflicts in litigation tactics and conflicts in proof, as each group attempts to show that the lion’s share of the damages was really absorbed by it. The inevitable result of these conflicts would be delay, complexity, and hopeless confusion for the judge or the jury attempting to sort out the “facts.”

Some people apparently believe that in cases of premeditated, hard-core, price-fixing conspiracies such ordeals may be justifiable, with the conspirators bearing the risk. But many, if not most, areas of the substantive antitrust law are not as clear as the rules against price-fixing, nor are the rules as clearly understood by the business and consuming public. The interrelation of regulation and competition policies, for example, can lead to many situations where the businessman is cursed if he does and cursed if he does not. Even antitrust enforcers give **contradictory signals**. The Department of Justice once sought to prohibit by consent order conduct which the Federal Trade Commission was simultaneously attempting to encourage by rulemaking.9 A businessman can be faced with an action under the Robinson-Patman Act for allegedly cutting his price too far, and then with a prosecution for price fixing for checking whether he was “meeting competition” in defense against the Robinson-Patman claim.10 It **is fundamentally unfair** in such situations to authorize **multiple damages claims.**

In sum, the bill threatens a proliferation of extremely complex lawsuits, when the court system is already seriously overloaded. Such a massive influx of litigation, especially complex litigation, **could seriously impair the courts’ ability to dispense justice at all**, **antitrust or otherwise.**

Such new impositions on the seriously overburdened judicial system are not only unwarranted, but **may boomerang on antitrust enforcement**. In institutional self-defense, courts faced with a new onslaught of private antitrust litigation by peripheral plaintiffs **may accelerate the trend of cutting back on substantive antitrust principles**, thereby **curtailing Government *and* private antitrust enforcement alike**.11

The prime beneficiaries of such proliferating or amorphous litigation would be the lawyers, *on all sides.* For example, in the *Antibiotics* litigation settlement, while consumers eventually received a distribution of $28 million, the plaintiffs attorneys received over $40 million. Attorney General Griffin Bell recently stated that he “would not countenance using the resources of the government or court when the recovery is going to be $2 for each person in the class, and the real recovery is simply for the lawyers.”28

Rules of law and procedure which permit such cases to persist, threatening indeterminate but potentially enormous liabilities, **clearly create unjust leverage for settlement**. For as the Supreme Court has noted, “even a complaint which by objective standard may have little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial long as he may prevent the suit from being resolved against him by dismissal or summary judgment.13 But the “immense and unmanageable” class action antitrust suits which have been devised in recent years have almost never gone to trial. Instead, such suits became “overwhelmingly costly and potent engine[s] for the compulsion of settlements, **whether just or unjust**.”14

**[2]---Alternative holdings---adding another ground for liability confuses *both* doctrines and prevents spillover**

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

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

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

[begin fn23

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

[end fn23]

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

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

**Stinson**, Clinical Professor of Law, Sandra Day O’Connor College of Law at Arizona State University, **‘10**

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

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

**[3]---Parens patriae---civil RICO doesn’t allow state AGs sue under federal law**

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

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

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

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

**That undermines aff solvency---states derail federal enforcement to favor political and economic interests**

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

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

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

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

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

**[A]---Civil RICO is guided by and reinforces antitrust precedent—statutory similarity means that the counterplan’s predictable**

**Nathan**, Formerly Deputy Assistant Attorney General for Enforcement in the Criminal Division of the United States Department of Justice, **‘83**

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

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

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

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

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

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

**The counterplan’s limited application of RICO retains certainty**

**Nathan**, Formerly Deputy Assistant Attorney General for Enforcement in the Criminal Division of the United States Department of Justice, **‘83**

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

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

**[B]---Links just as much to the aff---RICO precedent develops analogously to antitrust**

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

(Randy D., “RICO Had a Birthday! A Fifty-Year Retrospective of Questions Answered and Open,” 105 Marq. L. Rev. 131)

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

**No spillover**

**Goldsmith**, Professor of Law, Brigham Young University, **‘90**

(Michael, “Civil RICO Reform: The Gatekeeper Concept,” 43 Vanderbilt Law Review 735)

Professor Abrams suggests that private parties **arguably abuse civil RICO** when they bring cases which, though facially violative of the law, would have been rejected at the discretion of a public prosecutor. This assertion, however, is based on the two flawed premises just discussed.2 Moreover, even if the preceding premises were true, actual abuse must exist or talk of reform is misguided. Obviously, some abuse of every statute occurs.6 Remedies, however, already exist to combat such abuse. 4 Proof of unusual abuse is required to mandate reform of any statute on this basis alone. To this end, Professor Abrams notes various long-standing criticisms of civil RICO, and ultimately implies that RICO's private attorney general rationale is abused when civil plaintiffs bring cases that prosecutors would not file.", He also points to the expansion of fraud liability under RICO as contributing to the potential for misguided litigation.6 Professor Abrams's concerns, however, are unwarranted.

1. Long-Standing Criticisms As Evidence of Abuse

Professor Abrams notes many of the long-standing criticisms of civil RICO, 7 and observes that most of these criticisms "translate into the contention that the private attorney general purpose is not being properly implemented insofar as a great many cases are being filed that would not warrant criminal prosecution." 8

Although Professor Abrams does not take a formal position on these criticisms, his proposal implicitly accepts them as true-otherwise he would not propose reform. The criticisms, however, do not withstand analysis. For example, RICO critics state that federal courts have been overwhelmed with RICO claims.6 9 The number of civil RICO claims, however**, has leveled off** at approximately one thousand per year.70 Of the cases filed, approximately sixty percent contain other jurisdictional grounds.7 1 Thus, claims of a federal judicial overload attributable to RICO are **grossly misrepresented**.

Opponents also assert that "civil RICO claims are being used to displace 'well-established federal remedial provisions.' "72 **RICO supplements**, **rather than displaces**, other federal remedial provisions.73 Furthermore, although RICO may **overlap** with federal remedies such as antitrust and securities, **the overlap is not complete**. **Numerous** RICO based securities and antitrust claims, for example, have been rejected for failure to establish RICO's enterprise and pattern elements. 74 Moreover, statutory overlap is **neither uncommon** 5 **nor inappropriate**.76 Consequently, this concern is **fundamentally misplaced**.

Critics further contend that civil RICO claims convert broad areas of state civil law into federal issues." Their argument is that the ease with which state common-law fraud claims can be converted into a RICO action violates principles of federalism. Courts, however, have regularly rejected common-law fraud claims filed under RICO, for failure to satisfy RICO's complex statutory requirements. 78 Moreover, in United States v. Turkette0 the Supreme Court dismissed an analogous argument based on federalism.80 After reviewing the legislative history, the Court stated that Congress enacted RICO knowing that the conduct being prosecuted under RICO also might be criminal under state law,8 ' because states retain jurisdiction over such matters. RICO not only fails to raise any legitimate federalism concerns, but is a perfect example of cooperative federalism. 2

Opponents of civil RICO also assert that RICO claims label ordinary business people as "racketeers."8' 3 At best, this argument is a **false issue**. The racketeering label can be eliminated **simply by changing the terminology** of the statute. In place of the prejudicial word "racketeering," Congress could insert the word "illicit" or another neutral term.84

Finally, critics contend **that "the threat or use of a RICO** claim has given plaintiffs improper leverage to **induce settlements**. 85 **No evidence actually supports this claim**. Treble relief is needed to **ensure the recovery of actual damages** and **otherwise equalize the plaintiff's chance of success**. If anything, the record demonstrates **that frivolous claims encourage defendants to stiffen their resistance** when racketeering charges have been brought.88

**Courts flush out non-meritorious cases early**

**Mahler**, JD, commercial litigation partner @ Farrell Fritz, **‘21**

(Peter A., “Civil RICO: A Blunt But Elusive Tool in Business Divorce Cases,” March 22, https://www.jdsupra.com/legalnews/civil-rico-a-blunt-but-elusive-tool-in-9986868/)

When I began practicing law in the 1980s, **civil RICO seemed to be all the rage**. The in terrorem effect of an award of treble damages and legal fees, plus the ease of alleging mail and/or wire fraud in connection with business operations and transactions, plus the relatively **undeveloped state of the case law** interpreting the statute’s nebulous terms, plus the ability to file the case in federal court as well as state court, **was too good to pass up**. **In the ensuing decades**, however, the federal courts, including the U.S. Supreme Court, perhaps in response to hyperactive civil RICO litigation, **issued a series of major rulings tightening statutory definitions** and **pleading standards** required to survive an early dismissal motion. As the NYT article observed, “[j]udges take a dim view of efforts to **turn what look like ordinary state law claims into federal cases by claiming a RICO violation**. For that reason, RICO cases often don’t survive the pleading stage.”

Civil RICO and Business Divorce Litigation

That observation is consistent not only with the apparent dearth of reported court decisions in business divorce litigation in New York and elsewhere, but also with the apparent dearth if not total absence of any reported decisions finding RICO liability in a business divorce setting. The following examples illustrate the hurdles to pleading a sustainable RICO claim in a business divorce setting:

In Daskal v Tyrnauer, 2012 NY Slip Op 52036(U) [Sup Ct Kings County 2012], the plaintiff brought direct and derivative claims against his co-owner in a realty holding LLC and others arising from a realty development project that ultimately led to the construction lender’s foreclosure on the LLC’s realty asset. The complaint’s gravamen was the plaintiff’s claim that his business partner defrauded him with the assistance of the lender’s loan officer in the diversion of the LLC’s assets. The complaint asserted civil RICO claims based on predicate acts of alleged mail fraud, wire fraud, bank fraud, and criminal bribery under state law. The defendants moved pre-answer to dismiss the RICO claims for failure to plead the existence of a racketeering “enterprise” and, specifically, failure to allege with the required particularity how the various associates of the alleged enterprise worked together as a unit to achieve the enterprise’s common purpose. The court agreed, finding that the complaint “is silent as to the internal workings or organization of the alleged enterprise, and fails to explain how such alleged organization was run or by whom it was run.” The court also based its dismissal of the RICO claims on the plaintiff’s failure to plead the existence of an enterprise “that is distinct from the alleged pattern of racketeering activity.” Rather, the court wrote, the plaintiff merely alleges that “the participants came together for the common purpose of defrauding him and the LLC’s by engaging in [the predicate acts].” Yet additional pleading defects, the court found, were the complaint’s failure to plead facts adequately showing enterprise continuity either of the open-ended or closed-ended variety, and the failure to allege that he or the LLC’s on whose behalf he sued suffered a non-speculative injury caused by the alleged racketeering activity.

In Weingarten v Kopelowitz, 2020 NY Slip Op 51260(U) [Sup Ct Kings County 2020], the plaintiff brought suit individually and derivatively on behalf of a Delaware LLC in which he held a one-third membership agreement after he was terminated as property manager of multi-unit rental properties in Tennessee owned indirectly by the LLC. The complaint included civil RICO claims alleging wire, mail, and bank fraud as predicate acts as part of a racketeering enterprise for the purpose of injuring plaintiff including loss of the LLC as an ongoing business, lost of investment, loss of personal credit, and reputational injury. The defendants moved to dismiss the RICO claims, arguing that the complaint failed to allege direct injury to himself or to the LLC resulting from the alleged predicate acts, and that any harm plaintiff suffered was derivative of any harm allegedly caused to the lending institutions to which the defendant member purportedly made misrepresentations. Applying the direct injury test for proximate causation established by U.S. Supreme Court decisional law, the court held that the plaintiff “does not even begin to approach the required showing” and that, at best, the plaintiff’s alleged injury resulted from his co-member’s “alleged retaliatory conduct against him personally after he told [the co-member] that he had learned of [the co-member’s] fraudulent activity.”

In Frank v D’Ambrosi, 4 F.3d 1378 [6th Cir. 1993], the plaintiff and defendant were 50/50 shareholders and co-directors in an Ohio steel processing company which was dissolved on consent in 1989 after the defendant, D’Ambrosi, sued for judicial dissolution. The plaintiff, Frank, subsequently filed a federal suit asserting RICO claims against D’Ambrosi and others claiming that they combined to form an association-in-fact enterprise through which they engaged in a pattern of racketeering activity including predicate acts of mail and securities fraud. The defendants moved to dismiss the complaint or, alternatively, for summary judgment which the District Court granted. On appeal to the Sixth Circuit, the court affirmed the dismissal of Frank’s RICO claims, finding that he lacked standing because the alleged wrongs and injuries were all directed at the corporation and that Frank “does not have standing to bring a RICO action for wrongs to [the corporation] in a direct suit as shareholder” or as an employee. The court also held that Frank did not adequately support his “absurd” allegation of mail fraud involving a letter sent by D’Ambrosi to Frank which “at most represents a fight for control of [the corporation].” The court likewise rejected Frank’s reliance on the corporation’s dissolution as a forced sale by him of securities, finding that “Frank owned then, and continues to own, 50% of [the corporation’s] stock, and 50% of its assets and liabilities — he cannot now seriously contend that the dissolution [pursuant to a consent decree] was a forced sale.”

The Takeaway. The RICO statute, enacted over 50 years ago, undoubtedly **has had a major impact** in the realm of criminal law enforcement, which was the main impetus for its enactment. Its popularity as a cudgel in civil litigation in the commercial realm has waxed and waned as the courts put their judicial gloss on the statute’s many requirements in an effort to put a damper on plaintiffs who, as one District Court wrote, in their zealous pursuit of RICO’s treble damages remedy and the stigma that may attach to RICO defendants, “have often been overzealous in pursuing RICO claims, flooding federal courts by dressing up run-of-the-mill fraud claims as RICO violations” **requiring courts “to flush out frivolous RICO allegations at an early stage of the litigation**.” As the above-discussed cases illustrate, the RICO statute and its case law present daunting and potentially insuperable challenges in suits between co-owners of closely held businesses who, in the end, may be better served by the causes of action and remedies available under state common and statutory law.

**It’s inevitable regardless**

**Goldsmith**, Professor of Law, Brigham Young University, **‘90**

(Michael, “Civil RICO Reform: The Gatekeeper Concept,” 43 Vanderbilt Law Review 735)

Underlying Professor Abrams's gatekeeper proposal is the belief that existing remedies against RICO abuse are inadequate. Some civil RICO abuse **undoubtedly occurs**. Abusive litigation, however, **is not a problem limited to civil RICO**, but is of **general concern in our legal system**. Moreover, such abuse does not necessarily evidence the **need for reform**,143 as existing remedies may **adequately address the problem**. Fortunately, existing remedies for abusive civil litigation generally **are adequate for RICO's needs as well**.'" Such remedies include ethical constraints;145 tort remedies;' 4 and Federal Rules of Civil Procedure 12(b)(6),'147 9(b), 148 and 11.149 Other remedies also are potentially available. 151

Professor Ronald Goldstock, in a recent statement before the Subcommittee on Crime of the House Judiciary Committee, summarized his review of 704 civil RICO cases decided between January 1, 1987, and June 1, 1989.151 His study **showed that sixty-five percent of the cases were dismissed before trial**.1 "2 Of these 457 cases, courts dismissed: twenty-one percent for failure to plead fraud with particular- ity;1 53 forty-nine percent for failure to state a claim upon which relief could be granted;154 and thirty percent on summary judgment.15 Thirty-seven additional cases were partially dismissed. These figures suggest that judges are dismissing improper RICO claims at the pretrial pleading stage. **Thus, our existing system appears adequate for controlling unwarranted claims**.

**Concerns are bunk, but you know that rampant fraud is occurring now**

**Brickman**, Emeritus Professor of Law, Benjamin N. Cardozo School of Law, **‘19**

(Lester, “Civil Rico: An Effective Deterrent to Fraudulent Asbestos Litigation?” 40 Cardozo L. Rev. 2301)

In addition to listing mechanisms that in her view are increasingly curtailing fraud and thus limiting the need for use of RICO, Engstrom provides a **list of the risks** that would accrue were **RICO to be invoked on a wider scale** than the handful of RICO cases that have been brought to address mass tort fraud, including: distortion of existing remedies,168 “**dampen[ing]** attorney **advocacy** and chill[ing] the initiation of valid, as well as invalid, claims,”169 **overdeterrence**,170 **additional costs**,171 **satellite litigation**,172 and eroding the finality of judgments.173 In support of the latter argument, she cites to a First Circuit case where the court affirmed the dismissal of a retaliatory RICO complaint and stated: “In essence, simply by alleging defendants’ litigation stance in the state court was ‘fraudulent,’ plaintiff is insisting upon a right to relitigate that entire case in federal court . . . [t]he RICO statute obviously was not meant to endorse any since occurrence.”174 Of course, the suit Engstrom has selected to support her claim that RICO will erode the “finality of judgments” would be quickly rejected by 100 out of 100 federal courts as a clear violation of the Rooker-Feldman doctrine.175

Engstrom is to be commended for breaking from the solid front of torts scholars’ refusal to acknowledge “the problem of fraud in the tort litigation environment,”176 which is “all too real.”177 She states that her intent in writing her Article is “to highlight the problem of fraud in the tort litigation environment—a problem that is often discussed and frequently lamented but rarely studied and poorly understood.”178 Distancing herself from Rosenbaum, she rejects the view that “retaliatory RICO actions are never justified,”179 instead recognizing that there are circumstances where “courts should permit retaliatory RICO actions . . . .”180 But balancing against that, she finds that “even if retaliatory RICO suits do successfully reduce litigation fraud, that benefit will come at a very high cost.”181

Unfortunately, she does not regard “the problem of fraud in tort litigation” to be sufficient to warrant a more aggressive response than has heretofore been the case. Though acknowledging that there “**has only been a smattering of [RICO] suits**,”182 **far short of the “trend”** that Rosenbaum perceives,183 she warns “that the unbridled use of retaliatory RICO carries substantial danger . . . .”184 **The evidence, however, that she offers that we are headed toward “unbridled use**” **is gossamer**. Furthermore, I have questioned the efficacy of the evidence she offers that the fraud-curtailing mechanisms she lists substantially reduces the need to have a recourse such as RICO. What is, or at least should be, unquestioned, is that fraud has permeated certain areas of the civil justice system, in particular, mass torts, and that there is a compelling need for more effective mechanisms, including RICO, to combat that fraud.

**Absent central bank liquidity, the economy collapses---that sparks global world war**

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

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

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

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

Crisis responses limited

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

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

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

From bust to bubble

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

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

**Nuclear war---the next decline is uniquely destabilizing.**

Dr. Mathew **Maavak 21**, PhD in Risk Foresight from the Universiti Teknologi Malaysia, External Researcher (PLATBIDAFO) at the Kazimieras Simonavicius University, Expert and Regular Commentator on Risk-Related Geostrategic Issues at the Russian International Affairs Council, “Horizon 2030: Will Emerging Risks Unravel Our Global Systems?”, Salus Journal – The Australian Journal for Law Enforcement, Security and Intelligence Professionals, Volume 9, Number 1, p. 2-8

Various scholars and institutions regard **global social instability** as the **greatest threat** facing this decade. The catalyst has been postulated to be a **Second Great Depression** which, in turn, will have **profound implications** for **global security** and national integrity. This paper, written from a broad systems perspective, illustrates how emerging risks are getting more complex and **intertwined**; blurring boundaries between the economic, environmental, geopolitical, societal and technological taxonomy used by the World Economic Forum for its annual global risk forecasts. **Tight couplings** in our **global systems** have also enabled risks accrued in **one area** to **snowball** into a **full-blown crisis** **elsewhere**. The COVID-19 pandemic and its socioeconomic fallouts exemplify this systemic chain-reaction. Onceinexorable forces of globalization are rupturing as the current global system can no longer be sustained due to poor governance and runaway wealth fractionation. The coronavirus pandemic is also enabling Big Tech to expropriate the levers of governments and mass communications worldwide. This paper concludes by highlighting how this development poses a dilemma for security professionals.

Key Words: Global Systems, Emergence, VUCA, COVID-9, Social Instability, Big Tech, Great Reset

INTRODUCTION

The new decade is witnessing rising volatility across global systems. Pick any random “system” today and chart out its trajectory: Are our education systems becoming more robust and affordable? What about food security? Are our healthcare systems improving? Are our pension systems sound? Wherever one looks, there are dark clouds gathering on a global horizon marked by volatility, uncertainty, complexity and ambiguity (VUCA).

But what exactly is a global system? Our planet itself is an autonomous and selfsustaining mega-system, marked by periodic cycles and elemental vagaries. Human activities within however are not system isolates as our banking, utility, farming, **health**care and retail sectors etc. are increasingly **entwined**. Risks accrued in **one system** may **cascade** into an **unforeseen crisis** within and/or without (Choo, Smith & McCusker, 2007). Scholars call this phenomenon “emergence”; one where the behaviour of **intersecting systems** is determined by **complex** and largely **invisible interactions** at the **substratum** (Goldstein, 1999; Holland, 1998).

The ongoing COVID-19 pandemic is a case in point. While experts remain divided over the source and morphology of the virus, the contagion has ramified into a global health crisis and supply chain nightmare. It is also tilting the geopolitical balance. China is the largest exporter of intermediate products, and had generated nearly 20% of global imports in 2015 alone (Cousin, 2020). The pharmaceutical sector is particularly vulnerable. Nearly “85% of medicines in the U.S. strategic national stockpile” sources components from China (Owens, 2020).

An initial run on respiratory masks has now been eclipsed by rowdy queues at supermarkets and the bankruptcy of small businesses. The entire global population – save for major pockets such as Sweden, Belarus, Taiwan and Japan – have been subjected to cyclical lockdowns and quarantines. Never before in history have humans faced such a systemic, borderless calamity.

COVID-19 represents a classic emergent crisis that necessitates real-time response and adaptivity in a real-time world, particularly since the global Just-in-Time (JIT) production and delivery system serves as both an enabler and vector for transboundary risks. From a systems thinking perspective, emerging risk management should therefore address a whole spectrum of activity across the economic, environmental, geopolitical, societal and technological (EEGST) taxonomy. Every emerging threat can be slotted into this taxonomy – a reason why it is used by the World Economic Forum (WEF) for its annual global risk exercises (Maavak, 2019a). As traditional forces of globalization unravel, security professionals should take cognizance of emerging threats through a systems thinking approach.

METHODOLOGY

An EEGST sectional breakdown was adopted to illustrate a sampling of extreme risks facing the world for the 2020-2030 decade. The transcendental quality of emerging risks, as outlined on Figure 1, below, was primarily informed by the following pillars of systems thinking (Rickards, 2020):

• Diminishing diversity (or increasing homogeneity) of actors in the global system (Boli & Thomas, 1997; Meyer, 2000; Young et al, 2006);

• Interconnections in the global system (Homer-Dixon et al, 2015; Lee & Preston, 2012);

• Interactions of actors, events and components in the global system (Buldyrev et al, 2010; Bashan et al, 2013; Homer-Dixon et al, 2015); and

• Adaptive qualities in particular systems (Bodin & Norberg, 2005; Scheffer et al, 2012) Since scholastic material on this topic remains somewhat inchoate, this paper buttresses many of its contentions through secondary (i.e. news/institutional) sources.

ECONOMY

According to Professor Stanislaw Drozdz (2018) of the Polish Academy of Sciences, “a global financial crash of a previously unprecedented scale is highly probable” by the mid- 2020s. This will lead to a **trickle-down meltdown**, impacting **all areas** of human activity.

The economist John Mauldin (2018) similarly warns that the “2020s might be the worst decade in US history” and may lead to a **Second Great Depression**. Other forecasts are equally alarming. According to the International Institute of Finance, global debt may have surpassed $255 trillion by 2020 (IIF, 2019). Yet another study revealed that global debts and liabilities amounted to a staggering $2.5 quadrillion (Ausman, 2018). The reader should note that these figures were tabulated before the COVID-19 outbreak.

The IMF singles out widening income inequality as the trigger for the next Great Depression (Georgieva, 2020). The wealthiest 1% now own more than twice as much wealth as 6.9 billion people (Coffey et al, 2020) and this chasm is widening with each passing month. COVID-19 had, in fact, boosted global billionaire wealth to an unprecedented $10.2 trillion by July 2020 (UBS-PWC, 2020). Global GDP, worth $88 trillion in 2019, may have contracted by 5.2% in 2020 (World Bank, 2020).

As the Greek historian Plutarch warned in the 1st century AD: “An imbalance between rich and poor is the oldest and most fatal ailment of all republics” (Mauldin, 2014). The stability of a society, as Aristotle argued even earlier, depends on a robust middle element or middle class. At the rate the global middle class is facing catastrophic debt and unemployment levels, widespread social disaffection may morph into outright anarchy (Maavak, 2012; DCDC, 2007).

Economic stressors, in transcendent VUCA fashion, may also induce **radical geopolitical realignments**. Bullions now carry more weight than NATO’s **security guarantees** in **Eastern Europe**. After Poland repatriated 100 tons of gold from the Bank of England in 2019, Slovakia, Serbia and Hungary quickly followed suit.

According to former Slovak Premier Robert Fico, this **erosion** in **regional trust** was based on historical precedents – in particular the 1938 Munich Agreement which ceded Czechoslovakia’s Sudetenland to Nazi Germany. As Fico reiterated (Dudik & Tomek, 2019):

“You can hardly trust even the closest allies after the Munich Agreement… I guarantee that if something happens, we won’t see a single gram of this (offshore-held) gold. Let’s do it (repatriation) as quickly as possible.” (Parenthesis added by author).

President Aleksandar Vucic of Serbia (a non-NATO nation) justified his central bank’s gold-repatriation program by hinting at economic headwinds ahead: “We see in which direction the crisis in the world is moving” (Dudik & Tomek, 2019). Indeed, with two global Titanics – the **U**nited **S**tates and China – set on a **collision course** with a quadrillions-denominated iceberg in the middle, and a viral outbreak on its tip, the **seismic ripples** will be felt

**far**, **wide** and for a **considerable period**.

A reality check is nonetheless needed here: Can additional bullions realistically circumvallate the economies of 80 million plus peoples in these Eastern European nations, worth a collective $1.8 trillion by purchasing power parity? Gold however is a potent psychological symbol as it represents national sovereignty and economic reassurance in a potentially hyperinflationary world. The portents are clear: The current global economic system will be weakened by rising nationalism and autarkic demands. Much uncertainty remains ahead. Mauldin (2018) proposes the introduction of Old Testament-style debt jubilees to facilitate gradual national recoveries. The World Economic Forum, on the other hand, has long proposed a “Great Reset” by 2030; a socialist utopia where “you’ll own nothing and you’ll be happy” (WEF, 2016).

In the final analysis, COVID-19 is not the root cause of the current global economic turmoil; it is merely an accelerant to a burning house of cards that was left smouldering since the 2008 Great Recession (Maavak, 2020a). We also see how the four main pillars of systems thinking (diversity, interconnectivity, interactivity and “adaptivity”) form the mise en scene in a VUCA decade.

ENVIRONMENTAL

What happens to the **environment** when our **economies implode**? Think of a **debt-laden** workforce at sensitive **nuclear** and **chemical plants**, along with a concomitant **surge** in **industrial accidents**? **Economic stressors**, workforce demoralization and rampant profiteering – rather than manmade climate change – arguably pose the **biggest threats** to the environment. In a WEF report, Buehler et al (2017) made the following pre-COVID-19 observation:

The ILO estimates that the annual cost to the global economy from accidents and work-related diseases alone is a staggering $3 trillion. Moreover, a recent report suggests the world’s 3.2 billion workers are increasingly unwell, with the vast majority facing significant economic insecurity: 77% work in part-time, temporary, “vulnerable” or unpaid jobs.

Shouldn’t this phenomenon be better categorized as a societal or economic risk rather than an environmental one? In line with the systems thinking approach, however, global risks can no longer be boxed into a **taxonomical silo**. Frazzled workforces may precipitate another Bhopal (1984), Chernobyl (1986), Deepwater Horizon (2010) or Flint water crisis (2014). These disasters were notably not the result of manmade climate change. Neither was the Fukushima nuclear disaster (2011) nor the Indian Ocean tsunami (2004). Indeed, the combustion of a long-overlooked cargo of 2,750 tonnes of ammonium nitrate had nearly levelled the city of Beirut, Lebanon, on Aug 4 2020. The explosion left 204 dead; 7,500 injured; US$15 billion in property damages; and an estimated 300,000 people homeless (Urbina, 2020). The environmental costs have yet to be adequately tabulated.

Environmental disasters are more attributable to Black Swan events, systems breakdowns and corporate greed rather than to mundane human activity.

Our JIT world aggravates the **cascading potential** of risks (Korowicz, 2012). Production and delivery delays, caused by the COVID-19 outbreak, will eventually require industrial **overcompensation**. This will further stress senior executives, workers, machines and a variety of computerized systems. The trickle-down effects will likely include substandard products, contaminated food and a general lowering in health and safety standards (Maavak, 2019a). Unpaid or demoralized sanitation workers may also resort to indiscriminate waste dumping. Many cities across the United States (and elsewhere in the world) are no longer recycling wastes due to prohibitive costs in the global corona-economy (Liacko, 2021).

Even in good times, strict protocols on waste disposals were routinely ignored. While Sweden championed the global climate change narrative, its clothing flagship H&M was busy covering up toxic effluences disgorged by vendors along the Citarum River in Java, Indonesia. As a result, countless children among 14 million Indonesians straddling the “world’s most polluted river” began to suffer from dermatitis, intestinal problems, developmental disorders, renal failure, chronic bronchitis and cancer (DW, 2020). It is also in cauldrons like the Citarum River where pathogens may mutate with emergent ramifications.

On an equally alarming note, depressed economic conditions have traditionally provided a waste disposal boon for organized crime elements. Throughout 1980s, the Calabriabased ‘Ndrangheta mafia – in collusion with governments in Europe and North America – began to dump radioactive wastes along the coast of Somalia. Reeling from pollution and revenue loss, Somali fisherman eventually resorted to mass piracy (Knaup, 2008).

The coast of Somalia is now a maritime hotspot, and exemplifies an entwined form of economic-environmental-geopolitical-societal emergence. In a VUCA world, indiscriminate waste dumping can unexpectedly morph into a Black Hawk Down incident. The laws of unintended consequences are governed by actors, interconnections, interactions and adaptations in a system under study – as outlined in the methodology section.

Environmentally-devastating industrial sabotages – whether by disgruntled workers, industrial competitors, ideological maniacs or terrorist groups – cannot be discounted in a VUCA world. Immiserated societies, in stark defiance of climate change diktats, may resort to dirty coal plants and wood stoves for survival. Interlinked ecosystems, particularly water resources, may be **hijacked** by nationalist sentiments. The **environmental fallouts** of critical infrastructure (CI) breakdowns loom like a **Sword of Damocles** over this decade.

GEOPOLITICAL

The **primary catalyst** behind **WWII** was the **Great Depression**. Since history often **repeats itself**, expect **familiar bogeymen** to **reappear** in societies roiling with **impoverishment** and ideological clefts. Anti-Semitism – a societal risk on its own – may reach alarming proportions in the West (Reuters, 2019), possibly **forc**ing Israel to undertake **reprisal operations** inside allied nations. If that happens, how will **affected nations** react? Will security resources be reallocated to protect certain minorities (or the Top 1%) while larger segments of society are exposed to restive forces? **Balloon effects** like these present a classic VUCA problematic.

Contemporary geopolitical risks include a possible **Iran-Israel war**; **US-China military confrontation** over **Taiwan** or the **S**outh **C**hina **S**ea; **North Korean proliferation** of **nuclear** and **missile technologies**; an **India-Pakistan nuclear war**; an **Iranian closure** of the Straits of **Hormuz**; **fundamentalist-driven implosion in the Islamic world**; or a **nuclear confrontation** between **NATO** and **Russia**. Fears that the Jan 3 2020 assassination of Iranian Maj. Gen. Qasem Soleimani might lead to WWIII were grossly overblown. From a systems perspective, the killing of Soleimani did not fundamentally change the actor-interconnection-interaction adaptivity equation in the Middle East. Soleimani was simply a cog who got replaced.

# 1NR

**Judicial Economics DA**

**Link alone turns the case.**

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

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

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

**And, conflicting objectives mean it will be unreliable and ineffective—Supercharges our circumvention arguments and makes them offense. AND—AFF means antitrust is perceived as arbitrary**

**Melamed 20** – Professor of the Practice, Stanford Law

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

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

**Either zeroes the case or triggers our impacts**

**Melamed 20** – Professor of the Practice, Stanford Law

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

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

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

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

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

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

**Courts will not “tip in favor of Brandesianism” – it will continue to coalesce around static economic efficiency.**

**Graham 21** – Analyst, Investor’s Business Daily

Jed Graham, FTC, Biden Antitrust Enforcement Push Takes On Amazon, Google — And The Supreme Court, 16 September 2021, https://www.investors.com/news/antitrust-enforcement-push-by-ftc-biden-takes-on-amazon-google-supreme-court/

**The** **Supreme Court's June opinion rejecting NCAA limits** on educational benefits for student-athletes **reads like a celebration of noninterventionist antitrust law**, William Kovacic, who **chaired the FTC** under President George W. Bush, told IBD.

"**Markets** **are** often **more effective** than the **heavy hand of judicial power** when it comes to **enhancing consumer welfare**," Justice Neil Gorsuch wrote. Courts examining business dealings **should take care not to "set sail on a sea of doubt**," he added, elevating William Howard Taft's **warning of the danger** of a "**shifting, vague and indeterminate" antitrust standard.**

**The words** seemed to **carry a not-too-subtle message** for the Biden team, Kovacic says. "**Until** the **Congress changes the law**, **we will continue to endorse the approach we have taken for** the last **40 years**," he said.

**Legal decisionmaking is exclusively grounded in economics now and will remain so in the future absent plan**

**Meriwether 18** – Director, American Antitrust Institute & Lecturer, the George Mason Institute of Law and Economics for Judges

litigation partner with Cafferty Clobes Meriwether and Sprengel LLP with a role in many high-profile, high-stakes antitrust litigation, and co-chair of the Editorial Board of ANTITRUST, a publication by the Antitrust Law Section of American Bar Association, Editor’s Note: Antitrust in the Supreme Court, *Antitrust*, Vol. 33, No. 1 (Fall 2018)

**Future Trends** in Supreme Court

Antitrust Jurisprudence

**Unmistakably**, a **key characteristic** of the **Court’s decision in**

**Amex** is its discussion of and **reliance on economics** and economic literature as the **basis for its legal analysis**. Alden

Abbott and Bruce Hoffman view Amex as a “**welcome continuation**” of the **long-standing trend** in the Supreme Court

to **look at “prevailing economic doctrine” in forming anti -**

**trust jurisprudence**.36 These authors applaud the Court’s

focus on the “economics of vertical agreements and the welfare-enhancing efficiencies that often flow from restrictive

clauses inserted into such contracts.”37 They believe its **application of a “well-accepted applied economic methodology**”

will “enrich and improve judicial rule of reason evaluation.”38

And while noting the dissent’s disagreement with **how** these

economic principles were **applied**, they also point out that **the**

**dissenting opinion** “was rooted in sound economics.”39

**Reliance on** economics and **economic principles** **appears** to be

**here to stay.**

It bears noting that the decision was 5-4, **issued along**

**ideological lines** with the five conservative justices in the

majority. Some authors question the opinion for relying too

heavily on a handful of conservative-leaning economists,

with no real consideration of other points of view.40 For

Brunell, the decision appears result-driven, a consequence of

“the power of conservative ideology over vertical restraints.”41

With a **new conservative majority now firmly ensconced** on

the Court, however, there is **little reason to expect any fundamental shift** in the way the Court views vertical restraints

**in the future**.

**And link uniqueness ensures internal link uniqueness**

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

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

By **realigning antitrust** under a **singular objective** **grounded in economics**, the consumer welfare standard heralded the advent of the modern antitrust revolution that **squarely rejects** populist **desires to balance** multiple **non-economic factors** **in favor** of a **consistent and coherent framework focused** on the **straightforward**, but elegant, **question** of **whether a transaction or commercial arrangement makes consumers better off.** The virtues that originally motivated the adoption of the consumer welfare standard remain its most salient features and the **reason why** it **continues to be the best model** for antitrust analysis.

**Massive spillover—And they necessarily must link if they change the outcome of the cases**—Otherwise vote Negative on presumption! (or topicality)

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

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

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

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

**Fairness**15

**Inequality**16

**Labor** share of **income**17

**Jobs**18

Effect on **competition (apart from consumer welfare)**19

Consumer **choice**20

Promoting **democracy**; concentration of **political power**21

**Anti-globalization**; domestic control over **resources**22

**Media veracity**23

**Environment**al protection24

**Managerial competence**25

Mitigating consumer **error**26

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

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

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

**Single case spills over**

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

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

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

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

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

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

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

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

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

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

**COC 9/20** – U.S. Chamber of Commerce

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

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

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

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

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

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

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

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

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

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

**Can’t DISTINGUISH it—AND, if you tried that would only make it WORSE!—Supercharges both the LINK and the INTERNAL LINK/TURNS CASE arguments.**

**Melamed 20** – Professor of the Practice, Stanford Law

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

**These problems** **cannot be solved by legislative codification.** To **avoid arbitrariness**, the codification would need to be **precise**. **Simple, high-level rules** (e.g., no company may have more than X employees or Y revenues) would serve their **intended objectives** **very imperfectly** and with **substantial error costs**. **Because antitrust law applies to almost all industries** and **covers an infinite variety of market transactions**, **more detailed** rules would **need to be very complex**. **Complex rules** would **compound** **compliance problems** for business entities and would be **especially subject** to **rapid obsolescence** and **industry capture**. Most important, **any** such ruleswould **move antitrust law** from a **guardian of marketplace competition** toward a **vehicle for government regulation.** **Antitrust law** would **cease** being either a **prescription for economic welfare** or "the **Magna Carta of free enterprise**."100

Their Rogers card on the Adv CP proves our link arg -

The general community's interest in conducting commerce free of anticompetitive arrangements must be **balanced** against the **first amendment's** guarantee of **religious freedom**

**Antitrust law is unique in this respect—That’s what *makes* it antitrust law!—Guarantees massive scope of internal link—THIS is why the plan is a terrible idea and the CP is a good one—Prefer on-point evidence from the core topic experts.**

**Melamed 20** – Professor of the Practice, Stanford Law

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

It is tempting to suggest a broadening of that invitation. In an intriguing passage, Tim Wu said that "[n]o one denies that economic considerations are what should govern any individual case.""10 Wu did not explain what he meant by that, but the **comment suggests a world** in which **antitrust decision-makers decide cases, as they do now**, with a **singular, rigorous focus on economic welfare** **but** in which the **decision rules**-the **legal doctrine** and **proof standards**-are **informed by broader concerns** about aggregation and inequality of power and wealth. That way, Wu might **imagine**, antitrust law can **have it all**-it can be crafted to **serve a range of objectives having to do with economic power** but **still leave judges with a clear enough mandate to guard against arbitrary decisions**. Those **broader concerns** could then **inform** the discussion about elimination of market-power screens and no-fault intervention.

But **that dichotomy** **between crafting the rules and applying them** **does not work for antitrust law** **because**, as explained above, the law **cannot sensibly be fully codified** and **depends on a** **common-law like evolution** of **legal doctrine** and **standards**. Sound **antitrust law** is **made by judges** **on a** **case-by-case basis**. **Even in jury cases**, it is **judges** who develop **legal doctrine**, resolve **legal questions**, and craft jury **instructions**. The **lawmakers-the judges-must have a coherent objective so their decisions, and thus the law**, **are not arbitrary**. **Noneconomic objectives cannot sensibly be inserted into antitrust doctrine** **by distinguishing creation of antitrust law from its application.**

**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**.

**The FTC is fundamentally limited**

**Chakravorti**, dean of global business at Tufts University’s Fletcher School of Law and Diplomacy, **‘21**

(Bhaskar, “Lina Khan Has Her Own Antitrust Paradox,” July 7, Foreign Policy)

But **the FTC’s levers are limited**.

Although Khan can reframe the fundamentals of the antitrust complaint, without adequate regulatory infrastructure—**something only Congress can provide**—there are likely to be **unsurmountable obstacles** as the chess game between the law and Facebook unfolds. No matter how brilliantly Khan’s FTC rewrites the case against Facebook, the agency’s **powers**, **budget**, and **resources** are still limited. Ad hoc adjustments to the FTC’s budget, as envisioned in one of the bills in Congress, and **stopgap measures** to expand its powers **do not get around** the **fundamental fact** that the FTC was not set up to pursue the breadth of novel issues and policy trade-offs that digital industries create.

Antitrust in digital industries cannot be considered in isolation. It is also quite different from antitrust in other industries because there are issues unique to the industry. A holistic view of digital antitrust means tying antitrust concerns with numerous broader questions, such as securing users’ data rights, the responsibilities platforms ought to have for the content they host, and criteria that helps demarcate the benefits of network effects from the abuses of network power. The FTC is too much of a general purpose entity to dive into these complexities. As former Federal Communications Commission chair Tom Wheeler observed: “The **vast scope** of the FTC’s present responsibilities—as diverse as funeral director practices, robocalls, and labeling hockey pucks—means that the oversight of digital platform regulation must compete with the agency’s **existing diverse responsibilities** and **limited resources**.”

Meanwhile, Facebook is shoring up its defenses. Even as the FTC gets its act together and its complaint is reconsidered, Facebook is **busy integrating the backend infrastructure** that supports its popular apps: Facebook Messenger, Instagram, and WhatsApp. This is likely to make it impossible to tear the apps apart. In addition to the integration’s technical aspects, which offer the company many benefits, Facebook is making the case that consumers benefit from it as well. It is testing a unified “accounts center” that shows the user all the apps the user has open; Facebook Messenger and Instagram users can send messages and get access to features across apps as well. Most significantly, this could also enable end-to-end encryption across all the apps, which would be an enormous boost to Facebook’s argument that its changes are meant to enhance users’ privacy.

It is conceivable that even if the FTC’s rewritten complaint is accepted, an antitrust case would take a long time to prosecute. In the meantime, Facebook will **have already accomplished a fait accompli**, making it hard to push further with the current, narrow complaint’s core. In fact, Khan’s predecessor, Joseph Simons, acknowledged that Facebook’s plan to integrate its apps would pose challenges to any move to break up the company.

**No new FTC rulings in the short term---the commission is split 2-2 along partisan lines**

**Krishan 21** – Washington Examiner

Nihal Krishan, "Biden progressive FTC agenda faces pause as Democratic member leaves," Denver Gazette, 10-3-2021, https://denvergazette.com/news/biden-progressive-ftc-agenda-faces-pause-as-democratic-member-leaves/article\_f693a392-04cf-5bb8-9e00-d2df0ef91b0c.html

Federal Trade Commission Chairwoman Lina Khan will have to **pause elements** of her ambitious, progressive agenda as a Democratic commissioner is **leaving** next week, meaning Democrats will **no longer be in the majority**.

The Senate Thursday confirmed FTC Commissioner Rohit Chopra to lead the Consumer Financial Protection Bureau, meaning the agency will once again be **split along party lines** with two Republican and two Democratic commissioners until Chopra is replaced by Biden nominee Alvaro Bedoya.

For a few months, the **new dynamic** will likely result in **fewer controversial policy changes** at the agency, more regular enforcement of the law, and a focus on investigations, cases, and actions that both parties agree on.

"There are many non-controversial areas that have always gotten things done on a bipartisan basis, like consumer protection cases, fraud, privacy, and antitrust cases," Republican Commissioner Noah Phillips told the Washington Examiner.

Phillips added that the agency had historically operated largely on a bipartisan basis, including under the leadership of Commissioner Rebecca Kelly Slaughter, who was acting chair of the trade commission for a few months before Khan took over.

Democratic Top Regulator Says Breaking Up Big Tech Could A Good, 'Conservative' Solution

He also said that he and Republican Commissioner Christine Wilson are not "monolithically aligned" and "could be split" on some issues and votes within the agency, possibly giving the Democrats an opportunity to team up with Republicans on certain issues.

Conservative antitrust lawyers say that Khan and the Democrats at the agency, while being in the majority for the past few months, have pursued an aggressive and partisan agenda thus far, pointing to their expansion of regulatory powers, tightening of the merger approval process, and revoking of certain Trump administration guidelines.

"The controversial remaking of FTC rules with new policy statements and other initiatives passed along partisan lines will **no longer happen** for a little while without the Democratic majority," said Neil Chilson, acting chief technologist at the trade commission for a year during the Trump administration.

Chilson said, though, that since Democrats removed the requirement to get the approval of a majority vote of the commission to start an investigation or issue a subpoena, Khan will still be able to pursue many parts of her agenda without any official agency votes.

"Khan can pursue her agenda even without a majority for many months. That's part of the reason she gave every commissioner the subpoena power for investigations, as stop gap in case she wasn't in the majority," said Chilson, who is now a senior research fellow at the Charles Koch Institute, a libertarian research organization.

Those who are in favor of Khan's antitrust agenda said they are optimistic that Chopra's replacement, Bedoya, will be confirmed soon by the Senate and that much of the Democratic agenda will proceed even without them being in the majority in the coming weeks or months.

"It's true that the FTC **won't hold a lot of votes** during this time and it's important to move quickly to get Bedoya confirmed, so we can start having important votes again," said Charlotte Slaiman, head of competition policy at open internet advocacy group Public Knowledge.

**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, 20**21**, 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**.”

**Even if they are correct in the abstract about mergers being deterred, big tech specifically doesn’t care---they have the funds to contest squo investigations**

**Sorkin et al. 21** – Reporters and editors for the New York Times, citing Doug Melamed, a Stanford law professor and former acting chief of the Justice Department’s antitrust division

Andrew Ross Sorkin, Jason Karaian, Sarah Kessler, Stephen Gandel, Michael J. de la Merced, Lauren Hirsch, and Ephrat Livni, "Aon's Failed Deal Highlight's Biden's Aggressive Antitrust Approach," The New York Times, 7-27-2021, https://www.nytimes.com/2021/07/27/business/dealbook/aon-deals-antitrust.html

Tough talk can make big deals less appealing, former antitrust officials told DealBook. “The risk and time delays of a merger challenge often cause the parties to abandon a deal,” said Doug Melamed, a Stanford law professor and former acting chief of the Justice Department’s antitrust division. President Biden’s pledge to rein in corporate power with more aggressive antitrust enforcement efforts, backed by a team of Big Tech critics, is limited by existing laws. Aon’s move highlights how trustbusters can have their way by other means.

And even if the government doesn’t win every case it brings, the signals it sends about scrutinizing mergers more closely have been received by deal makers, who are otherwise having a very busy year. (One of the busiest on record, in fact.)

Filing lawsuits is one thing, but **going through with litigation is another**, because “the courts are generally **very conservative about antitrust** matters,” Melamed said. A case in point: The F.T.C.’s antitrust matter against Facebook was dismissed by a judge who said the government hadn’t properly defined the personal social networking market, much less showed that Facebook monopolized it. (The agency recently received a three-week extension to amend its complaint.) And **deep-pocketed tech giants** — a priority for the administration’s antitrust efforts — might not **back down from legal challenges** quite as readily as insurers.

**Big litigation is far off, low magnitude, and priced in**

Lauren **Feiner**, CNBC, Google’s antitrust mess: Here are all the major cases it’s facing in the U.S. and Europe, December 18, 20**20**, https://www.cnbc.com/2020/12/18/google-antitrust-cases-in-us-and-europe-overview.html

While Google faces the threat of potential break-ups in the future, **it will likely be years** before any significant resolution is reached. Once the new cases make their way through the courts, there’s still **far from a guarantee** that a judge would grant **anything that drastic** **even if they do side with the government**. It’s likely at least some of the cases against Google will be **consolidated**, with the bipartisan coalition already indicating it would file a motion to do so with the DOJ case.

**While new laws** that could make the courts more favorable to the government in such cases **loom on the horizon**, **they are far from an immediate threat**.

That’s likely why these new lawsuits **have had little impact** on Google’s stock price. Shares of its parent company Alphabet have **rocketed nearly 30%** in 2020 and nearly 20% over the past three months alone. **Investors have grown used to the scrutiny** on the trillion dollar company **and the threat is already priced in.**

**And investors will ignore the noise**

**Kim 19** – technology columnist at Bloomberg Opinion

Tae Kim, "Why Investors Shouldn’t Overreact to the DOJ’s Antitrust Review of Big Tech," Barrons, 7-26-2019, <https://www.barrons.com/articles/why-investors-shouldnt-overreact-to-an-antitrust-review-of-big-tech-51564181107>

Here we go again. The antitrust regulatory risk for Big Tech dominated the headlines this past week. But does the government’s new threat have any teeth, or are worries for investors inflated?

The Justice Department announced late Tuesday that it has opened a review of “the practices of market-leading online platforms.” The agency didn’t name specific companies, but the wording suggests that it will look into Google parent Alphabet (ticker: GOOGL) for search, Facebook (FB) for social media, and Amazon.com (AMZN) for e-commerce.

The Justice Department will also assess the online marketplace to ensure companies are competing on the merits of their services, which could suggest Apple’s (AAPL) and Google’s app-store practices will be reviewed.

The market shrugged. All four stocks barely moved the following day. Investors may have learned a lesson when the same four companies lost more than $130 billion in aggregate market value on June 3 after multiple antitrust-inquiry reports. The one-day selloff proved to be a buying opportunity, as the stocks have rallied about 15% to 20% since.

At the time, Barron’s suggested **antitrust fears may be overblown** (“Weighing the Antitrust Case Against Google, Apple, Amazon, and Facebook,” June 7). Following the latest news, our view hasn’t changed.

History has shown the government tends to either **lose in court**—such as its bid to block AT&T’s (T) acquisition of Time Warner and its order to break up Microsoft (MSFT)—**or settle**. In most cases companies agree to fines and peripheral business-practice changes, but nothing that will affect core business models.

Now, more evidence has emerged that the outcome may not be overly **punitive**. On Wednesday, the Federal Trade Commission and Facebook announced a $5 billion penalty over user-privacy practices from last year’s Cambridge Analytica scandal—“the largest ever imposed on any company for violating consumers’ privacy.”

While the figure may sound large, it is relatively small for a company with $49 billion in cash and which is estimated to make $18 billion in net income this year. When the settlement figure was first reported, Facebook shares rallied.

Moreover, proving consumer harm is a **tough task** when Facebook’s and Google’s services are mostly free, and Amazon’s e-commerce platform has arguably lowered prices and increased convenience through faster delivery.

Every weekday evening we highlight the consequential market news of the day and explain what's likely to matter tomorrow.

In fact, none of the companies have traditional monopoly positions in various markets. EMarketer estimates that Amazon represented 37% of U.S. e-commerce sales in 2018 and 3.5% of total retail sales. The firm also said Google accounted for 50% of U.S. digital-ad spending that year, while Facebook had 22%. Apple’s iPhone had 45% of the U.S. smartphone market, according to eMarketer’s latest data.

“Facebook and Google are large in digital advertising, but quite small in global advertising,” says Marcelo Lima, a hedge fund manager at Heller House. “The same is true for Amazon: large in e-commerce, small in retail sales. There is no reason to narrowly define these markets as digital only.”

David Nelson, chief strategist at Belpointe Asset Management, says antitrust laws are antiquated and require new legislation to go after digital-age companies.

Daniel Ives, a Wedbush Securities analyst, agreed and wrote that he finds any major legislation “**exceedingly unlikely**.”

Investors should **ignore the regulatory noise** and focus on Big Tech fundamentals instead.

**Close, but *not inevitable*---regulatory environment and maintaining comparative advantages in the private sector are key**

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

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

Clues for a Winning Strategy

**Is AI a race China is destined to win?** With a population four times the size of the United States, there is no question that China will have the largest domestic market for AI applications. With many multiples of the United States in data, substantially larger numbers of computer scientists and a government for which there is a first-order priority, we can understand colleagues who are pessimistic. Indeed, **it is our best judgment that on the current trajectory, while the United States will maintain a narrow lead over the next five years, China will then catch up and pass us quickly thereafter**.

Nonetheless, we **believe that this is an arena in which the United States can compete—and win**. Congress recently established the “National Security Commission on Artificial Intelligence,” with Eric Schmidt as its chair, and Bob Work, who served as Deputy Secretary of Defense under both Obama and Trump, as Vice Chair. Its mission is to develop that strategy “to ensure America’s national security enterprise has the tools it needs to maintain U.S. global leadership.”55 In the hope of being helpful to that effort, we conclude with five pointers toward a winning strategy.

First, Americans must wake up to the challenge. Recognition that that the United States faces a serious competitor in a contest in which the outcome will be decisive for our future is necessary to get our competitive juices flowing. The Olympics offers an instructive analogy for thinking about a competitive strategy for AI. It also reminds us that competition is inherently a good thing. Competition produces superior performance. Participants in a marathon run faster than they do when running alone. Indeed, competition is a core American value. Free markets organize a competitive process that produces better products at cheaper prices. Science and its applications advance as research teams compete to better understand the world.56

Second, in this competition, the United States cannot hope to be the biggest—in that category, China wins by default due to the size of its population. However, what the United States can be is the smartest. In the seeking to improve and advance the most advanced of technologies, the brightest 0.0001 percent of individuals make the difference. The United States can succeed by recruiting talent from all 7.7 billion people on Earth and enabling these individuals to realize their full potential.57 In fact, U.S. companies have now recruited more than half of the top 100 recognized AI geniuses. In sharp contrast, China is a closed society—limited essentially to 1.4 billion Chinese speakers. Just 1000 foreign born individuals became Chinese citizens last year. So while the United States will not win competitions in which bulk numbers are the dominant factor, where brilliance, creativity and innovation matter most, the United States has a decisive advantage.58

Third, platforms matter. Here the United States begins with a huge sustainable competitive advantage: English is the universal language for science, business and the web. Chinese face the choice of either speaking English, or simply talking to themselves. Not only do the Chinese, but also the French and others often complain that this is unfair—and it may be. But it is a fact. To transform Singapore from a third-world city into one of the world’s most successful and prosperous global trading hubs, Lee Kuan Yew insisted on making English its first language. (Indeed, at one point in counseling Chinese leaders, he suggested that China make English its first language.) Today, more than half of the 7.5 billion people on Earth speak English—and another billion are seeking to learn.

Fourth, American companies have a significant first mover advantage in the establishment of the major platforms in AI, including operating systems (Android and Apple), design of advanced semiconductors (arm), and killer apps—including Instagram, YouTube and Facebook. Instagram has 1 billion monthly active users; Facebook more than 2.4 billion. While Chinese competitors will certainly attempt to displace the current leaders in both platforms and applications, if American companies are smart enough to continue enlarging their users’ opportunities, improving their experiences, and expanding the number of people using their platforms and applications, Chinese and others who want to speak to the world could have to continue relying on U.S.-dominated platforms.

**The U.S. outpaces China in investment, hiring, patents, skill development and deep learning for AI – only we have issue specific evidence**

**Knoema 21** – Knoema Corporation is a privately owned New York-based data technology company launched in 2014, founded in 2011.

Knoema, May 11 2021, “US-China AI Competition | Who is Winning?” https://knoema.com/infographics/sxovfdc/us-china-ai-competition-who-is-winning

(5 May 2021) According to the latest [Artificial Intelligence (AI) Index Report](https://hai.stanford.edu/research/ai-index-2021) by Stanford University, in 2020 for the first time ever China surpassed the USA in the share of AI journal citations worldwide. This is not surprising given the fact that China surpassed the US several years ago in the number of AI journal papers published each year. Another fact from the UN: due to rapid economic expansion and information and communications technology (ICT) investment growth in recent decades, [China's ICT](https://knoema.com/tlnbmw/china-has-built-up-its-digital-muscles) sector today is almost as big as the ICT sector in the US. The question that is raised by these trends is — where is China in the AI race with the US?

Why AI? AI, as the core component of the modern economy based on digital platforms, is becoming the key factor of global competitiveness. The more efficient the AI component, the more added value a digital platform can generate.

Besides AI journal publications and citations, **the US still outpaces China in all other AI-development-related indicators**. For example, **the annual US AI investment exceeds AI investment in China by 138%.**

In a broader context, the R&D (research and development) **investment in the digital sector by US companies exceeds China's R&D investment in the digital sector by 237%.** And today **there are only two Chinese companies, compared with seven US companies**, among the companies worldwide that invest more than $6 billion in the digital sector each year.

Given its faster long-term economic growth, China has the potential to gradually change the balance of global AI power. However, **it is highly unlikely that China or any other country will equal the US in AI potential in the near future.**

Chart, radar chart

Description automatically generated

**Innovation is migrating, NOT slowing.**

**Kennedy ’20** [Joe; November 9; former chief economist for the U.S. Department of Commerce, Economics PhD from George Washington University, J.D. from the University of Minnesota; Information Technology and Innovation Foundation, “Monopoly Myths: Is Big Tech Creating “Kill Zones”?” https://itif.org/publications/2020/11/09/monopoly-myths-big-tech-creating-kill-zones]

Data on Venture Investments Suggests Tech Acquisitions and High Market Share Do Not Hurt Start-Ups

The right measure of the effect of killer zones is not the trend in the specific market wherein large tech firms operate, but in the overall tech innovation ecosystem. Even Hathaway acknowledged that the **relative declines** he observed in the narrow markets where the big firms are **strongest** could be **offset** by investments moving to **other, more promising, markets**. In fact, that appears to be exactly what has happened. From 2006 to 2019, venture capital investments in IT deals **increased steadily and significantly**. Although it leveled off in 2019, tech funding was still 54 percent above the 2017 level.

Figure 1. U.S. deal value in total and in tech (2006–2019)51

Figure 2 shows the number of technology angel and seed deals as well as the number of early stage deals. The number of **angel and seed deals** rose by almost **six-fold** between 2006 and 2019, peaking in 2015. The number of early deals rose by **2.4 times**. It is hard to see **any sign of investor activity slowing down**.

**Chinese AI dominance is the death knell of global peace---sparks great power wars**

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

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

An AI Arms Race?

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

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

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

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

**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 **S**outh **C**hina **S**eas **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**.