# 1NC---Round 7---NDT 22

## Off

### Off

FTC DA

#### Bedoya will be confirmed to the FTC now, but it’s narrow---his agenda is key to regulating facial recognition.

Jessica Rich 21. Former director of the Federal Trade Commission’s (FTC) Bureau of Consumer Protection (BCP), Counsel at Kelley Drye LLP. “Some fireworks at Bedoya’s Senate confirmation hearing, but confirmation still seems likely.” Ad Law Access, 11-18-2021. https://www.adlawaccess.com/2021/11/articles/some-fireworks-at-bedoyas-senate-confirmation-hearing-but-confirmation-still-seems-likely/

On November 17, the Senate Commerce Committee held its eagerly-awaited hearing on the nomination of Alvaro Bedoya, a data privacy academic from Georgetown Law, to be FTC Commissioner. Bedoya is slated to replace Rohit Chopra, who departed the agency last month to become Director of the CFPB, and Bedoya’s appointment would once again give the Democrats a voting majority. In the run-up to his hearing, some have wondered – Can we expect Bedoya to provide Chair Khan with a reliable third vote for her agenda, or will he bring a more bipartisan approach to the agency? From his answers and demeanor at the hearing, the answer is probably…both.

First, a little table-setting: Bedoya’s nomination was considered along with three others – Jessica Rosenworcel for FCC Chair and two nominees for the Department of Commerce. The hearing was well-attended by Committee members, who directed the majority of their questions to Rosenworcel. (Yes, net neutrality, broadband access, and the “homework gap” all got more attention than privacy.) All four current FTC Commissioners attended the hearing in person, in a bipartisan show of support for Bedoya, though Bedoya attended remotely due to a recent exposure to COVID.

Here are some takeaways from Bedoya’s portion of the hearing.

He appears likely to be confirmed, even if largely along party lines. Although Senator Wicker made a reference to Bedoya’s “strident” views and Senators Lee, Cruz, and Sullivan slammed his “extremist” tweets (see below), most of the questions (from 18 Senators!) related to Bedoya’s area of expertise (privacy), where there is more alignment between the parties than in other areas. He handled the questions well, and repeatedly expressed support for collaboration and bipartisanship (e.g., specifically mentioning that he wants to work closely with Commissioner Wilson on privacy). Democrats have the votes (in the Committee and on the Senate floor), even if they ultimately have to call in V.P. Harris to break a tie.

He spoke about his nomination and the issues in personal and emotional terms. Bedoya highlighted that he and his family were welcomed into this country 34 years ago. He talked about his experience as a Senate staffer, learning about the terror and harm caused by stalking apps from a shelter for battered women. He realized then and believes now that “privacy is not just about data, it’s about people.” His goal as a Commissioner would be to make sure the FTC protects people, and to help both consumers and businesses manage the multiple crises facing the country – a COVID crisis, a privacy crisis, and a small business crisis.

He appears likely to vote with the majority on many (or most) issues. No big surprise here, but when asked his views about various issues, he consistently supported positions that Khan, Slaughter, and (his predecessor) Chopra have supported – federal privacy legislation, Magnuson-Moss privacy rulemaking if Congress doesn’t act, pushing back against the “unprecedented consolidation” that is forcing small businesses to close, streamlining the FTC’s rulemaking and subpoena processes, reducing the power of the platforms, and reining in tracking technologies like facial recognition. As to the latter, he said he would not support banning facial recognition technologies altogether, since some applications assist with benefits like public safety and healthcare. However, he would support banning facial recognition technologies that are hidden, that lack consent, or that collect, use, and share data without limits.

He’s a real-live privacy expert. He clearly has the credentials, starting with his work as a Senate staffer and continuing through his years at Georgetown Law as a professor and head of a privacy think tank. But he also quickly and confidently answered all questions related to privacy – from the need for privacy legislation generally, to his views on Senator Schatz’s “duty of loyalty” and Senator Markey’s proposal to amend COPPA, to the lines he would draw on facial recognition (see above).

He wrote some controversial tweets, and a number of Republicans seem poised to vote “no” on his confirmation. Senator Sullivan cited a tweet from Bedoya calling the 2016 Republican convention a “White Supremacist rally.” Cruz cited tweets about ICE as a “domestic surveillance agency” and a retweet involving critical race theory and white supremacy. He also called Bedoya a “left wing activist, bomb thrower, extremist, and provocateur.” Lee ran through a series of supposedly “yes or no” questions in rapid succession, and accused Bedoya of being evasive when he tried to qualify his responses. And Wicker referred to Bedoya’s “strident” views, as noted above. As to the tweets, Bedoya apologized, saying that it was “rhetoric” and that he would put aside any partisan views if he became Commissioner. However, these Senators (and perhaps other Republicans) seem poised to vote “no” on Bedoya’s confirmation, and some have said they plan to place a “hold” on the process, which could slow it down.

If confirmed, he could help reduce tensions at the Commission. With acrimony among the Commissioners currently at unprecedented levels (see our recent post here), adding Bedoya to the mix could help reduce the tensions (despite the tweets). He’s known to be collegial, he worked across the aisle as a Senate staffer, he repeatedly invoked bipartisanship at the hearing, and all of the sitting Commissioners (Democrats and Republicans) showed up at the hearing to support him. That augurs well for the dynamics at the Commission, even if the votes remain split along party lines.

We will continue to monitor progress on Bedoya’s nomination and post updates as they occur.

#### The plan triggers backlash to the FTC.

Alison Jones 20. Professor of Law at King's College London, with William E. Kovacic – George Washington University, March, “Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy.” The Antitrust Bulletin. https://journals.sagepub.com/doi/full/10.1177/0003603X20912884

D. Political Backlash

As we have already indicated, the government’s prosecution of high stakes antitrust cases often inspires defendants to lobby elected officials to rein in the enforcement agency. Targets of cases that seek to impose powerful remedies have several possible paths to encourage politicians to blunt enforcement measures. One path is to seek intervention from the President. The Assistant Attorney General of the Antitrust Division serves at the will of the President, making DOJ policy dependent on the President’s continuing support. The White House ordinarily does not guide the Antitrust Division’s selection of cases, but there have been instances in which the President pressured the Division to alter course on behalf of a defendant, and did so successfully.125

The second path is to lobby the Congress. The FTC is called an “independent” regulatory agency, but Congress interprets independence in an idiosyncratic way.126 Legislators believe independence means insulation from the executive branch, not from the legislature. The FTC is dependent on a good relationship with Congress, which controls its budget and can react with hostility, and forcefully, when it disapproves of FTC litigation—particularly where it adversely affects the interests of members’ constituents. Controversial and contested cases may consequently be derailed or muted if political support for them wanes and politicians become more sympathetic to commercial interests. The FTC’s sometimes tempestuous relationship with Congress demonstrates that political coalitions favoring bold enforcement can be volatile, unpredictable, and evanescent.127 If the FTC does not manage its relationship with Congress carefully, its litigation opponents may mobilize legislative intervention that causes ambitious enforcement measures to the founder.

Imagine, for a moment, that the DOJ and the FTC launch monopolization cases against each of the GAFA giants. Among other grounds, these cases might be premised on the theory that the firms used mergers to accumulate and protect positions of dominance. The GAFA firms have received unfavorable scrutiny from legislators from both political parties over the past few years, but the current wave of political opprobrium is unlikely to discourage the firms from bringing their formidable lobbying resources to bear upon the Congress. It would be hazardous for the enforcement agencies to assume that a sustained, well-financed lobbying campaign will be ineffective. At a minimum, the agencies would need to consider how many battles they can fight at one time, and how to foster a countervailing coalition of business interests to oppose the defendants.

#### That derails Bedoya’s nomination.

Kathleen Murphy 21. Senior reporter at FTC Watch, 11/1/21. “Bedoya’s confirmation hearing draws closer,” FTC Watch. https://www.mlexwatch.com/articles/13940/print?section=ftcwatch

When Alvaro Bedoya, President Joe Biden’s nominee to the Federal Trade Commission, faces US senators, he will be asked about his scholarly views on privacy. But the hearing also gives senators a chance to assess the agenda of the last FTC nominee they confirmed, Chair Lina Khan.

The Senate Commerce, Science and Transportation Committee is set to consider Bedoya’s nomination, although no hearing date has been set. It’s most likely to occur the week of Nov. 15 or early December, based on the 2021 Senate calendar.

Serving on the FTC means Bedoya, a Georgetown University professor and former congressional lawyer, would end a 2-2 split and give Democrats a majority to implement the chair’s policies. Bedoya, founding director of the Center on Privacy & Technology at Georgetown Law, would replace former Commissioner Rohit Chopra who left Oct. 8 to serve as director of the Consumer Financial Protection Bureau.

Biden nominated Bedoya in mid-September. Khan, meanwhile, started serving as FTC chair in mid-June after an 83-day confirmation process. (See FTCWatch, No. 1002, March 29, 2021.)

‘99% about FTC Chair Lina Khan’

Michael Keeley, co-chair of the antitrust practice at Axinn, Veltrop & Harkrider, tweeted: “Bedoya confirmation is going to be 99% about FTC Chair Lina Khan, and 1% to do with Alvaro Bedoya. (And hopefully 0% about the Vertical Merger Guidelines.)”

Keeley said he expects the focus of the hearing to be assessing the wisdom of the policies being pursued by Khan.

“One area that might come up will be the number of steps the commission has been taking already to try to discourage mergers generally, which is consistent with the policies that were pursued and announced by the administration,” Keeley said in an interview. Confirmation hearings are useful for antitrust lawyers, Keeley said, because it’s “always good to understand the priorities that an enforcer believes in and to have them engage with senators on tough questions.”

Bedoya’s expertise

Bedoya, who is a naturalized US citizen born in Peru, has focused his work on the impact of surveillance and commercial data collection on immigrants and people of color. He has written about police use of facial recognition and oversaw the Center’s investigation that showed most American adults are enrolled in police face recognition databases that suffer from race and gender bias. Advocacy groups, such as anti-monopoly and civil rights organizations, urged the Senate to confirm Bedoya swiftly.

The antitrust views of Bedoya, a Yale Law School graduate, are less spelled out, offering another avenue of inquiry for senators. Republican senators are expected to examine how closely Bedoya will mirror the priorities Khan has established.

#### Bad FRT causes democratic backsliding---proactive US regulation is key.

Andrea Kendall-Taylor et al. 20. Senior fellow and director of the Transatlantic Security Program at the Center for a New American Security, co-author of Democracies and Authoritarian Regimes, with Erica Frantz - Assistant Professor of Political Science at Michigan State University, and Joseph Wright - Professor of Political Science at Pennsylvania State University, March/April 2020. “The Digital Dictators,” Foreign Affairs. <https://www.foreignaffairs.com/articles/china/2020-02-06/digital-dictators>

THE CHINA MODEL

The advancement of AI-powered surveillance is the most significant evolution in digital authoritarianism. High-resolution cameras, facial recognition, spying malware, automated text analysis, and big-data processing have opened up a wide range of new methods of citizen control. These technologies allow governments to monitor citizens and identify dissidents in a timely—and sometimes even preemptive—manner.

No regime has exploited the repressive potential of AI quite as thoroughly as the one in China. The Chinese Communist Party collects an incredible amount of data on individuals and businesses: tax returns, bank statements, purchasing histories, and criminal and medical records. The regime then uses ai to analyze this information and compile “social credit scores,” which it seeks to use to set the parameters of acceptable behavior and improve citizen control. Individuals or companies deemed “untrustworthy” can find themselves excluded from state-sponsored benefits, such as deposit-free apartment rentals, or banned from air and rail travel. Although the ccp is still honing this system, advances in big-data analysis and decision-making technologies will only improve the regime’s capacity for predictive control, what the government calls “social management.”

China also demonstrates the way digital repression aids the physical variety—on a mass scale. In Xinjiang, the Chinese government has detained more than a million Uighurs in “reeducation” camps. Those not in camps are stuck in cities where neighborhoods are surrounded by gates equipped with facial recognition software. That software determines who may pass, who may not, and who will be detained on sight. China has collected a vast amount of data on its Uighur population, including cell phone information, genetic data, and information about religious practices, which it aggregates in an attempt to stave off actions deemed harmful to public order or national security.

New technologies also afford Chinese officials greater control over members of the government. Authoritarian regimes are always vulnerable to threats from within, including coups and high-level elite defections. With the new digital tools, leaders can keep tabs on government officials, gauging the extent to which they advance regime objectives and rooting out underperforming officials who over time can tarnish public perception of the regime. For example, research has shown that Beijing avoids censoring citizens’ posts about local corruption on Weibo (the Chinese equivalent of Twitter) because those posts give the regime a window into the performance of local officials.

In addition, the Chinese government deploys technology to perfect its systems of censorship. AI, for example, can sift through massive amounts of images and text, filtering and blocking content that is unfavorable to the regime. As a protest movement heated up in Hong Kong last summer, for example, the Chinese regime simply strengthened its “Great Firewall,” removing subversive content from the Internet in mainland China almost instantaneously. And even if censorship fails and dissent escalates, digital autocracies have an added line of defense: they can block all citizens’ access to the Internet (or large parts of it) to prevent members of the opposition from communicating, organizing, or broadcasting their messages. In Iran, for example, the government successfully shut down the Internet across the country amid widespread protests last November.

Although China is the leading player in digital repression, autocracies of all stripes are looking to follow suit. The Russian government, for example, is taking steps to rein in its citizens’ relative freedom online by incorporating elements of China’s Great Firewall, allowing the Kremlin to cut off the country’s Internet from the rest of the world. Likewise, Freedom House reported in 2018 that several countries were seeking to emulate the Chinese model of extensive censorship and automated surveillance, and numerous officials from autocracies across Africa have gone to China to participate in “cyberspace management” training sessions, where they learn Chinese methods of control.

THE VELVET GLOVE

Today’s technologies not only make it easier for governments to repress critics; they also make it easy to co-opt them. Tech-powered integration between government agencies allows the Chinese regime to more precisely control access to government services, so that it can calibrate the distribution—or denial—of everything from bus passes and passports to jobs and access to education. The nascent social credit system in China has the effect of punishing individuals critical of the regime and rewarding loyalty. Citizens with good social credit scores benefit from a range of perks, including expedited overseas travel applications, discounted energy bills, and less frequent audits. In this way, new technologies help authoritarian regimes fine-tune their use of reward and refusal, blurring the line between co-option and coercive control.

Dictatorships can also use new technologies to shape public perception of the regime and its legitimacy. Automated accounts (or “bots”) on social media can amplify influence campaigns and produce a flurry of distracting or misleading posts that crowd out opponents’ messaging. This is an area in which Russia has played a leading role. The Kremlin floods the Internet with pro-regime stories, distracting online users from negative news, and creates confusion and uncertainty through the spread of alternative narratives.

Maturing technologies such as so-called microtargeting and deepfakes—digital forgeries impossible to distinguish from authentic audio, video, or images—are likely to further boost the capacity of authoritarian regimes to manipulate their citizens’ perceptions. Microtargeting will eventually allow autocracies to tailor content for specific individuals or segments of society, just as the commercial world uses demographic and behavioral characteristics to customize advertisements. Ai-powered algorithms will allow autocracies to microtarget individuals with information that either reinforces their support for the regime or seeks to counteract specific sources of discontent. Likewise, the production of deepfakes will make it easier to discredit opposition leaders and will make it increasingly difficult for the public to know what is real, sowing doubt, confusion, and apathy.

Digital tools might even help regimes make themselves appear less repressive and more responsive to their citizens. In some cases, authoritarian regimes have deployed new technologies to mimic components of democracy, such as participation and deliberation. Some local Chinese officials, for example, are using the Internet and social media to allow citizens to voice their opinions in online polls or through other digitally based participatory channels. A 2014 study by the political scientist Rory Truex suggested that such online participation enhanced public perception of the ccp among less educated citizens. Consultative sites, such as the regime’s “You Propose My Opinion” portal, make citizens feel that their voices matter without the regime having to actually pursue genuine reform. By emulating elements of democracy dictatorships can improve their attractiveness to citizens and deflate the bottom-up pressure for change.

DURABLE DIGITAL AUTOCRACIES

As autocracies have learned to co-opt new technologies, they have become a more formidable threat to democracy. In particular, today’s dictatorships have grown more durable. Between 1946 and 2000—the year digital tools began to proliferate—the typical dictatorship ruled for around ten years. Since 2000, this number has more than doubled, to nearly 25 years.

Not only has the rising tide of technology seemingly benefited all dictatorships, but our own empirical analysis shows that those authoritarian regimes that rely more heavily on digital repression are among the most durable. Between 2000 and 2017, 37 of the 91 dictatorships that had lasted more than a year collapsed; those regimes that avoided collapse had significantly higher levels of digital repression, on average, than those that fell. Rather than succumb to what appeared to be a devastating challenge to their power—the emergence and spread of new technologies—many dictatorships leverage those tools in ways that bolster their rule.

Although autocracies have long relied on various degrees of repression to support their objectives, the ease with which today’s authoritarian regimes can acquire this repressive capacity marks a significant departure from the police states of the past. Building the effectiveness and pervasiveness of the East German Stasi, for example, was not something that could be achieved overnight. The regime had to cultivate the loyalty of thousands of cadres, training them and preparing them to engage in on-the-ground surveillance. Most dictatorships simply do not have the ability to create such a vast operation. There was, according to some accounts, one East German spy for every 66 citizens. The proportion in most contemporary dictatorships (for which there are data) pales in comparison. It is true that in North Korea, which ranks as possibly the most intense police state in power today, the ratio of internal security personnel and informants to citizens is 1 to 40—but it was 1 to 5,090 in Iraq under Saddam Hussein and 1 to 10,000 in Chad under Hissene Habre. In the digital age, however, dictatorships don’t need to summon immense manpower to effectively surveil and monitor their citizens.

Instead, aspiring dictatorships can purchase new technologies, train a small group of officials in how to use them—often with the support of external actors, such as China—and they are ready to go. For example, Huawei, a Chinese state-backed telecommunications firm, has deployed its digital surveillance technology in over a dozen authoritarian regimes. In 2019, reports surfaced that the Ugandan government was using it to hack the social media accounts and electronic communications of its political opponents. The vendors of such technologies don’t always reside in authoritarian countries. Israeli and Italian firms have also sold digital surveillance software to the Ugandan regime. Israeli companies have sold espionage and intelligence-gathering software to a number of authoritarian regimes across the world, including Angola, Bahrain, Kazakhstan, Mozambique, and Nicaragua. And U.S. firms have exported facial recognition technology to governments in Saudi Arabia and the United Arab Emirates.

A SLIPPERY SLOPE

As autocracies last longer, the number of such regimes in place at any point in time is likely to increase, as some countries backslide on democratic rule. Although the number of autocracies globally has not risen substantially in recent years, and more people than ever before live in countries that hold free and fair elections, the tide may be turning. Data collected by Freedom House show, for example, that between 2013 and 2018, although there were three countries that transitioned from “partly free” to “free” status (the Solomon Islands, Timor-Leste, and Tunisia), there were seven that experienced the reverse, moving from a status of “free” to one of “partly free” (the Dominican Republic, Hungary, Indonesia, Lesotho, Montenegro, Serbia, and Sierra Leone).

The risk that technology will usher in a wave of authoritarianism is all the more concerning because our own empirical research has indicated that beyond buttressing autocracies, digital tools are associated with an increased risk of democratic backsliding in fragile democracies. New technologies are particularly dangerous for weak democracies because many of these digital tools are dual use: technology can enhance government efficiency and provide the capacity to address challenges such as crime and terrorism, but no matter the intentions with which governments initially acquire such technology, they can also use these tools to muzzle and restrict the activities of their opponents.

Pushing back against the spread of digital authoritarianism will require addressing the detrimental effects of new technologies on governance in autocracies and democracies alike. As a first step, the United States should modernize and expand legislation to help ensure that U.S. entities are not enabling human rights abuses. A December 2019 report by the Center for a New American Security (where one of us is a senior fellow) highlights the need for Congress to restrict the export of hardware that incorporates AI-enabled biometric identification technologies, such as facial, voice, and gait recognition; impose further sanctions on businesses and entities that provide surveillance technology, training, or equipment to authoritarian regimes implicated in human rights abuses; and consider legislation to prevent U.S. entities from investing in companies that are building ai tools for repression, such as the Chinese ai company SenseTime.

The U.S. government should also use the Global Magnitsky Act, which allows the U.S. Treasury Department to sanction foreign individuals involved in human rights abuses, to punish foreigners who engage in or facilitate Ai-powered human rights abuses. Ccp officials responsible for atrocities in Xinjiang are clear candidates for such sanctions.

U.S. government agencies and civil society groups should also pursue actions to mitigate the potentially negative effects of the spread of surveillance technology, especially in fragile democracies. The focus of such engagement should be on strengthening the political and legal frameworks that govern how surveillance technologies are used and building the capacity of civil society and watchdog organizations to check government abuse.

What is perhaps most critical, the United States must make sure it leads in AI and helps shape global norms for its use in ways that are consistent with democratic values and respect for human rights. This means first and foremost that Americans must get this right at home, creating a model that people worldwide will want to emulate. The United States should also work in conjunction with like-minded democracies to develop a standard for digital surveillance that strikes the right balance between security and respect for privacy and human rights. The United States will also need to work closely with like-minded allies and partners to set and enforce the rules of the road, including by restoring U.S. leadership in multilateral institutions such as the United Nations.

AI and other technological innovations hold great promise for improving everyday lives, but they have indisputably strengthened the grip of authoritarian regimes. The intensifying digital repression in countries such as China offers a bleak vision of ever-expanding state control and ever-shrinking individual liberty.

But that need not be the only vision. In the near term, rapid technological change will likely produce a cat-and-mouse dynamic as citizens and governments race to gain the upper hand. If history is any guide, the creativity and responsiveness of open societies will in the long term allow democracies to more effectively navigate this era of technological transformation. Just as today’s autocracies have evolved to embrace new tools, so, too, must democracies develop new ideas, new approaches, and the leadership to ensure that the promise of technology in the twenty-first century doesn’t become a curse.

#### Democracy prevents extinction.

Christopher Kutz 16. PhD UC Berkeley, JD Yale, Professor, Boalt Hall School of Law @ UC Berkeley, Visiting Professor at Columbia and Stanford law schools, as well as at Sciences Po University. “Introduction: War, Politics, Democracy,” in On War and Democracy, 1.

Despite Churchill’s famous quip—“Democracy is the worst form of government, except for all those other forms that have been tried from time to time”2—democracy is seen as a source of both domestic and international flourishing. Democracy, understood roughly for now as a political system with wide suffrage in which power is allocated to officials by popular election, can solve or help solve a host of problems with stunning success. It can solve the problem of revolutionary violence that condemns autocratic regimes, because mass politics can work at the ballot box rather than the streets. It can help solve the problem of famine, because the systems of free public communication and discussion that are essential to democratic politics are the backbone of the markets that have made democratic societies far richer than their competitors. It can help solve the problem of environmental despoliation, which occurs when those operating polluting factories (whether private citizens or the state) do not need to answer for harms visited upon a broad public. And democracy has been famously thought to help solve the problem of war, in the guise of the idea of the “peace amongst democratic nations”—an idea emerging with Immanuel Kant in the Age of Enlightenment and given new energy with the wave of democratization at the end of the twentieth century.

### Off

T-Scope

#### Interp---the scope of competition law defines it goals---attempts to meet current goals by banning practice are implementation questions.

ESE No Date. Erasmus School of Economics (as per their website, “The Erasmus Center for Economic and Financial Governance is an international multidisciplinary network of leading researchers and societal stakeholders initiated by researchers from Erasmus School of Economics and Erasmus School of Law. ECEFG conducts interdisciplinary research (law, economics and political science) and contributes to current debates in public and in academia on issues relating to European and global economic and financial governance.”). "Competition Policy". <https://www.eur.nl/en/ese/affiliated/ecefg/research/competition-policy>

Competition Policy

Research in this field consists of two broad areas. The first area – Theory and Implementation of Competition Law and Policy – refers to fundamental and applied research into topics that are traditionally seen as the core of competition policy. The second area – Scope of Competition Law and Policy – refers to all research on the effect and desirability of including new considerations in competition law and policy in order to address the challenges of our time, such as the increasing power of big tech firms, or global warming.

Theory and Implementation of Competition Policy

This covers for instance collusion, abuse of dominance, mergers, market regulation and state aid. Some examples of research topics are:

* the practices firms can use to engage in collusion and its welfare consequences;
* the practices firms can use to abuse a dominant position and its welfare consequences;
* which practices can be considered proof of such activities;
* how to regulate access to a market;
* how to properly assess the effects of a particular practice or merger;
* the practices, by which the state and public authorities distort competition such as subisidies and tax measures
* the interpretation and application of EU and national competition law by Competition Authorities and Courts and the extent to which they achieve the goals of competition policy

Scope of Competition Policy

The effectiveness of European competition law and policy in combination with rapid technological changes have raised questions about its proper scope. Which policy objectives can and should be pursued by means of competition law and policy, and which should be delegated to other legal fields and policies? Some examples of specific research questions include:

* Can and should competition law be used to protect the privacy of consumers on the internet?
* Information gathered by firms can be used to increase their own profits. How does this affect consumers, and what does this depend on? Can and should competition law deal with market power derived from information gathering? For instance, should the big five tech giants be forced to divest activities?
* Should competition policy also include considerations of economic inequality or environmental effects?
* Can competition law remain effective if it is used for more than safeguarding fair competition?

#### Violation---the Aff doesn’t replace the consumer welfare standard.

Trevor Wagener 21. "The Curse of Tradeoffs: Neo-Brandeisians vs. Consumers". Disruptive Competition Project. 5-21-2021. https://www.project-disco.org/competition/052121-the-curse-of-tradeoffs-neo-brandeisian-antitrust-versus-consumers/

Neo-Brandeisians seek to replace the longstanding objective and principles-based framework of the consumer welfare standard in antitrust enforcement with an amorphous, process-based framework guided by an ethos one Neo-Brandeisian described as: “Big is bad. Just don’t let big firms merge. The end.” A movement dedicated to replacing a consumer welfare-maximizing approach with an assortment of competing goals has proven unable to offer a quantified, systematic cost-benefit analysis justifying such a radical change, instead relying upon anecdotal evidence and moving prose. The many goals of the Neo-Brandeisian approach are often rhetorically appealing, but the rhetoric hides a simple truth: When you target every variable, you effectively target none. Addressing a wide range of goals through antitrust policy requires de-emphasizing consumer welfare, creating fundamental tradeoffs expected to harm consumers relative to the status quo.

The willingness to sacrifice consumer welfare in order to achieve other ends is a defining characteristic of Neo-Brandeisian antitrust. This is illustrated by concrete Neo-Brandeisian critiques, which typically emphasize perceived harms to businesses rather than harms to consumers. For example, the Neo-Brandeisian activist group American Economic Liberties Project (AELP) published a pair of policy briefs on May 3 that criticize online service operators for a litany of purported inconveniences to businesses over a combined 22 pages, but struggle to quantify any harms to ordinary consumers and users. Those few purported harms to consumers that AELP raised are distinctly qualitative rather than quantitative, consistent with the broader reluctance of prominent Neo-Brandeisian thinkers to conduct a rigorous quantitative cost-benefit analysis of their antitrust policy prescriptions relative to the consumer welfare standard.

#### Vote Neg---limits and ground---only “change goals” creates key economy and legal DAs over what antitrust should consider---the Aff’s topic races to tiny exemptions and technical changes with no core ground.

### Off

K

#### The Aff’s competitive state model reinforces taken-for-granted nationalism, which makes answering transnational questions impossible.

Pauli Kettunen 21. Professor of Political History in the Social Science Faculty of University of Helsinki. "Welfare state, competition state, security state: Nationalism in nation-state responses to crossborder mobilities." In Remapping Security on Europe’s Northern Borders, pp. 201-220. Routledge, 2021.

Democratic welfare nationalism, competitiveness-seeking nationalism, and security-seeking nationalism appear as rational nation-state policies and are generally not associated with nationalism. It is reasonable to argue that the persistent limits of the conventional use of “nationalism” outside specialist studies of nations and nationalism indicate the power of nationalism as a taken-for-granted mode of thought and action. Taken-for-granted nationalism seems to be reinforced by the intertwining of democratic welfare nationalism with competitiveness-seeking and security-seeking nationalism. There is thus a self-reinforcing circle. The extent to which globalisation is defined as a national challenge reinforces the role of competitiveness and security in political agenda setting, and the extent to which competitiveness and security frame the political agenda assists them to maintain national perspectives to globalisation.

From the welfare-state, competition-state, and security-state perspectives “nationalism” is not a tool for self-description, but for condemning xenophobic and racist far-right nationalism. However, the taken-for-granted nationalism justifying the nation-state limits of these perspectives provides a readymade framework for xenophobic nationalism. The distinctions between us and others and between the internal and external are a shared point of departure, but instead of policies recognising their interdependencies, xenophobic nationalism turns the us-other distinction into an exclusionary us-against-them divide, and the internal-external distinction into a motive for stricter borders.

The emphasis on the national “us” in mainstream modes of combining welfare-state, competition-state, and security-state arguments may facilitate populist protests that accuse the elite of betraying the people. There are similarities with how the nation as an imagined community provided subordinated social groups with the criteria for a collective critique of existing society and created preconditions for the labour movement. However, while the working class was able to motivate its demands by referring to its central role in the production of life’s necessities, the social divides associated with current projects for a national competitive community give little scope for such arguments.

We may find that an insoluble tension appears between what is recognised as the institutional preconditions of competitiveness, and how its content is conceived. At the same time as egalitarian institutions and participatory practices can be defended as preconditions for knowledge-based competitiveness, true membership in a competitive community is a matter of individual competitiveness. This in turn consists of communicative and innovative skills, talent, and a reflexive capacity to monitor oneself from the perspective of competitiveness. Besides winners and losers, some people cannot even participate in this competition.

Individual deficiencies or the unavoidable imperatives of the global economy tend to be offered as explanations for grievances. Welfare-state policies aim to improve individual capacities and compensate for job losses, yet it is far from self-evident that people willingly accept individualised or naturalised explanations. Political implications may be found in constructions demarcating collective threat images and in the support for right-wing populist parties that have managed, not least in the Nordic countries, to merge nostalgic welfare nationalism and xenophobic nationalism.

While the emphasis on “us” in the making of national competitive communities is an integral part of global capitalism, the same transformations may also either erode the solidarity based on common spatial ties or open new crossnational and crossterritorial perspectives for defining “us”. A multicircle non-divisive understanding of “us” would arguably require a transnational democratic dimension in defining problems and solutions. Inspiration may be found in the ideas of policy coordination beyond nation states and European regional integration that Gunnar Myrdal proposed in his 1950s critique of the nationalism of democratic Western welfare states. In any case, even good answers to questions of national competitiveness and security fail to answer questions of democracy, citizenship, social equality, and the ecological preconditions of life. There is a risk that the reinforced emphasis on the competition-state and security-state aspects of the nation state will make it even more difficult to formulate such questions to effectively recognise that they are simultaneously local, national, European, and global.

#### Vote Neg to challenge the Westphalian frame---taken-for-granted nationalism is up for contestation and determines the scope of justice---the “who” of politics predetermines the “what” of policy---only shifting the grammar of argument can address the global nature of crisis.

Nancy Fraser 5. Henry A. and Louise Loeb Professor of Political and Social Science and professor of philosophy at The New School. “Reframing Justice in a Globalizing World, NLR 36, November–December 2005.” New Left Review. https://newleftreview-org.proxy.library.emory.edu/issues/ii36/articles/nancy-fraser-reframing-justice-in-a-globalizing-world

Globalization is changing the way we argue about justice.footnote1 Not so long ago, in the heyday of social democracy, disputes about justice presumed what I shall call a ‘Keynesian-Westphalian frame’. Typically played out within modern territorial states, arguments about justice were assumed to concern relations among fellow citizens, to be subject to debate within national publics, and to contemplate redress by national states. This was true for each of two major families of justice claims—claims for socioeconomic redistribution and claims for legal or cultural recognition. At a time when the Bretton Woods system facilitated Keynesian economic steering at the national level, claims for redistribution usually focused on economic inequities within territorial states. Appealing to national public opinion for a fair share of the national pie, claimants sought intervention by national states in national economies. Likewise, in an era still gripped by a Westphalian political imaginary, which sharply distinguished ‘domestic’ from ‘international’ space, claims for recognition generally concerned internal status hierarchies. Appealing to the national conscience for an end to nationally institutionalized disrespect, claimants pressed national governments to outlaw discrimination and accommodate differences among citizens. In both cases, the Keynesian-Westphalian frame was taken for granted. Whether the matter concerned redistribution or recognition, class differentials or status hierarchies, it went without saying that the unit within which justice applied was the modern territorial state.footnote2

To be sure, there were always exceptions. Occasionally, famines and genocides galvanized public opinion across borders. And some cosmopolitans and anti-imperialists sought to promulgate globalist views.footnote3 But these were exceptions that proved the rule. Relegated to the sphere of ‘the international’, they were subsumed within a problematic that was focused primarily on matters of security, as opposed to justice. The effect was to reinforce, rather than to challenge, the Keynesian-Westphalian frame. That framing of disputes about justice generally prevailed by default from the end of the Second World War to the 1970s.

Although it went unnoticed at the time, this framework lent a distinctive shape to arguments about social justice. Taking for granted the modern territorial state as the appropriate unit, and its citizens as the pertinent subjects, such arguments turned on what precisely those citizens owed one another. In the eyes of some, it sufficed that citizens be formally equal before the law; for others, equality of opportunity was also required; for still others, justice demanded that all citizens gain access to the resources and respect they needed in order to be able to participate on a par with others, as full members of the political community. The argument focused, in other words, on exactly what should count as a just ordering of social relations within a society. Engrossed in disputing the ‘what’ of justice, the contestants apparently felt no necessity to dispute the ‘who’. With the Keynesian-Westphalian frame securely in place, it went without saying that the ‘who’ was the national citizenry.

Today, however, this framework is losing its aura of self-evidence. Thanks to heightened awareness of globalization, and to post-Cold War geopolitical instabilities, many observe that the social processes shaping their lives routinely overflow territorial borders. They note, for example, that decisions taken in one territorial state often have an impact on the lives of those outside it, as do the actions of transnational corporations, international currency speculators, and large institutional investors. Many also note the growing salience of supranational and international organizations, both governmental and non-governmental, and of transnational public opinion, which flows with supreme disregard for borders through global mass media and cybertechnology. The result is a new sense of vulnerability to transnational forces. Faced with global warming, the spread of aids, international terrorism and superpower unilateralism, many believe that their chances for living good lives depend at least as much on processes that trespass the borders of territorial states as on those contained within them.

Under these conditions, the Keynesian-Westphalian frame no longer goes without saying. For many, it has ceased to be axiomatic that the modern territorial state is the appropriate unit for thinking about issues of justice, and that the citizens of such states are the pertinent subjects of reference. The effect is to destabilize the previous structure of political claims-making—and therefore to change the way we argue about social justice.

This is true for both major families of justice claims. In today’s world, claims for redistribution increasingly eschew the assumption of national economies. Faced with transnationalized production, the outsourcing of jobs, and the associated pressures of the ‘race to the bottom’, once nationally focused labour unions look increasingly for allies abroad. Inspired by the Zapatistas, meanwhile, impoverished peasants and indigenous peoples link their struggles against despotic local and national authorities to critiques of transnational corporate predation and global neoliberalism. Finally, wto protestors directly target the new governance structures of the global economy, which have vastly strengthened the ability of large corporations and investors to escape the regulatory and taxation powers of territorial states.

In the same way, movements struggling for recognition increasingly look beyond the territorial state. Under the umbrella slogan ‘women’s rights are human rights’, for example, feminists throughout the world are linking struggles against local patriarchal practices to campaigns to reform international law. Meanwhile, religious and ethnic minorities, who face discrimination within territorial states, are reconstituting themselves as diasporas and building transnational publics from which to mobilize international opinion. Finally, transnational coalitions of human-rights activists are seeking to build new cosmopolitan institutions, such as the International Criminal Court, which can punish state violations of human dignity.

In such cases, disputes about justice are exploding the Keynesian-Westphalian frame. No longer addressed exclusively to national states or debated exclusively by national publics, claimants no longer focus solely on relations among fellow citizens. Thus, the grammar of argument has altered. Whether the issue is distribution or recognition, disputes that used to focus exclusively on the question of what is owed as a matter of justice to community members now turn quickly into disputes about who should count as a member and which is the relevant community. Not just the ‘what’ but also the ‘who’ is up for grabs.

Today, in other words, arguments about justice assume a double guise. On the one hand, they concern first-order questions of substance, just as before. How much economic inequality does justice permit, how much redistribution is required, and according to which principle of distributive justice? What constitutes equal respect, which kinds of differences merit public recognition, and by which means? But above and beyond such first-order questions, arguments about justice today also concern second-order, meta-level questions. What is the proper frame within which to consider first-order questions of justice? Who are the relevant subjects entitled to a just distribution or reciprocal recognition in the given case? Thus, it is not only the substance of justice, but also the frame, which is in dispute. The result is a major challenge to our theories of social justice. Preoccupied largely with first-order issues of distribution and/or recognition, these theories have so far failed to develop conceptual resources for reflecting on the meta-issue of the frame. As things stand, therefore, it is by no means clear that they are capable of addressing the double character of problems of justice in a globalizing age.footnote4

In this essay, I shall propose a strategy for thinking about the problem of the frame. I shall argue, first, that theories of justice must become three-dimensional, incorporating the political dimension of representation alongside the economic dimension of distribution and the cultural dimension of recognition. I shall also argue that the political dimension of representation should itself be understood as encompassing three levels. The combined effect of these two arguments will be to make visible a third question, beyond those of the ‘what’ and the ‘who’, which I shall call the question of the ‘how’. That question, in turn, inaugurates a paradigm shift: what the Keynesian-Westphalian frame cast as the theory of social justice must now become a theory of post-Westphalian democratic justice.

Specificity of the political

Let me begin by explaining what I mean by justice in general and by its political dimension in particular. In my view, the most general meaning of justice is parity of participation. According to this radical-democratic interpretation of the principle of equal moral worth, justice requires social arrangements that permit all to participate as peers in social life. Overcoming injustice means dismantling institutionalized obstacles that prevent some people from participating on a par with others, as full partners in social interaction. Previously, I have analysed two distinct kinds of obstacles to participatory parity, which correspond to two distinct species of injustice. On the one hand, people can be impeded from full participation by economic structures that deny them the resources they need in order to interact with others as peers; in that case they suffer from distributive injustice or maldistribution. On the other hand, people can also be prevented from interacting on terms of parity by institutionalized hierarchies of cultural value that deny them the requisite standing; in that case they suffer from status inequality or misrecognition.footnote5 In the first case, the problem is the class structure of society, which corresponds to the economic dimension of justice. In the second case, the problem is the status order, which corresponds to its cultural dimension. In modern capitalist societies, the class structure and the status order do not neatly mirror each other, although they interact causally. Rather, each has some autonomy vis-à-vis the other. As a result, misrecognition cannot be reduced to a secondary effect of maldistribution, as some economistic theories of distributive justice appear to suppose. Nor, conversely, can maldistribution be reduced to an epiphenomenal expression of misrecognition, as some culturalist theories of recognition tend to assume. Thus, neither recognition theory nor distribution theory alone can provide an adequate understanding of justice for capitalist society. Only a two-dimensional theory, encompassing both distribution and recognition, can supply the necessary levels of social-theoretical complexity and moral-philosophical insight.footnote6

That, at least, is the view of justice I have defended in the past. And this two-dimensional understanding of justice still seems right to me as far as it goes. But I now believe that it does not go far enough. Distribution and recognition could appear to constitute the sole dimensions of justice only so long as the Keynesian-Westphalian frame was taken for granted. Once the question of the frame becomes subject to contestation, the effect is to make visible a third dimension of justice, which was neglected in my previous work—as well as in the work of many other philosophers.footnote7

The third dimension of justice is the political. Of course, distribution and recognition are themselves political in the sense of being contested and power-laden; and they have usually been seen as requiring adjudication by the state. But I mean political in a more specific, constitutive sense, which concerns the nature of the state’s jurisdiction and the decision rules by which it structures contestation. The political in this sense furnishes the stage on which struggles over distribution and recognition are played out. Establishing criteria of social belonging, and thus determining who counts as a member, the political dimension of justice specifies the reach of those other dimensions: it tells us who is included in, and who excluded from, the circle of those entitled to a just distribution and reciprocal recognition. Establishing decision rules, the political dimension likewise sets the procedures for staging and resolving contests in both the economic and the cultural dimensions: it tells us not only who can make claims for redistribution and recognition, but also how such claims are to be mooted and adjudicated.

Centred on issues of membership and procedure, the political dimension of justice is concerned chiefly with representation. At one level, which pertains to the boundary-setting aspect of the political, representation is a matter of social belonging. What is at issue here is inclusion in, or exclusion from, the community of those entitled to make justice claims on one another. At another level, which pertains to the decision-rule aspect, representation concerns the procedures that structure public processes of contestation. Here, what is at issue are the terms on which those included in the political community air their claims and adjudicate their disputes.footnote8 At both levels, the question can arise as to whether the relations of representation are just. One can ask: do the boundaries of the political community wrongly exclude some who are actually entitled to representation? Do the community’s decision rules accord equal voice in public deliberations and fair representation in public decision-making to all members? Such issues of representation are specifically political. Conceptually distinct from both economic and cultural questions, they cannot be reduced to the latter, although, as we shall see, they are inextricably interwoven with them.

To say that the political is a conceptually distinct dimension of justice, not reducible to the economic or the cultural, is also to say that it can give rise to a conceptually distinct species of injustice. Given the view of justice as participatory parity, this means that there can be distinctively political obstacles to parity, not reducible to maldistribution or misrecognition, although (again) interwoven with them. Such obstacles arise from the political constitution of society, as opposed to the class structure or status order. Grounded in a specifically political mode of social ordering, they can only be adequately grasped through a theory that conceptualizes representation, along with distribution and recognition, as one of three fundamental dimensions of justice.

Three levels of misrepresentation

If representation is the defining issue of the political, then the characteristic political injustice is misrepresentation. Misrepresentation occurs when political boundaries and/or decision rules function to deny some people, wrongly, the possibility of participating on a par with others in social interaction—including, but not only, in political arenas. Far from being reducible to maldistribution or misrecognition, misrepresentation can occur even in the absence of the latter injustices, although it is usually intertwined with them. At least two different levels of misrepresentation can be distinguished. Insofar as political decision rules wrongly deny some of the included the chance to participate fully, as peers, the injustice is what I call ordinary-political misrepresentation. Here, where the issue is intra-frame representation, we enter the familiar terrain of political science debates over the relative merits of alternative electoral systems. Do single-member-district, winner-take-all, first-past-the-post systems unjustly deny parity to numerical minorities? And if so, is proportional representation or cumulative voting the appropriate remedy? Likewise, do gender-blind rules, in conjunction with gender-based maldistribution and misrecognition, function to deny parity of political participation to women? And if so, are gender quotas an appropriate remedy? Such questions belong to the sphere of ordinary-political justice, which has usually been played out within the Keynesian-Westphalian frame.

Less obvious, perhaps, is a second level of misrepresentation, which concerns the boundary-setting aspect of the political. Here the injustice arises when the community’s boundaries are drawn in such a way as to wrongly exclude some people from the chance to participate at all in its authorized contests over justice. In such cases, misrepresentation takes a deeper form, which I shall call misframing. The deeper character of misframing is a function of the crucial importance of framing to every question of social justice. Far from being of marginal significance, frame-setting is among the most consequential of political decisions. Constituting both members and non-members in a single stroke, this decision effectively excludes the latter from the universe of those entitled to consideration within the community in matters of distribution, recognition, and ordinary-political representation. The result can be a serious injustice. When questions of justice are framed in a way that wrongly excludes some from consideration, the consequence is a special kind of meta-injustice, in which one is denied the chance to press first-order justice claims in a given political community. The injustice remains, moreover, even when those excluded from one political community are included as subjects of justice in another—as long as the effect of the political division is to put some relevant aspects of justice beyond their reach. Still more serious, of course, is the case in which one is excluded from membership in any political community. Akin to the loss of what Hannah Arendt called ‘the right to have rights’, that sort of misframing is a kind of ‘political death’.footnote9 Those who suffer it may become objects of charity or benevolence. But deprived of the possibility of authoring first-order claims, they become non-persons with respect to justice.

It is the misframing form of misrepresentation that globalization has recently begun to make visible. Earlier, in the heyday of the postwar welfare state, with the Keynesian-Westphalian frame securely in place, the principal concern in thinking about justice was distribution. Later, with the rise of the new social movements and multiculturalism, the centre of gravity shifted to recognition. In both cases, the modern territorial state was assumed by default. As a result, the political dimension of justice was relegated to the margins. Where it did emerge, it took the ordinary-political form of contests over the decision rules internal to the polity, whose boundaries were taken for granted. Thus, claims for gender quotas and multicultural rights sought to remove political obstacles to participatory parity for those who were already included in principle in the political community. Taking for granted the Keynesian-Westphalian frame, they did not call into question the assumption that the appropriate unit of justice was the territorial state.

Today, in contrast, globalization has put the question of the frame squarely on the political agenda. Increasingly subject to contestation, the Keynesian-Westphalian frame is now considered by many to be a major vehicle of injustice, as it partitions political space in ways that block many who are poor and despised from challenging the forces that oppress them. Channelling their claims into the domestic political spaces of relatively powerless, if not wholly failed, states, this frame insulates offshore powers from critique and control.footnote10 Among those shielded from the reach of justice are more powerful predator states and transnational private powers, including foreign investors and creditors, international currency speculators, and transnational corporations. Also protected are the governance structures of the global economy, which set exploitative terms of interaction and then exempt them from democratic control. Finally, the Keynesian-Westphalian frame is self-insulating; the architecture of the interstate system protects the very partitioning of political space that it institutionalizes, effectively excluding transnational democratic decision-making on issues of justice.

From this perspective, the Keynesian-Westphalian frame is a powerful instrument of injustice, which gerrymanders political space at the expense of the poor and despised. For those persons who are denied the chance to press transnational first-order claims, struggles against maldistribution and misrecognition cannot proceed, let alone succeed, unless they are joined with struggles against misframing. It is not surprising, therefore, that some consider misframing the defining injustice of a globalizing age. Under these conditions, the political dimension of justice is hard to ignore. Insofar as globalization is politicizing the question of the frame, it is also making visible an aspect of the grammar of justice that was often neglected in the previous period. It is now apparent that no claim for justice can avoid presupposing some notion of representation, implicit or explicit, insofar as none can avoid assuming a frame. Thus, representation is always already inherent in all claims for redistribution and recognition. The political dimension is implicit in, indeed required by, the grammar of the concept of justice. Thus, no redistribution or recognition without representation.footnote11

In general, then, an adequate theory of justice for our time must be three-dimensional. Encompassing not only redistribution and recognition, but also representation, it must allow us to grasp the question of the frame as a question of justice. Incorporating the economic, cultural and political dimensions, it must enable us to identify injustices of misframing and to evaluate possible remedies. Above all, it must permit us to pose, and to answer, the key political question of our age: how can we integrate struggles against maldistribution, misrecognition and misrepresentation within a post-Westphalian frame?

### Off

Intrastate PIC

#### The United States federal government should:

#### - Increase prohibitions on interstate and foreign platform practices that fail under rule of reason without imposing heightened burdens on plaintiffs.

#### - Determine that applying federal antitrust law to intrastate anticompetitive practices violates the Commerce Clause.

#### The 50 states and all relevant territories should uniformly increase prohibitions on platform practices that fail under rule of reason without imposing heightened burdens on plaintiffs.

#### Competes---the CP retracts the scope of antitrust law and PICs out of intrastate anticompetitive practices.

Alan J. Meese 20. Ball Professor of Law and Co-Director, Center for the Study of Law and Markets, William and Mary Law School. Antitrust Regulation and the Federal-State Balance: Restoring the Original Design, 70 AM. U. L. REV. 75 (2020).

Abandoning the substantial effects test and retracting the scope of the Sherman Act would reboot competitive federalism in the antitrust field. States would again be free to adopt unique antitrust doctrine applicable to restraints that occur within their borders and produce no external harm. States would reap the benefits of doctrinal innovations, with no prospect that federal courts applying the Sherman Act will undermine state-specific policies. 556 The resulting competition between the states acting as "laboratories of democracy"557 would presumably generate a wider variety of possible solutions-both substantive and institutional-to various antitrust problems, as states vie for producers and consumers by offering rival packages of antitrust doctrine and enforcement institutions. 558 This decentralized process of articulating antitrust doctrine and policy would generate both experience and data about the impact of various rules and institutions, thereby informing lawmakers and state courts considering possible reforms. Federal courts, too, could learn from these results, drawing upon the "accumulated experience" of various states when fashioning Sherman Act doctrine. 559

Retraction of the scope of the Sherman Act would also radically alter the prominence and role of the state action doctrine, first articulated in 1943 in Parker v. Brown.560 As noted earlier, the vast majority of cases where parties raise the state action defense involve police power regulations restraining local commerce without producing any interstate harm.51 No doubt the resulting framing of the legal question as a clash between the Sherman Act and historic police power regulation has deterred the Court from invoking the Act as a source of general authority to evaluate the "reasonableness" of garden variety state regulations, especially during the 1940s, when faith in the motives and capacity of regulators was at its apogee.5 2 Indeed, scholars and jurists have attributed Parker to just such an anti-Lochnerian impulse. 563

Restoration of the pre-1948 direct/indirect standard would place such local regulations beyond the reach of the Sherman Act altogether, eliminating the need for any state action analysis with respect to such restraints.564 The Supreme Court's state action docket would shrink accordingly. Moreover, state action cases that did reach the Court would differ significantly from those that have thus far informed the Court's treatment of state-imposed restraints. Instead of state regulations of local billboards, dentistry, and intrastate lawyer advertising, such cases would, like Parker, involve state restraints imposing substantial harm on out-of-state consumers. 565 This new framing could force the current Court, less friendly to regulation than the Parker Court, to reconsider its hands-off approach to state-approved restraints. Reducing the scope of the Sherman Act could ironically result in more robust preemption of state-approved restraints than ever accomplished under the post1948 regime.

#### Solves and restores competitive government---the plan and perm unduly expand the Commerce Clause.

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Scholars and jurists increasingly acknowledge that the U.S. Supreme Court's Commerce Clause jurisprudence desperately needs a new direction. Even Laurence Tribe, widely regarded as a liberal commentator, concedes that until very recently the Court's decisions in this area came dangerously close to foreclosing it from imposing any kind of principled constitutional limitation on the scope of Commerce Clause jurisdiction.3 Chief Justice Rehnquist has openly admitted that much of the case law in this area is less than a model of clarity.4 In what has been heralded by some as the Rehnquist Court's "celebrated project to re-establish structural constitutional principles on federalism,' ' and by others more prosaically as "the new federalism, ''6 recent Supreme Court cases have imposed Tenth Amendment constraints on federal commerce power,7 limited the local application of federal regulatory statutes to Congress's unmistakable intent," and most importantly found that local non-economic activities lie outside the constitutional scope of Commerce Clause jurisdiction.9 Yet, in spite of indications the Rehnquist Court is inclined to seek a new direction, it remains to be seen how it might do so in a way that minimizes troublesome conflicts with the existing body of constitutional precedent. This Article shows that the Court can look to the evolution of Sherman Acto jurisdiction to realign its approach to Commerce Clause jurisdiction to restore the balance of dual sovereignty while posing little immediate threat to constitutional precedent.

The first of two steps is for the Court to fully embrace competitive federalism as the long-run framework within which to gradually narrow the evolving contours of Commerce Clause jurisdiction." Competitive federalism has experienced growing appreciation among political scientists, economists, and constitutional scholars, 2 with some even suggesting it has been the driving force of sustained economic development in modern times.1 3 There is no doubt the U.S. Constitution establishes a federal system, but this says nothing about what determines the proper balance of dual sovereignty. Under competitive federalism, state and federal governments compete with one another to provide regulation to a mobile citizenry. State regulation under local "police powers" is justified when economic markets fail to allocate resources efficiently due to economic spillovers-so-called "externalities"-that separate the parties who benefit from those who bear costs of an activity. When confined to a single state, competition from other states ensures that the state's regulators have sufficient incentive to address economic spillovers. In the face of interstate spillovers, however, individual states will misallocate political resources by engaging in too little regulation of their internal economic markets. Federal regulation of economic markets under the Commerce Clause is justified only when competition between states leads to a political market failure.

This approach has been criticized as a prescription for how the Court should determine the limits of federal commerce power because those seeking regulation can always make a plausible claim that the activity in question generates an interstate economic spillover, while in fact they are motivated by private rent seeking. 4 Through out this Article we remain agnostic on this issue. Whether a federal regulation is driven by public interest or rent seeking, our sole concern is with how the Court can gradually identify and screen out applications of antitrust regulations that do not plausibly involve interstate economic spillovers. The Court can thereby move toward the proper balance of dual sovereignty, and political competition should increasingly limit the sum of economic rents the respective sovereigns are able to extract.15

Competitive federalism has clear implications for the evolution of Sherman Act jurisdiction. This evolution provides a useful roadmap to help the Court find the appropriate jurisdictional balance for its general Commerce Clause jurisprudence. It is both fitting and instructive that case law under one of the nation's first pieces of Commerce Clause legislation would provide such a roadmap,"6 for this is where judicial understanding of the relevant market failure can be expected to have evolved furthest to reduce legal uncertainty raised by the statutory shock. Passed in response to fears that the great trusts were beyond • • the power \* of 17 any state to effectively regulate owing to a political market failure, the Sherman Act prohibits only restraints of trade or commerce "among the several States."'8 For more than eighty years following passage of the Act, the Court struggled to identify the nature of the market failure resulting from various business practices alleged to restrain. This led to a patchwork of conflicting decisions, judicial confusion over the proper objective of the Act, and condemnation of business activities now widely recognized as pro-competitive. As economic theory progressed it gave the Court increasing insight into the nature and effect of various trade restraints. Driven largely by the Chicago School of economics,' 9 antitrust scholars began to develop and test hypotheses regarding a host of business practices that were argued to restrain trade.2 0 This process eventually generated a body of scientific knowledge sufficiently reliable to support expert testimony on the nature of the market failure associated with trade restraints, now widely regarded as the defendants' exercise of market power. The problem with market power is not that it allows firms to suppress competition or earn monopoly profits, but that it may lead them to misallocate resources by reducing output and raising prices to consumers. Courts and commentators now largely agree that the exclusive substantive objective of the Sherman Act is to promote consumer welfare.

Case law under the Sherman Act has since evolved toward a body of clear, workable substantive rules. But relying uncritically on the substantial effects test from its decisions on general Commerce Clause jurisdiction, the Court has routinely upheld applications of the Sherman Act to restraints that harm consumers only locally, if at all. The Court's most recent jurisdictional decision under the Act indicates that it has yet to recognize the consumer welfare standard's profound jurisdictional implications. In Summit Health, Ltd. v. Pin- 23 has, a narrow majority of the Court found that an alleged conspiracy by a chain of hospitals to exclude a single doctor from the Los Angeles market for eye surgery had a sufficient nexus to interstate commerce to support jurisdiction under the Act. The Court reasoned that the defendants' alleged restraint on the practice of ophthalmological services should be measured by its impact on other market participants not just by its impact on the respondent.24 Joined in dissent by three members of the Court, Justice Scalia noted that the majority's "analysis tells us nothing about the substantiality of the impact on interstate commerce generated by the particular conduct at issue here."25 He also argued that the Sherman Act does not "prohibit all conspiracies that have sufficient constitutional 'nexus' to interstate commerce to be regulated. It prohibits only those conspiracies that are 'in restraint of trade or commerce among the several States.' This language commands a judicial inquiry into the nature and potential effect of each particular restraint."26

Following Summit, federal courts have regularly entertained cases in which the interstate exercise of market power is so unlikely that the defendants' restraint should be presumed as a matter of law to be purely intrastate. 7 In the spirit of Justice Scalia's dissent, the second step the Court should take to realign its approach to Commerce Clause jurisdiction is to overturn Summit by formally recognizing the jurisdictional implications of the consumer welfare standard. If the market failure justifying federal regulation of trade restraints is the exercise of market power, and if the problem with market power is that it injures consumers by raising prices, then, according to competitive federalism, trade restraints that do not plausibly increase prices to consumers outside the home state should lie beyond federal reach.

#### Concentrated power makes extinction from prolif, terrorism, warming, and inequality inevitable.

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There is no doubt that we live in “challenging” times. We face ‘social challenges,’ from racial discrimination to gender inequality, women’s rights (reproductive or otherwise) that will have to be addressed, LGBTQ issues (recognition of gay marriage), a gun violence epidemic due to both inadequate gun control laws but also excessive violence in our society, etc. We also face ‘economic challenges,’ like stagnant salaries and low wages, job insecurity (due to automation or outsourcing), taxes that are too high for some and not high enough for others, mounting student debt, and yes massive income inequality. And, of course, we do face ‘external challenges’, from nuclear proliferation in the Korean peninsula, to ISIS and religiously motivated global terrorism, to global warming and climate change!

Yet, most of these issues are but symptoms of a greater cause. Their existence, or our inability to overcome them, is being caused by a much greater problem in our society that unless we address soon we risk permanent societal failures within the next 20 to 30 years.

This greater cause is our very own failing system of governance!!!

Though brilliant in its original construction by the founding fathers, our Federal system of governance (separation of powers, check and balances, separate Federal and State governments) is grossly off track and highly unbalanced. During the past 200 years, we witnessed a steady transfer of power away from the States and into the Federal government, and within the Federal government we saw a similar steady concentration of power in the hands of the Executive (the singular President), and to a certain extend the Supreme Court (due to Congressional acquiescence).

This did not happen due to some conspiracy by the ‘powerful elite’ or through interference by foreign powers. It happened gradually (almost naturally), as a response to major failures at the State level: in dealing with slavery and racial discrimination (see Civil War and Jim Crow laws in the south), in dealing with market failures and the need to regulate business and provide a safety net (see Great Depression, The New Deal and the Great Society), in fighting a Cold War with the Soviet Union (see expansion of military and intelligence services to advance US foreign policy).

Today, power and authority to deal with issues and solve problems is highly concentrated at the Federal level, away from ordinary people and their ability to monitor let alone influence elected politicians.

There is so much power concentrated at the Federal level, and in particular in the hands of one person (the President) that it makes Washington politicians constant targets of special interests and lobbying organizations, makes negotiations for compromise impossible because there is so much at stake, and it has created a highly unbalanced system (where “checks and balances” are not fully implemented and more often can’t work effectively).

Washington gridlock, dysfunction, polarization, and partisanship have led to the inability to pass a budget (balanced or otherwise), or address the need for immigration reform, or provide for adequate healthcare coverage and affordable prescription drugs, or even implement proper tax reform. Therefore, unless we address these ‘systemic’ failures of our system of governance, unless we implement institutional changes and fix the process, we will never get lasting solutions to our current and future societal challenges.

Unfortunately, there is no one thing we can do, no ‘magic bullet’ that can fix the dysfunction of our Federal system of governance (because it’s not just ‘the Federal government’ that needs reform, but also/primarily Congress and the Judiciary). Rather, there are several things (from specific process changes through laws/regulations to Constitutional amendments) that we will have to changes now, in order to see improvement in the function of our system of governance in the next 20 to 30 years.

There is a parallel example to this system of governance failures, and it’s that of ‘global warming.’ Global temperatures have been rising, due to greenhouse gases (caused by human activity – burning fossil fuels like coal and oil), presenting an existential threat to our planet and our way of life. However, fossil fuels are not inherently evil, used by certain people bent on the destruction of humanity! Energy from fossil fuels was instrumental in facilitating the industrial revolution, which brought progress and technological innovations during the past 150 years, that helped the whole world to advance, prosper, and better connect. It was not until recently that we realized that the constantly expanding use of fossil fuels by humans is contributing to rising temperatures, and if we don’t do something now to ‘bent the curve’, then in 20 to 30 years from now temperatures will rise to levels that can be devastating to the planets ecosystem, and by extension us humans.

Concentration of power at the Federal level, over the past 200 years, though not inherently evil (downright necessary and proper during some critical periods), has reached a point of pure dysfunction. The proof of the unsustainable nature of our current system (like rising temperatures are a proof of global warming) is income inequality. During the past 50 years, we have witnessed a steady concentration of wealth at the hands of the top 10% (and primarily the top 1%).

And although one can look at our society today statically and say: “things are still ok: there are rich people and poor people, and we are still the most powerful and wealthy nation in the world – so what’s the problem?”… the trend keeps going upwards: currently over 70% of our national wealth is concentrated at the hands for the top 10%. When do we need to do something to stop this trend? When it gets to 80%, or 90%?

Democrats and Republicans (now thanks to Donald Trump) both agree on the existence of a ‘powerful elite, in cahoots with the political establishment, bent on exploiting the middle class’… yet both party’s solution is the same: win political power and cut or raise taxes, regulate more or less, appoint some type of judges… in essence, deal with the symptoms and not the underlying cause!

If we want to address the underlying cause of income inequality (and outsourcing of jobs, health-care failures, racial tensions, education funding, women’s rights, public housing, etc.), then we need to reform our system of governance, before we can consider specific policy priorities. By fixing the legislative process, restoring proper checks, correcting the imbalance within the government branches and returning powers back to the States… we can get on a path where we see real results within the next 20 to 30 years.

Otherwise, gridlock and dysfunction at the Federal level will only get worse!

### Off

T-Prohibitions

#### Interp---prohibitions are distinct from remedies that only block the anticompetitive elements of a practice, rather than the practice itself.

Jo Seldeslachts et al. 7. Professor of Industrial Organization at KU Leuven and a Senior Research Fellow at DIW Berlin, with Joseph A. Clougherty and Pedro Pita Barros. “Remedy for now but prohibit for tomorrow: the deterrence effects of merger policy tools.” https://www.ssoar.info/ssoar/bitstream/handle/document/25862/ssoar-2007-seldeslachts\_et\_al-remedy\_for\_now\_but\_prohibit.pdf;jsessionid=A244005110FDB5816E0347D9F1B75436?sequence=1

Let us now think about the differences between the two antitrust actions of prohibitions and remedies.7 In the case of a prohibition, the penalty for proposing a merger with significant anti-competitive problems involves the full prohibition of the merger: both the pro-competitive and the anti-competitive profits for merging firms are negated by the prohibition. The throwing out of the pro-competitive profits along with the anti-competitive profits is important, as this brings about the punitive measure that Posner (1970) acknowledges as being crucial for deterrence. The big difference between remedies and prohibitions is that remedies attempt to identify and eliminate the anti-competitive elements of a merger. In essence, the merging firms are able to hold on to the pro-competitive elements of the merger—so they keep (ΠPC), but the anti-competitive elements of the merger (ΠAC) are negated by the remedial action. If an antitrust authority imposes remedies, then the disincentive for firms to propose anti-competitive mergers is clearly lower. In short, prohibitions seemingly involve more deterrence than do remedies, as prohibitions represent larger punishments.

#### Business practices are ongoing conduct defined by the behaviors of many market participants.

Kerry Lynn Macintosh 97. Associate Professor of Law, Santa Clara University School of Law. B.A. 1978, Pomona College; J.D. 1982, Stanford University, “Liberty, Trade, and the Uniform Commercial Code: When Should Default Rules Be Based On Business Practices?,” 38 Wm. & Mary L. Rev. 1465, Lexis.

These new and revised articles reflect a strong trend toward choosing default rules 4 that codify existing business practices. 5 [FOOTNOTE 5 BEGINS] In this Article, the term "business practices" is used to refer to practices that emerge over time as countless market participants exercise their freedom to engage in profitable transactions. For an account of the evolution of business practices, see infra Part II. As used here, "business practices" is broader and less technical than "trade usage," which the Code narrowly defines as "any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question." U.C.C. 1-205(2). [FOOTNOTE 5 ENDS] This is particularly true of the recent revisions to Articles 3 (Negotiable Instruments), 4 (Bank Deposits and Collections) and 5 (Letters of Credit).

#### Violation---the plan only increases behavioral remedies that target anticompetitive aspects of the practice---topical Affs must increase prohibitions on the practices themselves.

#### Vote Neg:

#### 1. Limits---there are infinite ways to ameliorate anticompetitive aspects of a practice through behavioral remedies---only structural prohibitions make the topic manageable for the Neg---it’s key to prep and clash.

#### 2. Ground---our interp ensures the Aff must “break up” big industries---that’s key to ensure link uniqueness and build in offense based on the core controversy on a topic with very few DAs.

### Off

Regs CP

#### The United States federal government should:

#### - Determine that harm to a single side of the market in platform markets are sufficient ground for a case on unfair, deceptive, or abusive acts or practices.

#### - Clarify that anticompetitive business practices on multisided platforms are per se legal under antitrust law.

#### The CP PICs out of antitrust and anticompetitive---it solves.

Natasha Sarin 20. Assistant Professor of Law, the University of Pennsylvania Carey Law School; Assistant Professor of Finance, the Wharton School of the University of Pennsylvania. “What’s in Your Wallet (and What Should the Law Do About It?)”. The University of Chicago Law Review. https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/Sarin\_Wallet\_87UCLR553.pdf

The AmEx decision makes a version of this argument, stating that “[e]vidence of a price increase on one side of a two-sided transaction platform cannot, by itself, demonstrate an anticompetitive exercise of market power.”15 Many antitrust experts believe this is flawed reasoning that represents a stark departure from precedent,16 which historically defines markets for antitrust analysis narrowly by focusing on the service “directly affected by a challenged restraint.”17 These critiques have merit. But unless reversed, the AmEx decision will make it difficult to challenge the pricing practices of many two-sided platforms on antitrust grounds. This is also true for two-sided markets beyond payment networks: just as a card network’s restraint on merchants can be offset by benefits to consumers on the other side of the market, so too can restraints on Uber drivers be offset by low-cost rides.

This Essay proposes a way forward for reining in two-sided markets. Specifically, I advocate that consumer protection authority can play the role historically performed by antitrust, at least with respect to the payment industry. The Dodd-Frank Act18 provides the Consumer Financial Protection Bureau (CFPB) with the authority to prohibit unfair, deceptive, or abusive acts or practices (UDAAP) that cause injury that cannot be “reasonably avoid[ed].”19 The anti-steering clauses at the heart of the AmEx decision are unfair to consumers and thus can be restricted using the CFPB’s UDAAP authority. This is true generally for prohibitions on merchants’ ability to surcharge retail customers who use rewards cards to transact that are expensive for merchants to process.

Antitrust critics of the AmEx decision focus on the harm suffered by consumers in credit card markets. As Professor Erik Hovenkamp explains:

The Supreme Court overlooked the parties’ capacity to balance fees against rewards through bilateral contracting. Intuitively, when a buyer and seller are permitted to bargain over alternative payment platforms, their common objective is the same as that of all contracting parties: to maximize their joint-welfare and split the surplus in a way that leaves them both better off than the status quo.20

This is true, and so the antisteering rules are UDAAPs from the perspective of the credit card consumer, who is losing out on the ability to bargain for a piece of this surplus. She can’t reasonably avoid the harm of losing some of this surplus.21 But what the antitrust view misses in its focus on a well-defined market is that the choice of a payment instrument has important consequences for consumers outside of the credit card market as well. Because of antisteering rules, merchants set uniform retail prices. To process certain rewards cards, they pay more than 3 percent of total transaction value in interchange fees.22 This fee is significantly higher than the cost of processing debit cards (capped at $0.22 plus 0.05 percent of the transaction amount) or cash (no transaction fees).23 In low-margin businesses—for example, average general retail profits are 2 percent24—merchants pass large interchange costs through to consumers. Some consumers receive a kickback on their retail purchases in the form of credit card rewards. However, cash users bear high retail prices to cover the costs of other people transacting with credit cards. Cash users are disproportionately lower-income and less financially sophisticated consumers.25 This means that the payments system engenders regressive cross subsidization of the wealthy by the poor.

This cross subsidization is unfair to non-rewards-card users and cannot be avoided by them, especially given that many who transact with cash or low-interchange debit cards do not have access to credit. This means the CFPB has the authority to prohibit card networks’ antisteering provisions and restraints on merchant surcharging more broadly. This approach is not a panacea—as I discuss, many state laws restrict heterogeneous pricing. Further, even if merchants have the right to vary consumer price depending on the payment instrument used, they may choose not to do so for fear of alienating their customers. Preliminary survey evidence suggests that surcharges are unlikely to be popular in practice.

#### Legality is comparatively cheaper for FTC resources.

Ramsi A. Woodcock 21. Assistant Professor, University of Kentucky Rosenberg College of Law, Secondary Appointment, Department of Management, University of Kentucky Gatton College of Business and Economics. “The Hidden Rules of a Modest Antitrust”. Minnesota Law Review https://deliverypdf.ssrn.com/delivery.php?ID=659113087090031104014103108065077095007085007037003090100006007104097067091127069102026056048010010036110095109031088087113005104006091005020071012081030119066078004004007050007009107022066112100025112012088078019022090126007103004117086019091002026081&EXT=pdf&INDEX=TRUE

Because per se rules of illegality are more costly than per se rules of legality, it follows that a given budget will be able to afford fewer rules of reason when per se rules of illegality are used than when per se rules of illegality are not used and so the intersection of the budget line with ab, the line that shows points attainable without use of rules of per se illegality, will be closer to the origin than the intersection of the budget line with dc. As a result, the intersection points of the budget line with dc and ab will not be symmetrical, and so the budget line will not lie at a 45-degree angle to the axes. (This is a bit difficult to see in the figure as drawn.)

## Case

### Access Adv---1NC

#### Current Amex ruling is limited.

Richard Brunell 18. General Counsel of the American Antitrust Institute, Washington, DC. The AAI filed an amicus brief in Amex in the Supreme Court in support of the government. The views expressed in this article are those of the author and do not necessarily reflect the view of AAI. “Ohio v. Amex: Not So Bad After All?” https://www.antitrustinstitute.org/wp-content/uploads/2018/12/Brunell-Amex-Magazine-article.pdf

Conclusion

The majority decision in Amex raises uncertainty over numerous issues, but it is actually quite limited in scope. Regardless of which two-sided platforms may qualify for “single market” treatment for purposes of analyzing vertical restraints, Amex’s market-definition analysis should have no application to per se or quick-look claims, claims challenging horizontal restraints more generally, or to Section 2 monopolization claims.

As to vertical restraints, Amex does not abrogate the direct effects test nor establish a market power screen.To the extent that it may be read to require market definition beyond the two-sided platform context, defining the “rough contours” of the market should be sufficient in a direct effects case. And to the extent Amex applies to the rule of reason generally, it does not make reduced output a necessary factor in demonstrating anticompetitive harm; rather, it suggests that when a prima facie case is based on weak evidence of supracompetitive pricing and there is a demonstrable increase in industry-wide output, a plaintiff may be required to show that the increase in output is not caused by the restraint at issue. Finally, because it ostensibly turned on market definition, Amex does not alter the established rules that defendants have the burden of proving procompetitive justifications at step two of the rule of reason and that out-of-market benefits do not count. In short, Amex may not be as bad for antitrust enforcement as some contend.

#### Gradualism is key---plan causes massive false positives.

David E. Wheeler et al. 17. Verizon Communications Inc. Thomas R. McCarthy, Counsel of Record and Bryan K. Weir, Consovoy McCarthy Park PLLC. “Brief Amicus Curiae of Verizon Communications Inc. In Support of Neither Party”. https://www.supremecourt.gov/DocketPDF/16/16-1454/23911/20171214135834771\_16-1454%20Ohio%20et%20al.%20v.%20American%20Express%20Company%20et%20al..pdf

The costs of erroneous judicial decisions are substantial: “False positives and false negatives are harmful to the economy as a whole for reasons that go beyond the conduct in the case under review: False positives and false negatives may chill beneficial conduct by other economic actors (potentially in other industries) that must comply with the rule; these errors may also fail to deter harmful conduct by other economic actors to which the same rule would apply.” Baker, supra, at 5-6.

Because erroneous decisions “can deter conduct that may be desirable, or prevent challenges to undesirable conduct,” Popofsky, supra, at 449, when enforcing the Sherman Act, the Court should rule on the basis of the facts in a given case rather than make broad pronouncements on novel issues of antitrust law that may proscribe (or endorse) categories of activity for all time. The Court’s gradual move away from per se liability with regard to vertical restraints reflects just such a cautionary approach. See Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 901 (2007) (“In more recent cases the Court, following a common-law approach, has continued to temper, limit, or overrule once strict prohibitions on vertical restraints.”); see also State Oil Co. v. Khan, 522 U.S. 3 (1997); Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988); Cont’l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

In order to avoid harming the consumer public, the Court should follow a policy of “nonintervention” when it is unclear whether particular market activity is pro- or anti-competitive. Robert H. Bork, The Antitrust Paradox 133 (1978). This is especially true in the context of novel markets and business arrangements where courts “are forced to formulate doctrine in the dark.” Devlin & Jacobs, supra, at 83.

#### Decks certainty---turns innovation and competition with China.

David E. Wheeler et al. 17. Verizon Communications Inc. Thomas R. McCarthy, Counsel of Record and Bryan K. Weir, Consovoy McCarthy Park PLLC. “Brief Amicus Curiae of Verizon Communications Inc. In Support of Neither Party”. https://www.supremecourt.gov/DocketPDF/16/16-1454/23911/20171214135834771\_16-1454%20Ohio%20et%20al.%20v.%20American%20Express%20Company%20et%20al..pdf

Verizon participates in multi-sided markets both as a provider of connective platforms and as a market participant relying on a platform for connection. Verizon businesses rely on platform services from the credit card payment systems in Verizon-owned stores to the operating systems that run on mobile devices and connect Verizon subsidiaries’ applications to consumers. Consumers access third-party content over Verizon’s Fios and mobile services. Verizon’s applications from its Oath subsidiary (such as Yahoo! Sports) act as an intermediary between content providers and consumers in the digital world. Verizon is also itself a platform provider. ThingSpace is Verizon’s web-based Internet of Things platform that provides a workspace for developers to create applications and services for customers with connected IoT devices that are served by Verizon’s network. BrightRoll by Yahoo! provides programmatic tools to help buyers and sellers connect with consumers across ad formats and devices, and ONE by AOL provides a mobile monetization platform that connects publishers, advertisers, and consumers to enable these groups to connect. In short, platforms support Verizon’s business, and in many instances, they are Verizon’s business.

Verizon thus has a strong interest in the proper application of the antitrust laws and the Court’s antitrust jurisprudence and, most relevant here, a heightened interest in how the Court applies those laws and precedent to multi-sided markets. Although some markets with two or more sides have existed for some time now (e.g., newspapers), our modern economy has seen an explosion in the development of multi-sided markets. It is only recently that economic theory has focused on these complex markets; likewise, it is only recently that courts have considered their antitrust implications. Not surprisingly, then, there is no generally accepted guidance in the law or economic theory about how they should be treated under the antitrust laws. The Court thus should proceed cautiously here to avoid impairing pro-competitive behavior and harming consumer welfare in the process.

Verizon expresses no opinion on the merits of the case. Rather, Verizon writes to respectfully request that the Court refrain from issuing any broad pronouncements on novel issues of antitrust law in this case and instead decide only the particular dispute between these parties based on the specific facts and circumstances presented here.

#### Heg and the LIO are unsustainable.

Walter Russell Mead 21. James Clarke Chace Professor of Foreign Affairs and the Humanities at Bard College, the Global View columnist at The Wall Street Journal, and a Distinguished Fellow at the Hudson Institute. "The End of the Wilsonian Era". Foreign Affairs. https://www.foreignaffairs.com/articles/united-states/2020-12-08/end-wilsonian-era

This task was complicated by the Cold War, but “the free world” (as Americans then called the noncommunist countries) continued to develop along Wilsonian lines. Inevitable compromises, such as U.S. support for ruthless dictators and military rulers in many parts of the world, were seen as regrettable necessities imposed by the need to fight the much greater evil of Soviet communism. When the Berlin Wall fell, in 1989, it seemed that the opportunity for a Wilsonian world order had finally come. The former Soviet empire could be reconstructed along Wilsonian lines, and the West could embrace Wilsonian principles more consistently now that the Soviet threat had disappeared. Self-determination, the rule of law between and within countries, liberal economics, and the protection of human rights: the “new world order” that both the George H. W. Bush and the Clinton administrations worked to create was very much in the Wilsonian mold.

Today, however, the most important fact in world politics is that this noble effort has failed. The next stage in world history will not unfold along Wilsonian lines. The nations of the earth will continue to seek some kind of political order, because they must. And human rights activists and others will continue to work toward their goals. But the dream of a universal order, grounded in law, that secures peace between countries and democracy inside them will figure less and less in the work of world leaders.

To state this truth is not to welcome it. There are many advantages to a Wilsonian world order, even when that order is partial and incomplete. Many analysts, some associated with the presidential campaign of former U.S. Vice President Joe Biden, think they can put Humpty Dumpty together again. One wishes them every success. But the centrifugal forces tearing at the Wilsonian order are so deeply rooted in the nature of the contemporary world that not even the end of the Trump era can revive the Wilsonian project in its most ambitious form. Although Wilsonian ideals will not disappear and there will be a continuing influence of Wilsonian thought on U.S. foreign policies, the halcyon days of the post–Cold War era, when American presidents organized their foreign policies around the principles of liberal internationalism, are unlikely to return anytime soon.

THE ORDER OF THINGS

Wilsonianism is only one version of a rules-based world order among many. The Westphalian system, which emerged in Europe after the Thirty Years’ War ended in 1648, and the Congress system, which arose in the wake of the Napoleonic Wars of the early nineteenth century, were both rules-based and even law-based; some of the foundational ideas of international law date from those eras. And the Holy Roman Empire—a transnational collection of territories that stretched from France into modern-day Poland and from Hamburg to Milan—was an international system that foreshadowed the European Union, with highly complex rules governing everything from trade to sovereign inheritance among princely houses.

As for human rights, by the early twentieth century, the pre-Wilsonian European system had been moving for a century in the direction of putting egregious violations of human rights onto the international agenda. Then, as now, it was chiefly weak countries whose oppressive behavior attracted the most attention. The genocidal murder of Ottoman Christian minorities at the hands of Ottoman troops and irregular forces in the late nineteenth and early twentieth centuries received substantially more attention than atrocities carried out around the same time by Russian forces against rebellious Muslim peoples in the Caucasus. No delegation of European powers came to Washington to discuss the treatment of Native Americans or to make representations concerning the status of African Americans. Nevertheless, the pre-Wilsonian European order had moved significantly in the direction of elevating human rights to the level of diplomacy.

Wilson, therefore, was not introducing the ideas of world order and human rights to a collection of previously anarchic states and unenlightened polities. Rather, his quest was to reform an existing international order whose defects had been conclusively demonstrated by the horrors of World War I. In the pre-Wilsonian order, established dynastic rulers were generally regarded as legitimate, and interventions such as the 1849 Russian invasion of Hungary, which restored Habsburg rule, were considered lawful. Except in the most glaring instances, states were more or less free to treat their citizens or subjects as they wished, and although governments were expected to observe the accepted principles of public international law, no supranational body was charged with the enforcement of these standards. The preservation of the balance of power was invoked as a goal to guide states; war, although regrettable, was seen as a legitimate element of the system. From Wilson’s standpoint, these were fatal flaws that made future conflagrations inevitable. To redress them, he sought to build an order in which states would accept enforceable legal restrictions on their behavior at home and their international conduct.

That never quite materialized, but until recent years, the U.S.-led postwar order resembled Wilson’s vision in important respects. And, it should be noted, that vision is not equally dead everywhere. Although Wilson was an American, his view of world order was first and foremost developed as a method for managing international politics in Europe, and it is in Europe where Wilson’s ideas have had their greatest success and where their prospects continue to look strongest. His ideas were treated with bitter and cynical contempt by most European statesmen when he first proposed them, but they later became the fundamental basis of the European order, enshrined in the laws and practices of the EU. Arguably, no ruler since Charlemagne has made as deep an impression on the European political order as the much-mocked Presbyterian from the Shenandoah Valley.

THE ARC OF HISTORY

Beyond Europe, the prospects for the Wilsonian order are bleak. The reasons behind its demise, however, are different from what many assume. Critics of the Wilsonian approach to foreign affairs often decry what they see as its idealism. In fact, as Wilson demonstrated during the negotiations over the Treaty of Versailles, he was perfectly capable of the most cynical realpolitik when it suited him. The real problem of Wilsonianism is not a naive faith in good intentions but a simplistic view of the historical process, especially when it comes to the impact of technological progress on human social order. Wilson’s problem was not that he was a prig but that he was a Whig.

Like early-twentieth-century progressives generally and many American intellectuals to this day, Wilson was a liberal determinist of the Anglo-Saxon school; he shared the optimism of what the scholar Herbert Butterfield called “the Whig historians,” the Victorian-era British thinkers who saw human history as a narrative of inexorable progress and betterment. Wilson believed that the so-called ordered liberty that characterized the Anglo-American countries had opened a path to permanent prosperity and peace. This belief represents a sort of Anglo-Saxon Hegelianism and holds that the mix of free markets, free government, and the rule of law that developed in the United Kingdom and the United States is inevitably transforming the rest of the world—and that as this process continues, the world will slowly and for the most part voluntarily converge on the values that made the Anglo-Saxon world as wealthy, attractive, and free as it has become.

Wilson was the devout son of a minister, deeply steeped in Calvinist teachings about predestination and the utter sovereignty of God, and he believed that the arc of progress was fated. The future would fulfill biblical prophecies of a coming millennium: a thousand-year reign of peace and prosperity before the final consummation of human existence, when a returning Christ would unite heaven and earth. (Today’s Wilsonians have given this determinism a secular twist: in their eyes, liberalism will rule the future and bring humanity to “the end of history” as a result of human nature rather than divine purpose.)

Wilson believed that the defeat of imperial Germany in World War I and the collapse of the Austro-Hungarian, Russian, and Ottoman empires meant that the hour of a universal League of Nations had finally arrived. In 1945, American leaders ranging from Eleanor Roosevelt and Henry Wallace on the left to Wendell Willkie and Thomas Dewey on the right would interpret the fall of Germany and Japan in much the same way. In the early 1990s, leading U.S. foreign policymakers and commentators saw the fall of the Soviet Union through the same deterministic prism: as a signal that the time had come for a truly global and truly liberal world order. On all three occasions, Wilsonian order builders seemed to be in sight of their goal. But each time, like Ulysses, they were blown off course by contrary winds.

TECHNICAL DIFFICULTIES

Today, those winds are gaining strength. Anyone hoping to reinvigorate the flagging Wilsonian project must contend with a number of obstacles. The most obvious is the return of ideology-fueled geopolitics. China, Russia, and a number of smaller powers aligned with them—Iran, for example—correctly see Wilsonian ideals as a deadly threat to their domestic arrangements. Earlier in the post–Cold War period, U.S. primacy was so thorough that those countries attempted to downplay or disguise their opposition to the prevailing pro-democracy consensus. Beginning in U.S. President Barack Obama’s second term, however, and continuing through the Trump era, they have become less inhibited. Seeing Wilsonianism as a cover for American and, to some degree, EU ambitions, Beijing and Moscow have grown increasingly bold about contesting Wilsonian ideas and initiatives inside international institutions such as the UN and on the ground in places from Syria to the South China Sea.

These powers’ opposition to the Wilsonian order is corrosive in several ways. It raises the risks and costs for Wilsonian powers to intervene in conflicts beyond their own borders. Consider, for example, how Iranian and Russian support for the Assad regime in Syria has helped prevent the United States and European countries from getting more directly involved in that country’s civil war. The presence of great powers in the anti-Wilsonian coalition also provides shelter and assistance to smaller powers that otherwise might not choose to resist the status quo. Finally, the membership of countries such as China and Russia in international institutions makes it more difficult for those institutions to operate in support of Wilsonian norms: take, for example, Chinese and Russian vetoes in the UN Security Council, the election of anti-Wilsonian representatives to various UN bodies, and the opposition by countries such as Hungary and Poland to EU measures intended to promote the rule of law.

Meanwhile, the torrent of technological innovation and change known as “the information revolution” creates obstacles for Wilsonian goals within countries and in the international system. The irony is that Wilsonians often believe that technological progress will make the world more governable and politics more rational—even if it also adds to the danger of war by making it so much more destructive. Wilson himself believed just that, as did the postwar order builders and the liberals who sought to extend the U.S.-led order after the Cold War. Each time, however, this faith in technological change was misplaced. As seen most recently with the rise of the Internet, although new technologies often contribute to the spread of liberal ideas and practices, they can also undermine democratic systems and aid authoritarian regimes.

Today, as new technologies disrupt entire industries, and as social media upends the news media and election campaigning, politics is becoming more turbulent and polarized in many countries. That makes the victory of populist and antiestablishment candidates from both the left and the right more likely in many places. It also makes it harder for national leaders to pursue the compromises that international cooperation inevitably requires and increases the chances that incoming governments will refuse to be bound by the acts of their predece

ssors.

The information revolution is destabilizing international life in other ways that make it harder for rules-based international institutions to cope. Take, for example, the issue of arms control, a central concern of Wilsonian foreign policy since World War I and one that grew even more important following the development of nuclear weapons. Wilsonians prioritize arms control not just because nuclear warfare could destroy the human race but also because, even if unused, nuclear weapons or their equivalent put the Wilsonian dream of a completely rules-based, law-bound international order out of reach. Weapons of mass destruction guarantee exactly the kind of state sovereignty that Wilsonians think is incompatible with humanity’s long-term security. One cannot easily stage a humanitarian intervention against a nuclear power.

The fight against proliferation has had its successes, and the spread of nuclear weapons has been delayed—but it has not stopped, and the fight is getting harder over time. In the 1940s, it took the world’s richest nation and a consortium of leading scientists to assemble the first nuclear weapon. Today, second- and third-rate scientific establishments in low-income countries can manage the feat. That does not mean that the fight against proliferation should be abandoned. It is merely a reminder that not all diseases have cures.

What is more, the technological progress that underlies the information revolution significantly exacerbates the problem of arms control. The development of cyberweapons and the potential of biological agents to inflict strategic damage on adversaries—graphically demonstrated by the COVID-19 pandemic—serve as warnings that new tools of warfare will be significantly more difficult to monitor or control than nuclear technology. Effective arms control in these fields may well not be possible. The science is changing too quickly, the research behind them is too hard to detect, and too many of the key technologies cannot be banned outright because they also have beneficial civilian applications.

In addition, economic incentives that did not exist in the Cold War are now pushing arms races in new fields. Nuclear weapons and long-range missile technology were extremely expensive and brought few benefits to the civilian economy. Biological and technological research, by contrast, are critical for any country or company that hopes to remain competitive in the twenty-first century. An uncontrollable, multipolar arms race across a range of cutting-edge technologies is on the horizon, and it will undercut hopes for a revived Wilsonian order.

IT’S NOT FOR EVERYBODY

One of the central assumptions behind the quest for a Wilsonian order is the belief that as countries develop, they become more similar to already developed countries and will eventually converge on the liberal capitalist model that shapes North America and western Europe. The Wilsonian project requires a high degree of convergence to succeed; the member states of a Wilsonian order must be democratic, and they must be willing and able to conduct their international relations within liberal multilateral institutions.

At least for the medium term, the belief in convergence can no longer be sustained. Today, China, India, Russia, and Turkey all seem less likely to converge on liberal democracy than they did in 1990. These countries and many others have developed economically and technologically not in order to become more like the West but rather to achieve a deeper independence from the West and to pursue civilizational and political goals of their own.

In truth, Wilsonianism is a particularly European solution to a particularly European set of problems. Since the fall of the Roman Empire, Europe has been divided into peer and near-peer competitors. War was the constant condition of Europe for much of its history, and Europe’s global dominance in the nineteenth century and early twentieth century can be attributed in no small part to the long contest for supremacy between France and the United Kingdom, which promoted developments in finance, state organization, industrial techniques, and the art of war that made European states fierce and ferocious competitors.

With the specter of great-power war constantly hanging over them, European states developed a more intricate system of diplomacy and international politics than did countries in other parts of the world. Well-developed international institutions and doctrines of legitimacy existed in Europe well before Wilson sailed across the Atlantic to pitch the League of Nations, which was in essence an upgraded version of preexisting European forms of international governance. Although it would take another devastating world war to ensure that Germany, as well as its Western neighbors, would adhere to the rules of a new system, Europe was already prepared for the establishment of a Wilsonian order.

But Europe’s experience has not been the global norm. Although China has been periodically invaded by nomads, and there were periods in its history when several independent Chinese states struggled for power, China has been a single entity for most of its history. The idea of a single legitimate state with no true international peers is as deeply embedded in the political culture of China as the idea of a multistate system grounded in mutual recognition is embedded in that of Europe. There have been clashes among Chinese, Japanese, and Koreans, but until the late nineteenth century, interstate conflict was rare.

In human history as a whole, enduring civilizational states seem more typical than the European pattern of rivalry among peer states. Early modern India was dominated by the Mughal Empire. Between the sixteenth century and the nineteenth century, the Ottoman and Persian Empires dominated what is now known as the Middle East. And the Incas and the Aztecs knew no true rivals in their regions. War seems universal or nearly so among human cultures, but the European pattern, in which an escalating cycle of war forced a mobilization and the development of technological, political, and bureaucratic resources to ensure the survival of the state, does not seem to have characterized international life in the rest of the world.

For states and peoples in much of the world, the problem of modern history that needed to be solved was not the recurrence of great-power conflict. The problem, instead, was figuring out how to drive European powers away, which involved a wrenching cultural and economic adjustment in order to harness natural and industrial resources. Europe’s internecine quarrels struck non-Europeans not as an existential civilizational challenge to be solved but as a welcome opportunity to achieve independence.

Postcolonial and non-Western states often joined international institutions as a way to recover and enhance their sovereignty, not to surrender it, and their chief interest in international law was to protect weak states from strong ones, not to limit the power of national leaders to consolidate their authority. Unlike their European counterparts, these states did not have formative political experiences of tyrannical regimes suppressing dissent and drafting helpless populations into the service of colonial conquest. Their experiences, instead, involved a humiliating consciousness of the inability of local authorities and elites to protect their subjects and citizens from the arrogant actions and decrees of foreign powers. After colonialism formally ended and nascent countries began to assert control over their new territories, the classic problems of governance in the postcolonial world remained weak states and compromised sovereignty.

Even within Europe, differences in historical experiences help explain varying levels of commitment to Wilsonian ideals. Countries such as France, Germany, Italy, and the Netherlands came to the EU understanding that they could meet their basic national goals only by pooling their sovereignty. For many former Warsaw Pact members, however, the motive for joining Western clubs such as the EU and NATO was to regain their lost sovereignty. They did not share the feelings of guilt and remorse over the colonial past—and, in Germany, over the Holocaust—that led many in western Europe to embrace the idea of a new approach to international affairs, and they felt no qualms about taking full advantage of the privileges of EU and NATO membership without feeling in any way bound by those organizations’ stated tenets, which many regarded as hypocritical boilerplate.

EXPERT TEXPERT

The recent rise of populist movements across the West has revealed another danger to the Wilsonian project. If the United States could elect Donald Trump as president in 2016, what might it do in the future? What might the electorates in other important countries do? And if the Wilsonian order has become so controversial in the West, what are its prospects in the rest of the world?

Wilson lived in an era when democratic governance faced problems that many feared were insurmountable. The Industrial Revolution had divided American society, creating unprecedented levels of inequality. Titanic corporations and trusts had acquired immense political power and were quite selfishly exploiting that power to resist all challenges to their economic interests. At that time, the richest man in the United States, John D. Rockefeller, had a fortune greater than the annual budget of the federal government. By contrast, in 2020, the wealthiest American, Jeff Bezos, had a net worth equal to about three percent of budgeted federal expenditures.

Yet from the standpoint of Wilson and his fellow progressives, the solution to these problems could not be simply to vest power in the voters. At the time, most Americans still had an eighth-grade education or less, and a wave of migration from Europe had filled the country’s burgeoning cities with millions of voters who could not speak English, were often illiterate, and routinely voted for corrupt urban machine politicians.

The progressives’ answer to this problem was to support the creation of an apolitical expert class of managers and administrators. The progressives sought to build an administrative state that would curb the excessive power of the rich and redress the moral and political deficiencies of the poor. (Prohibition was an important part of Wilson’s electoral program, and during World War I and afterward, he moved aggressively to arrest and in some cases deport socialists and other radicals.) Through measures such as improved education, strict limits on immigration, and eugenic birth-control policies, the progressives hoped to create better-educated and more responsible voters who would reliably support the technocratic state.

A century later, elements of this progressive thinking remain critical to Wilsonian governance in the United States and elsewhere, but public support is less readily forthcoming than in the past. The Internet and social media have undermined respect for all forms of expertise. Ordinary citizens today are significantly better educated and feel less need to rely on expert guidance. And events including the U.S. invasion of Iraq in 2003, the 2008 financial crisis, and the inept government responses during the 2020 pandemic have seriously reduced confidence in experts and technocrats, whom many people have come to see as forming a nefarious “deep state.”

International institutions face an even greater crisis of confidence. Voters skeptical of the value of technocratic rule by fellow citizens are even more skeptical of foreign technocrats with suspiciously cosmopolitan views. Just as the inhabitants of European colonial territories preferred home rule (even when badly administered) to rule by colonial civil servants (even when competent), many people in the West and in the postcolonial world are likely to reject even the best-intentioned plans of global institutions.

Meanwhile, in developed countries, problems such as the loss of manufacturing jobs, the stagnation or decline of wages, persistent poverty among minority groups, and the opioid epidemic have resisted technocratic solutions. And when it comes to international challenges such as climate change and mass migration, there is little evidence that the cumbersome institutions of global governance and the quarrelsome countries that run them will produce the kind of cheap, elegant solutions that could inspire public trust.

WHAT IT MEANS FOR BIDEN

For all these reasons, the movement away from the Wilsonian order is likely to continue, and world politics will increasingly be carried out along non-Wilsonian and in some cases even anti-Wilsonian lines. Institutions such as NATO, the UN, and the World Trade Organization may well survive (bureaucratic tenacity should never be discounted), but they will be less able and perhaps less willing to fulfill even their original purposes, much less take on new challenges. Meanwhile, the international order will increasingly be shaped by states that are on diverging paths. This does not mean an inevitable future of civilizational clashes, but it does mean that global institutions will have to accommodate a much wider range of views and values than they have in the past.

There is hope that many of the gains of the Wilsonian order can be preserved and perhaps in a few areas even extended. But fixating on past glories will not help develop the ideas and policies needed in an increasingly dangerous time. Non-Wilsonian orders have existed both in Europe and in other parts of the world in the past, and the nations of the world will likely need to draw on these examples as they seek to cobble together some kind of framework for stability and, if possible, peace under contemporary conditions.

For U.S. policymakers, the developing crisis of the Wilsonian order worldwide presents vexing problems that are likely to preoccupy presidential administrations for decades to come. One problem is that many career officials and powerful voices in Congress, civil society organizations, and the press deeply believe not only that a Wilsonian foreign policy is a good and useful thing for the United States but also that it is the only path to peace and security and even to the survival of civilization and humanity. They will continue to fight for their cause, conducting trench warfare inside the bureaucracy and employing congressional oversight powers and steady leaks to sympathetic press outlets to keep the flame alive.

Those factions will be hemmed in by the fact that any internationalist coalition in American foreign policy must rely to a significant degree on Wilsonian voters. But a generation of overreach and poor political judgment has significantly reduced the credibility of Wilsonian ideas among the American electorate. Neither President George W. Bush’s nation-building disaster in Iraq nor Obama’s humanitarian-intervention fiasco in Libya struck most Americans as successful, and there is little public enthusiasm for democracy building abroad.

#### China prefers peaceful rise.

Paul Heer 19. Served as National Intelligence Officer for East Asia in the Office of the Director of National Intelligence from 2007 to 2015, since served as Robert E. Wilhelm Research Fellow at the Massachusetts Institute of Technology’s Center for International Studies and as Adjunct Professor at George Washington University’s Elliott School of International Affairs. "Rethinking U.S. Primacy in East Asia." National Interest. 1-8-2019. https://nationalinterest.org/blog/skeptics/rethinking-us-primacy-east-asia-40972

But this policy mantra has two fundamental problems: it mischaracterizes China’s strategic intentions in the region, and it is based on a U.S. strategic objective that is probably no longer achievable. First, China is pursuing hegemony in East Asia, but not an exclusive hostile hegemony. It is not trying to extrude the United States from the region or deny American access there. The Chinese have long recognized the utility—and the benefits to China itself—of U.S. engagement with the region, and they have indicated receptivity to peaceful coexistence and overlapping spheres of influence with the United States there. Moreover, China is not trying to impose its political or economic system on its neighbors, and it does not seek to obstruct commercial freedom of navigation in the region (because no country is more dependent on freedom of the seas than China itself). In short, Beijing wants to extend its power and influence within East Asia, but not as part of a “winner-take-all” contest. China does have unsettled and vexing sovereignty claims over Taiwan, most of the islands and other features in the East and South China Seas, and their adjacent waters. Although Beijing has demonstrated a willingness to use force in defense or pursuit of these claims, it is not looking for excuses to do so. Whether these disputes can be managed or resolved in a way that is mutually acceptable to the relevant parties and consistent with U.S. interests in the region is an open, long-term question. But that possibility should not be ruled out on the basis of—or made more difficult by—false assumptions of irreconcilable interests. On the contrary, it should be pursued on the basis of a recognition that all the parties want to avoid conflict—and that the sovereignty disputes in the region ultimately are not military problems requiring military solutions. And since Washington has never been opposed in principle to reunification between China and Taiwan as long as it is peaceful, and similarly takes no position on the ultimate sovereignty of the other disputed features, their long-term disposition need not be the litmus test of either U.S. or Chinese hegemony in the region. Of course, China would prefer not to have forward-deployed U.S. military forces in the Western Pacific that could be used against it, but Beijing has long tolerated and arguably could indefinitely tolerate an American military presence in the region—unless that presence is clearly and exclusively aimed at coercing or containing China. It is also true that Beijing disagrees with American principles of military freedom of navigation in the region; and this constitutes a significant challenge in waters where China claims territorial jurisdiction in violation of the UN Commission on the Law of the Sea. But this should not be conflated with a Chinese desire or intention to exclusively “control” all the waters within the first island chain in the Western Pacific. The Chinese almost certainly recognize that exclusive control or “domination” of the neighborhood is not achievable at any reasonable cost, and that pursuing it would be counterproductive by inviting pushback and challenges that would negate the objective. So what would Chinese “hegemony” in East Asia mean or look like? Beijing probably thinks in terms of something much like American primacy in the Western Hemisphere: a model in which China is generally recognized and acknowledged as the de facto central or primary power in the region, but has little need or incentive for militarily adventurism because the mutual benefits of economic interdependence prevail and the neighbors have no reason—and inherent disincentives—to challenge China’s vital interests or security. And as a parallel to China’s economic and diplomatic engagement in Latin America, Beijing would neither exclude nor be hostile to continued U.S. engagement in East Asia. A standard counterargument to this relatively benign scenario is that Beijing would not be content with it for long because China’s strategic ambitions will expand as its capabilities grow. This is a valid hypothesis, but it usually overlooks the greater possibility that China’s external ambitions will expand not because its inherent capabilities have grown, but because Beijing sees the need to be more assertive in response to external challenges to Chinese interests or security. Indeed, much of China’s “assertiveness” within East Asia over the past decade—when Beijing probably would prefer to focus on domestic priorities—has been a reaction to such perceived challenges. Accordingly, Beijing’s willingness to settle for a narrowly-defined, peaceable version of regional preeminence will depend heavily on whether it perceives other countries—especially the United States—as trying to deny China this option and instead obstruct Chinese interests or security in the region.

#### No US-China war.

Timothy Heath 17. Senior international defense research analyst at the nonprofit, nonpartisan RAND Corporation and member of the Pardee RAND Graduate School faculty, and William R. Thompson, Distinguished and Rogers Professor at Indiana University and an adjunct researcher at RAND. "U.S.-China Tensions Are Unlikely to Lead to War". National Interest. 4-30-2017. https://nationalinterest.org/feature/us-china-tensions-are-unlikely-lead-war-20411?page=0%2C1

Graham Allison's April 12 article, “ How America and China Could Stumble to War ,” explores how misperceptions and bureaucratic dysfunction could accelerate a militarized crisis involving the United States and China into an unwanted war. However, the article fails to persuade because it neglects the key political and geostrategic conditions that make war plausible in the first place. Without those conditions in place, the risk that a crisis could accidentally escalate into war becomes far lower. The U.S.-China relationship today may be trending towards greater tension, but the relative stability and overall low level of hostility make the prospect of an accidental escalation to war extremely unlikely. In a series of scenarios centered around the South China Sea, Taiwan and the East China Sea, Allison explored how well-established flashpoints involving China and the United States and its allies could spiral into unwanted war. Allison’s article argues that given the context of strategic rivalry between a rising power and a status-quo power, organizational and bureaucratic misjudgments increase the likelihood of unintended escalation. According to Allison, “the underlying stress created by China’s disruptive rise creates conditions in which accidental, otherwise inconsequential events could trigger a large-scale conflict.” This argument appears persuasive on its surface, in no small part because it evokes insights from some of Allison’s groundbreaking work on the organizational pathologies that made the Cuban Missile Crisis so dangerous. However, Allison ultimately fails to persuade because he fails to specify the political and strategic conditions that make war plausible in the first place. Allison’s analysis implies that the United States and China are in a situation analogous to that of the Soviet Union and the United States in the early 1960s. In the Cold War example, the two countries faced each other on a near-war footing and engaged in a bitter geostrategic and ideological struggle for supremacy. The two countries experienced a series of militarized crises and fought each other repeatedly through proxy wars. It was this broader context that made issues of misjudgment so dangerous in a crisis. By contrast, the U.S.-China relationship today operates at a much lower level of hostility and threat. China and the United States may be experiencing an increase in tensions, but the two countries remain far from the bitter, acrimonious rivalry that defined the U.S.-Soviet relationship in the early 1960s. Neither Washington nor Beijing regards the other as its principal enemy. Today’s rivals may view each other warily as competitors and threats on some issues, but they also view each other as important trade partners and partners on some shared concerns, such as North Korea, as the recent summit between President Donald Trump and Chinese president Xi Jinping illustrated. The behavior of their respective militaries underscores the relatively restrained rivalry. The military competition between China and the United States may be growing, but it operates at a far lower level of intensity than the relentless arms racing that typified the U.S.-Soviet standoff. And unlike their Cold War counterparts, U.S. and Chinese militaries are not postured to fight each other in major wars. Moreover, polls show that the people of the two countries regard each other with mixed views —a considerable contrast from the hostile sentiment expressed by the U.S. and Soviet publics for each other. Lacking both preparations for major war and a constituency for conflict, leaders and bureaucracies in both countries have less incentive to misjudge crisis situations in favor of unwarranted escalation. To the contrary, political leaders and bureaucracies currently face a strong incentive to find ways of defusing crises in a manner that avoids unwanted escalation. This inclination manifested itself in the EP-3 airplane collision off Hainan Island in 2001, and in subsequent incidents involving U.S. and Chinese ships and aircraft, such as the harassment of the USNS Impeccable in 2009. This does not mean that there is no risk, however. Indeed, the potential for a dangerous militarized crisis may be growing. Moreover, key political and geostrategic developments could shift the incentives for leaders in favor of more escalatory options in a crisis and thereby make Allison’s scenarios more plausible. Past precedents offer some insight into the types of developments that would most likely propel the U.S.-China relationship into a hostile, competitive one featuring an elevated risk of conflict. The most important driver, as Allison recognizes, would be a growing parity between China and the United States as economic, technological and geostrategic leaders of the international system. The United States and China feature an increasing parity in the size of their economies, but the United States retains a considerable lead in virtually every other dimension of national power. The current U.S.-China rivalry is a regional one centered on the Asia-Pacific region, but it retains the considerable potential of escalating into a global, systemic competition down the road. A second important driver would be the mobilization of public opinion behind the view that the other country is a primary source of threat, thereby providing a stronger constituency for escalatory policies. A related development would be the formal designation by leaders in both capitals of the other country as a primary hostile threat and likely foe. These developments would most likely be fueled by a growing array of intractable disputes, and further accelerated by a serious militarized crisis. The cumulative effect would be the exacerbation of an antagonistic competitive rivalry, repeated and volatile militarized crisis, and heightened risk that any flashpoint could escalate rapidly to war—a relationship that would resemble the U.S.-Soviet relationship in the early 1960s. Yet even if the relationship evolved towards a more hostile form of rivalry, unique features of the contemporary world suggest lessons drawn from the past may have limited applicability. Economic interdependence in the twenty-first century is much different and far more complex than in it was in the past. So is the lethality of weaponry available to the major powers. In the sixteenth century, armies fought with pikes, swords and primitive guns. In the twenty-first century, it is possible to eliminate all life on the planet in a full-bore nuclear exchange. These features likely affect the willingness of leaders to escalate in a crisis in a manner far differently than in past rivalries. More broadly, Allison’s analysis about the “Thucydides Trap” may be criticized for exaggerating the risks of war. In his claims to identify a high propensity for war between “rising” and “ruling” countries, he fails to clarify those terms, and does not distinguish the more dangerous from the less volatile types of rivalries. Contests for supremacy over land regions, for example, have historically proven the most conflict-prone, while competition for supremacy over maritime regions has, by contrast, tended to be less lethal. Rivalries also wax and wane over time, with varying levels of risks of war. A more careful review of rivalries and their variety, duration and patterns of interaction suggests that although most wars involve rivalries, many rivals avoid going to war. Misperceptions and strategic accidents remain a persistent feature of international politics, and it may well be that that mistakes are more likely to be lethal in periods of adjustment in relative power configurations. Rising states do have problems negotiating status quo changes with states that have staked out their predominance earlier. Even so, the probability of war between China and the United States is almost certainly far less than the 75 percent predicted by Allison. If the leaders of both countries can continue to find ways to dampen the trends towards hostile rivalry and maintain sufficient cooperation to manage differences, then there is good reason to hope that the risk of war can be lowered further still.

### Conduct Adv---1NC

#### Big tech fixing cybersecurity now---only the have the power to do it.

Ingrid Chung 21. Summer editorial intern at National Review. "Big Tech Is Doing the Right Thing on Cybersecurity". National Review. 8-30-2021. https://www.nationalreview.com/corner/big-tech-is-doing-the-right-thing-on-cybersecurity/

President Joe Biden recently met with Big Tech executives to discuss how to improve cybersecurity after recent cyberattacks in which government software contractor Solarwinds and oil pipeline Colonial Pipeline were targeted. Leading tech corporations, including IBM, Google, and Amazon, will all try to improve cybersecurity by investing in the training of personnel in this field and upgrading their respective encryption and security systems. Microsoft has also committed to investing $150 million in upgrades for cybersecurity systems of government agencies. Big Tech may not always do the right thing, but these plans to enhance cybersecurity are certainly something that we can all stand behind.

In recent years, as the Internet has become increasingly influential and indispensable, cybersecurity has, correspondingly, become an increasingly prominent threat to not only citizens’ privacy but also to national security. Former national-security adviser John Bolton explained the significance of cybersecurity to national defense in a recent National Review article, in which he characterized threats from cyberspace as “a multiplicity of hidden, ever-changing threats.” A recent report by the Heritage Foundation raised concern over espionage, trading of secrets, and the disruption of military commands and communication potentially being conducted in the cyber domain.

The effective regulation of cyberspace, a relatively new front for modern warfare characterized by its elusiveness and lack of boundaries, is sometimes challenging. Laxness in cybersecurity, however, has often led to catastrophic consequences. For instance, the WannaCry Ransomware Cyber Attack in 2017, in which files in affected computer systems were locked until ransom was paid for their decryption, affected approximately 200,000 computers in 150 countries and led to enormous financial costs. Victims of the cyber-extortion scheme included entities from government agencies such as the English National Health Service to major international corporates such as Boeing.

It is well established that both the state and leading tech corporations have a legitimate interest in enhancing cybersecurity. The government is responsible for engaging in national defense in the cyber domain and tech corporations are obligated to protect the privacy of their users, whose personal information is often entrusted to them.

Big Tech’s plans to cooperate with the government to improve cybersecurity through financial investments appears to be promising. While it may be difficult to predict the effectiveness of such investments, the fact that Big Tech and the government are placing the enhancement of cybersecurity close to the top of their agenda and are committing to coordinated efforts is good news. Big Tech, with its financial prowess derived from the sheer size of the industry, and a unique relationship with the use of cyberspace, is uniquely positioned to materially contribute to state-led efforts to secure cyberspace. Furthermore, investing in education on cybersecurity of employees may also be useful in raising awareness and amplifying the industry’s collective concern over capacity to combat cyberattacks in the long run.

#### Disaggregation is worse for cyber and grid resilience.

John Brandon 13. Contributing Editor. "Why Hackers Target Small Businesses: Cybersecurity Threats to Start-Ups". From The Dec. 2013/Jan. 2014 Issue of Inc. Magazine https://www.inc.com/magazine/201312/john-brandon/hackers-target-small-business.html

For many years, the average American small business was an unlikely target for a sophisticated cyberattack. Fewer financial resources and a relatively unknown brand worked in your favor to ward off hackers. Not anymore.

The dam has broken for small companies when it comes to security. Jeremy Grant, an adviser at the Department of Commerce’s National Institute of Standards and Technology, says in the past two years he has seen "a relatively sharp increase in hackers and adversaries targeting small businesses."

According to the security company Symantec, cyberattacks on small businesses rose 300 percent in 2012 from the previous year.

Smaller companies are attractive because they tend to have weaker online security. They’re also doing more business than ever online via cloud services that don’t use strong encryption technology. To a hacker, that translates into reams of sensitive data behind a door with an easy lock to pick. If you have any Fortune 500 companies as customers, you’re an even more enticing target--you’re an entry point.

#### Digital economy is uniquely good for risk resilience

Dmitry Ivanov & Alexandre Dolgui 20. Professor of Supply Chain and Operations Management at Berlin School of Economics and Law (HWR Berlin) and deputy director of Institute for Logistics at HWR Berlin. \*\*Distinguished Professor and the Head of Automation, Production and Computer Sciences Department at the IMT Atlantique, Nantes, France campus. "A digital supply chain twin for managing the disruption risks and resilience in the era of Industry 4.0." Product Planning & Control: The Management of Operations. 5-21-2020. https://www.tandfonline.com/doi/full/10.1080/09537287.2020.1768450

6. Conclusion

A combination of model-driven and data-driven decision-making support became a visible research trend in the last years. The quality of model-based decision-making support strongly depends on data, its completeness, fullness, validity, consistency, and timely availability. These data requirements are of special importance in SC risk management for predicting disruptions and reacting to them. Industry 4.0 in general and digital technology in particular give rise to data analytics applications to achieve a new quality of decision-making support when managing severe disruptions. The combination of simulation, optimisation, and data analytics constitutes a digital twin: a novel datadriven framework of managing disruption risks in the SC.

A digital SC twin is a model that represents the network state for any given moment in time and allows for complete end-to-end SC visibility to improve resilience and test contingency plans. The need and value of SC digital twins have become indisputably evident amid the COVID-19 pandemic when many firms needed to adapt their supply-demand allocations very quickly. Moreover, the experts expect the growing role of SC monitoring and visibility in post-pandemic recoveries.

This study focussed on creating a generic structure of a digital SC twin for managing disruption risks, i.e. a DSS for data-driven modelling of proactive resilient SC designs and reactive real-time disruption risk management. With the results of this study, we contribute to both theory and practice of decision-making support in SC disruption risk management by enhancing decision-makers’ understanding of the value and use of harnessing a firm’s own risk data and that of their partners for predictive and reactive decision-making.

First, the methodological principles of data-driven DSS and information technology for SC disruption risk management were derived using system-cybernetic analysis. Future DSS in SC disruption risk management will extensively utilise datadriven technologies and be united by three basic principles of system-cybernetic research to form SC risk analytics decision support and learning frameworks. A combination of these principles builds a framework of future digital SC twins for managing disruptions, i.e. DSS for SC disruption risk management which utilises integrated disruption risk modelling with simulation, optimisation, and analytics components to support situational forecasting, predictive simulation, prescriptive optimisation, and adaptive learning based on a transition from offline to online simulation and optimisation.

To prove the implementation feasibility of these principles in different contextual settings, a DSS for disruption risk management and business continuity in the SC was developed and tested. In addition, the framework of a generalised DSS was proposed. At the SC design stage and in the pre-disruption mode, the system should allow visualisation of SC risks, assessment of supplier disruption risks, prediction of possible supply interruptions, and computation of alternative supply network topologies and back-up routes with assessment of estimated times of arrival. In the dynamic mode, the system should be applied using real-time data to simulate disruption impacts on the SC and alternative SC designs that contain non-disrupted network nodes and arcs depending on real-time inventory, demand, and capacity data. The SC redesign results can be reported to ERP systems and quantified by means of KPIs, such as revenues, sales, on-time-delivery, etc.

The methodological principles and a generalised design of the digital SC twin proposed in this study can potentially enhance research on proactive and reactive resilient strategies and contingency plans by using the advantages of SC visualisation, historical disruption data analysis, and real-time disruption data to ensure business continuity in global companies. The findings presented can also guide a firm in properly maintaining data for model-based decision-making support. Ignoring accurate data on supplier and route disruption probabilities, advanced supply signal recognition, and real-time disruption detection can result in misleading disruption scenarios for SC design resilience and late deployment of recovery policies.

When generalising the insights gained in this study, the following directions can be observed. Ivanov et al. (2018) proposed that in the future competition will occur not between SCs, but rather between the information services and analytics algorithms behind the SCs. This is also true for SC disruption risk management. Examples of SC and operations risk analytics applications include logistics and SC control with real-time data, inventory control, and management using sensing data, dynamic resource allocation, improving recovery forecasting models using big data, SC visibility and risk control, optimising systems based on predictive information, and combining optimisation and machine learning algorithms. Success in SC disruption risk management will become more and more dependent on data analytics in combination with optimisation and simulation modelling.

Our study has a few limitations. First, a discussion of technical requirements on data processing capacities remained outside of the scope of this paper. Second, the detailed technical analysis of disruption data filtering, e.g. using machine learning techniques would make this study more comprehensive, however, going beyond of the scope of the paper.

A number of future research directions for extending these applications with the help of data driven techniques can be identified with regards to applications to SC disruption risk management. Detailed, technical analysis of the proposed technologies and how they can be integrated with each other could extend the content of this study. The speed and scope of SC digitalisation comprise a trend whereby the success of SC risk management will be more and more dependent on SC risk analytics. As such, a promising future research avenue is the development and testing of different manufacturing and logistics cloud platforms from the positions of both efficiency and resilience. Finally, the understanding of organisational changes in the new decision-making settings with an increased role of artificial intelligence algorithms belong to the crucial research areas helping to underpin the theoretical foundations of the new emerging field of a digital SC.

#### No cyber impact.

James Andrew Lewis 20. Senior vice president and director of the Strategic Technologies Program at the Center for Strategic and International Studies. “Dismissing Cyber Catastrophe”. 8-17-2018. https://www.csis.org/analysis/dismissing-cyber-catastrophe

More importantly, there are powerful strategic constraints on those who have the ability to launch catastrophe attacks. We have more than two decades of experience with the use of cyber techniques and operations for coercive and criminal purposes and have a clear understanding of motives, capabilities, and intentions. We can be guided by the methods of the Strategic Bombing Survey, which used interviews and observation (rather than hypotheses) to determine effect. These methods apply equally to cyberattacks. The conclusions we can draw from this are:

Nonstate actors and most states lack the capability to launch attacks that cause physical damage at any level, much less a catastrophe. There have been regular predictions every year for over a decade that nonstate actors will acquire these high-end cyber capabilities in two or three years in what has become a cycle of repetition. The monetary return is negligible, which dissuades the skilled cybercriminals (mostly Russian speaking) who might have the necessary skills. One mystery is why these groups have not been used as mercenaries, and this may reflect either a degree of control by the Russian state (if it has forbidden mercenary acts) or a degree of caution by criminals.

There is enough uncertainty among potential attackers about the United States’ ability to attribute that they are unwilling to risk massive retaliation in response to a catastrophic attack. (They are perfectly willing to take the risk of attribution for espionage and coercive cyber actions.)

No one has ever died from a cyberattack, and only a handful of these attacks have produced physical damage. A cyberattack is not a nuclear weapon, and it is intellectually lazy to equate them to nuclear weapons. Using a tactical nuclear weapon against an urban center would produce several hundred thousand casualties, while a strategic nuclear exchange would cause tens of millions of casualties and immense physical destruction. These are catastrophes that some hack cannot duplicate. The shadow of nuclear war distorts discussion of cyber warfare.

State use of cyber operations is consistent with their broad national strategies and interests. Their primary emphasis is on espionage and political coercion. The United States has opponents and is in conflict with them, but they have no interest in launching a catastrophic cyberattack since it would certainly produce an equally catastrophic retaliation. Their goal is to stay below the “use-of-force” threshold and undertake damaging cyber actions against the United States, not start a war.

This has implications for the discussion of inadvertent escalation, something that has also never occurred. The concern over escalation deserves a longer discussion, as there are both technological and strategic constraints that shape and limit risk in cyber operations, and the absence of inadvertent escalation suggests a high degree of control for cyber capabilities by advanced states. Attackers, particularly among the United States’ major opponents for whom cyber is just one of the tools for confrontation, seek to avoid actions that could trigger escalation.

The United States has two opponents (China and Russia) who are capable of damaging cyberattacks. Russia has demonstrated its attack skills on the Ukrainian power grid, but neither Russia nor China would be well served by a similar attack on the United States. Iran is improving and may reach the point where it could use cyberattacks to cause major damage, but it would only do so when it has decided to engage in a major armed conflict with the United States. Iran might attack targets outside the United States and its allies with less risk and continues to experiment with cyberattacks against Israeli critical infrastructure. North Korea has not yet developed this kind of capability.

#### No impact to the grid.

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Two weeks ago it was cyberattacks on the Irish power grid. Last month it was a digital assault on U.S. energy companies, including a nuclear power plant. Back in December a Russian hack of a Vermont utility was all over the news. From the media buzz, one might conclude that power grid infrastructure is teetering on the brink of a hacker-induced meltdown. The real story is more nuanced, however. Scientific American spoke with grid cybersecurity expert Robert M. Lee, CEO of industrial cybersecurity firm Dragos, Inc., to sort out fact from hype. Dragos, which aims to protect critical infrastructure from cyberattacks, recently raised $10 million from investors to further its mission. Before he founded the company, Lee worked for the U.S. government analyzing and defending against cyberattacks on infrastructure. For a portion of his military career, he also worked on the government’s offensive front. His work has given him a front-row view on both sides of infrastructure cybersecurity. [An edited transcript of the interview follows.] How concerned should we be about grid and infrastructure cybersecurity, and what should we be most worried about? The electric grid and most infrastructure we have is actually fairly well built for reliability and safety. We’ve had a strong safety culture in industrial engineering for decades. That safety and reliability has never been thought of from a cybersecurity perspective, but it has afforded us a very defensible environment. As an example: if a portion of the U.S. power grid goes down. We usually anticipate those things for hurricanes or winter-weather storms. And we’re good at moving away from the computers and doing manual operations, just working the infrastructure to get it back. Usually it’s hours, maybe days; never more than a week or so. A lot of these cyberattacks deal with the computer technology and the interconnected nature of the infrastructure. And so when they target it in that way, you’re talking hours, maybe a day, at most a week of disruption. For reasonable scenarios, we’re not talking about a long time of outages, and we’re not talking about compromising safety. Now, the scary side of it is [twofold]. One, our adversaries are getting much more aggressive. They’re learning a lot about our industrial systems, not just from a computer technology standpoint but from an industrial engineering standpoint, thinking about how to disrupt or maybe even destroy equipment. That’s where you start reaching some particularly alarming scenarios. The second thing is, a lot of that ability to return to manual operation, the rugged nature of our infrastructure—a lot of that’s changing. Because of business reasons, because of lack of people to man the jobs, we’re starting to see more and more computer-based systems. We’re starting to see more common operating platforms. And this facilitates a scale for adversaries that they couldn’t previously get. When you say our adversaries are getting more aggressive, what are you referring to? The key events are things like the Ukraine attack in 2015–2016, [in which a cyberattack brought down portions of the Ukrainian power grid], as well as two different campaigns in 2013–2014, BlackEnergy2 and Havex, [two malware programs that were deployed against energy sector companies]. Basically, far-reaching espionage on industrial facilities one year; the next year getting into industrial environments; and then culmination in attacks in 2015–2016. That’s aggressive in itself. For my own firm, what we’re seeing in the [overall] activity in the space is it’s growing. Over the last decade, I have seen adversary activity increase in some measure, and then around 2013–2014 just start spiking. What are the adversaries actually doing in these attacks? [There are two broad categories of attacks.] Stage I intrusions are those designed to gain information. These are the traditional espionage efforts we’ve become accustomed to hearing about, where information is stolen or deleted. A Stage II attack could result in temporary loss of power, physical damage to equipment, or other types of scenarios we often hear about. It is important to note these are not trivial to accomplish. If an attacker wants to progress to a Stage II attack, during the Stage I intrusion they have to steal information specific to [that] industrial environment. The 2013–2014 campaigns that I mentioned were exactly the kinds of Stage I activity that you’d want to use to pivot into a Stage II activity. And so they scared the heck out of all of us. But the stuff we’ve heard about recently—the nuclear site and about a dozen energy companies that were compromised in a phishing campaign that made the news—none of that sounded tailored toward pivoting into a Stage II. Once an adversary has broken into the “business networks” used for email, documents and so on, how far a jump is it for them to access the industrial control system (ICS) networks used to control and monitor the industrial equipment? In nuclear environments, [business networks and control networks are] airgapped—[i.e., computers on one network cannot talk to those on the other]—because of safety regulations. The idea that because you got into the business network you can easily move into the ICS network is ridiculous. That is not true with other industrial infrastructures—electric energy, oil and gas, manufacturing, etc. You absolutely have [ICS] networks that are connected up. The nuance here is that we have a joke in the community: you’ll get security folks who don’t know much about ICS coming in with penetration testers and saying, “Oh my gosh, I found so many vulnerabilities!” And so the joke is, why don’t I just sit you down at the terminal? I will give you 100 percent access. Now make the lights blink. There’s a big gap there. [So the challenge is] not so much getting access. It’s once you get access, do you know what to do in a way that’s not just going to be embarrassing? What motivation do these adversaries have to attack the U.S. grid? I do not feel that there is a legitimate reason for adversaries to disrupt or destroy industrial infrastructure outside of a conflict scenario. Ukraine and Russia is a great example. I don’t necessarily mean declared war, but in places where we see conflict, I think we’ll see industrial attacks: North Korea-South Korea, China-Taiwan. But there are some scenarios that concern me, where we might have our hands forced and not have clarity around what happened. I’m aware of at least one case where a skilled adversary broke into an industrial environment, and in the course of intelligence operations they accidentally knocked over some sensitive system that led to visible destruction and almost to multiple casualties. And the worst part is, we didn’t actually realize it was a failed operation until about a month after, because the forensics and analysis take time. So you could have a scenario where the U.S., Russia, China, Iran—big players—are doing intelligence operations on each other, are doing pre-positioning to have deterrence or political leverage, and mess up that operation in a way that looks like an attack that we do not have transparency on for some time. We do not have international norms around how to handle that. Outside of conflict scenarios, though, I don’t see the advantage to [deliberate] disruptive or destructive attacks. I think we haven’t seen it not because they haven’t wanted to, but because the return on investment is minimal. What’s really advantageous is sitting U.S. congressmen and policymakers fearing what can happen with industrial infrastructure. That fear drives policy far more than actually turning the lights off and having them realize [they will] come back on in six hours.

# 2NC

## Cosmo K

### Framework---2NC

#### Judging the aff’s constitutive political community is a reality creating principle.

Gerard Delanty 14. University of Sussex, UK “The prospects of cosmopolitanism and the possibility of global justice.” Journal of Sociology 2014, Vol. 50(2) 213–228 https://www.sciencespo.fr/ceri/plurispace/wp-content/uploads/2020/01/DELANTY\_Prospects-Cosmopolitanism.pdf

The notion that global justice is both a challenge and a possibility is a relatively new idea.1 Notions of justice have traditionally been confined to territorially limited political communities, generally nation-states, and global justice seen as a secondary or derivative matter. It was not very long ago that all questions of justice were thought to pertain to nationally defined political communities. This was certainly the assumption that Rawls made in A Theory of Justice in 1971, and which set the terms of debate for more than four decades. In the past two decades there has been a steady increase in what may be called discourses of global justice – including theoretical conceptualizations – and political practices that reflect notions of global justice. It would appear that global justice has become part of the Zeitgeist or the political imaginary of critical publics in contemporary societies as they address a range of global challenges.

To create new or possible worlds it is first of all necessary to be able to imagine them. The fact that we are unsure of what exactly constitutes global justice, but nonetheless speak of it, suggests that it is a reality of a certain kind. One might say it is a reality creating idea. The reality of global justice can now be declared to be a constitutive feature of political community. It is a way of judging the world and a way of thinking about the world, as well as a way of examining the world that challenges the exclusivity of national borders as determining the boundaries of justice. Global justice has a normative, a cognitive and an epistemological dimension: it offers principles against which injustice can be measured, it offers a language to speak about human interconnectedness, and it is a topic on which knowledge can be acquired through social research. The concern with global justice is central to the idea of cosmopolitanism, though not the only aspect of cosmopolitanism. In this article I am largely concerned with the political dimension of cosmopolitanism, which I see as the context in which to discuss global justice. The aim of the article is to explore the considerations that are at stake in assessing the prospects of cosmopolitanism today as a political project. I argue that there is scope for fruitful dialogue between sociology and political science around this question, which asks how a normative idea becomes an empirical phenomenon. In the first section I discuss the notion of global justice before outlining a theoretical approach to the analysis of cosmopolitanism. The third section of the article moves on to look at the conditions of the possibility of cosmopolitanism, before finally considering the prospects of cosmopolitanism.

#### 3. Debates over cosmopolitanism shape subjectivity---their model re-instantiates meta-norms that teach debaters to recreate the nation-state’s violence through social practices.

Gerard Delanty 14. Professor of Sociology and Social Political Thought (School of Law, Politics and Sociology) @ University of Sussex, UK “The prospects of cosmopolitanism and the possibility of global justice.” Journal of Sociology 2014, Vol. 50(2) 213–228 https://www.sciencespo.fr/ceri/plurispace/wp-content/uploads/2020/01/DELANTY\_Prospects-Cosmopolitanism.pdf

It is in the first instance a condition of openness to the world in the sense of the broadening of the moral and political horizon of societies. It entails a view of societies as connected rather than separated. Cosmopolitanism is made possible by the fact that individuals, groups, publics, societies have a capacity for learning in dealing with problems and, in particular, learning from each other. In this sense, then, cosmopolitanism is not a matter of diversity or mobility, but a process of learning. Dialogue is a key feature of cosmopolitanism since dialogue opens up the possibility of incorporating the perspective of others into one’s own view of the world. It can thus be associated with a communicative view of modernity. Rather than being an affirmative condition, it is transformative and is produced by social struggles rather than being primarily elite driven or entirely institutional. In this sense, cosmopolitanism can be related to popular and vernacular traditions rather than exclusively to the projects of elites (see Holton, 2009). From an epistemological perspective, cosmopolitanism involves the production of essentially critical knowledge, such as the identification of transformative potentials within the present.

Finally, cosmopolitanism is related to subject formation: it is constitutive of the self as much as it is of social and political processes. This is reflected in the von Humboldtian – in this case Wilhelm von Humboldt’s – understanding of cosmopolitanism as a particular kind of consciousness that is best exemplified in education. In the acquisition of knowledge, the self undergoes a transformation, for Bildung is a form of self-formation and occurs through the encounter of the individual with the world. Bildung is a means of encountering the universal, as reflected in the category of the world, and is the aim of education.

These features of cosmopolitanism challenge the received view of normative ideas, such as global justice as transcending political community or as simply utopian. The conception of cosmopolitanism I am putting forward is that it is constitutive of modernity and part of the make-up of political community. This is why cosmopolitanism is not a zero sum condition – either present or absent – as its critics often argue and its defenders mistakenly argue in its support. It is present to varying degrees in contemporary societies.

In order to assess the prospects of cosmopolitanism it is therefore necessary to determine the extent to which cosmopolitan phenomena are present in the cultural model of societies and in their modes of social organization and institutions. By the cultural model, I mean the social imaginary of societies, that is the dominant forms of collective identity or self-understanding. The cultural model of all modern societies involves the amplification and metamorphosis of transcultural ideas such as liberty, justice, freedom, autonomy, rights, which of course are variously interpreted and are not always fully institutionalized. But the existence of such ideas (essentially meta-norms), means that societies have the cognitive means of reaching beyond themselves. For this reason, there is generally a tension in modern societies between the cultural model and institutions. Related to these levels of analysis is the dimension of subject formation, the cosmopolitan self. It is possible that any one time in the history of a society there is a tension between subject formation, the cultural model of society, and social institutions. It is for this reason that cosmopolitanism can be seen as a critical theory of society (see Delanty, 2009): it shares with the critical heritage the concern with possibilities within the present or the immanent transcendence of society.

I am emphasizing, then, the formative dimensions of cosmopolitanism, which in other words is a structure forming itself out of both the self and society. It entails a subject (the cosmopolitan subject), a discourse in which ideas, knowledge, modes of cognition are produced, and social practices. Viewed in such terms, cosmopolitanism is a process as opposed to a fixed condition. It is marked by conflict, contradictions, negotiation. The implications of this view are that evidence of cosmopolitanism must be found not in an end state – a cosmopolitan society or state as opposed to a non-cosmopolitan one – but in the process by which it emerges. It is the task of sociology to determine whether and how this process is occurring.

#### 4. Misrepresentation---predetermining the “who” and “how” of policymaking blocks democratic arenas. Our public sphere of argument over the Westphalian frames is an act of justice through assertion of rights.

Nancy Fraser 05. Henry A. and Louise Loeb Professor of Political and Social Science and professor of philosophy at The New School. “Reframing Justice in a Globalizing World, NLR 36, November–December 2005.” New Left Review. https://newleftreview-org.proxy.library.emory.edu/issues/ii36/articles/nancy-fraser-reframing-justice-in-a-globalizing-world

But the claims of transformative politics go further still. Above and beyond their other demands, these movements are also claiming a say in a post-Westphalian process of frame-setting. Rejecting the standard view, which deems frame-setting the prerogative of states and transnational elites, they are effectively aiming to democratize the process by which the frameworks of justice are drawn and revised. Asserting their right to participate in constituting the ‘who’ of justice, they are simultaneously transforming the ‘how’—by which I mean the accepted procedures for determining the ‘who’. At their most reflective and ambitious, accordingly, transformative movements are demanding the creation of new democratic arenas for entertaining arguments about the frame. In some cases, moreover, they are creating such arenas themselves. In the World Social Forum, for example, some practitioners of transformative politics have fashioned a transnational public sphere where they can participate on a par with others in airing and resolving disputes about the frame. In this way, they are prefiguring the possibility of new institutions of post-Westphalian democratic justice.footnote16

The democratizing dimension of transformative politics points to a third level of political injustice, above and beyond the two already discussed. Previously, I distinguished first-order injustices of ordinary-political misrepresentation from second-order injustices of misframing. Now, however, we can discern a third-order species of political injustice, which corresponds to the question of the ‘how’. Exemplified by undemocratic processes of frame-setting, this injustice consists in the failure to institutionalize parity of participation at the meta-political level, in deliberations and decisions concerning the ‘who’. Because what is at stake here is the process by which first-order political space is constituted, I shall call this injustice meta-political misrepresentation. Meta-political misrepresentation arises when states and transnational elites monopolize the activity of frame-setting, denying voice to those who may be harmed in the process, and blocking creation of democratic arenas where the latter’s claims can be vetted and redressed. The effect is to exclude the overwhelming majority of people from participation in the meta-discourses that determine the authoritative division of political space. Lacking any institutional arenas for such participation, and submitted to an undemocratic approach to the ‘how’, the majority is denied the chance to engage on terms of parity in decision-making about the ‘who’.

### Impact---2NC

#### 5. Inability to conceptualize violence determines impact calculous---overcorrect for the intelligibility gap.

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How we relate to others should be a central concern of the field of International Relations. However, independent political communities—states—and their interrelations have historically been the focus of the discipline of International Relations (IR), thus limiting the forms of interaction that potentially constitute the field.[1] Postpositivist accounts have repeatedly indicated the disjuncture between the conceptual constructs that IR scholars use to make sense of the world historically and the way people practice their lives, which in the end is the substance of global politics. Many critical projects including Global IR have challenged the research produced through atomistic understandings of the world, and attempts have been made to integrate other ways of knowing into the discipline (Acharya 2014, Jackson and Nexon 1999, Tickner and Wæver 2009). While the ‘critical turn’ has made IR a more plural discipline by opening space for examining different types of relations, they have still been founded on modern, western ‘ontological’ assumptions about existence that have undercut their ability to reap the full benefits of other more robustly relational ways of existing (Blaney and Tickner 2017, Shani 2008, Trownsell 2013). Because the kind of plurality practised has not effectively dealt with distinctly relational ways of living and forms of knowing in their own terms, the call that we are making here is not just about adding other perspectives to the IR cauldron. We are aspiring for a deep plurality, in which IR scholars learn to effectively engage with difference at the ontological, methodological and practical levels.

Since the issue at hand is about ontological-cosmological commitments, we proffer our particular understandings of these terms. By ontology, we mean those basic assumptions about the nature of existence that are operative within any given tradition of living and thinking. In this sense ontology is closely linked to the cosmological in that they both reflect how we conceptualize our relationship with the cosmos and our place in it (Shani 2017). They are distinct in that cosmology refers more to origin stories and to cultural, spiritual and religious practices while ontology expresses the assumptions about the primordial condition of existence that provides the underlying logic of cosmological accounts and as such of all the other cultural fruits that emerge from them. Here we focus on ontology, because it helps draw attention to and provincialize many of the fundamental assumptions made in the dominant IR tradition, many of which have become invisible or merely commonsensical by being consonant with prevalent shared meaning systems and through longstanding and conventional use.

The general inability both in the field and discipline of international relations to recognize when and how one and others are engaging existence from very distinct ontological points of departure has had a serious impact in terms of both politics and knowledge production. Promoted through globally replicated institutions including academia, media, churches, etc., conceptualizing and practicing existence based on separation has become so naturalized that other more relational forms of being have been silenced and excluded. Conflict over what counts as real arises since those applying the predominant assumptions cannot even fathom that these other ways of being can be possible, legitimate or valid. As such living in one’s own or a group’s terms becomes a struggle when they are not aligned with the more predominant logic.

Several consequences of being blind to these relational ways of living and being manifest themselves politically. First these life expressions are often “othered” and “minimized” by treating them as myths (Law 2015), legends, superstitions, or stories about how people communicate with other beings. Denigration also becomes evident when examining public policies that do not even articulate, let alone protect, these relational ways of life. Among humans, groups abound that have not been deemed worthy of civil rights protections in the process of statebuilding for not engaging the world in sufficiently “civilized” manners (Sawyer 2004). Others have been the targets of state-led violence through national forced sterilization or “population control” initiatives (Carpio 2004, Pegoraro 2015). Beyond the human, these excluded groups have clamored to protect other beings that do not translate easily into traditional legal frameworks. For example, while indigenous groups were able to get the rights of nature officially acknowledged in Ecuador’s 2008 constitution, an effective implementation of these rights has yet to be seen. Efforts to maintain a healthy relationship with the beings of land, water, air, plants and animals often come into direct conflict with “national interests,” international treaties, foreign direct investment and forms of international cooperation, as can be clearly seen in last year’s indigenous struggles at Standing Rock in the United States. In the end, the ontological nature of these clashes has been clearly echoed in the zapatistas’ claims to a world of many worlds when stating, “We are another resistance, we are another reality.”[2]

In addition to the important political implications in the field of international relations, the discipline itself has yet to consider seriously relational ways of knowing and being. Because the problematics typical of IR and the tools generated to deal with them have been identified and named through the same predominant set of existential assumptions, the conceptual capacity of the discipline to grasp and respond to these ways of knowing is limited. In fact the predominant understanding of ontology within the discipline of IR has been referred to as “scientific ontology” (Patomäki and Wight 2000, Jackson 2011). Here scholars fight over what exists in the world without a prior discussion as to how it is ontologically that we arrive at a place where we insist on the existential autonomy of categories in the first place. This means that we keep studying these cosmologies through ontologically incommensurate filters (not based on similar existential assumptions) thinking that in this way we will still be able to understand them and then use the knowledge generated through reduced filters to find effective strategies for engagement. Yet our ontological parochialism still translates into epistemic violence by not being able to hear, understand, engage their world in their own ontological terms. Simultaneously we continue to generate a skewed picture of the kinds of knowing and being practiced in distinct parts of the world and subsequently of world politics. Consequently the resulting “intelligibility gap” still reinforces certain ways of being and knowing in the world as more legitimate or acceptable than others, thus reinforcing the source of cosmological insecurity for those falling outside these parameters.

#### 5. Off-Shoring.

Jerry Kopf et al 13 . Professor of Economics, Radford University. Charles Vehorn, Professor of Economics, Radford University. Joel Carnevale, Professor of Economics, Syracuse University. “Emerging Oligopolies in Global Markets: Was Marx Ahead of His Time?” Journal of Management Policy and Practice 14(3): 96-98. <http://www.m.www.na-businesspress.com/JMPP/KopfJ_Web14_3_.pdf>

With firms branching out into global competition and countries lowering their trade barriers to promote such competition, the absence of effective global regulation once again raises Marx concerns. Because of strong federal governments, national governments were able to pass and enforce, through the uses of military or police force where necessary, laws that regulated externalities, such as pollution, and antitrust. At the moment there is no strong federal government at the global level and, therefore, no one to pass and enforce laws that effectively regulate externalities or antitrust. Epstein and Greve raise a Marx like concern, “when firms have international market power, one would expect them to behave as monopolists just like domestic firms with market power” (2004). Therefore, without any dominant form of regulatory governance, industry concentration could very well replicate what was seen in the late 19th century, though, globally instead of nationally. Carstensen & Farmer discusses this tendency towards M&A’s: The transformation of formerly regulated or noncompetitive industries to competition is closely linked with merger movements. The historical record demonstrates that once faced with competition, leading firms in these industries began to merge. This has been the pattern in airlines, banks, railroads, electric and gas utilities, health care and, with great prominence, telecommunications (2008). While some may argue that reaching that level of concentration is unlikely, one should consider current industries that hold a considerable global market share. “Although it may be more difficult to establish and maintain market power internationally, there is no reason to believe that it is impossible or, for that matter, rare. Industries such as pharmaceuticals, passenger aircraft, and software illustrate the phenomenon” (Epstein & Greve, 2004). There are actually quite a few firms who have emerged into the global market that hold what can be considered a significant share within global industries, ranging from manufacturing, financial intermediation, and transport service along with other service industries. For example, The European Aeronautic Defense and Space Company and The Boeing Company combined hold more than 50% market share within the global civil aerospace products manufacturing industry. Goldman and Sachs hav2 20.20% market share within the global investment banking and brokerage industry and Vivendi holds 20.10% within the global music production and distribution industry. United Parcel Service holds 23.80%, within the global logistics – couriers industry (IBISW, 2011). We do not intend to imply that the monopolization that had plagued the United States in the late 19th century has emulated itself at the global level, creating one dominant firm controlling an entire global industry. However, it does appear that a number of industries are starting to exhibit Marx, “inevitable move toward a monopoly.” The increase in oligopoly power at the global level presents unprecedented challenges. Reaching a cross-country consensus on competition policy is a difficult. Epstein & Greve discuss some of the issues that arise when attempting to unite foreign and domestic competition policy. Competition policy embodies imprecise normative judgments that invite controversy and defection rather than consensus and commitment. Because its scope extends to such a wide range of economic activity, it has the potential to inflict significant costs on many transactors. In particular, competition policy tempts states both to impose nominally neutral policies that favor local producers and consumers at the expense of global welfare, and to administer their policies in a discriminatory fashion to similar ends” (2004). While more and more countries are adopting competition policies, this seemingly positive step towards unification of trust law has its negative effects. “Nearly one hundred jurisdictions now have antitrust laws” according to Epstein & Greve, this raises increasing issues of “jurisdictional overlaps” since many countries will assert their “jurisdiction over extraterritorial conduct that has a domestic impact” (2004). Antitrust enforcement agencies around the world have tried to cope with the increased power of global corporations by staying in regular and increasing contact with one another on individual merger cases as well as on general issues of mutual enforcement interest. Through instruments such as the 1995 Recommendation of the Organization for Economic Co-operation and Development (OECD) that its 29 members cooperate with one another in antitrust enforcement and bilateral agreements like that which exists between the United States and the European Community, the antitrust agencies notify one another when a case under investigation affects another's important interests and they share what information they can and otherwise cooperate in the investigation and resolution of those cases (1999). Richard Parker, Senior Deputy Director of the Bureau of Competition FTC, presenting on global merger enforcement, discussed the implementation of the Organization for Economic Co-operation and Development (OECD) and concluded with examples of global merger enforcement. While attempts at unified standards of competition policy are underway, the efforts of the OECD are considered to have substantial limitations on enforcing global merger laws. Epstein and Greve state: Information sharing or “soft” cooperation has also been pursued at the Organization for Economic Co-operation and Development, which has generated several aspirational texts. None of these impose obligations on states, and they are not intended to do so. Their goals are modestly limited to improving communication on competition issues. History shows us that even with a strong federal government with the ability to enforce laws through the use of force where necessary, such as the United States federal government has on its states, firms are very good at ignoring or getting around antitrust laws. If the U.S. government did not have strong federal power over states, and it was up to the states to reach agreements on antitrust laws, one can easily imagine that there would likely be problems resulting in less strenuous competition policy. Take for example state control over age discrimination laws. When these laws originated, states chose whether to enact policies aimed at protecting workers rights. By 1960 only 8 states had age discrimination laws until the federal government enacted such regulations as the Age Discrimination Employment Act of 1967 (ADEA). This, along with the Department of Labor in 1979 giving administrative authority to the U.S. Equal Employment Opportunity Commission (EEOC), established unified laws protecting individual employment rights (Lahey, 2007). Without this dominant authority of the federal government, fair employment practices may still continue to be a regionally dependent right. In the current era of globalization, where industry’s actions domestically can be felt by all corners of the globe and vice versa, without a global entity with strong “federal” powers capable of monitoring and enforcing competition policy, it seems reasonable to conclude that Marx may in fact be proven correct: the inevitable result of the efficient market is increasing concentration of power resulting in global oligopolies or, eventually, monopolies.

### AT: Cap Good---2NC

#### 3. But, it’s unsustainable---Mineral cycles – that’s Allinson – copper, lithium, manganese hit bottlenecks. Tipping points happen before we know them AND goods are not substitutable.

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Endless growth will generate minerals scarcity within decades

The EV transition is, in short, a massive industrial project. Electrification of roads and rail will require upgraded smart grids, complex routes connected to high power lines, and regular battery-swap stations. The paper explores several scenarios to explore how such a transition would take place.

In a continuing GDP growth scenario, the authors note that the economy begins to stagnate “due to peak oil limits at around 2025-2040,” but GDP is able to continue growing thanks to the EV transition. This shows that the reduction in liquid fuels in transportation can play a powerful role in avoiding “energy shortages in the economy as a whole.”

But then the economy hits the limits of mineral and material production to sustain this electric transition—in just three decades. And this is even with high levels of minerals recycling.

By 2050, in this scenario, the EV transition will “require higher amounts of copper, lithium and manganese than current reserves. For the cases of copper and manganese the depletion is mainly due to the demand from the rest of the economy,” but most lithium demand “is for EV batteries,” and this alone “depletes its estimated global reserves.”

Mineral depletion takes place even with “a very high increase in recycling rates” in a continuing GDP growth scenario.

In one such scenario, the authors apply what they consider to be realistic upper level recycling rates of 57 percent, 30 percent and 74 percent to copper, lithium and manganese respectively. These are based on extremely optimistic projections of recycling capabilities relative to their costs.

But still they find that even these high recycling rates wouldn’t prevent depletion of all current estimated reserves by 2050. The conclusion corroborates findings of other studies, estimating an expected bottleneck for lithium by 2042-2045 and for manganese by 2038-2050.

Actual bottlenecks could come even earlier because existing studies—including the MEDEAS model—don’t account for material requirements needed for internal wiring, the EV motor, EV chargers, building and maintaining the grid to connect and charge EV batteries, the catenaries to electrify the railways, as well as inherent difficulties in recycling metals.

### AT: Perm---2NC

#### 1. Inclusion of the Westphalian grammar in frame-setting is an act of injustice that prevents transformative politics and makes global death inevitable.

Nancy Fraser 05. Henry A. and Louise Loeb Professor of Political and Social Science and professor of philosophy at The New School. “Reframing Justice in a Globalizing World, NLR 36, November–December 2005.” New Left Review. https://newleftreview-org.proxy.library.emory.edu/issues/ii36/articles/nancy-fraser-reframing-justice-in-a-globalizing-world

The politics of framing can take two distinct forms, both of which are now being practised in our globalizing world.footnote12 The first approach, which I shall call the affirmative politics of framing, contests the boundaries of existing frames while accepting the Westphalian grammar of frame-setting. In this politics, those who claim to suffer injustices of misframing seek to redraw the boundaries of existing territorial states or in some cases to create new ones. But they still assume that the territorial state is the appropriate unit within which to pose and resolve disputes about justice. For them, injustices of misframing are not a function of the general principle according to which the Westphalian order partitions political space. They arise, rather, as a result of the faulty way in which that principle has been applied. Thus, those who practise the affirmative politics of framing accept that the principle of state-territoriality is the proper basis for constituting the ‘who’ of justice. They agree, in other words, that what makes a given collection of individuals into fellow subjects of justice is their shared residence on the territory of a modern state and/or their shared membership in the political community that corresponds to such a state. Thus, far from challenging the underlying grammar of the Westphalian order, those who practise the affirmative politics of framing accept its state-territorial principle.

Precisely that principle is contested, however, in a second version of the politics of framing, which I shall call the transformative approach. For its proponents, the state-territorial principle no longer affords an adequate basis for determining the ‘who’ of justice in every case. They concede, of course, that that principle remains relevant for many purposes; thus, supporters of transformation do not propose to eliminate state-territoriality entirely. But they contend that its grammar is out of synch with the structural causes of many injustices in a globalizing world, which are not territorial in character. Examples include the financial markets, ‘offshore factories’, investment regimes and governance structures of the global economy, which determine who works for a wage and who does not; the information networks of global media and cybertechnology, which determine who is included in the circuits of communicative power and who is not; and the bio-politics of climate, disease, drugs, weapons and biotechnology, which determine who will live long and who will die young. In these matters, so fundamental to human well-being, the forces that perpetrate injustice belong not to ‘the space of places’, but to ‘the space of flows’.footnote13 Not locatable within the jurisdiction of any actual or conceivable territorial state, they cannot be made answerable to claims of justice that are framed in terms of the state-territorial principle. In their case, so the argument goes, to invoke the state-territorial principle to determine the frame is itself to commit an injustice. By partitioning political space along territorial lines, this principle insulates extra- and non-territorial powers from the reach of justice. In a globalizing world, therefore, it is less likely to serve as a remedy for misframing than as a means of inflicting or perpetuating it.

#### 2. Ontology of War---Competition defines “us” through total war---the virtuous cycle of Darwinist competition eliminates morality.

Pauli Kettunen 97. Professor of Political History in the Social Science Faculty of University of Helsinki. "The society of virtuous circles." Models, modernity and the Myrdals (1997): 158-159. https://www.researchgate.net/profile/Pauli-Kettunen/publication/310465167\_myrdal97/data/582ee82d08aef19cb815235b/myrdal97.doc

There was, thus, a possibility of virtuous circle between national integration and welfare, and international integration and balance. Here, however, Myrdal's "created harmony" was clearly a criterion of an immanent critique of the Welfare State. Applying my account of the Nordic notion of society, I would interpret his position in the following way. On the national level planning made efficiency, solidarity and democracy become values and properties of society and 'us'. These values of national society and national 'us' each had an international dimension. Democracy meant international manifestation of the democratic model of society; solidarity was widened to international solidarity; and efficiency meant international economic competitiveness. But there was a big difficulty: it was very obvious that 'us' defined through international competitiveness and 'us' defined through international solidarity were not identical. The actor of the virtuous circle of national and international integration could not be 'us' defined through international competitiveness but here 'us' had to be based upon "the international idealism of all people, which I believe is a reality", as Myrdal wrote in 1960 (Myrdal 1960, 214).

This past vision of future may be contrasted with the recent description of present by Riccardo Petrella, a leading figure in the adminstration of social reseach in the European Union. The year is 1995. According to Petrella economic competitiveness

has become the prime objective bit just of enterprises but also of the State and of society as a whole. ... The 'gospel of competition', like all ideologies, boils down to a few simple ideas. We are engaged willy nilly - so the industrialists, economists, political leaders and academics tell us - in a ruthless technological, industrial and economic war encompassing the entire planet. The aim is to survive, and survival hinges on being competitive. Otherwise there is no short- and long-term salvation, no growth, no economic and social welfare. The chief role of State, local authorities and trades unions is to provide the most suitable environment for enterprises to be, become or stay competitive in the world economic war. (Petrella 1995, 11-12)

Petrella's sarcastic description of Darwinist competition for survival is a description of a way in which national society is reproduced in the globalized economy after the liberation of finance markets and after the disappearance of the Cold War confrontation and moral competition between different types of society. It is important to note that in his criticism of the enthusiastic construction of national competition strategies, Petrella is not in the first place talking about "bad" strategies of social dumping and the lowering of social costs. Rather, he is talking about "good" value-added strategies which are based on process and product innovation, education and training, increased competence, stronger attention to "human capital" by means of "human resource management", etc.

Petrella warns about breaking up of the social contract. But he is not talking about the same thing as Touraine who writes that we "no longer belong to a society, a social class or a nation to the extent that our lives are in part determined by the world market, and in part confined to a world of personal life, interpersonal relations and cultural traditions" (Touraine 1994, 373). Neither is Petrella talking about the dissolution of society in the sense of Lash and Urry who point to vanishing borders and growing reflexivity of actors in the process of globalization. On the contrary, Petrella identifies a very national and very influential way of reacting and contributing to globalization, in which competition of nations, firms and individuals is the main expression of "reflexive modernization" (cf. Beck, Giddens & Lash 1994).

There are, no doubt, different views about the role of nation-state and national society in globalizing capitalism. In this book The Work of Nations. Preparing ourselves for 21st century capitalism (1991) Robert B. Reich, the Secretary of Labor in the Clinton administration, argues for the thesis that there are no more national economies, there is only a global economy. But according to Reich, this very condition can liberate the national society of the imperatives of international economic competition. The national society could survive and even strengthen as a basis of social solidarity and as a basis of policies which contribute to the progress of global economy (Reich 1991, 301-315).

National society without national economy - without stopping to discuss the probability of this vision we may see that it is different from Myrdal's national and international "created harmony", despite the "international idealism" common to Myrdal and Reich.

However, the vision of another Harvard economist, Michael E. Porter, seems to offer more influential way of giving both role and meaning to national society. His book The Competitive Advantage of the Nations (1990) is an argument for a central role of nation as "home base" for globally operating and globally competitive enterprises. Crucial competitive advantages are created in national contexts, especially those that are based on innovation and competence. This argument attracts policy-makers and -planners. Even the defence of the Nordic institutions of industrial relations may get new legitimation as it is taught that high standards of working life and participation of employees are sources of innovation and thus competitiveness. The way is open to positive value-added competition strategies. In their connection many good things can be included in the argumentation for economic competitiveness. You can argue for moral, ecological, or aesthetic values without being obliged to use moral, ecological, or aesthetic arguments; you just prove that they promote economic competitiveness.

Obviously, this is a kind of virtuous circle. And it is not so very different from the old virtuous circle of the Swedish Model or Myrdal's thought. It is important to note that the vulgarized Keynesian notion of the virtuous circle between increased production and increased consumption does not adequately catch the main economic concern of Myrdal and other Swedish Social Democrats. They had a remarkable supply-side interest already in the 1930s, expressed, for example, in the plan of the Myrdals for the raising of the quality of human material in Sweden (cf. Esping-Andersen 1992, 45). A major concern was to release the creative resources of the people. This was a precondition for social equality and welfare, but still more, promoting social equality was seen as the means by which these human resources would be released.

Now, there is here a crucial difference between the old and new virtuous circles. Social equality and social solidarity have been dropped outside the virtuous circle in the project for competitive innovation. It is not through more equality that people are supposed to become more innovative and more competitive. And in the Nordic countries we carry a historical burden to which the Myrdals for their part contributed: all good things have to form a virtuous circle and only such things are good that can be placed in the virtuous circle of society.

#### 3. Competitive national security identifies threats to perpetuate nationalism.

Pauli Kettunen 21. Professor of Political History in the Social Science Faculty of University of Helsinki. "Welfare state, competition state, security state: Nationalism in nation-state responses to crossborder mobilities." In Remapping Security on Europe’s Northern Borders, pp. 201-220. Routledge, 2021.

In the world of increased crossborder mobilities of capital, information, people, and viruses the practical implications of the nationalism of Western welfare states are more evident than they were at the time of Myrdal’s critical account. However, we have seen no expansion of the national welfare state into a Myrdalian welfare world. European welfare states have changed, partly through regional integration, but especially through national responses to global challenges, most notably to crossborder mobilities. Such responses aim to offer an attractive competitive operational environment for globally mobile companies, investors, and people representing “international talent”. Yet nation states have also developed policies to prevent the entry of unwanted people and meet immigration-related challenges by defining them as security threats. The welfare state is assessed by the criteria of national competitiveness and security, and reshaped accordingly.

The changes occurring through the national responses can be described by the concepts of the welfare, competition, and security states. It is useful to employ these terms for different institutional and functional aspects of the nation state instead of for its different phases. Changes in the roles and relationships of these aspects appear to be important. Arguably, a change historical institutionalists call “institutional convergence” (Mahoney and Thelen, 2010) has occurred, in which the old welfare-state institutions have been modified to serve new competition-state and security-state functions.

“We”, referring to a national community, is one of the most frequent words in economic rhetoric. National policies driven by internal common interest and will are intended to respond to what are defined as external challenges. This implies “a reifying of the global as external and the national as internal”, not only in public debate but in studies Saskia Sassen criticises as “the state adaptability scholarship” (Sassen, 2006, 169, 228). To develop my argument, the modes of reproducing the distinctions between the internal and external and between us and others in the shaping of the political agenda and agency are important. These distinctions are reproduced in combinations of democratic welfare nationalism, competitiveness-seeking nationalism, and security-seeking nationalism. Different combinations appear in connection with different “models” of national society, including the “Nordic model”, a popular expression referring to similarities of national institutions in Denmark, Finland, Iceland, Norway, and Sweden. Utilising existing research literature, including my own previous studies, I will discuss nationalism in nation-state responses to crossborder mobilities by focusing on the Nordic model and, especially, Finland as a specific Nordic case.

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#### 3. Means only the alt can solve the case.

Nancy Fraser 12. Henry A. and Louise Loeb Professor of Political and Social Science and professor of philosophy at The New School. Can society be commodities all the way down? Polanyian reflections on capitalist crisis. 2012. ffhalshs-00725060f

Today, moreover, as many on the Left have long warned, and as Greeks have discovered to their dismay, the construction of Europe as an economic and monetary union, without corresponding political and fiscal integration, simply disables the protective capacities of member states without creating broader, European-level protective capacities to take up the slack. But that is not all. Absent global financial regulation, even very wealthy, free-standing countries find their efforts at national social protection stymied by global market forces, including transnational corporations, international currency speculators, financiers, and large institutional investors. The globalization of finance requires a new, post-westphalian way of imagining the arenas and agents of social protection. It requires arenas in which the circle of those entitled to protection matches the circle of those subject to risk; and it requires agents whose protective capacities and regulatory powers are sufficiently robust and broad to effectively rein in transnational private powers and to pacify global finance.

#### 4. China-bashing as a reaction to US decline is racist – directly contributes to a climate of Anti-Asian hate crimes here, reject team – independently spills up to war.

Hu 21 (Rachel, Correspondent for the Indypendent. “China Bashing Abroad Leads to Asian Bashing at Home.” 4-1-21. <https://indypendent.org/2021/04/china-bashing-abroad-leads-to-asian-bashing-at-home/> //shree)

Across the country in over 60 cities, thousands took to the streets on Saturday to demand an end to the anti-Asian violence and an end to China-bashing. The mainstream media continues to report the anti-Asian hate crimes as an isolated phenomenon that happen on an individual basis. Tepid calls for education, or inclusivity ignore the very fundamental core of the issue that anti-Asian hate crimes are a direct product of U.S. foreign policy.

There are two reasons for this. The first reason being that these hate crimes are happening within the context of a long history of anti-Asian racism in America. The second being that the U.S. has recently used China, and by extension Chinese people, as a scapegoat for coronavirus to further its imperial agenda.

The Massacres that Made Chinatown

Anti-Asian racism in this country dates back to the mid-19th Century. Chinese immigrants first came to the U.S. during the California Gold Rush of the 1850s. An estimated 15,000-20,000 Chinese laborers later played a key role in building the first transcontinental railroad. Within a few years, Chinese Americans were massacred in cities across the country when white racist mobs burned down homes and led violent rampages through communities.

There were 150 documented cases of anti-Chinese riots that took place on the West Coast during the late 1800’s. These riots were so violent, that the federal government sent in troops to “protect” Chinese people, but ultimately these troops ended up seizing cash from residents and joining the violent mobs.

One of the worst documented lynchings in U.S. history took place in Los Angeles in 1971 when 18 Chinese men were hanged to death in a single night. The development of Chinatowns went hand in hand with the racist massacres. They came to be safe havens for Chinese people that were being driven out of their homes through these heinous methods.

One of these methods was coined the “Tacoma Method” after Tacoma, Washington. The mayor of Tacoma was celebrated as a national hero for his method of herding Chinese Americans like cattle to train stations to drive them out. This was usually done through mass racist mobs that burned homes to the ground and dragged Chinese people out of their homes and into the streets.

Racist Scapegoating is the First Step to War

Skip forward to today. Racism against Chinese people, and by extension Asian American people has re-emerged with a vengeance, not out of thin air, but because of political elites’ nonstop campaign to portray China as the new enemy number one.

Take for example this Washington Post Headline from December, “ The election is Over. Can We finally blame China for the Pandemic?” This is one of many headlines that are blaring nightly. This kind of Anti-China propaganda is designed to stoke fear among the people of the U.S. to mentally prepare the population for a new cold war and possibly a hot one as well.

Over the last decade, U.S. foreign policy that began under the Obama Administration as a “pivot to Asia” has shifted its military resources and focus to Asia. We are seeing this shift in the news every night, and now we are seeing it play out in the 3,800 self-reported hate crimes across the country in the past year.

Why has the U.S. set its sights on China? Simply put, it is because China has become extremely influential on the world stage and is the only other power that could seriously challenge U.S. supremacy.

China’s economy is on track to overtake the U.S. economy in total size by 2028. Chinese companies now lead the world in many fields and Chinese technology is matching if not surpassing U.S. supremacy. Since the Soviet Union dissolved, no country has come close to challenging the global power of the United States, which now has over a thousand military bases scattered on every continent.

However, a counterweight to this hegemony of U.S. business interests was growing. China was one of many countries that pursued its own path of development, resisting pressure from the U.S. to implement a neoliberal program and be a vassal for foreign business interests.

Through state-owned enterprises, careful regulation of foreign direct investment, and central planning on capital allocation, China’s economy developed rapidly to a point where China was no longer “the world’s sweatshop” but a leading world innovator of technology, green development, and transportation.

While the United States was carpet bombing cities in an effort to crush independent governments and prop up U.S.-aligned client states, China developed projects that provided an alternative to Washington’s domination.

China Challenges U.S. Hegemony

In 2013, China unveiled the Belt and Road Initiative, a worldwide infrastructure project sometimes described as the most ambitious engineering project in human history. It aims to construct physical trade routes stemming from China to every continent. The project seeks to create a global community on the basis of mutual trade and cooperation, instead of the cruise missile diplomacy of the United States.

This world order based on more equitable trade lies in stark contrast with a world based on U.S. coercion, which is why 130 countries are already involved in the Belt Road Initiative.

More and more, countries closely allied with the United States are looking to China as a meaningful ally. Take Italy for example.

At one point, Italy was leading the world in coronavirus cases. Italy, a member of the European Union and NATO, received no assistance from their Western allies in this critical period. However, as one of the first and most enthusiastic European member-states of the Belt and Road Initiative, Italy received help from Chinese doctors and shipments of Chinese medical equipment.

So for those devoted to U.S. supremacy, the focus has been about how to cut down China’s rise. President Joe Biden even recently gave a speech where he stated that, “not on my watch” will China continue its economic development. This is outright naming the U.S.’s intentions. The Pentagon is hoping to put so much military and political pressure on China that they can halt or slow China’s rise as a leader in high-technology and as a world power.

This takes us back to where we started. The politicians and the media aren’t pointing fingers at China because they care about everyone that died during COVID or lost their job due to the coronavirus. They would rather make up accusations that China spread the virus rather than fix their own mistakes.

The long history of racism in the U.S. has always lumped Asian Americans together as one group of perpetual foreigners. Because of that, if the U.S. points it’s guns at Asia — and that is what is happening — then it will always mean racism for Asian Americans.

Anti-Asian racism has always been tied to US foreign policy. From Japanese internment to the attacks on South Asians after 9/11 Asian Americans have been routinely scapegoated as part of the process of war. In order to stop the anti-Asian violence, we must end the U.S. war drive on China and dismantle the U.S. war machine entirely.

From its inception, the United States was an imperialist nation fighting violent, colonial wars across the North American continent and then around the world. From the Vietnam War to the Korean war, or the conquest of the Philippines that remains a neo-colony to this day, millions of Asian people have been killed at the hands of the U.S. military.

The Path Forward for Anti-Racist Activists

There are only two paths ahead for Asian Americans and all those who care about the fight against racism. One path is we join in on the war effort and prove we are on the American side in that war, which has never worked well for us (think the Japanese 442nd infantry that won the most medals in war and still returned home to their families in camps). The second path we can take is the path where we say no to war fundamentally and fight to change U.S. foreign policy in Asia and around the globe.

Whatever you think about China, the big problems facing humanity such as the climate, automation of jobs, etc. all these issues rely on a level of cooperation with China. Peace with China is a necessity to confront the major problems the world is facing. Anti-racist activists have a responsibility to think seriously about the role of the U.S. government in foreign policy and make the connections between racism at home and the U.S. policy abroad. Asian Americans have always been part and parcel of the anti-war movement because we have always seen the connections between the racism we face in the U.S. and the war crimes done to our Asian sisters, brothers, and family back home.

#### 6. Reject their framing which is wedded to a racial affect of “Yellow Peril”

Siu and Chun 20 (Lok Siu – Assistant Professor of Asian American and Asian Diaspora Studies at UC Berkeley, and Claire Chun – Ph.D. student at the University of California, Berkeley in the Department of Ethnic Studies, “Yellow Peril and Techno-orientalism in the Time of Covid-19: Racialized Contagion, Scientific Espionage, and Techno-Economic Warfare,” Journal of Asian American Studies 23(3):421-440)

Make no mistake, as long as President Trump continues to take a confrontational stance, using the rhetoric of blame against China with the intention to punish it with new sanctions, tariffs, and even the cancellation of U.S. debt obligations,5 the racial aggressions against Asian Americans will continue to rise, if not intensify. By now, it is widely accepted that the novel coronavirus emerged first in Wuhan, and scientists believe that the zoonotic disease might have jumped from animals to humans at Wuhan’s Huanan Seafood Wholesale Market, a wet market where vegetables, seafood, meat, and a small number of exotic wildlife were sold. Despite this, on April 30, President Trump casually offered a new theory, which Secretary of State Mike Pompeo tweeted: that COVID had originated in the Wuhan Institute of Virology, which houses a biosafety level-4 lab, and that the virus might have “leaked” from that lab. The implicit suggestion is that China had either intentionally bioengineered the novel coronavirus to cause massive destruction, thereby attributing malice, or carelessly leaked the virus due to scientific negligence, thereby attributing incompetence. In either case, these kinds of unsubstantiated speculations work to further stoke anger and disdain against the Chinese state. More disturbingly, they traffic in the idea of China as a biotechnology threat, resonating with pre-existing filmic representations of futuristic dystopian worlds. The immediate and unqualified responses from the scientific community reveal the danger of these potentially incendiary speculations. Responding swiftly, the Office of the Director of National Intelligence issued a press release the morning of April 30 stating that “The Intelligence Community . . . concurs with the wide scientific consensus that the COVID-19 virus was not manmade or genetically modified . . . ” (my emphasis).6 Within days, the director of the National Institute of Allergy and Infectious Disease, Dr. Anthony Fauci, attested that the virus “could not have been artificially or deliberately manipulated.”7 These assertions sought to extinguish any attribution of malice to the Chinese state. Even with firm contestation, however, the very invocation of the idea of biotechnology warfare has tapped into and perhaps even fueled our existing techno-Orientalist anxieties. As the COVID pandemic story transpires in real time, engulfing the entire global community, taking unexpected twists and turns, making divergences and transgressions, we have become increasingly aware that the layers of entanglements cannot be easily parsed out, nor will we know anytime soon how and when the story will end. We offer a query into how we might assess and make sense of the intensifying Sinophobia and xenophobia in this current context. To do so, we must resist the temptation to confine our analysis to the narrow parameters of the pandemic. Rather, we insist on examining the rise of anti-Asian aggression within the concomitant vectors of the pandemic, the escalation of the U.S.-China trade war, and the growing concerns about cyber- and techno-security. Here we the ideology of yellow peril assert that set within a techno-Orientalist imaginary is powerfully animating the racial form and racial affect mediating the multiple terrains of public health, technology, global trade, and national security. While it is tempting to treat this historical conjuncture as extraordinary, it is crucial that we situate the current unfolding within the long history of Asian racialization, one that indexes the abiding tension between the political impetus to define national belonging and the shifting economic imperatives of the nation-state.8 In this essay, we examine the techniques and effects of race-making in this current moment, while linking them to historical antecedents, in order to illustrate the persistence of the yellow peril ideology as it is being configured through a techno-Orientalist imaginary where China is posited as the chief enemy-threat. What follows is an analysis of how Chinese alterity as national security threat is being simultaneously constructed and disciplined in the different but related arenas of the pandemic, science, and technology. The Contemporary Racial Repertoire of the “China/Chinese” Threat The outbreak of the pandemic could not have had worse timing (as if it could be timed), but timing is critically important here. Its emergence amid the ongoing intensive trade war between the United States and China is significant in that the prevailing tensions between the two countries and the discourses of Chinese unfair trade competition, scientific espionage, and technological surveillance frame the reception of the pandemic. One may argue that President Trump’s insistence on blaming China for the spread of the deadly virus is yet another tactic in his administration’s sustained attempt to quell China’s economic power at the same time that it provides a foil to distract from—and a scapegoat to blame for—the economic and public health crisis in which we find ourselves. At this particular juncture, we unfortunately have been inundated with media coverage of a plethora of accusations and actions launched against China and Chinese Americans. Within the past two years, we have witnessed the implementation of trade sanctions and tariffs against China, the removal of prominent Chinese American scientists from research institutions, and the severing of nationwide economic transactions with certain China-based telecommunications corporations, with Huawei Technologies Company being the most notable. All these have been advanced in the name of national security. The discursive formation and the representational devices that have been used to justify these state directives play a critical role in constructing the People’s Republic of China (PRC) as culprit and as America’s enemy number one. These constructions, some of which will be examined in this essay, are layered upon one another, each building and elaborating on the last, and each invoking and simultaneously inciting a different set of anxieties that lie within the broader repertoire of China/ Chinese as threat. Indeed, the inundation of media about China makes it difficult, if not impossible, to decipher truth from falsehood, myth from reality, rhetoric from evidence. Our task here is not to weigh the truth-value of these representations but to treat them as ongoing contests embedded in power and to draw out their material effects. It is worth noting that while the explicit target of U.S. state aggression has been the mainland Chinese state or the PRC, the actual effects are much more wide-ranging and extend into everyday aggressions against all those who present as East Asian American. In our examination of the variegated representations of China/Chinese, we suggest that the longstanding ideology of “yellow peril” remains not just pertinent, but extremely forceful in constructing a multifaceted repertoire of Chinese state threat and, by extension, of Chinese/Asian American threat. What is particular about this recent iteration of yellow peril is its configuration through the lens of techno-Orientalism, a framework that is primarily used to examine the explicitly fictional genres of novels, videogames, and films but that we now assert as being actively deployed in this current historical conjuncture. Yellow Peril and Techno-Orientalism The term yellow peril emerged in the late nineteenth century in response to Japan’s arrival to the geopolitical stage as a formidable military and industrial contender to the Western powers of Europe and the United States.9 The concept was further elaborated and given a tangible racial form through Sax Rohmer’s series of novels and films that provided the early content for the social imaginary of “yellow peril” along with its personification in the character of Dr. Fu Manchu, the iconic supervillain archetype of the Asian “evil criminal genius,” and his cast of minions.10 Strikingly, Dr. Fu Manchu’s characterization as evil, criminal, and genius continues to inform the racial trope of the Asian scientist spy; and more recently, we may add to the list the bioengineer, the CFO, the international graduate student, to name just a few. Moreover, the notion of the non-differentiable “yellow” masses continues to function as a homogenizing and dehumanizing device of Asian racialization, which makes possible the transference of Sinophobia to Asian xenophobia. In its inherent attempt to construct a racial other, “yellow peril” is more a projection of Western fear than a representation of an Asian object/subject, and in this sense, it may be better understood as a repository of racial affect that can animate a myriad of representational figures, images, and discourses, depending on context. Indeed, the images and discourses of yellow peril have surfaced multiple times throughout the twentieth century, capturing a multitude of ever-shifting perceived threats that range from the danger of military intrusion (i.e., Japanese Americans during WWII), economic competition (i.e., Chinese laborers in the late nineteenth century, Japan in the 1980s), Asian moral and cultural depravity (i.e., non-Christian heathens, Chinese prostitutes, opium smokers), to biological inferiority (i.e., effeminacy, disease carriers). As Colleen Lye observes, “the incipient ‘yellow peril’ refers to a particular combinatory kind of anticolonial [and anti-West] nationalism, in which the union of Japanese technological advance and Chinese numerical mass confronts Western civilization with a potentially unbeatable force.”11 Arguably, the yellow peril of today represents heightened Western anxieties around China’s combined forces of population size, global economic growth, and rapid technological-scientific innovation—all of which emerge from a political system that is considered ideologically oppositional to ours. The current context, we suggest, is best understood through the lens of techno-Orientalism. When the idea of techno-Orientalism first appeared in David Morley and Kevin Robins’s analysis of why Japan occupied such a threatening position in Western imagination in the late 1980s, techno-Orientalism offered a framework to make sense of the technologically imbued racist stereotypes of Japan/the Japanese that were emerging within the context of Western fears and anxieties around Japan’s ascendancy as a technological global power. They proposed that if technological advancement has been crucial to Western civilizational progress, then Japan’s technological superiority over the West also signals a critical challenge to Western hegemony, including its cultural authority to control representations of the West and its “others.” They claimed that the shifting balance in global power—the West’s loss of technological preeminence—has induced an identity crisis in the West. In response, techno-Orientalism, in which “[idioms of technology] become structured into the discourse of Orientalism,” is produced in large part to discipline Japan and its rise to techno-economic power.12 The United States, for instance, externalized its anxiety into xenophobic projections of Japan as a “culture that is cold, impersonal, and machine-like” in which its people are “sub-human” and “unfeeling aliens.”13 Techno-Orientalism, born from the “Japan Panic,” was effectively consolidated through and around political-economic concerns that frame Japanese and, by extension, Asian techno-capitalist progress as dangerous and dystopian. Extending Edward Said’s concept of Orientalism,14 techno-Orientalism marks a geo-historical shift where the West no longer has control over the terms that define the East—the “Orient”—as weak, inferior, and subordinate to the West. It marks a shift not only in political-economic power but also in cultural authority. Techno-Orientalism, then, is the expressive vehicle (cultural productions and visual representations) by which Western and Eastern nations articulate their fears, desires, and anxieties that are produced in their competitive struggle to gain technological hegemony through economic trade and scientific innovation.15 Analogous to Japan’s position in the late 1980s, China currently figures into the techno-Orientalist imaginary as a powerful competitor in mass production, a global financial giant, and an aggressive investor in technological, infrastructural, and scientific developments. At the same time, the increasing purchasing power of China provokes American fear of a future global market that is economically driven by Chinese consumptive desires and practices. It is this duality—the domination of both production and consumption across different sectors of the techno-capitalist global economy—that undergirds American anxieties of a sinicized future.16 Further amplifying these anxieties around Chinese techno-economic domination is our imagination of China/the Chinese as the ultimate yellow peril, whose state ideology is oppositional to that of the United States and whose unmatched population size combined with its economic expansion and technological advancements may actually pose a real challenge to U.S. global hegemony. We turn now to examine how the ideology of yellow peril is manifesting in the current context of techno-Orientalism, beginning first with an analysis of the racial trope of “Chinese as contagion” and its connection to anti-Asian aggression.

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#### 3. Socio-cognitive shifts are possible.

Gerard Delanty 14. University of Sussex, UK “The prospects of cosmopolitanism and the possibility of global justice.” Journal of Sociology 2014, Vol. 50(2) 213–228 https://www.sciencespo.fr/ceri/plurispace/wp-content/uploads/2020/01/DELANTY\_Prospects-Cosmopolitanism.pdf

Evidence of major change can never be easily found in the short term. Criticisms of cosmopolitanism that invoke the obvious presence of counter-cosmopolitan trends – which presumably presuppose cosmopolitan currents – are too short-sighted in focusing on a short time span or on reactive events. The Axial Age breakthrough itself took several centuries – 800 to 200 bc – to produce the first universalistic visions, which laid the foundations for the emergence of cosmopolitanism, and the tumultuous history of democracy is itself a reminder of the need to take a longer view on major social and political transformation. Thus the fact that there is much evidence of global injustice does not mean that global justice is absent from the self-understanding of contemporary critical publics or that it has no consequences. The thesis of this article is that the most compelling evidence resides less in manifest institutional change – despite considerable gains, as discussed in the preceding section – than in socio-cognitive shifts in learning competences. Thus the structuring impact that global justice has had on the political imagination in recent times is essentially more of a cognitive than a normative development in redefining the self-understanding of political community.

### AT: Realism---2NC

#### 2. they’ve answered the wrong K and our alt isn’t “world government”---Realism concedes anti-hegemonic blocks want to democratize decision making and that shared, meta-institutions are possible. Any structuralist reading of realism can’t explain democracy.

Daniele Archibugi 04. London School of Economics and Political Science, London, UK and Italian National Research Council, Italy European Journal of International Relations Copyright 2004. “Cosmopolitan Democracy and its Critics: A Review”. https://www.researchgate.net/profile/Daniele-Archibugi-2/publication/240701697\_Cosmopolitan\_Democracy\_and\_Its\_Critics\_A\_Review/links/5cc861b5299bf120978b3022/Cosmopolitan-Democracy-and-Its-Critics-A-Review.pdf

Realist Critics

The disenchanted Realists remind us that the world’s mechanisms are very different from how cosmopolitan democracy’s dreamers imagine them to be. They argue that the principal elements regulating international relations are, ultimately, force and interest. Thus, every effort to tame international politics through institutions and public participation is pure utopia (Zolo, 1997; Hawthorn, 2000; Chandler, 2003). I do not disagree with attributing importance to force and interest, but it is excessive not only to consider them as the sole force moving politics, but also as being immutable. Even from a Realist perspective it would be wrong to think that the interests of all actors involved in international politics are opposed to democratic management of the decision-making process. A more accurate picture is that of opposing interests in tension with each other. Thus at the moment, there is on the one side the influence exerted over the decision-making process by a few centres of power (a few governments, military groups, large enterprises); and on the other side the demands of wider interest groups to increase their role at the decision-making table. Whether peripheral states, global movements or national industries, these latter groups are not necessarily pure at heart. They follow an agenda which is de facto anti-hegemonic because their own interests happen to be opposed to those of centralized power. To support these interests is not a matter of theory, but rather of political choice.

Some Realists, however, reject not just the feasibility of the cosmopolitan project but also its desirability. These critiques are often confused; doubtless because a risk is perceived that the cosmopolitan project could, in the frame of contemporary political reality, be used in other directions. It is certainly relevant that Zolo, in order to construct his critique of cosmopolitan democracy, must continuously force the position taken by his antagonists. In Cosmopolis, he often criticizes the prospect of a global government, but none of the authors he cites — Bobbio, Falk, Habermas, Held — ever argued in its defence (on the other hand, the inevitability of world government is discussed in Wendt, 2003). These scholars limited their support to an increase in the rule of law and integration within global politics; they never argued in favour of the global concentration of coercive power. Cosmopolitan democracy is not to be identified with the project of a global government — which is necessarily reliant upon the concentration of forces in one sole institution — on the contrary, it is a project that invokes voluntary and revocable alliances between governmental and meta-governmental institutions, where the availability of coercive power, in ultima ratio, is shared between players and subjected to juridical control.

It would be useful to carry out an experiment to verify how often a Realist’s critique of cosmopolitan democracy could also apply to state democracy. If the Realist approach were to be applied coherently, democracy could not exist as a political system. Despite all of its imperfections, democracy does exist, and this has been made possible due, in part, to the thinkers and movements — all visionary! — who have supported and fought for its cause far before it could ever become possible.

### Alt Not Fiat---2NC

#### Demands create feasibility---they shift meta-politics.

Nancy Fraser 05. Henry A. and Louise Loeb Professor of Political and Social Science and professor of philosophy at The New School. “Reframing Justice in a Globalizing World, NLR 36, November–December 2005.” New Left Review. https://newleftreview-org.proxy.library.emory.edu/issues/ii36/articles/nancy-fraser-reframing-justice-in-a-globalizing-world

Today, however, monological theories of social justice are becoming increasingly implausible. As we have seen, globalization cannot help but problematize the question of the ‘how’, as it politicizes the question of the ‘who’. The process goes something like this: as the circle of those claiming a say in frame-setting expands, decisions about the ‘who’ are increasingly viewed as political matters, which should be handled democratically, rather than as technical matters, which can be left to experts and elites. The effect is to shift the burden of argument, requiring defenders of expert privilege to make their case. No longer able to hold themselves above the fray, they are necessarily embroiled in disputes about the ‘how’. As a result, they must contend with demands for meta-political democratization.

An analogous shift is currently making itself felt in normative philosophy. Just as some activists are seeking to transfer elite frame-setting prerogatives to democratic publics, so some theorists of justice are proposing to rethink the classic division of labour between theorist and demos. No longer content to ascertain the requirements of justice in a monological fashion, these theorists are looking increasingly to dialogical approaches, which treat important aspects of justice as matters for collective decision-making, to be determined by the citizens themselves, through democratic deliberation. For them, accordingly, the grammar of the theory of justice is being transformed. What could once be called the ‘theory of social justice’ now appears as the ‘theory of democratic justice’.footnote17

In its current form, however, the theory of democratic justice remains incomplete. To complete the shift from a monological to dialogical theory requires a further step, beyond those contemplated by most proponents of the dialogical turn.footnote18 Henceforth, democratic processes of determination must be applied not only to the ‘what’ of justice, but also to the ‘who’ and the ‘how’. In that case, by adopting a democratic approach to the ‘how’, the theory of justice assumes a guise appropriate to a globalizing world. Dialogical at every level, meta-political as well as ordinary-political, it becomes a theory of post-Westphalian democratic justice.

### Alt---2NC

#### Epistemic shifts are key---the future is defined by global crisis.

Sumiti Kataria and Hongmei Qu 21. School of Philosophy and Sociology, Jilin University. "The Coronavirus Pandemic: The Growing Relevance of Moral Cosmopolitan Justice?". SpringerLink. 10-23-2021. https://link.springer.com/article/10.1007/s40647-021-00334-6

The metaphysical modus operandi of cosmopolitanism demands an epistemological shift towards a hybrid account of moral responsibility, establishing reconciliation between national identity and global individualism. To reformulate the discourse on welfare and social progress, it is inevitable that we cogitate on the desire to move beyond the politics of populism, economic growth and profit-making approach of neo-liberalism emphasising on downsizing and disinvestment, purporting the reinterpretation of realist assertion international relations focusing on the conduct of inter-state conflict to the reflection on growing dependence and existing global inequality.

The adoption of HIF plan of action as an alternate model of arbitrary pricing mechanism of intellectual property rights can be a virtuous point of departure in furthering the accessibility and affordability level of the marginalised section to the health facilities, but at the same time, the focus should be on building a mechanism that also recognises the social and political impediments and emphasise on setting the global norms and operational guidelines to eliminate the structural barriers.

The multidimensional approach to cosmopolitanism attempts to construct a realm of fair distribution of duties and responsibilities that acknowledge the relevance of subsistence rights and the necessity of the global community to cooperate for creating an environment of social cohesion, providing the equal share of entitlements to the least-developed countries.

Conclusion

The essay tries to illuminate the strong interplay between the health catastrophe and its detrimental effects on the existing structural inequalities in the least-developed countries. Coronavirus revealed the hollowness of the pursuit of neo-liberal policy discourse. The conditions of human life were radically altered. The national government and international institutions failed miserably to ensure health faculties for the poor. The so-called civil society organisations, enchanting the slogan for strengthening the citizen entitlements to social and economic rights, kept staring at the plight of migrant labourers, and none took effective measures for the protection of the labouring class from hunger and starvation. We might overcome the coronavirus pandemic, but it is just a glimpse of the broader chains of crises waiting for us in the future. The global Pandemic has unravelled the dilemmas embedded in the premise of social theory. The correspondence of the development of diagnostic mechanism as a public policy formulation is much more complicated than outlining the diagnostic strategy in medical science based on scientific experimentation and following a cut-and-dried predetermined methodology. The societal problems are wicked and complex in nature. It requires not only the positivist problem-solving approach but also the capability to anticipate the casual chain of unseen future repercussions. Furthermore, consideration is needed to reconcile the pluralistic cultural values along with the reconstruction of unequal social and economic structure to restore the public faith in policy discourse (Rittel and Webber 1973).

#### 4. Solves innovation – mutual funds, dividends, public projects, larger and more creative workforce

Bee 18 [Vanessa A. Bee. Senior Litigation Counsel at the Consumer Financial Protection Bureau with a JD from Harvard Law. Innovation Under Socialism. 10-24-2018. <https://www.currentaffairs.org/2018/10/innovation-under-socialism> ]

In this market socialist society, most shares are pooled into highly regulated mutual funds, which then pursue different investment strategies when trading them on a highly regulated stock exchange. This exchange helps monitor the performance of the firm managers and assess which innovations are performing strongly. To avoid the concentration of market power and capital, the government sets the bar for how much stock any stakeholder can hold in any firm and industry. It also sets the minimum and maximum amount of dividends that each person can receive annually. As the economy grows, dividends can be adjusted to increase by a percentage, or commensurate with inflation. Surplus resulting from distributing only part of the profits allows the more profitable firms to subsidize innovative, but less profitable, activities. In addition, this regime does not tolerate anti-competitive contracts like restrictive employment agreements, strict license agreements, and long patents (although inventions may be attributable to their inventors and may be rewarded through other means like prizes, bonus compensation, or simply very short patents periods).

The model could incorporate elements of democratically-planned, participatory socialism, which emphasizes democracy and individual autonomy in the workplace. Economist David Kotz believes that particular features of this model could foster innovation performance:

First, the main features of the overall economic plan would be determined by a democratic process … Second, the planning and coordination of the economy would take place … by industry boards and local and regional negotiated coordination bodies that have representation of all affected constituencies, including workers, consumers, suppliers, the local community, and even “cause” groups such as environmentalists, job safety activists, feminists, etc.

Among other topics, these representative boards could vote on compensation minimums and maximums, to prevent innovation from supporting socioeconomic inequality and unfair social divisions of labor. This injection of democracy would give ordinary people a larger say in the direction of the markets, and what areas they think would benefit from more investment in innovation.

The second ingredient of innovation, capital, is guaranteed in the market socialist economy. Freed of its neoliberal handcuffs, the government can designate funding towards various innovative projects at a greater rate than it does now. Banks jointly owned by the government and other non-private stakeholders would provide entrepreneurs with access to capital for projects through loans with terms more generous than private lenders offer now. The firms owned by government, worker co-operatives, ordinary people, and other publicly-owned firms can also raise capital from each other as wealth is distributed more equally. In such a world, more individuals can pool their resources to invest in particular innovative projects rather than a recurring cast of millionaires.

Market socialism would easily deliver the third ingredient of innovation: human capital. Such an economy has no need for a reserve army of labor. While profit is encouraged, its primary function is increasing the pool of resources and cash distributable to workers and non-workers. It does not come at the price of providing generous wages, as dividends to shareholders are capped no matter how well the firm performs. In fact, this society could make a democratic decision to compensate people in positions on the lower band of wages with more in unearned income, out of the same pool of profits.

When applied earnestly, the principles of socialism are also incompatible with mass incarceration, discrimination, uncompensated caregiving, highly restrictive immigration policies, and other social practices that exclude large numbers of workers from participating in our capitalist economy. Add a fairer distribution of public resources among individuals and communities, along with more free or heavily subsidized goods like education, and a market socialist economy could really see an increase in the availability and skills in the pool of workers. Freeing more people to join the innovative process would naturally foster more innovation.

Lastly, innovation can only thrive if the innovation process affords individuals chances to be creative and the right conditions to motivate them. Studies on what fosters creativity show that workers who rate highly on creativity indexes perform best when they are given challenging work, a good measure of autonomy, and supportive and caring supervisors who can provide substantive and constructive feedback. The same study, however, shows that workers who are by nature less creative tend to be happier in less complex positions. Neither worker is, or should be, superior to the other. On the contrary, the innovation process has plenty of room for all types of workers with varying degrees of innate creativity. The core principles of socialism, however, do suggest that this economic system is better suited for supporting creative workers than capitalism.

#### Nationalized profit for stakeholders stifles innovation

#### A – Propriety rights, no incentive for R&D

Bee 18 [Vanessa A. Bee. Senior Litigation Counsel at the Consumer Financial Protection Bureau with a JD from Harvard Law. Innovation Under Socialism. 10-24-2018. <https://www.currentaffairs.org/2018/10/innovation-under-socialism> ]

But prioritizing profit is a double-edged sword that can hamper innovation. Owning the proprietary rights allows private firms to block workers—through anti-competitive tools like non-compete agreements, patents, and licenses—who put labor into the innovation process from applying the extensive technical expertise and intimate understanding of the product to improve the innovation substantially. This becomes especially relevant once the workers leave the firm division in which they worked, or leave the firm altogether. Understandably, this lack of control and ownership will cause some workers, however passionate they may be about a project, to be less willing to maximize their contribution to the innovation.

Of course, the so-called nimbleness that allows firms to make drastic changes like mass layoffs is extremely harmful to the workers. This is no fluke. The capitalist economy thrives on a reserve army of labor. Inching closer to full employment makes workers scarcer, which empowers the labor force as a whole to bargain for higher wages and better work conditions. These threaten the firm’s bottom line. So, the capitalist economy is structured to maintain the balance of power towards the owners of capital. Positions that pay well (and less than well) come with the precariousness of at-will employment and disappearing union power. A constant pool of unemployed labor is maintained through layoffs and other tactics like higher interest rates, which the government will compel to help slow growth and thereby hiring. This system harms the potential for innovation, too.

The fear of losing work can dissuade workers from taking risks, experimenting, or speaking up as they identify items that could improve a taken approach—all actions that foster innovation. Meanwhile, thousands of individuals who could be contributing to the innovative process are instead involuntarily un-employed. This model also encourages monopolization, as concentrating market power gives private firms the most control over how much profit they can extract. But squashing competition that could contribute fresh ideas hurts every phase of the innovation process, while giving workers in fewer workplaces space to innovate.

Deferring to profit causes many areas of R&D to go unexplored. Private firms have less reason to invest in innovations likely to be made universally available for free if managers or investors do not see much upside for the firm’s bottom line. In theory, the slack in private research can be picked up by the public sector. In reality, however, decades of austerity measures  threaten the public’s ability to underwrite risky and inefficient research. Both the Democratic and Republican parties increasingly adhere to a neoliberal ideology that vilifies “big government,” promotes running government like a business, pretends that government budgets should mirror household budgets or the private firm’s balance sheet, and rams privatization under the guises of so-called public-private partnerships and private subcontractors.

In the United States, public investment in R&D has been trending downward. As documented in a 2014 report from the Information Technology & Innovation Foundation, “[f]rom 2010 to 2013, federal R&D spending fell from $158.8 to $133.2 billion … Between 2003 and 2008, state funding for university research, as a share of GDP, dropped on average by 2 percent. States such as Arizona and Utah saw decreases of 49 percent and 24 percent respectively.” Even if public investment in the least profitable aspect of research suddenly surged, in our current model, the private sector continues to be the primary driver of development, production, and distribution. Where there remains little potential for profit, private firms will be reluctant to advance to the next phases of the innovation process. Public-private projects raise similar concerns. Coordinated efforts can increase private investment by spreading some costs and risk to the public. But to attract private partners in the first place, the public sector has a greater incentive to prioritize R&D projects with more financial upsides.

This is how the quest for profits and tight grip over proprietary rights, both important features of the capitalist model, discourage risk. Innovations are bound for plateauing after a few years, as firms increasingly favor minor aesthetic tweaks and updates over bold ideas while preventing other avenues of innovation from blossoming. At the same time, massive amounts of capital continue to float into the hands of a few. The price of innovating under capitalism is then both decreased innovation and decreased equality. The idea that this approach to innovation must be our best and only option is a delusion.

#### B – Inequality, work times, fear of shareholder suits

Bee 20 [Vanessa A. Bee. Senior Litigation Counsel at the Consumer Financial Protection Bureau with a JD from Harvard Law. Would We Have Already Had a COVID-19 Vaccine Under Socialism?. No Publication. 4-20-2020. https://inthesetimes.com/features/covid-19-coronavirus-vaccine-capitalism-socialism-innovation.html]

STIFLING WORKERS, STIFLING CREATIVITY

Many of the most sophisticated innovations of our time, from groundbreaking drugs to smart car technology, have depended on a deep pool of creative labor. But the idea that capitalism allows the bestsuited workers to join that pool is wishful thinking. As journalist Chris Hayes writes in Twilight of the Elites: America After Meritocracy, meritocracy “can only truly come to flower in a society that starts out with a relatively high degree of equality.” From 1979 to 2015, the annual average household income of the top 1% grew five times faster than that of the bottom 90th percentile. The reality is that deep inequalities in how this country’s wealth is distributed make meritocracy all but a myth. Some people can afford to attend college and access spaces where discovery is encouraged, moving into a “creative pipeline,” while their poorer peers go right into the workforce or juggle demanding classes with work schedules. While some with great innate talent for innovation end up in these coveted creative jobs, many more—poor and workingclass—are pushed by financial necessity into positions mismatched to their potential.

In theory, one doesn’t need a creative-focused job to innovate. But creativity requires a certain freedom— an ability to “waste” time, to work nonlinearly, to experiment and repeatedly fail. Capitalism’s constant dictate to maximize productivity leaves people with little time to spare, at work or at home—especially in poor and working-class households: The bottom fifth of earners have seen their work hours increase by 24.3% since 1979, compared to 3.6% for the top fifth.

Being in a more precarious financial position, or in a job with little security, also discourages workers from taking risks, even when the risks might lead to innovation. The precarity makes it difficult to approach one’s supervisors and ask for sick days, let alone personal time to go down rabbit holes. It makes it frightening to change fields or spend money on any project that might result in even more precarity.

Notably, the corporate structure itself has been known to stifle creation. Many corporate firms are under the effective control of shareholders, to whom managers owe a fiduciary duty to maximize profits. Shareholders who believe this duty has been breached typically have the right to sue the corporation. While this power can be used for the greater good—note how Tesla was sued by shareholders in response to its poor safety record—it also opens the door to shortsighted shareholders. One DuPont shareholder, for example, demanded the chemical company “not invest a single dollar in research that will not generate a positive return within f ive years.” What’s more, according to a 2017 working paper by the Institute for New Economic Thinking, “Many of America’s largest corporations, Pfizer and Merck among them, routinely distribute more than 100% of profits to shareholders, generating the extra cash by reducing reserves, selling off assets, taking on debt or laying off employees.”

Even the most creative of workers who make it into innovative roles in the private sector may find themselves starved of resources. As professors Chen Lin and Sibo Liu of the University of Hong Kong, and Gustavo Manso of the University of California, Berkeley, explain in a 2018 study, the threat of shareholder litigation generally discourages managers from “experimenting [with] new ideas,” which acts as an “uncontrolled tax on innovation.”

### AT: Utopia/No Blueprint---2NC

#### The alternative is a shared cosmopolitan demand for justice---lack of blueprint lets our imagination iterate and allows temporal alternatives to deliver.

Giuseppe Caruso 17. “Open Cosmopolitanism and the World Social Forum: Global Resistance, Emancipation, and the Activists’ Vision of a Better World.” Globalizations, 14:4, 504-518, DOI: 10.1080/14747731.2016.1254413

The cosmopolitan vision developed by global justice activists is rooted in diversity as much as Empire promises to flatten global cultures and, perhaps even more compellingly, it is not based on a blueprint, but it is developed in the process of political action. Activists the world over engage in both resistance against global domination and developing viable alternatives to neo-liberal globalisation. Political and social imaginations constructed on values of autonomy and justice inform both resistance and alternatives and are developed in the (temporary and constantly changing) spaces of global activism. WSF’s and global justice movement’s activists are concerned with the struggle for democracy and the constitution of a global community based on cooperation and solidarity. To achieve these goals, activists target the causes of violence between individuals and communities: economic and financial violence, social and cultural violence, war, and environmental degradation. The programme for global justice is extensive. The diagnosis, the prognosis, the instruments, the timing of the interventions, and the conception of the issues at stake are different among global justice activists.

Ethnicity, race, gender, and religion, among others, seem to deny the possibility of a cosmopolitan existence. How could it be otherwise when, for the first time in history, so many individuals and groups from all over the planet join in a common struggle for democracy? But the will to see justice prevail over domination is their shared cosmopolitan project. It is through the iterated reconstitution and grounding of a sense of unity that humanity’s most ambitious project can be pursued. But it is not an easy project. It is a social, cultural, and political struggle conducted individually and collectively, at the same time. It is the recognition of these multiple and combined aspects of the struggle for emancipation that constitute the open cosmopolitanism of the global justice movements. Historical and psychological conflicts and the inevitable gaps between aspirations and achievements make it harder for Cosmopolis to prevail. The challenges faced by Cosmopolis are real and grounded in social and political processes of global reach, and they may cause unexpected and unwelcome turns in global activism. Empire and Cosmopolis do traverse the global justice movement but, as Gills compellingly puts it, ‘Cosmopolis is not a dream, or a mere vision of utopia. Rather, like its dyadic antithesis Empire, it is a constant in world history. This should give us confidence for the future’ (2005, p. 9).

#### That cosmopolitan process is liberating.

Giuseppe Caruso 17. “Open Cosmopolitanism and the World Social Forum: Global Resistance, Emancipation, and the Activists’ Vision of a Better World.” Globalizations, 14:4, 504-518, DOI: 10.1080/14747731.2016.1254413

Open cosmopolitanism represents WSF’s end, its journey, and its mode of travel. Both aspirations and realisations develop through recursive conflicts between multiple instantiations, historical and psychological, of Empire and Cosmopolis. Open cosmopolitanism is not based on blueprints. It is a work in process, impossible to uniquely define. Open cosmopolitanism invokes a recursive process of emancipation. It is about freeing, just as much as it is about freedom. It is about opening, just as much as it is about openness. It is not built on the assumption of universality, but on continued struggles to confront the conflicts that traverse global society. The following passage illustrates WSF’s conception of resistance and alternatives as one:

To imagine that another world is possible is a creative act to make it possible. The WSF releases contradictions and makes them operate, catalyzing, liberating creative energies. [ ... ] The WSF intends to be a space to facilitate pulling together and strengthening an international coalition of the most diverse social movements and organizations, adhering to the principle of respect for differences, autonomy of ideas, and forms of struggle. [ ... ] It’s an initiative of the emerging planetary civil society. [ ... ] It’s a movement of ideas that feeds on human diversity and possibilities, opposing the ‘single way of thinking’. [ ... ] The WSF is a living laboratory for world citizenship. (WSF, 2003, original italics)

Resistance and experimentation gather energy from recursive processes of individual and collective emancipation taking place across multiple conflicts both within and without WSF’s open space. This also explains the emergent nature and the mutually constitutive relationship between WSF’s cosmopolitan imaginations, practices of resistance, and new solidarities. Justice, equality, self- and collective realisation, mutual recognition, and radical democracy are, at the same time, methodologies and objectives of WSF’s open cosmopolitanism. The multiple paths it explores are traced by the prevalence of collective work over basic assumptions of ‘equality in the struggle’ and are grounded on values supporting creative thinking: curiosity, empathy, and solidarity.

## Advantage 1

### Rant---2NC

#### They’ve made the aff so small---1AC CX was clear that firms can remain just as big which means they don’t solve their internal link! [Emory = BLUE]

1AC Foster & Arnold 20 – J.D. Candidate at Stanford Law School, Former Visiting Researcher at the Center for Security and Emerging Technology; Legislative Fellow at United States Senate Committee on Foreign Relations, Research Fellow at the Center for Security and Emerging Technology

Dakota Foster, Zachary Arnold, “Antitrust and Artificial Intelligence: How Breaking Up Big Tech Could Affect the Pentagon’s Access to AI,” CSET Issue Brief, Center for Security and Emerging Technology, May 2020, https://www.geopolitic.ro/wp-content/uploads/2020/05/CSET-Antitrust-and-Artificial-Intelligence.pdf

A post-breakup AI sector composed of smaller firms might have fewer foreign governments and technology linkages, reducing the risks of U.S. government contracting for both the Pentagon and companies themselves. International expansion and domestic government contracting sometimes stand at odds. Yet the leading U.S. tech firms all have an international presence and prioritize foreign expansion.143 [FOOTNOTE 143 STARTS] For example, Google opened an AI research lab in Beijing in 2017 and has repeatedly explored growth in Chinese markets. See Douglas MacMillan, Shan Li, and Liza Lin, “Google Woos Partners for Potential China Expansion,” The Wall Street Journal, August 12, 2018, https://www.wsj.com/articles/google-woos-partners-for-potential-chinaexpansion-1534071600; Bowdeya Tweh, “Treasury Secretary Finds No Security Concerns With Google Work in China,” The Wall Street Journal, July 24, 2019, <https://www.wsj.com/articles/treasury-secretary-finds-no-security-concerns-with-googlework-in-china-11563976459>. [FOOTNOTE 143 ENDS]

As companies become more intertwined with and subject to pressure from foreign customers and governments, the Pentagon and other national security customers may view those companies and their products as too risky for defense purposes. The Pentagon has previously ended contracts on the basis of contractors’ foreign entanglements. In 2017, it terminated its relationship with Kaspersky Lab, a Russian software and cyber firm, following concerns about Russian intelligence bugs in Kaspersky products.144 In 2019, it cut ties with Huawei, the Chinese telecommunications giant,145 going so far as to ban the sale of Huawei phones on U.S. military bases.146 Huawei joined a growing list of Chinese companies the DOD monitors in an effort to protect American supply chains.147

At the same time, as U.S. firms become more entangled globally, they may choose foreign markets over U.S. government contracts. Foreign markets, particularly in China, have high sales volumes and potential for large profits. The allure of these markets could outweigh a few, large contracts with the U.S. government. Larger companies will more likely encounter this choice given their international opportunities of significant scale. Companies choosing to expand abroad would more probably accumulate foreign creditors, regulatory requirements, supply chain relationships, and other exposures reducing their appeal for the U.S. government. Smaller firms are less likely to face this tradeoff, and less inclined to choose foreign markets; for these firms, the value of international expansion often does not exceed that offered by domestic growth.

Moreover, just as the U.S. government has warned private and public entities from partnering with foreign companies like Huawei and Kaspersky, foreign governments may cut off American firms’ access to their citizens if seen as too close to Washington.

**Says that must break open assets to solve---the aff doesn’t do that only changes balancing test. Emory = BLUE**

**Wheeler 20**, visiting fellow in Governance Studies at The Brookings Institution, Chairman of the Federal Communication Commission (FCC) from 2013 to 2017, ‘20

(Tom, “Digital Competition With China Starts With Competition At Home,” <https://www.brookings.edu/wp-content/uploads/2020/04/FP_20200427_digital_competition_china_wheeler_v3.pdf>)

The United States and China are engaged in a **technology-based conflict** to **determine** **21st-century** international economic **leadership**. China’s approach is to identify and support the research and development efforts of a handful of “**national champion**” companies. The **dominant tech companies** of the U.S. **are de facto embracing this** Chinese policy in their effort to maintain domestic marketplace control. Rather than embracing a China-like consecration of a select few companies, America’s digital competition with China **should begin with meaningful competition** at home and the allAmerican reality that competition drives innovation.

America’s dominant tech companies have seized upon the competition with China as a rationale for why their behavior should not be subject to regulatory oversight that would, among other things, promote competition. “China doesn’t regulate its companies” has become a go-to policy response. When coupled with “of course, we support regulation, but it must be responsible regulation,” it throws up a smokescreen that allows the dominant tech companies to make the rules governing their marketplace behavior.

At the heart of digital competition — both at home and abroad — is the capital asset of the 21st century: **data**. Initiatives such as **machine learning** and **artificial intelligence** are data-dependent, requiring a large data input to enable algorithms to reach a conclusion. China’s immense population of almost 1.5 billion gives it an advantage in this regard. By definition, a population that approaches five times the size of the U.S. population produces more data. The previously “backward” nature of the Chinese economy has resulted in another Chinese data advantage: New smartphone-based apps, created in place of the digital integration that China previously lacked, produce a richer collection of data. This bulk and richness of Chinese data creates **an inherent digital advantage** when compared to the United States.

If the United States **will never out-bulk China** in the quantity and quality of data**, it must out-innovate China**. Here, the United States **has an advantage**, **should it choose to take it**. **The centralized control** of the Chinese digital economy **is an anti-entrepreneurial force**. In contrast, **innovation** is the hallmark of a free and open market. But the domestic market must, indeed, be free, open, and **competitive**.

Currently, the American digital marketplace **is not competitive**. A handful of companies **command** the marketplace by hoarding the data asset others need to compete. As innovative as America’s tech giants may be, they represent a **bottleneck** **that starves independent innovators** **of the mother’s milk of digital competition**. **If America is to out-innovate China**, then American **innovators** **need access** to the **essential data asset** **required for that innovation**.

**The nation’s response to Chinese competition must not be the adoption of China-like national champions**, nor the “China doesn’t regulate its companies that way” smokescreen. American public policy should embrace the all-American concept of **competition-driven innovation**. This begins with **breaking the bottleneck** that withholds data from its **competitive application**. This **does not necessarily mean** **breaking up** the dominant companies, but it does mean breaking open **their mercenary lock** on the **assets essential for competition-driven innovation**.

## Advantage 2

### Rant---2NC

**Aff doesn’t change anti-competitive contracts which their ev says is key, just the balancing test. No ev says courts would side in favor of people that are bringing up suits, especially when AFF ev says they aren’t now!**

**Khan**, JD, FTC Chair, former director of legal policy with the Open Markets Institute, former professor at Columbia Law, **‘18**

(Lina, “The Supreme Court just quietly gutted antitrust law,” July 3, <https://www.vox.com/the-big-idea/2018/7/3/17530320/antitrust-american-express-amazon-uber-tech-monopoly-monopsony>)

Antitrust laws have never permitted monopolistic firms to wield their market power against one set of customers so long as they benefit another set of players. Yet this kind of “balancing” is exactly what the Second Circuit ratified. Consider: Under the logic the appeals court used, an anticompetitive scheme by Uber to suppress driver income would not be considered illegal unless those bringing the suit showed that riders were also harmed.

What’s more, the court said, plaintiffs have to **meet this new burden** at the **very earliest stage of litigation.**

Last Monday, a 5-4 majority on the Supreme Court upheld that approach. Not only does the decision show stunning disregard for core elements of antitrust law, it carelessly mangles long-accepted legal rules along the way to establishing its position. Perhaps most strikingly, it overrides or ignores facts established by the district court.

For example, the Supreme Court states that AmEx’s increased merchant fees reflect “increases in the value of its services,” even though the lower court expressly found that AmEx’s price hikes exceeded the value of the cardholder rewards.

**In practice**, the Court has **shielded from effective antitrust scrutiny a huge swath of firms** that provide services on more than one side of a transaction — and, in today’s digital economy, **there are many** (as Justice Stephen Breyer noted in a dissent he read from the bench to emphasize his concerns).

Worse yet, **the Court left unclear what kinds of businesses actually qualify for this new rule**. As the Open Markets Institute, for which I work, explained in an amicus brief, deciding an antitrust case using the amorphous concept of a “two-sided” market **will incentivize all sorts of companies to seek protection under this bad new theory**.

What kinds of companies **might have more freedom** to exert pressure on customers, as a result of this decision? Not newspapers, the Court said: Readers are “largely indifferent” to the number of advertisements on newspaper pages, even though advertisers are looking to reach readers. So someone suing a newspaper on antitrust grounds (say, for prohibiting advertisers from doing business with other newspapers) would not have to prove that a newspaper’s conduct harmed both readers and advertisers.

On the surface, the Court’s language suggests that the special rule **would apply to Amazon’s marketplace** for third-party merchants, to eBay, and to Uber — but not to Google search or Facebook. Indeed, the Justice Department’s antitrust division chief, Makan Delrahim, has also come to this conclusion about the scope of the decision. But the Court’s opinion **hardly delivers a clear and workable standard for judges to go by**.

One can imagine the **reams of studies Google would commission** to show that targeting users with advertising **did indeed amount to a “transaction**” with users that users highly valued — a showing that, if successful, **would likely qualify it for the shield of the special rule**. If so, Google might be able to **impose exclusionary contracts** on advertisers and **significantly boost the prices it charges** them. Amazon, meanwhile, can continue to **squeeze the suppliers** and retailers reliant on its platform with **little worry** about being charged with the abuse of monopsony power.

Federal judges generally lack the expertise needed to **independently assess the hyper-complex economic studies that this new rule will spur**. Rather than focusing on the conduct between a company and one set of its customers, **the new rule requires a much more involved showing.**

#### Doesn’t change vulnerabilities in the development process---key internal link.

1AC Duan 20 – Director of Technology and Innovation Policy, R Street Institute, Washington, D.C.

Charles Duan, “Of Monopolies and Monocultures: The Intersection of Patents and National Security,” Santa Clara High Technology Law Journal, Vol. 36, Issue 4, Article 5, May 2020, https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1655&context=chtlj

It is widely recognized that a monoculture is unavoidable in at least one respect: Most connected devices will need to conform to technical standards.177 5G, for example, is a technical standard developed by a private industry consortium called 3GPP.178 A flaw in any such standard would render all mobile devices implementing the standard vulnerable to an identical attack.179 Avoiding these sorts of systemic flaws in standards requires rigorous development, analysis, and testing of the standard in the development process, which in turn requires ensuring that as many firms as possible, especially firms that share basic American values, are involved in the development of those standards.180 Thus, the necessary standardization of information and communication technologies is perhaps the most important reason why a competitive communication technology market is essential to cybersecurity and national security.

### Defense---2NC

#### No cyber impact---non state actors lack capability, Russia and China don’t have an incentive.

Lewis 20 – (James A., PhD, a senior vice president and director of the Technology Policy Program at the Center for Strategic and International Studies (CSIS), Before joining CSIS, Lewis worked at the Departments of State and Commerce as a foreign service officer and as a member of the Senior Executive Service, a political advisor to the U.S. Southern Command for Operation Just Cause, the U.S. Central Command for Operation Desert Shield, and the Central American Task Force. Lewis served on the U.S. delegations to the Cambodian peace process and the Permanent Five talks on arms transfers and nonproliferation, and he negotiated bilateral agreements on transfers of military technology to Asia and the Middle East. He led the U.S. delegation to the Wassenaar Arrangement Experts Group on advanced civilian and military technologies. Lewis led a long-running Track 2 dialogue on cybersecurity with the China Institutes of Contemporary International Relations. He has served as a member of the Commerce Spectrum Management Advisory Committee, the Advisory Committee on International Communications and Information Policy, and the Advisory Committee on Commercial Remote Sensing and as an advisor to government agencies on the security and intelligence implications of foreign investment in the United States, 2020, “Dismissing Cyber Catastrophe,” [accessed 8/30/20], <https://www.csis.org/analysis/dismissing-cyber-catastrophe>, see)

A catastrophic cyberattack was first predicted in the mid-1990s. Since then, predictions of a catastrophe have appeared regularly and have entered the popular consciousness. As a trope, a cyber catastrophe captures our imagination, but as analysis, it remains entirely imaginary and is of dubious value as a basis for policymaking. **There has never been a catastrophic cyberattack.** To qualify as a catastrophe, an event must produce damaging mass effect, including casualties and destruction. The fires that swept across California last summer were a catastrophe. Covid-19 has been a catastrophe, especially in countries with inadequate responses. With man-made actions, however, a catastrophe is harder to produce than it may seem, and for cyberattacks a catastrophe requires organizational and technical skills most actors still do not possess. It requires planning, reconnaissance to find vulnerabilities, and then acquiring or building attack tools—things that require resources and experience. **To** **achieve mass effect, either a few central targets (like an electrical grid) need to be hit or multiple targets would have to be hit simultaneously (as is the case with urban water systems), something that is itself an operational challenge. It is easier to imagine a catastrophe than to produce it.** **The 2003 East Coast blackout is the archetype for an attack on the U.S. electrical grid.** **No one died in this blackout, and services were restored in a few days**. As electric production is digitized, vulnerability increases, but many electrical companies have made cybersecurity a priority. Similarly, at water treatment plants, the chemicals used to purify water are controlled in ways that make mass releases difficult. In any case, it would take a massive amount of chemicals to poison large rivers or lakes, more than most companies keep on hand, and any release would quickly be diluted. More importantly, **there are powerful strategic constraints on those who have the ability to launch catastrophe attacks**. **We have more than two decades of experience with the use of cyber techniques and operations for coercive and criminal purposes and have a clear understanding of motives, capabilities, and intentions.** We can be guided by the methods of the Strategic Bombing Survey, which used interviews and observation (rather than hypotheses) to determine effect. These methods apply equally to cyberattacks. The conclusions we can draw from this are: **Nonstate actors and most states lack the capability to launch attacks that cause physical damage at any level, much less a catastrophe**. There have been regular predictions every year for over a decade that nonstate actors will acquire these high-end cyber capabilities in two or three years in what has become a cycle of repetition. **The monetary return is negligible, which dissuades the skilled cybercriminals** (mostly Russian speaking) **who might have the necessary skills.** One mystery is why these groups have not been used as mercenaries, and this may reflect either a degree of control by the Russian state (if it has forbidden mercenary acts) or a degree of caution by criminals. **There is enough uncertainty among potential attackers about the United States’ ability to attribute that they are unwilling to risk massive retaliation in response to a catastrophic attack.** (They are perfectly willing to take the risk of attribution for espionage and coercive cyber actions.) **No one has ever died from a cyberattack, and only a handful of these attacks have produced physical damage. A cyberattack is not a nuclear weapon, and it is intellectually lazy to equate them to nuclear weapons.** Using a tactical nuclear weapon against an urban center would produce several hundred thousand casualties, while a strategic nuclear exchange would cause tens of millions of casualties and immense physical destruction. These are catastrophes that some hack cannot duplicate. The shadow of nuclear war distorts discussion of cyber warfare. State use of cyber operations is consistent with their broad national strategies and interests. Their primary emphasis is on espionage and political coercion. The United States has opponents and is in conflict with them, **but they have no interest in launching a catastrophic cyberattack since it would certainly produce an equally catastrophic retaliation**. Their goal is to stay below the “use-of-force” threshold and undertake damaging cyber actions against the United States, not start a war. This has implications for the discussion of inadvertent escalation, something that has also never occurred. The concern over escalation deserves a longer discussion, as there are both technological and strategic constraints that shape and limit risk in cyber operations, and the absence of inadvertent escalation suggests a high degree of control for cyber capabilities by advanced states. **Attackers, particularly among the United States’ major opponents for whom cyber is just one of the tools for confrontation, seek to avoid actions that could trigger escalation.** The United States has two opponents (China and Russia) who are capable of damaging cyberattacks. Russia has demonstrated its attack skills on the Ukrainian power grid, but **neither Russia nor China would be well served by a similar attack on the United States.** **Iran is improving and may reach the point where it could use cyberattacks to cause major damage, but it would only do so when it has decided to engage in a major armed conflict with the United States.** Iran might attack targets outside the United States and its allies with less risk and continues to experiment with cyberattacks against Israeli critical infrastructure. **North Korea has not yet developed this kind of capability.** **One major failing of catastrophe scenarios is that they discount the robustness and resilience of modern economies.** These economies present multiple targets and configurations; they are harder to damage through cyberattack than they look, given the growing (albeit incomplete) attention to cybersecurity; and **experience shows that people compensate for damage and quickly repair or rebuild.** This was one of the counterintuitive lessons of the Strategic Bombing Survey. Pre-war planning assumed that civilian morale and production would crumple under aerial bombardment. In fact, the opposite occurred. Resistance hardened and production was restored.1 This is a short overview of why catastrophe is unlikely. Several longer CSIS reports go into the reasons in some detail. Past performance may not necessarily predict the future, but after 25 years without a single catastrophic cyberattack, we should invoke the concept cautiously, if at all. Why then, it is raised so often? Some of the explanation for the emphasis on cyber catastrophe is hortatory. When the author of one of the first reports (in the 1990s) to sound the alarm over cyber catastrophe was asked later why he had warned of a cyber Pearl Harbor when it was clear this was not going to happen, his reply was that he hoped to scare people into action. "Catastrophe is nigh; we must act" was possibly a reasonable strategy 22 years ago, but no longer. The resilience of historical events to remain culturally significant must be taken into account for an objective assessment of cyber warfare, and this will require the United States to discard some hypothetical scenarios. The long experience of living under the shadow of nuclear annihilation still shapes American thinking and conditions the United States to expect extreme outcomes. American thinking is also shaped by the experience of 9/11, a wrenching attack that caught the United States by surprise. **Fears of another 9/11 reinforce the memory of nuclear war in driving the catastrophe trope, but when applied to cyberattack, these scenarios do not track with operational requirements or the nature of opponent strategy and planning**. The contours of cyber warfare are emerging, but they are not always what we discuss. Better policy will require greater objectivity.

**Squo solves spoofing---investment upgrades.**

Page O. Stoutland & Samantha Pitts-Kiefer 18. \*\*NTI’s Vice President for Scientific and Technical Affairs; doctorate in chemistry from the University of California, Berkeley; senior positions at Lawrence Livermore National Laboratory. \*\*Senior Director of NTI’s Global Nuclear Policy Program; JD. “NUCLEAR WEAPONS IN THE NEW CYBER AGE.” Nuclear Threat Intiative. September 2018. https://www.nti.org/media/documents/Cyber\_report\_finalsmall.pdf

Publicly available information suggests that the **U**nited **S**tates is **increasing its emphasis** on **addressing cyber threats** to **nuc**lear weapons systems. Although the specifics are not publicly available, some details on new and ongoing **cyber resilience modernization** priorities can be derived from U.S. defense budgets. For example, the U.S. Navy and Air Force are **each** spending approximately $**500 million** to make **improve**ments to strategic **c**ommand and **c**ontrol. Those improvements include **upgrading communications links** between all elements of the nuclear triad with the **N**ational **C**ommand **A**uthority. Within several independent program justifications, improving cybersecurity is listed as a priority. In addition, in its FY 2018 Congressional Budget Justification, the National Nuclear Security Administration (NNSA) requested more than $186 million from its weapons activities budget for enhancements to crosscutting NNSA information technology and cybersecurity efforts. Although this budget may cut across efforts to reduce cyber vulnerabilities on nuclear weapons systems, it cannot be specifically attributed to those efforts. Other indications that improving cybersecurity of NC3 systems is becoming a **priority** can be found in the FY 2018 National Defense Authorization Act, which became law on December 12 17. Section 1651 of that Act calls for the commander of the United States **Strat**egic **Com**mand and the commander of the United States **Cyber** **Com**mand to conduct an annual joint assessment of the cyber resiliency of the nuclear command and control system. In addition, Section 1640 calls on the Secretary of Defense, in consultation with the director of the National Security Agency, to provide a plan to establish a Department of Defense (DoD) “**Strategic Cybersecurity Program**,” which will assist the department in improving the **cybersecurity of systems**, including (a) offensive cyber systems, (b) long-range strike systems, (c) nuclear deterrent systems, (d) national security systems, and (e) critical infrastructure of the DoD. This is consistent with the recommendations of the 2017 Defense Science Board report on cyber deterrence, which recommended the establishment of a “thin line” of cyber-resilient systems in nearly those same categories. These and other efforts will be important to **minimize the risk of cyberattacks on nuclear weapons systems**. As highlighted in this report, however, although technical efforts are critical, no technological solution alone will be wholly effective; nuclear policy and posture changes must be implemented as well.

# 1NR---Round 7---NDT 22

## T-Prohibitions

### AT: Prohibitions = Effect Individuals---2NC

#### They violate “practices” even if they meet “prohibitions.” The plan’s contingent on the effects in each individual case.

Kevin Boyle & Hurst Hannum 74, Boyle is Barrister at Law at Queen’s University of Belfast; Hannum is a member of the California Bar, “Individual Applications Under the European Convention on Human Rights and the Concept of Administrative Practice: The Donnelly Case,” The American Journal of International Law, vol. 68, no. 3, American Society of International Law, 1974, pp. 440–453

In reply, the respondent government argued that the “administrative practices” exception developed by the Commission in relation to interstate cases could not in any circumstances apply to an individual application under Article 25. They submitted that it applied only where an application raised a general issue, distinct from its effects on individuals, and that an individual was incompetent to raise such general issues under Article 25.52 While denying generally that any violation of Article 3 had occurred, the respondent government maintained that, if violations did occur, adequate and effective remedies existed within domestic United Kingdom law which had not been exhausted by the individual applicants.

### AT: Prohibitions = Legal Tests---2NC

#### “Prohibitions” are distinct from behavioral remedies.

Tomaso Duso et al. 11. Professor at the Duesseldorf Institute for Competition Economics of the Heinrich-Heine University Duesseldorf, with Klaus Gugler and Burcin B. Yurtoglu. “How effective is European merger control?” European Economic Review 55 (2011) 980–1006. ScienceDirect. https://www.wu.ac.at/fileadmin/wu/d/i/iqv/Gugler/Artikel/dgy\_eer.pdf

ABSTRACT

This paper applies an intuitive approach based on stock market data to a unique dataset of large concentrations during the period 1990–2002 to assess the effectiveness of European merger control. The basic idea is to relate announcement and decision abnormal returns. Under a set of four maintained assumptions, merger control might be interpreted to be effective if rents accruing due to the increased market power observed around the merger announcement are reversed by the antitrust decision, i.e. if there is a negative relation between announcement and decision abnormal returns. To clearly identify the events’ competitive effects, we explicitly control for the market expectation about the outcome of the merger control procedure and run several robustness checks to assess the role of our maintained assumptions. We find that only outright prohibitions completely reverse the rents measured around a merger’s announcement. On average, remedies seem to be only partially capable of reverting announcement abnormal returns. Yet they seem to be more effective when applied during the first rather than the second investigation phase and in subsamples where our assumptions are more likely to hold. Moreover, the European Commission appears to learn over time.

1. Introduction

This paper aims to provide econometric evidence on the effectiveness of merger control decisions in the European Union (EU). This seems to be both necessary and timely. From an academic perspective, there is a lively on-going discussion among antitrust scholars as to whether there is any need for a competition policy at all, as witnessed by the discussion spurred by Crandall and Winston’s (2003) and Baker’s (2003) papers. In particular, merger control institutions are repeatedly under criticism: they are ineffective and do not deter anticompetitive conduct (Crandall and Winston, 2003), they destroy synergistic efficiencies by unnecessarily intervening in the market place (Aktas et al., 2004), are protectionist (Aktas et al., 2007), are relatively open to capture (Evans and Salinger, 2002), might not be the best instrument to prompt technological progress (Carlton and Gertner, 2003), or they are too lenient and allow anticompetitive mergers to go through (Kim and Singal, 1993).

From the policy standpoint, throughout the last decade there has been a clear shift in merger control to consider remedies as a superior policy instrument if compared to outright prohibitions. Remedies are supposed to function as a surgery treatment in that they effectively tackle the market power concerns potentially raised by mergers without destroying efficiency enhancing synergies. In this instance, the European experience is enlightening. The European Commission cleared most of the over 4200 notified mergers since 1990 without commitments (around 90%), as they presumably do not pose a threat to competition. Nonetheless, few major mergers have been completed without some conditions and obligations being offered by the parties and implemented by the agency, such as divestitures, provision of access, termination of agreements, or other behavioral requirements. More than 60% of phase 2 decisions were cleared compatible only with commitments; yet only 20 mergers were blocked between 1990 and 2009.2 Moreover, significantly fewer proposed mergers have been blocked in recent years, following the overruling of three of the Commission’s prohibitions by the European Court of Justice (Airtours/First Choice; Schneider/Legrand; and Tetra Laval/Sidel), which were under the media spotlight and triggered major institutional changes in European antitrust.3 A similar evolution of merger policy is reflected in the American experience. The Federal Trade Commission (FTC) and the Department of Justice (DOJ) have also been increasingly making use of remedies in merger control decisions during our sample period (see Fig. 1).4 However, unlike the European Commission, prohibitions have been intensively employed in the US, especially during the last 3 years of our sample.

#### “Prohibitions” require outright bans on a practice.

Jo Seldeslachts et al. ‘7. Professor of Industrial Organization at KU Leuven and a Senior Research Fellow at DIW Berlin, with Joseph A. Clougherty and Pedro Pita Barros. “Remedy for now but prohibit for tomorrow: the deterrence effects of merger policy tools.” https://www.ssoar.info/ssoar/bitstream/handle/document/25862/ssoar-2007-seldeslachts\_et\_al-remedy\_for\_now\_but\_prohibit.pdf;jsessionid=A244005110FDB5816E0347D9F1B75436?sequence=1

We also have measures that help capture the annual level of regulatory scrutiny given merger activity in a particular antitrust jurisdiction: our core explanatory variables. 'Antitrust Actions' refers to an antitrust jurisdictions annual sum of monitorings, remedies, and prohibitions. Where 'Monitorings' are the number of transactions cleared but with commitments by the antitrust authority to monitor post-merger behavior, 'Remedies' are the number of transactions cleared but forced to undertake behavioral or structural remedies to ameliorate anti-competitive concerns, and 'Prohibitions' are the number of transactions that are out-right prevented by the antitrust authority.16 Accordingly, antitrust actions represent an annual count of the possible merger policy actions taken by a particular jurisdiction with respect to merger behavior: with monitorings, remedies and prohibitions representing the three sub-categories of actions. Table 1 reports summary statistics – based on the observations employed in the empirical estimations – for the Mergers variable and the three types of Antitrust Actions broken down by the twenty-eight antitrust jurisdictions.

#### That’s different from remedies that ameliorate only anticompetitive elements---which is the aff.

Jo Seldeslachts et al. ‘7. Professor of Industrial Organization at KU Leuven and a Senior Research Fellow at DIW Berlin, with Joseph A. Clougherty and Pedro Pita Barros. “Remedy for now but prohibit for tomorrow: the deterrence effects of merger policy tools.” https://www.ssoar.info/ssoar/bitstream/handle/document/25862/ssoar-2007-seldeslachts\_et\_al-remedy\_for\_now\_but\_prohibit.pdf;jsessionid=A244005110FDB5816E0347D9F1B75436?sequence=1

Antitrust authorities in recent years have shown a proclivity to employ remedies to ameliorate the anti-competitive elements of proposed mergers instead of engaging in out-and- out prohibitions. For instance, the European Commission (EC) has largely relied on structural and behavioral remedies by only blocking one merger since 2001. In the US, remedies constituted only twenty-three percent of US merger policy actions in the late 1980s; but by the year 2000, remedies were employed in over sixty percent of US merger cases requiring antitrust action (Parker & Balto, 2000). The increased adoption of remedies spurred the U.S. Federal Trade Commission (FTC) into studying the success of divestitures as a remedy for anti-competitive concerns: that already-mentioned study (U.S. FTC, 1999) found divestitures to generally create viable competitors.2 Accordingly, the FTC issue guidelines for remedies in 1999, the EC followed suit by issuing guidelines in 2001, and the U.S. Department of Justice (DOJ) in 2004 (Duso, Gugler & Yurtoglu, 2007). The codification of remedies as an important merger policy tool in these three highly visible authorities would seemingly influence less-experienced authorities which look to established authorities for guidance and benchmarking in the development of antitrust practices. An example of an overt influence by established authorities on less-experienced authorities rests with the European Union's (EU) accession criteria mandating that candidate-nation antitrust policies conform to EU policies (Dutz & Vagliasindi, 2000). Figure 1 corroborates the above conjecture on the diffusion of remedies as a favored practice by illustrating that the average ratio of remedies to prohibitions has substantially increased over the 1995-2005 period; thus, remedies have become by-far the most popular merger-policy tool in the cross-national environment for antitrust.

#### The aff is NOT an increase in prohibitions---it increases “regulations” because the practice can still continue.

James Broaddus 50. February 6; Judge on the Kansas City Court of Appeals, Missouri; Westlaw, “City of Meadville v. Caselman,” 240 Mo. App. 1220. https://casetext.com/case/city-of-meadville-v-caselman-1

"Under power conferred on cities of the fourth class `to regulate and license' dramshops, there is no authority to wholly prohibit or suppress. Where there is mere power in a municipality to regulate in a state, with a general policy of conducting licensed saloons, authority to prohibit is excluded. The difference between regulation and prohibition is clear and well marked. The former contemplates the continuance of the subject-matter in existence or in activity. The latter implies its entire destruction or cessation.'" (Citing text writers and cases.)

#### Prohibitions are absolute bans without exemption.

PEDIAA 15. “Difference Between Prohibited and Restricted”. https://pediaa.com/difference-between-prohibited-and-restricted/

Main Difference – Prohibited vs. Restricted

Prohibited and Restricted are used in reference to limitations and prevention. However, they cannot be used interchangeably as there is a distinct difference between them. Prohibited is used when we are talking about an impossibility. Restricted is used when we are talking about something that has specific conditions. The main difference between prohibited and restricted is that prohibited means something is formally forbidden by law or authority whereas restricted means something is put under control or limits.

What Does Prohibited Mean

Prohibited is a variant of the verb prohibit. Prohibited can be taken as the past tense and past participle of prohibiting as well as an adjective. Prohibited means that something is formally forbidden by law or authority. When we say ‘smoking is prohibited’, it means that smoking is not allowed at all, there are no exceptions. Prohibit indicates an impossibility. This gives out the idea that it is not at all possible under any condition or circumstance. The term Prohibited goods is used to refer to items that are not allowed to enter or exit certain countries. For example, the government of South America lists Narcotic and habit-forming drugs in any form, Poison and other toxic substances, Fully automatic, military and unnumbered weapons, explosives and fireworks as prohibited goods. The following sentences will further explain the use of prohibited.

Inter-racial marriages were not prohibited by the government.

He was proved guilty of using prohibited substances.

No one was allowed to enter the grounds; entry was prohibited.

Prohibited imports are the items that are not allowed to enter a country.Difference Between Prohibited and Restricted

What Does Restricted Mean

Restrict means to put under limits or control. Restricted can be either used as the past tense of restrict or as an adjective meaning limited. When we say something is restricted, it means that limits or conditions have been added to it. It does not mean that it is completely impossible. For example, Restricted goods are allowed to enter or exit a country under certain circumstances. A written permission can help you to import or export that item. Likewise, a restricted area does not mean that people are not allowed to enter; it means that a special permission is required to enter the place. Restricted information refers to information that are not disclosed to the general public for security purposes.

The new regulations restricted the free movement of people.

The club was restricted to its members and their family members.

Only the highest military personnel had access to the restricted area.

American scientists had only restricted access to the area.Main difference - Prohibited vs Restricted

Difference Between Prohibited and Restricted

Meaning

Prohibited means banned or forbidden.

Restricted means limited in extent, number, scope, or action

Possibility

Prohibited means that there is no possibility of doing something.

Restricted means that something can be done under certain conditions.

Adjective

Prohibited functions as an adjective derived from prohibit.

Restricted functions as an adjective derived from restrict.

Past tense

Prohibited is the past tense and past participle of prohibit.

Restricted is the past tense and past participle of restrict.

#### There’s a clear test: can the practice described by the AFF ever legally occur in ANY capacity after the plan? If it’s ever still allowed, it’s not prohibited!

Martin G. Vallespinos 20, LLM, University of Michigan Law School; Manager at Ernst & Young Detroit, “Can the WTO Stop the Race to the Bottom? Tax Competition and the WTO,” 40 Va. Tax Rev. 93, Lexis

Prohibited subsidies, as described in Article 3 of the SCM Agreement, are disallowed outright, and WTO members can unilaterally impose countervailing measures against the country sponsoring them. This category [\*146] includes (i) subsidies that are contingent, in law 237or in fact 238upon export performance 239and (ii) subsidies that are contingent upon the use of domestic over imported goods.

Export contingency can be "de jure" or "de facto." De jure export contingency derives from "the very words of the relevant legislation, regulation[,] or other legal instrument constituting the measure." 240De facto export contingency is met when "the facts demonstrate that the granting of a subsidy ... is in fact tied to actual or anticipated exportation or export earnings." 241The WTO jurisprudence regarding "de facto" contingency, however, is not uniform and WTO panels have set forth various alternative tests. In Australia-Automotive Leather II, the Panel established a standard of "close connection" between the grant of a subsidy and export performance. 242In Canada-Aircraft, the Panel and the Appellate Body ("AB") implemented the so called but-for test, which interprets the "tied to" language to be equivalent to a relationship of "conditionality" between the grant of a subsidy and export performance. 243Therefore, de facto contingency is met when "the facts demonstrate that the tax benefit would not have been granted ... but for anticipated exportation or export earnings." 244In the same case, the AB clarified that "it does not suffice to demonstrate solely that a government granting a subsidy anticipated that exports would result." 245This means that, in the AB's view, the granting authority's expectations on exports may not be sufficient to meet the standard, so the subsidy must be objectively contingent upon export [\*147] performance. 246In pursuit of a more objective criteria, the AB suggested that, "where relevant evidence exists, the assessment could be based on a comparison between, on the one hand, the ratio of anticipated export and domestic sales of the subsidized product ... and on the other hand, the situation in the absence of the subsidy." 247But both the Panel and AB further clarified that an assessment based on ratios is incapable by itself of establishing that a given subsidy is de facto contingent on export performance "in the absence of any meaningful analysis regarding how a subsidy's design and structure contributes to the presence of an incentive for a recipient to [favor] export sales over domestic sales." 248

With respect to domestic use contingency, Article 3.1(b) contains no reference to contingency in law or in fact. Nevertheless, the AB has found that Article 3.1(b)'s scope covers both de jure and de facto contingency. 249Also, both the Panel and the AB have concluded that the general guidance regarding evaluations of de facto export contingency should be applicable to de facto domestic use contingency. Finally, it should be mentioned that the Panel and AB decisions are not binding precedential authority but rather can be only strongly persuasive authority. Therefore, countries should be aware of all these alternative tests when designing their tax policies, as there is no certainty as to which criteria WTO decision makers may apply in the event of a dispute (e.g. but-for test, close connection test, assessments based on ratios, etc.).

A subsidy that is not considered "prohibited" can still satisfy the specificity criteria and become an actionable subsidy if it meets the two following requirements:

(1) Specificity: an actionable subsidy is considered specific when the eligibility to receive the benefits is limited to certain enterprises, industries, or areas; 250and

(2) Adverse effect: an actionable subsidy is considered adverse when it produces a serious prejudice to the interests of another member, an injury to its domestic industry, or a nullification or impairment of benefits accruing directly or indirectly to other members under the GATT. 251

#### It requires ending something fully---anything short of that is a regulation, which allows activities to continue within the bounds of certain prescribed rules---the aff is the latter, because all it does is change the standard applied---that does not mandate prohibition.

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

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

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

### AT: We Meet---2NC

**They violate “prohibitions”. The aff does not prohibit a break up or prevention of merger or other anticompetitive practices---rather it leaves the firms intact and simply tinkers with decision-making, contracts, IP licenses, and information management. Proves our offense because the aff can gain advantages from these portions of the Aff that are impossible to negate since they don’t need to win that they are a prohibition to solve. [Emory = BLUE]**

**Hovenkamp**, James G. Dinan University Professor, University of Pennsylvania Carey Law School and The Wharton School, **‘21**

(Herbert, “Antitrust and Platform Monopoly,” 130 Yale L.J. 1952)

More Creative Alternatives

Frequently, **neither** simple **injunctions** nor **simple breakups** will be **good solutions for platform monopoly**. Injunctions may be inadequate to restore competition, and breakups may **impair efficient operation** and **harm consumers** in the process.

The case for a breakup is strongest when noncompetitive performance or conduct seems to be inherent in a firm’s current structure. Even then, however, there is no guarantee that the firm, once dismantled, will perform any better than before. For example, how do we break up Facebook without harming the constituencies that it serves?

The approaches discussed briefly in this Section **do not require the breakup of assets** or the **spinoff of divisions** or subsidiaries other than some that have been acquired by merger. Rather, they alter the nature of ownership, managerial **decision making**, **contracts**, intellectual-property **licenses**, or information management. Instead of **attempting to force greater competition** between a dominant platform and its rivals, we might do better to **leave the firm intact** but **encourage more competition within it**. Alternatively, we might increase interoperability by requiring more extensive sharing of information or other inputs. While the current antitrust statutes grant the courts equitable power sufficient to accomplish these remedies,299 the proposals are novel and could provoke resistance.

These remedies can be applied to entities other than structural monopolies, and for offenses under both section 1 and **section 2 of the Sherman Act**. While less intrusive than asset breakups, however, they can be more intrusive than simple conduct injunctions. As a result, they should be limited to situations where **prohibitory injunctions alone are unlikely to be adequate**. **Occasional uses of unlawful** exclusive **dealing**, most-favored-nation agreements,300 or other anticompetitive contract practices **deserve an injunction**, but ordinarily **would not merit a breakup** of the entire firm or fundamental alteration of its management structure.

The traditional way that antitrust law applies structural relief is to break up firms’ various physical assets, through such devices as forcing selloffs (divestiture) of plants, products, or subsidiaries.301 To the extent these breakups interfere with a firm’s production and distribution, **they can produce harmful results** such as increased costs or loss of coordination. This is particularly true of integrated production units, such as single digital platforms. The D.C. Circuit noted this concern in Microsoft when it refused the government’s request for a breakup.302

a. Enabling Competition Within the Platform

One alternative to divestiture is to leave a platform’s physical assets and range of participants intact but change the structure of ownership or management so as to make it more competitive internally. A platform or other organization **can itself be a “market”** within which competition can occur. In that case, antitrust law can be applied to its internal decisions, **improving competition** **without** limiting the **extent of scale economies or beneficial network effects.**

Ordinarily, agreements among subsidiaries or other agents within a firm are counted as unilateral and so are attributed to the firm itself.303 That rule is a direct consequence of the separation of ownership and control. The all-important premise, however, is that the firm’s central management is the only relevant economic decisionmaker. When that is not the case, even agreements among the various constituents within the firm can be treated as cartels.

There is plenty of precedent on this issue. The history of antitrust law is replete with examples of incorporated firms that are owned or managed by distinct and often competing entities. The courts have treated these firms as cartels or joint ventures, even for practices that, from a corporate law perspective, appeared to be those of a single firm. If properly managed, the result can be to force entities within the same incorporated organization to behave competitively vis-à-vis one another.

Firms whose ownership is reorganized in this fashion **can still be very large** and **retain** most of the **attributes of large firms**. On the one hand, this will **satisfy** those concerned that the breakup of large firms can **result in the loss of economies of scale or scope**, or of other synergies that generally lead to high output and lower prices. **On the other hand,** it will not satisfy those who believe that “big is bad” for its own sake.304

Joint management of unified productive assets has a storied history that goes back to the Middle Ages. Farmers, ranchers, and fishermen produced cattle, sheep, and fish on various “commons,” or facilities that were shared among a large number of owners and subjected to management rules.305 Many of these operated on a mixed model that involved individual production for stationary products such as crops, but a commons for grazing cattle or other livestock. For mobile products such as cattle or fish, the costs of shared management were lower than the costs of creating or maintaining boundaries. That was not the case for radishes or wheat. So rather than cutting a large pasture or bay into 100 fenced-off plots, participating property owners operated it as a single economic unit, substituting management costs for fencing costs. Just as for any firm, size and shape are determined by comparing the costs and payoffs of alternative forms of organization.306

So while a commons can be a very large firm, it can be operated by a collaboration of competing entities rather than a single one. Output reductions and price setting by a single firm are almost always out of reach of the federal antitrust laws. On the other hand, if a market is operated by a joint venture of

active business participants, their pricing is subject to the laws against collusion. Their exclusions also operate under the more aggressive standards that antitrust applies to concerted, as opposed to unilateral, refusals to deal.307 The fact that this joint venture is a corporation organized under state law, as many ventures are, does not make any difference. It is still a collaboration as far as antitrust law is concerned.

The theory of the firm precludes claims of an antitrust conspiracy between a corporation and its various subsidiaries, officers, shareholders, or employees. This preclusion is an essential corollary to the proposition that a corporation is a single entity for most legal purposes and not simply a cartel of its shareholders or other constituent parts. This is how corporate law preserves the boundary between firms and markets.308

But important exceptions exist. While a corporation is a single entity for most antitrust purposes, if it is operated by its shareholders for the benefit of their own separate businesses, its conduct is reachable under section 1 of the Sherman Act. A cartel is still a cartel even if it organizes itself into a corporation.

The classic antitrust example of such a collaborative structure is in the 1918 Chicago Board of Trade case, which first articulated the modern rule of reason for antitrust cases.309 As Justice Holmes had described the Board thirteen years previously, 310 it was an Illinois state-chartered corporation whose 1600 members were themselves traders for their own individual accounts, and with individual exclusive rights to do business on the Board’s trading floor.311 The “call rule,” which prevented collaborative price making among the members except during exchange hours, could not have been challenged under the antitrust laws as unilateral conduct. A single firm may set any nonpredatory price it wishes. Further, all of the relevant participants were inside the firm. Nevertheless, they were regarded as independent actors for the purpose of trading among themselves.

Thus the United States challenged the call rule as price fixing among competitors. 312 Not only is the substantive law against such collaborative activity more aggressive than that against unilateral actions, but the remedial problems are less formidable. If a firm acting unilaterally should set an unlawful price, the court must order it to charge a different price, placing it in the awkward position of a utility regulator. By contrast, price fixing by multiple independent actors operating in concert is remedied by a simple order against price fixing, requiring each participant to set its price individually without dictating what the price must be. The Supreme Court ultimately found the Chicago Board’s call rule to be lawful. If it had not, however, the remedy would have been an injunction against enforcement of the rule, leaving the members free to set their own prices. In fact, the United States’ requested relief was precisely that.313

The same thing applies to refusals to deal. If a firm is acting unilaterally, its refusal to deal is governed by a strict standard under which liability is unlikely, particularly if there has not been an established history of dealing.314 Further, in many circumstances a court can enforce a dealing order only by setting the price and other terms. By contrast, if the entity that refuses to deal is operated by a group of active business participants, its collective refusal to deal is governed by section 1 of the Sherman Act. A court usually need do no more than issue an injunction against the agreement not to deal. This is true even if the actors have incorporated themselves into a single business entity, as in the Associated Press case, which involved a New York corporation whose members were 1200 newspapers. 315 The government charged the Association with “combining cooperatively” to prohibit news sales to nonmembers or making it more difficult for a newspaper to enter competition with an existing newspaper.316 The Court upheld an injunction against the restrictive rules under the Sherman Act.317

The modern business world provides many analogies to this structural situation. For example, each of the NCAA’s 1200 member schools operates as a single entity in the management of education, student housing and discipline, and financing of its own operations, including athletic departments. By contrast, the rules for recruiting and maintaining athletic teams, their compensation, as well as the scheduling, operation, and playing rules of games, are controlled through rulemaking by the collective group.318 While the schools compete with one another in recruiting athletes and coaches, in obtaining both live and television audiences, and in the licensing of intellectual property, all of these things fall within NCAA rulemaking and are reachable by antitrust law. Specifically, decisions to restrict the number of televised games;319 to limit the compensation of coaches320 or players;321 or to limit licensing of students’ names, images, and likenesses322 all fall within section 1 of the Sherman Act. When a violation is found, the antitrust remedy is an injunction permitting each team to determine its choices individually.

The same analysis drove the American Needle litigation, a refusal-to-deal case that involved the National Football League (NFL).323 The NFL is an unincorporated association controlled by thirty-two individual football teams, each of which is separately owned. NFL Properties (NFLP) is a separate, incorporated LLC in New York, controlled by the NFL. The individual teams are members, and they also collectively control the licensing of the teams’ substantial and individually owned intellectual-property rights. In this case, the team members voted to authorize NFLP to grant an exclusive license to Reebok to sell NFLlogoed headwear (i.e., helmets and caps) for all thirty-two teams.324 The plaintiff, American Needle, was a competing manufacturer that the agreement excluded.325

The issue for the Supreme Court was whether NFLP’s grant of an exclusive license should be addressed as a “unilateral” act of NFLP or as a concerted act by the thirty-two teams acting together, and the Court unanimously decided the latter.326 As a matter of corporate law, the refusal to deal appeared to be unilateral. NFLP, the licensing party, was an incorporated single entity. The lower court had relied on earlier Seventh Circuit decisions holding that professional sports leagues should be treated as single entities under these circumstances.327

The Supreme Court’s decision to the contrary was consistent with its earlier cases Sealy328 and Topco.329 In both of those cases, the Court held that even if an entity is incorporated, it can be addressed as a collaboration of its competing and actively participating shareholders. In Sealy, each member was a shareholder, and collectively the members owned all of Sealy’s stock.330 In Topco, each of the twenty-five members owned an equal share of the common stock, which had voting rights. They also owned all of the preferred stock, which was nonvoting, in proportion to their sales.331

Agreements among the active memb+ers or shareholders on incorporated real-estate boards are treated in the same way. Acting as a single entity, the board organizes the listing of properties for sale, formulates listing rules, promulgates standardized listing forms and sales agreements, and controls much of the conduct of individual brokers. Acting individually, the shareholder-brokers show properties to clients and obtain commissions from sales. Each real-estate office acts as not only a shareholder or partner in the overall organization, but also a competitor for individual real-estate sales.

Without discussing single-entity status, in 1950 the Supreme Court held that price fixing among real-estate agents who were members of an incorporated board was an unlawful conspiracy.332 A leading subsequent decision involved Realty Multi-List, a Georgia corporation organized and owned by individual real-estate brokers.333 Under the corporation’s arrangement, one shareholder member could show properties listed by a different shareholder member.334 The Fifth Circuit concluded that both the agreements among the members fixing commission rates and setting exclusionary and disciplinary rules for brokers who deviated from these rates were unlawful under section 1 of the Sherman Act.335

In the 2000s, the government and private plaintiffs sued several multiplelisting services, challenging their decisions to exclude real-estate sellers.336 The Fourth Circuit eventually applied American Needle, rejecting the contention that concerted action was lacking because the parties making the decision were acting as “agents of a single corporation.”337 Several other decisions have arrived at similar results reaching both price fixing and concerted exclusion.338

Hospital-staff-privileges boards also provide an analogy. Hospitals regularly use such boards to decide which physicians can be authorized to practice at the hospital. If physician-board members with independent practices deny staff privileges to someone, they may be treated as a conspiracy rather than a single actor.339

Even an incorporated natural monopoly can be subject to section 1 of the Sherman Act if it is controlled by its shareholders for their separate business interests. That issue arose in the 1912 Terminal Railroad decision.340 The railroadbridge infrastructure across the Mississippi was very likely a natural monopoly, given it operated as a bottleneck through which all traffic across the river had to pass.341 However, the facility was incorporated, and its shareholders were a group of thirty-eight firms and natural persons organized by railroad financier Jay Gould.342 The venture constituted a single corporation under Missouri law, but it was actively managed by its shareholder participants, all of whom had separate businesses. They were mainly individual railroads, a ferry company, bridges, a “system of terminals,” and several individuals.343 The venture thus controlled an extensive collection of railroad transportation, transfer, and storage facilities at a point at which all east-west traffic in that part of the country had to cross the Mississippi River.344

The Court’s order is both interesting and pertinent to platforms. It rejected the government’s request for dissolution. It noted that dissolving the corporation would do nothing to eliminate the bottleneck.345 Rather, it ordered the district court to fashion a “plan of reorganization” that permitted all shippers, whether or not they were members of the organization, to have access on fair and reasonable terms, with the goal of “plac[ing] every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.”346 Dissolution would be mandated only if the parties failed to agree on these terms.347

The *Terminal Railroad* decree suggests a way to remedy anticompetitive behavior by large digital platforms representing several sellers **without sacrificing operational efficiencies**. Rather than requiring divestiture of productive assets, which almost always leads to higher prices, we could restructure ownership and management. A large firm such as Amazon can attain economies of scale and scope that rivals cannot match. Further, **Amazon benefits consumers**, most suppliers, and labor, by selling its own house brands and the brands of third-party merchants on the same website. This is how a seller of house brands can break down the power of large name-brand sellers.348

The problem is not that Amazon sells too much, but rather that Amazon’s ownership and management make it **profitable for Amazon to discriminate** in favor of its own products and against those of third-party sellers, or to enter other anticompetitive agreements with independent sellers. Breaking up Amazon or forcing a physical separation of own-product and third-party sales would mean giving up a great deal of brand rivalry that benefits consumers.

Suppose a court required Amazon to turn important commercial decisions over to a board of active Amazon participants who made their own sales on the platform, purchased from Amazon, or dealt with it for ancillary services. Acting collaboratively, they could control product selection, distribution and customer agreements, advertising, internal product development, and pricing of Amazon’s own products. Their decisions would be subject to antitrust scrutiny under section 1 of the Sherman Act.

Such an approach could be particularly useful in situations involving **refusals to deal**. To illustrate, an important focus of the EU’s November 2020 Statement of Objections Against Amazon is on claims that Amazon “artificially favour[s] its own retail offers” in product areas where it sells both its own and third-party merchandise.349 Under current United States antitrust law, a firm acting unilaterally would not be prevented from discriminating between its own and thirdparty sales. That was the very issue in Trinko—namely, that monopolist Verizon discriminated against third-party carriers and favored its own.350

If decision making in this area were entrusted to a board of active sellers, including both Amazon itself and third parties, the section 1 standard would reach the conduct. Justice Scalia’s Trinko opinion, citing Terminal Railroad, observed that the Supreme Court had imposed nondiscrimination obligations under similar circumstances, but only when the government was attacking concerted rather than unilateral conduct.351 Further, when such conduct is concerted, it is “amenable to a remedy that does not require judicial estimation of free-market forces: simply **requiring** that the outsider be **granted nondiscriminatory admission** to the club.”352 The number and diversity of participants could vary, but they should be sufficiently numerous and diverse to make anticompetitive collusion unlikely. That could include individual merchants who sell on Amazon, principal shareholders, and perhaps customers and others. The Board should be subject to rules setting objective standards for product selection.

Numerosity should not interfere with effective operation. The Chicago Board of Trade had 1800 trading members and decisionmakers in 1918, when organizational rules and procedures were still being managed with pencil and paper.353 The NCAA has more than 1200 member schools,354 and the Associated Press had more than 1200 member newspapers in 1945.355 The Terminal Railroad Association had 38 shareholder members, but the decree contemplated nondiscriminatory sharing with any non-shareholder who wished to participate. 356 One large real-estate board, the Chicago Association of Realtors, has

over 15,500 members.357

The designated decisionmakers need not be Amazon shareholders, as long as they have independent business interests and operate on Amazon. In fact, the details of state corporate law or organization would not ordinarily affect the federal antitrust issue. For example, in some of these cases—such as Terminal Railroad, 358 Sealy,359 and Topco360—the relevant decisionmakers owned shares in the corporation. In American Needle, the organization in question was NFL Properties, an LLC,361 which does not have shareholders but rather owner-members similar to a partnership. Similarly, in Associated Press, the Court probed a cooperative association incorporated under the Membership Corporation Laws of New York.362

Whether the court applies the per se rule or the rule of reason in such cases would depend on the offense. In NCAA, the Supreme Court concluded that the rule of reason should apply to all restraints undertaken by the association because cooperation was necessary to the creation of the product: intercollegiate sports.363 That is not the case with product sales on Amazon. Rather, the traditional distinction between naked and ancillary restraints would work well. Price fixing or unjustified limitations on output would be strongly suspect.364 On the other hand, rules establishing uniform practices governing distribution and resolution of customer complaints could certainly be reasonable and thus lawful. Concerted refusals to deal can cover a range of practices from naked boycotts motivated by price (per se unlawful)365 to reasonable standard setting (rule of reason),366 and should be addressed accordingly.

Such an approach **would notably not aim at size *per se*.** An Amazon with competitively restructured management could be **just as large as it is now**. Indeed, **it could be even larger**. Cartels and monopolies function by **restricting output**, and facilitating internal competition could serve to increase it. Amazon would likely **retain the efficiencies that flow from its size and scope**. We would have effectively **turned the internal workings of its platform into a market**. It still might be in a position to undersell other businesses or to exclude products that its members and rules disapprove. **If it did so in an anticompetitive manner,** however, section 1 of **the Sherman Act could be applied**.

#### 1. Requirements that firms act in a certain way are behavioral remedies---that describes the Aff.

Lisl Dunlop 18. Partner in the New York office and co- chair of the firm’s antitrust and competition practice group of Manatt, Phelps & Phillips, September 2018. “Current Themes in U.S. Merger Control.” https://www.manatt.com/getattachment/311dc3d1-8754-447e-91d2-01bbead87763/attachment.aspx

Two related themes that have emerged over the past year are an increased hostility toward remedies that result in ongoing supervision or monitoring by the agencies (known as “behavioral” remedies) and a sharper focus on vertical merger enforcement. The two are closely related in that the typical “fix” for competition concerns in vertical transactions is often a behavioral remedy—the imposition of requirements that the merged firm act in a certain way after consummation of the transaction, such as an obligation to continue to give access to competitors. In the absence of such a resolution, the agencies are faced with a decision to permit the transaction to proceed, look for a structural solution or challenge the transaction in its entirety.

#### 2. Those aren’t prohibitions---only structural remedies meet the violation.

John E. Kwoka 12. Neal F. Finnegan Professor of Economics, Northeastern University, with Diana L. Moss, Vice President and Director, American Antitrust Institute. “Behavioral merger remedies: Evaluation and implications for antitrust enforcement.” THE ANTITRUST BULLETIN: Vol. 57, No. 4/Winter 2012. ProQuest.

C. Preference for structural remedies in the United States and other major jurisdictions

As noted, the 2004 Remedies Guide expressed a clear preference for structural remedies, citing “speed, certainty, cost, and efficacy” as key factors by which the potential effectiveness of a remedy should be measured.19 By way of explanation, the 2004 Remedies Guide stated that structural remedies were preferred to behavioral remedies because “they are relatively clean and certain, and generally avoid costly government entanglement in the market. A carefully crafted divestiture decree is ‘simple, relatively easy to administer, and sure’ to preserve competition.”20 This preference for structural remedies was illustrated in countless merger cases both before and after issuance of the 2004 Remedies Guide.

In this approach, U.S. policy was consistent with the enforcement posture in Canada, the European Union, the UK, and Canada. In 2001, the European Commission stated:

Commitments that are structural in nature, such as the commitment to sell a subsidiary, are, as a rule, preferable from the point of view of the [Merger] Regulation’s objective, inasmuch as such a commitment pre- vents the creation or strengthening of a dominant position previously identified by the [European] Commission and does not, moreover, require medium or long-term monitoring measures.2

The UK Competition Commission expressed a similar preference in 2008 in this way:

In merger inquiries, the [Competition Commission] will generally prefer structural remedies, such as divestiture or prohibition, rather than behav- ioral remedies because: (a) structural remedies are likely to deal with [a substantial lessening of competition] and its resulting adverse effects directly and comprehensively at source by restoring rivalry; (b) behavioral remedies may not have an effective impact on the [substantial lessening of competition] and its resulting adverse effects, and may create significant costly distortions in market outcomes; and (c) structural remedies do not normally require monitoring and enforcement once implemented.22

#### 3. The plan bans ‘doing x in a way that causes effect y’---that means the object of the prohibition is effect y, NOT practice x.

Andriani Kalintiri 20, Lecturer in Competition Law at King's College London, “Analytical Shortcuts in EU Competition Enforcement: Proxies, Premises, and Presumptions,” Jnl of Competition Law & Economics (2020) 16(3): 392-433, Lexis

Normative and economic premises provide policymakers and adjudicators with valuable analytical shortcuts, insofar as they relieve them of the need to establish the merits of the entailed generalizations every single time they interpret and apply the competition rules. This is important in view of the far-reaching implications that the employed premises may have for competition enforcement.

Firstly, normative assertions and economic propositions are what gives shape to the otherwise vague letter of the antitrust and merger provisions. Arguably, those provisions do not immediately reveal what is prohibited and are in need of elaboration to become operational. In this process, varying perceptions about the goals of the discipline may completely shift the focus of the analysis. 45 For example, if competition law is to be enforced with a view to protecting small- and medium-sized enterprises or employment-as opposed or in addition to, say, promoting consumer welfare-then different effects in the market may become relevant. 46 On the other hand, economic premises about the procompetitive or anticompetitive nature of the conduct at hand typically inform the choice between the application of a 'rule' or a 'standard'. 47 The prohibition, for instance, of cartels as 'by object' violations of antitrust law rests on the economic premise that conduct of this kind lacks any efficiency justification and thus a rule of prima facie illegality is not liable to chill procompetitive behaviour. 48 Conversely, the treatment of quantity rebates as prima facie lawful is grounded in the idea that this type of discount reflects the cost savings achieved by the undertaking in question. 49 In the same vein, the 'by effect' analysis of exclusive dealing under Article 101(1) TFEU is explained by the economic insight that behaviour of this kind may entail efficiencies. 50 Accordingly, normative and economic premises are instrumental in the construction of competition law.

It is worth noting at this point that in the EU the 'by object' test has been occasionally portrayed as a presumption of actual or likely anticompetitive effects. Arguably, the language employed by the EU Courts is partly to blame for this. 51 In Cartes Bancaires, for instance, the Court of Justice explained that 'certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects ( ... ), that it may be considered redundant ( ... ) to prove that they have actual effects on the market', since 'experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers'. 52 This wording though is confusing, insofar as it may create the misimpression that a finding of 'by object' violation rests on a presumption-in the technical sense of the word-of the existence of actual or likely anticompetitive effects in the circumstances at hand. Considering that presumptions shift the burden of proof, in this case it should be open to undertakings to challenge such a finding by showing that their cartel agreement, for instance, was never implemented or that the presumed negative effects are unlikely to occur. Nevertheless, the EU Courts' jurisprudence demonstrates that such arguments may not reverse a finding of 'by object' liability. 53 Consequently, to speak of a presumption of actual or likely anticompetitive effects is incorrect.

Secondly, premises also play a fundamental role in the design of administrative priorities-that is, the identification of cases on which the authority will choose to expend its limited resources to maximize the return on taxpayers' money. For instance, if the goal is to promote consumer welfare, then it of course makes sense to prioritize investigations into practices which may have a bigger impact on it. Economic premises are critical in this screening exercise, since they can guide administrative agencies in detecting the most but also least 'problematic' types of behaviour in view of the pursued objective.

For example, the prioritization of cartel enforcement worldwide rests on the economic insight that cartel conduct is among the most harmful for competition and consumers. Conversely, the development of 'safe harbours' setting out the circumstances where an authority is unlikely to intervene is grounded in the idea that competition is not liable to be impaired in the absence of a degree of market power. The Commission Guidelines on agreements of minor importance, for instance, explain that arrangements entered into between parties whose market shares do not exceed certain thresholds will be considered not to appreciably restrict competition in the meaning of Article 101(1) TFEU. 54 Similar pronouncements may be located in the Commission Guidelines on horizontal cooperation agreements or in the Commission Guidelines on horizontal and nonhorizontal mergers. 55 While these 'safe harbours' are often presented as 'presumptions of lawfulness', strictly speaking they are simply illustrations of the authority's policy and understanding of the law. 56

Last but not least, premises have a third important function in competition enforcement-they form part of the backdrop against which the standard of proof inquiry is conducted. The reason for this is that the process of determining whether the available evidence is sufficient to surpass the requisite level of conviction or probability for a decision to be lawfully adopted is informed-among others-by normality considerations, which allow us to make sense of the evidence and to 'connect the dots'. Generally, our perception of 'usual' and 'unusual' is shaped by past experience and common sense. 57 In competition enforcement though, economic premises may also determine what is 'normal' and what is not. 58 For instance, because cartels are deemed to harm competition, claims and evidence of plausible explanations and efficiencies will be evaluated against this default idea. Likewise, the insight that 'the effects of a conglomerate-type merger are generally considered to be neutral, or even beneficial, for competition' led the General Court to emphasize in Tetra

Laval that 'the proof of anticompetitive conglomerate effects of such a merger calls for a precise examination, supported by convincing evidence, of the circumstances which allegedly produce those effects'. 59 Therefore, premises inform not only the construction of the law and the design of policy but also fact-finding, insofar as they provide 'rules of thumb' and baselines for drawing inferences from the evidence. 60

B. The Construction and Deconstruction of Normative and Economic Premises

Premises are not set in stone though. Because they embody contemporary norms and values as well as current knowledge, they may-and do-evolve over time. Societal and political shifts and advances in economics may lead to the emergence of new premises or the critical revisiting of old ones. The construction and deconstruction of normative and economic premises in competition enforcement occur in an incremental and cumulative manner predominantly outside but also within the legal system.

Outside the legal system, scholarly works exposing the thinking underlying competition enforcement and challenging its theoretical and empirical foundations, as well as its consistency, play a pivotal role in this regard. This is hardly surprising-by promoting evidence-based dialogue and allowing for the fermentation of ideas, academic debates may result in the elimination of weak propositions, the emergence of consensus positions, and the creation of new knowledge. This process though is a constant work in progress, which partly explains why many of the disputes concerning competition enforcement resurface now and again. The recently reignited conversation about the goals of the discipline is a good example of this-after the espousal by many of efficiency and consumer welfare as the main aims of competition law, the issue has again been brought into the spotlight by commentators advocating for the pursuit of broader social and political objectives. 61 Economic premises are not immune to challenges either. As the currently ongoing discussion around the low levels of vertical merger enforcement illustrates, even well-established propositions-such as the idea that nonhorizontal concentrations generally benefit competition and generate efficiencies-may be questioned and potentially overturned. 62 Finally, academic works exposing inconsistencies in the legal treatment of various categories of conduct may also cast doubt on the convincingness of the premises underlying the applicable tests. 63

Within the legal system, the construction and deconstruction of premises naturally occur during the development of policy and in the context of specific cases. Indeed, on several occasions the emergence of new knowledge or changes in the prevailing circumstances have prompted competition authorities to reflect on-and update, where necessary-the premises driving their enforcement activities. In the EU, for instance, the heavy criticisms against the Commission's early formalistic approach to the legal treatment of various practices led the authority to rethink its policy in different areas-from vertical agreements to horizontal arrangements to mergers and unilateral conduct. The replacement of old premises with new ones culminated in the publication of several soft law documents, which were seen as signalling a 'more economic' approach to EU competition enforcement. 64 More recently, the challenges of the digital economy have impelled several authorities to commission expert reports and to launch task forces or strategies with a view to ascertaining what normative and economic premises should drive antitrust and merger policy in that context. 65

By contrast, courts are naturally more cautious against regular or radical changes in the law as a result of contemporary developments due to the need to preserve legal certainty and stability. 66 Nevertheless, the normative and economic propositions underpinning competition enforcement may be exposed or challenged in the context of judicial proceedings, too. Leegin is probably among the best examples of a drastic overhaul of the law in judicial acknowledgment of an evolution in current thinking. Noting that 'economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance', the US Supreme Court overturned Dr Miles and dismissed the per se illegality test in favour of a rule of reason analysis. 67 In the EU, the Courts have frequently spelt out the premises behind their interpretation of the law. While many have survived the passage of time relatively unscathed, for example, the idea that pricing below average variable costs is generally irrational for an undertaking or the insight that certain restraints are necessary in selective distribution or franchising, 68 others have been tested-for instance, the idea that exclusivity rebates offered by a dominant firm are inherently harmful for competition and consumers. 69 Over the years, such challenges have provided EU judges with the opportunity to incrementally clarify and elaborate on the main ideas driving the enforcement of the antitrust and merger rules. 70

C. Economic Premises and Evidence Rules

Most, if not all, premises, in particular economic ones, have at least some empirical grounding, and their 'truth' or 'validity' may thus be contested, as just noted. To the extent that they underpin the construction of the competition provisions and their application to specific practices and may be challenged in the context of judicial proceedings, it is necessary to briefly consider whether they are subject to the evidence rules. Are economic propositions to be established to the standard of proof before being endorsed by the court? If there is disagreement between the parties about the 'correct' premise, say, for instance, regarding the competitive effects of exclusive dealing by dominant firms or the relationship between market structure and innovation, is this to be resolved in accordance with the rules on the burden of proof? And are judges exclusively dependent on parties to produce the relevant information, or can they engage in independent research?

These queries go to the heart of a rather old, yet highly important problem-that of the integration of social science in law. 71 To the extent that the construction and the application of the legal rules hinge on 'knowledge' derived from social science, including economics, is this to be treated as 'fact' or as 'law' or perhaps as something else? Scholars have approached this question in different, albeit not fundamentally conflicting, ways. On the one hand, it has been suggested that so-called legislative facts-that is, facts that 'inform ( ... ) a court's legislative judgment on questions of law and policy'- must be distinguished from adjudicative facts, that is, facts about 'what the parties did, what the circumstances were, what the background conditions were', and that the evidence rules apply only to the latter. 72 On the other hand, it has been argued that social science may be treated both as 'law' and as a 'fact depending on its use: it is akin to 'law' when it provides the basis for law-making or is employed to establish background knowledge and general methodology, while it is akin to 'fact', when it is applied to case-specific issues or to produce case-specific research findings. 73

With these remarks in mind, when economic premises are employed for the purpose of determining the optimal legal test-that is, whether a conduct should be subject to a rule or a standard (in EU terminology, the 'by object' or the 'by effect' test)-they arguably escape the application of the evidence rules. In the EU this conclusion is further reinforced by the exclusive competence of the EU Courts to provide authoritative guidance on the meaning of EU law. 74 Accordingly, conduct-specific economic premises, that is, generalized propositions pertaining to the economics of different practices-say, tying or price discrimination or refusal to supply-need not be established to the standard of proof to be accepted by EU judges as the motivation behind their choice of legal test. By contrast, where economic premises are employed as 'background knowledge' or even 'rules of thumb' for the purpose of making sense of the evidence, the answer is not as straightforward. As noted earlier, in [TABLE 1 OMITTED] this context economic premises may enable judges to draw inferences from the available pieces of information. Inevitably though, the strength of the inference is partly correlated with the strength or relevance of the economic premise. If either is prima facie challenged, then in principle the party with the burden of persuasion should explain why the inference should still be drawn.

V. PRESUMPTIONS AS ANALYTICAL SHORTCUTS IN EU COMPETITION ENFORCEMENT

A. A Brief Account of the Existing Presumptions

Somewhat ironically, considering the popularity of the term in competition scholarship, there are not many presumptions in the technical sense in EU competition law. Indeed, the examination of the EU Courts' jurisprudence reveals the existence of only five (Table 1). 75 These effectively correspond to different elements of the antitrust rules that the Commission must prove to adopt a prohibition decision.

The first presumption pertains to the notion of 'undertaking' against which Articles 101 and 102 TFEU are addressed. 76 As explained in H?fner and Elser, the concept comprises 'any entity engaged in an economic activity, regardless of the legal status of that entity and the way in which it is financed'. 77 Further elaborating on this in Hydrotherm, the Court stressed that the term 'undertaking' must be understood as designating an economic-rather than a legal-unit. 78 In this regard, the existence of distinct legal entities is immaterial; what matters is-as elucidated in Shell-that there is a 'unitary organisation of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement'. 79 In the case of parent companies and subsidiaries in particular, such an economic unit will exist where 'the subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company'; according to settled jurisprudence, in these circumstances the anticompetitive conduct of the subsidiary may be imputed to the parent company. 80 In Akzo the Court of Justice confirmed that 'where a parent company has a 100% shareholding in a subsidiary ( ... ) there is a rebuttable presumption that the parent company does in fact exercise decisive influence over the conduct of its subsidiary'. 81 Ever since its first affirmation, the Akzo presumption has been reiterated multiple times and is now solidly rooted in the Courts' jurisprudence.

In any event, to find a violation of Article 101(1) TFEU in particular, the Commission must also demonstrate that the undertaking participated in a collusive arrangement-be it a concerted practice or an agreement. 82 Showing the existence of a concerted practice in principle entails proving three elements: concertation, subsequent market conduct, and causal connection between the two. In H?ls and in Commission v Anic Partecipazioni, however, the Court clarified that 'subject to proof to the contrary, which it is for the economic operators concerned to adduce, there must be a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market'. 83 Ever since, the Anic presumption-as is often called-has become firmly embedded in the Courts' case law. 84 While it was initially developed in connection with concerted practices-that is, collusive arrangements falling short of an agreement-this presumption soon provided the basis for the emergence of another one, that of participation in a cartel upon evidence that the undertaking has attended a meeting with an anticompetitive object. Indeed, as confirmed for the first time in Aalborg Portland, 'it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anticompetitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in a cartel', the presumption being that its will concurs with that of the other attendants. 85

At any rate, to adopt a prohibition decision, the Commission must also establish the duration of the antitrust violation and of the undertaking's involvement in it. This can be a daunting task-especially in complex infringements extending over longer periods of time. In recognition of this challenge, the EU Courts have eased the authority's burden of proof in two ways. Firstly, they have developed the doctrine of single, continuous or repeated infringement, according to which there is one infringement-rather than several-where a series of acts form part of an unlawful 'overall plan'. 86 The latter may be deduced 'from the identical nature of the objectives of the practices at issue, of the goods concerned, of the undertakings which participated in the collusion, of the main rules for its implementation, of the natural persons involved on behalf of the undertakings, and lastly, of the geographical scope of those practices'. 87 Secondly-and most importantly, for the purposes of this work, the EU Courts have adopted a presumption of continuity, whose foundations originate in Dunlop. According to the latter, 'if there is no evidence directly establishing the duration of an infringement, the Commission should adduce at least evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates'. 88

Finally, the case law arguably points at the existence of one more presumption-that is, if a conduct lacks any plausible explanation, it is intrinsically capable of harming competition. 89 Premises about the economics of the practice at hand and any 'objective justifications' raised by the parties will be crucial to ascertaining whether, on the facts, there is no legitimate ground for it. 90 In this case, the anticompetitive potential of the practice is automatically inferred and needs not be proved ad hoc, unless the undertaking concerned produces evidence to the contrary, and a 'by object' violation will be considered established, provided that the other elements of Article 101 TFEU or Article 102 TFEU have been sufficiently demonstrated. In the context of Article 101 TFEU, the Court of Justice explained in T-Mobile that 'the distinction between "infringements by object" and "infringements by effect" arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition'. 91 As the Court elaborated, 'in order for a concerted practice to be regarded as having an anticompetitive object, it is sufficient that it has the potential to have a negative impact on competition'; in this case, there is no need for the Commission to consider its effects. 92 Nevertheless, Football Association Premier League clarifies that undertakings may 'put forward any circumstance within the economic and legal context' of the arrangement in question, which would justify the finding that it is 'not liable to impair competition'. 93 A similar presumption is visible in the context of Article 102 TFEU, as well. Indeed, the judgment of the Court of Justice in Intel implies that practices, which lack a plausible explanation, are presumed to be capable of harming competition, unless the dominant undertaking challenges this conclusion 'on the basis of supporting evidence'. 94

#### We also have an independent vagueness argument.

#### Not specifying the remedy is WORSE and links MORE to our offense! A vague plan prohibits nothing at all.

Andriani Kalintiri 20. Lecturer in Competition Law at King's College London, “Analytical Shortcuts in EU Competition Enforcement: Proxies, Premises, and Presumptions,” Jnl of Competition Law & Economics (2020) 16(3): 392-433, Lexis.

Firstly, normative assertions and economic propositions are what gives shape to the otherwise vague letter of the antitrust and merger provisions. Arguably, those provisions do not immediately reveal what is prohibited and are in need of elaboration to become operational. In this process, varying perceptions about the goals of the discipline may completely shift the focus of the analysis. 45 For example, if competition law is to be enforced with a view to protecting small- and medium-sized enterprises or employment-as opposed or in addition to, say, promoting consumer welfare-then different effects in the market may become relevant. 46 On the other hand, economic premises about the procompetitive or anticompetitive nature of the conduct at hand typically inform the choice between the application of a 'rule' or a 'standard'. 47 The prohibition, for instance, of cartels as 'by object' violations of antitrust law rests on the economic premise that conduct of this kind lacks any efficiency justification and thus a rule of prima facie illegality is not liable to chill procompetitive behaviour. 48 Conversely, the treatment of quantity rebates as prima facie lawful is grounded in the idea that this type of discount reflects the cost savings achieved by the undertaking in question. 49 In the same vein, the 'by effect' analysis of exclusive dealing under Article 101(1) TFEU is explained by the economic insight that behaviour of this kind may entail efficiencies. 50 Accordingly, normative and economic premises are instrumental in the construction of competition law.

#### The aff must specifically cite the business practices they prohibit.

Zephyr Teachout 21. 10/29/21. Associate professor of law at Fordham Law School. “Why Judges Let Monopolists Off the Hook.” https://www.theatlantic.com/ideas/archive/2021/10/antitrust-facebook-congress-sherman-act/620539/

Here’s what a good antitrust fix would look like: Instead of asking judges to apply impossible standards, the law should spell out and prohibit a specific set of abusive business practices—just as it does with bribery, fraud, and employment discrimination. Each of those practices is illegal on its own terms, and we don’t ask whether it was “worth it” to society. Likewise, dominant firms should be explicitly banned from predatory pricing, coercive dealing, and exclusive dealing, for example. Agencies should overtly ban bad mergers, instead of engaging—as they now do—in negotiations for minor concessions that will allow mergers to proceed.

### AT: Overlimiting---2NC

#### 2. Link turn. It’s the only clear bright line---if the business practice described by the aff can still legally occur post-plan, it is not prohibited.

Martin G. Vallespinos 20. LLM, University of Michigan Law School; Manager at Ernst & Young Detroit, “Can the WTO Stop the Race to the Bottom? Tax Competition and the WTO,” 40 Va. Tax Rev. 93, Lexis

Prohibited subsidies, as described in Article 3 of the SCM Agreement, are disallowed outright, and WTO members can unilaterally impose countervailing measures against the country sponsoring them. This category [\*146] includes (i) subsidies that are contingent, in law 237or in fact 238upon export performance 239and (ii) subsidies that are contingent upon the use of domestic over imported goods.

Export contingency can be "de jure" or "de facto." De jure export contingency derives from "the very words of the relevant legislation, regulation[,] or other legal instrument constituting the measure." 240De facto export contingency is met when "the facts demonstrate that the granting of a subsidy ... is in fact tied to actual or anticipated exportation or export earnings." 241The WTO jurisprudence regarding "de facto" contingency, however, is not uniform and WTO panels have set forth various alternative tests. In Australia-Automotive Leather II, the Panel established a standard of "close connection" between the grant of a subsidy and export performance. 242In Canada-Aircraft, the Panel and the Appellate Body ("AB") implemented the so called but-for test, which interprets the "tied to" language to be equivalent to a relationship of "conditionality" between the grant of a subsidy and export performance. 243Therefore, de facto contingency is met when "the facts demonstrate that the tax benefit would not have been granted ... but for anticipated exportation or export earnings." 244In the same case, the AB clarified that "it does not suffice to demonstrate solely that a government granting a subsidy anticipated that exports would result." 245This means that, in the AB's view, the granting authority's expectations on exports may not be sufficient to meet the standard, so the subsidy must be objectively contingent upon export [\*147] performance. 246In pursuit of a more objective criteria, the AB suggested that, "where relevant evidence exists, the assessment could be based on a comparison between, on the one hand, the ratio of anticipated export and domestic sales of the subsidized product ... and on the other hand, the situation in the absence of the subsidy." 247But both the Panel and AB further clarified that an assessment based on ratios is incapable by itself of establishing that a given subsidy is de facto contingent on export performance "in the absence of any meaningful analysis regarding how a subsidy's design and structure contributes to the presence of an incentive for a recipient to [favor] export sales over domestic sales." 248

With respect to domestic use contingency, Article 3.1(b) contains no reference to contingency in law or in fact. Nevertheless, the AB has found that Article 3.1(b)'s scope covers both de jure and de facto contingency. 249Also, both the Panel and the AB have concluded that the general guidance regarding evaluations of de facto export contingency should be applicable to de facto domestic use contingency. Finally, it should be mentioned that the Panel and AB decisions are not binding precedential authority but rather can be only strongly persuasive authority. Therefore, countries should be aware of all these alternative tests when designing their tax policies, as there is no certainty as to which criteria WTO decision makers may apply in the event of a dispute (e.g. but-for test, close connection test, assessments based on ratios, etc.).

A subsidy that is not considered "prohibited" can still satisfy the specificity criteria and become an actionable subsidy if it meets the two following requirements:

(1) Specificity: an actionable subsidy is considered specific when the eligibility to receive the benefits is limited to certain enterprises, industries, or areas; 250and

(2) Adverse effect: an actionable subsidy is considered adverse when it produces a serious prejudice to the interests of another member, an injury to its domestic industry, or a nullification or impairment of benefits accruing directly or indirectly to other members under the GATT. 251

#### 3. Data base of anti-trust literature from 2000 to the present shows it’s aff leaning.

Fiona M. Scott Morton 19. Theodore Nierenberg Professor of Economics at the Yale University School of Management. Previous deputy assistant attorney general for economics at the Antitrust Division of the U.S. Department of Justice. B.A. in economics from Yale University and Ph.D. in economics from the Massachusetts Institute of Technology. "Modern U.S. antitrust theory and evidence amid rising concerns of market power and its effects," Equitable Growth, https://equitablegrowth.org/research-paper/modern-u-s-antitrust-theory-and-evidence-amid-rising-concerns-of-market-power-and-its-effects/?longform=true

The experiment of enforcing the antitrust laws a little bit less each year has run for 40 years, and scholars are now in a position to assess the evidence. The accompanying interactive database of research papers for the first time assembles in one place the most recent economic literature bearing on antitrust enforcement in the United States. The review is restricted to work published since the year 2000 in order to limit its size and emphasize work using the most recent data-driven empirical techniques. The papers in the interactive database are organized by enforcement topic, with each of these topics addressed in a short overview of what the literature demonstrates over the past 19 years. These topics are: Horizontal mergers—mergers and acquisitions involving direct competitors Coordinated effects—the study of conditions under which competitors in an industry tacitly collude Vertical mergers—mergers and acquisitions where a company acquires another company to which it sells goods or services or from which it buys goods or services Exclusionary conduct—actions in the marketplace that deny a competitor access to either suppliers or customers Loyalty rebates—a type of conduct that occurs when a company gives a discount to a buyer for limiting its purchases from the company’s competitors Most Favored Nation clause—this clause requires a seller to give a specific buyer the best terms offered to other (often competing) buyers Predation—the strategy of taking losses in the short run in order to drive out a competitor and retain or gain a monopoly position, permitting prices the later exercise of market power Common ownership—the impact on competition when mutual funds and other types of institutional investors are the largest owners of product market competitors Monopsony power—the anticompetitive exercise of market power by employers (firms) in the labor market for workers Macroeconomics and market power—the impact of competition issues on the larger economy

**---DATA BASE OMITTED---**

The bulk of the research featured in our interactive database on these key topics in competition enforcement in the United States finds evidence of significant problems of underenforcement of antitrust law. The research that addresses economic theory qualifies or rejects assumptions long made by U.S. courts that have limited the scope of antitrust law. And the empirical work finds evidence of the exercise of undue market power in many dimensions, among them price, quality, innovation, and marketplace exclusion. Overall, the picture is one of a divergence between judicial opinions on the one hand, and the rigorous use of modern economics to advance consumer welfare on the other.

#### 4. Limits outweigh and turn topic education without clash---health care proves horizontal innovation solves.

#### Remedies v Prohibitions are a considerable debate.

Hiba Hafiz 8/9/21. Assistant Professor of Law at Boston College Law School; Affiliate Fellow, Thurman Arnold Project, Yale University. “Rethinking Breakups.” https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3892326

The U.S. Department of Justice (DOJ) and FTC have leveraged these core antitrust statutes to investigate and challenge Big Tech firms like Google, Facebook, and Amazon, and the Biden Administration has appointed leading progressive antitrust advocates in the White House, DOJ, and FTC to preside over the “TrustBusting Biden Presidency”. 22 In addition, Congress has sought to buttress current law with proposals to expand this arsenal through reform legislation strengthening merger policy, antitrust agency authority, and expanding the range of prohibited conduct under Section 2 beyond current judicial interpretations of its scope. 23 States have joined the anti-monopoly movement with abuse of dominance legislation that goes beyond federal antitrust law, prohibiting a wider spectrum of dominant firm conduct and even firm dominance itself.24

But while there has been significant movement in the executive and legislative branches to tackle the problem of “bigness” through more robust agency practice and more expansive substantive law extending the scope of firm antitrust liability, exactly how to remedy the problem once firms are found to contravene the law is the subject of considerable debate.

# 2NR

**B) It’s no longer a prohibition, but a disincentive. Emory reads GREEN.**

**Light ’19**[Sarah; 2019; Legal Studies Professor in the Wharton School at the University of Pennsylvania, Stanford Law Review, “The Law of the Corporation as Environmental Law,” vol. 71]

While antitrust law can serve as an environmental mandate by prohibiting collusive behavior that keeps environmentally preferable goods from the market, there is also conflict between antitrust law’s goals of promoting competition and environmental law’s goals of promoting conservation.192 Because antitrust law's per se rule and rule of reason operate on a somewhat **fluid continuum**, 193 this Subpart discusses the two doctrines together. The **per se** rule operates as a **prohibition**, whereas **the rule of reason** operates as **both** a prohibition **and** a disincentive.

As noted above, antitrust law generally **prohibits certain types of market activity** - price fixing, horizontal boycotts, and output limitations - as illegal **per se**, and harm to competition is **presumed**. 194 For example, if an industry association declines to award a seal of approval necessary for a product's sale without any good faith attempt to test the product's performance, but rather simply because that product is manufactured by a competitor, such an action would be illegal per se. 195 Under this Article's framework, a **per se** violation is **thus a prohibition**.

The more fact-intensive inquiry under the **rule of reason** tests "whether the restraint imposed is such as merely **regulates** and perhaps thereby **promote**s competition or whether it is such as may **suppress** or even **destroy** competition." 196 While this extremely broad statement might suggest that **any fact** is relevant to the inquiry, the salient facts under the rule of reason are "those that tend to establish whether a restraint increases or decreases output, or decreases or increases prices." 197 If an anticompetitive effect is found, then the action is **illegal** and the rule of reason **operates, like the per se rule, as a prohibition**. 198 The rule of reason can also operate as a disincentive, even if no  court finds an anticompetitive effect, as uncertainty and litigation risk may discourage firms from undertaking legally permissible, environmentally positive industry collaborations. 199

**3. Don’t give the aff the benefit of the doubt that they are a prohibition and not a disincentive---the both do NOT co-exist and rule of reason is primarily the latter.**

Sarah **Light 19**. Legal Studies Professor in the Wharton School at the University of Pennsylvania. The Law of the Corporation as Environmental Law. Stanford Law Review. 2019. Volume 71. Pg. 164

Table 1

Five **Primary Forms** of Interaction

|  |  |  |
| --- | --- | --- |
| Degree of Influence | Confluence with Environmental Values | Conflict with Environmental Values |
| Obligations (Must or Must Not) | Mandates  SEC environmental disclosures (primary effect); antitrust prevention of antienvironmental collusion | **Prohibitions**  Antitrust **per se** rule; Delaware corporate law director obligations in takeover context |
| Enabling Provisions (May) | Safe harbors  Ordinary business judgment rule | |
| Market- or Norm Leveraging (Should or Should Not) | Incentives  Benefit corporation; SEC environmental disclosures (secondary effect) | **Disincentives**  Bankruptcy discharge of environmental liability; antitrust **rule of reason** |