# 1NC

## 1

#### ‘Prohibition’ must ban all instances of anticompetitive behavior

James Lane Buckley 91, Judge on the United States Court of Appeals for the District of Columbia Court, BA and JD from Yale University, Former Undersecretary for Security Assistance at the State Department, Former United States Senator from New York, “Hazardous Waste Treatment Council v. Reilly”, United States Court of Appeals for the District of Columbia Circuit, 938 F.2d 1390, 1395-1396, 1991 U.S. App. LEXIS 16095, 7/26/1991, Lexis

Petitioners claim that the EPA considers a state law to "act as a prohibition" under the regulation only when it bans all treatment, storage, and disposal within a State, and they point to the ALJ's statement, based on his reading of the preamble to the regulations, 45 Fed. Reg. at 33,395, that the EPA "appears to have construed the phrase 'act as a prohibition' in [paragraph (b)] as equivalent to an outright ban or refusal to accept hazardous waste for treatment, storage, or disposal." ALJ Decision at 112. Petitioners contend that the regulation must embrace any law that would even indirectly, as in the instant case, prohibit any treatment facility; otherwise, a State could accomplish a total ban one facility at a time. Senate Bill 114, they charge, epitomizes the "NIMBY" syndrome: In response to the needs of the nation for treatment of hazardous waste, North Carolina has simply said, "Not in my backyard." By refusing to respond, petitioners urge, the EPA ignores its duty to monitor state programs.

Although, at oral argument, government counsel [\*\*13] attempted to defend the "ban on all treatment" position that petitioners ascribe to the EPA, that is not the basis on which the agency concluded that Senate Bill 114 did not act as a prohibition within the meaning of section 271.4(b). In explaining why the second condition of paragraph (b) had not been met, the Regional Administrator emphasized that of the 485 riparian miles available in North Carolina for a facility of the kind proposed by GSX, 333 remained available under the Act, and noted that a smaller plant could be built at the Laurinburg site. Final Decision at 2. We therefore construe the EPA's decision to mean that a state law "acts as a prohibition" on the treatment of hazardous wastes when it effects a total ban on a particular waste treatment technology within a State, and nothing more.

[\*1396] Such a construction is reasonable and merits deference. The language of paragraph (b), which uses the word "prohibit[]" rather than "impede[]" or "restrict[]" as in the case of paragraph (a), suggests that the former allows States greater latitude in regulating particular treatment facilities before a prohibition is found to exist. This is consistent with the preamble's expression of [\*\*14] a desire to encourage the development of state programs by avoiding the establishment of "very tight standards." See 45 Fed. Reg. at 33,385. Second, defining prohibition in terms of the ban of a particular technology falls well within the language of paragraph (b). Finally, we see nothing inconsistent between this construction and the language of the underlying statute, 42 U.S.C. § 6926(b), which merely asserts that a state program may not be authorized if "such program is not consistent with the Federal and State programs applicable in other States." This language allows the agency enormous latitude in structuring its own implementing regulations and in interpreting them.

#### The plan is regulation, not a prohibition.

#### Vote neg:

#### Limits---each case is multiplied by hundreds of conditions, standards, or modifications, overstretching research

## 2

#### The 50 states and all relevant sub-federal territories should

#### - Adopt a presumption that agricultural mergers which cause a significant increase in concentration are anticompetitive

#### - Ban agrifood consolidation - Mandate environmentally sustainable agricultural innovation and environmental protections in the agricultural industry - Substantially increase funding for small farms

#### Solves the entire aff—Congress has devolved antitrust authority to the states

Harvard Law, 20

(Harvard Law Review, “Antitrust Federalism, Preemption, and Judge-Made Law,” JUN 10, 2020 133 Harv. L. Rev. 2557 NL)

Both the United States government and the governments of the fifty states use antitrust principles to regulate firms. A collection of federal statutes, first and foremost the Sherman Act,1 outlaws anticompetitive behavior under federal law. The federal executive branch, through the Federal Trade Commission (FTC) and the Department of Justice's Antitrust Division (DOJ), enforces the federal statutes.2 Meanwhile, each state has its own antitrust statutes outlawing anticompetitive behavior.3 The states' agencies enforce their own antitrust laws, and they can enforce federal antitrust law as parens patriae 4 for full treble damages thanks to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 5 (Hart-Scott-Rodino). However, when state legislation itself produces anticompetitive effects that seem to violate federal antitrust principles, the state gets a free pass: "[A]nticompetitive restraints are immune from antitrust scrutiny if they are attributable to an act of 'the State as sovereign.' 6 Wherever the federal and state governments share regulatory authority, federalism concerns naturally follow. Federalism refers to the division, overlap, and balance of power between the federal and state governments in our federal system.7 The emergence of a strong national government since the New Deal has turned federalism into a statecentric concept about protecting the states' role in that balance.8 This state-centric federalism is partially baked into the Constitution: for example, the Tenth Amendment confirms that the Constitution reserves powers not delegated to the United States for the fifty states, 9 and some scholars have attributed a state-centric view of federalism to the Guarantee Clause.10 However, when, as with antitrust, the federal and state governments share concurrent regulatory authority, the Constitution alone cannot resolve the federalism-nationalism balancing act. Even when it is not a constitutional hurdle, federalism is still a relevant constitutional value. The Framers embraced federalism for its policy virtues,11 and contemporary judges and scholars laud federalism for its modern-day policy perks. 1 2 The Supreme Court often invokes federalism in the form of a presumption that Congress does not lightly intrude on state sovereignty.13 One example is the Court's presumption against preemption: a party alleging federal preemption of state law faces a judicial presumption that Congress did not intend to make that choice.14 That presumption is validated by Congress's choice to refrain from preempting state law in the antitrust arena: state and federal antitrust laws have coexisted since the federal government's first steps into the arena in 1890.15 This congressional restraint is controversial, and likely to grow more so. Some scholars have argued powerfully that Congress should preempt state antitrust laws. 16 These arguments may gain renewed prominence, as antitrust as a whole has recently achieved greater political salience than it has enjoyed in a century.1 7 In the state context, attorneys general have increasingly taken antitrust action in high-profile matters the federal government has declined to pursue. In 2019, states opposed the merger between Sprint and T-Mobile,18 and many began to investigate potential antitrust violations in Big Tech. 19 While some recent, high profile state antitrust actions have been brought under federal antitrust laws, 20 others have been brought under state law.21 Moreover, a number of the current state antitrust actions are at the investigatory stage22 \_ states could potentially bring federal claims, state claims, or both. Newsworthy state involvement in antitrust policing is bringing attention to the states' antitrust role more generally, and that attention will likely bring scrutiny to the oddity of America's competing antitrust systems. This Note argues that, in considering its position within this debate, Congress should grapple with federal antitrust law's peculiar status as a largely judicially created regulatory regime. Congress should be wary of allowing federal judge-made law to preempt state legislative power. Even when the federal government preempts state legislation, the federalism balance is partially preserved by democratic checks on federal power. Yet, when a nondemocratic branch is making the law, those checks disappear. Moreover, the federal judiciary is a uniquely poor policymaking body; its lack of policymaking chops does not support overriding states' policy choices. These factors highlight the need for Congress to account for the degree to which current antitrust law is largely judge made. Part I outlines the general landscape of antitrust federalism. It first describes antitrust federalism's three components and then surveys arguments for and against maintaining one of those components: the coexistence of state and federal antitrust laws. Following this survey, Part II offers a new defense of the current system: federal antitrust law's judge-made status makes it particularly unsuitable to preemption. Finally, Part III compares antitrust's judge-made law to other preemptive federal common law, concluding that federal antitrust preemption would be uniquely susceptible to Part II's criticism. I. THE ANTITRUST FEDERALISM LANDSCAPE Antitrust federalism, meaning the space carved out for the states in the more generally federal antitrust arena, can be thought of as made up of two "swords"- the first the states' ability to bring suit under federal antitrust law and the second their ability to enact and enforce their own state antitrust laws - and one "shield" - immunity from federal antitrust law for state actions. 23 The swords allow states to attack antitrust offenders, while the shield allows states to defend against federal antitrust action. All three elements of antitrust federalism find their roots in congressional action or the courts' interpretation of congressional inaction. The power to enforce federal antitrust law as parens patriae for full treble damages - the first sword - was granted to the states by Congress in Hart-Scott-Rodino. 24 On the judicial front, the Supreme Court acknowledged state immunity from federal antitrust actions - the shield - in Parker v. Brown,25 noting that the Sherman Act did not explicitly mention its application to state action. 26 Finally, when the Court confirmed that states' ability to make their own antitrust laws - the second sword and the one discussed in this Note - was not preempted in California v. ARC America Corp.,2 7 it considered the same Sherman Act silence. 28 This is all to say that antitrust's federalism tools are congressionally, not constitutionally, given rights and are therefore congressionally rescindable. Congress could amend Hart-Scott-Rodino or make explicit that the Sherman Act applies to state action. 29 And, crucially for this Note's discussion, although state antitrust law is not judicially preempted, Congress could choose to expressly preempt it in the future.30 There are strong policy arguments for express congressional preemption of state antitrust law. The remainder of this Part attempts to outline the general pros and cons of congressional antitrust preemption but is not meant to be exhaustive or to cover new ground. The intent is to situate Part II's argument about federalism and preemption by judgemade law within the broader policy landscape. A. The Patchwork Regime Problem First, critics of the status quo argue that a patchwork regime of state antitrust laws can make it expensive for companies that operate across state borders to comply. State and federal regimes share similar philosophies regarding most of antitrust law.31 But state antitrust laws do not perfectly mirror their federal counterparts - and the antitrust laws of the different states are heterogeneous themselves. 32 Disputes are concentrated in a few areas of the doctrine, like vertical restraints and mergers. 33 For example, states often focus on damage to intrabrand competition when enforcing limits on vertical restraints, whereas federal antitrust law focuses primarily on interbrand competition.34 Additionally, state merger guidelines often materially differ from federal guidelines, 35 and states are likelier to define markets "more narrowly," "refus[e] to consider efficiencies" favored by federal agencies, and show a concern for local jobs and competitors that does not "enter . . . the [federal] calculus."3 6 An inconsistent antitrust regime that may conflict between states could cause economic inefficiency, for example by discouraging companies from undertaking what might otherwise be an economically efficient merger.37 This critique relies in part on the federal government having a better approach to vertical restraints and mergers, and that is anything but clear. The classic federalism argument that states function as laboratories of democracy 38 applies here: antitrust law is far from settled, and having multiple regimes allows for testing different theories. For example, some scholars argue that the states are correct to consider intrabrand competition's effects on price, especially in certain markets.39 Similarly, in the merger context, there is support for both the states' refusal to consider only economic efficiency40 and their push for heightened antimerger enforcement. 41 Of course, the laboratories of democracy might not work so well in the antitrust context: because of the interwoven economic effects of federal and state antitrust laws and enforcement in an interconnected national economy, determining the effects of one state's slightly different antitrust regime would be difficult.4 2 But federalism can still offer benefits by breaking the antitrust orthodoxy: by putting different policies on the table, a multilevel regime reminds us both that there are different possible "best" antitrust policies and that antitrust law has a variety of potential goals.43 B. The One-State Dominator Problem Closely related to the patchwork regime problem is the one-state dominator problem: because national firms may not always be able to maintain different business practices in each state, firms could be forced to follow the law of whichever state has the strictest antitrust policy nationwide. For example, a single state could use its own antitrust laws to "challenge the largest nationwide transactions so long as it can show that the state itself, its citizens, or its economy is affected in a way that provides standing." 4 4 If a nationwide merger is illegal under one state's laws, it may not be worth it for the firm to restructure the transaction in order to merge in all but one jurisdiction. This reality could allow for the state with the strictest antitrust policy to dominate the policy decisions of every other state and of the federal government.45 The one-state dominator problem is exacerbated by unrecognized interstate externalities: in making its antitrust laws, a state is not forced to consider the harm or benefit to businesses based outside of its borders. 46 These uninternalized externalities make it more likely that a state will overregulate. The laboratory-of-democracy defenses to the patchwork regime problem, with their variety-is-the-spice-of-life flair, fail to explain why an individual state's antitrust regime should be allowed to dominate the policy of the entire nation. Consider a recently passed Maryland law regulating wholesale pharmaceutical prices. The law prohibited manufacturers or wholesalers from "price gouging," defined as "an unconscionable increase in the price of" certain drugs.47 Federal antitrust law does not prevent monopolists from receiving the reward of monopoly prices, under the theory that potential future monopoly profits encourage present investment.4 8 The Maryland law can be viewed as a limit on this monopolist tolerance in the pharmaceutical space, preventing pharmaceutical companies from taking advantage of their dominant market position in the treatment of certain diseases. Not all states had decided to regulate drug prices, with most hewing more closely to the general rule of monopoly tolerance.49 Based on its drafting, however, Maryland's law could have had significant implications nationwide: even assuming the law required some sort of connection to an eventual consumer sale in Maryland,5 0 the law regulated a wholesaler's initial sale, whether or not that sale occurred in Maryland, so long as the drug was eventually resold in Maryland.5 1 As such, any manufacturer who sold drugs to a Maryland retailer would have to set their initial prices in consideration of Maryland's law. Pricing is a core antitrust issue; why should Maryland be able to set the nation's pricing policy? Or consider the ability of indirect purchasers to sue under antitrust laws. In Illinois Brick Co. v. Illinois,52 the Supreme Court held that only direct purchasers of a price-fixed good or service, not subsequent indirect purchasers, could sue for treble damages under the Clayton Act.5 3 In response, twenty-six states passed "'Illinois Brick-repealer laws' authorizing indirect purchasers to bring damages suits under state antitrust law."5 4 But these twenty-six states have an impact even on the residents of nonrepealer states. In a class action currently on appeal in the Ninth Circuit, a district court applied California antitrust law – including California's repealer law - to a nationwide class that included class members from nonrepealer states.55 The defendant-appellant has argued that this application undermines the nonrepealer states' interest in choosing their own consumer-business balance.5 6 The Maryland and Ninth Circuit examples may be more bogeymen than real threats to federalism. First, alternate doctrines aside from antitrust preemption work to keep individual state interests in check. For example, the Fourth Circuit enjoined enforcement of the Maryland law on dormant commerce clause grounds.5 7 Where one state intrudes too much on other states' ability to regulate antitrust - where "[t]he potential for 'the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude' is ... both real and significant" 58 - the Constitution, rather than Congress, can prevent the onestate dominator problem's greatest harms. Dormant commerce clause challenges are not limited to the Maryland case's facts. In fact, the Fourth Circuit dissent complained that the majority's logic would invalidate other state antitrust laws, including Illinois Brick-repealer laws.5 9 Second, the trouncing of federalism in cases like these is often overstated. Take the defendant-appellant's depiction of the interests in the Ninth Circuit case as an example of exaggerated federalism costs. The district court found that the nonrepealer states had no interest in having their laws applied because the defendant-appellant was a California company; California's more consumer-friendly law would only help nonrepealer-state residents, not hurt nonrepealer-state businesses.6 0 If the nonrepealer states have an interest in denying their own consumers access to relief when there is no benefit to their own businesses, it seems tangential to an interest in striking their own consumer-business balances. Instead, a choice to prioritize foreign defendants over in-state consumers appears more like an attempt to govern the national consumer-business balance, a choice imbued with far less federalism oomph than the defendant-appellant portrayed. Whether exaggerated or not, a worry that antitrust federalism allows one state to dominate national antitrust policy weighs in favor of congressional antitrust preemption. This problem, however, is not unique to antitrust. Any area of law in which states fail to internalize the harms of overregulation, meaning any law that regulates businesses with a national footprint, could be dominated by one state. 61 If Congress were to take the one-state dominator problem too seriously, it would swallow up huge swaths of state regulation, excluding states from their traditional role in consumer protection, at least where the largest (and potentially most worrisome) industries are implicated. C. The Overdeterrence Problem Third, critics argue that a multilevel antitrust regime threatens to overdeter procompetitive conduct. The policy behind much of preemption is to prevent state law from interfering with detailed, well-balanced federal regulation: obstacle preemption exists to prevent states from "stand[ing] as ... obstacle[s] to the accomplishment and execution of the full purposes and objectives of Congress,"6 2 and field preemption exists to prevent state interference where Congress "left no room for lower-level regulation."6 3 Although it is not field or obstacle preempted, 64 antitrust law exhibits the type of detailed regulatory balance that the preemption doctrines attempt to prevent states from damaging. Much of antitrust law is built on finding the perfect balance of standards and remedies: the law must properly deter anticompetitive acts without deterring healthy competition. 65 A state law that shifts remedies or standards can upset this careful balancing, thus overdeterring desirable private action. Critics can point directly to ARC America as evidence of this overdeterrence threat. The Court's decision in Illinois Brick, which limited suits by indirect purchasers, relied in large part on a belief that concentrating suits in direct purchasers would avoid overdeterrence. 66 By allowing for additional suits, ARC America created extra deterrence not envisioned by the federal antitrust scheme. 67 Like the patchwork regime critique, the overdeterrence critique is weakened if the federal regime has failed to achieve proper balancing. Many antitrust regimes around the globe adopt different balances than the United States does. The European Union, for example, differs from the United States on remedial structure, the standard for illegal unilateral conduct, and market definition, among other issues. 68 Moreover, many scholars argue that the U.S. antitrust balance is off and that more enforcement is needed.6 9 Even if U.S. antitrust policies are getting the balance generally right, it is unlikely that the federal regime is so finely tuned that any added deterrence will destroy the balance. D. The Misaligned Incentives Problem7 Fourth, in the misaligned incentives problem, critics argue that states do not have proper incentives when they enforce state antitrust laws. Although state antitrust laws are supposed to mainly target intrastate antitrust violations, courts have refused to police that limit too strictly. 7 1 In an interconnected economy where seemingly hyperlocal activity can have national implications, 72 courts have admitted that limiting state antitrust laws to cases that do not touch the national economy would "fence[] off" "a very large area .. . in which the States w[ould] be practically helpless to protect their citizens."7 But, even though suits under state laws may have nationwide consequences, state attorneys general lack nationwide incentives. Critics of the status quo worry that elected attorneys general are more susceptible to lobbying by state interests than are appointed federal enforcers and that a cost-benefit analysis is flawed where a state can attack a company headquartered out of state in order to protect one headquartered in state.74 These fears seem mostly imagined. The idea that elected attorneys general are bringing antitrust suits to hurt competitors of state businesses "appears to [have] little empirical support[,] ... and none has been provided by the advocates of this position."7 5 Past state antitrust enforcers have stated that, while they considered state-specific factors when deciding where to spend their limited resources, those factors would be used only to choose "from among those cases that also made sense on traditional economic grounds."7 6 And there is reason to believe that these enforcers are telling the truth. For one thing, states often make antitrust decisions that seem to go against the interests of major state employers. For example, New York antitrust enforcers have taken antitrust positions adverse to both Verizon and IBM, top New York employers.7 7 For another, a state that is only minutely affected by an antitrust action is unlikely to bring that action alone. If a state is only trivially affected by allegedly anticompetitive conduct, "that state is very unlikely as a practical and political matter to spend the enormous sums of money required to sustain a challenge." 78 If a state is majorly affected but is the only state affected, then the misaligned incentives critique does not apply because there is no competing set of national incentives. And in a case that actually has major impacts in multiple states, it is unlikely that one state could act without other states wanting to join in on the enforcement.79 When states work together on antitrust enforcement, they tend to cooperate closely with one another, especially through the National Association of Attorneys General's (NAAG) antitrust group.o Even if an individual state might be swayed by state-specific concerns, it is unlikely that it could convince a multistate coalition to act on those concerns - the group would be forced to evaluate the action on its more national merits.81 E. The Incompetent States Problem Finally, critics argue that state enforcers will make error-ridden antitrust choices due to a lack of resources, experience, and expertise. Whereas federal enforcers have significant budgets for antitrust enforcement, the percentage of funding set aside for antitrust enforcement by state attorneys general is minute. 2 Because of this lack of resources, state enforcers have been accused of staffing antitrust cases with senior attorneys who, while experienced in civil litigation generally, are antitrust novices.83 These factors have led critics to argue that state attorneys general handle antitrust suits poorly, clogging the judicial pipeline with questionable suits. 84 State attorneys general are accused of acting as free riders on federal actions and of making settlements more difficult rather than undertaking useful enforcement.1 5 But there is reason to dispute critics' claims. The critique of individual attorneys general ignores the states' ability to work in unison. Cooperating through NAAG, states are able to build on each other's experiences in antitrust enforcement.1 6 Thus, worries about inexperienced antitrust divisions working alone may be overstated. Although interstate coordination may weaken their point, critics can retort that most state actions are not coordinated: according to NAAG's State Antitrust Litigation Database, only nineteen of the fifty-six civil antitrust actions brought by states between 2014 and 2019 were brought by multiple states working together,8 7 although many of the noncooperative suits regarded intrastate anticompetitive conduct. 8 This same dataset, however, also undermines the critics' argument that states act only as free riders: only nineteen of the fiftysix suits included federal participation.8 9 Finally, much of the criticism leveled at state attorneys general occurred before a renaissance in state law enforcement. Since Judge Posner derided the skill of state attorneys general in 2001,90 lawyers and judges, including Chief Justice Roberts, have recognized a marked improvement in state attorney offices' advocacy.9 1 Whether or not Judge Posner's critiques were valid at the turn of the century, it is unclear that the landscape remains the same today. Finally, this critique undermines the arguments, noted earlier, that state law enforcement is overdeterring competition or creating a patchwork of antitrust law. If states are nothing but free riders, then we need not worry about overdeterrence.

#### Third Plank solves environment.

Pearce ’19 [Fred; May 29; Environmental journalist and author, citing former British Government Chief Scientist David King, Harvard University Physicist David Keith, Kelly Wanser for the Marine Cloud Brightening Project, and other academics; Yale Environment 360, “Geoengineer the Planet? More Scientists Now Say It Must Be an Option,” <https://e360.yale.edu/features/geoengineer-the-planet-more-scientists-now-say-it-must-be-an-option>]

Once seen as spooky sci-fi, geoengineering to halt runaway climate change is now being looked at with growing urgency. A spate of dire scientific warnings that the world community can no longer delay major cuts in carbon emissions, coupled with a recent surge in atmospheric concentrations of CO2, has left a growing number of scientists saying that it’s time to give the controversial technologies a serious look.

“Time is no longer on our side,” one geoengineering advocate, former British government chief scientist David King, [told a conference last fall.](https://www.edie.net/news/9/Sir-David-King--Policy-and-business-action-needed-on-climate--restoration-/) “What we do over the next 10 years will determine the future of humanity for the next 10,000 years.”

King helped secure the Paris Climate Agreement in 2015, but he no longer believes cutting planet-warming emissions is enough to stave off disaster. He is in the process of establishing a Center for Climate Repair at Cambridge University. It would be the world’s first major research center dedicated to a task that, he says, “is going to be necessary.”

Technologies earmarked for the Cambridge center’s attention include a range of efforts to restrict solar radiation from reaching the lower atmosphere, including spraying aerosols of sulphate particles into the stratosphere, and refreezing rapidly warming parts of the polar regions by deploying tall ships to pump salt particles from the ocean into polar clouds [to make them brighter.](https://www.bbc.co.uk/news/science-environment-48069663)

United States scientists are on the case, too. The National Academies last October launched a study into [sunlight reflection](http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=10162018) technologies, including their feasibility, impacts and risks, and governance requirements. Marcia McNutt, president of the National Academy of Sciences, said: “We are running out of time to mitigate catastrophic climate change. Some of these interventions… may need to be considered in future.”

The study’s prospective authors held their [first meeting](http://nas-sites.org/dels/studies/reflecting-sunlight-to-cool-earth/meetings-and-events/) in Washington, D.C., at the end of April. Speakers included David Keith, a Harvard University physicist who has developed his own patented technology for using chemistry to remove CO2 directly from the atmosphere, and Kelly Wanser of the [Marine Cloud Brightening Project](http://www.geoengineeringmonitor.org/2018/04/marine-cloud-brightening-project-geoengineering-experiment-briefing/), which is studying the efficacy of seeding clouds with sea salt and other materials to reflect more sunlight back into space. The project is preparing for future field trials.

China too has an active government-funded research program. It insists it has no current plans for deployment, but is looking, among other things, at how solar shading might [slow the rapid melting](https://royalsocietypublishing.org/doi/full/10.1098/rsta.2012.0086) of Himalayan glaciers.

Geoengineering the climate to halt global warming has been discussed almost as long as the threat of warming itself. American researchers back in the 1960s suggested floating billions of white objects such as golf balls on the oceans to reflect sunlight. In 1977, Cesare Marchetti of the Austria-based International Institute for Applied Systems Analysis discussed ways of catching all of Europe’s CO2 emissions and injecting them into [sinking Atlantic Ocean currents.](https://link.springer.com/article/10.1007/BF00162777)

In 1982, Soviet scientist Mikhail Budyko proposed filling the stratosphere with sulphate particles to reflect sunlight back into space. The first experiments to test the idea of fertilizing the oceans with iron to stimulate the growth of CO2-absorbing algae were carried out by British researchers in 1995. Two years later, Edward Teller, inventor of the hydrogen bomb, proposed putting [giant mirrors](https://www.newscientist.com/article/mg18124403-700-a-mirror-to-cool-the-world/) into space.

Still, many climate scientists until recently regarded such proposals as fringe, if not heretical, arguing that they undermine the case for urgent reductions in greenhouse gas emissions. A group of scientists writing in Nature as recently as April last year, called solar geoengineering “outlandish and unsettling… [redolent of science fiction](https://www.nature.com/articles/d41586-018-03917-8).”

But the mood is shifting. There is broad, international scientific agreement that the window of opportunity to avoid breaching the Paris climate target of staying “well below” 2 degrees Celsius (3.6 degrees Fahrenheit), is narrowing sharply. A pause in the rise in CO2 emissions that brought hope in 2015 and 2016 has ended; the increase has resumed at a time when we should be making progress toward a goal of [halving emissions by 2030](https://report.ipcc.ch/sr15/pdf/sr15_headline_statements.pdf), says Johan Rockstrom, science director of the Potsdam Institute for Climate Impacts Research. CO2 concentrations in the atmosphere — the planetary thermostat — are now at 415 parts per million (ppm) and rising by almost 3 ppm each year, reaching levels that have not been seen in 3 million years. “We have two years left to bend the curve” downward, says Rockstrom.

Some experts contend we may be approaching a moment when nothing other than geoengineering can meet the international community’s promise — made when signing the UN Climate Change Convention at the Earth Summit in 1992 — to prevent “dangerous anthropogenic interference with the climate system.” Myles Allen of Oxford University’s Environmental Change Institute says: “Every year we are not even trying to reduce emissions is another 40 billion tons of CO2 dumped into the atmosphere that we are blithely committing future generations to scrub out again.”

## 3

#### BBB will pass – it’s key to meeting the U.S.’s climate commitments

DUMAIN 11/8 (Emma; E&E Daily, “Democrats cheer reconciliation vote, but big fights remain,” <https://www.eenews.net/articles/democrats-cheer-reconciliation-vote-but-big-fights-remain/>, //pa-ww)

Congressional Democrats painted a rosy view this past weekend of the prospects for swift legislative action on their massive, $1.7 trillion climate and social spending package. From the White House on Saturday, President Biden said without equivocation, “We will pass this in the House, and we’ll pass it in the Senate.” From Glasgow, Scotland, on a panel at the United Nations climate talks, Sen. Ed Markey (D-Mass.) said his message to the entire international community was that the Senate would ultimately get the votes to advance the reconciliation bill, enabling Biden to meet his goal of achieving 50 percent emissions reductions below 2005 levels by the year 2030. “We will get this job done,” said Markey of legislation that would invest roughly $550 billion to fight the climate crisis — the biggest federal investment in the environment in history. And yesterday, White House chief of staff Ron Klain hammered the point home: “We are going to lead the world in tackling climate change,” he said on on NBC’s “Meet The Press,” adding, “We’re going to pass this bill and have the tools to do it.” But simmering beneath this optimism are real uncertainties as to how lingering disagreements over the cost and content of the reconciliation bill, known as the “Build Back Better Act,” will get resolved and fulfill the many promises on climate action Democrats intend to tout in Glasgow over the next several days. This past Friday, progressives finally agreed to clear the separate, $1 trillion bipartisan infrastructure package for the president’s signature, even without ironclad commitments from moderate Democratic Sens. Joe Manchin of West Virginia and Kyrsten Sinema of Arizona that they would vote for the separate, partisan bill. Those commitments had been a hard line that liberals had held on to for weeks. Meanwhile, another dilemma emerged: House Democratic moderates said they would not support the reconciliation bill until it had received an official cost estimate from the nonpartisan Congressional Budget Office. House Democratic leadership ultimately culled together the votes to pass the bipartisan infrastructure bill, 228-206, with all but six Democrats supporting and with help from 13 Republicans to make up the shortfall. Moderates essentially promised progressives they’d vote for the reconciliation bill once the CBO score is finalized. At the same time, Congress took a procedural step, 221-213, regarding the reconciliation bill to bring that measure closer to a final passage vote the week of Nov. 15, when the House returns following the Veterans Day recess. Rep. Josh Gottheimer (D-N.J.), one of the moderates who insisted the reconciliation bill be scored prior to a vote, said on CNN’s “State of the Union” yesterday he expected the score to be in line with White House projections, in which case he and his colleagues would back the bill as soon as next week. Party leaders, however, are taking a tremendous gamble that the CBO score will be sufficient. They are now working against a much tighter deadline to resolve intraparty differences on multiple policy proposals by the year’s end, where the final weeks of December will also be consumed by other legislative battles relating to the appropriations process and the debt ceiling. They are also putting tremendous trust in Biden’s ability to convince Manchin and Sinema to support the larger spending package, about which Manchin has expressed serious reservations while Sinema has stayed mostly mum. Manchin released a statement late Friday praising action on the infrastructure bill, which he helped write in the Senate; Sinema tweeted similar sentiments on Saturday. Neither said anything about the reconciliation package. The talking points following the chaos of last week, which culminated in a vote in the House on the bipartisan infrastructure bill in the early hours of Saturday morning, varied. Biden’s allies took to the Sunday talk show circuit to tout the most recent legislative victory and assure the public the reconciliation bill, with its historic climate investments, was next on tap. “What’s in our minds is the fact that the ‘Build Back Better’ plan that we’ve been talking about has the largest investment in American history to get us to a clean energy economy, to create millions of jobs in this country moving forward to sustainable, renewable energy,” Klain said Markey, who earlier this summer helped popularize the #NoClimateNoDeal campaign on Capitol Hill, made clear he had no interest in sowing seeds of doubt in Glasgow. “What we’re saying to the rest of the world here today [is] we are going to act domestically, we are going to act on methane, we are going to deliver on our promises,” he said at a COP 26 event hosted by the Climate Action Center. “You can turn the page on the Trump era,” said Markey. “We’re putting these [clean energy] tax breaks on the books for a 10-year period, there will be a climate bank … a $220 billion in private-sector investment in new clean energy technology … a Civilian Climate Corps.” Elsewhere, environmental advocates were making it very clear there would be political consequences for inaction on the reconciliation package, which contains the vast majority of the climate provisions for which environmentalists have been clamoring. Manish Bapna, president and CEO of the Natural Resources Defense Council, said there was reason to cheer passage of the infrastructure bill only insofar as it “clear[ed] the way” for passage of the reconciliation measure. “The infrastructure bill doesn’t confront the climate crisis,” Bapna said. “For that, we need Congress to enact the historic clean energy investment in the ‘Build Back Better Act’ without delay.” Tiernan Sittenfeld, senior vice president of government affairs with the League of Conservation Voters, agreed. “Today was not the historic day we’d hoped for,” she said in the hours after the House advanced the infrastructure bill but not the reconciliation deal. “Now is the time to finish the job, pass the Build Back Better Act and quickly get it to the President’s Desk.”

#### The plan drains PC

Carstensen, 21

(Peter C. Carstensen Fred W. & Vi Miller Chair in Law Emeritus, University of Wisconsin Law School "THE “OUGHT” AND “IS LIKELY” OF BIDEN ANTITRUST," Feb 2021 <https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#adelstein> NL)

14. Similarly, despite bipartisan murmurs about competitive issues, the potential in a closely divided Congress that any major initiatives will survive is limited at best. In part the challenge here is how the Biden administration will rank its commitments. If it were to make reform of competition law a major and primary commitment, it would have to trade off other goals, which might include health care reform or increases in the minimum wage. It is likely in this circumstance the new administration, like the Obama administration’s abandonment of the pro-competitive rules proposed under the PSA, would elect to give up stricter competition rules in order to achieve other legislative priorities. 15. Another key to a robust commitment to workable competition is the choice of cabinet and other key administrative positions. Here as well, the early signs are not entirely encouraging. In selecting Tom Vilsack to return as secretary of agriculture, the president has embraced a friend of the large corporate interests dominating agriculture who has spent the last four years in a highly lucrative position advancing their interests. Given the desperate need for pro-competitive rules to implement the PSA and control exploitation of dairy farmers through milk-market orders, the return of Vilsack is not good news. Who will head the FTC and who will be the attorney general and assistant attorney general for antitrust is still unknown, but if those picks are also centrists with strong links to corporate America the hope for robust enforcement of competition law will further attenuate! 16. In sum, this is a pessimistic prognostication for the likely Biden antitrust enforcement agenda. There is much that ought to be done. But this requires a willingness to take major enforcement risks, to invest significant political capital in the legislative process, and to select leaders who are committed to advancing the public interest in fair, efficient and dynamically competitive markets. The early signs are that the new administration will be no more committed to robust competition policy than the Obama administration. Events may force a more vigorous policy—I will cling to that hope as the Biden administration takes shape.

#### PC key to timely passage – overcomes all obstacles

BARRON-LOPEZ 11/11 (Laura; Politico, “Dems to White House: The only prescription is more Biden,” <https://www.politico.com/news/2021/11/11/dems-white-house-biden-520946>, //pa-ww)

After months of deference to Congress, President Joe Biden moved more assertively last week to shepherd half his domestic agenda into law. With the other half still in limbo, Democrats want some of that Biden punch again. Outside groups fear that congressional Democrats could come up short on Biden’s social spending package. They are concerned that moderates in the House may end up buckling if the budget scores on the bill come back worse than anticipated. And there is residual anxiety that one of the two wavering Senate Democrats — Joe Manchin of West Virginia and Kyrsten Sinema of Arizona — could vote “no” over concerns about inflation and long-term debt. The clearest solution to avoiding this, they argue, is more Biden. “All eyes are on the president, all expectations are on the president,” said Lorella Praeli, co-president of the progressive Community Change Action. “We are playing our role. We are mobilizing. We're reminding people everyday what this is about.” Praeli added that Biden must ensure there aren’t future cuts to the package, which dropped from $3.5 trillion to $1.75 trillion to accommodate centrist Democrats in the House and Senate. “This is what he campaigned on. Only the president can deliver it in the end.” Until last week, Biden’s involvement in negotiations had been more deferential than managerial. That befuddled lawmakers, who were waiting for him to draw red lines about which priorities he wants in and out of the deal or to even demand votes. To date, Biden has publicly refrained from drawing a red line around including paid leave in the final version of the legislation, leaving the leadership in the House at odds with centrists in the Senate. But Biden did ramp up his involvement in the negotiations last week. And Democrats viewed that as key to getting an agreement in the House on their infrastructure bill, as well as on a rule to move forward with their social spending package, which funds universal pre-K, expands Medicare access, cuts taxes for families with children 18 years old and under, and combats climate change. Now they want more. Expectations are high for Biden to keep the House to its promise of a vote on that social spending plan the week of Nov. 15. “They basically made a promise,” said Rahna Epting, executive director of the progressive advocacy group MoveOn. “And Biden was able to get enough progressives to vote for the bipartisan infrastructure bill, on that promise. We are expecting Biden and the Democratic Caucus will make good on their word and pass the Build Back Better Act no later than Nov 15th as stated.” White House officials contend that Biden and his team remain in close touch with the Hill, and their legislative affairs staff continues to push the social spending bill toward a vote. The White House said it is communicating regularly with a range of lawmakers including Manchin, but did not answer when asked whether Biden has spoken to the West Virginia senator or other moderates in recent days. “There has been no kind of slowdown when it comes to our Hill outreach,” a White House official said. The growing demands for Biden to stay heavily involved reflect a fear in the party that the window to act on the agenda is quickly closing, especially as concerns mount about lingering inflation and the midterms near. If the House meets its deadline next week and passes the social spending bill, some Democrats want Biden to issue a deadline for the Senate to act. Others noted that the end-of-year legislative calendar is short and brutal. The “dynamic has totally changed,” said a Democratic strategist. “The president secured this agreement with the five holdouts for House passage of BBB next week and it’s on him to enforce it.” A top climate operative echoed that assessment telling POLITICO that Biden “will have failed” on tackling climate change if the second piece of the agenda doesn’t pass. But the operative also expressed a newfound fear that Biden’s current effort to sell the benefits of the infrastructure bill could distract or complicate Democrats’ attempt to keep public interested in the social spending plan. "They need to sell [physical infrastructure] but also act like it's not enough," said the activist. "How are they also creating the urgency for BBB to get done, for it to stay on the timeline of getting it done by Thanksgiving? It's a balancing act.” Matt Bennett, co-founder of the moderate group Third Way, agreed that the dynamics were “tricky” in trying to sell one just-passed bill as historic while simultaneously making the case that another ambitious bill is needed. Biden will travel to New Hampshire and Michigan next week to highlight the money the infrastructure bill will direct toward new roads, bridges and transit projects across the country. “This moment that we're in is hard,” said Bennett. “It will be much, much easier when both bills are completed. There is a very profound political imperative for Democrats to get this finished, to end the infighting and sausage-making and shift to creating a narrative about what Democrats have just done for Americans because they've been utterly unable to do that.” A number of groups plan to amp up pressure next week as Congress returns. House Speaker Nancy Pelosi and the White House have repeated their desire to have a vote on the social spending plan by the end of next week. The Service Employees International Union will descend on Capitol Hill with some 500 union members, said Mary Kay Henry, the union’s president. “We are escalating phone calls, text messages,” said Henry. “We're bringing members into Washington next Tuesday, we have the president's back, to get Congress to act quickly and get the full back package.” Democratic outside groups have spent more than $150 million on TV and digital ads promoting the president’s social spending plan, known as “Build Back Better.” The League of Conservation Voters and Climate Power launched new digital ads calling on the five moderates who reached an agreement with the White House and House leadership last week to follow through on their commitment to pass the second piece of Biden’s economic agenda “next week.” The longer it takes to pass the social spending plan, the harder it becomes to keep the party unified, Democrats warn, especially amid up-and-down economic news. A new report Wednesday revealed inflation hit 6.2 percent in October, its highest point in 31 years, contributing to high gas, car and food prices. It forced Biden to quickly issue a statement addressing the issue and ever-so-slightly shift his messaging, arguing that passage of the social spending plan would combat inflation. “Inflation hurts Americans’ pocketbooks, and reversing this trend is a top priority for me,” Biden said in a statement. “It is important that Congress pass my Build Back Better plan, which is fully paid for and does not add to the debt, and will get more Americans working by reducing the cost of child care and elder care, and help directly lower costs for American families.”

#### U.S. climate leadership is vital to preventing extinction from global climate change, addressing systemic racism, mitigating global conflict, preserving military readiness and U.S. competitiveness

BLINKEN ’21 (Antony J.; U.S. Secretary of State, “Tackling the Crisis and Seizing the Opportunity: America’s Global Climate Leadership,” <https://www.state.gov/secretary-antony-j-blinken-remarks-to-the-chesapeake-bay-foundation-tackling-the-crisis-and-seizing-the-opportunity-americas-global-climate-leadership/>, //pa-ww)

Well, good afternoon, everyone. And Will, thank you for a wonderful introduction. And thank you for lending us this absolutely spectacular setting and backdrop – certainly the best setting and backdrop I’ve had in my brief tenure as Secretary. And thanks so much to the Chesapeake Bay Foundation for your lasting commitment to save the Bay. The Chesapeake Bay was formed nearly 12,000 years ago by melting glaciers. Today, it stretches 200 miles and is home to over 3,600 species of plants and animals. A hundred thousand rivers and streams feed over 50 billion gallons of water into the Bay every single day. More than 18 million people live in the watershed, and many rely on it for their livelihood. The local seafood industry alone provides some 34,000 jobs and nearly $900 million in annual income. And yet, as Will alluded to, warming temperatures caused by human activity are transforming the Bay. Its water is rising. And the land – including where I stand right now – is sinking due to the melting of the glaciers that formed the Bay. If this continues at the current pace, in just 80 years, the Bay will extend inland for miles, overtaking the homes of 3 million people, destroying roads, bridges, farms. Many of the Bay’s plants and animals will die out. So will the fishing industry. To my children’s children, the landscape will be unrecognizable. We have to stop this from happening while we still can. That’s why President Biden took steps to rejoin the Paris Agreement right after taking office, and named Secretary Kerry as our nation’s first Special Presidential Envoy for Climate to lead our efforts around the world. It’s also why President Biden invited 40 world leaders to Washington this week for a summit on climate. And it’s why the Biden-Harris administration will do more than any in history to meet our climate crisis. This is already an all-hands-on-deck effort across our government and across our nation. Our future depends on the choices we make today. As Secretary of State, my job is to make sure our foreign policy delivers for the American people – by taking on the biggest challenges they face and seizing the biggest opportunities that can improve their lives. No challenge more clearly captures the two sides of this coin than climate. If America fails to lead the world on addressing the climate crisis, we won’t have much of a world left. If we succeed, we will capitalize on the greatest opportunity to create quality jobs in generations; we’ll build a more equitable, healthy, and sustainable society; and we’ll protect this magnificent planet. That’s the test we face right now. Today, I want to explain how American foreign policy will help us meet that test. Not too long ago, we had to imagine the impact of climate change. No one has to imagine it anymore. For the last 60 years, every decade has been hotter than the one that came before it. Weather events are becoming more extreme. During the cold wave this February, temperatures from Nebraska to Texas were more than 40 degrees below normal. In Texas alone, thousands were left homeless, over 4 million people went without heat and electricity, more than 125 people died. It may seem counterintuitive that global warming leads to cold weather. But as the Arctic warms, cold weather gets pushed south. And that can contribute to record cold spells like the one in Texas. The 2020 wildfire season burned more than 10 million acres. That’s more than the entire state of Maryland. We saw five of the six biggest wildfires in California’s history, and the single biggest wildfire in Colorado’s history. Together, natural disasters in 2020 cost the United States around $100 billion. Meanwhile, 2019 was the wettest year on record for the lower 48 states. Heavy rains and floods prevented farmers in the Midwest and Great Plains from planting 19 million acres of crops. And from 2000 to 2018, the American Southwest experienced its worst drought since the 16th century – the 16th century. We’re running out of records to break. The costs – in monetary damage, livelihoods, human lives – keep going up. And unless we turn this around, it’s going to get worse. More frequent and more intense storms; longer dry spells; bigger floods; more extreme heat and more extreme cold; faster sea level rise; more people displaced; more pollution; more asthma. Higher health costs; less predictable seasons for farmers. And all of that will hit low-income, black and brown communities the hardest. The last part’s important. The costs of the climate crisis fall disproportionately on the people in our society who can least afford it. But it’s also true that addressing climate change offers one of the most powerful tools we have to fight inequity and systemic racism. The way we respond can help break the cycle. These are all reasons why we must succeed in preventing a climate catastrophe. But the world has already fallen behind on the targets we set six years ago with the Paris Agreement. And we now know those targets didn’t go far enough to begin with. Today, the science is unequivocal: We need to keep the Earth’s warming to 1.5 degrees Celsius to avoid catastrophe. America has a key role to play in hitting that mark. We only have around 4 percent of the world’s population, but we contribute nearly 15 percent of global emissions. That makes us the world’s second biggest emitter of greenhouse gases. If we do our part at home, we can make a significant contribution to addressing this crisis. But that won’t be enough. Even if the United States gets to net zero emissions tomorrow, we’ll lose the fight against climate change if we can’t address the more than 85 percent of emissions coming from the rest of the world. Coming up short will have major repercussions for our national security. Pick a security challenge that affects the United States. Climate change is likely to make it worse. Climate change exacerbates existing conflicts and increases the chances of new ones – particularly in countries where governments are weak and resources are scarce. Of the 20 countries the Red Cross considers most vulnerable to climate change, 12 are already experiencing armed conflicts. As essential resources like water dwindle, as governments struggle to meet the needs of growing populations, we’ll see more suffering and more strife. Climate change can also create new theaters of conflict. In February, a Russian gas tanker sailed through the Arctic’s Northern Sea Route for the first time ever. Until recently, that route was only passable a few weeks each year. But with the Arctic warming at twice the rate of the rest of the global average, that period is getting much longer. Russia is exploiting this change to try to exert control over new spaces. It is modernizing its bases in the Arctic and building new ones, including one just 300 miles from Alaska. China is increasing its presence in the Arctic, too. Climate change can also be a driver of migration. There were 13 Atlantic hurricanes in 2020 – the highest number on record. Central America was hit especially hard. Storms destroyed the homes and livelihoods of 6.8 million people in Guatemala, Honduras, and El Salvador, and wiped out hundreds of thousands of acres of crops, leading to a massive rise in hunger. Months after the storms, entire villages are still subsumed in mud, and people are carving off pieces of their buried homes to sell as scrap metal. When disasters strike people who are already living in poverty and insecurity, it can often be the final straw, pushing them to abandon their communities in search of a better place to live. For many Central Americans, that means trying to make it to the United States – even when we say repeatedly that the border is closed, and even though the journey comes with tremendous hardships, especially for women and girls who face heightened risk of sexual violence. All of these challenges are placing greater demands on our military. The U.S. Naval Academy is only five miles north of here, and Naval Station Norfolk, the largest naval base in the world, about 200 miles to the south. Both bases – and the critical missions they support – face an imminent threat from climate change. And these are just two of the dozens of military facilities that climate change puts at risk. What’s more, our military often responds to natural disasters, which are getting more frequent and more destructive. In January, Secretary of Defense Austin announced that the military would immediately integrate climate change into its planning and operations and how it assesses risk. As Secretary Austin put it, and I quote, “There is little about what the department does to defend the American people that is not affected by climate change.” Having said all that, it would be a mistake to think about climate only through the prism of threats. Here’s why. Every country on the planet has to do two things – reduce emissions and prepare for the unavoidable impacts of climate change. American innovation and industry can be at the forefront of both. This is what President Biden means when he says, and I quote, “When I think of climate change, I think jobs,” end quote. To give you a sense of scale, consider that, by 2040, the world will face a $4.6 trillion infrastructure gap. The United States has a big stake in how that infrastructure is built. Not only whether it creates opportunities for American workers and businesses, but also whether it’s green and sustainable, and done in a way that’s transparent; respects workers’ rights; gives the local population a say; and doesn’t mire developing countries and communities in debt. That’s an opportunity for us. Or consider the massive investments countries are making in clean energy. Renewables are now the cheapest source of bulk electricity in countries that contain two-thirds of the world’s population. And the global renewable energy market is projected to be $2.15 trillion by 2025. That’s over 35 times the size of the current market for renewables in the United States. Already, solar and wind technicians are among the fastest growing jobs in America. It’s difficult to imagine the United States winning the long-term strategic competition with China if we cannot lead the renewable energy revolution. Right now, we’re falling behind. China is the largest producer and exporter of solar panels, wind turbines, batteries, electric vehicles. It holds nearly a third of the world’s renewable energy patents. If we don’t catch up, America will miss the chance to shape the world’s climate future in a way that reflects our interests and values, and we’ll lose out on countless jobs for the American people. Now, let me be clear: Goal number one of our climate policy is preventing catastrophe. We’re rooting for every country, business, and community to get better at cutting emissions and building resilience. But that doesn’t mean we don’t have a stake in America developing these innovations and exporting them to the world. And it doesn’t mean we don’t want to shape the way countries reduce their emissions and adapt to climate change. So how can we do that? We can start with leading by the power of our example. As we work to meet our ambitious climate targets, the following core principles will guide our approach. We will significantly increase our investment in clean energy research and development, because it’s how we will catalyze breakthroughs that benefit American communities and create American jobs. In all our climate investments, we will aim not only to promote growth, but also equity. We’ll be inclusive, focusing on providing Americans across the country – and from a range of communities – with good-paying jobs, and the opportunity to join a union. We’ll empower youth, not just because they will bear more of the consequences of climate change, but also because of the urgency, ingenuity, and leadership they’ve demonstrated in confronting this crisis. We will enlist states, cities, businesses large and small, civil society, and other coalitions as partners and models. Others have been doing groundbreaking work in this field for a long time. We’ll lift them up and share best practices. And this is important: We will be mindful that for all the opportunities offered by the unavoidable shift to clean energy, not every American worker will win out in the near term. Some livelihoods and communities that relied on old industries will be hit hard. We won’t leave those Americans behind. We’ll provide our fellow Americans with pathways to new, sustainable livelihoods, and support as they navigate this transition. Right after taking office, President Biden created the Interagency Working Group on Coal and Power Plant Communities and Economic Revitalization. It’s working across the government to identify and deliver federal resources to revitalize the local economics of coal, oil, gas, and power plant communities, and ensure benefits and protections for workers in those same communities. And as part of his American Jobs Plan, the President proposed a $16 billion upfront investment to put hundreds of thousands of people to work in union jobs plugging abandoned oil and gas wells and mines. If we can stay true to these principles while meeting our climate targets, we’ll demonstrate a model that other countries will want to partner with and follow. With those values in mind, here’s how the State Department will leverage our foreign policy to deliver for the American people on climate. First, we’ll put the climate crisis at the center of our foreign policy and national security, as President Biden instructed us to do in his first week in office. That means taking into account how every bilateral and multilateral engagement – every policy decision – will impact our goal of putting the world on a safer, more sustainable path. It also means ensuring our diplomats have the training and skills to elevate climate in our relationships around the globe. Now, what it does not mean is treating other countries’ progress on climate as a chip they can use to excuse bad behavior in other areas that are important to our national security. The Biden-Harris Administration is united on this: Climate is not a trading card – it’s our future. I am particularly delighted that President Biden named my friend John Kerry to serve as our Special Presidential Envoy for Climate. No one is more experienced or effective in convincing other countries to raise their climate ambitions. We need the whole world focused on taking action now, and through this decade, to promote the achievement of net-zero global emissions by 2050. I am with John 100 percent in this effort. The leaders of our other U.S. Government agencies, they are as well. And his leadership will be indispensable in weaving climate into the fabric of everything we do at the State Department. Second, as other countries step up, the State Department will mobilize resources, institutional know-how, technical expertise from across our government, the private sector, NGOs, and research universities to help them. In the last few weeks alone, we announced new funding for clean energy entrepreneurship and more efficient renewable energy markets in Bangladesh and to help India’s small businesses invest in solar energy. These investments move us toward our climate goals and bring energy access to people who had never had it before. Third, we’ll emphasize assisting the countries being hit hardest by climate change, most of which lack the resources and capacity to handle its destabilizing impacts. Now, that includes Small Island Developing States, a number of which are literally sinking into the ocean because of rising sea levels. In 2020, only 3 percent of climate finance was directed toward these countries. We’ve got to fix that. To that end, America is deploying experts and technology to vulnerable islands in the Pacific and the Caribbean to improve early warning and response systems, and we’re investing in building resilience in areas like infrastructure and agriculture. Fourth, our embassies will lead on the ground. They already are – helping governments design and implement climate-smart policies, while looking for ways to draw on the unique strengths of America’s public and private sectors. Just last month, the U.S. company Sun Africa broke ground on two massive solar energy facilities in Angola, including the 144-megawatt Biopio site. When finished, it will be the biggest solar facility in all of Sub-Saharan Africa. The project will provide enough power for 265,000 homes and eliminate 440,000 gallons of carbon-intensive diesel fuel that Angola imports and burns each year. Plus, this project is expected to use around $150 million in solar energy equipment exported from the United States. This effort is good for the Angolan people, good for climate, and good for American jobs and business. And it simply wouldn’t have happened if not for the efforts of our diplomats. Fifth, we will use all the tools in our kit to make U.S. clean energy innovators more competitive in the global market. That includes leveraging instruments like the financing provided by the Export-Import Bank to incentivize renewable energy exports; the proposed expansion of tax credits for clean energy generation and storage in the President’s American Jobs Plan; and the Administration’s ongoing efforts to level the global playing field for American-made products and services. Support like these can have an outsized impact, particularly because the current market for renewables is only a small fraction of the market to come. Beyond solar panels, wind turbines, batteries, there are more than 40 additional categories of clean energy, including clean hydrogen, carbon capture, and next-generation renewables like enhanced geothermal energy. No one has staked a dominant claim to these promising technologies yet. And, with a lift from our domestic and foreign policy, every one of them can be American-led and American-made. A Massachusetts start-up called Boston Metal shows how this can be done. The company pioneered a new process that can produce steel and other metals more efficiently and at lower costs, while also producing less pollution. Most of the U.S. steel sector already uses clean technologies, but the company’s CEO, a Brazilian immigrant, saw an untapped market in countries like Brazil, where Boston Metal is partnering with industry to replace older, dirtier ways of making steel. This company is creating good-paying, quality jobs in the United States. Steel is a $2.5 trillion global industry, and many of the world’s producers will need to make a similar leap. America can help them do it. Sixth, our diplomats will challenge the practices of countries whose action – or inaction – is setting the world back. When countries continue to rely on coal for a significant amount of their energy, or invest in new coal factories, or allow for massive deforestation, they will hear from the United States and our partners about how harmful these actions are. And finally, we’ll seize every chance we get to raise these issues with our allies and partners, and through multilateral institutions. At NATO, for example, there is consensus that we need to adapt our military readiness for the inevitability of climate change and reduce the reliance of the Allies’ forces on fossil fuels, which is both a vulnerability and a major source of pollution. I know that Secretary General Stoltenberg, who has called climate a “threat multiplier,” is as serious about addressing climate change as we are. We will convey a strong message to the meeting of the G7 next month, whose members produce a quarter of the world’s emissions. And I’ll also represent the United States at next month’s ministerial meeting of the Arctic Council, where I’ll reaffirm America’s commitment to meeting our climate goals and encourage other Arctic nations to do the same. All of these efforts, at home and abroad, will allow us to lead from a position of strength when the world comes together in November for the United Nations Climate Conference in Glasgow. I spend a great deal of my time focused on threats to America’s security and interests – aggressive actions by Russia or China, the spread of COVID-19, the challenges facing democracies. But an equally grave threat to the American people – and an existential one over the long term – can be seen right here, on the Chesapeake Bay, where the costs of climate change are already manifesting themselves. Yet from this very same place, we can also see examples of American innovation and leadership that – if taken to scale – can prevent a climate catastrophe and benefit American workers and communities. Maryland has committed to cutting the state’s emissions by at least 40 percent by 2030, and to 100 percent clean energy by 2040. Maryland also offers farmers strong incentives to plant cover crops, which help trap carbon dioxide. More than 40 percent of the state’s farmers are now using these crops. And countless others are doing their part to prevent climate change on the Bay – and often benefiting American jobs in the process. Just consider the Merrill Center building right here, from which I speak. When it opened 20 years ago, it was the first LEED Platinum Building in the entire world, a U.S. standard for energy efficiency that has since become the gold standard globally. Around a third of its energy comes from solar power. It uses 80 percent less water than most buildings its size. Nearly half of the building – the building materials, excuse me, came from within 300 miles. Its design saves $50,000 a year in energy costs alone. A newer facility the Chesapeake Bay Foundation built in 2014 is even more efficient, reflecting advances in American design and manufacturing. It produces more energy than it consumes, and all the water it uses is captured rainwater. Its solar panels come from Oregon, its wind turbines from Oklahoma. These solar panels and wind turbines are American-designed, American-owned, American-built. And people from around the world have come to study these buildings. It’s changes like these that will help preserve the Bay as we know it, and all of the communities and livelihoods that it sustains. This is the blueprint for American leadership on climate. Bringing together innovation from government and the private sector, communities and organizations. Not just meeting targets for controlling climate change, but doing it in a way that’s open, that’s a good investment, that creates opportunities for American workers. The climate crisis we face is profound. The consequences of not meeting it would be cataclysmic. But if we lead by the power of our example – if we use our foreign policy not only to get other countries to commit to the changes necessary, but to make America their partner in implementing those changes – we can turn the greatest challenge in generations into the greatest opportunity for generations to come. Thanks for listening.

## Case

#### No environment impact and it’s self-correcting

Kareiva, 18

(Peter Kareiva & Valerie Carranza 18. Institute of the Environment and Sustainability, University of California, Los Angeles. 01/2018. “Existential Risk Due to Ecosystem Collapse: Nature Strikes Back.” Futures. CrossRef, doi:10.1016/j.futures.2018.01.001.)

The interesting question is whether any of the planetary thresholds other than CO2 could also portend existential risks. Here the answer is not clear. One boundary often mentioned as a concern for the fate of global civilization is biodiversity (Ehrlich & Ehrlich, 2012), with the proposed safety threshold being a loss of greater than .001% per year (Rockström et al., 2009). There is little evidence that this particular .001% annual loss is a threshold—and it is hard to imagine any data that would allow one to identify where the threshold was (Brook et al., 2013; Lenton & Williams, 2013). A better question is whether one can imagine any scenario by which the loss of too many species leads to the collapse of societies and environmental disasters, even though one cannot know the absolute number of extinctions that would be required to create this dystopia. While there are data that relate local reductions in species richness to altered ecosystem function, these results do not point to substantial existential risks. The data are small-scale experiments in which plant productivity, or nutrient retention is reduced as species number declines locally (Vellend, 2017), or are local observations of increased variability in fisheries yield when stock diversity is lost (Schindler et al., 2010). Those are not existential risks. To make the link even more tenuous, there is little evidence that biodiversity is even declining at local scales (Vellend et al 2017; Vellend et al., 2013). Total planetary biodiversity may be in decline, but local and regional biodiversity is often staying the same because species from elsewhere replace local losses, albeit homogenizing the world in the process. Although the majority of conservation scientists are likely to flinch at this conclusion, there is growing skepticism regarding the strength of evidence linking trends in biodiversity loss to an existential risk for humans (Maier, 2012; Vellend, 2014). Obviously if all biodiversity disappeared civilization would end—but no one is forecasting the loss of all species. It seems plausible that the loss of 90% of the world’s species could also be apocalyptic, but not one is predicting that degree of biodiversity loss either. Tragic, but plausible is the possibility our planet suffering a loss of as many as half of its species. If global biodiversity were halved, but at the same time locally the number of species stayed relatively stable, what would be the mechanism for an end-of-civilization or even end of human prosperity scenario? Extinctions and biodiversity loss are ethical and spiritual losses, but perhaps not an existential risk. What about the remaining eight planetary boundaries? Stratospheric ozone depletion is one—but thanks to the Montreal Protocol ozone depletion is being reversed (Hand, 2016). Disruptions of the nitrogen cycle and of the phosphorous cycle have also been proposed as representing potential planetary boundaries (one boundary for nitrogen and one boundary for phosphorous). There are compelling data linking excesses in these nutrients to environmental damage. For example, over-application of fertilizer in Midwestern USA has led to dead zones in the Gulf of Mexico. Similarly, excessive nitrogen has polluted groundwater in California to such an extent that it is unsuitable for drinking and some rural communities are forced to drink bottled water. However, these impacts are local. At the same time that there is too much N loading in the US, there is a need for more N in Africa as a way of increasing agricultural yields (Mueller et al., 2012). While the disruption of nitrogen and phosphorous cycles clearly perturb local ecosystems, end-of-the-world scenarios seem a bit far-fetched. Another hypothesized planetary boundary entails the conversion of natural habitats to agricultural land. The mechanism by which too much agricultural land could cause a crisis is unclear—unless it is because land conversion causes so much biodiversity loss that is species extinctions that are the proximate cause of an eco-catastrophe. Excessive chemical pollution and excessive atmospheric aerosol loading have each been suggested as planetary boundaries as well. In the case of these pollution boundaries, there are well-documented mechanisms by which surpassing some concentration of a pollutant inflicts severe human health hazards. There is abundant evidence linking chemical and aerosol pollution to higher mortality and lower reproductive success in humans, which in turn could cause a major die-off. It is perhaps appropriate then that when Hollywood envisions an unlivable world, it often invokes a story of humans poisoning themselves. That said, it is doubtful that we will poison ourselves towards extinction. Data show that as nations develop and increase their wealth, they tend to clean up their air and water and reduce environmental pollution (Flörke et al., 2013; Hao & Wang, 2005). In addition, as economies become more circular (see Mathews & Tan, 2016), environmental damage due to waste products is likely to decline. The key point is that the pollutants associated with the planetary boundaries are so widely recognized, and the consequences of local toxic events are so immediate, that it is reasonable to expect national governments to act before we suffer a planetary ecocatastrophe.

#### No food wars.

Vestby, 18

(Vestby, Ida Rudolfsen, and Halvard Buhaug; 5-18-18; Doctoral Researcher at the Peace Research Institute Oslo; doctoral researcher at the Department of Peace and Conflict Research at Uppsala University and PRIO; Research Professor at the Peace Research Institute Oslo (PRIO); Professor of Political Science at the Norwegian University of Science and Technology (NTNU); and Associate Editor of the Journal of Peace Research and Political Geography; “Does hunger cause conflict?” Prio, https://blogs.prio.org/ClimateAndConflict/2018/05/does-hunger-cause-conflict/)

It is perhaps surprising, then, that there is little scholarly merit in the notion that a short-term reduction in access to food increases the probability that conflict will break out. This is because to start or participate in violent conflict requires people to have both the means and the will. Most people on the brink of starvation are not in the position to resort to violence, whether against the government or other social groups. In fact, the urban middle classes tend to be the most likely to protest against rises in food prices, since they often have the best opportunities, the most energy, and the best skills to coordinate and participate in protests. Accordingly, there is a widespread misapprehension that social unrest in periods of high food prices relates primarily to food shortages. In reality, the sources of discontent are considerably more complex – linked to political structures, land ownership, corruption, the desire for democratic reforms and general economic problems – where the price of food is seen in the context of general increases in the cost of living. Research has shown that while the international media have a tendency to seek simple resource-related explanations – such as drought or famine – for conflicts in the Global South, debates in the local media are permeated by more complex political relationships.

#### Squo solves food insecurity – genetic modification sustainable

Pachapur et al., 20

(Preetika Kuknar, INRS, Université du Québec, Vinayak Laxman Pachapur, Department of Civil Engineering and Water Engineering, Université Laval, Department of Civil Engineering, Lassonde School of Engineering, York University, Satinder K. Brar, INRS, Université du Québec, Department of Civil Engineering, Lassonde School of Engineering, York University, Rosa Galvez, Centre de recherche industrielle du Québec, Yann Le Bihan, Department of Civil Engineering, Lassonde School of Engineering, York University, and Rao Y. Surampalli, Global Institute for Energy, Environment and Sustainability, “Food Security and Sustainability”, Sustainability: Fundamentals and Applications (2020): 357-374, https://onlinelibrary.wiley.com/doi/pdf/10.1002/9781119434016.ch17)\\JM

17.8 Genetically Modified Foods for Food Security The application of biotechnology using genetically modified (GM) organisms in the field of agriculture has resulted in sustainable productivity and developed strategies for improved farming (Dibden et al. 2013). The rapid global spread of GM crops increased from 2 million ha (in 1996) to 120 million hectares (in 2006), and presently around 100 million farmers grow GM crops across 25 developed and developing countries (Qaim 2010). The choice of GM crops differs among developing countries: insect‐resistant cotton is grown in Asia and Africa, with herbicide‐ and insect‐resistant soybean grown across Latin America (Qaim 2010). The impact of GM crops in India has been to deliver 89% of profit, with a 42% decrease in insecticide usage, contributing 90% of total cotton production, providing employment opportunities, supporting agricultural laborers’ income and boosting regional transport with inter‐state trading business with the USA (Qaim 2010). GM tomatoes gain the nutritional quality with ripening, can be harvested simultaneously and tolerate increased storage time. GM rice, also called “golden rice,” is rich in vitamin A, provides 80% of daily caloric uptake and is a staple food for half of the world’s population (Mathur 2018). GM seeds/food crops possess improved quality, extended shelf‐life, and are farmer, consumer and environmentally friendly. GM food crops deliver a potential solution to food security now and even for the future. GM seed/food technology companies promote food products claiming to be healthier, cheaper, stable, tastier and high quality with essential nutrients. The introduction of GM technology in developing countries will decrease the growth duration with higher yields, decrease the amount of fertilizers required, and allow plant breeding for new crop varieties, antibiotic resistance to drought conditions and elevated vitamin/nutrient quality (Azadi and Ho 2010). GM crops in developing countries will ensure a stable, sustainable food supply, increase production, improve livelihoods and enhance food quality (Dibden et al. 2013). The introduction of GM seeds/food in several countries still needs public acceptance for several reasons, such as public risk perceptions, varied responses, socio‐political attitudes, the methodologies adopted, risk involved, trust in institutions, public worry, acceptability and concerns over GM foods (Frewer et al. 2004). There are some disadvantages of GM foods, such as potential toxicity and allergenicity, unintentional gene transfer to non‐GM crops, synthesis of new toxins/viruses, limited access to patented GM seeds, the possibility of new as‐yet‐unrealized concerns and religious/cultural/ethical concerns (Azadi and Ho 2010). The food safety system has introduced different regulations, principles and guidelines for more transparency on the safety of GM crops for public acceptance. The food safety system has introduced regulatory frameworks, defined principles of risk analysis, elaborated safety assessment, and introduced guidelines for toxicity measurement, investigating potential adverse effects, as well as developing an animal testing and monitoring system for post‐marketing of food products from GM crops. The introduction of safety assessments on GM crops and food products in comparison with traditional counterparts has determined a high level of safety assurance for human food use (König et al. 2004; Qaim and Kouser 2013). The use of GM technology has reduced food insecurity by 25–40% among farmers, will help to solve the food security problem and is also an important element for sustainable food security across the world.

#### Zero risk of global food crisis or export collapse.

Latham 21 - (Jonathan R Latham, Doctor of Philosophy (PhD) Virology, Executive Director of The Bioscience Resource Project, Author of scientific papers in the fields of Virology, Ecology, Genetics, and Molecular Biology; 4-12-2021, Independent Science News | Food, Health and Agriculture Bioscience News, "Agriculture's Greatest Myth," doa: 6-28-2021) url: https://www.independentsciencenews.org/commentaries/agricultures-greatest-myth/

Critiquing the critical assumptions In a new peer-reviewed paper, The Myth of a Food Crisis, I have critiqued FAO’s GAPS – and by extension all similar food system models – at the level of these, often unstated, assumptions (Latham, 2021). The Myth of a Food Crisis identifies four assumptions in food system models that are especially problematic since they have major effects on the reliability of modeling predictions. In summary, these are: 1) That biofuels are driven by “demand”. As the paper shows, biofuels are incorporated into GAPS on the demand side of equations. However, biofuels derive from lobbying efforts. They exist to solve the problem of agricultural oversupply (Baines, 2015). Since biofuels contribute little or nothing to sustainability, land used for them is available to feed populations if needed. This potential availability (e.g. 40% of US corn is used for corn ethanol) makes it plainly wrong for GAPS to treat biofuels as an unavoidable demand on production. 2) That current agricultural production systems are optimized for productivity. As the paper also shows, agricultural systems are typically not optimised to maximise calories or nutrients. Usually, they optimise profits (or sometimes subsidies), with very different results. For this reason, practically all agricultural systems could produce many more nutrients per acre at no ecological cost if desired. 3) That crop “yield potentials” have been correctly estimated. Using the example of rice, the paper shows that some farmers, even under sub-optimal conditions, achieve yields far in excess of those considered possible by GAPS. Thus the yield ceilings assumed by GAPS are far too low for rice and probably other crops too. Therefore GAPS grossly underestimates agricultural potential. 4) That annual global food production is approximately equal to global food consumption. As the paper also shows, a significant proportion of annual global production ends up in storage where it degrades and is disposed of without ever being counted by GAPS. There is thus a very large accounting hole in GAPS. The specific ways in which these four assumptions are incorporated into GAPS and other models produces one of two effects. Each causes GAPS to either underestimate global food supply (now and in the future), or to overestimate global food demand (now and in the future). Thus GAPS and other models underestimate supply and exaggerate demand. The cumulative effect is dramatic. Using peer-reviewed data, the discrepancy between food availability estimated by GAPS and the underlying supply is calculated in the paper. Such calculations show that GAPS and other models omit approximately enough food annually to feed 12.5 billion persons. That is a lot of food, but it does perfectly explain why the models are so discrepant with policymakers’ and farmers’ consistent experiences of the food system. The consequences of this analysis are very significant on a number of fronts. There is no global shortage of food. Even under any plausible future population scenario or potential increases in wealth, the current global glut will not disappear due to elevated demand. Among the many implications of this glut is, other things being equal, global commodity prices will continue to decline. The potential caveat to this is climate chaos. Climate consequences are not factored into this analysis. However, for people who think that industrial agriculture is the solution to that problem, it is worth recalling that industrialised food systems are the leading emitter of carbon dioxide. Industrialising food production is therefore not the solution to climate change –­ it is the problem. Another significant implication of this analysis is to remove the justification for the (frequently suggested) adoption of special and sacrificial ‘sustainable intensification’ measures featuring intensive use of pesticides, GMOs, and gene edited organisms to boost food production (Wilson, 2021). What is needed to save rainforests and other habitats from agricultural expansion is instead to reduce the subsidies and incentives that are responsible for overproduction and unsustainable practices (Capellesso et al., 2016). In this way, harmful agricultural policies can be replaced by ones guided by criteria such as ecological sustainability and cultural appropriateness. A second implication stems from asking: if the models err on such elementary levels, why are critics largely absent? Thomas Hertel’s critique should have rung alarm bells. The short answer is that the philanthropic and academic sectors in agriculture and development are corrupt. The form this corruption takes is not illegality – rather that, with important exceptions, these sectors do not serve the public interest, but their own interests. A good example is the FAO, which created GAPS. The primary mandate of FAO is to enable food production – its motto is Fiat Panis – but without an actual or imminent food crisis there would hardly be a need for an FAO. Many philanthropic and academic institutions are equally conflicted. It is no accident that all the critics mentioned above are relative or complete outsiders. Too many participants in the food system depend on a crisis narrative. But the biggest factor of all in promotion of the crisis narrative is agribusiness. Agribusiness is the entity most threatened by its exposure. It is agribusiness that perpetuates the myth most actively and makes best use of it by endlessly championing itself as the only valid bulwark against starvation. It is agribusiness that most aggressively alleges that all other forms of agriculture are inadequate (Peekhaus, 2010). This Malthusian spectre is a good story, it’s had a tremendous run, but it’s just not true. By exposing it, we can free up agriculture to work for everyone.

#### Agricultural innovation is societal insurance against any existential threat.

Meyer ‘16 [Robinson; 2016; associate editor at The Atlantic, citing a report by the Global Challenges Foundation; The Atlantic; “Human Extinction Isn't That Unlikely,” <http://www.theatlantic.com/technology/archive/2016/04/a-human-extinction-isnt-that-unlikely/480444/>]

Nuclear war. Climate change. Pandemics that kill tens of millions.

These are the most viable threats to globally organized civilization. They’re the stuff of nightmares and blockbusters—but unlike sea monsters or zombie viruses, they’re real, part of the calculus that political leaders consider everyday. And according to a new report from the U.K.-based Global Challenges Foundation, they’re much more likely than we might think.

In its annual report on “global catastrophic risk,” the nonprofit debuted a startling statistic: Across the span of their lives, the average American is more than five times likelier to die during a human-extinction event than in a car crash.

Partly that’s because the average person will probably not die in an automobile accident. Every year, one in 9,395 people die in a crash; that translates to about a 0.01 percent chance per year. But that chance compounds over the course of a lifetime. At life-long scales, one in 120 Americans die in an accident.

The risk of human extinction due to climate change—or an accidental nuclear war—is much higher than that. The Stern Review, the U.K. government’s premier report on the economics of climate change, estimated a 0.1 percent risk of human extinction every year. That may sound low, but it also adds up when extrapolated to century-scale. The Global Challenges Foundation estimates a 9.5 percent chance of human extinction within the next hundred years.

And that number probably underestimates the risk of dying in any global cataclysm. The Stern Review, whose math suggests the 9.5-percent number, only calculated the danger of species-wide extinction. The Global Challenges Foundation’s report is concerned with all events that would wipe out more than 10 percent of Earth’s human population.

“We don’t expect any of the events that we describe to happen in any 10-year period. They might—but, on balance, they probably won’t,” Sebastian Farquhar, the director of the Global Priorities Project, told me. “But there’s lots of events that we think are unlikely that we still prepare for.”

For instance, most people demand working airbags in their cars and they strap in their seat-belts whenever they go for a drive, he said. We may know that the risk of an accident on any individual car ride is low, but we still believe that it makes sense to reduce possible harm.

So what kind of human-level extinction events are these? The report holds catastrophic climate change and nuclear war far above the rest, and for good reason. On the latter front, it cites multiple occasions when the world stood on the brink of atomic annihilation. While most of these occurred during the Cold War, another took place during the 1990s, the most peaceful decade in recent memory:

In 1995, Russian systems mistook a Norwegian weather rocket for a potential nuclear attack. Russian President Boris Yeltsin retrieved launch codes and had the nuclear suitcase open in front of him. Thankfully, Russian leaders decided the incident was a false alarm.

Climate change also poses its own risks. As I’ve written about before, serious veterans of climate science now suggest that global warming will spawn continent-sized superstorms by the end of the century. Farquhar said that even more conservative estimates can be alarming: UN-approved climate models estimate that the risk of six to ten degrees Celsius of warming exceeds 3 percent, even if the world tamps down carbon emissions at a fast pace. “On a more plausible emissions scenario, we’re looking at a 10-percent risk,” Farquhar said. Few climate adaption scenarios account for swings in global temperature this enormous.

Other risks won’t stem from technological hubris. Any year, there’s always some chance of a super-volcano erupting or an asteroid careening into the planet. Both would of course devastate the areas around ground zero—but they would also kick up dust into the atmosphere, blocking sunlight and sending global temperatures plunging. (Most climate scientists agree that the same phenomenon would follow any major nuclear exchange.)

Yet natural pandemics may pose the most serious risks of all. In fact, in the past two millennia, the only two events that experts can certify as global catastrophes of this scale were plagues. The Black Death of the 1340s felled more than 10 percent of the world population. Eight centuries prior, another epidemic of the Yersinia pestis bacterium—the “Great Plague of Justinian” in 541 and 542—killed between 25 and 33 million people, or between 13 and 17 percent of the global population at that time.

No event approached these totals in the 20th century. The twin wars did not come close: About 1 percent of the global population perished in the Great War, about 3 percent in World War II. Only the Spanish flu epidemic of the late 1910s, which killed between 2.5 and 5 percent of the world’s people, approached the medieval plagues. Farquhar said there’s some evidence that the First World War and Spanish influenza were the same catastrophic global event—but even then, the death toll only came to about 6 percent of humanity.

The report briefly explores other possible risks: a genetically engineered pandemic, geo-engineering gone awry, an all-seeing artificial intelligence. Unlike nuclear war or global warming, though, the report clarifies that these remain mostly notional threats, even as it cautions:

[N]early all of the most threatening global catastrophic risks were unforeseeable a few decades before they became apparent. Forty years before the discovery of the nuclear bomb, few could have predicted that nuclear weapons would come to be one of the leading global catastrophic risks. Immediately after the Second World War, few could have known that catastrophic climate change, biotechnology, and artificial intelligence would come to pose such a significant threat.

So what’s the societal version of an airbag and seatbelt? Farquhar conceded that many existential risks were best handled by policies catered to the specific issue, like reducing stockpiles of warheads or cutting greenhouse-gas emissions. But civilization could generally increase its resilience if it developed technology to rapidly accelerate food production. If technical society had the power to ramp-up less sunlight-dependent food sources, especially, there would be a “lower chance that a particulate winter [from a volcano or nuclear war] would have catastrophic consequences.”

#### No impact to disease

Barratt, 17

(Owen Cotton-Barratt 17, et al, PhD in Pure Mathematics, Oxford, Lecturer in Mathematics at Oxford, Research Associate at the Future of Humanity Institute, 2/3/2017, Existential Risk: Diplomacy and Governance, https://www.fhi.ox.ac.uk/wp-content/uploads/Existential-Risks-2017-01-23.pdf)

For most of human history, natural pandemics have posed the greatest risk of mass global fatalities.37 However, there are some reasons to believe that natural pandemics are very unlikely to cause human extinction. Analysis of the International Union for Conservation of Nature (IUCN) red list database has shown that of the 833 recorded plant and animal species extinctions known to have occurred since 1500, less than 4% (31 species) were ascribed to infectious disease.38 None of the mammals and amphibians on this list were globally dispersed, and other factors aside from infectious disease also contributed to their extinction. It therefore seems that our own species, which is very numerous, globally dispersed, and capable of a rational response to problems, is very unlikely to be killed off by a natural pandemic. One underlying explanation for this is that highly lethal pathogens can kill their hosts before they have a chance to spread, so there is a selective pressure for pathogens not to be highly lethal. Therefore, pathogens are likely to co-evolve with their hosts rather than kill all possible hosts.39

#### No impact to biodiversity---rebound and resilience.

Halstead ’19 [John; April 2019; Ph.D. from the University of Oxford, researcher at Founders Pledge, citing Dr. Peter Kareiva, a Ph.D. in ecology and evolutionary biology at Cornell University and Director of UCLA’s Institute of the Environment and Sustainability; Centre for the Study of Existential Risk, “Centre for the Study of Existential Risk Six Month Report: November 2018 - April 2019,” <https://forum.effectivealtruism.org/posts/zbZxisJRJBCdtYvh9/centre-for-the-study-of-existential-risk-six-month-report>]

[-]Halstead2y

49

Can you explain what the mechanism is whereby biodiversity loss creates existential risk? And if biodiversity loss is an existential risk, how big a risk is it? Should 80k be getting people to go into conservation science or not?

There are independent reasons to think that the risk is negligible. Firstly, according to wikipedia, during the Eocene period ~65m years ago, there were thousands fewer genera than today. We have made ~1% of species extinct, and we would have to continue at current rates of species extinctions for at least 200 years to return to Eocene levels of biodiversity. And yet, even though significantly warmer than today, the Eocene marked the dawn of thousands of new species. So, why would we expect the world 200 years hence to be inhospitable to humans if it wasn't inhospitable for all of the species emerging in the Eocene, who are/were significantly less numerous than humans and significantly less capable of a rational response to problems?

Secondly, as far as I am aware, evidence for pressure-induced non-linear ecosystem shifts is very limited. This is true for a range of ecosystems. Linear ecosystem damage seems to be the norm. If so, this leaves more scope for learning about the costs of our damage to ecosystems and correcting any damage we have done.

Thirdly, ecosystem services are overwhelmingly a function of the relations within local ecosystems, rather than of global trends in biodiversity. Upon discovering Hawaii, the Polynesians eliminated so many species that global decadal extinction rates would have been exceptional. This has next to no bearing on ecosystem services outside Hawaii. Humanity is an intelligent species and will be able to see if other regions are suffering from biodiversity loss and make adjustments accordingly. Why would all regions be so stupid as to ignore lessons from elsewhere? Also, is biodiversity actually decreasing in the rich world? I know forest cover is increasing in many places. Population is set to decline in many rich countries in the near future, and environmental impact per person is declining on many metrics.

I also find it surprising that you cite the Kareiva and Carranza paper in support of your claims, for this paper in fact directly contradicts them:

"The interesting question is whether any of the planetary thresholds other than CO2 could also portend existential risks. Here the answer is not clear. One boundary often mentioned as a concern for the fate of global civilization is biodiversity (Ehrlich & Ehrlich, 2012), with the proposed safety threshold being a loss of greater than 0.001% per year (Rockström et al., 2009). There is little evidence that this particular 0.001% annual loss is a threshold—and it is hard to imagine any data that would allow one to identify where the threshold was (Brook, Ellis, Perring, Mackay, & Blomqvist, 2013; Lenton & Williams, 2013). A better question is whether one can imagine any scenario by which the loss of too many species leads to the collapse of societies and environmental disasters, even though one cannot know the absolute number of extinctions that would be required to create this dystopia.

While there are data that relate local reductions in species richness to altered ecosystem function, these results do not point to substantial existential risks. The data are small-scale experiments in which plant productivity, or nutrient retention is reduced as species numbers decline locally (Vellend, 2017), or are local observations of increased variability in fisheries yield when stock diversity is lost (Schindler et al., 2010). Those are not existential risks. To make the link even more tenuous, there is little evidence that biodiversity is even declining at local scales (Vellend et al., 2013, Vellend et al., 2017). Total planetary biodiversity may be in decline, but local and regional biodiversity is often staying the same because species from elsewhere replace local losses, albeit homogenizing the world in the process. Although the majority of conservation scientists are likely to flinch at this conclusion, there is growing skepticism regarding the strength of evidence linking trends in biodiversity loss to an existential risk for humans (Maier, 2012; Vellend, 2014). Obviously if all biodiversity disappeared civilization would end—but no one is forecasting the loss of all species. It seems plausible that the loss of 90% of the world’s species could also be apocalyptic, but not one is predicting that degree of biodiversity loss either. Tragic, but plausible is the possibility of our planet suffering a loss of as many as half of its species. If global biodiversity were halved, but at the same time locally the number of species stayed relatively stable, what would be the mechanism for an end-of-civilization or even end of human prosperity scenario? Extinctions and biodiversity loss are ethical and spiritual losses, but perhaps not an existential risk."

#### Small businesses are strong and increasingly confident.

Magats ’21 [Jim; June 22; Senior Vice President of Omni Payments at PayPal, M.B.A. from Indiana University; PayPal Newsroom, “Small Business Confidence Index Finds SMBs More Optimistic and Focused on Digitization,” <https://newsroom.paypal-corp.com/2021-06-21-Small-Business-Confidence-Index-Finds-SMBs-More-Optimistic-and-Focused-on-Digitization>]

It’s been well over a year since the coronavirus began spreading around the globe, devastating economies and communities and impacting local businesses and populations. While many local economies are beginning to open back up, the impact of the pandemic continues to be felt, especially among the small business community.

As a partner to millions of small businesses around the world, PayPal understands the critical role they play in giving opportunity to the underserved, in developing communities and in driving local economic growth. To understand their needs and how we can work to move toward an inclusive recovery, PayPal partnered with Morning Consult for its second wave of the [PayPal Small Business Index by Morning Consult](https://publicpolicy.paypal-corp.com/sites/default/files/MC_PayPal_SMB_Confidence_Index_Report_Wave_2.pdf)1.

The survey of 500 U.S. small businesses 2, fielded in April 2021, found increased optimism of small business owners, as compared to the [inaugural index](https://newsroom.paypal-corp.com/2020-01-19-Introducing-the-PayPal-Morning-Consult-Small-Business-Confidence-Index) fielded in November 2020. The survey also found that even as economies begin to reopen, SMBs are looking to digitize even further, begin selling across channels, and invest in their businesses by upgrading their technology. What is now clear to SMBs, after seeing many [digital businesses grow during the pandemic](https://newsroom.paypal-corp.com/2020-10-29-new-paypal-study-finds-two-sources-of-resilience-and-growth-for-smbs-amidst-the-global-pandemic), is that digital payments and commerce are now table stakes, and that businesses need to enable these experiences to meet customer expectations.

The survey revealed three important themes:

1. There is optimism about the future of the economy. Small business confidence is growing across the board, but digital SMBs are more confident than their physical-only counterparts.

* The PayPal Small Business Confidence Index by Morning Consult has increased from 128 to 157 (+29 points)3 since the previous survey was fielded in November, showing that small businesses are increasingly optimistic about the future.
* In April 2021, there were 22% more small business owners who felt increased optimism about economic conditions impacting their businesses in the next year, as compared to November 2020.
* Growing optimism around the COVID vaccine has contributed to small business optimism for the future. Nearly three in five small business owners say the vaccine will improve economic conditions, and approximately two-thirds of currently closed SMBs say they will likely reopen in the next six months.

2. SMBs indicate that digital payments and ecommerce are now critical to their success.

* In both November 2020 and April 2021, small businesses that sell online-only or across channels scored higher on the confidence index compared to those who sell only in-person. SMBs that sell only in-person were as confident in April 2021 as their counterparts that sell online-only or across channels were in November 2020, during the height of the pandemic. It’s clear that digital commerce, and especially omnichannel commerce, is the future.
* While in-person commerce will likely increase moving forward, online selling will continue to be a critical channel for SMBs. All of the small business respondents reported a significant increase in online selling during the pandemic compared to prior to the pandemic. Additionally, they expect to conduct 43% of their business online when the pandemic ends, compared to only 37% prior to the pandemic.
* Interestingly, 31% of currently closed SMBs said they will change to operating entirely online if they reopen.
* SMBs are now 18% more likely to say they will invest in their businesses. Minority SMBs specifically have an interest in investing by upgrading technology. Additional changes SMBs plan to make include, improving their website, accepting more payments from apps, and conducting more business online.

#### Antitrust harms competition and growth---numerous economic studies.

Jamison ’20 [Mark; September 2; Nonresident Senior Fellow at the American Enterprise Institute, Professor of the Public Utility Research Center at the University of Florida’s Warrington College of Business, former member of the FCC transition team, Ph.D. in Economics from the University of Florida; American Enterprise Institute, “Debunking three common antitrust myths,” <https://www.aei.org/technology-and-innovation/debunking-three-common-antitrust-myths/>]

Sometimes antitrust seems like an evidence-free zone. As with any topic, some writers on antitrust are happy to announce their opinions without explanation or evidence. More troubling are those who support their opinions with arguments that are known to be flawed. These unsupported arguments take the forms of myths that, if repeated enough, become part of antitrust folklore. Here are three examples of such myths.

Myth 1: Increased regulation would limit market power.

Reality: More often than not, regulation protects incumbents and harms consumers.

Belief in this myth has two steps. The first step is to falsely equate market power with business size. Economist Franklin Fisher [explained](http://economics.mit.edu/files/1383) in 1979 that this is false, but it is still a prominent belief held by [journalists](https://www.axios.com/the-growing-antitrust-concerns-about-u-s-tech-giants-2433870013.html?utm_medium=linkshare&utm_campaign=organic), [think tank experts](https://www.brookings.edu/blog/techtank/2020/07/31/big-tech-and-antitrust-pay-attention-to-the-math-behind-the-curtain/), [academics](https://www.foreignaffairs.com/articles/2020-02-10/too-big-prevail), and members of [Congress](https://www.rpc.senate.gov/policy-papers/big-tech-faces-antitrust-scrutiny).

The second step is to falsely believe that government interventions would result in smaller companies. In his book “A Conflict of Visions: Ideological Origins of Political Struggles,” Thomas Sowell explained that governments are largely unable to directly create their desired results. And, as Jeff Eisenach and Kevin Caves showed in a [2012 paper](https://www.aei.org/wp-content/uploads/2012/09/-eisenach-cato-phone-deregulation-paper_09341082848.pdf?x91208), deregulation in telecommunications resulted in lower prices, not higher, implying that deregulation decreased market power.

Myth 2: Lax antitrust enforcement has resulted in increased market power.

Reality: Regulation tilts markets toward large firms.

This myth results partly from ideology, bias, and misspecified research. I have written about the ideology and bias issues in the past ([here](https://www.aei.org/technology-and-innovation/big-tech-and-the-backwards-logic-of-the-neo-brandeisians/) and [here](https://www.aei.org/technology-and-innovation/proponents-of-hipster-antitrust-fail-to-understand-economic-history-and-business-realities/)). Regarding the research, a favorable summary can be found [here](https://econfip.org/policy-brief/confronting-rising-market-power/).

But the research has at least two misspecifications: It largely measures business size, not market power, and it omits the effects of regulation. The figure below shows how these mistakes matter. The blue line shows the growth of regulations in the US since 1998, the first year that these regulation data were available. The red line shows large firms’ share of business establishments. This is almost a perfect correlation, but the research trying to establish that market power has grown in the US omits anything about the rise of regulation.

As I wrote in a recent [bl](https://www.aei.org/technology-and-innovation/breaking-up-big-tech-will-not-help-the-us-innovate-or-compete-with-china/)[o](https://www.aei.org/technology-and-innovation/breaking-up-big-tech-will-not-help-the-us-innovate-or-compete-with-china/)[g](https://www.aei.org/technology-and-innovation/breaking-up-big-tech-will-not-help-the-us-innovate-or-compete-with-china/) post:

More regulation results in industries having larger firms, not smaller ones, and it also lowers labor productivity. This has been confirmed in several economic studies (see examples [here](https://www.jstor.org/stable/pdf/2555465.pdf), [here](https://www.aeaweb.org/articles?id=10.1257/aer.20130232), and [here](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3169332)). Regulations raise the cost of a firm being in business, which means firms need to be larger to cover those fixed costs.

Myth 3: People should follow their gut instincts on antitrust.

Reality: Growing complexity means more careful analyses are needed.

This myth shows up in appeals to [lived experiences](https://promarket.org/2020/08/27/we-are-more-than-our-amazon-prime-accounts/?mc_cid=2608a684c8&mc_eid=3e3e4546cf) and to [phobias](https://www.aei.org/technology-and-innovation/three-fears-hamper-tech-progress/). The lived experience argument relies on [availability bias](https://www.behavioraleconomics.com/resources/mini-encyclopedia-of-be/availability-heuristic/), [illusion of truth](http://www2.psych.utoronto.ca/users/hasher/PDF/Frequency%20and%20the%20conference%20Hasher%20et%20al%201977.pdf), and other cognitive biases that lead people to draw conclusions that are unsupportable with careful analyses. This reliance on people’s biases explains why the practitioners of this approach rely heavily on stories, which are easy to slant.

# 2NC

## CP

#### Second, the perm tanks solvency—ruins enforcement and gets struck down

Weiser, 20

(Philip J., Colorado Attorney General; Hatfield Professor of Law and Telecommunications, and Executive Director and Founder of the Silicon Flatirons Center for Law, Technology, and Entrepreneurship at the University of Colorado, "The Enduring Promise of Antitrust." Loyola University Chicago Law Journal, vol. 52, no. 1, Fall 2020, p. 1-14. HeinOnline.)\\JM

Unfortunately, federal antitrust authorities don't always show respect for state antitrust enforcement. In late 2019, for example, the Department of Justice (DOJ) filed a brief taking an unfortunate and unjustified position in the Sprint/T-Mobile merger.1 3 In particular, the DOJ asserted in its brief that the states' "[quasi-sovereign] role does not permit states to override the sovereign interests of the United States." 14 In essence, the DOJ argued that the DOJ itself is the supreme arbiter of antitrust law. On the DOJ's view, once it takes a position on a matter, the states are foreclosed from any enforcement that would be contrary to the selected path of the federal agency.' 5 That view runs contrary to what Congress intended in framing broad enforcement of the antitrust laws that recognizes the critical role of the states. 16 Because this position would upend forty-five years of antitrust practice and jurisprudence, the litigating states properly responded that the "[s]tates are independent enforcers of the antitrust laws, and it is the role of the Court-not any federal agency-to decide the lawfulness of the merger."17 The DOJ's flawed argument in the T-Mobile case was based on the dissenting opinion in Georgia v. Pennsylvania Railroad Co. 18 Notably, the majority in that case held that states are authorized to seek injunctive relief under the antitrust laws. Moreover, the DOJ's suggestion-that the DOJ and FCC (Federal Communications Commission) merger review in the T-Mobile case is exclusive and preclusive-contradicts Congress' empowerment of state AGs and is a dangerous idea as well. Under the DOJ's theory, if a federal antitrust agency approves a merger, antitrust enforcement against the merger would be precluded as long as the merger was subject to review and approval by the federal agency. That would diminish antitrust enforcement and would, in effect, permit the federal antitrust agencies to extinguish the rights of states and private parties to enforce and seek remedies for harm caused by violations of antitrust laws. The DOJ's rationale in the T-Mobile case would also justify exempting transactions from antitrust review because a federal regulatory agency approved such a matter. Notably, the DOJ invoked the FCC's regulatory action in that case as a basis for stripping states of authority to challenge the merger. This is a dangerous claim and goes flatly against federal merger law, which has consistently refused to reject antitrust claims for non-antitrust reasons since the Supreme Court's 1963 decision in Philadelphia National Bank.19

#### States solve the whole aff—the past 30 years prove the states can farther than the feds and that there’s no preemption

Arteaga, 21

(Juan A Arteaga is a partner in Crowell & Moring’s antitrust and white-collar groups. His practice focuses primarily on advising companies, boards of directors, and executives in a broad range of civil and criminal antitrust matters, including litigation, merger reviews, governmental and internal investigations, and counselling regarding various business practices. Between 2013 and 2017, Mr Arteaga was a senior official in the Antitrust Division of the US Department of Justice. During this period, he served as the Deputy Assistant Attorney General for Civil Enforcement, where he worked on and oversaw numerous civil merger and non-merger investigations and litigations involving various industries. Mr Arteaga also served as the chief of staff and senior counsel to the Assistant Attorney General for the Antitrust Division. While at the Antitrust Division, Mr Arteaga worked on various high-profile merger litigations, including the DOJ’s challenges to the Aetna/Humana, US Airways/American Airlines, Halliburton/Baker Hughes, Electrolux/General Electric, Energy Solutions/Waster Control Specialists and National Cinemedia/Screenvision transactions. Mr Arteaga regularly represents Fortune 500 companies and financial institutions in connection with complex transactions and high-stakes litigation and government investigations. Mr Arteaga has been recognised as a leading practitioner by numerous professional publications and bar associations, including the American Bar Association, New York City Bar Association, Hispanic National Bar Association, New York Law Journal, Law360 and the Ethisphere Institute. He has also received numerous awards for his pro bono work and civic service. & Jordan Ludwig is a counsel in the antitrust group in Crowell & Moring’s Los Angeles office, where he focuses on antitrust litigation, civil and criminal antitrust investigations, and appeals. Jordan has extensive experience litigating high-stakes cases in the state and federal courts under the Sherman Act, Cartwright Act, the California Unfair Competition Law, and the California Unfair Practices Act. As a dynamic litigator, Jordan regularly represents both plaintiffs and defendants across a diverse array of industries, including healthcare, telecommunications, hospitality, financial services, and consumer products. "The Role of US State Antitrust Enforcement," Jan 28 2021 <https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement> NL)

In the United States, competition laws have been implemented and enforced through a dual system where the state and federal governments play distinct, yet complementary, roles in regulating the competitive process. While the Department of Justice (DOJ) Antitrust Division and Federal Trade Commission (FTC) are widely viewed as the stewards of US antitrust laws, state attorneys general have long played an important, albeit varying, role within the United States’ antitrust enforcement regime. This has been especially true during the past 30 years because state attorneys general have become much more effective at coordinating their antitrust enforcement efforts to ensure that they have a meaningful seat at the table in any actions brought jointly with their federal counterparts or are able to bring their own actions when the DOJ and FTC decide not to do so. Prior to the enactment of the first federal antitrust law – the Sherman Act – in 1890, state antitrust enforcement was quite robust in the United States because at least 26 states had already enacted some form of antitrust prohibition.[[2]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-126) In addition, state enforcers had often used general corporation law and common law restraint of trade principles to regulate anticompetitive business practices and transactions.[[3]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-125) This well-established state antitrust enforcement infrastructure – coupled with the fact that the Antitrust Division and FTC had only recently been created – permitted state attorneys general to continue playing a leading enforcement role for the first 30 years after the Sherman Act’s passage.[[4]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-124) Indeed, state attorneys general successfully prosecuted a number of the most consequential antitrust enforcement actions during this period.[[5]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-123) In the early 1920s, however, state antitrust enforcers began playing a less prominent role because ‘the national dimension of the most important trusts, . . . as well as their ability to restructure in order to evade problematic state laws’, made clear that the federal government needed to step forward in order to adequately protect consumers and the competitive process.[[6]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-122) As a result, the DOJ and FTC – whose national jurisdiction and greater resources enabled them to tackle the most pressing competition issues of the time – displaced state attorneys general as the primary source of government antitrust enforcement within the United States.[[7]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-121) This largely remained true until the mid-1970s when Congress, in response to the DOJ and FTC’s perceived inactivity, passed two laws that expanded the authority of state attorneys general to enforce the federal antitrust laws and provided them with financial resources to do so.[[8]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-120) In 1976, Congress passed the Hart-Scott-Rodino Antitrust Improvement Act, which, among other things, authorised state attorneys general to bring parens patriae suits (i.e., legal actions brought on behalf of natural persons residing within their states) seeking monetary (treble damages) and injunctive relief for Sherman Act violations.[[9]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-119) Congress also passed the Crime Control Act of 1976, which, among other things, provided state attorneys general with tens of millions in federal grants as ‘seed money’ for the creation of antitrust bureaus within their offices.[[10]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-118) These laws had their intended effect of reinvigorating state antitrust enforcement. During the 1980s, for example, state attorneys general once again emerged as vigorous antitrust enforcers, especially with respect to the prosecution of resale price maintenance practices and other vertical restraints.[[11]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-117) The rise in the level and prominence of state antitrust enforcement during this period was largely due to a perceived enforcement void at the federal level, where the DOJ and FTC had mostly limited their focus to ‘prohibiting cartels and large horizontal mergers’.[[12]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-116) No longer content with ceding antitrust enforcement to federal enforcers, state attorneys general expanded their antitrust dockets from prosecuting purely ‘local matters, such as bid-rigging on state contracts’, to actively investigating and litigating matters with multistate and national implications.[[13]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-115) To help ensure that they had a larger seat at the antitrust enforcement table, state attorneys general also increased the coordination of their enforcement efforts and competition advocacy through organisations such as the National Association of Attorneys General (NAAG), which created a Multistate Antitrust Task Force and issued state Vertical Restraints and Horizontal Merger Guidelines during this period.[[14]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-114) Since the reawakening of state antitrust enforcement nearly 30 years ago, state attorneys general have continued to play an important role in the enforcement of both state and federal antitrust laws. During periods of lax federal antitrust enforcement, state attorneys general have often ramped up their enforcement activity in order to protect consumers from anticompetitive transactions and business practices.[[15]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-113) During periods of vigorous federal antitrust enforcement, they have often served as strong partners for the DOJ and FTC by, among other things, offering valuable insights about competitive dynamics in local markets, assisting with obtaining information from key market participants (including state governmental entities that are direct purchasers of goods and services), and helping develop and implement litigation strategies for cases being tried before federal judges presiding in their states.[[16]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-112) Since January 2017, state attorneys general have increasingly played a leading and independent antitrust enforcement role. State antitrust enforcers have significantly increased their enforcement activity and willingness to act separately from their federal counterparts because many of them believe that there has been ‘under-enforcement’ by the DOJ and FTC.[[17]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-111) State antitrust enforcers have also been able to enhance their influence over key competition policy issues and the antitrust enforcement agenda within the United States because there appears to have been a significant decline in the coordination and relationship between the DOJ and FTC.[[18]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-110) In once again flexing their enforcement muscle, state attorneys general have shown a willingness to publicly disagree with the DOJ and FTC on both policy and enforcement decisions, and have also sought to pressure their federal counterparts into more aggressively policing certain industries. Recent examples of the increased independence and assertiveness of state antitrust enforcers include: •The DOJ, FTC and several state attorneys general have been actively investigating and prosecuting ‘no-poach’ agreements (i.e., where competitors for employees agree not to recruit or hire each other’s employees) in recent years. However, the DOJ and state attorneys general have taken directly opposing positions in private litigation challenging the legality of ‘no-poach’ clauses in corporate franchise agreements. The DOJ has argued that courts should review these clauses under the rule of reason whereas various state attorneys general have argued that these clauses should be deemed per se unlawful.[[24]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-104) In their joint investigation into the T-Mobile/Sprint merger, nearly 20 state attorneys general sued to block the transaction in September 2019 even though the DOJ, along with seven state attorneys general, approved the deal after securing certain structural and behavioural remedies.[[19]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-109) After the DOJ announced its proposed settlement with the companies, the Attorney General for New York, who led the states’ challenge to the merger, issued a press release dismissing the adequacy of the remedies negotiated by the DOJ: ‘The promises made by [the divestiture buyer] and [the merging companies] in this deal are the kinds of promises only robust competition can guarantee. We have serious concerns that cobbling together this new fourth mobile [phone] player, with the government picking winners and losers, will not address the merger’s harm to consumers, workers, and innovation.’[[20]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-108) Thereafter, the DOJ opposed the states’ enforcement action by, among other things, moving to disqualify the private counsel hired by the states to represent them[[21]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-107) and filing submissions that argued against the states’ requested injunction.[[22]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-106) Ultimately, the state attorneys general were unsuccessful in their bid to block the deal.[[23]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-105) None of the more than 20 state attorney general offices that actively investigated the AT&T/Time Warner merger joined the DOJ’s unsuccessful challenge to the transaction despite the DOJ’s concerted effort to secure their support.[[25]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-103) In fact, nine state attorneys general filed an amicus brief opposing the DOJ’s appeal of the trial court’s decision.[[26]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-102) After the FTC declined to seek any Colorado-related remedies in connection with Optum’s acquisition of DaVita Medical Group, the Attorney General for Colorado required the merging companies to lift the exclusivity provisions in contracts with certain healthcare providers and to extend their existing contracts with certain health insurers. In announcing this settlement, the Colorado Attorney General stated: ‘I recognize that this case marks an important step in state antitrust enforcement . . . . I am committed to protecting all Coloradans from anticompetitive consolidation and practices, and will do so whether or not the federal government acts to protect Coloradans.’[[27]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-101) After voicing displeasure with federal antitrust enforcement in the technology sector, numerous state attorneys general launched their independent investigations into ‘Big Tech’ companies even though the DOJ and FTC have ongoing investigations into these companies.[[28]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-100) Given that companies will increasingly have to engage with state attorneys general in a meaningful manner with respect to antitrust matters, this chapter discusses key issues related to state antitrust enforcement in the United States. Specifically, this chapter discusses: the federal and state antitrust laws under which state enforcers operate; the processes through which state enforcers coordinate with each other and their federal counterparts; the opportunity for coordination and conflict between state enforcers and private counsel during litigation; strategic and practical considerations when engaging with state attorneys general; and certain noteworthy enforcement actions that state enforcers have recently prosecuted. Statutory regime governing US state antitrust enforcement Civil enforcement of federal antitrust laws Enforcement actions on behalf of state governmental entities Under the federal antitrust laws, state attorneys general have the express authority to bring civil actions on behalf of their state, municipalities, and governmental entities for harm suffered when directly purchasing goods or services.[[29]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-099) In bringing such actions, state attorneys general can seek monetary (treble damages) and injunctive relief, as well as their costs and reasonable attorney’s fees.[[30]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-098) In actions seeking monetary relief, state attorneys general typically allege that the state plaintiffs were forced to pay higher prices by an unlawful horizontal conspiracy, such as a price-fixing or bid-rigging scheme, and seek to recover the overcharges.[[31]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-097) In some cases, state attorneys general have sought to recover damages arising out of anticompetitive unilateral conduct, such as overcharges paid by state governmental entities due to a defendant’s actual or attempted monopolisation of a specific market.[[32]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-096) In seeking injunctive relief, state attorneys general often argue that such relief is proper because the business practice or transaction in question – in addition to harming the state plaintiffs – has or will cause injury to the state’s general economy.[[33]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-095) While general harm to a state’s economy can serve as a basis for injunctive relief, state attorneys cannot base their request for damages on such harm.[[34]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-094) Parens patriae enforcement actions A well-settled principle in the United States’ legal system is that ‘the States have a quasi sovereign interest in protecting their citizens from ongoing economic harm’.[[35]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-093) Consequently, the federal antitrust laws expressly authorise state attorneys general to file parens patriae actions in federal court that seek to redress the harm suffered by their citizens due to federal antitrust violations.[[36]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-092) In providing state attorneys general with parens patriae authority, the federal antitrust laws permit state antitrust enforcers to seek monetary (treble damages) and injunctive relief, as well as their costs and reasonable attorney’s fees.[[37]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-091) State attorneys general have been empowered to seek such broad and substantial relief on behalf of their citizens to allow them ‘to deter further economic harm and to obtain relief for the injury inflicted on their economies and their citizens’.[[38]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-090) In exercising their parens patriae authority, state attorneys general have often sought to protect their citizens and state economies from the harm caused by anticompetitive business practices. For example, in the e-Books Litigation, 33 state attorneys general alleged that Apple, Inc and various book publishers unlawfully conspired to fix the prices of electronic books, which resulted in their citizens paying higher prices and harm to their states’ general economies.[[39]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-089) Ultimately, these state attorneys general, working alongside private class counsel, secured settlements from the defendants that provided nearly US$600 million in direct refunds to their citizens.[[40]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-088) In a pending lawsuit brought against various manufacturers of generic pharmaceuticals, 44 state attorneys general have alleged that the defendants unlawfully conspired to fix the prices for numerous generic drugs, which forced their states and citizens to pay billions of dollars in overcharges, as well as significantly harmed their states’ general economies.[[41]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-087) State attorneys general have also invoked their parens patriae authority to protect their citizens and state economies from the harm caused by anticompetitive transactions. For instance, in their unsuccessful challenge to T-Mobile’s acquisition of Sprint, various state attorneys general alleged that the transaction would result in their residents paying higher prices for lower quality mobile phone services as well as harm to their states’ general economies.[[42]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-086) Likewise, the state attorneys general that joined the DOJ’s successful challenges to the proposed Anthem/Cigna and Aetna/Humana mergers alleged that these mergers would have harmed their citizens and the general economies of their states by reducing the number of large health insurance providers from five to three.[[43]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-085) There are, however, important limitations on the parens patriae authority conferred to state attorneys general under the federal antitrust laws. For instance, the monetary relief sought by state attorneys general must: (1) arise out of a Sherman Act violation;[[44]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-084) (2) have been incurred by natural persons residing in their states (i.e., the losses suffered by business organisations cannot be included in the alleged damages);[[45]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-083) (3) exclude harm suffered by indirect purchasers of the goods and/or services in question;[[46]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-082) (4) avoid the risk of multiple recoveries by excluding amounts previously awarded for the same injuries;[[47]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-081) and (5) arise out of actual financial losses rather than general harm to their state’s economy.[[48]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-080) Moreover, state attorneys general must provide their residents with adequate notice of the lawsuit and a meaningful opportunity to opt out of the litigation.[[49]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-079) In seeking to prove the monetary harm suffered by their citizens, state attorneys general can employ many of the same methods utilised by private plaintiffs. In price-fixing cases, for example, state attorneys general can prove the claimed aggregate damages by utilising ‘statistical or sampling methods’, ‘comput[ing] [the] illegal overcharges’, or relying on any other methodology deemed ‘reasonable’ by the court.[[50]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-078) In addition, a number of state antitrust laws authorise their state attorney general to hire private lawyers to handle parens patriae actions, which was done by the state attorneys general who challenged the T-Mobile/Sprint merger.[[51]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-077) Civil enforcement of state antitrust laws Most states have enacted state antitrust laws that are comparable to Sections 1 and 2 of the Sherman Act.[[52]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-076) In addition, some states have passed antitrust laws that are similar to Sections 3 and 7 of the Clayton Act and the Robinson-Patman Act.[[53]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-075) These state antitrust laws typically contain provisions expressly requiring that ‘they be construed in conformity with comparable [f]ederal antitrust statutes’.[[54]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-074) Some states may have statutes that go beyond the scope of the federal antitrust statutes. For example, California recently passed a statute that would deem certain ‘reverse-payment settlements’ to be presumptively anticompetitive.[[55]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-073) State antitrust statutes typically provide state attorneys general with broad authority to investigate possible violations, including the power to ‘issue civil investigative demands compelling oral testimony, the production of documents, and responses to written interrogatories to individuals and corporations’.[[56]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-072) Like the federal antitrust laws, most state antitrust laws authorise state attorneys general to file civil lawsuits on behalf of their states and state governmental entities whenever a violation has caused them to suffer harm in their capacity as direct purchasers of goods or services, as well as parens patriae actions on behalf of their citizens.[[57]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-071) In bringing enforcement actions under state antitrust laws, state antitrust enforcers typically have the authority to seek a broad range of relief, including treble damages, disgorgement of unlawful profits, injunctions, and attorney’s fees and costs.[[58]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-070) In some states, antitrust enforcers can also seek to have a contract declared void; suspend a violator’s ability to be awarded state contracts for a certain period; rescind an out-of-state company’s ability to do business within the state; and terminate an in-state company’s corporate charter.[[59]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-069) Moreover, state attorneys general can often seek relief on behalf of indirect purchasers when exercising their state law parens patriae authority. This is an important distinction between the parens patriae authority that state attorneys general enjoy under federal and state antitrust laws. The United States Supreme Court’s decision in Illinois Brick Co. v. Illinois precludes state attorneys general from seeking damages on behalf of indirect purchasers in parens patriae actions brought under the federal antitrust laws.[[60]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-068) In direct response to this decision, nearly 25 states and the District of Columbia have passed ‘Illinois Brick repealer’ laws that expressly authorise state attorneys general to recover damages on behalf of indirect purchasers that were harmed by state law antitrust violations.[[61]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-067) Notably, the United States Supreme Court has rejected constitutional challenges to these laws on the bases that states are free to permit indirect purchasers to recover damages given that (1) Congress has not passed legislation that preempts such state laws

and (2) allowing indirect purchaser recovery under state law does not frustrate the legislative purpose of the federal antitrust laws.[[62]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-066) The states that have passed Illinois Brick repealer laws include California, New York and Illinois.[[63]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-065) Criminal enforcement of state and federal antitrust laws While many states have criminal penalties for state law antitrust violations, ‘[f]ew state attorneys general’s offices have significant experience prosecuting criminal antitrust violations.’[[64]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-064) Indeed, most state criminal prosecutions for antitrust violations have involved local bid-rigging schemes.[[65]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-063) Coordination in multistate investigations and litigation Coordination among state antitrust enforcers State attorneys general often coordinate their investigation and prosecution of antitrust matters with their counterparts in other states.[[66]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-062) To help ensure that these coordinated efforts are conducted in an efficient and effective manner, the NAAG has created an Antitrust Committee, which ‘is responsible for all matters relating to antitrust policy’.[[67]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-061) This committee is comprised of 12 state attorneys general[[68]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-060) and is responsible for promoting effective state antitrust enforcement by developing the NAAG’s antitrust policy positions and by facilitating communications among state enforcers regarding investigations, litigation, legislative matters and competition advocacy initiatives, among other things.[[69]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-059) In 1983, the NAAG established a Multistate Antitrust Task Force that is ‘comprised of state staff attorneys responsible for antitrust enforcement in their states’.[[70]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-058) This task force ‘recommends policy and other matters for consideration by the Antitrust Committee, organizes training seminars and conferences, and coordinates multistate investigations and litigation’.[[71]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-057) The task force is chaired by a person appointed by the head of the NAAG’s Antitrust Committee[[72]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-056) and has a representative from each NAAG member state.[[73]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-055) The chair of the task force serves as ‘the principal spokesperson for the states on antitrust enforcement’.[[74]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-054) The NAAG’s Multistate Antitrust Task Force does not handle actual investigations or litigation. Instead, such coordination usually occurs through working groups established by the states involved in an investigation or litigation. In most multistate investigations, the working group will designate a state responsible for leading the investigation. The lead state is often a state that has the most relevant experience and can dedicate the appropriate level of resources to the investigation, and has a sufficient interest in ensuring that the investigation is handled in an effective and efficient manner (i.e., the transaction or business practice in question could potentially impact a significant number of consumers or commerce within its state). (If an investigation is sufficiently large or complex, such as a mega-merger involving numerous markets, the states may create an executive committee that oversees the working group as well as designate multiple lead states.) In conducting the investigation, the working group will often have a participating state issue information requests under its authorising state laws and thereafter obtain waivers from the respondent that permit the state to share the information with the other participating states.[[75]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-053) As the investigation progresses, the lead state will typically provide the working group with oral and written status reports detailing the work that has been completed, summarising the factual record that has been developed, identifying any key factual and legal issues, and setting forth proposed next steps. Once the working group has completed its fact-gathering, the lead state will prepare a recommendation indicating whether an enforcement action should be brought and, if so, whether it would be appropriate to enter a settlement. This recommendation is typically shared with the working group first and then with any other interested states. If the lead state recommends that a contested enforcement action be filed, such a recommendation will often be accompanied with briefing material setting forth the legal and factual basis for the recommendation and a draft complaint. After reviewing this material, each state makes an independent determination on whether to join the enforcement action. If more than one state decides to join the enforcement action, the participating states will often file a single complaint in federal court that alleges both federal antitrust causes of action and pendent state law claims. In most cases, the complaint will invoke the participating states’ federal and state law parens patriae authority. Once the decision to file a contested enforcement action has been made, the participating states will often create a litigation working group that coordinates and handles their day-to-day litigation tasks, such as pre-trial motion practice, fact and expert discovery, and witness preparation. In addition, the participating states typically create committees that help oversee the litigation and provide input on important strategic decisions and policy-related issues. The most common committees established in multistate enforcement actions include an executive committee, a discovery committee, an expert committee and a settlement committee. To help cover the cost of prosecuting contested enforcement actions, the participating states typically enter into cost-sharing agreements. These cost-sharing agreements usually provide that common litigation expenses, such as expert and vendor fees, shall be apportioned based on the participating states’ population, thereby requiring larger states to cover a larger portion of the costs. As a result, larger states, such as New York and California, have recently begun advocating for the adoption of a hybrid cost-sharing model that determines each state’s contribution based on a pro rata formula and population figures. In certain instances, the cost-sharing agreements will also specify how any settlement or judgment shall be allocated among the participating states once any common litigation expenses have been paid. In addition to cost-sharing arrangements, state antitrust enforcers sometimes seek to fund enforcement actions through grants from the NAAG’s ‘milk fund’, which was established in 1989, and helps cover expert fees in antitrust investigations and litigation. This fund was set up using portions of the settlements that were secured in a series of bid-rigging cases involving school milk contracts in New York.[[76]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-052) Over the years, the NAAG has maintained the ‘milk fund’ by requiring the repayment of grants provided to enforcement actions that result in a settlement or judgment and by obtaining contributions from recoveries obtained in other antitrust enforcement actions.[[77]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-051) More recently, state attorneys general have also sought to help finance multistate antitrust investigations and enforcement actions through the NAAG’s ‘Volkswagen fund’, which was established in 2017 following settlements that state attorneys general reached with Volkswagen for emissions standards violations.[[78]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-050) Coordination among state and federal enforcers Cooperation in civil matters The level and nature of coordination between state and federal antitrust enforcers can vary based on whether their enforcement philosophies and objectives are aligned. For instance, the current level of coordination between the DOJ and state attorneys general appears to be significantly lower than in recent history as reflected by the conflicting enforcement decisions reached in multiple high-profile investigations and certain new restrictions that the DOJ has implemented with respect to the sharing of investigative material with state attorneys general. Likewise, the collaboration between state and federal antitrust enforcers can vary based on the particular circumstances of an investigation, such as the subject matter of the investigation and the resources and past investigative experience of the state attorneys general involved in the investigation. For instance, the FTC and state attorneys general have a long history of working hand-in-hand on investigations and litigation related to hospital mergers given that such transactions have particularly local impacts.[[79]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-049) As a general matter, however, state and federal antitrust enforcers (especially their career staffs) seek to maximise their coordination when conducting parallel investigations because they have long recognised that ‘[e]ffective cooperation between [them] benefits the public through the efficient use of antitrust enforcement resources’ while ‘promot[ing] consistent enforcement [decisions]’ and ‘minimiz[inig] the burden of duplicative investigations’.[[80]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-048) While state and federal enforcers have most often coordinated on merger investigations, they have a strong track record of working closely on civil non-merger investigations.[[81]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-047) During state-federal investigations, the DOJ or FTC typically take the lead because they have greater resources (including large teams of lawyers and economists), significant expertise in the relevant industries and oftentimes the business operations of the companies being investigated, and extensive experience conducting large and complex investigations. If an investigation involves numerous states, the state attorneys general typically establish an executive committee to coordinate their work and serve as the point of contact for the DOJ or FTC’s investigative team. During the investigation, the DOJ or FTC’s investigative team will provide the participating state attorney general offices with regular updates on the status of the investigation and any key issues. At the conclusion of the investigation, the DOJ or FTC’s investigative team will advise the state attorneys general whether it believes the facts and law support the filing of an enforcement action and, if so, whether a settlement should be entered with the companies being investigated. Each state participating in the investigation makes an independent determination on whether to agree with the DOJ or FTC’s conclusions. In most instances, the state attorneys general reach the same enforcement decision as the DOJ or FTC. However, there have been instances where the state attorneys general reached a very different enforcement decision as shown by the recent AT&T/Time Warner and T-Mobile/Sprint merger investigations. If state and federal antitrust enforcers file a contested enforcement action, the DOJ or FTC will typically take the lead in litigating and trying the case. However, the state attorneys general will continue to play an important and substantive role, including assisting with pre-trial submissions, offensive and defensive depositions, expert reports, and trial witness preparation.[[82]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-046) Coordination between state enforcers and private counsel In general, there often is an overlap between the victims of antitrust violations that state attorneys general seek to represent when suing for damages in their parens patriae capacity and those that private class action counsel seek to represent. This overlap creates the opportunity for close coordination as well as direct conflict. On the one hand, this overlap in ‘clients’ can lead to significant conflict because state antitrust enforcers and class counsel ‘can differ sharply in their respective goals, approaches, and incentives’.[[83]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-045) On the other hand, this overlap in ‘clients’ can result in significant coordination because state antitrust enforcers and private counsel can realise meaningful efficiencies by working together during fact and expert discovery, and can ultimately obtain a better result by ‘presenting a united front in settlement discussions’.[[84]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-044) In addition, state antitrust enforcers can benefit from having access to class counsel’s ‘more experienced trial attorneys and readier access to economic experts’.[[85]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-043) In turn, class counsel can utilise the state antitrust enforcers’ ‘pre-complaint discovery’ to defeat any motions to dismiss and implement an effective fact and expert discovery plan.[[86]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-042) Moreover, class counsel can avoid various class certification issues when state attorneys general invoke their parens patriae authority.[[87]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-041) Oftentimes, the degree of coordination between state antitrust enforcers and class counsel will depend on various factors, such as the stage of the case, the state attorneys general and private lawyers involved in the case, and each group’s perceptions of possible outcomes.[[88]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-040) For instance, state antitrust enforcers are generally less inclined to coordinate with class counsel where class counsel is perceived as simply filing a follow-on action that seeks to piggyback off the work conducted by government enforcers during their investigation and litigation.[[89]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-039) In contrast, state attorneys general are more inclined to coordinate with class counsel that has made significant investments in developing the case and demonstrated a genuine desire to secure the best outcome for consumers rather than simply maximising their fee award.[[90]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-038) The e-Books Litigation is a recent example of effective coordination between state attorneys general and class counsel that resulted in consumers receiving nearly US$600 million in direct repayments from the defendants. Another example of effective coordination between state attorneys general and class counsel are the lawsuits brought by 23 state attorneys general and private class counsel related to a vitamin price-fixing conspiracy that resulted in US$305 million in settlements for indirect purchasers.[[91]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-037) Strategic and practical considerations when engaging with state attorneys general Below are several factors that parties should consider when assessing the most effective manner in which to engage with state antitrust enforcers prior to or during an investigation. Unlike the leaders of the DOJ Antitrust Division and FTC, most state attorneys general are elected officials who have to answer to their constituents. As a result, state attorneys general might be more inclined to take into consideration possible public reaction when making an antitrust enforcement decision. In addition, they might be more willing to listen to the views of key players in their state’s electoral process – such as influential lawmakers, important employers and labour unions, and powerful interest groups – prior to making an enforcement decision. Thus, the efforts of parties seeking to persuade an attorney general office to reach a specific enforcement decision could be helped by having these types of groups advocate – either through public statements or direct communications with state attorneys general – for their desired outcome. Such third-party advocacy is likely to be more persuasive and effective when presented within an antitrust analytical framework. Given that state antitrust enforcers have recently become more active and shown a willingness to act separately from their federal counterparts, parties should assess early on whether any state attorneys general are likely to be particularly interested in an investigation and, if so, determine whether their objectives would be served by proactively engaging with these state attorneys general. Such proactive engagement at the outset of an investigation could take the form of early meetings with senior leaders and investigative staff, written submissions that frame the key issues, or expressing a willingness to respond to targeted information requests. Factors that may influence a state attorney general office’s interest in an antitrust matter could include whether a large number of residents would be or have been harmed by a transaction or business practice; whether an investigation relates to an important industry in the state; whether a merger may result in significant job losses in the state; or whether the issues involved in an investigation have received considerable local or national media attention. While state attorneys general have recently shown a greater willingness to bring enforcement actions when federal enforcers fail to do so, the inability to rely on the DOJ or FTC’s expertise and resources poses challenges that could make state enforcers more reluctant to bring cases that present higher litigation risks, such as vertical merger challenges or conduct that would require a full blown rule of reason analysis. Accordingly, parties should take into account the theories of harm that are likely to arise in an investigation and whether federal enforcers are likely to act on such theories when formulating and adjusting their engagement strategy with respect to state enforcers. There are significant differences among state attorneys general. Some offices have a more pro-enforcement culture and philosophy when it comes to antitrust matters. Certain offices have more experienced staff and greater resources that enable them to take an aggressive enforcement approach. Consequently, parties should take these differences into account when determining their strategy for engaging with state antitrust enforcers. For instance, these differences may cause parties to seek to set the tone for an investigation early on by lining up the support of potentially ‘friendlier’ state attorneys general through immediate and proactive engagement with them. These differences could also cause parties to focus their efforts on state attorneys general that are viewed as leaders within the state antitrust enforcement community. If faced with parallel state and federal investigations, parties should generally welcome and encourage coordination between the investigative teams. Such coordination helps limit the time, burden and cost associated with overlapping investigations. In addition, such coordination can help parties minimise the risk of conflicting enforcement decisions that can disrupt their business operations, hurt employee morale, and create challenges with important customer and supplier relationships. Similarly, parties faced with parallel state and federal investigations should ensure that the positions they take before both investigative teams are consistent because state and federal enforcers often share information with each other. If they believe that parties are misleading them in any way, this can prolong both investigations, increase the time and money that parties have to spend on the investigations, and make it much harder to obtain the desired outcome. Certain state laws provide less confidentiality protection than federal laws. Thus, parties should familiarise themselves with each state’s confidentiality protections for material produced during antitrust investigations when negotiating the scope of information requests and any related confidentiality agreements. Given that state antitrust enforcers tend to have small staffs and limited resources, they may consider closing or limiting the scope of an investigation if they believe that consumer harm is not sufficiently widespread to justify the expenditure of those resources. Similarly, state antitrust enforcers may take a ‘wait and see approach’ in an investigation if there is pending private litigation that could adequately protect consumers and the competitive process. Thus, while not conceding any wrongdoing, parties seeking to persuade state attorneys to close or curtail an investigation could highlight the limited alleged harm or the fact that such harm (if any) would likely be adequately addressed through other proceedings. Recent examples of state enforcement litigation Cartel cases In recent years, the states have been at the forefront of several cartel-related civil litigations. Their role in such cases has varied from taking the lead entirely and breaking from their federal counterparts, to working with the federal government and private plaintiffs. The most prominent example of the state attorneys general taking the lead in civil cartel litigation is their role in the massive (and continuously expanding) In re Generic Pharmaceuticals Pricing Antitrust Litigation.[[92]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-036) In this case, the attorney generals for 47 states and the District of Columbia and Puerto Rico, led by the Connecticut Attorney General, joined a complaint after an extensive investigation that alleges an industry-wide conspiracy to inflate the price of certain generic drugs.[[93]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-035) Two years later, the state attorneys general for 43 states and Puerto Rico, again led by the Connecticut Attorney General, filed a new, second complaint against several manufacturers and, notably, many individuals. The newer complaint, nearly 500 pages long and concerning over 100 different drugs, alleges ‘an overarching conspiracy, the effect of which was to minimize if not thwart competition across the generic drug industry’.[[94]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-034) Most recently, a coalition of 51 states and territories filed a third complaint against 26 corporate defendants and 10 individual defendants alleging that the defendants fixed prices and allocated markets for 80 topical generic drugs.[[95]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-033) The DOJ, by contrast, has been slower to act and pursue this alleged conduct, although it has become more aggressive in 2020. The DOJ obtained two guilty pleas from executives in late 2016. The allegations in the executives’ charging documents concerned only two drugs, as opposed to the sprawling conspiracy alleged by the states.[[96]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-032) Since then – mostly in 2020 – the DOJ has charged six companies and four individuals in the alleged generic drugs conspiracy, most of whom have pleaded guilty.[[97]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-031) DOJ’s charging documents are often of a much narrower scope than the conspiracies alleged by the states.[[98]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-030) This, of course, does not mean that the allegations the states are pursuing have merit or that the DOJ will not ultimately cover more ground, but to date, the states have undeniably taken the more aggressive approach in this sweeping investigation. The Generic Drugs MDL also illustrates the advantages and challenges of coordination with a large contingent of state attorneys general in multi-district litigation. The state attorneys general can be extremely valuable allies for plaintiffs in multi-district litigation. Unlike private plaintiffs, they have the benefit of pre-litigation compulsory process and any complaint they file will benefit from their ability to conduct pre-litigation discovery. To illustrate, the states’ later-filed complaint in the Generic Drugs MDL was based on: (1) the review of many thousands of documents produced by dozens of companies and individuals throughout the generic pharmaceutical industry, (2) an industry-wide phone call database consisting of more than 11 million phone call records from hundreds of individuals at various levels of the Defendant companies and other generic manufacturers, and (3) information provided by several as-of-yet unidentified cooperating witnesses who were directly involved in the conduct alleged herein.[[99]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-029) In only the rarest of circumstances could a private antitrust plaintiff hope to gain access to so much information prior to filing an action. Therefore, by simply being a part of a multi-district litigation, the states can be tremendous sources of information and, to the extent permitted, can significantly assist private plaintiffs. On the other hand, states can (and do) have unique interests from private litigants and may try to distance themselves, as has occurred in the Generic Drugs MDL. There, the states filed a motion to establish a separate government track for case management purposes, apart from the private plaintiffs. Specifically, the states sought a ruling that would exempt them from the court’s requirement to file complaints on a drug-by-drug basis.[[100]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-028) Among other things, the states highlighted the ‘fundamental differences’ between state plaintiffs and class plaintiffs,[[101]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-027) and that the states’ theory was based on an ‘extensive multi-year investigation, including information . . . that was unavailable to the private plaintiffs when pleading their separate complaints’.[[102]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-026) Finally, the states noted that they were not part of the multidistrict litigation when the court issued its original order requiring drug-by-drug complaints.[[103]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-025) The court granted the states’ request with ‘no hesitation’.[[104]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-024) While the Generic Drugs MDL may not be wholly unique, it has previously been less common for states to take the leading role in cartel-related civil litigation, even where states may have started the investigation. The e-Books Litigation discussed above is illustrative of what has been the more traditional dynamic, although that may well be changing. As senior DOJ officials have noted, the e-Books Litigation serves as a ‘remarkable example of effective federal-state cooperation’, where the investigation was opened by the Texas Attorney General’s Office; early investigative work done by the state attorney general offices in Texas and Connecticut enabled the DOJ to get up to speed quickly; one of the best documents in the case was found during a document review by an Arkansas attorney; depositions taken by Texas and Connecticut lawyers were important during trial; and the states’ economist testified at trial, which complemented testimony from the DOJ’s economist.[[105]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-023) Despite the undeniably important role the states played throughout this litigation, the case remained captioned United States v. Apple Inc., and the DOJ took the lead role in establishing liability at trial and prevailing on appeal. One important feature often seen in cartel-related civil litigation (as was seen in the e-Books Litigation and may be seen in the Generic Drugs MDL) is the states’ parens patriae authority. Parens patriae suits are powerful tools in several respects. Unlike private class actions, certain attorneys general are granted ‘statutory authority to sue in parens patriae and need not demonstrate standing through a representative injury nor obtain certification of a class in order to recover on behalf of individuals’.[[106]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-022) Likewise, a state suit in parens patriae can even have a res judicata effect in private litigation.[[107]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-021) For that reason, it is critical for private litigants to be mindful of any parens patriae lawsuits and to engage state enforcers early in the process in order to ensure their cooperation as much as possible. Non-cartel civil conduct cases State attorneys general have also played pivotal roles in recent non-cartel civil conduct cases. Perhaps most notably is certain states’ roles in the American Express anti-steering litigation—an unusual rule of reason case that raised novel issues of relevant market definition. In American Express, the DOJ and 17 states sued Visa, MasterCard, and American Express over each network’s anti-steering rules. Visa and MasterCard settled, but American Express took the case to trial. American Express’ anti-steering rules prohibited merchants who accept American Express cards from ‘steering customers to alternative credit card brands’.[[108]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-020) Led by a DOJ trial team, the DOJ and states prevailed after a month-long trial.[[109]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-019) The district court concluded that ‘[b]y preventing merchants from steering additional charge volume to their least expensive network, for example, the [anti-steering rules] short-circuit the ordinary price-setting mechanism in the network services market by removing the competitive “reward” for networks offering merchants a lower price for acceptance services’.[[110]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-018) American Express, however, appealed the decision and secured a complete reversal of the district court’s judgment; the Second Circuit remanded the case with instructions to enter judgment for American Express.[[111]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-017) At this point, after a change in presidential administrations and after obtaining several extensions of time to file a petition for writ of certiorari, the DOJ dropped out. Led by Ohio, 11 of the original 17 states filed a petition for a writ of certiorari seeking review of the Second Circuit’s decision.[[112]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-016) In an interesting twist, the DOJ then filed a brief opposing review of the Second Circuit’s decision, while nonetheless arguing the decision was incorrect.[[113]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-015) Despite the fact that the DOJ, as the lead plaintiff at trial, affirmatively opposed the grant of certiorari, the United States Supreme Court agreed to review the case. Ohio took the lead at oral argument (although it split oral argument with the DOJ, which rejoined the states’ efforts after certiorari was granted). In a five-to-four decision, the United States Supreme Court affirmed the Second Circuit’s decision, concluding that American Express’ anti-steering rules did not violate the Sherman Act.[[114]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-014) While the scope of the decision is beyond the focus of this chapter, the United States Supreme Court addressed novel issues involving relevant markets for two- or multi-sided platforms and appeared to endorse, for the first time, a structured rule of reason analysis.[[115]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-013) Another high profile non-cartel conduct case brought by a state attorney general is California’s case against Sutter Health (Sutter Health Litigation). Interestingly, this case followed two private class actions: one brought in the California state court and one brought in the federal court.[[116]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-012) In the Sutter Health Litigation, the California Attorney General alleged that Sutter Health ‘unreasonably restrained trade through a variety of anticompetitive [contractual] terms’ that fall into three buckets: all-or-nothing terms, which require health plans that offer services at a Sutter Health hospital or related health care provider to also offer the services at every other Sutter Health hospital or related health care provider;[[117]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-011) anti-incentive terms, which forbid or penalise health plans that use tiered networks or other incentives to incentivise enrollees for choosing a cheaper competing hospital or provider over a more expensive one;[[118]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-010) and price-secrecy terms, which prohibit health plans from disclosing the prices that Sutter Health negotiated for services offered through the health plan.[[119]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-009) Based on these contractual terms, the California State Attorney alleged three violations of California’s antitrust statute, the Cartwright Act. The first cause of action was for price tampering, the second for tying and the third for conspiracy to monopolise. The court denied Sutter Health’s motion for summary judgment,[[120]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-008) and subsequently held that, with one potential exception, the state’s claims would be adjudicated under the rule of reason.[[121]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-007) On the eve of trial, Sutter Health settled the actions brought by the California State Attorney General and private plaintiffs, agreeing to pay $575 million to resolve the class damages claims and agreeing to ‘comprehensive injunctive relief that will enjoin . . . Sutter’s alleged restrictions on the ability of health plans to steer patients away from higher cost providers’.[[122]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-006) The terms of the settlement will in many ways determine the importance and impact of the Sutter Health Litigation but commentators have already noted that this litigation represents a ‘landmark case’, as it ‘is really important for other big health systems and is a clear signal that the state enforcers are looking out for [the challenged business practices] and recognising this as anticompetitive behavior’.[[123]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-005) If nothing else, ‘it reflects a potential expansion of antitrust enforcement from state attorneys general where federal enforcers may be reluctant to intervene.’[[124]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-004) Commentators have also noted that the private plaintiffs received a significant lift when the California Attorney General decided to join the litigation and adopt their theories of harm because it gave ‘them more weight than they might otherwise have if brought solely by private plaintiffs’.[[125]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-003) Merger litigation Traditionally, it has been the federal government that has taken the lead on challenging mergers through litigation. But recently, the states have shown that they are willing to independently challenge high-profile mergers even where federal enforcers have opted not to so. The most notable example by far is the 2019 lawsuit filed by numerous state attorneys generals that unsuccessfully sought to block the merger of T-Mobile and Sprint. Led by New York, these states filed their lawsuit before the DOJ made its enforcement decision. Moreover, the states continued pressed forward with their lawsuit even after the DOJ and Federal Communications Commission negotiated settlements with the companies that included certain structural and behavioural relief. As commentators have observed, there does not appear to have ever been another ‘situation where state antitrust enforcers went to court to challenge a merger without waiting for a decision by their federal counterparts’, or where ‘states tr[ied] to stop a telecommunications merger approved by both the [DOJ] and [FCC]’.[[126]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-002) This state enforcement action was made all the more remarkable by the fact that the states proceeded to try the case to judgment even in the face of the DOJ’s active opposition, which, as noted above, included the DOJ’s efforts to disqualify the states’ retained private counsel as well as the DOJ’s filing of court submissions opposing the states’ requested injunction. There have been other lower profile, but still significant, instances of states independently flexing their enforcement muscle as well. Notably, states have shown a willingness to seek more aggressive remedies to protect their citizens where the federal government fails to do so. As mentioned above, when Optum sought to acquire DaVita Medical Group, the FTC declined to seek any Colorado-related remedies. The Colorado Attorney General, however, took independent action by filing a complaint under the Colorado Antitrust Act with a consent judgment that sought additional protections in Colorado, namely, precluding UnitedHealth Group (Optum’s parent) from enforcing certain exclusivity provisions and from entering into new agreements with certain exclusivity provisions, and keeping in place agreements between DaVita Medical Group and other health plans.[[127]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-001) In seeking this additional remedy, the Colorado Attorney General stated: ‘Traditionally, state attorney general offices have taken a back seat to the federal government in protecting consumers. . . . Today’s action is a path-marking step that demonstrates Colorado’s commitment to protecting consumers from anti-competitive mergers or other harmful actions.’[[128]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-000) Overall, merging parties should not neglect state enforcers in attempting to gain approval for a transaction, even if it appears that federal approval is likely. As the above examples show, states are willing to depart from their federal enforcement partners if they believe their citizens’ interests and state economies will be harmed by a merger.

#### States solve the whole aff—creates regulatory regimes which constrain powerful agrobusinesses

Bowen, 17

(Kathryn Bowen, Law Clerk to Judge John T. Noonan, Jr., United States Court of Appeals for the Ninth Circuit. J.D. 2016, University of California, Berkeley Former consultant, Food and Agriculture Organization of the United Nations. “Protecting Regulatory Expressions of Food Populism Through Interstate Cooperation,” Tennessee Law Review [Vol. 85.1 2017] Hein Online NL)

Food populism rests on a rich tradition of "distinct, yet overlapping" alternative food movements.2 33 These coalitions comprise advocates of organic, local, and slow food, who share a desire for a "more socially and environmentally just food system." 2 34 Food populism is distinct, however, in that it highlights a redistributive political economy element only implicit in some of these alliances. That normative core is founded upon a dual-pronged principle, which respectively seeks greater democratic control over food structures, and to minimize the negative consequences of modern industrial food production. "[D]emands for economic democracy have had a renaissance in food-but not in law." 2 3 5 Historicizing the rise of agricultural industrialization, Amy Cohen observes that "agrarians and other 'decentralist intellectuals"' have long critiqued the aggregation of economic and political power in the hands of twentieth century corporate elites. 2 36 Cohen notes that modern food progressives are tapping into a contemporary discontent with political and economic dispossession.2 37 Attention to the democratic implications of largescale industrialization is critical to re-ceding some degree of decision making autonomy to consumers and small food producers. 238 At the heart of this agenda is a concern with disproportionate corporate influence over government decisions on food and agriculture. Recent qualitative accounts suggest that legislative capture by integrators trades off with policies that enhance public welfare. 239 Deregulatory preemption raises distributive concerns about the role of government in providing public accountability and transparency on food issues. While issues of capture predate the Trump presidency, the administration's deregulatory efforts have brought debates over corporate control into the mainstream, including in the food and agriculture realm. As with other areas of the administrative state, food policy has been subject to executive actions by the Trump Administration that are designed to scale back corresponding efforts by the Obama Administration. 240 To advance that agenda, "deregulation teams" have been formed in both USDA and the Environmental Protection Agency (EPA).241 Many believe that these efforts will work to the financial benefit of large food and agriculture companies. 242 It is not surprising, then, that these entities are pursuing their policy priorities with renewed vigor. In addition to pushing back against concerns over corporate capture, food populism roots in a second, albeit related, value: reducing negative consequences attendant to industrialized food and agriculture production. Volumes have been written on the socioeconomic harms of consolidation, automation, and concentration in the food sector. I therefore provide but an overview of some of IAA's harmful effects, grouping illustrative examples into the areas of public health and disease, employment (including wage, labor and safety concerns), rural communities, environment and natural resources, and animal cruelty. Public health considerations have emerged as a leading cause for concern in debates over IAA. This attention is driven by the livestock industry's prolific use of antibiotics in animals.243 Animal agriculture consumes about eighty percent of antibiotics sold in the United States, with high-density livestock operations responsible for the bulk of this trend. 244 Antibiotics are administered to promote animal growth, and to reduce the risk of disease that results from customary farming practices, including intensive confinement. 245 At current volumes, industry's use of antibiotics contributes to the evolution and spread of antibiotic resistant bacteria.246 The emergence of antibiotic resistant bacteria in turn reduces the efficacy of antibiotics in humans. 247 The Center for Disease Control estimates that antibiotic resistant infections cause at least 23,000 deaths and two million illnesses per year.2 4 8 In addition to antibiotic resistance, other public health considerations attendant to IAA include animal-to-human disease transmission, food-borne illnesses, and diffuse harm to workers at IAA facilities and nearby communities. 249 Indeed, those groups proximate to sites of production often face the most debilitating aspects of IAA. Several features of IAA, including high animal density, accelerated processing, and automation, create dangerous working conditions.250 These conditions result in high rates of accidental injury, and chronic physical stress disorders. 251 Occupational hazards are compounded by other public health harms, including cognitions of acute and prolonged respiratory illness. 252 IAA engenders problematic labor issues like low wages, lack of unionization, and the absence of health benefits.253 Exploitative conditions are part and parcel of industry's reliance on immigrant communities. 254 This dependence has itself been the subject of criminal investigation. 255 IAA operations also trade off with the economic, physical, mental, and social well-being of surrounding communities. 256 The integratorgrower contract model reduces financial capital in agricultural areas, as compared to regions that retain more locally owned farms. 2 5 7 Communities proximate to IAA operations suffer from relatively greater cognitions of depression and posttraumatic stress disorder.258 IAA sites reduce quality of life for surrounding residents, and can create destructive social rifts when individuals express their opposition to integrators. 259 IAA facilities are disproportionately located in low-income areas, or those populated primarily by people of color.2 6 0 Manifestations of environmental injustice have been an increasing focus of both activists and academics. 2 6 1 The environmental implications of industrial meat production are similarly alarming. Consolidation and concentration of feeding operations creates unique obstacles for disposing of animal waste. IAA facilities typically store manure in large lagoons, adversely impacting water quality via runoff and erosion, direct discharges, spills, and leaching. 262 Manure lagoons also emit gasses (ammonia and hydrogen sulfide), particulate matter, volatile organic compounds, microorganisms, and odor-all of which degrade air quality. 263 In addition, IAA operations release carbon dioxide and methane, contributing to climate change. 264 Subsequent reductions in air, water, and soil quality generate their own set of negative public health and environmental consequences. 265 This Article's focus, intensive confinement, provides but one of the animal cruelty issues associated with IAA. Other customary and problematic animal treatment practices can include castrations, debeaking, tail docking, and dietary restrictions, in addition to welfare issues involved in transport and slaughter. 266 Some also find troubling the sheer number of farm animals killed for food each year in the U.S.-in 2015, about nine billion.2 6 7 There are, of course, putative benefits to IAA. These stem primarily from IAA's capacity to produce more meat cheaply, thereby enhancing profitability and lowering costs for consumers. 268 And yet, peer-reviewed studies cast doubt on these efficiency rationales. 269 Scientific findings demonstrate that productivity gains are only possible via externalized environmental costs and government subsidies for corn and soybeans. 270 Productivity enhancements are, moreover, likely to level off as energy prices increase and agricultural conditions worsen due to climate change. 271 As far as profit-based benefits of IAA, wealth accrues primarily to corporate integratorsnot individual farmers or rural communities. 272 This again invokes concerns about market control and income inequality. Consumerbased benefits presume that eating meat is intrinsically valuable, an issue that scientists, economists, and ethicists debate.273 These defenses of LAA, more broadly, take an all-or-nothing approach to reform. Many of IAA's harms are actually issues of size and scale, which can be incrementally reduced to prevent harmful price increases. 2 74 Somewhat apart from these economic efficiency rationales, IAA advocates claim that the industrial model better protects public health, the environment, and animals. But many of these defenses presuppose IAA's single-tactic approach to problem solving.2 7 5 Take, for instance, the argument that industry's current use of antibiotics is critical to prevent disease transmission. Disease cognitions might be reduced were animals not intensively confined and fed a poor diet. Other IAA defenses, including that IAA improves food safety, implicitly assume government regulations are followed and properly enforced. Existing manifestations of harm, like the rate of food-borne illness, belie that confidence. 276 With respect to animal welfare, IAA advocates rely on a myopic view that excludes evidence about natural behaviors and mental well-being. 277 Rather, industry's welfare assessments focus on gross physical factors, like growth and weight gain.278 Some might criticize the notion of food populism based on its purely reactive iteration, i.e. food hysteria or alarmism.279 Kuran and Sunstein reference a similar "pollutant of the month syndrome," whereby "expressed concerns about a particular substance fuel growing anxieties, which then generate an irresistible demand for regulation." 280 This uninformed demand can lead to poor government decision-making. Widespread panic over Alar provides a seminal example. Alar is a pesticide sprayed on apples that contains one percent of a particular carcinogen. 281 Alar's manufacturer undertook an initial study of the pesticide's effects in 1986. Preliminary findings issued in 1989 suggested a correlation between tumor incidence in animals and exposure to Alar.2 8 2 According to several accounts, the Natural Resources Defense Council (NRDC) then vastly extrapolated the risks to children posed by Alar.2 83 Several media outlets publicized NRDC's allegations, which led to a public outcry.284 By the time the EPA found Alar's health risks negligible, the domestic apple industry had been devastated. 285 Alar's manufacturer voluntarily pulled the product from retail sale. EPA later agreed to revise its regulations to more easily ban chemicals "suspected of being carcinogenic." 286 For some, the Alar scare represents the social and economic costs to "bad science."287 Others, including NRDC, hail the EPA's subsequent move towards a precautionary approach as an outstanding victory. 288 Despite this divergence, these camps probably agree that the state can add value to public policy by providing holistic technical expertise.289 This comports with food populism's dualpronged principle, which responds to popular desires for sustainable food while paying greater attention to potential risks associated with industrial food production. 290 Encouraging state officials to take greater ownership over sustainable food and agriculture policies thus represents an important step in fulfilling a deliberative democratic approach. In other words, an approach that balances popular values with scientific principles. A state-based strategy facilitates contestation and debate over regulatory expressions of food populism, which can otherwise be easily dismissed as the work of "fringe radicals" and "fanatics."291 The negative stigma attached to these labels, in turn, further delays solutions to long-festering harms.292 While HSUS was instrumental in initially catalyzing policy change, a lack of direct state engagement creates roadblocks where citizen-led initiatives are unavailable. 293 The absence of political support from elected lawmakers also poses a problem if the ultimate goal is to enact a welfare-enhancing national standard. Indeed, both activists and outside observers agree that stringent federal regulation is ideal for redressing IAA's potential harms, including those associated with animal cruelty.29 4 Recognizing that sympathetic state officials, with entrepreneurial incentives of their own, can serve a value-adding role thus provides a fruitful new area for theorization. B. Interstate Action and Defensive Preemption Federalism scholars have taken stock of the mutually constitutive nature of inter-systemic decision-making, in which federal and state officials regulate in view of their overlapping authorities. 295 State action can impact federal policy in at least three ways: through broadbased uniformity, planned dissent, and coordinated lobbying. First, states can voluntarily cooperate to enhance uniformity and thereby address the negative economic externalities of inconsistency. Successful harmonization, in turn, signals to federal policymakers that intervention is unnecessary or even counter-productive. 296 The converse is also true: the failure or absence of proposed harmonization can inspire calls for federal action.2 9 7 The primary question then becomes whether the extent of state uniformity is sufficient or could be sufficient to stymie concerns about interstate inconsistency. A secondary question is whether reducing inconsistency, but maintaining stringency, would placate corporate entities, like IAA firms, who could pursue a "double win."2 98 Second, state cooperation can make more effective specific displays of aberrant regulatory behavior by states; that is, when states take an unorthodox approach to regulation. As Heather Gerken explains, dissident states offer up a "real life instantiation" of alternative governance in departing from the majoritarian policy approach. 299 Dissenters thereby "provide important reassurance and guidance to federal legislators who are considering whether to change gears."3 0 0 Aberrant states also agenda-set for national lawmakers by raising otherwise sidelined substantive and normative considerations. 301 To be sure, states adopting anti-confinement regulations are already dissenting in isolation. 302 But by organizing their opposition, states may improve substantive outcomes and add value to their collective action project.303 This, in turn, can signal that federal intervention is undesirable.304 Preemption dynamics thus also intersect with how well states address an underlying problem. Third, state lobbying efforts are strengthened by coordination. 305 States act as do other interest groups, by attempting to influence lawmakers considering novel statutes. 306 Geographically and politically significant states, like California and New York, have empirically succeeded in defending their regulatory regimes vis-a-vis corporate interests. 3 07 But smaller states may be unwilling or unable to go it alone against powerful interest groups. To that end, coordinated action can add strength and coherence to state views. 308 Uniformity, planned dissent, and coordinated lobbying can shift federal interest group dynamics. When it comes to policy outcomes, the result can take several forms. For instance, state collective action might ensure that a national preemptive standard is as rigorous as then-existing state rules. 309 Alternatively, state action can influence the extent of preemption, whereby the federal statute sets a floor that states are allowed to exceed.3 10 Decisions over funding, compliance with federal targets, and enforcement provide other areas in which states can assert regulatory control.311 Extremely strong state coordination might also dissuade corporate entities from pursuing a federal standard in the first instance. 3 12

#### New York

Petrosyan, 20

(Grant, JD from Brooklyn Law School, and received a degree in Economics from Fordham University in 2011. During law school, he interned at the Federal Trade Commission and completed two judicial internships at the Kings County Supreme Court in New York and the Bergen County Superior Court in New Jersey. Grant Petrosyan is an associate in the New York office of Constantine Cannon. His practice is focused on antitrust litigation and counseling, and commercial litigation in both state and federal courts. Grant is also active in the firm’s e-discovery practice. "New York Could Lead the Nation Into 21st Century Antitrust Enforcement," Sept 16 <https://constantinecannon.com/2020/09/16/new-york-could-lead-the-nation-into-21st-century-antitrust-enforcement/> NL)

New York is on the verge of revamping state antitrust enforcement to tackle competition issues of the 21st Century. On September 14, 2020, the Consumer Protection Committee of the New York State Senate held a [virtual antitrust hearing](https://www.nysenate.gov/calendar/public-hearings/september-14-2020/public-hearing-discuss-antitrust-laws-and-issues) regarding Senate Bill S8700, which is known as the [“Twenty-First Century Anti-Trust Act.”](https://legislation.nysenate.gov/pdf/bills/2019/S8700A) The [proposed legislation](https://www.nysenate.gov/legislation/bills/2019/s8700/amendment/a), which, New York State Senator Michael Gianaris introduced in July 2020, would modernize existing state antitrust law and expand the State’s and private litigants’ ability to litigate against companies for anticompetitive conduct. The bill, if passed, would place New York at the forefront of antitrust enforcement in the nation. It is no secret that there has been a significant increase in consolidation in recent years across many industries, including wireless telecommunications, agriculture, and healthcare, to name just a few. This consolidation is the result of decades of lax antitrust enforcement, which has led to historic levels of market concentration. At the September 14 hearing, New York Attorney General Letitia James expressed her support for the proposed legislation [stating](https://www.wivb.com/news/ny-lawmakers-discuss-proposed-antitrust-legislation-during-virtual-hearing/), “it will give New York’s antitrust laws the scope and the flexibility needed for effective antitrust enforcement in this era of increasing economic concentration.” Passage of the Twenty-First Century Anti-Trust Act would transform New York’s antitrust law, known as the Donnelly Act, in several important ways. First, the bill would broaden the scope of conduct subject to antitrust enforcement. Specifically, it would allow lawsuits against corporations that act unilaterally to stifle competition. Though such lawsuits are permissible under the federal Sherman Act, the Donnelly Act does not explicitly prohibit single-firm anticompetitive conduct. Therefore, under existing New York law, an action cannot be brought against anticompetitive conduct unless two or more companies are collaborating or conspiring to restrain competition. The proposed bill would further align New York state antitrust law with federal law and, in particular, with Section 2 of the Sherman Act, which specifically proscribes single-firm conduct that creates or maintains a monopoly. Second, the proposed legislation would allow private class action antitrust lawsuits. New York’s class-action rule—CPLR 901(b)—prohibits certification of class actions in which the plaintiff seeks to recover a “penalty,” unless specifically authorized by statute. The Donnelly Act does not authorize class actions. In Sperry v. Crompton Corp., 8 N.Y.3d 204, 214 (2007), the New York Court of Appeals concluded that treble damages under the Donnelly Act constitute a penalty insofar as class actions are concerned. Accordingly, the Court held class actions may not be brought under the Donnelly Act. Third, the bill would raise the penalty limits imposed on individuals and corporations in violation of state antitrust law to $1 million and $100 million, respectively. This represents a significant increase from the [current levels](https://ag.ny.gov/antitrust/antitrust-enforcement) under the Donnelly Act—namely, $100,000 for individuals and $1 million for corporations.

#### B. Minnesota

Fish, 21

(Noah, reporter for Ag Week, "Keith Ellison talks strategy to halt concentration in agribusiness," Feb 19 <https://www.agweek.com/business/agriculture/6890673-Keith-Ellison-talks-strategy-to-halt-concentration-in-agribusiness> NL)

Minnesota's attorney general says more needs to be done to eliminate and prevent monopolies in the ag sector. At a recent session of the Sustainable Farming Association 2021 annual conference, Minnesota Attorney General Keith Ellison shared the state's response to concentration in the ag industry, which has caused lower prices and less competition among producers. "In Washington and other parts of our country as well, there's a lot of conversation going on around monopoly and market concentration — not enough in the agricultural sector," Ellison said. "There's attention focused around Facebook and Google, and that's appropriate, but we need to focus on ag monopoly." Ellison said that former U.S. Ag Secretary Sonny Perdue's controversial comments in 2019 that with America's farms the "big get bigger and small go out," has been the U.S. ag policy for "quite a long time." "This is directly contrary to what the policy should be. Under the Sherman and Clayton (Antitrust Acts), it should be that the small should get the help, and the big should be regulated," Ellison said. "We should be seeking to increase the number of participants in the market, add more producers, which will give us greater variety and make more competitive, healthier markets." But instead, Ellison said for decades the ag industry in the U.S. has experienced market concentration, which hasn't resulted in a cheaper product for consumers. "Since 1970, more than 90% of American dairy farms have gone out of business," Ellison said. "The price farmers get paid for milk has dropped, but if you go shopping for milk, you know that milk cost what it did before." When small producers go out of business they are purchased by larger ones. According to Ellison, market consolidation has resulted in 85% of the beef market, 90% of global grain trade and 70-80% of pork packers being controlled by four companies. He said that half of chicken farmers work in regions controlled by just one or two processing companies. "You wonder why three out of four poultry farmers live in poverty — it's not because people don't like chicken; people eat chicken all the time," Ellison said. "Chicken farmers should be making a lot of money, but the market is controlled by the giant players." He said it's the same story for hog producers and the sales of herbicides and pesticides. "The truth is, whenever I see mergers, I see them skeptically, and we go right to work to figure out how we can be opposed to them," Ellison said. Ellison said what the ag sector "needs more than anything" is antitrust enforcement. In order to do so, legislation would need to be passed that essentially changes the current laws. "Between Supreme Court decisions and legislation, and just administrative inertia, it's been very difficult to challenge these mergers and stop market concentration," Ellison said. The attorney general's office in Minnesota is asking the state legislature for more funding to "staff up on this area," Ellison said. He said along with working with other attorneys general offices, they are "engaging with federal partners" to put pressure on the Biden administration to do more work on antitrust enforcement. Last spring, Ellison was one of the 11 attorneys general in Midwestern states that urged the Justice Department to pursue a federal investigation into market concentration and [potential price fixing](https://www.agweek.com/business/agriculture/5555297-Lawmakers-and-cattle-producers-ask-for-beef-market-investigation) in the cattle industry during the pandemic.

#### State antitrust stimulates competition in the agricultural sector.

Sutton ’13

(Kelsea, 2014 Sterling Honors Graduate from the University of South Dakota School of Law, “The beef with big meat: meatpacking and antitrust in America's heartland,” South Dakota Law Review, Fall 2013, vol. 58)

D. State Bans on Packer Ownership

At least four significant livestock-producing states have enacted legislation banning packer ownership of livestock. Iowa's statute was originally enacted in 1977, and has been amended several times. (119) The statute prevented cattle and swine producers from owning, controlling, or operating production facilities within the state of Iowa. (120) The statute was amended again in 2000 to additionally prohibit a processor from "directly or indirectly contracting for the care and feeding of swine in Iowa." (121) South Dakota's 1998 constitutional amendment similarly provided, "no corporation or syndicate may acquire, or otherwise obtain an interest ... in any real estate used for farming in this state, or engage in farming." (122) The language of Minnesota's statute is almost identical to the language of South Dakota's constitutional provision. (123) Finally, the Nebraska statute provides,

After May 27, 1999, it is unlawful for a packer to directly or indirectly be engaged in the ownership, keeping, or feeding of livestock for the production of livestock or livestock products, other than temporary ownership, keeping, and feeding, not to exceed five days, necessary and incidental to the process of slaughter. (124)

Generally, a desire to help family farms survive, keep small farms competitive, keep rural communities stable, and protect environmental health and safety motivated these measures. (125) Lawmakers and voters in South Dakota feared corporate manipulation of markets, so they passed the Constitutional amendment in order to curtail anticompetitive contract practices, protect family farms and rural communities, and keep those small independent farmers and ranchers from being turned into a "new generation of sharecroppers." (126)

Both the Iowa and South Dakota measures were found unconstitutional under the Dormant Commerce Clause of the U.S. Constitution. (127) The plaintiffs in both cases successfully argued the state measures were economic protectionist laws that discouraged interstate commerce. (128) The Minnesota and Nebraska statutes, however, are still in effect today. (129) In 2001, U.S. Senator Tim Johnson (D-SD) defended a Farm Bill (130) amendment that would have banned packer ownership of livestock on a national level. (131) Senator Johnson claimed the amendment aimed to "protect America's livestock producers from the overwhelming market domination of a few meatpackers." (132) United States Senators from livestock producing states like Iowa, South Dakota, and Nebraska introduced national packer ownership bans to the Senate Farm Bill again in 2002, 2007, and 2012. (133) Over 108 state and national organizations have endorsed the National Sign-On Letter in Support of Packer Livestock Ban as of June 1, 2012. (134) The most recent version of the proposed ban would amend the Packers and Stockyards Act to make it illegal for a packer to own, feed, or control livestock intended for slaughter for more than fourteen days before slaughter. (135) The amendment would affect only large packers that slaughter over 120,000 animals per year; the amendment also provides exceptions for cooperatives and packers that own only one processing plant. (136)

The sponsoring senators, primarily from agricultural states, have persevered for over a decade in trying to pass packer bans of livestock ownership and restrictions on packer mergers. (137) Three major reasons explain why a national amendment to the 2012 Farm Bill is an ongoing priority for representatives of agricultural states. First, the consolidation of firms in the meatpacking industry has placed excessive market power in the hands of only a few companies. (138) Second, packer-owned and contracted livestock has contributed to a diminished cash market for hogs and cattle in recent years furthering negative effects on competition. (139) Third, government action, or a lack thereof, has failed to address the problem in an effective way. (140)

All of these factors have contributed to the government's legislative, judicial, and executive branches apparent ineffectuality in maintaining a competitive meatpacking industry and have also contributed to the pressure for legislative action at the state and national level. (141) Solutions can, and should, be employed by not only the federal government, but also state governments, local governments, and individual consumers. (142)

#### There are about a thousand examples of states doing and influencing foreign policy AND on top of all of that, even if they get preempted, the states will just ignore the federal government and do it anyway—the Constitution is a dead document and no one cares about it anymore

Engstrom, 18

(David Freeman Engstrom (dfengstrom@law.stanford.edu) is a professor of law at Stanford Law School, and Jeremy M. Weinstein (jweinst@stanford.edu) is a professor of political science and a senior fellow at the Freeman Spogli Institute for International Studies at Stanford University “What If California Had a Foreign Policy? The New Frontier of States’ Rights,” The Washington Quarterly, 41:1, 27-43, 2018 DOI: 10.1080/0163660X.2018.1445356 NL)

When President Donald Trump announced his decision to withdraw the United States from the Paris agreement on climate change, the response from local and state officials was swift. The mayors of 61 U.S. cities quickly released an open letter promising to meet the commitments agreed to under the Paris framework. Twelve states and Puerto Rico announced the formation of the United States Climate Alliance, a coalition of state governments committed to upholding the Paris agreement. And Michael Bloomberg, the U.N. special envoy for cities and climate change, submitted to the U.N. a joint statement signed by more than one thousand business leaders, mayors, governors, and others prepared to quantify the emissions reductions that can be achieved in the United States without the federal government’s help. Entitled, “We are Still In,” the letter symbolizes an important phenomenon in U.S. foreign policy, one that is taking off in the age of Trump—the rise of assertive states and cities ready to act on their own on the international stage. Leading the pack is California, led by Governor Jerry Brown who is in the home stretch of his more than forty years in public life. Even as President Trump spoke in the Rose Garden in June 2017, Brown was on his way to China, where a formal meeting with President Xi Jinping in the Great Hall of the People—an honor typically reserved for visiting Heads of State—signaled a budding partnership between California and China to battle carbon emissions. Brown eagerly positioned California at the forefront of global efforts to confront climate change, just as China seemed poised to assume the leadership role abandoned by President Trump. But this was not just symbolism, and it was only the most recent chapter in California’s international climate policy. While the state’s far-reaching fuel economy standards get the lion’s share of attention, more than 170 jurisdictions, including Canada and Mexico, have embraced Brown’s Under 2 Coalition—a nonbinding, global agreement launched in 2015, before the Paris agreement, that commits signatories to reduce their emissions to net-zero by 2050. Collectively, the signatories represent nearly 40 percent of the global economy.1 Because California prides itself on its global reach, the idea of a distinctively Californian foreign policy has been kicking around for a while. Governor Arnold Schwarzenegger famously celebrated the state as the modern-day equivalent of Athens and Sparta in 2007, a “nation state” by virtue of its economic strength, population, and technological force.2 Indeed, California is the world’s sixth largest economy— larger than France or Brazil. Its 40 million residents make it the most populous state in the United States. And between Silicon Valley and Hollywood, California has almost unrivaled capability in terms of technological leadership and cultural influence. By virtually any measure, California would be a global powerhouse except for two fundamental constraints: it lacks many of the legal attributes and policy instruments of a nation-state, and the U.S. Constitution expressly reserves for the federal government responsibility for the conduct of foreign affairs. As a result, until recently, the enthusiasm for a Californian foreign policy far exceeded the reality. Before its climate leadership, California’s foreign policy looked pretty parochial and a lot like any other state or province with a focus on export promotion, trade, and foreign investment. Though some legal constraints remain, the Trump presidency has spurred, and will likely continue to galvanize, a range of new efforts by California—and other states and municipalities—to test the legal limits of federal power in foreign affairs. Californians are proud that their commitments to diversity, the environment, and human rights set them apart from what they see emanating from Washington D.C., while California’s politicians will undoubtedly see the value in resisting Trump administration policies and distinguishing California from the United States as an actor in global politics. Among others, an ambitious governor—one who already ran for president three times—is seemingly prepared to see just how far California can get. Whether these efforts succeed will depend, in part, on how much latitude the courts ultimately grant to the states. Historically, the answer has been not much. But these new state initiatives may be emerging at just the right time. In the midst of a long-running transformation in how foreign affairs are conducted and an evolution in legal thinking about federalism’s boundaries, the time to challenge federal foreign affairs powers may have finally arrived. Subfederal actors are building a legal case and infrastructure for their expanded role, while pressing forward on climate, human rights, and immigration. While the federal government could rely on the judiciary to referee this contest in an episodic fashion, the pace of expanded state and municipal activism is unlikely to slow

. National policymakers would be wise to wake up to this new set of practices and think strategically about how to harness the opportunities while mitigating the risks. Erosion of the Unitary State It used to be the case that foreign policy was considered the sole province of diplomats and soldiers—agents of a national government pursuing its interests on the international stage. To understand foreign policy, one needed only to understand the power and interests of competing nation-states. National governments were seen to act as coherent units, making decisions that served the national interest and contending with one another to accumulate greater power and influence. This state-centric view of world affairs originated with the Peace of Westphalia in 1648, and is still taught to undergraduates as a first approximation of how international relations operate. For better or worse, it is also how our Constitution conceptualizes the appropriate roles of national and state governments in the conduct of foreign affairs. But this perspective was never fully compelling as an empirical matter. It missed the diverse interests and competing power centers of the federal government. Cabinet agencies, Congress, the military, and the courts all shape how national interests are defined and what instruments are used to pursue them. It overlooked the network of domestic actors outside of government—corporations, non-governmental organizations, unions, religious institutions, unaffiliated billionaires, and others—that seek to influence the foreign policy priorities of the United States, shape the international environment in which foreign policy is conducted, and impact domestic politics in other countries directly, often acting autonomously in pursuit of their own interests. And it ignored the growing web of transnational governmental relations: networks of government officials (including policymakers, regulators, and enforcement agencies) that operate across borders to cooperate on issues as diverse as banking, transnational crime, corruption, taxation, and immigration, often without explicit direction from the president. Over time, these realities have brought significant changes to the architecture of U.S. foreign policy. The emergence and growth of the National Security Council since the passage of the National Security Act of 1947 reflects a recognition that the management and coordination of competing power centers in the executive branch is key to articulating and implementing a coherent foreign policy. The proliferation of informal mechanisms for consultation, formal advisory committees, and public-private partnerships signal how seriously policymakers take the task of understanding, influencing, and channeling the attention and resources of non-governmental actors including NGOs, corporations, and philanthropies. Whereas it used to be the case that international diplomacy was conducted through the State Department, using a professional corps of trained diplomats, now almost every federal agency—from the Department of Agriculture to Health and Human Services and the Environmental Protection Agency—has its own office of international affairs, facilitating the kind of expert-led, transnational cooperation that is key to addressing global problems. The dispersal and fracturing of the international relations function across government has, no doubt, made life more difficult for State Department diplomats, and it has fundamentally challenged the notion of a single and unified U.S. government operating with a clear and coherent mandate. The foreign policy activism of states and cities fits quite naturally in this increasingly complex network of actors that influence and make foreign policy. In one sense, they are like any other pressure group in the political system. In the bargaining process to determine U.S. foreign policy, states and cities can make their voice heard by advocating directly to senior policymakers in the executive branch, influencing elected officials in Congress, or leveraging their relationships with federal agencies. But states and cities differ in important ways as well. In particular, governors and mayors are elected representatives of a geographic constituency with a mandate to advance that state’s or region’s particular interests. When those interests are poorly served by the federal government’s foreign policy, the pressure to act in ways that challenge the federal government’s preeminence can be irresistible. Examples abound. In the 1970s and 1980s, hundreds of cities and states declared themselves nuclear-free zones to keep nuclear weapons production-related materials out of their jurisdictions during the Cold War. Today’s resistance to federal immigration law has its roots in the “sanctuary” movement of the 1980s, when Wisconsin and a number of cities, including Berkeley—spurred by religious congregations—committed to provide safe-haven to refugees fleeing conflicts in Central America. When the Reagan administration was embracing “constructive engagement” with South Africa’s apartheid regime in the 1980s, states and municipalities played a significant role in advancing the sanctions movement, prohibiting engagement with businesses investing in South Africa.3 The notion that foreign policy functions as a reflection of the interests of a “unitary state” has eroded in practice. Today, a huge diversity of actors—sometimes acting in unison, oftentimes acting in parallel, occasionally conflicting— shape how U.S. interests are defined and advanced on the world stage. Will the law adapt to this new reality? There are some reasons to think that California and others may have more room to play, as a result of a revolution in federalism that has challenged federal preeminence in a range of new areas. “One Voice” in Foreign Policy? If the “unitary state” has given way to a richer transnational vision of international relations, then it might follow that legal understandings have shifted as well. After all, the majesty of the law, as Justice Oliver Wendell Holmes said long ago, is its ability to adapt to changing circumstances. But legal change in the area of foreign affairs federalism, as it is sometimes called, has come more slowly. The growing disconnect between the law and ground-level realities of how foreign relations are actually conducted has put the two on a collision course. The result is a heady mix of legal risks and opportunities as California and other subfederal governments move onto the global stage. The conventional view is that the Constitution makes foreign affairs the exclusive province of the federal government. While this view has many facets, much of it is built around a single and appealing turn of phrase: the United States must be able to speak with “one voice.” The idea, built out of multiple provisions of the Constitution and voiced by the Supreme Court as far back as the 1820s, is that sound foreign relations depend on clear and deliberate communication among sovereigns. It cannot be entrusted to a provincial and parochial chorus of states and localities. The “one voice” idea is a convenient shorthand, but the legal case in its favor is hardly ironclad. Begin with the text of the Constitution itself. True, the Framers plainly prohibited certain state actions. States may not engage in war or make treaties, and they may not enter into compacts or agreements with other states, whether domestic or foreign, without Congress’s permission. But the textual case for the “one voice” concept otherwise lacks much punch. To begin, the Constitution sprinkles foreign affairs powers across both the legislative and executive branches. Congress gets to regulate foreign commerce, define offenses under international law, declare war, and raise and regulate the military, while the president is the commander in chief, makes treaties, and nominates ambassadors (the latter two with Senate concurrence). From the start, then, the Constitution’s commitment to separation of powers has meant multiple federal voices on foreign affairs, not a single one. More importantly, on foreign affairs the Constitution is, as a leading scholar put it, a “strange, laconic document.”4 It carefully specifies many foreign affairs powers but omits mention of others. Where, to cite a few examples, is the power to recognize other governments, open consulates in other countries and admit foreign consulates, or acquire or cede territory? The Supreme Court has tried to fill gaps by fleshing out the “one voice” concept, but questions remain as to just how far the concept stretches. In cases of direct conflict between federal and state policies, all agree that state policy must yield. The Supremacy Clause, which says that federal law trumps state law, is clear on that score. But that leaves myriad situations in which federal and state law do not formally conflict, where the case for “one voice” is more complicated and only a small handful of Court decisions light the way. A standard concern about multiple voices is that, even where there is no direct conflict between federal and state law, state actions can still create big federal problems. Indeed, an ill-considered state tax on foreign commerce, the Court has said, might benefit the particular state but risk retaliation—whether economic, military, or otherwise— against the whole nation. Here, the “one voice” doctrine can be seen as a curb on a kind of free-rider behavior by states, but it is not always obvious which state actions are rogue enough to count. The Court has further suggested that it is not just state interference with concrete and continuing federal action, but also potential federal action, which can impair the federal government’s solo voice. For instance, state action can, by removing a potential “bargaining chip,” deprive the federal government of needed leverage in its dealings with other nations. Thus, when Massachusetts moved in 1996 to sanction Myanmar by refusing to enter into procurement contracts with companies that did business with its repressive government, the Court held that the Bay State’s refusal to deal was preempted by a federal law that imposed similar sanctions but gave the president flexibility to raise or lower them in nudging the regime toward better behavior. The Massachusetts law thus stood as an “obstacle” to federal policy because it took away “levers of influence” that the federal government might wish to hold in reserve for future use.5 On this expansive version of the “one voice” idea, even seemingly symbolic state-level slights can muffle the federal government’s voice. In a key case from the 1960s, the Court confronted an Oregon law that, in a jab against Communist countries, barred foreign nationals from collecting inheritances in Oregon unless an Oregonian would have the same rights in the other country. The Court struck down application of the law, but it did so not because of a direct conflict between federal and state law—the Nixon administration told the Court the Oregon law did not affect its conduct of foreign affairs.6 Rather, the Oregon law fell because it would require judges to sit in judgment of foreign nations—and gauge their “democracy quotient,” as Justice William Douglas put it.7 This, the Court said, was a task for the feds alone—a move in the Cold War’s ideological chess match that was far too important to leave to the state-level rabble. Weaving together multiple threads of the “one voice” concept, we can imagine current legal doctrine as creating a defensive halo that radiates out from any particular area of federal foreign policymaking. This halo is brightest near its center, where federal and state policies directly conflict. But its light grows progressively dimmer as it moves outward and touches state actions that pose a less direct conflict with federal law. The million-dollar questions as California and other subfederal governments move onto the global stage are: Just how far out does the defensive halo extend as the degree of federal-state conflict weakens—or, in the current context, where the federal government has left the field altogether and has no policy at all? And how, in determining the halo’s reach, should the Court weigh other factors, such as the importance and pedigree of the state interest, the state’s motive in pursuing it, or the level of competence the state brings to the table? Because the Court has only sporadically addressed these questions over time, and as states and localities steadily move onto the global stage in the new and more dynamic world of foreign relations, the foundation of the “one voice” idea suddenly seems full of fissures and cracks. It is these fissures and cracks that states and other subnational governments will have to exploit as they pursue opportunities for global leadership. Testing Constitutional Limits Will California and other states and cities seeking a place on the global stage be able to move the law? The answer, as good lawyers know, is as much logistical as it is legal. Two examples highlight some of the legal opportunities a state like California might seize under current doctrine. The first surfaces most cleanly in a 2003 case in which the Supreme Court invalidated a California law that required insurance companies to disclose details of insurance policies held by Jews during the Holocaust and, further, made it illegal for insurers to refuse to pay claims on those policies. The problem was that the law conflicted with an executive agreement, signed by President Clinton and the leaders of several other countries, that took a purely voluntary approach to the problem, cajoling insurers rather than commanding them. Echoing its earlier decision in the Myanmar case, the Court invalidated California’s law because, while the federal approach used “kid gloves,” California’s used an “iron fist,” thus undermining the president’s “diplomatic discretion.”8 But tucked in the decision was a sleeper. In striking down the law, the Court said its analysis might be different where a state was acting within its “traditional competence” and, further, that analysis of federal-state conflict would turn, at least in part, on “the strength or the traditional importance of the state concern asserted.”9 For a state like California that is fast moving into the climate space, this is manna from heaven. Indeed, the Supreme Court said more recently in a 2007 case that Massachusetts, as both a sovereign and landowner, has a powerful and longstanding interest in protecting its own shorelines against the rising sea levels that come with climate change.10 Of course, this argument may not wash, so to speak, in land-locked Oklahoma. But for coastal states like California, it provides a ready-made defense to a “one voice” challenge to state action. As states and cities move onto the global stage and attack global problems, expect them to frame their efforts as local efforts to protect people and property—the core of a state’s traditional, time-tested police powers. As they do so, the distinction between what is foreign and domestic will blur—and could fall away entirely— further undermining the “one voice” idea in the climate space and perhaps even beyond, in areas like immigration or human rights, wherever states can plausibly point to concrete interests. The second opportunity states can seize might be the Constitution’s bar on state-level compacts with foreign nations. Though the Constitution prohibits foreign-state compacts absent congressional consent, in reality states have entered into them on myriad issues, from trade and firefighting cooperation to transboundary bridges and water diversion. States are entering such compacts at a growing clip—there have been 340 agreements since the 1950s, and some 200 of them in the last ten years alone.11 Few of these, however, have suffered invalidation. Part of the reason is explicit or implicit congressional authorization. But the Court has also been quick to read congressional silence on compacts and agreements as acquiescence and, thus, approval.12 If the current trend continues and the number of foreign-state agreements continues to rise, Congress will face an unsavory choice: bluntly disallow entire categories of agreements and thereby risk the ire of friends and foes alike, or spend valuable time and energy sifting good and bad ones on a case-by-case basis. Either approach brings costs. And in the current era of partisan gridlock and political paralysis, one wonders just how often Congress will be able to muster action at all. In seeking to exploit these and other legal opportunities, California will also be aided by the shifting political tides of federalism. Throughout much of American history, federalism and states’ rights have been a conservative war cry—a needed check on a liberal, overweening federal government. The most recent wave arose in decisions throughout the 1980s and 1990s, as the Supreme Court, with Chief Justice William Rehnquist leading the charge, trimmed federal power and strengthened the states’ position across numerous policy areas, often to deregulatory effect. But last November’s election and the recent wave of state-level activism has flipped federalism’s political valence, making states the hope of progovernment progressives. Will this matter? To be sure, as cases testing the boundaries of foreign affairs federalism reach the Court, the decisions might prove, once and for all, that federalism is just a political football. But so far, at least, the smart money seems to be that the commitment to state autonomy at the core of the Rehnquist Court’s federalism revolution will continue to enjoy significant sway in the Roberts Court. At the very least, a more forward-leaning state role on climate, trade, and other problems with a global cast will create uncomfortable dissonance for conservative justices who have long laced their opinions with encomiums to federalism’s virtues. The other reason to believe California will be able to exploit available legal opportunities is logistical. Legal revolutions are not built on ideas alone. They also require an infrastructure—and a set of institutional actors with the will and capacity to advance novel legal claims and make them stick. The most significant development here is the dramatic rise in recent decades of state attorneys general —and their steady acquisition of resources and topflight legal talent. Notable as well is California’s recent high-profile retention of former Attorney General Eric Holder to quarterback the state’s strategizing on federalism matters.13 Even local governments have built impressive litigation shops and staffed them with some of the best and brightest young lawyers. During yesteryear, San Francisco might have buckled in response to Trump administration threats to cut off federal funding if the city does not assist federal immigration authorities. So might have nearby Santa Clara County. Today, both have sued the Trump administration on the issue and, so far at least, are winning.14 To this point, much of this new subfederal legal infrastructure has been given over to what might be called defensive legal efforts. Think here of state-led opposition to the Trump administration’s travel ban, or—as just noted—litigation challenging the federal government’s effort to pull federal funding from sanctuary jurisdictions unwilling to play ball with federal immigration authorities. Both have a clear defensive posture—an effort to push back against federal policies. But the growing and increasingly sophisticated legal infrastructure can also be deployed to defend more affirmative policymaking efforts as California and other subfederal governments move onto the global stage. New Frontiers of State Action In what policy areas are California and other jurisdictions most likely to push the envelope? Top of the list is climate policy, as recent headlines attest. Yet while Governor Jerry Brown’s Beijing sit-down with President Xi Jinping dramatized California’s global ambitions and bolstered Brown’s status as a de facto envoy for the United States on climate issues, the actual conversation was mostly benign—little different from the assurances aired when state trade delegations make nice in foreign countries. Even the Under 2 Coalition’s memorandum of understanding promises only “coordination and cooperation” on emission reductions, with signatories to pursue “their own strategies.”15 However, bolder state initiatives are afoot, in California and elsewhere, and may soon crest as legal issues. The best example is regional cap-and-trade programs for reducing carbon emissions that reach across international borders, linking American states with foreign governments. The idea dates back to well before Trump. In 2007, California spearheaded an effort to create a cap-and-trade program among five western states, following in the footsteps of a more limited effort among New England and Mid- Atlantic states. But the western version soon took on a novel international flavor when four Canadian provinces climbed aboard. Reaching across borders is good: more territory brings scale economies, a thicker market for trading carbon permits, and a reduced threat of “leakage” when industry picks up and moves outside the system. That was the initial attraction of a multi-state approach, even before Canadian provinces got involved. But when the Great Recession and turnover at governor’s mansions sent all the other American states to the exits, California suddenly found itself pursuing Canadianonly linkages, beginning with Quebec in 2013. The problem is that linkage involves lots of paperwork—and a set of written understandings between sovereigns that looks far meatier than the oral statements that passed between Governor Brown and President Xi in Beijing. To be sure, the linkage document inked in 2013 by California’s Air Resources Board and Quebec’s government is a skinny 14 pages, and its preamble contains plenty of hedging language that it does not limit either government’s “sovereign right and authority.”16 But the rest of the document belies such claims, including its formal styling as an “agreement” and its parade of “shall” clauses. Most worrying from a legal perspective are termination and withdrawal provisions requiring participants to remain in the agreement for a year after serving notice to the other side. These details present legal challenges and opportunities. The main challenge is that much of the agreement has a binding feel and so might be said to deprive the federal government of a potential “bargaining chip” or otherwise impair its ability to speak with “one voice” in its dealings with Canada. But there is an equally big opportunity, too. Cap-and-trade linkage may be the best way for California to expand the beachhead the Supreme Court provided in 2007 when it recognized Massachusetts’s sovereign interest in safeguarding its own shorelines against the effects of climate change. That view explicitly connects climate policy to a “traditional state concern” that the Court has said must be weighed in assessing federal-state conflict around foreign affairs. Cap-and-trade linkage may also test Congress. Despite its power to disapprove state agreements under the Compacts Clause, Congress never objected to the Quebec linkage. But California recently finalized a second Canadian linkage, to Ontario. Doing so has provided a focusing event that could raise congressional antennae. But do climate-denying Republicans in landlocked states have the stomach to disallow climate policy in a distant state, particularly one that may help, rather than hinder, their own states’ efforts to attract mobile capital and industry? Continued congressional silence would go a long way toward entrenching a norm in favor of cross-border state action, paving the way for other state efforts to step onto the global stage on climate issues and beyond. State-Led Human Rights Advocacy Affirmative efforts to confront human rights violations and other egregious behavior by foreign governments—including repression, corruption, and human trafficking— represent another area ripe for action. The evidence so far suggests that the Trump administration is advancing a narrow conception of American self-interest, deemphasizing the universal values of freedom and opportunity that have occupied a central place in the foreign policies of Democrats and Republicans for decades. In particular, Trump’s embrace of leading autocrats and proposed budget cuts for the federal agencies that lead on these issues —the State Department and USAID—put the administration on a collision course with activists around the country who want to maintain American leadership on human rights. The experience with apartheid provides them with an important precedent. While the Reagan administration chose quiet dialogue and cooperative engagement with South Africa—prioritizing instead the fight against communist insurgencies in the developing world—dozens of states and cities across the United States embraced an aggressive divestment campaign that some say played a key role in ending the apartheid system.17 The result was a web of subnational laws limiting the extent to which state and local governments could contract with companies doing business in South Africa and authorizing public pension funds to divest from companies working with the apartheid state. Moved at least in part by this subnational mobilization, the federal government adopted comprehensive sanctions against South Africa of its own, over President Ronald Reagan’s veto. At the time, the authority of states and cities was never challenged in the courts. The enthusiasm for state and local action using procurement sanctions and investment/divestment policies has not waned, though the legal basis for doing so has narrowed. Since the Court held in 1996 that federal law preempted Massachusetts’ procurement sanctions against Myanmar, most state-level sanction regimes have been trained on Iran and Sudan pursuant to explicit authorization by Congress. But as states pursue a more global role, they will find firmer legal ground when it comes to divestment actions. Procurement sanctions prohibit the state government from conducting business with private corporate entities, either U.S. companies doing business in a human rights-abusing country or companies based in the targeted country. These companies and their dealings with targeted countries may also be the subject of federal regulation. Divestment statutes arguably sit closer to the exercise of purely state power: states’ management of their own investment funds. And because state public pension funds have a fiduciary obligation to protect their members’ investments, divestment can be framed as a strategy of managing investment risks that flow from repressive and politically unstable regimes. The potential impact is significant, with nearly $3 trillion of investment capital available in state pension funds in 2015. Beyond divestment, look for states to test-drive new policies in areas where traditional state competence is beyond question: state-chartered banks and local real estate markets. For example, New York has long been at the forefront of efforts to strengthen regulatory oversight of state-chartered banks. Because every major international bank is chartered in New York, the state has a powerful platform to police efforts by repressive autocrats to keep their regimes afloat by laundering the proceeds of corruption and bypassing sanctions programs. States are also well positioned to help clean up the U.S. real estate market, where human rights abusers and kleptocrats use a lack of transparency or anonymous shell companies to launder and store money. With pressure mounting against such practices, state governments can use their authority over real estate markets to impose higher standards for customer due diligence and transparency around beneficial ownership. With these kinds of regulations in place, it would be far more difficult for corrupt and repressive regimes to stash wealth in the United States. States’ Role in Immigration Policymaking A third area where states and localities are carving out a more global role and pushing the legal envelope is immigration. As already noted, much of the headline- grabbing action here is defensive, with sanctuary jurisdictions like San Francisco and Chicago pushing back against the federal government in lawsuits invoking constitutional doctrines that protect them against federal coercion. But in the shadow of this litigation is a longer and deeper record of subnational action that has put states like California on the front lines of immigration policymaking. As with so much else in the world of foreign affairs federalism, Trump’s election last November was not so much a sudden, seismic event as a punctuation point for trends long in the making. Viewed at a distance, immigration federalism can look different from other policy areas that implicate foreign affairs. First, the case for exclusive federal authority is stronger in the immigration area. This is because the “one voice” doctrine is bolstered by the Constitution’s grant of power to Congress to “establish an uniform Rule of Naturalization.”18 The Supreme Court has consistently held that this clause confers exclusive federal authority over admission, deportation, and naturalization of noncitizens. This makes the second distinctive feature of immigration federalism something of a paradox: State and local policymaking around immigration is far thicker than in other policy areas that implicate foreign affairs. In fact, the last decade has seen an explosion of legislative activity in statehouses on immigration matters—so much so, that it is not a stretch to say the United States has already undertaken “immigration reform,” just not at the federal level.19 Some states have taken a restrictionist approach, pledging state and local support for federal enforcement efforts—and some, like Arizona, have gone beyond mere cooperation and engaged in more rigorous enforcement than federal law does, drawing a rebuke from the Supreme Court in 2012 for a state law that imposed additional sanctions on undocumented persons and authorized arrests beyond what federal law provides.20 Other states’ laws, by contrast, are integrationist. Some of these, like the current litigation efforts, are defensive and aim to secure sanctuary at home, work, and school by, among other things, expressly prohibiting state and local officials from cooperating with federal enforcement efforts. But a raft of other measures in California and elsewhere take a more affirmative approach to integration, granting immigrant access to education, medical care and other public benefits, and driver’s as well as professional licenses. A lesson here is that, even if the federal government holds exclusive power over admission, deportation, and naturalization, states can do much to modulate immigrant flows via policies that either foil or foster settlement and permanency. This may prove once and for all that the current era of rapid globalization has rendered the line between what is foreign and domestic, in the immigration area and beyond, more apparent than real. And this is part of why many integrationist laws—unlike Arizona’s harsh restrictionist approach—have survived legal challenges. Without a clear way to distinguish laws designed to shape immigration flows and those performing the traditional state functions of protecting the welfare of persons within state borders, the Court has instead reached a rough equilibrium granting states and localities latitude to regulate immigrants and immigrant services so long as they leave regulation of immigration to the feds. But two further examples of subnational action may test this equilibrium. The most dramatic is state efforts to advance more inclusive constructions of state citizenship. A bill first put forward in New York in 2014 would grant citizenship to state residents regardless of immigration status, granting them full access to public benefits and—reviving a practice common earlier in American history— entitling them to vote in state and local elections.21 More recently, Utah passed a law establishing a state guest worker program for noncitizens. Though implementation has since stalled under the threat of a Department of Justice lawsuit, a key point here is that Utah is only the most visible actor in a long-running and increasingly tense drama: More than a dozen other states, frustrated by chronic shortages of workers in the agriculture, energy, construction, and tech sectors, have proposed measures by which Congress would grant state and local control over federal guest worker visas. If Congress continues to punt on immigration—or, as the Trump administration recently suggested, the feds take a more restrictive line even as to legal immigration—look for more assertive, boundary-pushing action by states that could chip away at plenary federal power. The second type of boundary-pushing state action on immigration may lack the diplomatic feel of a Brown-Xi summit, but nonetheless has states and localities carving out a global role: the increasingly dense web of relations between state and local officials and the fifty-plus U.S.-based Mexican consulates. This is evident in the proliferation of memoranda of understanding between states and localities and consulates on deportation defense and legal proceedings involving Mexican children. Harder to see, but no less important, is an increasingly rich and routinized system of communication around other key issues impacting immigrant communities, including notario fraud, in which non-lawyers falsely represent themselves as qualified to offer immigration-related legal services, and the Ventanilla de Salud (literally, “windows of health”) system, a Mexican program run through its U.S. consulates to provide Mexican nationals with health counseling and referrals. This dense web of consular agreements and communications is important, and not just because it sits at the center of a shadow system of subnational diplomacy on immigration matters. If we squint hard enough, we can also see in it a much wider process of capacity-building as state and local governments draw in talent and expertise that can drive a new, more global role. This process began long ago in big states like California, where many state officials have done time in the federal foreign policy apparatus. But it is becoming visible in other places as gridlock in Washington, on immigration and more generally, has moved smaller states and a growing corps of self-styled “global cities” to reach beyond the water’s edge. Just the Beginning Trump’s election and his administration’s major shifts in policy on the environment, human rights, and immigration have thrust a wide range of subfederal initiatives into near-daily headlines. Undoubtedly, these efforts will serve the political interests of progressive policymakers in Democratic-leaning states looking to challenge the policies of the Trump administration at every turn, and they are sure to find a receptive audience overseas where long-standing U.S. allies are looking for ways to continue making progress on shared priorities and to stand up to President Trump. They will also test the boundaries of federal foreign affairs power, raising the question of whether the Justice Department is preparing for a fight. But it is also important to note that the enthusiasm of states and cities to exercise leadership on the global stage has been long in the making; it will not go away when Trump does. Nor is it limited to hot button, highly politicized areas like climate, human rights, and immigration. Exhibit A is cyber security, where a patchwork federal presence has moved states to the front lines of policymaking despite the fact that cyber-regulation’s frequent extraterritoriality—think here of a Parisian bookseller who fails to safeguard a Massachusetts customer’s online data—would seem to make it an ideal candidate for federalization. Most arresting of all, some say state-level cybersecurity efforts to combat botnets and other malware could soon involve countermeasures—that is, malware that goes the other way and attacks the perpetrator’s systems—that look a lot like state-led warfare. Is U.S. foreign policy enabled or hobbled by growing subfederal activism in foreign affairs? This is not an easy question to answer, even if the trend is difficult to reverse. Two of the central virtues of federalism—its potential to spur policy innovation and the ability to bring the locus of policy choice closer to voters—are in direct tension with the view that U.S. power depends on policy coherence and the leverage that comes from acting in unison. In an environment of strong bipartisan agreement on major national security priorities, few were concerned about activist states and municipalities; with a shared sense of direction, the energy of subfederal actors was seen as a virtue, opening up new tools and channels for advancing U.S. interests. But with the loss of that bipartisan consensus, the likelihood that the federal government and states may act at cross-purposes is increasing, and the incentives for pushing the boundaries even stronger. Whether the courts will allow the most forward-leaning state policy efforts to proceed is anyone’s guess at this stage, but it is not clear that judges are best positioned to help policymakers navigate this new terrain. Judges will encounter these issues only episodically, in a subset of policy domains, and without the expertise to identify the conditions under which a more expansive subfederal role advances U.S. policy goals. Policymakers, on both sides of the aisle, would be wise to get ahead of the courts on this one. While it may be too late to turn back the clock, the challenge of harnessing all the instruments of American power involves figuring out how to lead this diverse network of players in a common direction with a shared goal—a significant organizational task for any president, and one made far more difficult when views on policy are so polarized.

#### Third, the commerce clause isn’t an issue for antitrust rulings specifically—the Supreme Court settled this ages ago

Rauch, 20

(Daniel E., Yale Law School, J.D; Finalist, Morris Tyler Moot Court of Appeals; Coker Fellow, Legal Writing Instructor in Contract Law; The Yale Law Journal, Projects Editor; J. Welles Henderson Senior Thesis Prize; Phi Beta Kappa; 2009 American Parliamentary Debate Association Speaker of the Year, Princeton University, A.B., “SHERMAN'S MISSING ‘SUPPLEMENT’: PROSECUTORIAL CAPACITY, AGENCY INCENTIVES, AND THE FALSE DAWN OF ANTITRUST FEDERALISM”, Cleveland State Law Review, vol. 68, no. 2, 2020, p. 172-216. HeinOnline.)\\JM

1. The Dormant Commerce Clause A first doctrinal argument stems from the so-called "Dormant Commerce Clause." Under Dormant Commerce Clause jurisprudence, states are forbidden from legislating when doing so would have a significant adverse effect on interstate commerce. 7 3 Analyzing this doctrine, some have argued that early state antitrust laws were in constitutional peril from the start, since enforcing them might impose unacceptable economic effects beyond state borders. 74 There is no doubt that lawyers of the 1890s thought certain types of economic activity could be off-limits to state antitrust enforcement: indeed, this assumption is partially what motivated the passage of the Sherman Act. 75 However, these categories were not very broad and, therefore, would not have substantially reduced the capacity for state-level enforcement. To the contrary, the Commerce Clause jurisprudence of this period was, if anything, hostile to federal, not state, interventions. Perhaps the leading example of this tendency is the 1895 case of United States v. E. C. Knight Co. 76 There, the federal government brought a Sherman Act prosecution against a group of major sugar manufacturers, all operating within Pennsylvania. Although these manufacturers collectively possessed an enormous share of the sugar market, the Court found this challenge to be beyond the scope of the Commerce Clause, finding the factories were engaged merely in "manufacture," and not in the transport of goods across state lines. 7 7 Yet in doing so, at least some believe that the Court was motivated not so much by a laissez-faire defense of corporate wealth, but by an effort to buttress state authority over the intrastate operations of interstate combinations.78 Accordingly, throughout the period at issue in this analysis, it would have been most logical to conclude, as a doctrinal matter, that state power to regulate the economy, even if such regulations impacted events beyond state borders, was quite robust. Indeed, this point would be confirmed by the Supreme Court in Justice Holmes' opinion in Standard Oil Co. of Kentucky v. Tennessee.7 9 In that case, a Kentucky-based corporation appealed from a conviction under Tennessee's state antitrust statute, arguing that under the Constitution, a state's courts could not levy criminal penalties against an out-of-state corporate entity. 0 In particular, it argued such penalties would violate the Dormant Commerce Clause because it would constitute one state imposing impermissible regulations across state lines. 1 The Court disagreed, instead finding that each state clearly had jurisdiction to regulate economic effects caused within its jurisdiction, even if caused by out-of-state actors: The present statute deals with the conduct of third persons, strangers to the business. It does not regulate the business at all. It is not even directed against interference with that business specifically, but against acts of a certain kind that the state disapproves in whatever connection. The mere fact that it may happen to remove an interference with commerce among the states as well with the rest does not invalidate it. It hardly would be an answer to an indictment for forgery that the instrument forged was a foreign bill of lading, or for assault and battery, that the person assaulted was engaged in peddling goods from another state. How far Congress could deal with such cases we need not consider, but certainly there is nothing in the present state of the law, at least, that excludes the states from a familiar exercise of their power.8 2 To be sure, this power would be limited since "Congress would have understood that state imposition or regulation of direct restraints of interstate commerce would violate the Dormant Commerce Clause."83 However, on the whole, the power available would have been considerable, especially since, as discussed below, America's economy at this time was far more concentrated at the state level anyway.84 Thus, the Dormant Commerce Clause jurisprudence of this era would not have seemed to be a fatal obstacle to effective state antitrust enforcement.

#### Fourth, there’s already precedence for the states to regulate commerce in other states—they’re actively ignoring federal oversight or concerns about overreach

Coleman, 20

([James W. Coleman](https://regproject.org/person/james-w-coleman/) Professor of Law Southern Methodist University Dedman School of Law, "Deep Dive Episode 128 – Can States Trump Interstate Commerce?," Aug 27 <https://regproject.org/podcast/deep-dive-ep-128/> NL)

James Coleman:  Thank you so much, Professor Kochan. I’m just so happy to be here today discussing this topic because, as I’ll try to explain, I think this is the single most important, interesting, and urgent question of constitutional law at the moment. I’ll explain why it is each of those things. To start with why this is the most important question in constitutional law. I think, if you haven’t read Professor Kochan’s Notre Dame Law Review article that was sent with this, go read it now. I’m on Twitter @energylawprof. I just tweeted it. You can go check it out there. The reason it’s important is because looking at those Founding-era sources, Professor Kochan shows how for the people who developed the Constitution and did its initial interpretation, the whole point of the U.S. Constitution was to have free trade between the U.S. states; that states could have their policy, but there would be free trade between them. That was one of the problems that as perceived with the Articles of Confederation, and that’s what the Constitution was supposed to provide. Professor Kochan looks at the writings of Alexander Hamilton, of James Madison, of Justice Story, and shows how each of them saw the Constitution. They thought the whole point of the Constitution was to provide free trade between the states. The reason that’s so important is because it’s not really possible — the problem if you had a very simplistic states’ rights rhetoric is it’s not actually possible for states to choose their own policies unless they have free trade between them. To give a simple example, California — imagine you said, “Okay, let’s just let states adopt their own policies. This whole idea of a Dormant Commerce Clause is a problem.” Well, what happens when California adopts a law that says, “You cannot purchase a product in California unless it was produced in a state that had the same minimum wage or was produced by workers operating with the protection of California labor laws.” That regulation, although it’s just a state regulation of California and it’s a nondiscriminatory regulation because it just says if you’re going to sell any product in our state, it has to have been produced in the same way that we would require somebody to produce it within California, that law would immediately set a minimum wage for every other state in the U.S. So it’s a nondiscriminatory regulation but because it applies to transactions that happen outside of California’s borders—making it extraterritorial—it constrains what other states can do. And this is not just a hypothetical. For many, many years, that was the example that people gave. They said, “Well, surely no state — we can’t have something like that happen because that would be the end of free trade between the states.” But California has actually done something very similar, which is if you go to the grocery store right now anywhere across the country, and if you look at the eggs that you get, on it will be printed “CASEFS.” What that means is that it is compliant with California’s laws for how you treat chickens when you are laying eggs. Those eggs are not laid in California. That is California regulating how every other state treats its egg-laying hens. You might agree with the animal rights perspective that California has. It’s not to say that the law is bad, but the reason that is necessary is because California said, “You can’t sell eggs in our state unless you treat your chickens in this way.” So it’s almost like they’re setting a nationwide minimum wage for chickens, and basically what’s happened is all those other states—because they have to sell in this national market—have, as a result, been forced to follow California’s laws. So it no longer matters what the big states that produce a lot of eggs, places like Missouri and Iowa. It no longer matters what kind of regulation Missouri or Iowa has for treating animals. The only thing that matters is what’s the most strict law that’s adopted by a major market state? In this case, California. If you don’t have some limits on what kind of laws that states can make to break up interstate commerce, the end result is that the states themselves are not allowed to choose their own level of regulation. The laboratories of democracy that we count on don’t work. And this is exactly, as Professor Kochan shows, what the Founders were worried about—this kind of states interfering with each others’ regulatory systems and schemes—so this was the entire point of the Constitution. So it’s extremely important to see that the Constitution actually provides it. Now, why I say it’s the most interesting question in constitutional law—that’s because, although, as Professor Kochan shows, this is the whole point of the Constitution, it’s a real puzzle because there has been extreme disagreement among judges, justices, and legal scholars about what part of the Constitution provides free trade between the states. Historically, this was done under the Dormant Commerce Clause, and Professor Kochan explained how Justice Story basically sees this accomplished through the Dormant Commerce Clause. However, recently, conservative scholars on the Supreme Court have started to say, “We don’t really think the Dormant Commerce Clause does that because the Dormant Commerce Clause, of course, is just an implication from silence.” So, the Constitution doesn’t have a Dormant Commerce Clause; that’s just the implication. Well, if Congress didn’t regulate this, maybe, then, we don’t want the states to regulate this as well. Justice Thomas, initially, then Justice Scalia, now Justice Gorsuch, have all expressed more and more skepticism with applying any kind of review under the Dormant Commerce Clause. For a while, Justice Scalia and Justice Thomas said, “Well, maybe we’ll at least strike down discriminatory regulations.” Since that time, Justice Thomas has moved away from that, and he basically says, “I don’t want to apply the Dormant Commerce Clause at all.” Now, when Justice Thomas initially took a stand against the Dormant Commerce Clause, he, at that time, suggested maybe there was another part of the Constitution—he said the Import/Export Clause, that’s Article I, Section 10—that might operate to stop some discrimination and border controls between the states. Since that time, he has not said very much more about that, so we don’t know if that’s a real viable cause. Other legal scholars have said that, “Well, maybe, actually, the Privileges and Immunities Clause in Article IV, Section 2. Maybe that provides some protection from states; that if you’re okay under one state law, you should be able to trade — if you have eggs that are okay under Iowa or Missouri law, you should be able to trade with California.” Similarly, some people have said the Full Faith in Credit Clause, Article IV, Section 1. Maybe that somehow creates free trade between the states. Others have said, “Well, maybe it’s actually the Due Process Clause. You shouldn’t be trying to regulate how chickens are treated in other states because you don’t have sufficient contact, basically, with that.” And others have said that there’s general principle of horizontal federalism that creates free trade between the states. If you’re counting, that’s six different theories of where this is in the Constitution. The reason that scholars are struggling with this so much is that it’s clear that we do need some limits on state regulations to provide free trade between the states. One way we can tell that is that every federalist system that exists anywhere in the world has limits on state regulation that allow for free trade. If you look at Canada, there are limits on province by province regulation. If you look in Switzerland, there are limits on canton by canton regulation. If you look at the E.U. even, there are limits, and they’re the same limits that Professor Kochan described: You can’t discriminate, you can’t regulate extraterritorially, and you can’t adopt certain regulations that would so mess up things that they would create an undue burden. So, it must be the case that the Constitution somehow provides what it was intended to provide, but the challenge is that we don’t know, and there’s a lot of disagreement about, which specific part of the Constitution does that. As a practice pointer for all of you, if you are filing a Dormant Commerce Clause lawsuit, prepare for the day that you might have to explain it to an appellate court or even the Supreme Court with a different view of what accomplishes free trade between the states, and use all those six theories. You have to plead them because otherwise, when you write your cert petition, Justice Thomas will say, “Well, I don’t believe in a Dormant Commerce Clause. That’s gone. Maybe if you had said something about the Import-Export Clause.” Maybe some of the other justices would be okay with the Privileges and Immunities argument, but you’re going to need to cobble together enough of these different theories to count to five on that, and that’s a very difficult task right now with the U.S. Supreme Court. Lastly, let me just say something about why I believe this is also the most urgent question in constitutional law. That’s from my perspective as an energy scholar. Again, I just posted one of my articles on exactly this topic @energylawprof on Twitter, and you can see. Basically, the problem is that in the U.S. today, we have largely solved the problem of producing energy affordably. We have had the biggest oil boom that’s ever happened in the history of the world, and we’re doing it even at very, very low prices. So, we have extremely low prices. They’re about $40 a barrel today. But if you look at some of our cleaner, newer sources of energy, it’s even cheaper. If I look at natural gas, where that natural gas is produced — often the price is $0 for that natural gas. Sometimes that price is negative. More and more frequently, that price is going negative. The same thing is true of wind power. Rock bottom prices for wind power. Sometimes the price is negative. People will pay you to take away wind power at the wind turbine. So, then, what’s the problem with energy? Why are we having incredibly high energy prices in some places, like the U.S. northeast, in California? Why are we even having outages in California? Well, the reason is because we can’t transport those cheap, cleaner energy sources to the places where they’re needed. Why can’t we transport them? Because you need state-by-state approval to build an oil pipeline or a powerline, and actually, increasingly, even to build a natural gas pipeline. Natural gas pipelines are regulated by the federal government, but the states have found ways to exercise veto authority over those. They do that under Clean Water Act Section 401, which requires a water quality certification for a pipeline, and they’ve also been able to do that using eminent domain where they’ve said, “You cannot exercise eminent domain against those natural gas company even though you have federal approval because of our sovereign immunity.” So, there are a number of obstacles that are emerging to that interstate transport. States have also gotten very aggressive in terms of adopting laws designed to stop energy sources that they don’t like. For instance, Missouri was unhappy about a powerline that was going to cross it to bring wind power to the Midwest, to Chicago from the windy prairies, so it tried to pass laws that were basically to stop eminent domain to get that wind power where it needed to go. Similarly, if you look at California, California has passed a law to block any new oil pipelines across state land. You’ve had coal terminals, you’ve had regulations and laws passed against new coal terminals or oil terminals for export—an attempt to blockade the sources of coal, which are mostly in Wyoming and Montana, as well as sources of oil, trying to prevent that oil from North Dakota from leaving the west coast. There’s also been regulations against oil export in Portland, Maine. So, on both sides of the country, this is happening. There’s an increased effort to blockade both your traditional oil and gas sources as well as some of those new renewable sources. Regardless of what your goal is for the United States energy policy, if you believe in American energy dominance and you want to have more oil and gas production and export—right now, the U.S. is still projected to be the world-leading liquefied natural gas exporter in five years—well, you need to have interstate transport of natural gas. Similarly, if you believe that we need to transition away from fossil fuels and we need cleaner energy sources, we need those renewables that are mostly located in our deserts and prairies to get to the markets where they’re needed—the urban centers on the west coast, east coast, Midwest, and southeast—you also need to have interstate energy transport. This trend towards states blocking interstate transport of sources they don’t like is a huge and pressing problem for the United States. Finally, let me just end by again highlighting something from Professor Kochan’s article, which is he points out that for Madison and Hamilton and Story, free interstate trade was not just about the economic benefits. Of course, it was about those economic benefits, but it was also about creating a more perfect union. That’s why every place—even somewhat imperfect unions like the E.U.—has these free trade rules. The reality is, if you’re concerned about the individual states growing apart and having less to do with each other and wanting to have less to do with each other, then one of the most important things, as Alexander Hamilton and James Madison showed during a time that also included a lot of division, is that increased trade between the states. Because that increased trade between the states binds the United States together, and I think there couldn’t be a more important time for that. With that, I’ll turn it over to Jonathan. Thank you so much.

#### Second, states is core of the literature—the NAAG spans across all 50 states and allows for uniform action, which proves the CP is predictable and not utopian

Grosso, 21

(Jacob P Grosso, J.D. Candidate, 2021, University of Richmond School of Law. B.A., 2018, George Mason University., “The Preemption of Collective State Antitrust Enforcement in Telecommunications,” 55 U. RICH. L. REV. 615 (2021) NL)

State action is continuing to rise, with collective action becoming a cemented enforcement strategy. 151 The National Association of Attorneys General ("NAAG") serves to help organize disparate state enforcers and gives them a forum to discuss enforcement policies and cooperation. 15 2 The NAAG emulates a federal agency in geographic breadth of enforcement but is comprised of individual states and their elected officials (the States' Attorneys General).1 53 It achieves its influence through standing committees and task forces, including its Multistate Antitrust Task Force. 154

#### Third, we have ev about all 50 states acting uniformly to do antitrust actions, which means it is predictably grounded in the literature and you can research it—

#### An anti-Google case involved 50 state and US territories

McGinnis and Sun 21, John O. McGinnis is the George C. Dix Professor in Constitutional Law at Northwestern Pritzker School of Law. McGinnis is a panelist called on to decide WTO disputes and graduate of Harvard Law School, Linda Sun is an intellectual property lawyer at Wilmerhale and former editor in chief of Northwestern Journal of Technology and Intellectual Property during her time at Northwestern Pritzker School of Law, “Unifying Antitrust Enforcement for the Digital Age”, 78 Wash. & Lee L. Rev. 305, 2021

Big Tech's rise has not gone unnoticed. After the 2016 presidential election, many questioned whether large tech platforms wield too much influence.i0 2 In the years following, Big Tech has come under fire from lawmakers on both sides of the political spectrum.103 In 2019, the House Judiciary Subcommittee on Antitrust opened a bipartisan "top-to-bottom" investigation of the tech industry, calling on tech executives to address allegations of anti-competitive behavior.10 4 In the same year, fifty attorneys general from U.S. states and territories opened an antitrust investigation of Google.i05 Another coalition of state attorneys general announced a similar probe into Facebook. 06

#### Anti-tobacco cases in the early 2000s involved multistate action

Pridgen, 18

(Dee, Carl M. Williams Professor of Law and Social Responsibility, University of Wyoming College of Law, Pridgen has also been a Visiting Professor of Law at the University of Baltimore School of Law, the University of Maryland School of Law, and the Catholic University of America, Columbus School of Law. Before she joined the College of Law Faculty at the University of Wyoming, she served as a Staff Attorney, for the Federal Trade Commission, Bureau of Consumer Protection, Washington, D.C. from 1978-82. She was also a law clerk for the Honorable Barrington D. Parker, U.S. District Court, District of Columbia from 1974-76. In May of 2003, Pridgen was elected to membership in the American Law Institute. Dee Pridgen's publications include two treatises aimed at practicing attorneys, Consumer Protection and the Law, and Consumer Credit and the Law, coauthored with Richard M. Alderman both published by Thomson/Reuters, and both of which are updated yearly. She is also a coauthor of a law school casebook entitled Consumer Law: Cases and Materials (4th ed. 2013; West Academic). She is the principal author (with coauthor Gene A. Marsh) of Consumer Protection in a Nutshell (4th ed. 2016). She has written articles and reports on consumer law, and has given presentations at international consumer law meetings in Helsinki, Finland and Auckland, New Zealand, B.A., Cornell University (1971), Phi Beta Kappa and with distinction, J.D., New York University (1974), Order of the Coif and cum laude, “The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Laws”, (2018). *Faculty Articles*. 13. https://scholarship.law.uwyo.edu/faculty\_articles/13)\\JM

II. KEY ROLE OF STATE ATTORNEYS GENERAL As stated in the preceding part, the FTC developed their model state UDAP statute with a goal of broadening the reach of the FTC’s consumer protection mission to the states. The state government enforcers were viewed as allies, perhaps even foot soldiers, in the fight against unfair and deceptive trade practices. But since the vehicle for this extension of FTC authority to the states came in the form of independently enacted state laws, the FTC had no direct control over the activities of the states in this sector, other than the federal preemption doctrine. Over the years, the power and enthusiasm of the state AG’s for their consumer protection mission grew, while the FTC and the federal government in general became less enthusiastic about perceived over-regulation of the free market during the 1980s and in later periods as well. Further venturing past their federal “parent,” states also enhanced their power by joining together in multistate litigation to take on large corporate advertisers, such as the tobacco companies and magazine publishers using sweepstake marketing. In the 2000s, states used their UDAP statutes to challenge prescription drug makers and predatory lenders, among others, and sometimes employed outside private counsel on a contingent fee basis to further enhance the efficiency and effectiveness of their cases. And yet despite the periodic federal/state tensions regarding the appropriate role of government regulation in the consumer protection arena, both the FTC and the more recently created Consumer Financial Protection Bureau, continue to partner with the state AGs on so-called enforcement “sweeps.” All in all, the role of the states in enforcing the state UDAPs has been beneficial for consumers and the relationship with the federal agencies has been more of a sibling rivalry than an armed conflict.

## Case

#### Data disproves

Cliffe, 16

(Sarah Cliffe 16, Director of the Center on International Cooperation at New York University, 3/29/16, “Food Security, Nutrition, and Peace,” http://cic.nyu.edu/news\_commentary/food-security-nutrition-and-peace)

However, current research **does not** yet indicate a clear link between climate change, food insecurity and conflict, except perhaps where rapidly deteriorating water availability cuts across existing tensions and weak institutions. But a series of interlinked problems – changing global patterns of consumption of energy and scarce resources, increasing demands for food imports (which draw on land, water, and energy inputs) can create pressure on fragile situations. Food security – and food prices – are a highly political issue, being a very immediate and visible source of popular welfare or popular uncertainty. But their **link to conflict** (and the wider links between climate change and conflict) is indirect rather than direct. What makes some countries more resilient than others? **Many** countries face food price or natural resource shocks **without falling into conflict**. Essentially, the two important factors in determining their resilience are: First, whether food insecurity is combined with **other stresses** – issues such as unemployment, but most fundamentally issues such as political exclusion or human rights abuses. We sometimes read nowadays that the 2006-2009 drought was a factor in the Syrian conflict, by driving rural-urban migration that caused societal stresses. It may of course have been one factor amongst many but it would be **too simplistic** to suggest that it was the primary driver of the Syrian conflict. Second, whether countries have strong enough institutions to fulfill a social compact with their citizens, providing help quickly to citizens affected by food insecurity, with or without international assistance. During the 2007-2008 food crisis, developing countries with low institutional strength experienced more food price protests than those with higher institutional strengths, and more than half these protests turned violent. This for example, is the difference in the events in Haiti versus those in **Mexico or the Philippines** where far greater institutional strength existed to deal with the food price shocks and **protests did not spur deteriorating national security** or widespread violence.

#### Ag resilient—adaptation

FAOUN, 19

(FAO COMMISSION ON GENETIC RESOURCES FOR FOOD AND AGRICULTURE @ UN, “THE STATE OF THE WORLD’s BIODIVERSITY FOR FOOD AND AGRICULTURE”, https://www.courthousenews.com/wp-content/uploads/2019/02/fao-report.pdf)

Maintaining, using and developing adapted genetic resources A number of countries note the significance of well-adapted species, varieties or breeds in terms of enhancing resilience to climate change. Several specific examples of how such components of BFA have been utilized in adaptation efforts are provided. For example, Papua New Guinea mentions the distribution to farmers of crop accessions identified in ex situ collections as being tolerant to salinity (taro and cassava varieties), drought (cassava, banana and aibika13 varieties) and flooding (taro and banana varieties). It notes that this activity proved very useful in sustaining food security during the drought that struck the country in 2015 and 2016,14 when 40 percent of the population was seriously affected. Panama reports that its criollo livestock breeds have a combination of characteristics that are not found in any introduced breeds, including high fertility rates, longevity, resistance to parasites and diseases and good grazing abilities, including the ability to make use of poor-quality pastures. It notes, in particular, the potential of two locally adapted cattle breeds, the Guaymi and the Guabal^, in climate change adaptation. It also mentions, among its climate change adaptation measures, the development of maize varieties and hybrids that are tolerant of drought and diplodia rot (a fungal disease) and that grow well in soils with low nitrogen levels. With regard to choices at species level, Sudan reports that some of its livestock keepers have replaced cattle and sheep with dromedaries and goats, as the latter species are better suited to a climate change-affected environment that is more prone to droughts.Some countries note the significance of participatory breeding programmes in the context of climate change. For example, Oman mentions that local wheat and barley landraces have been improved through such programmes to obtain varieties that have shorter growing seasons and can be managed more flexibly, especially during years with prolonged periods of extreme heat and limited water availability. Ensuring farmers have access to the adapted germplasm they need is another issue highlighted. Nepal, for example, mentions the role of community-based seed banks in providing farmers with immediate access to locally adapted germplasm that can be used in efforts to cope with climate change.

#### Bio-d loss isn’t existential

Kareiva, 18

(Peter and Valerie Carranza, Institute of the Environment and Sustainability, University of California, Los Angeles “Existential risk due to ecosystem collapse: Nature strikes back,” Futures, available online January 5, 2018, ScienceDirect, dml)

The interesting question is whether any of the planetary thresholds other than CO2 could also portend existential risks. Here the answer is not clear. One boundary often mentioned as a concern for the fate of global civilization is biodiversity (Ehrlich & Ehrlich, 2012), with the proposed safety threshold being a loss of greater than 0.001% per year (Rockström et al., 2009). There is little evidence that this particular 0.001% annual loss is a threshold—and it is hard to imagine any data that would allow one to identify where the threshold was (Brook, Ellis, Perring, Mackay, & Blomqvist, 2013; Lenton & Williams, 2013). A better question is whether one can imagine any scenario by which the loss of too many species leads to the collapse of societies and environmental disasters, even though one cannot know the absolute number of extinctions that would be required to create this dystopia. While there are data that relate local reductions in species richness to altered ecosystem function, these results do not point to substantial existential risks. The data are small-scale experiments in which plant productivity, or nutrient retention is reduced as species numbers decline locally (Vellend, 2017), or are local observations of increased variability in fisheries yield when stock diversity is lost (Schindler et al., 2010). Those are not existential risks. To make the link even more tenuous, there is little evidence that biodiversity is even declining at local scales (Vellend et al., 2013, 2017). Total planetary biodiversity may be in decline, but local and regional biodiversity is often staying the same because species from elsewhere replace local losses, albeit homogenizing the world in the process. Although the majority of conservation scientists are likely to flinch at this conclusion, there is growing skepticism regarding the strength of evidence linking trends in biodiversity loss to an existential risk for humans (Maier, 2012; Vellend, 2014). Obviously if all biodiversity disappeared civilization would end—but no one is forecasting the loss of all species. It seems plausible that the loss of 90% of the world’s species could also be apocalyptic, but not one is predicting that degree of biodiversity loss either. Tragic, but plausible is the possibility of our planet suffering a loss of as many as half of its species. If global biodiversity were halved, but at the same time locally the number of species stayed relatively stable, what would be the mechanism for an end-of-civilization or even end of human prosperity scenario? Extinctions and biodiversity loss are ethical and spiritual losses, but perhaps not an existential risk.

#### No tipping point

Jeremy Hance 18, wildlife blogger for the Guardian and a journalist with Mongabay focusing on forests, indigenous people, climate change and more. He is also the author of Life is Good: Conservation in an Age of Mass Extinction., 1-16-2018, "Could biodiversity destruction lead to a global tipping point?," Guardian, https://www.theguardian.com/environment/radical-conservation/2018/jan/16/biodiversity-extinction-tipping-point-planetary-boundary

“It makes no sense that there exists a tipping point of biodiversity loss beyond which the Earth will collapse,” said co-author and ecologist, José Montoya, with Paul Sabatier Univeristy in France. “There is no rationale for this.” Montoya wrote the paper along with Ian Donohue, an ecologist at Trinity College in Ireland and Stuart Pimm, one of the world’s leading experts on extinctions, with Duke University in the US. Montoya, Donohue and Pimm argue that there isn’t evidence of a point at which loss of species leads to ecosystem collapse, globally or even locally. If the planet didn’t collapse after the Permian-Triassic extinction event, it won’t collapse now – though our descendants may well curse us for the damage we’ve done. Instead, according to the researchers, every loss of species counts. But the damage is gradual and incremental, not a sudden plunge. Ecosystems, according to them, slowly degrade but never fail outright. “Of more than 600 experiments of biodiversity effects on various functions, none showed a collapse,” Montoya said. “In general, the loss of species has a detrimental effect on ecosystem functions...We progressively lose pollination services, water quality, plant biomass, and many other important functions as we lose species. But we never observe a critical level of biodiversity over which functions collapse.”

#### History and biology prove

Ord, 20

(Dr. Toby Ord 20, Senior Research Fellow in Philosophy at Oxford University, DPhil in Philosophy from the University of Oxford, The Precipice: Existential Risk and the Future of Humanity, Hachette Books, Kindle Edition, p. 124-126)

Are we safe now from events like this? Or are we more vulnerable? Could a pandemic threaten humanity’s future?10 The Black Death was not the only biological disaster to scar human history. It was not even the only great bubonic plague. In 541 CE the Plague of Justinian struck the Byzantine Empire. Over three years it took the lives of roughly 3 percent of the world’s people.11 When Europeans reached the Americas in 1492, the two populations exposed each other to completely novel diseases. Over thousands of years each population had built up resistance to their own set of diseases, but were extremely susceptible to the others. The American peoples got by far the worse end of exchange, through diseases such as measles, influenza and especially smallpox. During the next hundred years a combination of invasion and disease took an immense toll—one whose scale may never be known, due to great uncertainty about the size of the pre-existing population. We can’t rule out the loss of more than 90 percent of the population of the Americas during that century, though the number could also be much lower.12 And it is very difficult to tease out how much of this should be attributed to war and occupation, rather than disease. As a rough upper bound, the Columbian exchange may have killed as many as 10 percent of the world’s people.13 Centuries later, the world had become so interconnected that a truly global pandemic was possible. Near the end of the First World War, a devastating strain of influenza (known as the 1918 flu or Spanish Flu) spread to six continents, and even remote Pacific islands. At least a third of the world’s population were infected and 3 to 6 percent were killed.14 This death toll outstripped that of the First World War, and possibly both World Wars combined. Yet even events like these fall short of being a threat to humanity’s longterm potential.15 [FOONOTE] In addition to this historical evidence, there are some deeper biological observations and theories suggesting that pathogens are unlikely to lead to the extinction of their hosts. These include the empirical anti-correlation between infectiousness and lethality, the extreme rarity of diseases that kill more than 75% of those infected, the observed tendency of pandemics to become less virulent as they progress and the theory of optimal virulence. However, there is no watertight case against pathogens leading to the extinction of their hosts. [END FOOTNOTE] In the great bubonic plagues we saw civilization in the affected areas falter, but recover. The regional 25 to 50 percent death rate was not enough to precipitate a continent-wide collapse of civilization. It changed the relative fortunes of empires, and may have altered the course of history substantially, but if anything, it gives us reason to believe that human civilization is likely to make it through future events with similar death rates, even if they were global in scale. The 1918 flu pandemic was remarkable in having very little apparent effect on the world’s development despite its global reach. It looks like it was lost in the wake of the First World War, which despite a smaller death toll, seems to have had a much larger effect on the course of history.16 It is less clear what lesson to draw from the Columbian exchange due to our lack of good records and its mix of causes. Pandemics were clearly a part of what led to a regional collapse of civilization, but we don’t know whether this would have occurred had it not been for the accompanying violence and imperial rule. The strongest case against existential risk from natural pandemics is the fossil record argument from Chapter 3. Extinction risk from natural causes above 0.1 percent per century is incompatible with the evidence of how long humanity and similar species have lasted. But this argument only works where the risk to humanity now is similar or lower than the longterm levels. For most risks this is clearly true, but not for pandemics. We have done many things to exacerbate the risk: some that could make pandemics more likely to occur, and some that could increase their damage. Thus even “natural” pandemics should be seen as a partly anthropogenic risk.

#### ABR won’t get close to extinction plus intervening actors check

Cara 17

(Ed Cara 17, science writer for The Atlantic, Newsweek, and Vocativ, 1/27/17, “The Attack Of The Superbugs,” http://www.vocativ.com/394419/attack-of-the-superbugs/)

Antibiotic-resistant infections kill at least 700,000 people worldwide a year right now, according to an exhaustive report commissioned by the UK in 2014, and without any substantial medical breakthroughs or policy changes that slow down resistance, they may claim some 10 million deaths annually by 2050 — eclipsing cancer in general as a leading cause. These deaths largely won’t come from pan-resistant infections, just tougher ones. A preventable death there, a preventable death here. Leaving that aside, antibiotics, along with proper sanitation and nutrition, gird our entire way of living. Most every invasive surgery, pregnancy, organ transplant and chemotherapy session we go through will become riskier. Other diseases like HIV, malaria or influenza will become deadlier, since bacteria often exploit the opening in our immune system they leave behind. And already precarious populations like those living with cystic fibrosis, prisoners, and the poor will lose years off their lives. For all the warranted gloom, though, Farewell does think there are reasons to be hopeful. “I don’t think we are doing enough, but the scientific community along with many governmental and private foundations are very actively involved in finding not only new antibiotics, but new solutions to this problem,” she said. There’s been a noticeable change in attitude and increased urgency surrounding antibiotic resistance, she said, one that she hadn’t seen even five years ago, let alone twenty. Until recently, that attitude change could be seen from places as high up as the U.S. federal government. In 2014, former President Obama issued an executive order aimed at addressing antibiotic resistance, the first real acknowledgement of the problem from an administration, devoting funding and outlining a national action for combatting resistance. Through its federal agencies, the administration pushed to reduce antibiotic use on farms and encouraged doctors to stop using them in excess. “There has been a lot of work done the last couple of years, much of it spurned by [Obama’s] National Action Plan,” said Dr. David Hyun, a senior officer for Pew Charitable Trusts’ Antibiotic Resistance Project. The CDC, in particular, has used its funding to open up regional labs that allow them to better detect and respond to antibiotic-resistant outbreaks like the Nevada case, he said. They ultimately hope to create an expansive surveillance system that can easily keep track of resistance rates on a national, state and regional level. A parallel system also exists for monitoring resistance in the food chain, shepherded by the CDC and the U.S. Department of Agriculture. In fact, it was this sort of cooperation between national and local health agencies that enabled Nevada doctors to stop the worst from happening, said Dr. Lei Chen. The swift identification of a possible CRE strain by the hospital, coupled with the woman’s medical history, led to a precautionary quarantine, while also prompting Chen’s public health department and eventually the CDC into action. And it may help prevent future cases from spilling into the public. According to Chen, the CDC has allocated funding this year to all of Nevada’s state public health departments so they can better detect CRE and other dangerous resistant strains. Under the Trump administration, there’s no telling how these small victories will hold up or whether they will advance. All references to antibiotics once found on the Whitehouse.gov site have been removed, including a link to the Obama administration’s national action plan, and the fact that they’re already tried to bar USDA scientists from discussing their work with the public while stripping funding from other public health agencies isn’t encouraging. Even with the best public policy, however, there’s no clear light at the end of the tunnel. Antibiotic resistance has gradually been worsening, even within the last 15 to 20 years, when superbugs like methicillin-resistant Staphylococcus aureus (MRSA) first became widely known, said Hyun. The effort needed to develop new drugs has been in short supply, hamstrung by pharmaceutical companies’ inability to recoup the costs of bringing new antibiotics to market. That’s because, unlike the latest heart medication, any new antibiotics will have to be treated like the last drops of water during a drought, used as little as possible — the exact opposite way to make money off a new product. Yet, much like climate change, the financial toll of not doing anything will total in the trillions years down the road. And it already numbers in the billions now, according to the CDC. Of course, we need bacteria to survive. And most need or pay no mind to us in return. Even pan-resistant bacteria don’t really mean harm. Some have been found in perfectly healthy people, a fact that’ll either comfort you or keep you awake at night, only causing problems when our immune system wavers. There’s no army of sentient E. coli that will rise up and someday overthrow the human race. But barring the calvary showing up, a new fear of ours will learn to settle in, almost unnoticed. It’ll creep in when we pick our heads up from a nasty fall that scrapes our skin open or breaks our bones; when we wave goodbye to our loved ones before they enter an operating room, or when we cradle our newborns into a world teeming with the living infinitesimal, wishing there was still a way to shield them from it as our parents once could for us. A fear of naked vulnerability. The antibiotic apocalypse will be gentle, if it fully arrives, but it won’t be any less devastating to the human spirit.

#### ABR is gradual and slow—this time is not different

Smith, 16

(Drew Smith 16, former R&D director at MicroPhage and SomaLogic, 6/14/16, “The Myth Of The Post-Antibiotic Era,” <https://www.forbes.com/sites/quora/2016/06/14/the-myth-of-the-post-antibiotic-era/#db027696fa83>)

Right now, drug resistant infections are mainly a threat to those that are already sick and/or in medical facilities. But, if we continue down this path, mundane infections in the otherwise healthy could someday morph into life-threatening ordeals, and simple medical procedures and surgeries may be skipped to avoid risk of infection. However, while this threat is real, it’s important to keep in mind that this is an ongoing, gradual challenge; it’s extremely unlikely that a single event will herald with complete certainty the abrupt end of modern medicine as we know it. In this context, those scary headlines are inappropriate, if not numbing and counterproductive. In May, Ars wrote about some alarmist and inaccurate news stories dealing with a newly identified type of drug resistance—one that makes bacteria resistant to a last-resort antibiotic called colistin and can spread between bacteria easily. The headlines blared that it was the “first” time such a dastardly microbe had seeped into the US—which is not true. And they suggested that it would certainly mark the end of antibiotics—also not true. This week, scientists provided updates on tracking that type of resistance, and of course some alarmist headlines followed. Yet, the new data actually suggests that a tempering of concerns about this particular resistance may be in order. It turns out that this “dreaded,” "scary," “nightmare” of a drug-resistant microbe has been in the US for more than a year and elsewhere in the world since as far back as 2005—it’s just that nobody noticed it. And nobody noticed it because so far it hasn’t been the dreaded, scary nightmare some have feared. “It’s not a huge cause for concern,” Mariana Castanheira, lead author of one of this week's resistance updates, told Ars. Castanheira is the director for Molecular and Microbiology at JMI Laboratories, a private company that monitors drug resistance microbes in hospitals and medical settings. They and others are finding this new type of resistance now simply because they’re looking for it, she said. Castanheira explains that people initially started digging for this new type of drug resistance—a gene called mcr-1—out of concern that it makes bacteria resistant to the antibiotic colistin, which is a relatively toxic drug used only when nearly all others have failed against a multi-drug resistant infection. Bacteria have shown up with colistin resistance before—in fact, many times in the US and elsewhere around the world. But in those cases, the genes were embedded in the bacteria’s chromosomes and generally passed down through generations. The mcr-1 resistance gene, on the other hand, seems to always sit on a plasmid, a small loop of DNA that bacteria can readily pass around to neighbors. If colistin-resistant bacteria shared their mcr-1 plasmid with others that are already resistant to lots of antibiotics, they could create a long-feared invincible germ—a “pan-resistant” bacteria. "Doesn't scare me" So far that doesn’t seem to be happening, though, Castanheira said. In more than a decade of skulking around,

mcr-1 has made its way into bacteria in animals, people, and soil all over the world. Yet, all of the mcr-1 carrying microbes examined have been susceptible to at least one antibiotic—and often several.

# 1NR

## DA

#### Any major antitrust reform costs PC, even if it’s politically popular—especially given that key personnel are not yet in place

Folio, 21

(Joseph Charles Folio III, JD from the George Mason School of Law, Lisa M. Phelan, JD from the American University School of Law, Jeff Jaeckel, JD from the University of Wisconsin School of Law, and Alexander Paul Okuliar, JD from the Vanderbilt School of Law, "Antitrust Update: Up and Down the Avenue" March 22 <https://www.mofo.com/resources/insights/210322-atr-update.html> NL)

Are the stars aligning for antitrust reform? President Biden is filling key positions in the White House (Timothy Wu, National Economic Council) and at the FTC (Lina Khan, nominee for commissioner) with lawyers who have advocated for increased antitrust enforcement, especially against “big tech.” In Congress, the House antitrust subcommittee concluded a year-long investigation in October 2020 and found bipartisan agreement on discrete areas for reform. With Democrats now in control of both houses of Congress, antitrust legislation seems close. But not so fast. The House and Senate antitrust subcommittees have held four hearings since February 25, 2021, but it is crucial to view these recent developments in their proper context. Even when politicians and enforcers appear to agree on a goal, it can still be a long and winding road to actual policy reform. Two to go Although antitrust reform advocates cheered President Biden’s initial appointments, two of the most consequential antitrust positions—the assistant attorney general (AAG) for antitrust and the FTC chair—remain open. Both the AAG and FTC chair wield tremendous authority; they approve cases, guide investigations, and will decide how to proceed with ongoing litigation. It is unlikely that the Biden administration will make any significant decisions, or support any particular legislation, before its key personnel are firmly in place. And that can take time. Former AAG Makan Delrahim was nominated in March 2017 but not confirmed until September 2017. Interestingly, the pressure to nominate like-minded antitrust reformers for these two positions is coming from multiple angles. One public interest group recently sent a letter to White House chief of staff Ron Klain and, after “highly commend[ing]” the nomination of Ms. Khan to be an FTC commissioner, warned against the influence of certain White House and DOJ officials over the AAG and FTC chair nominations because of their links to “big tech” companies.[[1]](https://www.mofo.com/resources/insights/210322-atr-update.html" \l "_ftn1) Additionally, many in the press have been critical of the level of tech enforcement activity during the Obama administration and want to avoid a replay of those years.[[2]](https://www.mofo.com/resources/insights/210322-atr-update.html" \l "_ftn2) Meanwhile, on Capitol Hill … Down the avenue, Congress is debating whether to provide the agencies with additional tools and resources. But how realistic are the prospects for legislative reform? In short, although the prospects for sweeping legislative reform of the antitrust laws are dim, targeted reforms appear increasingly likely, especially increased funding for the agencies. In October 2020, the House antitrust subcommittee concluded a year-long bipartisan investigation into these issues, and the House Democrats published a lengthy report detailing their findings and making recommendations for reform. Notably, the House Republican response identified several areas of agreement, including “providing antitrust enforcement agencies with the necessary resources.” [[3]](https://www.mofo.com/resources/insights/210322-atr-update.html" \l "_ftn3) House Republicans also made it clear that they too are concerned about tech companies “using ‘killer acquisitions’ to remove up-and-coming competitors from the marketplace,” and that the burdens of proof for mergers and predatory pricing cases need to be reevaluated.[[4]](https://www.mofo.com/resources/insights/210322-atr-update.html" \l "_ftn4) On March 18, 2021, however, the Republican ranking member on the committee reiterated a shared interest in reforming the evidentiary burden of proof in merger cases, which he described as having become “essentially insurmountable” and “a grant of near total immunity to big tech companies.” Although a path to agreement on more substantive issues typically has many obstacles, reforming the burden of proof in certain instances may be emerging as the most likely candidate for significant legislative action. In the Senate, on February 4, 2021, newly installed antitrust subcommittee chair Senator Amy Klobuchar (D-MN) [introduced a bill](https://www.mofo.com/resources/insights/210211-far-reaching-bill.html) that would overhaul existing antitrust laws. Among other reforms, it would lower the government’s burden of proof to block a merger, shift the burden of proof in certain cases and require the merging parties to justify the deal, and increase funding for both the DOJ Antitrust Division and the FTC. At the subcommittee’s March 11, 2021 hearing related to the bill, subcommittee ranking member Senator Mike Lee (R-UT) (who promptly released a statement noting his opposition to Ms. Khan’s nomination) made it clear that he firmly opposes “a sweeping transformation of the antitrust laws.” Throughout the hearing, however, there appeared to be bipartisan support for taking some sort of action to address these issues, and at the very least to provide increased funding to the DOJ and FTC. Even Senator Lee, who recently introduced a bill that would combine the DOJ and FTC to avoid inefficiencies in antitrust enforcement, acknowledged that agency leaders need the resources that are necessary to vigorously enforce antitrust laws. So, what does it all mean? In these circumstances, the most likely outcome appears to be antitrust officials creatively using their existing tools to enhance enforcement while not so quietly pressing Congress for additional assistance. On March 16, 2020, acting FTC Chair Rebecca Slaughter advocated for increased scrutiny of mergers between pharmaceutical companies. She also told the House antitrust subcommittee that the agencies “should consider withdrawing” the guidance for “vertical” mergers issued during the last administration to allow for more aggressive enforcement.[[5]](https://www.mofo.com/resources/insights/210322-atr-update.html" \l "_ftn5) But at the same time, FTC Commissioner Noah Phillips explained that the agency would not be able to challenge certain deals without more funding. The Biden administration and the agencies will need to determine how to square those positions. Also, even assuming Congress could provide the agencies with additional funding quickly (on top of the additional $20 million Congress provided to the FTC in December 2020), using that funding to hire additional attorneys will take time. The path for meaningful legislative reform remains extremely complicated. The prospect for reform depends significantly on whether members of Congress, congressional leadership, and the Biden administration are willing to expend the time and political capital necessary to pass a reform bill (which also assumes the relevant parties can agree on what should be included—or, perhaps more importantly, excluded—from that bill). In light of competing priorities, the absence of key personnel, and the already narrowing congressional calendar (major non-appropriations legislation typically will not move after July in an election year (2022)), those prospects appear to be slim. In the meantime, we expect that Congress will continue to focus attention on these issues with more hearings and new legislative proposals, but it remains to be seen when attention will become action.

#### Antitrust action saps finite capital, imperils rest of agenda

Karaim 21

(Reed, <http://library.cqpress.com/cqresearcher/document.php?id=cqresrre2021050705>, 5-7)

Stucke, the former U.S. Justice Department antitrust official, says that despite Wu and Khan's credentials and reputation, changing antitrust policy will require a concerted effort. With Biden having an ambitious overall agenda and his Democratic Party holding the slimmest possible majority in the Senate, Stucke says, the question is “to what extent will the Biden administration want to expend political capital on this. They've got some bipartisan support for antitrust reform, but to what extent are they going to mobilize that?”

#### Manchin will come around

BOLTON 11/9 (Alexander; The Hill, “Manchin sees his power grow,” <https://thehill.com/homenews/senate/580647-manchin-sees-his-power-grow>, //pa-ww)

Manchin still hasn’t signed off on the framework, despite the significant concessions to him. But some moderate Democratic strategists are doubtful that lumping everything into one massive infrastructure package or keeping the bipartisan infrastructure bill firmly tied to the outcome of the negotiations on reconciliation bill would have moved Manchin to support more social spending. “That’s not what was going to happen. Manchin is happy to wait five more months,” said Jim Kessler, the executive vice president for policy at Third Way, a centrist Democratic think tank. Even when Democrats set a $3.5 trillion spending target for the reconciliation package in the budget resolution, Kessler thought “this is going to end up at $2 trillion” because of resistance from Manchin and other centrists. But Democratic strategists think Manchin will eventually sign onto the reconciliation package, though it may not be until the week of Thanksgiving, when the Congressional Budget Office is expected to provide an official cost estimate for the bill, or later. Steve White, the director of the Affiliated Construction Trades Foundation in Charleston, W.Va., said “the idea somehow that he doesn’t want the second bill, I think, is wrong.” “I think he doesn’t want all of the second bill. Half of the second bill is a lot,” he added of the reconciliation bill. “I’m looking forward to what it looks like and I think there will be a lot of good stuff for West Virginia.” White said the bipartisan infrastructure bill will have a “huge” impact on West Virginia but he said the reconciliation bill will also have significant investments for the state. He said spending on renewable energy, such as wind turbines, could create good job opportunities in the state.

#### Manchin will vote ‘yes’

AP 11/4 (Associated Press, “Biden Claims Historic Progress on Climate Efforts at Summit,” https://news.wttw.com/2021/11/04/biden-claims-historic-progress-climate-efforts-summit, //pa-ww)

President Joe Biden argued Tuesday that historic progress on addressing global warming was achieved at the U.N. climate conference in Glasgow, Scotland, and expressed optimism for a similar outcome in Washington, where his legislative agenda has been stalled by intra-party disagreements. Speaking in a press conference before boarding Air Force One to return to Washington, Biden highlighted new efforts to stop methane leaks, protect forests, invest in new technologies and spend money on clean energy infrastructure. But his efforts to meet U.S. commitments on climate change with a major domestic spending bill remained held up by legislative maneuvering. “I can’t think of any two days where more has been accomplished on climate than these two days,” Biden said. The president contrasted the U.S. posture of leading several major initiatives at the summit with those of Russia and China, who did not send their leaders to Glasgow. “The single most important thing that’s got the attention of the world is climate, everywhere, from Iceland to Australia,” Biden said, “and they’ve walked away.” “We showed up. We showed up,” Biden said. “And by showing up we’ve had a profound impact, I think, on how the rest of the world is looking at the United States.” Biden has been determined to demonstrate to the world that the U.S. is back in the global effort against climate change, after his predecessor Donald Trump pulled the U.S. — the world’s largest economy and second-biggest climate polluter — out of the landmark 2015 Paris climate accord. Putting the U.S. on the path to halve its own output of coal, oil and natural gas pollution by 2050, as his climate legislation seeks to do, “demonstrates to the world the United States is not only back at the table, it hopefully can lead by the power of our example,” Biden told delegates and observers on Monday. “I know that hasn’t always been the case,” he added, in a reference to Trump. But Biden has yet to deliver on his own commitments as coal-state U.S. Sen. Joe Manchin has again threatened Biden’s domestic effort. For all the optimism Biden has been radiating at the summit in Scotland, persistent doubts lurk about whether he can deliver solely through executive actions as continued talks with Congress have steadily cut into his ambitions. Manchin said Monday, at an unfortunate time for the president, that he remained undecided on Biden’s $1.75 trillion domestic policy proposal, which includes $555 billion in provisions to combat climate change. Manchin holds a key vote in the Senate, where Biden has the slimmest of Democratic majorities, and has successively killed off key parts of the administration’s climate proposals. He said Monday he was uncertain about the legislation’s impact on the economy and federal debt and was as “open to voting against” it as for it. Biden minimized Manchin’s objections on Tuesday, saying of the senator, “He will vote for this” and “I believe that Joe will be there.” He insisted no world leaders were pressing him on the fate of the legislation in Washington and expressed confidence in its passage. Biden has essentially bet that the right mix of policies on climate change and the economy are not only good for the country but will help Democrats politically. But questions remain about whether he has enough political capital at home to fully honor his promises to world leaders about shifting the U.S. toward renewable energy. Gubernatorial elections Tuesday in Virginia and New Jersey — states Biden won in last year’s election — will provide the first ballot-box test of how Americans view his presidency. Biden joined other leaders Tuesday for an initiative to promote safeguarding the world’s forests, which pull vast amounts of carbon pollution from the air. As part of a broader international effort, the administration is attempting to halt natural forest loss by 2030 and intends to dedicate up to $9 billion of climate funding to the issue, pending congressional approval. “Forests have the potential to reduce — reduce — carbon globally by more than one third,” Biden said. The president and European Commission President Ursula von der Leyen co-hosted an event to promote an alternative to China’s infrastructure financing programs. Biden compared his “Build Back Better World” policies to the Chinese programs, saying his would not expose countries seeking infrastructure funds to “debt traps and corruption.” He then highlighted the commitments by roughly 100 countries to cut methane emissions by 30% over the next decade. Biden also joined world leaders in promoting investments in new technology to fight climate change and build a carbon-neutral future. “Our current technology alone won’t get us where we need to be,” he said, “We need to invest in breakthroughs.” The president also met behind closed doors with Prince Charles and “commended the Royal Family for its dedication to climate issues,” the White House said. Crucial for his time in Scotland is that he’s emphasizing several policies that can be achieved without congressional buy-in, such as the methane pledges and private partnerships. Back home, his administration chose Tuesday to launch a wide-ranging plan to reduce methane emissions, targeting a potent greenhouse gas that contributes significantly to global warming. Biden came to the summit saying he hoped to see his legislation pass this week, but Manchin’s new objections threaten to close the narrow window Biden may have to win passage of his initiatives. The senator is eager to preserve his state’s declining coal industry despite coal’s falling competitiveness in U.S. energy markets. If Biden’s climate legislation falters, he could be limited to regulatory projects on climate that could easily be overturned by the next U.S. president, and turn his stirring cries for climate action abroad into wistful talk at home. Manchin’s statements are a possible sign that one of two key Democratic votes in the Senate wants to delay votes on the president’s agenda until the bill is fully reviewed. But House Democrats are still taking steps this week to pass Biden’s $1 trillion infrastructure package, which includes efforts to address climate change. The White House is seeking to turn both measures into law, linking them in hopes of appeasing a diverse and at times fractious Democratic caucus. White House press secretary Jen Psaki pushed back, saying the administration is confident the spending package already meets the criteria set by Manchin. “It is fully paid for, will reduce the deficit, and brings down costs for health care, childcare, elder care, and housing,” Psaki said. “We remain confident that the plan will gain Senator Manchin’s support.”

#### Manchin will support the climate provisions

NILSEN 9/14 (Ella; CNN Politics, “Biden's spending bill could be Democrats' last hope of achieving meaningful climate action as crisis worsens,” <https://www.cnn.com/2021/09/14/politics/biden-budget-congress-climate-action/index.html>, //pa-ww)

With a razor-thin majority in both the House and Senate, this is Democrats' only shot at passing a substantial climate bill before world leaders meet in November. But there's at least one prominent Senate Democrat who could thwart those plans. Sen. Joe Manchin of West Virginia, Senate Democrats' key swing vote, wants to pare down the overall size of the bill, and he has said he has concerns about what the climate provisions could mean for a fossil-fuel producing state like West Virginia. As chair of the Senate Energy and Natural Resources Committee, the senator will have a large hand in shaping Democrats clean electricity program. Sen. Sheldon Whitehouse of Rhode Island told CNN negotiations with Manchin are ongoing — but he was optimistic the West Virginia senator would understand the gravity of a fast-warming climate and its impacts. "At the end of the day, we're all answerable to the future to get the job done right," Whitehouse said. "I don't think [Manchin] wants to be on the wrong side of that future."

#### At worst, the climate provisions will be tweaked, not removed

DUEHREN 9/16 (Andrew; Wall Street Journal, “Democrats Rethink Climate Measures, Consider Carbon Tax,” <https://www.wsj.com/articles/democrats-rethink-climate-measures-consider-carbon-tax-11631800800>, //pa-ww)

Mr. Manchin’s concerns have pushed other Democrats to review the design of the program. Sen. Tina Smith (D., Minn.), who has led efforts to craft the clean electricity performance program in the Senate, said she is in talks with Mr. Manchin, with an aim toward broadening the program to better incorporate carbon-capture technology. Sufficient carbon-capture technology, which involves pulling emissions out of the air, could allow states with large fossil-fuel industries—like West Virginia—to rely on the same energy mix and avoid penalties for utilities. “If you take energy, and you make it clean through carbon capture, then that counts as clean, I think, in my book and in Sen. Manchin’s book,” she said.

#### Winners don’t win

Subramanian 21 – White House correspondent at USA Today, citing William Howell – political scientist at the University of Chicago Harris School of Public Policy

Courtney, with Joey Garrison, 3/7. “'Dinner table' politics: Why Joe Biden ditched bipartisan dealmaking to pass his COVID-19 relief bill.” https://www.usatoday.com/story/news/politics/2021/03/07/covid-19-bill-biden-chooses-dinner-table-politics-over-bipartisanship/6892438002/

Despite the relief plan's popularity outside the Beltway, it is unlikely that momentum from its passage will hurtle Biden into future legislative wins, Howell said.

“The idea that a legislative win begets a subsequent legislative win in this environment is probably asking for too much,” he said, noting the prospect of passing COVID-19 relief was higher than more hot-button issues like immigration or health care.

A legislative defeat would have raised questions about Biden’s ability to pass any meaningful legislation, but its passage won’t be a “springboard to the production of all kinds of landmark legislation – far from it," Howell said.

“Sure, he can claim victory,” said Ari Fleischer, former press secretary for President George W. Bush. “Nobody will ultimately know whether it truly is a victory until we see the shape the economy is in a year or so.”Winners win is wrong – Overreach plunges Biden’s agenda into quicksand

#### BBB solves warming by investing in clean energy and a clean electricity standard – meeting climate commitments is the only way to ensure US climate leadership which guarantees global follow on and solves all threats that’s Blinken

#### Warming causes extinction

Dr. Yew-Kwang Ng 19, Winsemius Professor of Economics at Nanyang Technological University, Fellow of the Academy of Social Sciences in Australia and Member of Advisory Board at the Global Priorities Institute at Oxford University, PhD in Economics from Sydney University, “Keynote: Global Extinction and Animal Welfare: Two Priorities for Effective Altruism”, Global Policy, Volume 10, Number 2, May 2019, pp. 258–266

Catastrophic climate change Though by no means certain, CCC causing global extinction is possible due to interrelated factors of non-linearity, cascading effects, positive feedbacks, multiplicative factors, critical thresholds and tipping points (e.g. Barnosky and Hadly, 2016; Belaia et al., 2017; Buldyrev et al., 2010; Grainger, 2017; Hansen and Sato, 2012; IPCC 2014; Kareiva and Carranza, 2018; Osmond and Klausmeier, 2017; Rothman, 2017; Schuur et al., 2015; Sims and Finnoff, 2016; Van Aalst, 2006).7 A possibly imminent tipping point could be in the form of ‘an abrupt ice sheet collapse [that] could cause a rapid sea level rise’ (Baum et al., 2011, p. 399). There are many avenues for positive feedback in global warming, including: • the replacement of an ice sea by a liquid ocean surface from melting reduces the reflection and increases the absorption of sunlight, leading to faster warming; • the drying of forests from warming increases forest fires and the release of more carbon; and • higher ocean temperatures may lead to the release of methane trapped under the ocean floor, producing runaway global warming. Though there are also avenues for negative feedback, the scientific consensus is for an overall net positive feedback (Roe and Baker, 2007). Thus, the Global Challenges Foundation (2017, p. 25) concludes, ‘The world is currently completely unprepared to envisage, and even less deal with, the consequences of CCC’. The threat of sea-level rising from global warming is well known, but there are also other likely and more imminent threats to the survivability of mankind and other living things. For example, Sherwood and Huber (2010) emphasize the adaptability limit to climate change due to heat stress from high environmental wet-bulb temperature. They show that ‘even modest global warming could ... expose large fractions of the [world] population to unprecedented heat stress’ p. 9552 and that with substantial global warming, ‘the area of land rendered uninhabitable by heat stress would dwarf that affected by rising sea level’ p. 9555, making extinction much more likely and the relatively moderate damages estimated by most integrated assessment models unreliably low. While imminent extinction is very unlikely and may not come for a long time even under business as usual, the main point is that we cannot rule it out. Annan and Hargreaves (2011, pp. 434–435) may be right that there is ‘an upper 95 per cent probability limit for S [temperature increase] ... to lie close to 4°C, and certainly well below 6°C’. However, probabilities of 5 per cent, 0.5 per cent, 0.05 per cent or even 0.005 per cent of excessive warming and the resulting extinction probabilities cannot be ruled out and are unacceptable. Even if there is only a 1 per cent probability that there is a time bomb in the airplane, you probably want to change your flight. Extinction of the whole world is more important to avoid by literally a trillion times.

#### BBB solves warming, bioD, econ -- extinction

Oakes, 3/25

(Jonette, reporter for the Hill, "Ted Lieu raises alarm over biodiversity and climate change,' 3/25/21 <https://thehill.com/policy/energy-environment/544881-ted-lieu-raises-alarm-biodiversity-climate-change> NL)

Rep. [Ted Lieu](https://thehill.com/people/ted-lieu) (D-Calif.) on Wednesday said declines in biodiversity are a global concern that can be addressed at various levels of government. Speaking at The Hill’s “The Loss of Nature: A Global Threat” event, Lieu said climate change has prompted an upheaval in biodiversity, with policies needed at the state, federal and international to address the problem. “Climate change is an existential threat, not just to California or America, but to the entire world. And the way that we solve this is we get the rest of America to do what California did and the rest of the world to do what America hopefully will do soon," Lieu told The Hill’s Steve Clemons. “The good news is a number of countries are taking climate change seriously. I think they can all do more, but we’ve shifted in just a decade or so from a bunch of people denying that climate change even is happening to now people who are acknowledging it and that’s a very good first step,” said Lieu, a member of the House Foreign Affairs Committee. Lieu's comments come as the Biden administration and congressional Democrats look to pass a sweeping infrastructure package that's expected to include numerous environmental components, including provisions for renewable energy. Lieu argued that California’s climate laws are not only good for the environment, they're good for economic prospects as well. “What we’re seeing is that when you take actions to make your water cleaner, your air having less pollution, and when you’re taking carbon and methane out of air, it actually improves the quality of people’s lives. It gets people to want to come to the state and it can generate green energy and green jobs,” Lieu said at the event sponsored by Natural Security.

#### Outweighs on magnitude

McDonald ‘19 (Samuel Miller McDonald is a writer and geography PhD student at University of Oxford studying the intersection of grassroots movements and energy transition; 1/4/19; “Deathly Salvation”; *The Trouble*; https://www.the-trouble.com/content/2019/1/4/deathly-salvation)

A devastating fact of climate collapse is that there may be a silver lining to the mushroom cloud. First, it should be noted that a nuclear exchange does not inevitably result in apocalyptic loss of life. Nuclear winter—the idea that firestorms would make the earth uninhabitable—is based on shaky science. There’s no reliable model that can determine how many megatons would decimate agriculture or make humans extinct. Nations have already detonated 2,476 nuclear devices. An exchange that shuts down the global economy but stops short of human extinction may be the only blade realistically likely to cut the carbon knot we’re trapped within. It would decimate existing infrastructures, providing an opportunity to build new energy infrastructure and intervene in the current investments and subsidies keeping fossil fuels alive. In the near term, emissions would almost certainly rise as militaries are some of the world’s largest emitters. Given what we know of human history, though, conflict may be the only way to build the mass social cohesion necessary for undertaking the kind of huge, collective action needed for global sequestration and energy transition. Like the 20th century’s world wars, a nuclear exchange could serve as an economic leveler. It could provide justification for nationalizing energy industries with the interest of shuttering fossil fuel plants and transitioning to renewables and, uh, nuclear energy. It could shock us into reimagining a less ~~suicidal~~ civilization, one that dethrones the death-cult zealots who are currently in power. And it may toss particulates into the atmosphere sufficient to block out some of the solar heat helping to drive global warming. Or it may have the opposite effects. Who knows? What we do know is that humans can survive and recover from war, probably even a nuclear one. Humans cannot recover from runaway climate change. Nuclear war is not an inevitable extinction event; six degrees of warming is.

#### Solves – now is key

Leber, 10/7

(Rebecca, “The US is closer than ever before to making major progress on the climate crisis”, Vox, 10-07-2021, https://www.vox.com/22685920/democrats-infrastructure-build-back-better-climate-change)\\JM

The United States — the largest carbon polluter in history — is closer than it’s ever been to taking sweeping and lasting action on the climate crisis. The bad news is that if Democrats can’t pull it off, they may never get another opportunity like this — and the planet certainly won’t. Democratic leaders are trying to pass two major pieces of legislation — the $1 trillion bipartisan infrastructure bill and the up to $3.5 trillion Build Back Better Act — that they say can slash US pollution by up to 45 percent in the coming decade. In the outlined Build Back Better Act, Congress would flex its power to transform the electricity sector so that it runs on mostly clean energy, steer the transportation sector toward electric vehicles, and finally take action on methane pollution, one of the most harmful greenhouse gases. But there have been many recent moments when the precarious dealmaking in Congress seemed close to falling apart. One of the biggest sticking points has been with West Virginia Sen. Joe Manchin, who has questioned the party’s approach to passing both bills simultaneously. “What’s the urgency that we have?” Manchin asked on CNN’s State of the Union in late September. In part because of Manchin’s opposition, even progressive leaders have begun to manage expectations, signaling the ultimate bill will be less ambitious. Sen. Bernie Sanders of Vermont suggested that the $3.5 trillion figure would see some “give and take.” The package is likely to shrink to $2.3 trillion or less, the New York Times reported on Wednesday. So what is the urgency? Democrats only have one year before midterm elections could take away their narrow majorities in the House and Senate. That would leave them powerless to pass any legislation without help from Republicans. At the same time, the planet faces a rapidly closing window to avert the worst catastrophes of global warming. Every fraction of a degree will translate into lives and livelihoods lost. The world can’t afford another decade of American inaction, and what Congress does next will help determine the future of the climate. A last chance for Democrats Historically, the president’s party loses seats in Congress in midterm elections. Next November, Democrats could lose their narrow control of Congress if they lose even one Senate seat or more than a few House seats. “The middle of that Venn diagram — when we have leaders who care about science and we still have that window of opportunity — is now,” said Lena Moffitt, campaign director at the climate advocacy group Evergreen Action. Democrats in Congress are also relying on a roughly once-a-year process, known as budget reconciliation, to try and push the Build Back Better Act through the Senate. Reconciliation allows them to pass a budget with a simple majority, instead of the 60 votes that are usually required in the Senate. There might not be time or political will to make a similar move in 2022. And some Democrats remain unwilling to eliminate the Senate filibuster, which is the other way they could pass progressive policies. In short, if the historical pattern holds, Democrats may not get another chance under President Biden — or even this decade — to take serious action on climate. Some Republicans have been hinting at taking climate change more seriously, but much of the party’s leadership continues to downplay and deny climate science. The next time the US has an opening like this, climate change will likely be dramatically worse — and that much harder to stop. The best chance for the global climate Climate scientists have warned that once the atmosphere warms more than 1.5 degrees Celsius, we will live in a drastically changed world. If countries, corporations, and individuals don’t take immediate action to reduce pollution, the world may hit that grim milestone in just 10 years. Over the long term, if the world continues on its current polluting path, the world will warm more than double that amount, risking catastrophes humanity has never had to confront. The window to chart a new course is rapidly closing. And the world’s “last, best chance” to take decisive collective action is less than a month away, as John Kerry, who serves as President Biden’s climate envoy, has said. In early November, world governments will gather in Glasgow for the United Nations climate conference, COP26. Following up on the Paris climate accord, countries will pledge more ambitious pollution targets and tackle the challenge of financing a worldwide transition to clean energy. The US bears the most responsibility of any country for global warming, having released 20 percent of the world’s greenhouse pollution since 1850. Today, the country ranks second in emissions behind China. But the US also has the power to magnify its impact if it leads by example, or if it flexes its influence on the global economic system, for example by affecting global prices of fossil fuels by ending government subsidies. Climate experts say progress at the COP26 conference depends on the United States proving it can do its part, for symbolic as well as practical reasons. This is the first year the US officially returns to global negotiations after former President Donald Trump withdrew the country from the Paris climate accord. Now, Biden has to lead by example by showing that the country can swiftly change direction for good, demonstrating progress on its national pledge of cutting emissions 50 to 52 percent by 2030. “There is this sense of exhaustion about how long is it going to take for one of the biggest emitters in the world to do its fair share,” said Rachel Cleetus, the clean energy policy director at the Union of Concerned Scientists. It’s unclear whether Congress will deliver on climate-change legislation by the time the international community meets in Glasgow. But any steps forward would send “a very important signal that can really help catalyze more ambition from other countries,” Cleetus said.

#### Solves the economy via green tech and job growth

Kuttner, 9/17

(Robert, professor at Brandeis University’s Heller School. "Biden’s Build Back Better Plan Is First and Foremost a Jobs Plan,' 9/17/21 <https://prospect.org/infrastructure/building-back-america/bidens-build-back-better-plan-first-and-foremost-jobs-plan/> NL)

The Build Back Better legislation now working its way through the budget reconciliation process does many important things, but let’s not lose sight of the job creation benefits. Even after a partial and intermittent recovery, the U.S. economy currently has 5.3 million fewer jobs than in the last pre-pandemic month of February 2020. Our friends at the Economic Policy Institute have done a [comprehensive study](https://www.epi.org/publication/iija-budget-reconciliation-jobs/) of the combined impact of the bipartisan infrastructure bill plus the larger reconciliation package based on Biden’s Build Back Better. They find that the two, taken together, will directly create upward of four million new jobs. Of the direct job creation, 556,000 new jobs would be created yearly in manufacturing; 312,000 in construction industries; 763,000 in climate-related jobs, including electric-vehicle infrastructure and federal procurement of clean technologies, public transit, power infrastructure, climate resilience, agriculture and forestry innovations, environmental remediation, and scientific research and development; and 1.2 million in the caregiving professions. So there is a powerful synergy between the social investment that the economy needs and the complementary gains in job creation. Since these federal outlays come with wage standards (and manufacturing and construction jobs already pay well above median wage), these public investments also have major benefits in the form of higher worker pay. Build Back Better not only creates upward of four million new jobs; it creates good jobs. This is especially important in the caregiving occupations, where earnings have been a disgrace. By dramatically increasing public investments in universal pre-K, child care, home care, and other forms of elder care, government both enables workers to gain more skills that command higher pay and provides leverage for government standards to raise earnings directly. EPI’s analysis also provides a very useful comparison between Biden’s Build Back Better as revised by budget reconciliation, and the much-touted bipartisan infrastructure bill, now known as the Infrastructure Investment and Jobs Act. That act, with a much lower price tag of $548 billion in new money, creates only 772,000 new jobs per year, or just 19 percent of the combined total. Build Back Better, investing $3.5 trillion, creates the lion’s share—3.2 million new jobs per year. Build Back Better provides an array of complementary gains that will benefit citizens of red states along with blue ones. This is the benefit of going big. Before these deals are done, Congress may shave the total figure and shift some of it to spending disguised as tax cuts, such as the refundable Child Tax Credit. But the order of magnitude will not change much, and it is monumental. As we’ve seen from reports of jobs going begging, workers now have increased bargaining power to turn down lousy jobs with low pay. That dynamic, in turn, has raised prevailing wages, even without a higher statutory minimum wage. When the federal government creates another four million good jobs via direct public spending, that will increase worker bargaining power and earnings even more. This four-million-job figure does not even take into account multiplier effects, as the public investment helps underwrite and stimulate new economic activity in the private sector, making the likely real total well in excess of five million new jobs. It has long been established by social science research that increases in early-childhood education pay dividends several times over in the form of improved prospects of lifetime earnings and reduced need for social services and reduced entanglement with the criminal justice system. But similar kinds of multiplier benefits result from other areas of public investment. As the EPI analysis points out, Spending on infrastructure yields immediate benefits due to the labor- and capital-intensive demands of these investment projects, and it continues to yield economic dividends for years to come by allowing people, goods, and ideas to move around more efficiently. Estimates of the longer-term economic impacts of infrastructure spending find returns on investment range from 17 to 73% as businesses more efficiently reach markets, workers access more job opportunities, and families find it easier to access quality education and health care. Build Back Better provides an array of complementary gains that will benefit citizens of red states along with blue ones, Trump voters as well as Biden voters. There was a time when both parties recognized the benefits of this scale of public investment, from the original 1944 GI Bill to the Eisenhower-sponsored interstate highway system, as late as ARPA-E, intended to increase U.S. capacity in renewable energy, and created in 2007 under George W. Bush. No longer. Though the bipartisan infrastructure bill pointed in the right direction, it is a pittance compared with the need. It would be a miracle if even one of the Republican co-sponsors voted for Build Back Better, which thankfully can be enacted with 50 Democratic votes.

#### Growth solves war via MAD while decline ensures extinction

Farrell, 20

(HENRY FARRELL is Professor of Political Science and International Affairs at George Washington University. ABRAHAM L. NEWMAN is a Professor at the Edmund A. Walsh School of Foreign Service and in the Department of Government at Georgetown University. “Chained to Globalization: Why It’s Too Late to Decouple,” Foreign Affairs January/February 2020 NL)

Friedman was right that a globalized world had arrived but wrong about what that world would look like. Instead of liberating governments and businesses, globalization entangled them. As digital networks, financial flows, and supply chains stretched across the globe, states—especially the United States—started treating them as webs in which to trap one another. Today, the U.S. National Security Agency lurks at the heart of the Internet, listening in on all kinds of communications. The U.S. Department of the Treasury uses the international financial system to punish rogue states and errant financial institutions. In service of its trade war with China, Washington has tied down massive firms and entire national economies by targeting vulnerable points in global supply chains. Other countries are in on the game, too: Japan has used its control over key industrial chemicals to hold South Korea’s electronics industry for ransom, and Beijing might eventually be able to infiltrate the world’s 5G communications system through its access to the Chinese telecommunications giant Huawei. Globalization, in short, has proved to be not a force for liberation but a new source of vulnerability, competition, and control; networks have proved to be less paths to freedom than new sets of chains. Governments and societies, however, have come to understand this reality far too late to reverse it. In the past few years, Beijing and Washington have been just the most visible examples of governments recognizing how many dangers come with interdependence and frantically trying to do something about it. But the economies of countries such as China and the United States are too deeply entwined to be separated—or “decoupled”—without causing chaos. States have little or no ability to become economically self-reliant. Hawks in Beijing and Washington may talk about a new Cold War, but there is today no way to split the world into competing blocs. Countries will remain entangled with one another, despite the dangers that their ties produce—bringing a new era of what might be called “chained globalization.” Under chained globalization, states will be bound together by interdependence that will tempt them to strangle their competitors through economic coercion and espionage, even as they try to fight off their rivals’ attempts to do the same. In some ways, chained globalization makes the Cold War seem simple. The economies of the Western and Soviet camps shared few points of contact and thus offered few opportunities for economic coercion (and policymakers on both sides came to understand the existential danger of nuclear weapons and developed strategies for limiting it). The situation today is far messier. The world’s powers are enmeshed in financial, trade, and information networks that they do not fully understand, raising the risk of blunders that could set off dangerous conflicts. Accepting and understanding the reality of chained globalization must be the first step toward limiting those risks. Policymakers cannot cling to fantasies of either decoupled isolation or benign integration. Like it or not, the United States is bound to its competitors. Since it cannot break those bonds, it must learn to master them. BOTTLENECKS AND BLOCKAGES For decades, commentators understood globalization as a natural extension of market freedoms. To the extent that international economic networks would lead to disagreements, the thinking ran, those squabbles would lie largely between the groups that benefited from open markets and those that opposed them. But that line of thinking missed the fact that globalization itself would also allow for a new kind of conflict. As the world’s economic and information networks expanded, many of them coalesced around single points of control, and some states learned to wield those hubs as weapons against their competitors. Among the first networks to undergo such a transformation was the system underpinning international financial transactions. In the 1970s, the Society for Worldwide Interbank Financial Telecommunication (swift) network made it easier to route transactions through banks around the world, and the dollar clearing system allowed those banks to reconcile torrents of payments denominated in U.S. dollars. Once both banks and individuals had accepted this new messaging system, international exchanges became even more dependent on a single currency—the U.S. dollar—granting Washington additional leverage over the global financial system. International supply chains were next. In the 1980s and 1990s, electronics manufacturers began to outsource production to specialized firms such as Foxconn, creating supply chains with tens or even hundreds of suppliers. Then, in the first decade of this century, cloud computing began to centralize key functions of the Internet in systems maintained by a few large firms, such as Amazon and Microsoft. In each case, money, goods, and information passed through essential economic hubs. A few privileged powers ruled over those hubs, gaining the chance to exclude others or to spy on them. The United States saw those opportunities before most other countries did, thanks to the fact that so many networks lay within its reach. Since the attacks of September 11, 2001, the Treasury Department has used the world’s reliance on the U.S. dollar to turn the global financial system into a machinery of control, freezing out rogue actors such as al Qaeda and North Korea and using the threat of sanctions to terrify banks into advancing its goals. The National Security Agency has transformed the Internet into an apparatus of global surveillance by tapping into the networks of telecommunications providers such as AT&T and Verizon and running clandestine programs that can identify communications chokepoints and exploit them against both adversaries and allies. Until recently, other states struggled to keep up. China, a latecomer to the globalized economy, could respond to perceived slights only by locking transgressors out of its valuable domestic market. And although the European Union played a significant role in global economic networks, it lacked the kind of centralized institutions, such as the U.S. Treasury Department’s Office of Foreign Assets Control, that Washington had been able to convert into instruments of power. Driven by both fear and opportunism, however, China is now insulating itself from networked attacks and building networks of its own to turn against its rivals. Take Huawei, which seeks to build the world’s 5G communications network with the tacit support of Beijing. If Huawei comes to dominate global 5G, the Chinese government could exploit its access to the firm to tap into communications around the world, using its new powers over the network against its rivals. O r to put it another way: China could do to the U nited States what the United States has already been doing to China. T hat explains why Washington has worked so hard to frustrate Huawei’s ambitions. The Trum p administration has barred Huawei from U.S. markets, lobbied U.S. allies to shun the company’s 5G infrastructure, and forbidden U.S. companies from selling to Huawei the sophisticated semiconductors that it cannot easily acquire elsewhere. The Chinese government has responded to those moves by threatening to blacklist U.S. firms such as FedEx and companies based in countries allied with Washington, such as the British bank hsbc. Even if the Trump administration eases up on Huawei as part of a trade deal with Beijing, a bipartisan coalition in Congress will likely try to undermine those concessions. Europe has also been drawn into a fight over networks, in part as a result of the United States’ campaign against Iran. Ever since 2018, when the United States pulled out of the international agreement limiting Iran’s nuclear activities, it has used its control of the dollar clearing system to limit Iran’s access to global financial resources and has threatened to sanction European firms that do business with Iran. European governments worry that such measures are a prelude to a wider campaign of U.S. coercion. After all, the economic cost that isolating Iran imposes on European countries pales in comparison to the damage that would follow if the United States used similar tactics to force them to decouple from Russia, by, for example, making it harder for them to obtain Russian natural gas and other raw materials. Some European policymakers are thinking about how to play defense. One option would be to turn the United States’ economic ties with Europe against it by withdrawing U.S. companies’ rights to operate in the eu if they comply with U.S. sanctions that harm eu members. Smaller powers are also joining the fray. Japan, incensed by rulings from South Korean courts that have criticized Japanese companies for their use of forced labor during World War II, threatened in July to strangle the South Korean technology industry by restricting Japanese exports of the specialized chemicals on which major South Korean firms, such as Samsung, rely. South Korea responded by threatening to stop exporting the heating oil that Japanese homes and businesses count on each winter. The dispute has highlighted the power states can wield when they target a crucial link in transnational supply chains. CHAIN REACTIONS In this landscape, blunders could set off escalatory spirals, and mutual suspicion could engender hostility. By targeting a firm with an unexpectedly crucial role in a broader industrial network, for instance, a government could mistakenly generate widespread economic damage—and trigger retaliation from other states in turn. As global networks grow thanks to developments such as the so-called Internet of Things, such dangers will grow, as well. Accordingly, it is not surprising that countries want to free themselves from chained globalization by smashing its links. U.S. commentators speak of a great decoupling from the Chinese economy, only vaguely understanding what such a rupture might involve. China, for its part, is pouring resources into an indigenous semiconductor industry that would protect it from U.S. threats. South Korea has sought to build up its own chemical sector in order to lessen its dependence on Japan. Russia, meanwhile, has embarked on a quixotic project to create what it calls a “sovereign Internet”: one that could prevent perceived foreign meddling and let Moscow monitor the communications of its own citizens. In a few areas, some degree of insulation might be possible. When it comes to defense procurement, for example, countries can increase their autonomy by rerouting parts of their supply chains to minimize the risks Washington should break of spying and sabotage. The United States has already made changes to limit the ability of China to compromise its military technology; among other things, it has identified companies with connections to the People’s Liberation Army and cut them out of its military’s supply chains. Other countries will surely follow suit. Except in the case of total war, however, governments will find it impossible to re-create the separate national economies that prevailed before the advent of globalization. After all, today’s states do not simply make use of worldwide financial systems, manufacturing supply chains, and information networks: they rely on them. Washington may be able to reshape its military procurement, but it would set off massive resistance and economic chaos if it tried to remake the consumer economy along similar lines, since that would overturn entire industries and vastly increase prices for ordinary people. THE TIES THAT BIND Instead of withdrawing from global networks, the United States must learn to live with them. Doing so will give the United States new powers and generate enormous vulnerabilities, and policymakers will need to carefully manage both. U.S. officials must remember that willfully trapping its rivals in U.S.-dominated financial and information systems could provoke a backlash, encouraging other states to enmesh the United States in nets of their own—or encouraging them to slip out of the country’s grasp for good. Washington also has to worry about other kinds of unintended consequences. For example, in April 2018, when the Treasury Department announced that it would impose sanctions on the Russian oligarch Oleg Deripaska and his vast aluminum empire, it apparently failed to realize that doing so would produce chaos in the car and airplane manufacturing supply chains that relied on products made by Deripaska’s businesses. (After lobbying by European companies and governments, the Trump administration delayed enforcement of the sanctions and then unwound them entirely.) As less savvy governments seek to bend networks to their own ends, the risks of such blunders will grow. To avoid such problems, policymakers need to understand not just how the world’s networks function but also how each of them connects to the others. And because government agencies, international organizations, and businesses have only incomplete, scattered maps of those relationships, Washington must do the hard work itself. That will require making massive investments in parts of the federal bureaucracy that have withered in recent decades, as neoliberal, pro-market views took hold and regulation and oversight fell out of favor. The government’s broad goal should be to break down the traditional barriers between economic and security concerns. The Commerce Department could be expanded to deal with security issues, for instance, or the Pentagon could take a newfound interest in the private sector outside the defense industry. Congress, for its part, could reestablish its Office of Technology Assessment, which was shut down as a result of partisan disputes in the 1990s, to study emerging technologies and how to manage them. Finally, the government should establish specialized agencies to study threats related to specific networks, such as global supply chains, drawing on information from across the government and the private sector. In the U.S. Cybersecurity and Infrastructure Security Agency, policymakers have a valuable model. Next, regulators will have to intervene in the economy more deeply than they have in decades. Washington has already taken a useful step in this direction through its reforms to the process run by the Committee on Foreign Investment in the United States, or c fiu s, which examines the security implications of foreign capital flows entering the United States. In 2018, Congress passed bipartisan legislation calling for the Department of Commerce to reevaluate the licensing requirements for firms working in a variety of high-tech fields, including artificial intelligence and machine learning. Congress has also pushed the Trump administration to revive a long-dormant law requiring U.S. officials to identify Chinese military companies and groups operating in the United States. Other governments are following Washington’s lead. The eu is rolling out its own process to scrutinize foreign investments, and some eu officials are debating whether to impose restrictions on the bloc’s ties with China in sensitive areas, such as defense technology, energy infrastructure, media, and telecommunications. But scrutinizing foreign investments is not enough. U.S. regulators should also seek to protect sensitive domestic markets from foreign exploitation. In some sectors, Washington will need to restrict access to trusted groups. Policymakers could make it harder for U.S. adversaries to use social media to undermine the country’s political system by, for instance, banning on those platforms political advertisements that target narrow demographic groups. In other cases, the government may need to go further. By building redundancies at key points in the country’s critical infrastructure—such as its telecommunications, electricity, and water systems—policymakers could help those networks survive outside attacks. Finally, governments need to learn to talk to one another in new ways. During the Cold War, the Soviet Union and the United States established a shared vocabulary to avoid crises, drawing on the work of scholars in a variety of fields who had developed concepts such as mutual assured destruction and second-strike deterrence. Today, China, the United States, the eu, and other powers need to do something similar. Academics can play an important role in building that new vocabulary, much as they did during the Cold War. But they can do so only if they break out of the confines of their disciplines by homing in on the intersections of economic and security concerns and by working with the specialists who understand the technical underpinnings of global networks. Most national security experts know little about the infrastructure that supports the Internet. If they worked with engineers to understand those systems, protecting them would be easier. EASING THE TENSIONS A common language should be a first step toward common rules. Developing such rules of the road won’t be easy, since networked conflict and its consequences are messy and unpredictable. And whereas the tacit rules of the Cold War were developed mostly by politicians, military leaders, and nuclear physicists, their twenty-first-century equivalents will necessarily involve the participation of a broader and more quarrelsome set of communities, including not just state officials but also businesses and nongovernmental organizations. Governments should tread carefully around others’ network hubs, such as the swift system or the essential focal points of the world’s telecommunications architecture. Much like nuclear command-andcontrol systems, those hubs let the states that control them exercise enormous offensive and defensive power. That is why China’s efforts to use Huawei to topple the United States’ control over global telecommunications are so provocative. For its part, the United States needs to recognize that its attempts to weaponize the world’s financial and information networks threaten others and moderate its behavior accordingly. Restraint will not just encourage stability; it will also serve the country’s own narrow interests. U.S. policymakers should remember that their punitive measures can encourage states to defect to networks beyond Washington’s control, stripping the United States of important sources of leverage. Take President Donald Trump’s October 2019 threat to “destroy Turkey’s economy” through financial sanctions and tariffs if Turkish forces overstepped in some unspecified way in their invasion of northeastern Syria. At the time, Turkey had already begun to lay the groundwork to insulate some of its international financial transactions from the U.S. dollar and the dollar clearing system by embracing Russia’s alternatives to the swift system. Even though Trump’s threat was quickly withdrawn, it surely unsettled Turkish leaders, who feared that Congress might press for more substantial and long-lasting sanctions. And although Turkey or other midsize powers will probably not cut themselves off from the U.S.-dominated financial system, they certainly could persuade their banks to make greater use of networks that are beyond Washington’s grasp. The United States should not use such tactics against China, Russia, or other major powers except under extraordinary circumstances, since those countries might respond to economically [devastating] crippling attacks not just with economic measures but also with military force. States should work to make their decisions transparent and predictable. Today, as in the nuclear era, mixed signals could lead to catastrophic consequences. The United States’ recent inability to decide whether its sanctions against Iran were meant to change that country’s behavior or its regime may have empowered Iranian radicals who were eager to retaliate by threatening regional shipping lanes and U.S. allies. To reduce the chances of mistaken escalations, the United States and other powers should use rules-based structures akin to cfius to decide when to take offensive and defensive steps, and they should broadcast those choices clearly.