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## T Exemptions

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#### Scope’ is the extent of the area dealt with or relevant to the core laws

Oxford Languages ND, “scope,” shorturl.at/wCDY3

scope

the extent of the area or subject matter that something deals with or to which it is relevant.

"we widened the scope of our investigation"

#### It’s bounded by exemptions and immunities

Kruse et al. 19, Layne E. Kruse, Co-Chair; Melissa H. Maxman, Co-Chair; Vittorio Cottafavi, Vice Chair; Stephen M. Medlock, Vice Chair; David Shaw, Vice Chair; Travis Wheeler, Vice Chair; Lisa Peterson, Young Lawyer Representative; all on the Exemptions and Immunities Committee of the ABA Antitrust Section, “Long Range Plan, 2018-19,” American Bar Association, 3/18/19, https://www.americanbar.org/content/dam/aba/administrative/antitrust\_law/lrps/2019/exemptions-immunities.pdf

D. Top 3 Accomplishments Since Last Long Range Plan in 2015

(1) Publications. In addition to our Annual ALD Updates, we are set to publish an update to the Noerr-Pennington Handbook, which should be out in 2019. We also published a new version of the State Action Handbook in 2016. The Handbook on the Scope of the Antitrust Laws was published in 2015.

(2) Commentary on Legislative and Regulatory Proposals. The Committee has been very active in supporting Section commentary on proposed legislation, regulations, and other policy issues.

For instance, in March 2018, the E&I Committee assisted former E&I Chair John Roberti in composing his article, “The Role and Relevance of Exemptions and Immunities in U.S. Antitrust Law”, presented to the DOJ Antitrust Division Roundtable on behalf of the ABA Antitrust Section.

In January 2018, in response to a request from the Section Chair, we submitted Section comments along with the Legislative and State AG Committees, addressing the proposed Restoring Board Immunity Act legislation that would impact the post-NC Dental exemptions and immunity climate. Previously, we commented on the Professional Responsibility Act.

(3) Spring Meeting Programs. We have sponsored or co-sponsored a program at every Spring Meeting since our last long range plan. In 2019 we will chair Sham Litigation after FTC v. AbbVie The FTC v. AbbVie decision – calling for the disgorgement of $448 million on the basis of sham patent litigation. In addition, we will co-sponsor in 2019 with the Trade, Sports & Professional Associations Committee, a program on “Antitrust Law's Anomalous Treatment of Sports,” addressing how US courts have shown broad deference to the "rules of the game," including near-immunity status for concepts such as "amateurism."

II. Major Competition/Consumer Protection Policy or Substantive Issues Within Committee’s Jurisdiction Anticipated to Arise Over Next Three Years

A. Issue #1: Will Certain Exemptions Be Eliminated or Expanded?

A goal of the current DOJ Antitrust Division is to streamline antitrust laws, and in particular, take a hard look at exemptions and immunities. This is in the wheelhouse of our Committee’s fundamental policy issue: How much of the economy has opted out of our antitrust system? Is that a problem or are ad hoc exemptions acceptable ways to fine tune the application of the antitrust laws?

We anticipate, therefore, that efforts to enact or to repeal existing statutory exemptions and immunities will continue. In recent years, there have been efforts to repeal the exemptions for railroads and (at least in part) the McCarran-Ferguson insurance exemption. The Section and the Committee has generally supported efforts to repeal statutory exemptions. Given that repeal issues are very political it is unlikely that we will see many exemptions actually repealed.

On the other hand, proposals for new exemptions and immunities will continue to be introduced in Congress. The Committee will improve on a template for use in assisting the Section in drafting comments to Congress on newly proposed exemptions and immunities.

One development that may continue in the health care area are issues over a "COPA" or "Certificate of Public Advantage" at the state level. A COPA is a state statutory mechanism that provides certain collaborations in the health care community with immunity from private or government actions under the antitrust laws by invoking the state action doctrine. The FTC has generally opposed such efforts at the state level, but several states have used them to immunize health care mergers. This is a major development that should be monitored.

Through programs, newsletters, and Connect entries, the Committee intends to educate its members about Congressional and other efforts to repeal, or introduce new, exemptions and immunities, as well as the application of existing statutory exemptions and immunities in the courts. The Committee’s Handbook on the Scope of Antitrust Law, published in 2015, addresses developments in the statutory immunities area. It built on the prior publication, Federal Statutory Exemptions from Antitrust Law Handbook in 2007. Our Scope book will need to be updated within the next three years.

B. Issue #2: Will There Be Legislative Solutions to State Action Issues at State and Federal Levels?

The FTC’s case against the North Carolina Board of Dental Examiners put the "active supervision" prong of the state action test front and center. North Carolina State Board of Dental Examiners v. Federal Trade Commission, 135 S.Ct. 1101 (2015). The Court agreed with the FTC’s position that state occupational licensing boards comprised of market participants must satisfy the active supervision requirement. This spurred additional suits against other types of state boards involving regulated professionals. Moreover, every State had to reassess its boards to determine if there is "active supervision." Courts and state legislatures are addressing those issues. We also expect the proper framing of the clear articulation prong of the state action doctrine will be addressed. The Supreme Court spoke to the clear articulation test in FTC v. Phoebe Putney Health System, Inc., 133 S.Ct. 1003 (2013), narrowing the foreseeability test to cover only situations in which the anticompetitive conduct is the “inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature.” How this test has played out in the lower courts will be of particular interest to the Committee and its membership. The COPA issues, at the state level, as previously mentioned, will impact this area.

The Committee expects to address these issues through updates to Connect, newsletters, Spring Meeting programs, committee programs, its contributions to the Annual Review of Antitrust Law Developments. The State Action Practice Manual addresses these issues, as well as the Committee’s Handbook on the Scope of Antitrust Law.

C. Issue #3: Will Noerr Be Restricted or Expanded?

The Noerr-Pennington doctrine is an exemption issue that is frequently litigated. In particular, the most likely area of further development is in the pharma industry. Alleged misrepresentations to government agencies has caught the attention of some courts. In addition, there may be more development on the pattern exception, which raises the issue of whether each act of petitioning in a pattern must satisfy the objectively and subjectively baseless requirements for sham petitioning. The Committee’s new Handbook on Noerr (forthcoming) and its earlier Handbook on the Scope of Antitrust Law addresses developments in the Noerr law.

III. Specific Long Term Plans to Strengthen Committee

The Committee provides important services to the membership of the Section through publications, drafting ABA Antitrust Section comments to proposed regulation and international competition proposed immunities, and programming. The goals of the Committee include: (1) to provide policy comments on key questions about the scope of the antitrust laws for legislation and policy-making; (2) produce a mix of publications and programming that provides relevant and useful information to our members; (3) to ensure that the Committee remains valuable to our members’ practices; and (4) to make the most productive use of electronic communications to deliver the Committee’s work product.

A. Potential Modifications to Charter: What is the Role of this Committee?

The Committee’s current charter accurately characterizes its purview—that is, addressing the scope of the antitrust laws. That scope, of course, is defined primarily in terms of exemptions and immunities (both statutory and non-statutory). The Committee, however, has dealt with other doctrines, such as preemption and primary jurisdiction. These areas may not necessarily be viewed as traditional exemptions or immunities, but they nonetheless directly affect the application and extent of the antitrust laws. In addition, the Committee expends significant efforts to address international issues, including statutory exclusions from the U.S. antitrust laws, including the FTAIA; the related doctrines of act of state, sovereign immunity, and foreign sovereign compulsion; and industry-specific exemptions and exclusions from non-U.S. antitrust laws, including blocking exemptions.

#### Vote NEG---eliminating exemptions and immunities provides a limited AND predictable basis for prep, and focuses debates on the balance between antitrust and regulation, ensuring conceptual unity.

## States

#### TEXT: The attorney generals of 50 states and relevant territories, through the National Association of Attorneys General’s Multistate Antitrust Task Force, adopt a presumption that agricultural mergers which cause a significant increase in concentration are anticompetitive. The 50 states and relevant territories should pass a statute which increases prohibition on agricultural mergers which cause a significant increase in concentration.

#### A multistate AG antitrust enforcement over state antitrust statutes solves the aff---causes federal follow-on

**Artega 19** (Juan A. Arteaga is an experienced antitrust attorney and a former Deputy Assistant Attorney General for the U.S. Department of Justice’s Antitrust Division, The Role of US State Antitrust Enforcement, Global Competition Review, 11-19, <https://www.lexology.com/library/detail.aspx%3Fg%3Dd423301d-f4d1-4550-a99c-1880869e67e7+&cd=11&hl=en&ct=clnk&gl=us>, y2k)

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 **a**ttorneys **g**eneral have long played **an important**, albeit varying, **role** within the **U**nited **S**tates’ antitrust enforcement regime. This has been especially true during the **past 30 years** because state **a**ttorneys **g**eneral 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. In addition, state enforcers had often used general corporation law and common law restraint of trade principles to regulate anticompetitive business practices and transactions. 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. Indeed, state attorneys general successfully prosecuted a number of the most consequential antitrust enforcement actions during this period.

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. 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. 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.

In 1976, Congress passed the Hart-Scott-Rodino Antitrust Improvement Act, which, among other things, authorised state **a**ttorneys **g**eneral 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. Congress also passed the Crime Control Act of 1976, which, among other things, provided state **a**ttorneys **g**eneral with tens of millions in federal grants as ‘seed money’ for the creation of antitrust bureaus within their offices. 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. 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’. 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. To help ensure that they had a larger seat at the **antitrust enforcement** table, state **a**ttorneys **g**eneral also increased the **coordination** of their enforcement efforts and competition advocacy through organisations such as the **N**ational **A**ssociation of **A**ttorneys **G**eneral (NAAG), which created a **Multistate Antitrust Task Force** and issued state Vertical Restraints and Horizontal Merger Guidelines during this period.

Since the reawakening of state antitrust enforcement nearly 30 years ago, state **a**ttorneys **g**eneral 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. 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.

Since January 2017, state **a**ttorneys **g**eneral 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. State antitrust enforcers have also been able to **enhance** their **influence** over key competition policy issues and the antitrust enforcement agenda within the **U**nited **S**tates because there appears to have been a significant decline in the coordination and relationship between the DOJ and FTC.

In once again **flexing their enforcement muscle**, state **a**ttorneys **g**eneral 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:

In their joint investigation into **the T-Mobile/Sprint merger**, nearly 20 state attorneys general have sued to block the transaction even though the DOJ, along with seven state attorneys general, have approved the deal after securing certain structural and behavioural remedies. After the DOJ announced its proposed settlement with the companies, the Attorney General for New York, who has been leading 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.’

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.

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. In fact, nine state attorneys general filed an amicus brief opposing the DOJ’s appeal of the trial court’s decision.

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.’

After voicing **displeasure** with federal antitrust enforcement in the **technology sector**, numerous state **a**ttorneys **g**eneral launched their independent investigations into ‘**Big Tech’ companies** even though the DOJ and FTC have ongoing investigations into these companies.

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. 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.

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. 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.

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. 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.

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’. 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. 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. 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’.

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. 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. 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.

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 pending challenge to T-Mobile’s proposed acquisition of Sprint, nearly 20 state attorneys general have alleged that the transaction will result in their residents paying higher prices for lower quality mobile phone services as well as harm to their states’ general economies. 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.

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; (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); (3) exclude harm suffered by indirect purchasers of the goods and/or services in question; (4) avoid the risk of multiple recoveries by excluding amounts previously awarded for the same injuries; and (5) arise out of actual financial losses rather than general harm to their state’s economy. Moreover, state attorneys general must provide their residents with adequate notice of the lawsuit and a meaningful opportunity to opt out of the litigation.

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. In addition, a number of state antitrust laws authorise their state attorney general to hire private lawyers to handle parens patriae actions, which the state attorneys general challenging the T-Mobile/Sprint merger have done.

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. 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. These state antitrust laws typically contain provisions expressly requiring that ‘they be construed in conformity with comparable [f]ederal antitrust statutes’.

**State antitrust statutes** typically provide state **a**ttorneys **g**eneral 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’. 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.

#### Multistate rulemaking solves

Snow 18 (Aaron Snow is the Executive Director and a co-founder of 18F, the consultancy inside the U.S. Government's General Services Administration, an honors graduate of Harvard College and Columbia Law School, where he was Technology Editor for the Columbia Law Review, Multistate Rulemaking, 10-7, <https://web.law.columbia.edu/sites/default/files/microsites/career-services/Multistate%20Rulemaking.pdf>, y2k)

Note: the date for the article was found in this URL: http://www.administrativelawreview.org/wp-content/uploads/2019/07/71.1\_Green\_Final.pdf

It is a well-understood strength of multistate litigation1 that together, state attorneys general can influence corporate business practices in ways one state acting alone cannot. But multistate litigation is not a perfect enforcement mechanism, and legitimate criticisms can be made, especially regarding the vagaries of the process by which settlements (for multistate litigation nearly always results in settlement) are reached. Since the advent of modern multistate litigation in the last twenty years, state attorneys general have coordinated their substantive work almost exclusively in the pursuit of litigation. But attorneys general have other tools in their belts: In addition to litigation and prosecution powers, many, in certain spheres, also have substantial rulemaking authority. One such sphere is that of unfair and deceptive trade practices, or “UDAP,” statutes, which are the statutory basis of much multistate litigation.2

#### State antitrust doctrines is key to build state courts autonomy---perm collapses it by forcing a “lockstep” approach

**Waxman 14** (Michael P. Waxman, Professor of Law, Marquette University Law School, Wisconsin's Antitrust Law: Outsourcing the Legal Standard, 94 Marq. L. Rev. 1173 (2011), y2k)

VI. WHERE IS THE STATE OF WISCONSIN TO Go FROM HERE?

To continue the requirement that Wisconsin courts interpreting the Wisconsin Antitrust Act follow in lockstep the interpretations of federal antitrust law by federal decisions is neither necessary nor advisable. Unless the Wisconsin state legislature chooses to adopt a more specific set of antitrust rules, a problematic practice for the same reasons that the United States Congress has avoided this practice with the Sherman Act, the Wisconsin state courts, much like the federal courts, must evolve **their own legal standards** for **antitrust** violations. Necessarily, this does not mean that the state courts must jettison all relationship to the federal law. Rather, Wisconsin **state court** analyses of what constitutes anticompetitive practices should examine federal doctrines with a broader eye to the evolution of antitrust law, and forego **dogmatic** application of the most **recent federal decisions** and **government policies** where they do not fit the nature of Wisconsin's economic concerns and values. In so doing, the Wisconsin courts applying the Wisconsin Antitrust Act will allow for a set of values and interests that reflect the **business** and **consumer communities** in Wisconsin.

As noted above, recent federal decisions that have revealed stark conflicts in economic analysis resulting in close decisions, such as those in California Dental Ass'n and Leegin, have increased the need for flexibility on the part of Wisconsin courts when considering federal interpretations of federal antitrust law. Also, the differences in interpretation of the United States Supreme Court wording in Monsanto Co. v. Spray-Rite Service Corp.,7 brings into sharp focus the problems the Wisconsin courts will face if they continue to follow a policy of doggedly following federal decisions. A further problem arises when the Wisconsin courts must address not only the vague language in Monsanto, but also must consider whether they are bound by federal district and circuit court decisions within their own circuit or should consider decisions by "foreign" district and appellate courts. Worse still, can federal court decisions in diversity cases where the Wisconsin courts have not spoken bind the state courts under the Wisconsin Supreme Court's federal decision policy? Ultimately, the Wisconsin Supreme Court's failure to provide a priority structure among the decisions by the federal courts as well as the federal agency decisions and guidelines has left Wisconsin antitrust law with very little guidance.

Many other states, through legislative action or judicial application, are less tethered to federal court interpretations of antitrust law (in announced policy even if not always in practice). Because the **legislatures** and **courts** of many states have opted to be "**guided**" by **federal** decisions rather than follow **a lockstep approach**, these courts have assured their citizenry of both an **opportunity** to **deviate from** what they believe are **federal decisions** inappropriately applying antitrust doctrine and to look to **sister state courts** for a **commonality of interpretation**. With greater **freedom** the Wisconsin courts may sometimes choose to follow **other states** rather than federal decisions interpreting federal antitrust law.

Finally, some states have taken a more progressive stance. In particular, the Vermont antitrust (and trade) law is patterned after the Federal Trade Commission Act." The leeway the Act gives the state and its courts is much greater than the "Little Sherman Acts," yet allows the principles that are embodied in the Sherman Act to continue to play a significant part in the state antitrust law. Other states have followed the Little Sherman Act model but provided their own "spin," giving courts greater independence without sacrificing the Sherman Act language and application (e.g. California's Cartwright Act).89 Instead of being whipsawed by the hairpin turns of federal judicial policy, Wisconsin should develop its own interpretations of antitrust law where warranted and meet state interests and concerns. Unfortunately, by failing to follow an **independent state policy** over the past century, Wisconsin has **foregone** the natural development of **state antitrust law**. If the Wisconsin Supreme Court could develop an **independent voice** it could not only reflect **state values** and interests but return to its historical role as a **leader** in national economic thinking.

#### State court autonomy is key to transnational legal innovation---federalization of law destroys it

**Marshall 8** (Margaret H. Marshall is Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts, State Courts in the Global Marketplace of Ideas, Papers from the Eleventh Annual Liman Colloquium at Yale Law School, 2008, <https://law.yale.edu/sites/default/files/documents/pdf/liman_whyTheLocalMatters.pdf>, y2k)

“Law, like engineering, changes fast.” So observed the late United States Supreme Court Justice William O. Douglas in his 1974 autobiography.1 The law of the internet was unknown then. A robust European Union, much less an impressive body of European Union law, was still on the horizon. Environmental law, sexual harassment law, cable broadcast law—all were in their infancy. Although law indeed changes fast, we know that **tech**nological and social **advances worldwide** will continue to spur demands for **new laws**, and new ways of thinking about law. Law’s frontiers will expand in ways heretofore unimagined. One example: The phenomenon of multinational law firms serving multinational clients, often before newly created international or transnational tribunals, raises urgent questions about, among other things, legal ethics (Which country or entity’s code of professional conduct governs the lawyers’ actions?) and the transjurisdictional licensing of lawyers (Who decides?). Cutting-edge transnational legal issues are hotly debated in the halls of our most influential law schools. Yet something is missing. That something is an understanding of state courts in the evolving legal landscape. To be sure, the existence of state courts in our federal scheme is a topic generally well covered in our law schools. However, because the work of **state courts** is rarely an independent topic of study, far less well understood is their historic and **ongoing role** as portals of **innovation**, incubators of new directions in the law—state courts as indispensable players in forming **national**, and I would argue **global, consensus**. Sheer numbers tell the story, at least in part. These are the statistics for 2006, the latest date for which readily-accessible comparative data are available. The total number of cases filed in the federal district and appellate courts was 402,489.2 In state courts, 46.8 million cases were filed in 2006, not including traffic offenses.3 It is conventionally estimated that each year at least **ninety-five percent** of all litigation in the United States takes place in **state courts**, as do the vast majority of jury trials, **the “lungs” of democracy**, in John Adams’s words. Most civil and criminal cases filed in state courts will not make headlines. But more than a few state court decisions will change **legal** and **social paradigms**. Some examples: Perez v. Sharp4 was the 1948 California state case declaring laws banning interracial marriage to be unconstitutional; it laid the groundwork for the United States Supreme Court’s similar decision in Loving v. Virginia5 nineteen years later. The court on which I serve has a long, proud history of expanding the boundaries of human liberties. The first constitutional matter decided by the Massachusetts Supreme Judicial Court was brought by a runaway slave claiming his freedom under the terms of the new Massachusetts Constitution. Three years after the Massachusetts Constitution was ratified, the court concluded in 1783 that slavery was “repugnant” to the constitutional guarantees of equality and freedom, and that “slavery is inconsistent with our . . . Constitution.”6 It was the first time a court anywhere had abolished slavery. Massachusetts courts were the first, or among the first, to recognize the right of workers to form unions to improve wages and working conditions,7 a decision that flew in the face of settled law deeming such associations criminal conspiracies; to invalidate the use of peremptory challenges based on race8; and to provide counsel for indigent defendants in criminal cases.9 You also may recall a recent case concerning same-sex marriage. The role of state courts in shaping the legal landscape is not confined to questions of personal liberty. State court decisions on other matters also have been game-changers. Consider MacPherson v. Buick Motor Co., 10 a 1916 case before New York’s highest court, which announced what for its time was a radical proposition: an automobile manufacturer could be liable to the purchaser of an automobile for a defective product, even though the manufacturer and the consumer had no contractual relationship with one another. The MacPherson analysis was initially rejected by many state courts. Yet today no one seriously argues that a retail customer cannot recover from an automobile maker for a defective product. Today, just as in 1916, state-court adjudication can and does start legal revolutions, revolutions with broad economic and social consequences. Yet remarkably, my informal survey of hundreds of class offerings by our nation’s top ten law schools in the 2008-2009 academic year reveals one course devoted exclusively to state court litigation, and only two more referring to state courts in a title. Of course state law cases present themselves in legal textbooks, and much litigation in law school legal clinics occurs in state courts. But with rare exception, courses focusing on the comprehensive, systematic study of how state courts advance legal developments are absent from our most prestigious law schools. There are many reasons for this neglect: a student body drawn from many states; the dizzying array of procedural, structural, and substantive differences among state courts; and an entrenched bias that federal court litigation is both intellectually and substantively more challenging than state court litigation.11 My aim here is not to offer a paean to state courts, but rather to point out the disconnect between the goal of influential law schools to train law’s future leaders and the puzzling fact that those same schools ignore state courts as fertile ground for the development of legal principles. The omission is particularly unfortunate today: While **state courts** historically have been important change agents in the **formation** of a national consensus on legal matters, now they are posed to reprise that role in the development and **transmission** of **transnational legal norms**. Understanding why this is so requires some brief historical background. \*\*\* Prior to World War II, the United States, the world’s first constitutional democracy, stood alone among nations in its chosen form of government, in which written guarantees of individual and property rights are enforced by a neutral, independent, co-equal branch of government, the judicial branch. A more popular form of democratic government was the parliamentary model, in which the law of the parliament, the people’s voice, reigned supreme. Under a parliamentary system, it is not possible for judges to say “no” to executive and legislative actors. No matter how oppressive the legislation, the role of the judge is to enforce duly-enacted laws. In a constitutional democracy, on the other hand, the judge’s role is to impartially review whether government action transgresses the boundaries established by the nation’s charter of government, its constitution, and if so, to restrain or forbid the government action. The painful experience of World War II and of the totalitarian regimes associated with it—including the apartheid regime of my native South Africa—illuminated for the world that **independent constitutional review is central to a free and thriving nation**. **Constitutional democracy** with **constitutional courts** has become the international norm from **India** to **Japan**, from South **Africa** to **Canada** to Estonia, Cyprus, Chile, Ireland, Sweden, Fiji, and **beyond**. As the courts of new constitutional democracies set to work, they **look**ed first **to the U**nited **States**, and then increasingly turned to each other, for sources of authority and guidance. This process was spurred and continues to be accelerated by modern technology. Access to the internet gives everyone from Jacksonville to Java a gateway to the best thinking of the world’s most renowned judges and legal scholars. International conferences, an increasingly common occurrence, stimulate global jurisprudential dialogue. And as the world’s lawyers and judges and scholars read and discuss one another’s work, transnational legal norms begin to emerge. I am speaking here not of the norms embodied in treaties and international fora, but of what in an earlier day we called the customary law of nations. Transnational legal norms are legal concepts that transcend fixed geographical boundaries and become a jurisprudential lingua franca. Transnational norms of commerce, intellectual property, due process, state power, human rights—in countless direct and indirect legal “conversations” swirling around us, the international legal community, representing a diversity of personal and property in terests, works its way toward consensus.12 **State courts play a vital**, if largely unrecognized, **role in shaping and transmitting transnational legal norms**. Consider the influence of state court adjudication abroad. While American law students, in their search for persuasive authority, principally focus their sights on federal law, our colleagues around the world cast a broader net. Evans v. United Kingdom, 13 for example, decided by the European Court of Human Rights in 2007-2008, concerns an English couple who had had their frozen embryos extracted and stored by a clinic for future use. The issue confronting the justices was whether the man's attempt to withdraw his consent for his ex-partner's use of the couple's stored embryos outweighed her rights to life, reproductive choice, and freedom from discrimination guaranteed by the European Charter of Human Rights. Both the parties and the justices paid close attention to a handful of United States state court decisions, including A.Z. v. B.Z.,14 decided by my court in 2000. There we held that the woman’s procreative right must yield to the man’s right not to be forced to procreate. The A.Z. v. B.Z. case itself was considered in light of an Israeli decision on similar facts.15 The decision of the European Court of Human Rights echoed that of A.Z. v. B.Z.. From Israel to Massachusetts to the United Kingdom to the European Court of Human Rights, a judicial conversation about reproductive choice, and to a larger extent about human dignity, took shape, each voice having impact on the evolving dialogue. State court decisions also play a decisive role in what Judith Resnik has called the international “migration and sharing of constitutional norms.”16 State v. Makwanyane, 17 decided in 1995, is the Constitutional Court of South Africa’s seminal holding on the death penalty. That punishment, the Justices held, violates South Africa’s constitutional ban on cruel, inhuman, or degrading punishment. Makwanyane is principally grounded, as one would expect, in a close analysis of the circumstances surrounding the adoption of the South African Constitution. But the opinions drew significantly on decisions from the high courts of Massachusetts and California.18 The Justices cited these two state court decisions for more than evidence of the weight of international consensus on the death penalty. They relied on the reasoning of these opinions in their efforts to articulate a constitutional basis for prohibiting capital punishment. Surprisingly, in foreign cases presenting no highly-charged constitutional issues, foreign courts have found models of guidance and authority in **state court** decisions. Again, examples abound. In the 1996 case M.C. Metha v. Kamal Nath & Ors.,19 the Indian Supreme Court undertook an extended analysis of three Massachusetts decisions, among others, in incorporating the public trust doctrine into Indian property law. In Dart Industries, Inc. v. The Decor Corporation Pty Ltd.,20 a 1994 case, the Australian Supreme Court looked to the decisional law of Massachusetts and other states to determine damages in a patent infringement case. The use of state court decisions abroad is, among other things, a testament to two features of American jurisprudence in particular. First is the vitality of federalism. A central feature of American federalism, of course, is its allowance for a diversity of decisional law among the states on issues of general concern. Second is the synthetic method of legal analysis characteristic of the common law that makes state court decisions particularly interesting to foreign jurists. I. Federalism Each U.S. state is independently sovereign, autonomous in its own sphere, so long as it takes no action illegal under federal law. Our fifty autonomous state courts and fifty sovereign state constitutions are the products of highly localized conditions and customs, to be sure. But it would be shortsighted to mistake this localization for provincialism. More accurate is the famous description of former United States Supreme Court Justice Louis Brandeis. Our state courts, he said, have **a unique ability** “to remould, **through experimentation**, our **economic practices** and **institutions** to meet changing **social** and **economic needs.”21** “It is one of the happy incidents of the federal system,” he continued, that “a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”22 Today’s state court “experiment” may be—or not—tomorrow’s status quo. A related aspect of our federalist system that may make state court decisions attractive to foreign judges is that state constitutions, unlike the federal constitution, often contain “positive rights” provisions. Such provisions tell governments what they must do, while “negative rights” provisions tell government what they must not do. The right to an adequate public education, for example, is among the most common of positive law provisions in state constitutions, and in many foreign constitutions.23 State court judges, like our counterparts in other contemporary constitutional democracies, are often called upon to interpret such positive rights provisions against a backdrop of limited public resources. Our search for solutions to a common problem make us natural allies. II. The nature of state court analysis There is a second reason that state court decisions have global resonance, while acting as engines of innovation in the United States. To an extent virtually unknown in the federal courts, state court judges are common law judges. Because we are deeply rooted in the common law, we are fluent in its cardinal principle of law’s plasticity. The common law adapts to changing realities with a disciplined incrementalism. Grand principles of our constitutional law—from freedom of speech to freedom from cruel and unusual punishment—are rooted in the common law. Our fundamental tort principles—such as comparative negligence or strict liability—are rooted in the common law. Because of its ordered adaptability, the common law is an ideal medium through which to fashion practical rules from evolving circumstances. In Goodridge v. Department of Public Health, my court redefined the common law meaning of marriage to preserve the constitutionality of the marriage statutes. The ruling built on years of prior decisions that slowly, inexorably but without design, moved the common law in a particular direction. Adoption of Tammy, 24 for example, which we decided ten years before Goodridge, held that, in the absence of a statutory definition of “parent” in our adoption law, we would read the word “parent” to include people of the same sex who wished to adopt together.25 Working with the interplay of statute, constitution, and the common law—that is what state court judges do every day. And that is one reason why foreign judges look to state courts, and state courts look to each other, to adapt the general principles of Anglo-American jurisprudence to actual experience. The methodology of the common law has in a sense become the grammar of our new global conversation about law’s reach. Foreign courts, and foreign lawyers, not infrequently find in state decisional law a rich source for the importation of new legal values. Is the opposite also true? Might not state courts emerge as a significant conduit for the importation of transnational legal norms?26 One unfortu nate result of the new nativist bent of the United States Supreme Court, as many commentators have documented, is that the Court is losing its influence among the world’s constitutional courts. State courts are not burdened by the view that the United States has a special destiny among nations, the so-called exceptionalist view. State courts have shown an increasing willingness to consider transnational legal principles in resolving issues of **domestic law**, including state constitutional law. As a general matter, state court judges are finely attuned to law beyond our own borders. Even where Massachusetts constitutional law is concerned, I find it helpful to consider relevant opinions of state courts whose own constitutions may be a hundred or more years younger, and whose states may be very different from Massachusetts, such as Montana or Oregon. The important principles of our civil and criminal law, developed through the common law, know no boundaries. Other states’ court decisions provide guidance, perspective, inspiration, reassurance, or cautionary tales. Consideration of transnational legal principles fits nicely within the natural comparativist bent of state jurists. That is a good thing, because state courts are increasingly drawn into transnational litigation in many areas of the law. Family law and commercial real estate development are quintessentially local, statecourt matters. Yet today the domestic relations lawyer who knows nothing about the Hague Convention on the Civil Aspects of International Child Abduction or the business litigator unaware of the Hague Convention on Taking Evidence Abroad on Civil or Commercial Matters can hardly be deemed competent in their respective spheres. Recently I had occasion to review cases decided by my court in the past few years touching on foreign and international law. I was as surprised as anyone by the results. Here are two of the many cases involved. When an Indian national residing temporarily in Massachusetts claimed that the Massachusetts Juvenile Court had no jurisdiction to declare him an unfit parent and to approve the adoption of his daughter, also an Indian national, by a Massachusetts couple, we had occasion to consider, among other things, art. 21 of the United Nations Convention on the Rights of the Child and art. 37, the consular notification provision, of the Vienna Convention.27 When a criminal defendant claimed he had been kidnapped from Guyana by Massachusetts police, we construed Section 28 of Guy ana’s Immigration Act and the Extradition Treaty between the United States and the United Kingdom.28 No area of domestic law is untouched by legal globalization. State courts, in the best common-law tradition, look beyond our national borders in a variety of cases in which local and national law may already be developed, offering unparalleled opportunities to align domestic law with emerging transnational legal norms. The 2008 **Ca**lifornia decision on same-sex marriage invokes **numerous international human rights treaties** and **foreign constitutions** as persuasive authority for the proposition that the right to marriage and a family life is a basic human right.29 The **W**est **V**irginia Supreme Court invoked the **U**niversal **D**eclaration of **H**uman **R**ights in faulting the Unites States Supreme Court’s refusal to find a fundamental **right to education**.30 The **Fl**orida Supreme Court looked to the United Nations Convention on the **L**aw **o**f the **S**ea in considering whether the owners of a “cruise to nowhere” owed sales and use taxes to the state for cruise activities.31 In considering whether a parent had a right to use “moderate or physical force” on his or her child without incurring criminal liability, Maine’s Supreme Judicial Court gave extended consideration to a case on the same issue decided by the European Court of Human Rights.32 **There is enormous transformative potential here**. Yet I would be remiss if I conveyed the impression that **state courts are in robust health**, ready to respond to **global challenges**. They are not. Central to the states’ participation in national and international legal dialogue, central to federalism itself, and central to the rule of law, is the ability of state courts to continue functioning as **independent**, **impartial**, **respected arbiters of the law**. This fundamental role of state courts is **under attack**. I briefly describe here two sources of that assault. First, what had been state substantive law has been increasingly federalized. With alarming frequency, the **bubbling-up process of state court innovation is being stifled by** both judicial and legislative **federalization**. In Troxel v. Glanville33 in 2000, the United States Supreme Court undertook to set out due process requirements for decisions in volving grandparent visitation, heretofore a subject confined to state courts. The result was a jumble of opinions, concurrences, and dissents that has created a virtual cottage industry about Troxel’s meaning. Perhaps the Justices cut off the debate among state courts too quickly? And Congress? Increasingly, it has required, or attempted to require, that a wide array of cases that formerly could be heard in state courts be heard in federal courts exclusively. Examples include many class actions, cases involving risk insurance for terrorism-related damages and recovery for harm caused by medical drugs, and gun manufacturer liability. What are the long-term costs—jurisprudential and otherwise—of this mandated shift to the federal courts? Now for the second threat facing state courts: highly politicized judicial elections and retention battles. Space limitations do not permit me to address this serious problem in detail. For that, you may wish to read the report of the American Bar Association’s Commission on the 21st Century Judiciary, on which I served. 34 Here is a quick overview of what we face. Forty-seven states (Massachusetts is not among them) select some or all of their judges by popular vote. Approximately eighty-seven percent of state judges, trial and appellate, are chosen or reappointed in this fashion. Since the late 1980s, special interest groups increasingly have targeted judicial appointments in order to advance their own narrow agendas, and are pouring huge amounts of money into supporting certain candidates for judicial office and opposing others. The upshot? More campaigning, more advertising, more campaign money—a lot more campaign money—and an endless barrage of attack ads and editorials, frequently castigating a judge up for reappointment or reelection for a particular decision. The nonpartisan judicial watchdog group Justice at Stake noted, for example, that in the race for a seat on the Illinois Supreme Court in 2004, two candidates “combined to raise over $9.3 million.”35 More than $5.3 million dollars was spent on the 2008 race for a seat on Alabama’s Supreme Court.36 Behind this influx of judicial campaign money, behind the attention of special interest groups, is the assumption that justice is for sale. In 2008, the New York Times highlighted a case, currently on appeal before the United States Supreme Court, in which the West Virginia Supreme Court overturned a $50 million damage award against a company.37 The deciding vote was cast by a justice who had received campaign contributions of $3 million from the company. Is it little wonder that the public, lawyers, and even judges believe that campaign money leads to conflicts of interest for judges or that it influences judicial decisions? Add to all this an extraordinary decision of the United States Supreme Court, decided in 2002, Republican Party of Minnesota v. White. 38 The case began when a candidate for a seat on the Minnesota Supreme Court distributed campaign literature criticizing the judicial decisions of his opponent—on crime, welfare, abortion, and other issues. By a bare majority, and over scathing dissents, the Justices concluded that the provision of Minnesota’s Code of Judicial Conduct that prohibited a “candidate for a judicial office, including an incumbent judge,” from “announc[ing] his or her views on disputed legal or political issues” violated the First Amendment. The decision effectively permits state court judges to campaign on undertaking to rule a certain way in cases that may come before them. **Federalization** and highly **politicized judicial campaigns** are not isolated phenomena. They are part of one of the most disturbing developments I have seen since I graduated from law school: an **all-out assault on the judiciary** as an independent, counter-majoritarian arm of government. The assaults on state courts are **particularly troublesome** because so much judicial business is conducted in those fora. Remember— at least ninety-five percent. **If state courts fail, justice in America fails**. \*\*\*

#### That solves extinction

**Domingo 10** (Rafael Domingo is Professor of Law at the University of Navarra School of Law, The New Global Law, Cambridge University Press, <https://iejiweb.files.wordpress.com/2017/09/the-new-global-law-asil-studies-in-international-legal-theory-1.pdf>, y2k)

We live in a world of **profound change**. The implementation of new **tech**nologies; the growing impact of mass **media** communications; the unprecedented development of **a market economy** on a global scale; the ubiquitous role of a civil society progressively consolidating, vertically and horizontally; the shared desire to address the problems afflicting **humanity**, such as international **terrorism**, arms **trafficking**, **hunger** and **poverty**, **sexual exploitation**, political and economic **corruption**, abuse of power, and increasing **environmental challenges** that threaten the configuration and **peace of the planet** – these are some of the issues that characterize our **unique** and never-recurring **historical moment**. We are propelled through life at a dizzying speed. Perhaps this is the most salient difference from the past: the hectic **pace** of our social relations, which at times makes it difficult to **adapt** to the demands of justice. Our society is the product of a complex mosaic of political, economic, and cultural relationships, the intricacies of which are hardly recognizable merely by applying the social norms of yesteryear. Faced with this reality, which is as certain as our own existence, we **jurists** cannot and should not turn a blind eye, thereby allowing **the law of the jungle to take over** in this age of globalization because of **lack of** foresight, consistency, or **imagination**. We cannot acquiesce to world domination by economic imperialism or political cryptocracy as if it were some kind of private estate. The science of **law** has become obsolete in many respects; it has been **overwhelmed** by new facts and circumstances. The increasingly opaque distinction between public and private spheres, the intrinsic complexity of facts to be ordered by law, and poor planning in the face of a rapidly changing future have eviscerated many legal principles that once might have seemed permanent and unchanging and now seem, at best, mercurial. At times, the weight of cultural idiosyncrasies and circumstance is so great that we think of them as part of nature. Nature itself, however, also changes – at least in part I am reminded of the famous words in Gaius’ Institutes (2.73), where the second-century jurist states that “what a man builds on my land becomes mine by natural law, although he built on his own account, because a superstructure goes with the land” (superficies solo cedit). 1 I doubt that the same jurist would repeat this precept, accepted by courts throughout the ages, if he had taken a stroll along Manhattan's Fifth Avenue. Today, this principle has been overturned in many cases, with “structure prevailing over land.” Thus, natural law, in the modern sense of the term, does not embrace this tenet. In Ancient Rome, however, the inherent nature of things (rerum natura) prevailed as the standard of legal interpretation that led Gaius to formulate this principle. To be sure, though, for a long time, the stricture was observed. In his classical essay Revitalizing International Law, Richard Falk complained that jurists – especially American jurists – are averse to paradigm shifts in response to the complexities of society and political phenomena. 2 Globalization commands a **reformulation of the law**, an appropriate **legal response** to **changing** times to avoid becoming hostage to **outmoded**, **transient paragons**. It is a moral obligation. 3 The time has come for a global law just as earlier, the time was ripe for the law of nations and what later became “international law.” Without the ius gentium, international law cannot be understood. Moreover, absent the development of international law, nascent global law would not come into being. These three legal domains (the law of nations, international law, and global law) are like grandfather, father, and grandson, respectively. They are part of one and the same family. Therefore, they have common traits that bind them even though they are based on different legal principles and were applied at completely different times in history. That they have coexisted and overlapped bespeaks this commonality and difference. I do not, therefore, entirely agree with the great legal scholar Lassa Oppenheim (1858–1919) – nor with his followers – when he suggests that international law in the term's current sense is “a product of Christian civilization” that gradually began to develop in the Late Middle Ages, especially with Grotius, who was the originator of a later conceptualization of the law of nations. 4 Such a point of departure is somewhat artificial. Is it possible to understand Grotius without at least Gentili or Vitoria, Vitoria without Thomas Aquinas, or Aquinas without Isidore of Seville? Can we understand St. Isidore without first knowing Ulpian, Ulpian without Gaius, Gaius without Cicero, the great Roman orator without the Stoics, and stoicism without Socrates? The litany of epistemological “moments” of development leads to a simple and succinct response: Of course not. Certainly, this penchant in favor of fragmentation has occurred within the history of international law, notable for platitudes that, like a family heirloom, have been passed down for generations. I do accept, however, the happy turn of phrase with which Jean Monnet (1888–1979) closes his fascinating memoirs: “les nations souveraines du passé ne sont plus le cadre où peuvent se résoudre les problèmes du present.” 5 It represents an outdated notion and pointless nostalgia, but it also underscores the need to acknowledge that tools useful at certain times in history, such as the concept of the sovereign nation itself, may lose their relevance in another era. The time has come for imagination and creativity. **Humanity** has common problems that must be addressed by the **justice system** and, therefore, by **law** – a law that, to use the well-known expression of the “Father of Europe,” must unite [hu]mankind, not **merely nation-states**. 6

## Ptx

#### A smaller BBB package including the climate provisions will pass---solves warming and “saves the planet”

AFP 1-25 Climate change: Biden's next big political gamble? https://www.france24.com/en/live-news/20220125-climate-change-biden-s-next-big-political-gamble

After a string of setbacks on getting his priorities through the deeply divided US Congress, President Joe Biden may set his sights on climate change in a bid to save the planet -- and his imperiled legacy.

Last week, the president announced that efforts were underway to revive the environmental component of his $1.8 trillion social spending plan, after it was all but killed in the Senate.

The Build Back Better package was to include $555 billion for renewable energy and clean transport incentives in the country's largest ever climate investment, to meet Biden's goal of cutting 2005 greenhouse gas emissions in half by 2030.

"I've been talking to a number of my colleagues on the Hill. I think it's clear that we would be able to get support for the $500-plus billion for energy and the environmental issues," Biden told reporters last week.

Democratic lawmakers immediately busied themselves behind the scenes in seeing if they could make it happen.

American wallet

Prioritizing bold action on climate change might be seen in progressive quarters as a no-brainer -- but proponents of realpolitik see it as something of a gamble.

In a country hit yearly by deadly floods and raging wildfires, climate action is an incongruously low priority, with the public voicing far more concern in opinion polls over inflation and the Covid-19 pandemic.

The trick for White House aides putting Biden's vision into words has been to appeal to America's wallet rather than its existential dread.

Instead of imposing sanctions against polluters, the $555 billion package would offer substantial tax credits for producers and consumers of wind, solar and nuclear power.

Under this carrot-not-stick approach, motorists would get up to $12,500 in tax relief for buying electric cars made domestically, while householders could claim back around a third of the cost of installing solar panels.

Debbie Weyl, the deputy director of the World Resources Institute lobby group in the United States, argues there is "no question" that the country would struggle to achieve its environmental targets without the reforms.

For the moment, Democrats can only count on votes from their own side, as the Republicans appear unified in their opposition to the proposals.

A spokeswoman for Lisa Murkowski, a moderate Republican who has a record of working across the aisle, told AFP the Alaska senator was unable to support the energy and climate provisions in the Build Back Better text.

The spokeswoman criticized the "highly partisan" process for writing the legislation and said the energy elements were designed to "deliberately harm Alaska."

The Manchin equation

Biden's majority is as slim as it could be in the evenly split Senate, where his vice president can cast tie-breaking ballots in favor of Democrats when votes are split 50-50.

As a result, any Democratic senator effectively has a veto on any White House initiative that comes before the chamber.

The most high profile hold-out on Build Back Better was Joe Manchin, a headline-grabbing centrist from the coal mining state of West Virginia.

Some local miners' groups came out in favor of the president's climate reforms, which include help for people suffering from "black lung disease," a serious condition caused by inhaling coal dust.

But Manchin effectively killed the package when he said he would be withholding his support because he feared that spiraling spending would exacerbate the already alarming US inflation rate.

Staffers and politicians across Washington are now hoping the party can coalesce around a narrower, less expensive bill with much of the climate-focused legislation remaining intact but the main items Manchin objects to expunged.

"I'm convinced that Democrats will pass a (scaled) down but monumental climate bill this year," Paul Bledsoe, a climate advisor in Bill Clinton's administration, told AFP.

"If they don't, the voters will punish them."

Democrats have just a few months left to act before the midterm elections, in which they could lose their slim majorities in Congress, making any legislative progress even more problematic.

Biden, who is struggling with a plummeting approval rating, cannot afford to fail.

#### Antitrust trades-off

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, <https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en>, y2k)

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.

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!

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.

## Stocks

#### CP: The United States federal government should maintain the scope of antitrust enforcement at status quo levels.

#### Stocks are rising

Caitlin McCabe 2-4 reporter for The Wall Street Journal, S&P 500 Rises After Amazon Earnings, Jobs Report, https://www.wsj.com/articles/global-stocks-markets-dow-update-02-04-2022-11643953296

The S&P 500 and Nasdaq Composite rose Friday, pushing major stock indexes to weekly gains, after a better-than-expected January jobs report showed the economy is still growing solidly. The technology-focused Nasdaq Composite jumped by 219.19 points, or 1.6%, to finish at 14098.01, a day after the index posted its largest loss since September 2020. The S&P 500 climbed 23.09 points, or 0.5%, to end at 4500.53. Both were bolstered by a 14% jump in shares of Amazon.com, which surged after the e-commerce giant said profit nearly doubled in the holiday period. The Dow Jones Industrial Average slipped by 21.42 points, or 0.1%, to end at 35089.74. The index of blue-chip stocks was down more than 300 points earlier in the day. Even with the Dow’s small loss, all three indexes finished higher for the week, extending their weekly winning streak to two. The Nasdaq notched a weekly gain of 2.4%, its largest weekly gain since late December. The S&P 500 rose 1.5% during the period, while the Dow gained 1%. Last month, major indexes tumbled for a stretch of weeks as concerns flared about the path of monetary tightening by the Federal Reserve. The central bank last week signaled that it would begin raising rates in mid-March. This week’s gains, though, were hard-won. On Thursday, major indexes sank, dragged down by technology companies after Meta Platforms posted disappointing earnings results. The tumble by major indexes seemed to threaten to kick-start a selloff in the U.S. stock market again. By Friday afternoon, however, sentiment had largely turned positive, shaking off concerns earlier in the day that the latest jobs report could support more hawkish Fed action. The Labor Department said Friday that the U.S. economy added 467,000 jobs in January. Economists surveyed by The Wall Street Journal had expected a gain of 150,000. Central bank officials have in recent days played down speculation that they might raise interest rates by a half percentage point in March instead of a quarter point. But they have also said that their rate increases will be guided by data. “Markets were afraid the Fed would raise rates at a time when the economy was rolling over and there were worries about policy errors,” said Jamie Cox, managing partner for Harris Financial Group. “What data like [Friday’s jobs report] suggests is that the Fed is adjusting monetary policy to adapt to the economy. Hyper-accomodative monetary policy is no longer needed.” Major indexes enjoyed support Friday from a rise in the shares of big technology stocks including Microsoft and Tesla. With its 14% jump, Amazon broke the record for the largest-ever one-day gain in market value for a U.S. company. The stock ultimately added $375.88 to close at $3,152.79. Meta, however, fell by 67 cents, or 0.3%, to close at $237.09, a day after it tumbled 26% following a disappointing earnings report. Sharp moves in the share prices of large technology and social-media companies have an outsize impact on broader indexes. Amazon had a 3.3% weighting on the S&P 500 as of Wednesday, according to data from S&P Dow Jones Indices. Meta had a 2% weighting. Financials and energy stocks also finished solidly higher. Oil prices climbed, with global benchmark Brent crude rising 2.4% Friday to $93.27 a barrel, due to supply tightness and a winter storm in the U.S. that may disrupt production.

#### Expanding the scope of antitrust is perceived as a wrecking ball on corporate earnings

Rogerson 20 Dr. William Rogerson 20, Charles E. and Emma H. Morrison Professor of Economics at Northwestern University, Ph.D. in Social Sciences from the California Institute of Technology, and Dr. Howard Shelanski, Ph.D. in Economics from University of California, Berkeley, Professor of Law at Georgetown University and Partner at Davis Polk & Wardwell LLP, JD from the UC Berkeley School of Law, BA from Haverford College, Former Clerk for Judge Stephen F. Williams of the U.S. Court of Appeals for the D.C. Circuit and Justice Antonin Scalia of the United States Supreme Court, Former Administrator of the White House Office of Information and Regulatory Affairs and Director of the Bureau of Economics at the Federal Trade Commission, Former Chief Economist of the Federal Communications Commission and Senior Economist for the President’s Council of Economic Advisers at the White House, “Antitrust Enforcement, Regulation, and Digital Platforms”, University of Pennsylvania Law Review, 168 U. Pa. L. Rev. 1911, June 2020, Lexis

I. GOING BEYOND ADJUDICATION FOR ANTITRUST ENFORCEMENT

Antitrust statutes are primarily enforced in court, usually through the adjudication of specific cases or settlement against the backdrop of court-made antitrust doctrine. Indeed, despite statutory authority for the FTC to issue competition rules, and despite the technical complexity of many antitrust cases, antitrust enforcement and policy in the United States has evolved primarily through precedent developed by generalist courts, not specialized agencies. 18To be sure, the Department of Justice and the FTC influence policy through the investigations they pursue and the consent decrees they reach with parties. The FTC itself adjudicates some cases, although it does so largely according to law developed in the federal courts, to which parties can appeal any FTC decision. 19Academics and other commentators have also affected the evolution of antitrust in the United States, from supporting an economic, notably price-focused framework for U.S. competition policy to sparking a rethinking of that framework in contemporary debates. As the courts have absorbed such learning, antitrust doctrine has evolved over the decades through the push and pull of precedent across the United States judicial circuits, with the Supreme Court periodically stepping in to correct, clarify, or resolve differences among the lower federal courts. Commentators often cite antitrust as a rare example of "federal common law" in the U.S. system. 20

The adjudicatory model for implementing antitrust enforcement has several key attributes, which in turn have both advantages and disadvantages. We put aside for now the question of who is adjudicating--whether it be an expert tribunal or a court of general jurisdiction, for example--and focus on three characteristics of antitrust adjudication itself.

A. Case-by-Case, Fact-Specific Approach

Complexity of underlying issues aside, adjudication is well suited to settings in which applicability of the law is contingent on case-specific facts. With the exception of the limited conduct that the antitrust laws prohibit per se, courts review most business activities through a rule of reason, under which some conduct that is illegal in one set of circumstances is allowable in [\*1918] another. 21The inquiry into liability goes beyond whether particular conduct in fact occurred (which is the extent of the inquiry into conduct that is illegal per se) and extends into a balancing of the conduct's likely effects on competition. 22The more that liability is contingent on such case-specific facts, the more difficult it is to determine liability in advance of the conduct's having taken place. Adjudication typically occurs when conduct either is imminent or has already occurred, at which point the relevant facts as to the effects of the conduct are, in principle, more readily measured. 23Such "ex post" mechanisms of enforcement can reduce the risk of over-enforcement when compared to alternative approaches, like some forms of regulation, that spell out more comprehensively in advance what conduct is illegal. 24Reducing false positives, however, may or may not be a virtue--that calculation depends on the extent to which particular adjudicative institutions and processes under-enforce by allowing harmful conduct or transactions to slip through the liability screen.

B. Slow, Usually Predictable Doctrinal Development

A second attribute of the American adjudicatory process for antitrust is stability. While antitrust doctrine has occasionally swerved abruptly over the past century, the common-law process through which antitrust law has developed usually provides clear notice that a change is coming. As a recent example, the Supreme Court's shift in *Leegin Creative Leather Products, Inc. v. PSKS. Inc*. 25from per se liability to a rule of reason for resale price maintenance likely caught few observers by surprise. 26

Antitrust adjudication's stability, like its suitability for fact-dependent situations, is potentially double-edged. Antitrust jurisprudence can be slow to adjust to changes in economic learning or changes in the underlying economy that alter the effects of a particular kind of business conduct. For [\*1919] example, nearly thirty years ago the Supreme Court in Brooke Group v. Brown & Williamson Tobacco Corp. 27required that plaintiffs claiming predatory pricing show not only prices below some measure of incremental cost, but also that the defendant could recoup its losses. 28No plaintiff has prevailed in a predatory pricing case in a U.S. federal court since. 29That outcome might not be of concern were it the case that the Supreme Court's test accurately captures the incidence of predatory pricing. 30Economic research demonstrates, however, that predatory conduct does occur and does not depend on either below-cost pricing or recoupment. 31Predation is just one area in which court-made doctrine appears out of step with relevant economic facts and knowledge. To be sure, other forces could accelerate the common-law process of doctrinal development. For example, Congress could legislate changes to the scope, presumptions, and other parameters of antitrust law in ways that would immediately alter precedent and bind the courts going forward. 32 In practice, however, such intervention is rare and unlikely, making significant lags in doctrine a reality of antitrust adjudication in the courts.

C. Market-Driven Case Selection

In the United States, most adjudicative bodies do not select the cases that come before them. To be sure, courts have jurisdictional limitations that prevent them from hearing certain kinds of cases, and doctrines exist that allow courts to reject weak or poorly conceived complaints. Beyond those mechanisms, however, independent parties decide when and whether to pursue litigation as method of relief. One potential virtue of this separation between decisionmaking and case selection is that the market can drive the focus of judicial attention. Assuming the most widespread and most troublesome anticompetitive conduct will receive the greatest investment of litigation resources, that conduct will in turn receive the most adjudication and doctrinal development.

[\*1920] Unfortunately, the separation between adjudication and case selection will not necessarily lead to an efficient match between judicial attention and the most pressing antitrust violations. In practice, even conduct that is clearly prohibited can persist when offenders think detection is difficult; one only has to look at the consistently high number of civil and criminal price fixing cases that wind up in court, even though that conduct has clearly been illegal per se for nearly a century. 33The most widespread anticompetitive conduct might not therefore be the conduct most in need of doctrinal development--it can be just the opposite, as the persistence of cartels demonstrates. 34Moreover, if the courts develop doctrine that needs revisiting, but that deters the government or private plaintiffs from filing cases, 35then the market for judicial attention to antitrust conduct will not work well dynamically; once doctrine is settled, there may be no mechanism outside of legislation or regulatory intervention to drive doctrinal change. We return to this issue below.

D. Generalists versus Industry Experts

Returning to an issue we put aside earlier, who is doing the adjudication can matter for substantive outcomes. In U.S. antitrust law, that adjudication has occurred, at least ultimately, in generalist federal courts. That institutional locus might well make sense given the wide variety of conduct, industries, and factual circumstances that antitrust cases present. However, as specific industries come to pose particular challenges for antitrust enforcement, the case for more specialized enforcement decisionmakers becomes stronger. Traditionally, where detailed, industry-specific knowledge is required to make sound competition policy decisions, Congress has assigned authority over those decisions, at least in part, to industry-specific regulatory agencies. Thus, the Securities and Exchange Commission has authority over competitive conduct in key financial sectors. 36The FCC has parallel authority with the Department of Justice (DOJ) over telecommunications mergers and sole authority to establish terms for competitive entry into various telecommunications markets. 37State [\*1921] regulators govern entry into hospital markets through Certifications of Public Need. 38The federal courts have increasingly safeguarded the domain of industry specific regulators over competition issues even when agency decisions might be in tension with antitrust law. 39

As antitrust enforcement focuses on distinct challenges posed by a particular industry, whether digital platforms, pharmaceuticals, or something else, expert and specialized knowledge becomes even more essential to making good enforcement decisions. Under current law and enforcement frameworks, there is no systematic way to bring such specialization into the ultimate adjudication of antitrust cases in industries not already covered by specific, competition-related, regulatory statutes. To be sure, the FTC and DOJ have divisions that specialize in various industrial sectors in which they have considerable expertise. Those divisions bring that expertise into their review of conduct and transactions, but neither the FTC nor DOJ has ultimate adjudicative authority over the cases they choose to litigate. The DOJ must go to federal court to seek enforcement. The FTC can opt for an administrative enforcement mechanism with the Commission itself sitting in appellate review of initial adjudication by an administrative law judge. The Commission's decision is, however, subject to review by federal appellate courts, which have not hesitated to reverse the agency's decisions. 40 The result is that, even when agencies have brought specific industry expertise into antitrust enforcement, doctrinal application and resolution still proceeds through the common-law process of adjudication by generalist judges.

E. Tradeoffs Inherent in the Adjudicatory Approach to Antitrust

As the foregoing discussion suggests, the ex post case-by-case approach, slow doctrinal evolution, and case selection mechanism of antitrust adjudication have potential advantages and disadvantages. The tradeoffs become particularly clear through the interaction of those three characteristics.

[\*1922] Adjudication may mitigate the rate of false positives or false negatives obtained through enforcement, as proceeding case-by-case is less likely to bring about those results than are general rules that impose limits on business conduct in advance, regardless of specific circumstances. Broad ex ante specifications could prohibit beneficial or harmless conduct, and narrow ex ante specifications could fail to prevent anticompetitive practices. As a decisionmaking process moves from strict ex ante prescription to pure case-by-case adjudication, particular facts and circumstances increasingly predominate over generic categorization of conduct. 41In principle, the movement along that spectrum enables the decisionmaker to avoid under-inclusiveness or over-inclusiveness of categorical rules. 42

The extent to which an adjudicator actually succeeds in reducing enforcement errors in either direction depends on the doctrine and precedent through which it evaluates the case-specific evidence. Doctrine and precedent will determine how a court allocates burdens, prioritizes facts, and weighs presumptions in evaluating the legality of conduct. If precedent provides mistaken guidance on those factors, case-specific adjudication might do no better a job than ex ante prohibitions in avoiding errors or bias toward either under or over-enforcement. For this reason, the evolutionary pace of doctrinal development through antitrust adjudication is very important. Where that evolution has been toward convergence with state-of-the-art analysis and evidence as to the effects of conduct, doctrinal stability is a virtue. Reasonable people disagree over the Supreme Court's movement from per se illegality to rule of reason treatment of vertical price restraints, as Justice Breyer's dissent in Leegin demonstrates. 43 The decision in that case nonetheless drew on a body of legal and economic analysis that, over decades, had continually narrowed the application of per se rules to vertical conduct and led logically (even if some might argue incorrectly) to the majority's conclusion. 44Many commentators might therefore say Leegin is a good example of where the evolution of doctrine through adjudication worked well: stakeholders had notice and the doctrine moved in an internally consistent direction. While it is debatable whether the per se rule against restraints on [\*1923] intra-brand competition has in recent years led to over-enforcement, there is a good case that it had done so in the past, 45so that the doctrine plausibly moved in an error-reducing direction.

However, where doctrine gets on the wrong track, the application of precedent will perpetuate rather than reduce enforcement errors. In the case of predation, for example, there is a good argument that, in the light of current economic knowledge, the Brooke Group decision has led to underenforcement. 46The potential case-by-case advantages of adjudication are lost where judicial precedent renders important facts and circumstances irrelevant. In such cases, the relatively slow process of doctrinal correction through common law evolution is harmful to sound antitrust enforcement.

The discussion above shows that the error-reducing potential of a case-by-case, adjudicatory approach to antitrust enforcement depends heavily on the actual doctrine courts apply and on the process by which that doctrine evolves. Similarly, whether case selection in an adjudicatory approach in fact directs judicial attention to the conduct that most warrants oversight depends on existing doctrine and precedent. It may well be that the conduct doing the most harm is also the conduct for which the courts impose the highest burdens of proof on plaintiffs. The deterrent effect of those burdens likely leads to fewer cases than the conduct's actual effects warrant. 47Similarly, doctrine that too readily imposes liability could have the opposite effect: lower barriers for plaintiffs would lead to too many cases and more devotion of judicial resources than the conduct deserves. 48Like error-reduction, the distribution of antitrust cases brought for adjudication depends heavily on the state of the doctrine and on the ability of the common law process to correct course where necessary.

The potential disadvantages of antitrust adjudication by generalist courts raise the question of whether a different approach might be preferable, specifically with regard to digital platforms. Digital platforms present relatively novel challenges. Considering the tenuous fit between some [\*1924] potential theories of harm and current antitrust doctrine, the complexity of the underlying technical issues in antitrust cases, and the interrelatedness of those issues and adjacent policy goals, a more informed, comprehensive approach coordinated by an expert regulatory agency might foster more advantages than does the exclusive resort to traditional antitrust adjudication. However, before we turn to the form such regulation might take, we briefly identify some general principles for such regulation.

#### Bull market exuberance is tenuous—the plan causes a crash and recession

Roberts 11/7/21 (Lance, Seeking Alpha, “Did The Fed Just Set The Stock Market Up For A Crash?”, https://seekingalpha.com/article/4466775-did-the-fed-just-set-the-stock-market-up-for-a-crash)

Market Back To Extreme Overbought As noted last week, the more significant concern remains the underlying technical condition of the market. While the rally has been impressive, rising to all-time highs, the market is now back to more extreme overbought levels. Furthermore, our "money flow buy signal" is near a peak and slightly triggered a "sell signal." However, with the MACD still positive, the signal suggests a consolidation rather than correction. However, a confirming MACD often aligns with short-term corrections at a minimum. Therefore, we will watch that signal closely. Also, this entire rally from the recent lows has been on very weak volume, which suggests a lack of commitment. Currently, the bulls control the market as we are in the middle of a "buying stampede." Historically, buying stampedes last on average between 7 and 12 days. Logically, buying stampedes always get followed by selling stampedes of similar lengths. However, there are times these stampedes can last much longer than expected. We are currently in one of those longer-term periods. As shown below, the S&P 500 has only been down in 2 of the last 18 days. How unusual is that? In the previous 20 years of the S&P 500, the number of times the market accomplished such a feat was precisely ZERO. Of course, that stampede gets driven by exuberance. Irrational Exuberance In our daily market commentary, we quoted a piece of analysis from Chartr.com. To wit: "Every week it feels like we get a new headline about financial markets doing something unusual. Just this week we've had:" A "squid game" crypto token falling 99.99% in a few minutes. Tesla adding hundreds of billions of dollars in value over a deal with Hertz that hasn't even been signed. US stock markets hitting fresh all-time highs. "All of which begs the question: are we in a bubble?" So where are we now? The latest CAPE ratio for the S&P 500 Index is 38x. That's pretty close to the all-time record, which was 44x back in 2000. For those with a short memory, that was just before the dotcom bubble burst and stock markets (particularly tech) crashed hard." As we have noted previously, valuations, by themselves, are a terrible timing metric. However, they tell us a great deal about expected future returns and current market psychology. When it comes to "irrational exuberance," there are other indicators better at revealing speculation in the markets that have preceded a stock market crash. The CNN Fear/Greed index is now at extreme greed territory. Furthermore, the demand for protection against a stock market crash (put options) fell to new lows. Historically, such periods of "speculative" activity led to a minimum of short-term stock market corrections, but a crash is not beyond the realm of possibilities. As noted above, with the market extremely overbought, speculative activity surging, and conviction weak, taking some actions to rebalance and manage risk is warranted. However, for now, investors have "no fear" as they believe the Fed will continue to remain accommodative. The Fed's Third Mandate Takes Priority My co-portfolio manager, Michael Lebowitz, made an important observation on Thursday. "Jerome Powell made it clear the Fed is in no hurry to raise interest rates. 'We don't think it's time yet to raise interest rates. There is still ground to cover to reach maximum employment, both in terms of employment and in terms of participation.' The Fed's reason is the employment picture is not back to pre-pandemic levels. In our mind, there is plenty of evidence such as the outsize quits rate, rising wages, and the record number of job openings that scream the labor market is very healthy. Does Mr. Powell disagree with our assessment, or is there more to the Fed's policy stance? We believe he answered the question at Wednesday's press conference. Per Jerome Powell: 'The Fed's policy actions have been guided by our mandate to promote maximum employment and stable prices for the American people along with our responsibilities to promote the stability of the financial system.'" The last sentence is the most important. According to the Federal Reserve's Congressional authorization, the Fed has only TWO mandates: price stability (inflation) and full employment. The third mandate is a self-imposed mandate from Ben Bernanke, who was the Fed Chairman in 2010: "This approach eased financial conditions in the past and, so far, looks to be effective again. Stock prices rose, and long-term interest rates fell when investors began to anticipate the most recent action. Easier financial conditions will promote economic growth. For example, lower mortgage rates will make housing more affordable and allow more homeowners to refinance. Lower corporate bond rates will encourage investment. And higher stock prices will boost consumer wealth and help increase confidence, which can also spur spending." Fed Opts To Keep Markets Elevated Jerome Powell ignored surging inflationary pressures and a robust job market in favor of supporting asset prices. With valuations surging, speculative activity rising, and investors heavily leveraged, the Fed faces a difficult choice. There is already a decoupling of markets from consumer confidence. A stock market crash would further devastate confidence pushing the economy into recession. That is the risk the Fed cannot afford.

#### Nuke war

Jomo Kwame Sundaram & Vladimir Popov 19. Former economics professor, was United Nations Assistant Secretary-General for Economic Development, and received the Wassily Leontief Prize for Advancing the Frontiers of Economic Thought in 2007. Former senior economics researcher in the Soviet Union, Russia and the United Nations Secretariat, is now Research Director at the Dialogue of Civilizations Research Institute in Berlin “Economic Crisis Can Trigger World War.” <http://www.ipsnews.net/2019/02/economic-crisis-can-trigger-world-war/>.

Economic recovery efforts since the 2008-2009 global financial crisis have mainly depended on unconventional monetary policies. As fears rise of yet another international financial crisis, there are growing concerns about the increased possibility of large-scale military conflict.

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

Crisis responses limited

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

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

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

From bust to bubble

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

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

The implications beyond the economy of such developments and policy responses are already being seen. Prolonged economic distress has worsened public antipathy towards the culturally alien — not only abroad, but also within. Thus, another round of economic stress is deemed likely to foment unrest, conflict, even war as it is blamed on the foreign.

International trade shrank by two-thirds within half a decade after the US passed the Smoot-Hawley Tariff Act in 1930, at the start of the Great Depression, ostensibly to protect American workers and farmers from foreign competition!

Liberalization’s discontents

Rising economic insecurity, inequalities and deprivation are expected to strengthen ethno-populist and jingoistic nationalist sentiments, and increase social tensions and turmoil, especially among the growing precariat and others who feel vulnerable or threatened.

Thus, ethno-populist inspired chauvinistic nationalism may exacerbate tensions, leading to conflicts and tensions among countries, as in the 1930s. Opportunistic leaders have been blaming such misfortunes on outsiders and may seek to reverse policies associated with the perceived causes, such as ‘globalist’ economic liberalization.

Policies which successfully check such problems may reduce social tensions, as well as the likelihood of social turmoil and conflict, including among countries. However, these may also inadvertently exacerbate problems. The recent spread of anti-globalization sentiment appears correlated to slow, if not negative per capita income growth and increased economic inequality.

To be sure, globalization and liberalization are statistically associated with growing economic inequality and rising ethno-populism. Declining real incomes and growing economic insecurity have apparently strengthened ethno-populism and nationalistic chauvinism, threatening economic liberalization itself, both within and among countries.

Insecurity, populism, conflict

Thomas Piketty has argued that a sudden increase in income inequality is often followed by a great crisis. Although causality is difficult to prove, with wealth and income inequality now at historical highs, this should give cause for concern.

Of course, other factors also contribute to or exacerbate civil and international tensions, with some due to policies intended for other purposes. Nevertheless, even if unintended, such developments could inadvertently catalyse future crises and conflicts.

Publics often have good reason to be restless, if not angry, but the emotional appeals of ethno-populism and jingoistic nationalism are leading to chauvinistic policy measures which only make things worse.

At the international level, despite the world’s unprecedented and still growing interconnectedness, multilateralism is increasingly being eschewed as the US increasingly resorts to unilateral, sovereigntist policies without bothering to even build coalitions with its usual allies.

Avoiding Thucydides’ iceberg

Thus, protracted economic distress, economic conflicts or another financial crisis could lead to military confrontation by the protagonists, even if unintended. Less than a decade after the Great Depression started, the Second World War had begun as the Axis powers challenged the earlier entrenched colonial powers.

They patently ignored Thucydides’ warning, in chronicling the Peloponnesian wars over two millennia before, when the rise of Athens threatened the established dominance of Sparta!

Anticipating and addressing such possibilities may well serve to help avoid otherwise imminent disasters by undertaking pre-emptive collective action, as difficult as that may be.

## T Per se

**‘Prohibiting’ a practice requires per se illegality.**

Lee **Mendelsohn 6**, Director at Edward Nathan, “KIPA Conduct Amounts to Price Fixing”, Business Day (South Africa), 6/12/2006, Lexis

The **first step** in any **competition law** analysis is to **define** the relevant market. There are two components to an analysis of the relevant market, namely the relevant product market and the geographic market.

The relevant product market consists of those products and services that operate as a competitive constraint on the behaviour of the suppliers of those products and/or services.

The relevant product market is determined by ascertaining whether a small but significant non-transient increase in pricing of the product in question would cause buyers to substitute the product with another product or would cause suppliers of other products to begin producing the product in question.

The relevant geographic market is determined by ascertaining whether a small but significant non-transient increase in pricing of the product in question would cause buyers to purchase the product from other geographic areas, alternatively suppliers of the product in other geographic areas to supply those products into the area in question.

For the purposes of this case study, we are instructed to accept that each medical speciality constitutes a relevant product market and that the relevant geographic market for each of them is Kleindorpie.

The Competition Act provides that "an agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if … it involves … directly or indirectly fixing a purchase or selling price or any other trading condition".

An "agreement" is defined as including a contract, arrangement or understanding, whether or not legally enforceable. The term agreement is very widely defined. A "horizontal relationship" is defined as a "relationship between competitors".

The **prohibition** on the fixing of a purchase or selling price or any other trading condition is one of the so-called **"per se"** prohibitions which are included in our Competition Act. The prohibition is **automatic** and **absolute** and the fixing of prices or other trading condition **cannot be justified** on the basis of any technological, efficiency or other procompetitive **gains** that could **outweigh** the potential **anticompetitive effect** of the fixing of the price or trading condition. If the capitation plan of KIPA falls within the restrictive horizontal practice prohibiting price fixing and the fixing of other trading conditions, such practice will be a contravention of the act.

**Limits---many standards, requiring distinct answers, make the topic unmanageable.**

**Ground---fringe standards dodge links and allow bidirectional permissiveness.**

## T No Mergers

**Practices are ongoing conduct---mergers violate---the merger itself is a one-off event, even if they’re evaluated because of their effects on ongoing practices.**

Stanley Mosk 88, Judge, California Supreme Court, “Cal. ex rel. Van De Kamp v. Texaco,” 46 Cal. 3d 1147, Lexis [italics in original]

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

What the Attorney General challenges in this actionis the **Texaco-Getty** merger**.** Under the Barquis court's construction **of the statute,** however, the merger itself cannotbe characterized as "a 'pattern' . . . of conduct," "ongoing conduct," "a pattern of behavior," "a course of conduct," or anything relevantly similar: it is rather a single act.That the complaint, under **[\*\*\*\*156]** the Attorney General's reading, alleges that Texaco engaged in certain unlawful, unfair, or fraudulent business practices in the past and may engage in other such practices in the future is simply not enough: the complaint attacks not those past or future practices, but only the merger**.**

**Voting issue---forcing AFFs to regulate ‘patterns of conduct’ locks in NEG defenses of ways of doing business---any other interp allows review of individual transactions and decisions which are impossible to negate.**

## Adv CP

#### Text: The United States federal government should:

#### ---substantially increase subsidies for public and private research and development of sustainable agriculture technologies;

#### --- make receipt of current agricultural subsidies contingent on meeting standards for sustainable farming practices\*;

#### ---provide overwhelming financial incentives to promote small farm firm growth;

\*eliminate agricultural subsidies not tied to sustainable farming practices and direct the money toward subsidies conditioned on these standards

#### Reforming subsidies makes it a financial necessity to shift production patterns—that means if farmers don’t meet targets, they won’t get paid and will get priced out of the market

Hornstein, 10 (Donald T. Aubrey L. Brooks Distinguished Professor of Law, University of North Carolina School of Law , “SYMPOSIUM: THE FUTURE OF FOOD REGULATION: THE ENVIRONMENTAL ROLE OF AGRICULTURE IN AN ERA OF CARBON CAPS.” Health Matrix: Journal of Law Medicine, 20 Health Matrix 145, Lexis.)

In a country where agricultural regions are given disproportionately greater political representation in the legislature (South Dakota has the same number of United States Senators as either New York or California), the attraction and political economy of agricultural subsidies coming from Washington, D.C. probably need little elaboration. Less appreciated, however, are the effects of globalization and free trade on what otherwise would be a purely domestic (and politically cozy) set of agricultural policies. Recently, pressure from free-trade has begun to crack the system of federal agricultural subsidies that, for over half a century, have shaped the mindset and crop production decisions of conventional farmers. Among other things, this means that the future may hold fewer financial incentives to support vast monocultures that, due to artificial price supports, regularly produce more crops, such as corn, than a freer market would dictate.

Such a development could have enormous implications both for the practice of agriculture and for the nation's food supply. Agriculturally, upon the removal of price incentives that only incentivize farmers to produce more, growers may finally be able to direct their knowledge and experience toward less environmentally destructive, agricultural systems. This outcome may be even more likely if the government paid farmers who produce positive environmental externalities in their production systems. And, as a side note, the implications of this development for the food supply, nutrition, and public health could be significant; a market stripped of artificially cheap corn -- and high-fructose corn syrup -- for example, might significantly impact the American diet. n17 This development in international trade -- the ending of agricultural subsidies that reward overproduction -- de-serves to be briefly amplified.

[\*150] Between the New Deal and the 1990s, Congress authorized a system of agricultural subsidies, such as "deficiency" payments n18 and nonrecourse loans, n19 which were designed to support farmers' incomes without regard to the vagaries of crop yield. This system rewarded farmers simply for producing a crop without regard to market demand. n20 In the mid-1990s, however, Congress approved the results of the Uruguay Round of trade negotiations, creating the World Trade Organization ("WTO"), and "for the first time subjected U.S. agricultural subsidies to significant restrictions under global trade rules." n21 The rationale for this shift was the idea that growth in American agricultural exports, under the WTO's liberalized trading regime, would provide farmers with an expanded source of income that would more than counterbalance a reduced stream of agricultural subsidies. Accordingly, in its 1996 Farm Bill, Congress limited domestic agricultural subsidies to $ 19.1 billion by eliminating deficiency payments and replacing them with a series of fixed payments that would diminish over a seven-year period. n22

Soon, however, this shift in thinking was tested. In the late 1990s, agricultural commodity prices collapsed, and Congress responded with new farm legislation that sought to reverse the diminishing payments it had approved in 1996. n23 In 2002, Congress again increased farm subsidies in the Farm Security and Rural Investment Act of 2002 n24 (the 2002 "Farm Bill"). n25 To square these actions with its earlier approval of the Uruguay Round of international trade rules (under [\*151] which agricultural subsidies were to be reduced), Congress attempted to gain international support for reinvigorating domestic subsidy programs through the so-called "Doha Round" of international trade talks that began in Doha, Qatar, in 2001. n26 The Doha Round, however, seemed to collapse in July 2006 when negotiations were suspended "primarily because of broad disagreements over agriculture." n27 Thus, as to agricultural subsidies, international trade law reverted to the framework that announced in the Uruguay Round and Congress approved in the mid-1990s.

That said, it had always been unclear whether the Uruguay framework was sufficiently strong actually to penalize the United States with trade sanctions for Congress's reintroduction of increased agricultural subsidies. Although the New York Times chastised the government in an editorial in 2004 entitled Those Illegal Farm Subsidies, n28 many experts believed that ambiguity in the text of the Uruguay Round's Agreement on Agriculture n29 would "rarely permit successful reining in by [the WTO's] dispute settlement panels of the nearly $ 1 billion a day developed nations [were providing] to their farmers." n30

In 2004, however, two decisions issued by WTO dispute settlement panels sent a warning shot to the business-as-usual system of agricultural commodity subsidies. The first decision, arising from a complaint brought by Brazil against the United States for American subsidies on upland cotton, found that the United States had exceeded the amount of subsidies it was allowed under the Agreement on Agriculture. n31 The second decision, from a Brazilian complaint against the European Union ("EU") for the EU's level of subsidies to domestic sugar producers, found that the EU had exceeded its internationally applicable limits on commodity subsidies. Not only did these decisions surprise many observers, but they triggered the WTO's often-cumbersome enforcement mechanism - under which the complaining [\*152] state is authorized to impose tariffs on exports (of any kind) from the offending state. These actions signaled that the WTO was taking seriously the world's commitment to phase out certain types of agricultural crop subsidies.

In September 2009, the WTO authorized Brazil to retaliate against the American cotton subsidies with almost $ 300 million in trade sanctions -- the second-largest retaliation ever approved by the WTO. Brazil has indicated informally its interest in levying these sanctions against the U.S. services and intellectual property export sectors. n32 Yet the impact of international trade law on American crop subsidies may be just beginning. n33 In the words of two prominent commentators, "The Sugar Panel's finding that below-cost exports of an agricultural product may [violate American obligations under the WTO] . . . makes the United States rice, corn, soybeans, and other commodities programs vulnerable to dispute challenge." n34

In fact, the new trade rules change the incentive mix for farmers in another way, as well. In addition to the newly brandished "stick," the WTO's new rules on agricultural subsidies also contain a "carrot." The Agreement on Agriculture requires member nations to reduce farm support but differentiates among types of support based upon each subsidy's trade-distorting features. The most trade-distorting, and thus least favored, types of support are known as "Amber Box" subsidies; which Congress authorized under the 2002 Farm Bill. n35 However, two other types of subsidies are considered by the Agreement on Agriculture to be less trade-distorting: "Blue Box" subsidies, which are made for farmers who agree to limit production; and "Green Box" subsidies, which include payments made under "environmental and conservation programs." n36 For our purposes, it is significant that payments made to farmers that reward them for their stewardship of their lands' carbon-sequestration properties -- whether made under Blue Box or Green Box types of programs -- continue [\*153] under the new international trade rules, just as the deficiency payments tied to production are being limited.

The significance of these developments, therefore, is this: the current system of domestic agricultural subsidies has received an endogenous shock, the sort of shock that, played out into the foreseeable future, might very well open American farmers to the financial necessity of re-imagining the ways in which they make business and operating decisions.

#### The CP couples financial incentives to support programs—that solves

Presley, 14 – Master’s Candidate, Agriculture and Integrated Resource Management, Colorado State University (Leigh, May. “UNDERSTANDING BARRIERS TO AGRICULTURAL CONSERVATION PRACTICE ADOPTION.” http://webdoc.agsci.colostate.edu/wcirm/ConservationPracticeAdoption\_IRM2014\_Presley.pdf)

In overcoming economic barriers, financial incentives are certainly effective and can be the most influential means of encouraging producers to adopt conservation practices. Financial incentives can help reduce the risk of adopting a new or unfamiliar practice, providing farmers with an opportunity to experiment without sacrificing profitability. In order for the practice to be continued and implementation to result in environmental improvements, however, the practice needs to prove economical for the producer beyond terms of the cost-share. With this factor in mind, it can be argued that one-time government financial support doesn’t truly solve soil and water resource issues (Nowak, 2009).

Many studies conclude that financial incentives for conservation should be a priority for policymakers drafting agriculture legislation. In more recent decades, progressive suggestions recommend coupling conservation practices and crop support programs. Although conservation funding has been cut significantly in the recently passed 2014 Farm Bill, the bill does include an agreement requiring farmers to engage in conservation compliance practices in order to receive federal crop insurance support, a measure agreed upon by both conservation and agriculture organizations. Although many farms are already in compliance with existing conservation plans, this requirement may result in more farmers being exposed to conservation practices, and environmental improvements in critical areas.

## Case

### 1NC – Solvency

#### Breaking up large firms forces companies to compete with each other through political influence instead of firm growth --- causes regulators to weaponize the aff against politically vulnerable firms, INCREASING concentration

Manne 18**-** Founder and executive director for ICLE

[Geoffrey, "The illiberal vision of neo-Brandeisian antitrust," Truth on the Market, April 2018. <https://truthonthemarket.com/2018/04/16/the-illiberal-vision-of-neo-brandeisian-antitrust/>), accessed 11-24-21]

The urge to treat antitrust as a legal Swiss Army knife capable of correcting all manner of social and economic ills is apparently difficult for some to resist. Conflating size with market power, and market power with political power, many recent calls for regulation of industry — and the tech industry in particular — are framed in antitrust terms. Take Senator Elizabeth Warren, for example:

[T]oday, in America, competition is dying. Consolidation and concentration are on the rise in sector after sector. Concentration threatens our markets, threatens our economy, and threatens our democracy.

And she is not alone. A growing chorus of advocates are now calling for invasive, “public-utility-style” regulation or even the dissolution of some of the world’s **most innovative companies** essentially because they are “**too big**.”

According to critics, these firms impose all manner of alleged harms — from fake news, to the demise of local retail, to low wages, to the veritable destruction of democracy — because of their size. What is needed, they say, is industrial policy that shackles large companies or effectively mandates smaller firms in order to keep their economic and political power in check.

But consider the relationship between firm size and political power and democracy.

Say you’re successful in reducing the size of today’s largest tech firms and in deterring the creation of new, very-large firms: What effect might we expect this to have on their political power and influence?

For the critics, the effect is obvious: A re-balancing of wealth and thus the reduction of political influence away from Silicon Valley oligarchs and toward the middle class — the “rudder that steers American democracy on an even keel.”

But consider a few (and this is by no means all) countervailing points:

To begin, at the margin, if you limit **firm growth** as a means of **competing** with rivals, you make correspondingly **more important** competition through **political influence**. Erecting barriers to entry and raising rivals’ costs **through regulation** are time-honored American **political traditions**, and rent-seeking by smaller firms could both be **more prevalent**, and, paradoxically, ultimately lead to **increased concentration**.

Next, by imbuing antitrust with an **ill-defined** set of vague political objectives, you also make antitrust into a sort of “**meta-legislation**.” As a result, the return on **influencing** a handful of government appointments with authority over antitrust **becomes huge** — increasing the **ability** and the **incentive** to do so.

#### Private companies rig the aff to increase concentration

Dorsey 18 -executive director of the Global Antitrust Institute

[Elyse, “Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent-Seeking,” Competition Policy International Antitrust Chronicle, April 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3165192, accessed 11-24-21]

Additionally, the **incredibly costly nature** of antitrust proceedings **exacerbates** its **vulnerability** to **rent seeking**.39 Antitrust cases and investigations can drag on **for years**, entail the collecting, processing, and production of **millions** of **documents**, and involve **tremendous attorneys’ fees**. Remedies (or consent terms) can be invasive, last for years, and impair a defendant’s ability to adapt to changing circumstances and thus to remain competitively viable. Looming in the background is the **possibility** of trebled **damages** at the end of the day. Consider that an unhappy competitor could embroil a rival in an antitrust quagmire via its **own litigation**, or by complaining to a government agency and potentially triggering an investigation, that would **divert** significant amounts of that rival’s resources for **years** — thereby ~~crippling~~ **[devastating]** a rival and **diminishing** the amount of **competition** it faces. With so much at stake, conditions are ripe for actors to engage in just such rent-seeking activities in an attempt to appropriate some of this vast wealth for themselves. The **empirical evidence** and **historical record** of antitrust actions — particularly during the era when antitrust was explicitly governed by a **vague**, **multi-faceted standard** — provide **ample support** for **public choice theory** and the economic theory of regulation, while tending to reject the public interest account of regulatory behavior.40

### 1NC – US Not Key

#### US not key—most meat production is overseas

Clark, 16 – sustainable-food campaigner at Humane Society International (Alexandra, 1/29. “As the World Tackles Climate Change, is Meat Off the Table? (Op-Ed).” http://www.livescience.com/53542-more-climate-negotiations-addressing-meat-consumption.html)

However, most farm animal production (and growth in production) is taking place in polluting and inhumane industrial farm animal production systems. These industrial systems are feeding middle- and higher-income consumers who could benefit from more plant-based diets.

According to the World Health Organization (WHO), approximately 40 percent of adults across the globe are overweight, and noncommunicable diseases linked to the overconsumption of fats and energy-dense foods (such as meat, eggs and milk) are now a leading cause of illness and death worldwide. The WHO has called for an increase in the consumption of plant-based foods — specifically fruits, vegetables, legumes, whole grains and nuts — as part of the solution.

Developed countries like the United States still have the highest per-capita meat consumption. However, according to the FAO, developing and emerging economies already account for the majority of meat production overall, and are projected to account for the majority of growth in animal consumption in the coming years.

**Plan causes factory farms to go abroad**

**Nierenberg 3** (Danielle, Staff Researcher – Worldwatch Institute, “Factory Farming in the Developing World”, May/June, http://www.worldwatch.org/system/files/EP163A.pdf)

The Philippines is not the only country at risk from the spread of factory farms. Argentina, Brazil, Canada, China, India, Mexico, Pakistan, South Africa, Taiwan, and Thailand are all seeing growth in industrial animal production. **As regulations** controlling air and water pollution from such farms **are strengthened in one country, companies simply pack up and move to countries with more lenient rules**. Western European nations now have among the strongest environmental regulations in the world; farmers can only apply manure during certain times of the year and they must follow strict controls on how much ammonia is released from their farms. As a result, a number of companies in the Netherlands and Germany are moving their factory farms—but to the United States, not to developing countries. According to a recent report in the Dayton Daily News, cheap land and less restrictive environmental regulations in Ohio are luring European livestock producers to the Midwest. There, dairies with fewer than 700 cows are not required to obtain permits, which would regulate how they control manure. But 700 cows can produce a lot of manure. In 2001, five Dutch-owned dairies were cited by the Ohio Environmental Protection Agency for manure spills. “Until there are international regulations controlling waste from factory farms,” says William Weida, director of the Global Reaction Center for the Environment/Spira Factory Farm project, “it is impossible to prevent farms from moving to places with less regulation.”

#### Developing countries outweigh—demand is rising with incomes

Swain, 12/14/16 – Senior Analyst at Breakthrough Institute (Marian, 12/14. “An Outlook on Omnivorism and the Environmental “Hoofprint” of Livestock.” https://thebreakthrough.org/index.php/issues/the-future-of-food/the-future-of-meat)

Thus, in affluent economies with relatively high levels of health and environmental concern, efforts to moderate the impacts of meat consumption through behavior change might be best focused on moderating, rather than eliminating, meat consumption and encouraging consumption of less resource-intensive meats such as chicken and pork.

The majority of global meat demand growth, however, is projected to occur in Asia, Latin America, and Africa15 where not only are populations growing, but average meat consumption is well below developed country levels and rising strongly (Figure 1). Indeed, historically, meat demand tends to increase as incomes rise, a pattern nutrition researchers call the “dietary transition.” When people’s incomes rise from very low levels, they begin to increase their overall calorie consumption. As incomes rise further, they substitute away from simple starches towards refined carbohydrates like wheat, and from plant-based protein like beans towards animal products.16 Rachel Laudan, a food historian, explains that for many around the world, “Meat eating is not just a matter of taste or the environment, it’s a foothold, it’s a stake in the rich, modern world. It’s a sign that they too can leave behind the hierarchical societies of the past and be full citizens and enjoy what we already enjoy in the United States.”17

Although the dietary transition is visible worldwide, food is also a cultural product, and societal norms do impact patterns of meat consumption. Mongolia, for example, has unusually high meat consumption rates for its income level due to its tradition of nomadic livestock rearing. India, by contrast, has very low meat consumption because of the cultural and religious tradition of vegetarianism there. However, while beef and pork consumption remain taboo for many Indians, poultry consumption in India has risen considerably in recent decades.18

Given how robust the dietary transition has proven globally, it is reasonable to assume that global meat production will continue to increase as incomes rise in developing countries. Changes in meat-eating behavior in affluent countries have been modest so far, and consumption levels there remain much higher than in emerging economies. As such, successful efforts to significantly mitigate the environmental impacts of meat consumption will likely need to focus on meat production.

### 1NC—Big Ag Inevitable

#### Big ag is inevitable and mergers aren’t the cause.

#### Patents make monocultures inevitable

Hodgson 18 (Camilla, Writer at Financial Times, “Monopoly and Monoculture”, https://medium.com/the-food-issue-weapons-of-reason/global-food-industry-monopoly-monoculture-growing-corporate-profits-3df0ae5f7237)

Patents mean power. Not only did Justice Burger’s ruling mean seed companies had control over who could buy and license their products, it also allowed them to threaten farmers who strayed outside the rules with legal action, including a ban on farmers saving patented seeds from one season to the next. Instead, they had to buy new seeds every year.

Monsanto has been accused of employing particularly aggressive tactics to enforce its patent rights. In 2000, it even admitted to hiring detectives — whom it called ‘auditors’ — to root out and prosecute farmers who were saving seeds. Since 1997, the company has filed 147 lawsuits relating to seed patent infringements in the US.

Since the 1990s, an estimated 75% of plant genetic diversity has been lost as farmers worldwide have turned to cultivating genetically identical, high- yielding crops. Three quarters of the world’s food is now generated from only 12 plants and five animal species, with rice, maize, and wheat contributing nearly 60% of the plant calories and protein consumed by humans.

This reliance on only a few crop varieties is potentially dangerous in the long term: diversity in the natural world and access to a variety of seeds with different traits and resistances is vital, particularly in the context of climate change. But, as farmers’ profit margins have narrowed, growing a single crop and enforcing a monoculture on agricultural land, which is simpler, easier to automate, and requires fewer employees, has become an attractive option for many.

#### Non-merger monopoly forces!

Hafiz & Miller 21 (Hiba Hafiz, Hiba Hafiz is an assistant professor of law at Boston College Law School. Nathan Miller is the Saleh Romeih associate professor at the Georgetown University McDonough School of Business and Nathan Miller, Associate Professor Nathan Miller is the Saleh Romeih associate professor at the Georgetown University McDonough School of Business. His research covers topics in industrial organization and antitrust economics, with a recent focus on collusion and the competitive effects of mergers. He has published articles in the American Economic Review, Econometrica, and the RAND Journal of Economics, among other journals. Prior to joining Georgetown University, Miller served as an economist at the U.S. Department of Justice, where he provided economic analysis for antitrust investigations. He holds a Ph.D. in economics from the University of California, Berkeley and a B.A. from the University of Virginia., “Competitive Edge: Big Ag’s monopsony problem: How market dominance harms U.S. workers and consumers” https://equitablegrowth.org/competitive-edge-big-ags-monopsony-problem-how-market-dominance-harms-u-s-workers-and-consumers/)

Empirical evidence of the effects of Big Ag’s buyer power on rural communities and consumers nationally is mounting. Suppliers and processing workers suffer lower pay while downstream consumers are paying higher prices on essential food. Around “three-quarters of contract growers live below the poverty line,” and average-sized operators lose money 2 out of 3 years.

Then, there is the evidence of rising farm bankruptcy rates. Farm bankruptcies have steadily increased every year for the past decade, due, in part, to high U.S. farm debt. Small farmers are not the only ones being undercompensated—a 2000 U.S. Department of Labor survey found that 100 percent of poultry processing plants failed to comply with federal wage-and-hour laws.

Buyer power also enables processors to impose abominable working conditions without workers quitting. Even before the coronavirus pandemic, poultry processing workers suffered occupational illnesses at five times the rate of other U.S. workers. But their conditions plummeted during the pandemic, with immigrant workers and workers of color suffering the most. A November 2020 study estimated livestock processing plants suffered 236,000 to 310,000 cases of COVID-19, the disease caused by the new coronavirus, and 4,300 to 5,200 deaths—3 percent to 4 percent of all U.S. deaths—with the majority related to community spread. Consumers have also suffer nationally by having to pay higher prices for meat products while facing fewer choices and lower quality.

More evidence of Big Ag’s buyer power emerges from high-profile U.S. Department of Justice and private enforcement actions against dominant Big Ag buyers in the poultry and pork industries for colluding to fix prices, rig bids, and suppress pay to growers and processing workers. High concentration levels make it easier for Big Ag firms to collude, and in June 2020, the Department of Justice indicted leading chicken industry defendants for price-fixing and bid-rigging in the broiler chicken market. Civil suits were filed against Tyson, Pilgrim’s Pride Corp., and others for price-fixing, wage-fixing, and using no-poach agreements in the markets for broiler chicken products, contract farmer services (contract farmers are farmers who grow chickens from chicks to market weight in long-term contracts with processors), and chicken-processing labor services.

The Department of Justice is currently investigating price-fixing and bid-rigging among dominant beef processors, too, and private plaintiffs have sued pork and beef processors for allegedly colluding to lower prices paid to producers and raise prices for consumers. Current litigation against the poultry, pork, and meat cartels estimates that hundreds of thousands of workers suffer poverty wages from wage-fixing conspiracies.

### 1NC – Ag Impact

#### No food wars.

Demarest 15—PhD Researcher at the Centre for Research on Peace and Development [Leila, “Food price rises and political instability: Problematizing a complex relationship,” *The European Journal of Development Research*, Vol. 27, No. 5, p. 650-671, Emory Libraries]

6. Conclusions and Way Forward

While some progress has been made in improving our understanding of the linkages between rising food prices and conflict, several important gaps remain. Firstly, notions of conflict and political instability are often used interchangeably, while these concepts and the relationships between them remain to some extent vague. The ‘food riot’ concept in particular leads to confusion. Although it is popularly seen as a violent rise of the masses, in reality, many peaceful events are gathered under this term, while violence is often committed by the state rather than by hungry consumers. The term also presupposes that food is the central issue at hand, which does not necessarily have to be the case. Many misunderstanding arise from the second gap identified in this paper: the uncritical data gathering based on international news reports. Not only are these remarkably inconsistent, they also make use of classifications which are not scientifically investigated. Finally, causal mechanisms in the relationship between rising food prices and conflict often remain assumptions in the literature and lack empirical foundation. Three crosscutting avenues for improvement therefore exist: better concept definitions, better data gathering, and more focus on contexts.

Clearly defined concepts and categorizations of conflict and instability are a necessary foundation for research on the linkages between rising food prices and conflict. For (food) protests in particular, purposeful categorizations require an enhanced insight in the events that took place on the ground. Local news sources for data gathering can prove to be more reliable than Western (English) media to accomplish this. Event descriptions are also likely to be more detailed in local sources, which allows for a first-hand qualitative analysis of causes and context.

As international food prices are likely to remain high, improving our understanding of the causal mechanisms which can lead to conflict remains crucial. We can draw important lessons from the literature on poverty and conflict, resource scarcity and conflict, and regime transition in Africa. The causal role of economic factors alone has continuously been questioned, and ‘context’ or prevailing political, economic, and social factors play a crucial role in the conflict outcome. The argument that adverse economic shocks seem more of a trigger to conflict rather than an important cause is not particularly remarkable in itself. Yet while many authors acknowledge this, the focus often remains on the trigger. Resource scarcity, climate change, population growth, or food insecurity often remain the starting point of analyses, with researchers consequently tracing the divergent (theoretical) possibilities for conflict. In the end, most admit that these factors do not automatically lead to conflict everywhere, and stress the importance of context. Because the theoretical possibilities for conflict are so large, however, the context factor remains rather understudied with as most agreed upon notions that elements of ‘grievance’ and ‘collective action’ are required.

It is hence important to focus more on the ‘contexts’ that can lead to conflict and, in doing so, to make the distinction between different forms of conflict. This also implies a data collection exercise. Contextual data are currently collected at the aggregate, national level, and only on a yearly basis, which can lead to spurious relations. While the use of these variables is increasingly questioned in civil war studies, we can also doubt their strength in the study of highly localized, one-time events such as riots. I particularly make the case for ‘bringing politics back in’. The policies taken by the government are crucial in the violent escalation of social conflict (e.g. accommodation versus repression), but the only variable currently in use to explain state behaviour seems to be the country-level regime type variable (Polity IV or Freedom House), which is also used with regards to highly localized conflicts. Other ways in which politics matter, can be the strength of the political opposition. The Muslim Brotherhood in Egypt, for example, was probably better organized than other opposition groups to make use of economic unrest.

### 1NC – Enviro Impact

#### Environment is resilient

Kareiva and Carranza, 18—Institute of the Environment and Sustainability, University of California, Los Angeles (Peter and Valerie, “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.

### 1NC – Disease

#### Natural pandemics won’t cause human extinction

Sebastian Farquhar 1/23/17, director at Oxford's Global Priorities Project, Owen Cotton-Barratt, a Lecturer in Mathematics at St Hugh’s College, Oxford, John Halstead, Stefan Schubert, Haydn Belfield, Andrew Snyder-Beattie, "Existential Risk Diplomacy and Governance", GLOBAL PRIORITIES PROJECT 2017, https://www.fhi.ox.ac.uk/wp-content/uploads/Existential-Risks-2017-01-23.pdf

1.1.3 Engineered pandemics 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

# 2NC

## States

#### This turns everything

Rosa **Brooks 14**. Law professor at Georgetown University and a senior fellow with the New America/Arizona State University Future of War Project. She served as a counselor to the U.S. defense undersecretary for policy from 2009 to 2011 and previously served as a senior advisor at the U.S. State Department. “Embrace the Chaos” Foreign Policy. 11-14-2014. <https://foreignpolicy.com/2014/11/14/embrace-the-chaos/>

The last century’s technological revolutions have made our world more globally interconnected than ever. Power (along with access to power) has become more democratized and diffuse in some ways, but more concentrated in other ways. For most individuals around the globe, day-to-day life is far less dangerous and brutal than in previous eras; for the species as a whole, however, the **risk of future global catastrophe has increased.** The continuously accelerating rate of technological and social change makes it increasingly **difficult to predict the geopolitical future.** Nothing is particularly original about these observations; they’re repeated in some fashion in every major national strategic document produced over the last decade. They probably teach this stuff to kindergarteners now. Indeed, we’ve heard it all so often that it’s tempting to dismiss such claims as meaningless platitudes: Been there; theorized that. Can we get please get back to foreign-policy business as usual? No, we can’t. Not if we want our children and grandchildren to live decent lives. If we care about the future at all, we need to do more than prattle on at cocktail parties about globalization, interconnectedness, complexity, danger, and uncertainty. We need to feel these seismic changes in our bones. So bear with me. Let’s try to breathe some life into the clichés. I’ve written about these issues before (here and here), and at risk of being both a narcissist and a broken record, I’ll quote myself: The world has grown more complex. Believe it. The world now contains more people living in more states than ever before, and we’re all more **interconnected**. A hundred years ago, the world population was about 1.8 billion, there were roughly 60 sovereign states in the world, the automobile was still a rarity, and there were no commercial passenger flights and no transcontinental telephone service. Fifty years ago, global population had climbed to more than 3 billion and there were 115 U.N. member states, but air travel was still for the wealthy and the personal computer still lay two decades in the future. Today? We’ve got 7 billion people living in 192 U.N. member states and a handful of other territories. These 7 billion people take 93,000 commercial flights a day from 9,000 airports, drive 1 billion cars, and carry 7 billion mobile phones around with them. In numerous ways, life has gotten substantially better in this more crowded and interconnected era. Seventy years ago, global war killed scores of millions, but interstate conflict has declined sharply since the end of World War II, and the creation of the United Nations ushered in a far more egalitarian and democratic form of **international governance** than existed in any previous era. Today, militarily powerful states are far less free than in the pre-U.N. era to use **overt force to accomplish their aims**, and the world now has numerous transnational courts and dispute-resolution bodies that collectively offer states a viable alternative to the use of force. The modern international order is no global utopia, but it sure beats colonial domination and world wars. In the 50 years that followed World War II, **medical** and **ag**ricultural advances brought unprecedented **health and prosperity** to most parts of the globe. More recently, the communications revolution has enabled exciting new forms of nongovernmental cross-border alliances to emerge, empowering, for instance, global human rights and environmental movements. In just the last two decades, the near-universal penetration of mobile phones has had a powerful leveling effect: All over the globe, people at every age and income level can use these tiny but powerful computers to learn foreign languages, solve complex mathematical problems, create and share videos, watch the news, move money around, or communicate with far-flung friends. All this has had a dark side, of course. As access to knowledge has been democratized, so too has access to the tools of violence and destruction, and greater global **interconnectedness** enables **disease, pollution, and conflict** to spread quickly and easily beyond borders. A hundred years ago, no single individual or nonstate actor could do more than cause localized mayhem; today, we have to worry about massive **bioengineered threats** created by tiny terrorist cells and **globally devastating cyberattacks** devised by malevolent teen hackers. Even as many forms of power have grown more democratized and diffuse, other forms of power have grown more concentrated. A very small number of states control and consume a disproportionate share of the world’s resources, and a very small number of individuals control most of the world’s wealth. (According to a 2014 Oxfam report, the 85 richest individuals on Earth are worth more than the globe’s 3.5 billion poorest people). Indeed, from a species-survival perspective, the world has grown vastly **more dangerous** over the last century. Individual humans live longer than ever before, but a small number of states now possess the **unprecedented ability to destroy** large chunks of the human **race and possibly the Earth** itself — all in a matter of days or even **hours**. What’s more, though the near-term threat of interstate nuclear conflict has greatly diminished since the end of the Cold War, nuclear material and know-how are now both less controlled and less controllable. Amid all these changes, our world has also grown far more uncertain. We possess more information than ever before and vastly greater processing power, but the accelerating pace of global change has far exceeded our collective ability to understand it, much less manage it. This makes it increasingly difficult to make predictions or calculate risks. As I’ve written previously: We literally have no points of comparison for understanding the scale and scope of the risks faced by humanity today. Compared to the long, slow sweep of human history, the events of the last century have taken place in the blink of an eye. This should … give us pause when we’re tempted to conclude that today’s trends are likely to continue. Rising life expectancy? That’s great, but if climate change has consequences as nasty as some predict, a century of rising life expectancy could turn out to be a mere blip on the charts. A steep decline in interstate conflicts? Fantastic, but less than 70 years of human history isn’t much to go on…. That’s why one can’t dismiss the risk of catastrophic events [such as disastrous climate change or nuclear conflict] as “high consequence, low probability.” How do we compute the probability of catastrophic events of a type that has never happened? Does 70 years without nuclear annihilation tell us that there’s a low probability of nuclear catastrophe — or just tell us that we haven’t had a nuclear catastrophe yet?… Lack of catastrophic change might signify a system in stable equilibrium, but sometimes — as with earthquakes — pressure may be building up over time, undetected…. Most analysts assumed the Soviet Union was stable — until it collapsed. Analysts predicted that Egypt’s Hosni Mubarak would retain his firm grip on power — until he was ousted. How much of what we currently file under “Stable” should be recategorized under “Hasn’t Collapsed Yet”? This, then, is the character of world messiness in this first quarter of the 21st century. So on to the next question: Where, in all this messiness, does the United States find itself? II. The United States in the Mess: Goodbye, Lake Wobegon? For Americans, the good news is that the United States remains an extraordinarily powerful nation. The United States has “the most powerful military in history,” Obama declared in a recent speech. Measured by sheer destructive capacity, he is surely right. The United States spends more on its military than China, Russia, Saudi Arabia, France, the United Kingdom, Germany, Japan, and India combined. The U.S. military can get to more places, faster, with more lethal and effective weapons, than any military on Earth. The United States also manages to gobble up a disproportionate share of the world’s wealth and resources. By the year 2000, wrote Betsy Taylor and Dave Tilford, the United States, with “less than 5 percent of the world’s population,” was using “one-third of the world’s paper, a quarter of the world’s oil, 23 percent of the coal, 27 percent of the aluminum, and 19 percent of the copper.” In 2010, Americans possessed 39 percent of the planet’s wealth. The bad news for Americans? U.S. power and global influence have been declining. In part, this is because various once-weak states have been growing stronger, and in part, it’s because no state can be as autonomous today as it might have been in the past. The United States’ geographical position long helped protect it from external interference, while its strong military and economy enabled it to dominate or control numerous less powerful states. But globalization has reduced every state’s autonomy, creating collective challenges — from climate change to the regulation of capital — that no state can fully address on its own. U.S. power and global influence have also declined in absolute terms, as America’s own political and economic health has been called into question. The United States now has greater income inequality than almost every other state in the developed world — and most states in the developing world. American life expectancy ranks well below that of other industrialized democracies, and the same is true for infant mortality and elementary school enrollment. Meanwhile, the United States has the world’s highest per capita incarceration rate, and on international health and quality-of-life metrics, the United States has been losing ground for several decades. This domestic decline jeopardizes the country’s continued ability to innovate and prosper; it also makes American values and the American political and economic systems less appealing to others. Worse, the political system that Americans rely on for reform and repair seems itself to be broken; the federal government shutdown in 2013 offered the world a striking illustration of U.S. political dysfunction. Add to this the divisive national security policies of George W. Bush’s administration — many of which were continued or expanded by the Obama administration — and it’s no surprise that the United States has recently become less admired and less emulated around the globe, reducing American “soft power.” No matter how you slice it, it comes to the same thing: Compared with 30 years ago, the United States today has a greatly reduced ability to control its own destiny or the destiny of other states. The United States still has unprecedented power to destroy (Saddam Hussein and Osama bin Laden both discovered this, to their detriment). But the country’s capacity for destruction is not equaled by its capacity to shape the behavior of other states or their populations, and the United States has less and less ability to insulate itself from the world’s woes. Unfortunately, American political leaders share a bipartisan inclination to deny these realities. Mostly, they succumb to the Lake Wobegon effect: “Declinism” and “declinist” have entered the American political vocabulary, but only as purely pejorative terms. This is both stupid and dangerous. How can we adapt our global strategy to compensate for the ways in which U.S. power has been declining if we refuse to admit that decline? Continued U.S. decline is certainly not inevitable, and some argue that the United States is in fact poised for an economic and political resurgence. There is no way to know for sure — but it’s worth recalling that, historically, every significant empire has eventually declined. Are we prepared to bet that the United States will prove an exception? There is also no way to know for sure what form continued or eventual U.S. decline will take. We don’t know whether it will be fast or slow; we don’t know whether the American Empire is in for a hard landing or a soft one. Will the United States crash, like the former Soviet Union? Or will a slow decline in power leave the country an intact and influential nation, like the United Kingdom? Will America’s future be more like Canada’s present, or more like Brazil’s? III. Behind the Veil of Ignorance: Uncertainty as Lodestone We don’t know what America’s future will look like, and we can make fewer and fewer geopolitical predictions with confidence. The world has changed too much and too fast for us to accurately assess the probabilities of many types of future events. Perhaps this is why it’s so tempting for Americans to stay in Lake Wobegon, with eyes closed and fingers crossed. Uncertainty is frightening. But paradoxically, this very uncertainty should be a lodestone, pointing realists and idealists alike toward a sensible, forward-looking global strategy. In fact, radical uncertainty can be a powerful tool for strategic planning. That may seem oxymoronic, but consider one of the 20th century’s most influential thought experiments: In his 1971 book, A Theory of Justice, philosopher John Rawls famously sought to use a hypothetical situation involving extreme uncertainty to derive optimal principles of justice. Imagine, said Rawls, rational, free, and equal humans seeking to devise a set of principles to undergird the structure of human society. Imagine further that they must reason from behind what Rawls dubbed a “veil of ignorance,” which hides from them their own future status or attributes. Behind the veil of ignorance, wrote Rawls, people still possess general knowledge of economics, science, and so forth, and they can draw on this knowledge to assist them in designing a future society. Their ignorance is limited to their own future role in the society they are designing: “no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like.” If we were collectively designing social structures and rules, but could not know our own individual future positions in that social structure, what structures and rules would we come up with? Applying a version of decision theory, Rawls concluded that in the face of such radical uncertainty, rational, free, and equal beings behind the veil of ignorance would be drawn toward a “maximin” (or “minimax“) rule of decision, in which they would seek to minimize their losses in a worst-case scenario. Since those behind the veil of ignorance don’t know whether they’ll be among the haves or among the have-nots in the society they are designing, they should seek to build a society in which they each will be least badly off — even the luck of the draw leads them to start with the fewest advantages. Rawls posited that such a rule of decision should lead those behind the veil of ignorance to support two core principles: the first relating to liberty (“each person [should] have an equal right to the most extensive basic liberty compatible with a similar liberty for others”), and the second relating to social and economic goods. (Social goods should be distributed equally, unless an unequal distribution would serve the common good and be “to the greatest benefit of the least advantaged,” while “offices and positions [should remain] open to all under conditions of fair equality of opportunity.”) This is in some ways intuitive: On a national level, it is the reason Americans across the political spectrum continue to express substantial support for the maintenance of unemployment benefits, Social Security, Medicare and Medicaid, and so on. Any one of us might someday face a job loss or illness; nearly all of us will eventually face old age. We know we might someday need those benefits ourselves. In the face of uncertainty about the future, we all recognize the value of insurance, savings, and at least some minimal social safety net. In the international arena, the same is true. This has obvious implications for global strategy. Empires, like individuals, can sink into poverty, illness, or simple old age — and in an era of uncertainty, empires, like individuals, would do well to hedge against the possibility of future misfortune. Indeed, two decades after the publication of A Theory of Justice, Rawls sought to apply a form of this thought experiment to derive the core principles that he believed would characterize a just global order. His arguments are complex, and I can’t do justice to them here — but fortunately, unlike Rawls, I am not interested in coming up with abstract principles of global justice. My less lofty agenda is limited to arguing that a crude version of Rawls’s thought experiment can help us delineate the contours of a sensible U.S. global strategy — a “maximin” strategy that is well-suited to protecting the interests of the United States and its people, both in today’s messy world and in a wide range of future messes. Here’s my thought experiment. Imagine a crude version of Rawls’s veil of ignorance, with only the United States behind it. This veil of ignorance doesn’t require us to disavow what we know of history (America’s or the world’s), nor does it require us to disavow what we know of recent trends, present global realities, U.S. values, or our current conception of the good. It only hides our future from us: Behind this veil of ignorance, we don’t know whether energy, food, water, and other vital resources will be scarcer or more plentiful in the decades to come; we don’t know whether global power will be more or less centralized; we don’t know whether new technologies and new forms of social organization will make existing technologies and institutions obsolete. Most of all, we don’t know whether, in the decades to come, the United States will be rich or poor, weak or strong, respected or hated. For that matter, we don’t know whether the United States — or even the form of political organization we call the nation-state — will exist at all a century or two from now. In the face of such radical uncertainty, what kind of grand strategy should a rational United States adopt? Of course, this shouldn’t really be called a “thought experiment” at all: The United States already operates behind a veil of ignorance, if we could only bring ourselves to admit it. We know the past; we have a reasonable understanding of recent trends; we know that the world is messy and dangerous; we know that the potential for rapid and potentially catastrophic change is real; and we know that our ability to predict future changes and quantify various risks is profoundly limited. This knowledge is profoundly unsettling. Thus, we try our best to know and not know, at the same time: We speak glibly of complexity, accelerating change, danger, and uncertainty, but then fall back into the comfortable assumption that continued U.S. global dominance is a given and that catastrophic change is unlikely to occur. As long as we remain willfully ignorant of the veil of ignorance that hangs over us, we can avoid asking hard questions and making harder choices. But this is shortsighted and dangerous. Empires that refuse to accept reality tend to rapidly decline. A clear-eyed acceptance of uncertainty and risk is the surest route to a more secure future. Instead of blinding us or paralyzing us, the uncertainty of our future should motivate us to engage in more responsible strategic planning. If the **U**nited **S**tates can manage to be as rational as Rawls’s hypothetical decision-makers, it should adopt a similar maximin rule of decision: It should **prefer international rules** and institutions that will maximize America’s odds of thriving, even in a worst-case future scenario. In fact, we should wish for international rules and institutions that will be kindest to the individuals living in what is now the United States and their descendants, even if the United States should someday cease to exist entirely. Could happen, folks. Look around you. Do you see the Roman Empire, or the Aztec Empire, or the Ottoman Empire?Look around you. Do you see the Roman Empire, or the Aztec Empire, or the Ottoman Empire? IV. From Messiness to Strategy: A Preliminary Sketch This has urgent implications for U.S. strategic planning. Precisely because U.S. global power may very well continue to decline, the United States should **use** the very considerable military, political, cultural, and economic power it still has to **foster the international order** most likely to benefit the country if it someday loses that power. The ultimate objective of U.S. grand strategy should be the creation of an equitable and peaceful international order with an effective system of **global governance** — one that is built upon respect for human dignity, **h**uman **r**ights, and the rule of law, with robust mechanisms for **resolving thorny collective problems.** We should seek this not because it’s the “morally right” thing for the United States to do, but because a maximin decision rule should lead us to conclude that this will offer the United States and its population the best chance of continuing to thrive, even in the event of a radical future decline in U.S. wealth and power. But, one might argue, the United States already tries to promote such a global order — right? Sure it does — but only inconsistently, and generally as something of an afterthought. We pour money into our military and intelligence communities, but starve our diplomats and development agencies. We fixate on the threat du jour, often exaggerating it and allowing it to distort our foreign policy in self-destructive ways (cf. Iraq War), while viewing matters such as United Nations reform or reform of global economic institutions or environmental protection rules as tedious and of low priority. If we take seriously the many potential dangers lurking in the unknowable future, however, fostering a stronger, fairer, and more effective **system of international governance** would become a matter of urgent national self-interest and our highest strategic priority — something that should be reflected both in our policies and in our budgetary decisions. An effective **global governance** system would need to be built upon the recognition that states remain the primary mode of political and social organization in the international sphere, but also upon the recognition that new forms of social organization continue to evolve and may ultimately displace at least some states. An effective and dynamic international system will need to develop innovative ways to bring such new actors and organizations within the **ambit of i**nternational **law** and institutions, both as responsible creators of law and institutions and as responsible subjects.

#### Perm forces a lockstep approach---undercuts state autonomy

**Logan 14** (Wayne A. Logan, Professor of Law, Florida State University College of Law, A House Divided: When State and Lower Federal Courts Disagree on Federal Constitutional Rights, 90 Notre Dame L. Rev. 235 (2014), <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4572&context=ndlr>, y2k)

It has also been suggested that **state courts** simply defer to lower **federal court wisdom,**195 including that they follow federal positions in “**lockstep” fashion**, much as they often do in interpreting their own constitutions.196 Such proposals, while ensuring uniformity, are deeply **problematic** because they again **undercut state autonomy** and ignore the instrumental benefits surveyed above.197 They also risk **lock-in** of unfounded or unwise positions adopted by a majority (or consensus) of lower federal courts,198 which could reflect nothing more than a bandwagon effect being at work,199 and would have **the practical effect** of **precluding state courts** from adopting **minority positions** that ultimately get adopted by the Court, such as occurred in Florida v. Jardines, Georgia v. Randolph, and Arizona v. Gant. 200

#### The lock-step approach undermines motives for state judges to innovate

**O’Neill 14** (Timothy P. O’Neill, Professor, The John Marshall Law School, ARTICLE: ESCAPE FROM FREEDOM: WHY "LIMITED LOCKSTEP" BETRAYS OUR SYSTEM OF FEDERALISM, 48 J. Marshall L. Rev. 325, 325-334, y2k)

[\*325] This Symposium celebrates the significance of the Illinois Constitution. Yet the Illinois Supreme Court has ironically chosen to make the Illinois Constitution completely insignificant in several areas of constitutional law. It has accomplished this through "**the limited lockstep doctrine**." This approach is used to interpret cognate provisions of the U.S. and Illinois Constitutions. The Illinois Supreme Court describes the doctrine in this way: [W]hen the **language** of the provisions within our state and federal constitutions is nearly **identical**, departure from the United States Supreme Court's construction of the provision will generally be warranted only if we find 'in the language of our constitution, or in the debates and the committee reports of the constitutional convention, something which will indicate that the provisions of our constitution are intended to be construed differently than are similar provisions in the Federal Constitution, after which they are patterned.' The Illinois Supreme Court has applied this to a number of state constitutional provisions. Two excellent new articles by James K. Leven and the [\*326] Honorable John Christopher Anderson critique "limited lockstep" from multiple angles. This Essay, however, approaches the subject from only one relatively narrow perspective: what makes this odd doctrine so attractive to the Illinois Supreme Court? In answering this question, it contends that the use of lockstep flouts basic principles central to the effective running of the federal system. **Limited lockstep** can be characterized as a type of **legal formalism**. Richard Posner, in his recent book Reflections on Judging, notes that "[t]he **character** of legal formalism can be **captured** in such slogans as **'the law made me do it.'"** The legal formalist sees law as largely a "compendium of texts"--e.g., statutes, constitutions, regulations--and rules. The text and rules drive the answer--and there is only one right answer. The rule-driven legal formalist judge can effectively disown personal responsibility for a legal decision. According to Posner, formalism's appeal lies in the fact that judges "usually are happy to **hand off** responsibility for deciding to **another adjudicator**." Formalism's somber invocation of "higher-level rules" masks an approach in which judges can defer to decisions already made by lower-court judges, juries, legislatures, and administrative agencies. With **limited lockstep**, the decision comes **ready-made from the U.S. Supreme Court**. Using lockstep requires **no thinking** from **state court judges**. This has a **deleterious** effect. Because the formalist judge "**minimizes the occasions** on which he has to base a decision on his own notions of a sensible resolution of the case," his ability to **consider** the consequences of his decisions **atrophies**. In Posner's words, **"[j]udges' belief that they don't make law dulls their critical faculties."**

#### Perm independently causes federal-state competition for antitrust cases---that drains state judicial resources

**Zambrano 19** (Diego A. Zambrano, Assistant Professor of Law, Stanford Law School, Federal Expansion and the Decay of State Courts, 86 U. Chi. L. Rev. 2101, y2k)

After laying out these three eras of judicial federalism, the heart of the Article draws on a wealth of political economy literature to evaluate the effects that federal expansion can have on state courts. To be sure, federalization has the potential to bring a wealth of benefits, as it allows federal courts to manage cases with national repercussions, police negative externalities stemming from state law, and bring uniformity to federal law. Moreover, I argue that **federal expansion** can lead to **federal-state competition** for **cases**--spurring state governments to streamline their court systems.

Despite these benefits, the Article argues that an **expanding** federal judiciary may actually contribute to the **decay** of state courts. This novel claim runs counter to scholarship in the area which has failed to identify this connection and has instead worried that federalization may overburden and weaken federal--not [\*2108] state--courts and could even relieve overtaxed state-court dockets. But I argue that by expanding the **breadth** of arbitration and **federal jurisdiction** over state-court cases, federal courts have **compounded** existing problems in **state judiciaries**. A **state-to-federal shift** allows **businesses** and institutional **litigants** to effectively **opt out of state court** in favor of **arbitration** or **federal courts.** This alters the **equilibrium of stakeholders** in state courts, with **dynamic** and **negative consequences**.

First, state courts may grow increasingly **proplaintiff** and federal courts **prodefendant** because repeat players are no longer stuck at the state level; they can opt out. As businesses **emigrate** from state to federal court, they leave behind a **stakeholder pool** that is **less corporate heavy** and, eventually, more plaintiff **friendly**. That is partly because as large businesses care less about state litigation, they cede their repeat-player influence to other stakeholders and focus mostly on lobbying federal courts (even though, as I explain below, they maintain a significant interest in state judicial elections). State judges eager to retain some litigation may then market th

eir courts to plaintiffs' attorneys, who in turn prefer heterogeneous state judiciaries from which they have more opportunities to find friendly judges. In line with this theory, I draw on significant evidence that defendant firms generally prefer to litigate in federal court while plaintiffs' attorneys side with state courts; that plaintiffs' win rate in federal court has collapsed since 1985; and that while federal courts have adopted prodefendant procedural reforms, state courts have remained relatively proplaintiff. One concern is that such a stark state-federal divergence can lead to a negative feedback loop: prompted by allegations of state bias against defendants, the federal government increases its jurisdiction, only to turn state courts even more proplaintiff and in need of further intervention. In other words, as the federal judiciary expands to absorb state cases, local courts end up inviting further federal action, leading to a negative spiral.

Second, **federalization** means that businesses that used to be repeat litigants in **state court** no longer have as much of a **vested** [\*2109] **interest** in the quality of **local judiciaries,** reducing any incentive they had to **lobby state legislatures** for **competent** and **well-funded courts**. Although normatively it may be a good thing for state courts to lose prodefendant lobbying, businesses nonetheless retain an incentive to lobby for procorporate judges (especially in judicial elections) and the state substantive law that follows them to federal court (for example, tort reform). Due to federal expansion, businesses only lose the incentive to lobby for **better courts**. This may partly explain one of the Article's findings: that federal court budgets have grown much more than state-court budgets recently. The main problem with this shift is that it carries distributional consequences and leads to a classic political economy problem: while businesses are **better off** in **federal** court, remaining **state-court litigants** (including consumers, employees, and those in family courts) are **stuck** with **deteriorating** state judiciaries. Society may lose the beneficial effect businesses had on **state courts** yet retain the normatively worrisome effects of prodefendant and procorporate substantive law.

Third, **federal monopolization** of large **state claims** weakens the ability of state courts to **shape** the **common law**. Because the largest cases are increasingly litigated in **federal** court--including state-law claims under diversity or supplemental jurisdiction--the common law is stuck in a double bind: state courts have less jurisdiction to change it and federal courts cannot engage in **innovative interpretations** because of Erie Railroad Co v Tompkins. This can lead to common-law **stagnation**. The Fifth Circuit explicitly recognized this problem in December 2018 in the context of a products-liability case against Apple, writing that "where defendants operate nationwide in highly consolidated industries, like Apple in the smartphone industry, the rules governing federal courts in diversity cases may substantially close state courts to novel claims. . . . The result may be a legal system **less generative** than normal." To evaluate this dynamic, I review preliminary evidence that federal courts are doing more work interpreting novel areas of state law.

#### Soil production rates are increasing – newest studies

Larsen et al. ’14 [Science Daily source: I. J. Larsen, Department of Earth and Space Sciences University of Washington, P. C. Almond, Department of Soil and Physical Sciences at Lincoln University, A. Eger, J. O. Stone, D. R. Montgomery, B. Malcolm, 1/16/14, “Soil production breaks geologic speed record,” http://www.sciencedaily.com/releases/2014/01/140116150802.htm, accessed 3/27/14]

Geologic time is shorthand for slow-paced. But new measurements from steep mountaintops in New Zealand show that rock can transform into soil more than twice as fast as previously believed possible.

The findings were published Jan. 16 in the early online edition of Science.

"Some previous work had argued that there were limits to soil production," said first author Isaac Larsen, who did the work as part of his doctoral research in Earth sciences at the University of Washington. "But no one had made the measurements."

The finding is more than just a new speed record. Rapidly eroding mountain ranges account for at least half of the total amount of the planet's weathering and sediment production, although they occupy just a few percent of Earth's surface, researchers said.

So the record-breaking production at the mountaintops has implications for the entire carbon cycle by which Earth's crust pushes up to form mountains, crumbles, washes with rivers and rainwater to the sea, and eventually settles to the bottom to form new rock.

"This work takes the trend between soil production rates and chemical weathering rates and extends it to much higher values than had ever been previously observed," said Larsen, now a postdoctoral researcher at the California Institute of Technology in Pasadena.

The study site in New Zealand's Southern Alps is "an extremely rugged mountain range," Larsen said, with rainfall of 10 meters (33 feet) per year and slopes of about 35 degrees.

To collect samples Larsen and co-author André Eger, then a graduate student at Lincoln University in New Zealand, were dropped from a helicopter onto remote mountaintops above the tree line. They would hike down to an appropriate test site and collect 20 pounds of dirt apiece, and then trek the samples back up to their base camp. The pair stayed at each of the mountaintop sites for about three days.

"I've worked in a lot of places," Larsen said. "This was the most challenging fieldwork I've done."

Researchers then brought soil samples back to the UW and measured the amount of Beryllium-10, an isotope that forms only at Earth's surface by exposure to cosmic rays. Those measurements showed soil production rates on the ridge tops ranging from 0.1 to 2.5 millimeters (1/10 of an inch) per year, and decrease exponentially with increasing soil thickness.

The peak rate is more than twice the proposed speed limit for soil production, in which geologists wondered if in places where soil is lost very quickly, the soil production just can't keep up. In earlier work Larsen had noticed vegetation on very steep slopes and so he proposed this project to measure soil production rates at some of the steepest, wettest locations on the planet.

The new results show that soil production and weathering rates continue to increase as the landscape gets steeper and erodes faster, and suggest that other very steep locations such as the Himalayas and the mountains in Taiwan may also have very fast soil formation.

"A couple millimeters a year sounds pretty slow to anybody but a geologist," said co-author David Montgomery, a UW professor of Earth and space sciences. "Isaac measured two millimeters of soil production a year, so it would take just a dozen years to make an inch of soil. That's shockingly fast for a geologist, because the conventional wisdom is it takes centuries."

#### State claims won’t be removed to the federal courts---the Supreme Court conclusively ruled that state antitrust can proceed on its own

OAW 14 Orrick’s Antitrust Watch, one-stop resource to help practitioners and in-house counsel weed through the daily avalanche of news, and also to provide in-depth analysis and commentary on major developments in antitrust and competition law, U.S. Supreme Court Holds That Parens Patriae Suits Are Not Removable to Federal Court as “Mass Actions” Under the Class Action Fairness Act, 2-5, https://blogs.orrick.com/antitrust/2014/02/05/u-s-supreme-court-holds-that-parens-patriae-suits-are-not-removable-to-federal-court-as-mass-actions-under-the-class-action-fairness-act/

On Jan. 14, 2014, the U.S. Supreme Court, in an opinion by Justice Sonia Sotomayor for a unanimous Court, held that a *parens patriae* antitrust suit filed in state court by Mississippi’s Attorney General seeking damages on behalf of the citizens of Mississippi was not removable to federal court under the Class Action Fairness Act of 2005 (CAFA). Mississippi ex rel. Hood, Attorney General v. AU Optronics Corp., et al., No. 12-1036, (U.S. Jan. 14, 2014) .

The Attorney General of Mississippi sued AU Optronics and other manufacturers of liquid crystal display (LCD) panels in state court, alleging claims under the Mississippi Antitrust Act, Miss. Code Ann. § 75-21-1 et seq. and the Mississippi Consumer Protection Act, § 75-24-1 et seq. The AG alleged that the defendants operated an international cartel to restrict competition and raise prices for LCD products, and sought, among other things, restitution for purchases of LCD products by Mississippi and its citizens. AUO and the other defendants removed the case to federal court under CAFA’s provision that a “mass action” includes “any civil action … in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact.” 28 U.S.C. § 1332(d)(11)(B)(i). The Court held that a suit filed by a state as the sole plaintiff does not qualify as a “mass action” under CAFA where it includes a claim for restitution based on injuries suffered by the state’s citizens.

The Court explained that CAFA “loosened” diversity jurisdiction for two types of cases, class actions and mass actions. The lower courts ruled that the lawsuit was not brought as a class action, and that ruling was not at issue in the Supreme Court. The Supreme Court held that the lawsuit also was not a mass action. Defendants argued that the clause “100 or more persons” should be construed to include both named and unnamed real parties in interest, even if they are not named as “plaintiffs.” The Court rejected defendants’ proposed construction of the statute, explaining that the term “‘plaintiffs’ [needed to be given] its usual meaning—to refer to actual named parties who bring an action.”

The decision, which resolves a split of authority among the Circuits, enables states to bring their own actions—including price-fixing actions—in state court and to avoid consolidation with class actions in federal court through the multi-district litigation process or otherwise. In issuing its unanimous decision, the Supreme Court applied the language of the statute as it is written, deferring to Congress to amend the statute if it so desires. Unless and until that happens, defendants will face the prospect of parallel proceedings in which citizens of a state are represented in both a class action and a parens patriae action—and the potential for duplicative liability. The Court’s decision does not address the potential for duplicative liability, and there undoubtedly will be more litigation in the future regarding that important issue.

#### No commerce clause challenges

**Hildabrand 14** (Clark L. Hildabrand, Assistant Solicitor General, Tennessee Attorney General's Office, Interactive Antitrust Federalism: Antitrust Enforcement in Tennessee Then and Now, 16 Transactions: TENN. J. Bus. L. 67, y2k)

On one hand, some critics of state antitrust enforcement focus on the interstate character and impact of state antitrust litigation. 28 Due to the **nationalization** and increased interconnectivity of the country's economy, a **broader** reading of the **I**nterstate **C**ommerce **C**lause and other federal antitrust laws, that at one time simply precluded state enforcement of activities with interstate effects, would, today, effectively render state antitrust laws useless.29 **However**, the U.S. Supreme Court has **consistently** held that federal antitrust laws do not **preclude** or **preempt** application of similar or **more far-reaching state antitrust statutes**.30 As long as the state law or policy in question reflects a **legitimate state public interest** and is not **excessively** discriminatory or protectionist, state antitrust enforcement does **not** run afoul of the **D**ormant **C**ommerce **C**lause. 31 State antitrust enforcement thus overcomes one potential barrier for situations in which the regulated activity has **interstate** effects

#### States can regulate interstate commerce

**DeClercq 7** (Andy DeClercq, J.D. expected, University of Wisconsin Law School, May 2008; M.S.T., Pace University, 2005, FISTICUFFS IN FREE MARKETS: MUNICIPAL EXEMPTIONS TO WISCONSIN ANTITRUST LAW AFTER COUNTY OF MILWAUKEE V. WILLIAMS, 2007 Wis. L. Rev. 1355, y2k)

In 1893, Wisconsin enacted its first antitrust law. This law held closely to the language of the Sherman Act, the federal antitrust legislation passed three years earlier, leading courts and commentators [\*1362] to refer to it as the "Little Sherman Act." Initially, and well into the twentieth century, Wisconsin courts observed a strict separation between state and federal antitrust claims. The state courts adopted this position in accordance with the view of United States Supreme Court Chief Justice John Marshall, who maintained that "the **federal** government and the various **state** governments existed in **mutually exclusive spheres,** with **no** overlap." According to this theory, federal antitrust law applied to cases involving interstate commerce, where the federal government had authority under the Commerce Clause, while state antitrust law applied to intrastate-commerce cases. By 1978, **however**, the U.S. Supreme Court had **made it clear** that this rigid notion of separate spheres of influence **no longer held** and that state antitrust law **may** regulate matters of **interstate commerce**.

[\*1363] This shift in policy affected the reach of both state and federal antitrust laws. States could now apply their antitrust laws more **broadly** to situations affecting **interstate commerce**. And the federal government could expand the reach of its antitrust provisions to cover what would previously have been considered intrastate commerce. Thus, there are now many instances where federal and state antitrust laws overlap and address precisely the same practices.

#### 3---Real world---50 states action is real!

**Hubbard & Yoon 5** (Robert Hubbard is Director of Litigation and James Yoon is an Assistant Attorney General in the Antitrust Bureau of the New York Attorney General's office, FEATURE ARTICLE: HOW THE ANTITRUST MODERNIZATION COMMISSION SHOULD VIEW STATE ANTITRUST ENFORCEMENT. Loyola Consumer Law Review, 17, 497, y2k)

C. States Both **Lead** and **Initiate Antitrust Litigation**

Contrary to being free riders, states are often the first and only plaintiff in antitrust matters. Acting alone, states have **initiated matters** or **extended matters into new areas** or for new claimants. The **cases** cited in the **footnote** illustrates these points for **all fifty states**.

**(Footnote 127 starts)**

The following cases are illustrative of states' initiatives in antitrust matters:

**Alabama** v. Blue Bird Body Co., Inc., 573 F.2d 309, 311 (5th Cir. 1978) (Alabama and local educational authorities sued manufacturers and distributors of school bus bodies, claiming defendants conspired to fix prices and restrain trade);

**Alaska** v. Chevron Chem. Co., 669 F.2d 1299, 1300-01 (9th Cir. 1982) (Alaska sued manufacturers of agricultural fertilizer for fixing prices and allocating markets);

**Arizona** v. Maricopa County Med. Soc'y., 457 U.S. 332, 336-37 (1982) (Arizona sued medical societies for price-fixing through agreements among competing member physicians who agreed to set the fee amounts they could collect for their services);

**Arkansas** v. Chicago, Rock Island & Pac. Ry., Co., 128 S.W. 555, 55-56 (Ark. 1910) (Arkansas sued a railroad corporation for fixing the rates to be charged for freight and passenger service);

**California** v. Am. Stores Co., 495 U.S. 271, 275-76 (1990) (California sued for an injunction after the fourth largest grocery chain acquired all of the outstanding stock of the largest grocery chain in California, alleging the merger constituted an anti-competitive acquisition);

**Colorado** v. Goodell Bros., Inc., Civ. A No. 84-A-803, 1987, at \*1 (D. Colo. July 7, 1987) (Colorado sued contractors alleging a conspiracy to restrain trade in the highway construction industry by bid-rigging on various highway construction projects);

**Connecticut** v. Am. Med. Response, Inc., No. Cv-99-589962 (Conn. Super. Ct. June 3, 1999) (Connecticut sued to prohibit acquisition of major competing ambulance service providers in Connecticut);

**Delaware** v. Mid-Atlantic Paving Co., C.A. No. 7197, 1983 WL 14930, at \*1 (Del. Ch. June 24, 1983) (Delaware sued a construction company for price-fixing the sale of liquid asphalt);

**District of Columbia** v. CVS Corp., Civ. No. 03-4431 (D.C. Sup. Ct. May 30, 2003) (District of Columbia sued to challenge the acquisition of a pharmacy);

**Florida** v. Abbott Labs., 1993-1 Trade Cas.(CCH) P 70,241 (N.D. Fla. 1993) (Florida sued and settled with infant formula manufacturers for a conspiracy among competitors regarding pricing and marketing of infant formula products);

**Georgia** v. Pennsylvania R. Co., 324 U.S. 439, 443-44 (1945) (Georgia sued defendant railroads for conspiring to fix rates charged for transportation of freight);

**Hawaii** v. Standard Oil Co. of California, 405 U.S. 251, 253 (1972) (Hawaii sued defendants for conspiracy to restrain trade and commerce in the sale, marketing, and distribution of refined petroleum products and for monopolization of the market);

**Idaho** v. Daicel Chem. Indus., Ltd., 106 P.3d 428, 430 (D.C. Sup. Ct. May 30, 2003) (Idaho sued chemical manufacturers for an illegal conspiracy to fix prices in the commercial sorbates industry);

**Illinois** v. Sangamo Constr. Co., 657 F.2d 855, 857 (7th Cir. 1981) (Illinois sued construction companies for engaging in a conspiracy to allocate highway construction projects put out for public bids);

**Indiana** v. The Home Brewing Co. of Indianapolis, 105 N.E. 909, 910 ( Ind. 1914) (Indiana sued a corporation for monopolizing the business of selling beer and other intoxicating liquors);

**Iowa** v. Scott & Fetzer Co., Civil No. 81-362- E, 1982 WL 1874, at \*1 (S.D. Iowa July 8, 1982) (Iowa sued defendants for antitrust violations, in a case testing the state attorney general's ability to sue under the parens patriae provision of the Clayton Act);

**Kansas** v. Am. Oil Co., 446 P.2d 754, 755 (Kan. 1968) (Kansas sued corporations engaged in the supply of liquid asphalt for bid-rigging asphalt sales and allocating sales territory);

**Kentucky** v. Plain view Farms Dev. Corp., No. 234010, 1977 WL 18405 (Ky. Cir. Ct. Sept. 6, 1977) (Kentucky sued a real estate developer for an unlawful tying arrangement which conditioned the purchase of a residential condominium or unit upon the purchase of use of a recreational facility);

**Louisiana** v. Seifert, 524 So. 2d 160, 161 (La. Ct. App. 1988) (Louisiana sued three defendants for monopolization and attempted monopolization of the film industry);

**Maine** v. Connors Bros. Ltd., 2000-1 Trade Cas. (CCH) P 72,937 (Me. Super. Ct. 2000) (Maine, in a consent agreement, permitted a Canadian sardine processing company to a acquire the assets of a Maine-based competitor);

**Maryland** v. Blue Cross & Blue Shield Ass'n, 620 F. Supp. 907, 909 (D. Md. 1985) (Maryland sued health insurers for price fixing and allocating markets, customers, and contracts by submitting non-competitive and collusive bids);

**Massachusetts** v. William Bayley, Ltd., 1983 WL 14914, (Mass. Super. Ct. Jan. 21, 1983) (Massachusetts sued defendant for exclusive dealing by requiring bid specifications for public construction and renovation projects specify exclusive use of the products of a certain manufacturer of security windows);

**Michigan** v. McDonald Dairy Co., 905 F. Supp. 447, 450 (W.D. Mich. 1995) (Michigan sued dairy companies on behalf of public schools for bid-rigging on contracts to supply milk to area school districts);

**Minnesota** v. Nat'l Beauty Supply Co., No. 736778, 1977 WL 18389 (D. Minn. June 9, 1977) (Minnesota sued five beauty supply wholesalers for price-fixing and eliminating discounts from wholesale prices of beauty supplies);

**Mississippi** v. Jackson Cotton Oil Co., 48 So. 300, 300 (Miss. 1909) (Mississippi sued two competing cotton seed oil manufacturers for a price-fixing conspiracy to limit the price of a commodity);

**Missouri** v. Poplar Bluff Physicians Group, Inc., No. CV195-393-CC, 1995 WL 788087 (Mo. Cir. Ct. Apr. 12, 1995) (Missouri sued a group of physicians who operated a medical clinic -partnership for conspiracy and attempted monopolization for the sale of prescription drugs and durable medical equipment to patients, nursing homes and residential care facilities);

**Montana** v. SuperAmerica, 559 F. Supp. 298, 299-300 (D. Mont. 1983) (Montana sued an oil company for a conspiring with its competitors to fix prices for gasoline);

**Nebraska** v. Associated Grocers, 332 N.W.2d 690, 691 (Neb. 1983) (Nebraska sued dairy product wholesalers, a retail grocer and individuals for price-fixing the sale of milk);

**Nevada** v. Merkley & Hankins, Inc., No. 20644, 1988 WL 247972 (D. Nev. July 6, 1988) (Nevada sued a gasoline and petroleum product wholesaler for fixing the resale prices of gasoline);

**New Hampshire** v. New Hampshire Grocers Ass'n, Inc., 348 A.2d 360, 360-61 (N.H. 1975) (New Hampshire sued a retail grocers association for attempts to coerce manufacturers and distributors to refrain from offering fresh baked goods to discount bakery stores);

**New Jersey** v. Morton Salt Co., 387 F.2d 94, 95 (3d Cir. 1967) (New Jersey filed suit in district court against seven corporations, seeking treble damages for violations of Sections 1 and 2 of the Sherman Act);

**New Mexico** v. Scott & Fetzer Co., Civil No. 81-054- JB. 1981 WL 2167 (D. N.M. Dec. 22, 1981) (New Mexico sued defendants for antitrust violations, in a case testing the state attorneys general ability to sue under the parens patriae provision of the Clayton Act);

**New York** v. St. Francis Hosp., 94 F. Supp. 2d 399, 402-03 (S.D.N.Y. 2000) (New York sued two New York hospitals for engaging in illegal price-fixing and market allocation through joint negotiations);

**North Carolina** v. P.I.A. Asheville, Inc., 740 F.2d 274, 276 (4th Cir. 1984) (North Carolina sued the owner of psychiatric facilities alleging that acquisition of particular facility violated the antitrust laws);

**Ohio** v. Louis Trauth Dairy, Inc., 925 F. Supp. 1247, 1248-49 (S.D. Ohio 1996) (Ohio sued several dairies, alleging conspiracy to set prices and allocate territories in sale of milk to school districts);

**Oklahoma** v. Allied Materials Corp., 312 F. Supp. 130, 131 (W.D. Okla. 1968) (Oklahoma sued corporations for conspiring to rig bids for liquid asphalt sales);

**Oregon** v. Fields & Endsley, Inc., No. 151873, 1984 WL 15669 (Or. Cir. Ct. Oct. 4, 1984) (Oregon sued defendants for price-fixing wholesale and retail gasoline);

**Pennsylvania** v. Providence Health Sys., Inc., Civ. A. No. 4: CV-94-772, 1994 WL 374424 (D. Pa. May 26, 1994) (Pennsylvania charged that three competing hospitals combining to manage the provision of health care would result in an anti-competitive concentration of market power);

**Puerto Rico** v. Wal-mart Puerto Rico, Inc., 238 F. Supp. 2d 395, 409 (D.P.R. 2002) (Puerto Rico sued to obtain a preliminary injunction to enjoin a retail chain from buying a chain of grocery stores);

**Rhode Island** v. Neptune Int'l Corp., Civil Action No. 80-4503, 1980 WL 4688 (R.I. Super. Ct. Dec. 30, 1980) (Rhode Island sued a manufacturer-wholesaler and retailer of furniture products for price-fixing and implementing exclusive dealing and refusal to deal agreements);

Loftis v. **South Carolina** Elec. & Gas Co., 604 S.E.2d 714, 715 (S.C. Ct. App. 2004) (South Carolina instituted an UTPA (consumer protection) action against SCE&G for routinely overcharging municipal franchise fees to a portion of its population);

**South Dakota** v. Cent. Lumber Co., 123 N.W. 504, 506 (S.D. 1909), aff'd, 226 U.S. 157 (1912) (South Dakota sued a lumber company for criminal and civil antitrust violations by forming a combination to restrain trade);

**Tennessee** v. Joe Stewart Body Shop, 1992-1 Trade Cas. (CCH) P 69,748 (W.D. Tenn. 1992) (Tennessee sued auto body repair shop for attempting to fix the prices of repair services);

**Texas** v. Zeneca, Inc., No. 3-97 CV 1526-D, 1997 WL 570975, at \*1 (N.D. Tex. June 27, 1997) (Texas led a multistate case against a pesticide manufacturer for conspiring with its distributors to fix resale prices);

**Utah** v. Univ. of Utah, 1994-1 Trade Cas. (CCH) P 70,550 (D. Utah 1994) (Utah sued a state university hospital for exchanging wage information with other health care facilities concerning compensation paid to nurses, fixing prospective compensation, and discouraging others from negotiating with other third-party payers);

**Vermont** v. Densmore Brick Co., Inc., Civil Action File No. 78-297, 1980 WL 1846, at \*1 (D. Vt. Apr. 10, 1980) (Vermont brought a state parens patriae action against a manufacturer of wood burning stoves for price-fixing);

**Virginia** v. Buckley Moss, Inc., Civil Action No. G-8998-2, 1983 WL 14948, at \*1 (Va. Cir. Ct. Apr. 5, 1983) (Virginia sued a seller of decorative artwork for price-fixing the resale prices of its dealers);

**Washington** v. Larson, No. 39916-1- I, 1998 WL 141935 (Wash. Ct. App. Mar. 30, 1998) (Washington sued two pharmacy owners for price-fixing the prices that would be paid by insurers, third-party payers, or consumers for drugs);

**West Virginia** v. Meadow Gold Dairies, 875 F. Supp. 340, 343 (D. W. Va. 1994) (Action against two dairies alleging conspiracy to illegally and artificially raise price of milk supplied to school boards);

**Wisconsin** v. Marigold Foods, Inc., 1980 WL 4676, at \* 1-2 (Wis. Cir. Ct. Sept. 3, 1980) (Wisconsin sued a milk products firm for resale price-fixing selected dairy products).

**(Footnote ends)**

As the parentheticals in the footnote specify, many of these cases are local and involve local activity such as groceries, dairies, construction firms, and a varied list of manufacturers and retailers. The majority of the litigations assert claims for price-fixing and bid-rigging, but include other antitrust claims such as tying, monopolization, and exclusive dealing.

#### Specifically, multistate suits are a real thing!

**Dishman 20** (Elysa M. Dishman is an Associate Professor at BYU Law School, CLASS ACTION SQUARED: MULTISTATE ACTIONS AND AGENCY DILEMMAS, 96 Notre Dame L. Rev. 291, y2k)

**Multistate actions** often involve many states, sometimes with **almost every state in the country** participating in the action. For example, the National Mortgage Settlement had forty-nine participating states, the Target multistate [\*306] settlement had forty-seven participating states, the **W**estern **U**nion multistate settlement had **fifty participating states**, and the Master Settlement Agreement had forty-six states. Since each AG represents a large number of state residents, the interests of many states and people are represented in multistate actions.

#### 4---Literature and solvency advocates check

**Rose 13** (Amanda M. Rose, Associate Professor, Vanderbilt University Law School, Article: State Enforcement of National Policy: A Contextual Approach (with Evidence from the Securities Realm). Minnesota Law Review, 97, 1343, y2k)

**A mature debate** exists over the **wisdom** of concurrent state enforcement in the **antitrust context**. See, e.g., Stephen Calkins, Perspectives on State and Federal Antitrust Enforcement, 53 Duke L.J. 673 (2004) (defending concurrent state enforcement); Carole R. Doris, Another View on State Antitrust Enforcement - A Reply to Judge Posner, 69 Antitrust L.J. 345 (2001) (same); Harry First, Delivering Remedies: The Role of the States in Antitrust Enforcement, 69 Geo. Wash. L. Rev. 1004 (2001) (same); Robert L. Hubbard & James Yoon, How the Antitrust Modernization Commission Should View State Antitrust Enforcement, 17 Loy. Consumer L. Rev. 497 (2005) (same); cf. Richard A. Posner, Federalism and the Enforcement of Antitrust Laws by State Attorneys General, in Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy 252-66 (Richard A. Epstein & Michael S. Greve eds., 2004) [hereinafter Competition Laws in Conflict] (criticizing concurrent state enforcement); Michael L. Denger & D. Jarrett Arp, Does Our Multifaceted Enforcement System Promote Sound Competition Policy?, 15 Antitrust 41 (2001) (same); Robert W. Hahn & Anne Layne-Farrar, Federalism in Antitrust, 26 Harv. J.L. & Pub. Pol'y 877 (2003); Posner, supra note 22 (same). For more information about this debate, see also Michael DeBow, State Antitrust Enforcement: Empirical Evidence and a Modest Reform Proposal, in Competition Laws in Conflict, at 267-88; Michael S. Greve, Cartel Federalism? Antitrust Enforcement by State Attorneys General, 72 U. Chi. L. Rev. 99 (2005).

#### Reservations will shut-down factory farms

Steve Miller 3 West River Editor, Rosebud tribe seeks hog-farm closure, 4-17 <https://rapidcityjournal.com/news/local/rosebud-tribe-seeks-hog-farm-closure/article_a038a14c-e099-5c04-bafe-b5bc5792fcf9.html>

The Rosebud Sioux Tribal Council voted last month to shut down two large hog farms on tribal trust land west of White River. The tribal council voted 15-4 to ask the Bureau of Indian Affairs to shut down the farms, according to a copyright article on the tribe's Web site. Each farm has 24 barns and can feed as many as 96,000 pigs a year. The action completes a reversal of the tribe's position on the hog farms operated by Sun Prairie Partnership, a Nebraska affiliate of Bell Farms of Wahpeton, N.D. The tribal council approved a lease in the late 1990s with Sun Prairie, allowing it to build as many as 288 huge barns on 13 sites on tribal trust land. Sun Prairie since has built one 24-barn farm just off S.D. Highway 44, about seven miles west of White River, and another 24-barn farm to the northwest, near Cottonwood Creek. The first farm, called Grassy Knoll, has been operating since 1999. Both farms employ tribal members. However, a tribal election in late 1999 brought in a new tribal president and 15 new council members, many of whom opposed the hog-farm project. A couple of years of legal wrangling came to a head a year ago when a federal appeals court struck down district judge Charles Kornmann's 1999 ruling that allowed the hog farm to be built and operated. The appeals court said Sun Prairie had no legal standing to seek the order because it was not an Indian tribe. Sun Prairie appealed the decision to the U.S. Supreme Court. In February of this year, the Supreme Court refused to hear the appeal. The tribe's action to shut down the two farms came a couple of weeks after the Supreme Court decision. An attorney for Sun Prairie and Bell Farms said the firm had not received notification to shut down from either the tribe or the BIA. The BIA has not yet responded to the tribe's request to halt the farms' operation, according to tribal attorneys. Any decision on the hog farms will come from BIA headquarters in Washington, Rosebud BIA superintendent JoAnn Young said Thursday. Last year, Sun Prairie filed another lawsuit in federal court in Rapid City, contending that federal and tribal agencies have unconstitutionally interfered with the hog farms and should be liable for any Sun Prairie losses if the operations are shut down. Sun Prairie officials said that if the farms are shut down, the firm could not repay loans or comply with contracts for buying and selling hogs. Tribal attorneys have filed motions to dismiss that suit and say U.S. District Judge Richard Battey could rule within the next couple of months. The Sun Prairie hog farms, both in Mellette County, feed young pigs for about six months and then ship them to slaughter. Sun Prairie has invested about $20 million so far in the two hog farms, each of which can feed as many as 96,000 hogs a year. Sun Prairie officials say the barns use state-of-the-art technology to produce top-quality hogs while protecting the environment. They also say the farms are a good economic-development tool for the reservation. Both farms employ tribal members. However, some tribal members, along with animal-rights and environmental groups, have criticized the hog farms, saying they emit offensive odors and threaten to pollute area streams. U.S. Environmental Protection Agency officials say the farms have not violated federal clean-water laws. Jim Dougherty, a Washington lawyer representing the tribe as well as Concerned Rosebud Area Citizens, the Humane Farming Association and other groups opposed to the farms, says some tribal members want the farms shut down immediately. "Other people say let's wait six months. They want to minimize unnecessary financial harm to these guys (Sun Prairie), but they do want it closed," Dougherty said.

## Case

#### Break ups are only legal AFTER litigation, which ITSELF takes years.

Wheeler 20 (Tom Wheeler is an American entrepreneur and author who served as 31st Chairman of the Federal Communications Commission (FCC) from 2013-2017. He is a visiting fellow at the Brookings Institution and a senior fellow at the Harvard Kennedy School. “Digital Competition with China Starts with Competition at Home,” *Brookings*. April 2020. <https://www.brookings.edu/wp-content/uploads/2020/04/FP_20200427_digital_competition_china_wheeler_v3.pdf>)

Keeping the focus on bigness and breakup is a sleight of hand that keeps the discussion on favorable ground for the companies. The companies (and their lawyers) know that breaking up a corporation is a remedy only after the company is found to have violated the antitrust laws. Such a determination and the complexity of an antitrust case will delay any final action for years and in the end will have a low probability of success. The breakup of AT&T took nearly 10 years from the initial suit to the actual breakup. The success of any breakup lawsuit would ultimately be decided by the current Supreme Court, where a majority appears supportive of the entrenched (if recently seriously challenged) economics of the Chicago School that a narrow application of the “consumer welfare” (principally measured by price) should be the basis of antitrust enforcement.

#### Breakips are innefective!

Usman 21**-** JD Candidate at the University of Pennsylvania

[Maham, “Breaking Up Big Tech: Lessons from AT&T,” University of Pennsylvania Law Review, May 2021, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3859441>, accessed 11-24-21]

Based on the analysis above, it is clear that orchestrating the **breakup** of a Big Tech company would be **extremely complex** and be much more **challenging** than the AT&T breakup was. This does not mean that courts should not pursue breakups as a remedy just because it would be complicated, only that care should be taken to make sure that a breakup is the best solution for efficiently remedying antitrust violations. Many scholars have posited that breakups are most useful when reversing acquisitions and spinning off previously acquired companies that would be competitive in the market.99 This is supported by the analysis above, which demonstrates how difficult it is when one intangible resource is central to the business model. However, the degree of integration of an acquired company will also play into whether or not it is good candidates for a spinoff.100 For example, in the case of Facebook, Instagram was so immediately and heavily integrated that it would likely take years for a breakup to be finalized.101 “Instagram is no longer viable outside of Facebook infrastructure. They spent years moving things over,” stated a former Facebook engineer.102 Again, the fact that a breakup would be cumbersome and lengthy is not alone a reason not to utilize a structural remedy, but time comes with a cost. A multi-year breakup would mean a lot of time for anticompetitive harms to take place, and a lot of time for companies to find clever ways to retain their competitive **advantage**. Also, in an industry like technology that changes **so rapidly**, the spinoff company—or the entire market for that matter—could be **obsolete** by the time the **breakup** is **complete**, and the parent Big Tech company’s business model could look completely different. On the other hand, a less integrated and more recently acquired asset like WhatsApp “would be more like a six-month technical project” since it has not been properly integrated yet.103 If courts believe that this would be a beneficial spinoff, there are few compelling reasons not to advocate for a breakup in this instance, although another source argued that preserving the quality of the service while also unwinding the merger could make WhatsApp’s spinoff also “take years.”104 Furthermore, some have speculated that “the practice of retroactively unwinding mergers will spark caution and uncertainty among businesses and presumably dim merger activity,” which is another factor that may affect the competitiveness of the market and should be considered. 105

#### Merger restrictions don’t stop agricultural consolidation

James M. MacDonald 1, Economic Research Service, USDA; and Marvin L. Hayenga, Iowa State University, 2001, “Concentration, Mergers, and Antitrust Policy,” https://afpc.tamu.edu/research/publications/263/macdonald.pdf

Agribusiness mergers are one strategy for large firms, and they could respond to a ban with other strategic steps. Those seeking scale economies could grow internally by building bigger facilities instead of merging. Because firms have that alternative, a merger prohibition will not necessarily halt increases in concentration based on scale economies. Second, firms could respond to a prohibition on the purchase of large agribusiness firms by purchasing other large firms in the economy and becoming conglomerates. Such moves might be particularly inefficient (cost-raising).

#### the plan text doesn’t change acquisitions *at all*—they’re distinct from mergers and allow consolidation to continue

Hader and Syfert 99 (Stephen M. Hader, Esq.-B.A. 1984, State University of New York at Buffalo; J.D. 1987, Rutgers University. Mr. Hader is a partner in the International Division of Parker, Poe, Adams & Bernstein, LLP in Charlotte, North Carolina. Mr. Hader also served as General Attorney to the Immigration and Naturalization Service from 1987 to 1989. He practices in the areas of U.S. immigration and naturalization law. Scott D. Syfert, Esq.-B.C. 1990, The London School of Economics; B.A. 1991; The University of North Carolina at Chapel Hill; M.A. 1994, The University of Virginia; J.D. 1997, The University of North Carolina at Chapel Hill. Mr. Syfert is an associate in the International Division of Parker, Poe, Adams & Bernstein, LLP in Charlotte, North Carolina. He is involved in immigration, mergers and acquisitions, and general corporate law. “ARTICLE: The Immigration Consequences of Mergers, Acquisitions, and Other Corporate Restructuring: A Practitioner's Guide” , 24 N.C.J. Int'l L. & Com. Reg. 547, 24 N.C.J. Int'l L. & Com. Reg. 547, Spring, 1999, Lexis accessed online via KU libraries, date accessed 12/22/21)

A merger is not the same as an acquisition. In the M&A field, the term "acquisition" describes a transfer of ownership, generally of a corporation, by merger, stock or asset sale, or some combination thereof. 118 The term "merger," however, is a narrow technical term that relates to a statutorily created procedure in which two or more corporations or other entities combine into one. 119 A merger may or may not have anything to do with a corporate acquisition. A merger is one means by which an acquisition can be carried out.

#### US reductions can’t compensate for meat production abroad

Rowe, 16 – journalist for multiple outlets, citing Dr. Tara Garnett, head of the Food Climate Research Network at the University of Oxford (Mark, 12/25. “The true cost of meat.” http://geographical.co.uk/reviews/books/item/2034)

Dr Garnett also suggests a downward trend in Western meat consumption will not, by itself, be enough. ‘We eat more meat in the West but we are relatively few in number. Even if the West goes entirely vegan overnight it will not compensate for the growth in consumption elsewhere.’ Even more pertinently, she points out, is that this issue would be a welcome quandary for some nations: for them the chance to eat more meat would be a fine thing. ‘In some sub-Saharan countries they are eating less meat than they did 30 years ago.’

#### Leakage is emeprically true

Pelikan et al, 15 – Researcher at the Federal Agricultural Research Centre. (FAL), Institute of Market Analysis and Agricultural Trade Policy (Janine, with Wolfgang Britz and Thomas W. Hertel. “Green Light for Green Agricultural Policies? An Analysis at Regional and Global Scales.” Journal of Agricultural Economics Volume 66, Issue 1, pp 1-19. Wiley.)

Since 2003, the Common Agricultural Policy (CAP) of the EU has begun to focus on biodiversity protection and the maintenance of high nature value farming systems. EU Member States are required to implement agri-environmental measures in order to halt the loss of biodiversity. However, it appears that this objective has not been met. Thus, in 2011 the EU Commission proposed to ‘green’ the CAP and to devote 7% of arable farm land to an ecological focus. This paper analyses the global spillover effects of this particular policy measure which targets environmental public goods within the EU.

The proposed EFA requirement, while obligatory, takes into account existing practices of farmers, e.g. when they already set-aside land or manage their farm biologically. Accordingly, the share of additionally set-aside land is highest in high-yielding regions, which have to-date shown low participation rates for opt-in measures. Of course, our analysis cannot capture all the details of the proposed programme, such as exemptions for small farms or the effect of a possible update of the eligible areas. Therefore, our results should be seen as upper bound on the possible impacts of the EFA requirement.

The intra-EU regional analysis shows an improved environmental status in the high-yielding EU-regions due to the increase in idle land. However, prices increase across the EU, and create pressures for yield increases in the more marginal regions where little or no additional land is taken out of production. The global analysis adds the interaction between land use changes across world regions with croplands in the rest of the world expanding as a result of this policy. There are also modest increases in nitrogen, phosphorus and potassium fertiliser use in other regions of the world, contributing to higher GHG emissions.

Overall, we estimate that, for each additional hectare of land which the EU sets aside under the EFA proposal, land-based GHG emissions and emissions from fertiliser use in the rest of the world will rise by about 21 tonnes CO2 equivalent. In summary, attempts to enhance biodiversity in Europe can have unintended consequences in the rest of the world and these consequences should be factored into the decision-making process when giving a green light for restrictions on cropland use in the EU.

#### AND—Mergers are irrelevant – Big ag has supply chain control. They’ll do it with contracting!

Hafiz & Miller 21 (Hiba Hafiz, Hiba Hafiz is an assistant professor of law at Boston College Law School. Nathan Miller is the Saleh Romeih associate professor at the Georgetown University McDonough School of Businessand Nathan Miller, Associate Professor Nathan Miller is the Saleh Romeih associate professor at the Georgetown University McDonough School of Business. His research covers topics in industrial organization and antitrust economics, with a recent focus on collusion and the competitive effects of mergers. He has published articles in the American Economic Review, Econometrica, and the RAND Journal of Economics, among other journals. Prior to joining Georgetown University, Miller served as an economist at the U.S. Department of Justice, where he provided economic analysis for antitrust investigations. He holds a Ph.D. in economics from the University of California, Berkeley and a B.A. from the University of Virginia., “Competitive Edge: Big Ag’s monopsony problem: How market dominance harms U.S. workers and consumers” https://equitablegrowth.org/competitive-edge-big-ags-monopsony-problem-how-market-dominance-harms-u-s-workers-and-consumers/)

Big Ag is able to exercise its buyer power through its industry-transforming supply chain restructuring that allows lead firms to extract rents at each layer of their supply chain for their profit, and most especially, from small farmers and workers at the production level.2 Starting in the 1960s, poultry firms such as Tyson vertically integrated to own or control hatcheries, feed mills, veterinary care, slaughterhouses, processors, and sales contracts with poultry growers. The pork industry followed Tyson’s lead in the early 1980s, extending top-down ownership or control of hog production, packing, and processing in large-scale farms and processing facilities.

The only level of the supply chain not directly owned or operated by Big Ag chicken and pork producers is the growing stage, where Big Ag processors rely on small farmers to grow and raise the broilers and hogs provided by Big Ag-provided breeders, hatcheries, farrows, and weaners to slaughter weight. Still, Big Ag firms in these two meat sectors can squeeze these growers’ margins from above and below: Their inputs are supplied by Big Ag, and their product is sold to Big Ag.

Big Ag does this through contractual controls, forcing growers into one-sided production and marketing contracts while using their significant control over spot or cash markets to limit sales outside those contracts. Around 97 percent of chicken broilers are raised by contract growers in “take it or leave it” contractual arrangements; 63 percent of hogs were contractually raised in 2017, nearly double that in 1997.

These arrangements are [devastating] crippling. Chicken growers’ production contracts require significant sunk investments—around $1 million in mostly debt-financing—and growers are required to purchase nearly all inputs, veterinary care, and technical assistance from vertically integrated buyers. Buyers can change or terminate contracts for almost any reason. Farmers sell their chickens in a “tournament system,” where their chickens compete for rankings with others given the same feed amount, but the ranking process lacks transparency—buyers weigh chickens behind closed doors and provide no standards for knowing whether a farmer is “getting the same inputs as the other farmers against whom the company makes him compete,” according to Lina Khan, then-policy analyst at the New America Foundation and now an assistant professor of law at Columbia Law School.

#### 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.

#### No tipping point—overwhelming experimental ev.

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.”

#### Their evidence assumes a level of virulence that has literally never occurred

Wendy Orent 15, anthropologist and freelance science writer whose work has appeared in The Washington Post, The LA Times, The New Republic, Discover, and The American Prospect, instructor in science journalism @ Emory, Ignore predictions of lethal pandemics and pay attention to what really matters, LA Times, 1/3/15, http://www.latimes.com/opinion/op-ed/la-oe-orent-pandemic-hysteria-20150104-story.html

Prophets of doom have been telling us for decades that a deadly new pandemic — of bird flu, of SARS or MERS coronavirus, and now of Ebola — is on its way. Why are we still listening? If you look back at the furor raised at many distinguished publications — Nature, Science, Scientific American, National Geographic — back in, say, 2005, about a potential bird flu (H5N1) pandemic, you wonder what planet they were on. Nature ran a special section titled — “Avian flu: Are we ready?” — that began, ominously, with the words “Trouble is brewing in the East” and went on to present a mock aftermath report detailing catastrophic civil breakdown. Robert Webster, a famous influenza virologist, told ABC News in 2006 that “society just can't accept the idea that 50% of the population could die. And I think we have to face that possibility.” Public health expert Michael T. Osterholm of the University of Minnesota, at a meeting in Washington of scientists brought together by the Institute of Medicine, warned in 2005 that a post-pandemic commission, like the post-9/11 commission, could hold “many scientists … accountable to that commission for what we did or didn't do to prevent a pandemic.” He also predicted that we could be facing “three years of a given hell” as the world struggled to right itself after the deadly pandemic. And Laurie Garrett, author of what must be the urtext for pandemic predictions, her 1994 book “The Coming Plague,” intoned in Foreign Affairs that “in short, doom may loom.” Although she followed that with “But note the may,” the article went on to paint a terrifying picture of the avian flu threat nonetheless. And such hysteria still goes on: Whether it's over the MERS coronavirus, a whole alphabet of chicken flu viruses, a real but not very deadly influenza pandemic in 2009, or a kerfuffle like the one in 2012 over a scientist-crafted ferret flu that also was supposed to be a pandemic threat. Along the way, virologist Nathan Wolfe published “The Viral Storm: the Dawn of a New Pandemic Age,” and David Quammen warned in his gripping “Spillover” that some new animal plague could arise from the jungle and sweep across the world. And now there's Ebola. Osterholm, in a widely read op-ed in the New York Times in September, wrote about the possibility that scientists were afraid to mention publicly the danger they discuss privately: that Ebola “could mutate to become transmissible through the air.” “The Ebola epidemic in West Africa has the potential to alter history as much as any plague has ever done,” he wrote. And Garrett wrote in Foreign Policy, “Attention, World: You just don't get it.” She went on to say, “Wake up, fools,” because we should be more frightened of a potential scenario like the one in the movie “Contagion,” in which a lethal, fictitious pandemic scours the world, nearly destroying civilization. But there were fewer takers this time. Osterholm's claims about Ebola going airborne were discounted by serious scientists, and Garrett seemingly retracted her earlier hysteria about Ebola by claiming that, after all, evolution made such spread unlikely. The scientific world has changed since 2005. Now, most scientists understand that there are significant physical and evolutionary barriers to a blood- and fluid-borne virus developing airborne transmission, as Garrett has acknowledged. Though Ebola virus has been detected in human alveolar cells, as Vincent Racaniello, virologist at Columbia University, explained to me, that doesn't mean it can replicate in the airways enough to allow transmission. “Maybe … the virus can get in, but can't get out. Like a roach motel,” wrote Racaniello in an email. H5N1, we understand now, never went airborne because it attached only to cell receptors located deep in human lungs, and could not, therefore, be coughed or sneezed out. SARS, or severe acute respiratory syndrome, caused local outbreaks after multiple introductions via air travel but spread only sluggishly and mostly in hospitals. Breaking its chains of transmission ended the outbreak globally. There probably will always be significant barriers preventing the easy adaptation of an animal disease to the human species. Furthermore, Racaniello insists that there are no recorded instances of viruses that have adapted to humans,

changing the way they are spread. So we need to stop listening to the doomsayers, and we need to do it now. Predictions of lethal pandemics have — since the swine flu fiasco of 1976, when President Ford vowed to vaccinate “every man, woman and child in the United States” — always been wrong. Fear-mongering wastes our time and our emotions and diverts resources from where they should be directed — in the case of Ebola, to the ongoing tragedy in West Africa. Americans have all but forgotten about Ebola now, because most people realize it isn't coming to a school or a shopping mall near you. But Sierra Leoneans and Liberians go on dying.

# 1NR

## DA

**Clary’s dataset includes only rival dyads from 1950**

**Clary 15** (“Economic Stress and International Cooperation: Evidence from International Rivalries,” Massachusetts Institute of Technology Political Science Department Research Paper No. 2015-­‐8, “Economic Stress and International Cooperation: Evidence from International Rivalries,” <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2597712>)

Do economic downturns generate pressure for diversionary conflict? Or might downturns encourage austerity and economizing behavior in foreign policy? This paper provides new evidence that economic stress is associated with conciliatory policies between strategic rivals. For states that view each other as military threats, the biggest step possible toward bilateral cooperation is to terminate the rivalry by taking political steps to manage the competition. **Drawing on data from 109 distinct rival dyads since 1950**, 67 of which terminated, the evidence suggests rivalries were approximately twice as likely to terminate during economic downturns than they were during periods of economic normalcy. This is true controlling for all of the main alternative explanations for peaceful relations between foes (democratic status, nuclear weapons possession, capability imbalance, common enemies, and international systemic changes), as well as many other possible confounding variables. This research questions existing theories claiming that economic downturns are associated with diversionary war, and instead argues that in certain circumstances peace may result from economic troubles. Defining and Measuring Rivalry and Rivalry Termination I define a rivalry as the perception by national elites of two states that the other state possesses conflicting interests and presents a military threat of sufficient severity that future military conflict is likely. Rivalry termination is the transition from a state of rivalry to one where conflicts of interest are not viewed as being so severe as to provoke interstate conflict and/or where a mutual recognition of the imbalance in military capabilities makes conflict-causing bargaining failures unlikely. In other words, rivalries terminate when the elites assess that the risks of military conflict between rivals has been reduced dramatically. This definition draws on a growing quantitative literature most closely associated with the research programs of William Thompson, J. Joseph Hewitt, and James P. Klein, Gary Goertz, and Paul F. Diehl.1 My definition conforms to that of William Thompson. In work with Karen Rasler, they define rivalries as situations in which “[b]oth actors view each other as a significant politicalmilitary threat and, therefore, an enemy.”2 In other work, Thompson writing with Michael Colaresi, explains further: The presumption is that decisionmakers explicitly identify who they think are their foreign enemies. They orient their military preparations and foreign policies toward meeting their threats. They assure their constituents that they will not let their adversaries take advantage. Usually, these activities are done in public. Hence, we should be able to follow the explicit cues in decisionmaker utterances and writings, as well as in the descriptive political histories written about the foreign policies of specific countries.3 Drawing from available records and histories, Thompson and David Dreyer have generated a universe of strategic rivalries from 1494 to 2010 that serves as the basis for this project’s empirical analysis.4 This project measures rivalry termination as occurring on the last year that Thompson and Dreyer record the existence of a rivalry.5

**These findings are robust when considering the role of territorial diversion in diversionary conflict escalation**

**Tir 10** (Jaroslav, PhD, professor of political science at University of Colorado at Boulder, “Territorial Diversion: Diversionary Theory of War and Territorial Conflict,” The Journal of Politics, Vol. 72, No. 2, April 2010, pp. 413–425)

**Neglecting to link territorial and diversionary research is important because the link could be used to address important critiques leveled against the theory.** The critiques have emerged from the literature’s inability to produce a set of unambiguous, supportive findings. Even though domestic problems may be encouraging leaders to contemplate diversions, other factors may prevent these incentives from being acted upon. Consequently, a reliable pattern between diversionary incentives and use of force may not be detectable. Below, I identify **the two most relevant types of critiques** and argue that **they can be addressed successfully in the context of territorial diversion**.

First, Levy (1998; see also Tir and Jasinski 2008) observes that suitable diversionary targets are quite difficult to find. For just about all the states in the international system, the loss of strength gradient (Boulding 1962) is so serious that they are only able to interact militarily with their immediate neighbors. This would limit diversionary opportunities significantly for all but the most powerful states. Furthermore, many countries would make poor targets because they are important economic, security, or diplomatic partners or because the attack would go against the constraints posed by the democratic peace (Russett and Oneal 2001). Cognizant of these issues, Mitchell and Prins (2004), for example, focus on diversions between enduring rivals. Enduring rivals (e.g., India-Pakistan) have a history of antagonism, which indicates that they are willing and able to interacting militarily. Moreover, the context of rivalry can provide an aura of credibility to the leader’s claim that their actions are conducted not out of selfish interest but for the benefit of the country. And given their already poor relations, the attacks would not be particularly damaging to their relationship.6 **The problem**, however, **is that rivalry-related diversionary opportunities are available to only few countries. Enduring rivals constitute only 5.4% of dyads that experience militarized international conflict** (Diehl and Goertz 2000) **and an even smaller fraction of all dyads** (.4% to 3.75%, depending on how politically relevant dyads are defined).

**The above concerns may be lessened in the context of territorial diversion**. First, the power projection capability is not necessarily an issue because most territorial conflicts take place precisely between neighboring countries (Tir 2003, 2006; Vasquez 1993). Second, diversionary action has to be perceived by the population as so important that it is persuaded that the conflict (i.e., the diversion) is worth the cost of damaging or even breaking the otherwise important ties. Territorial diversion is arguably in a good position to help the leader do this because territorial issues are seen as so central to the matters of national survival and protection of identity that economic, diplomatic, and other considerations can be subordinated. These important points suggest that diversionary behavior could be a cross-national phenomenon, not limited to the most powerful or rival states.

The second critique challenges diversionary theory’s core logical mechanism, which is rooted in the ingroup, outgroup premise (Coser 1956). Diversions are launched to unify a fractured society (i.e., transform it into the ingroup) by painting the foreign enemy as the outgroup.7 Morgan and Anderson (1999; Morgan and Bickers 1992), however, argue that overcoming the societal division to create a cohesive ingroup is no easy task. If the leader calculates that surmounting this important obstacle is unlikely, then they would presumably be deterred from diverting. I argue below that territorial diversion provides what is probably the most promising option for unifying the society, because territorial issues have the unique ability to speak to and ‘‘connect’’ with the broad swaths of the population.

Theoretical Argument

In this section, I present arguments specifying why territorial diversion may be particularly attractive for an embattled leader. I contend that territorial diversion can provide the leader with certain advantages, which are unlikely to be found in the realm of conflicts over other issues. People have unique and strong bonds to land, which can be manipulated by the unscrupulous leader them to mask the true intents of their actions, which include rally effects and retention of power.

In explaining why researchers have repeatedly found territory to be the most war prone issue (seeHensel 2000; Tir and Vasquez 2010), Vasquez (1993) notes that humans’ tendency to define themselves as territorial creatures is deeply ingrained into their collective genetic and/or cultural inheritance—arguments well known in the sociobiological and evolutionary psychology literatures (e.g., Buss 1995; Valzelli 1981). The tendency is seen in the great willingness of people to fight over economically and strategically worthless land, which suggests that the pursuit of territory is more than just about rational, calculating behavior. It may be either a function of how humans are wired or of learning ‘‘that territorial issues . . . are ‘best’ handled by the use of force and violence’’ (Vasquez 1993, 140). While the related literature debates whether the traits are more inherent or learned, the point is that the bond people feel to land, their anxiety over who controls it, and their willingness to support the use of force to act on territorial disagreements can all potentially be manipulated and exploited by the leader who is seeking to distract the people’s attention from the real problems plaguing the country.

A related argument focusing on how people develop their conceptions of self is offered by the constructivist school of thought. Among others, Gottman (1973), Sack (1986), and Touval (1972) find that people become socialized and emotionally attached to the territory they think of as belonging to them. The land becomes an integral part of their identity, ingrained in the national psyche. This even holds in cases where there are only weak objective claims to the land in question. Witness, for example, the fervor by which ordinary Chinese respond to suggestions that Tibet is not legitimately Chinese territory. Or consider the Serbian attitude toward Kosovo. Despite the fact that few Serbs remain there, Milosevic successfully rallied the Serb nation in the late 1980s by arguing that it could hardly afford a repeat of the 1389 Battle of Kosovo where that land was lost. Such predispositions suggest that disagreements over territorial control quickly turn into highly emotionally charged affairs where objective facts hold little sway. In fact, the territorial conflict literature argues that the emotional connections and related proclivities feed into the perceptions of land as zerosum, indivisible, and unsubstitutable, where compromises are seen as improbable, territorial disputes are thought of as irresolvable, and brute force is counted on as the only real means of obtaining (temporary) control (Hensel and Mitchell 2005; Tir 2006; Vasquez 1993). Critically for this project, the emotions connected to the land are something the unscrupulous leader can attempt to tap into, manipulate, and exploit for their own gain—much like Milosevic did.

Further relevant insights can be derived from prospect theory (e.g., Jervis 1992; Kahneman and Tversky 1979). According to the theory, people are risk acceptant when they perceive that they are losing (as opposed to gaining) something they value, that is when they are operating in the domain of losses.8 The reference point separating gains from loses is set according to whether one is trying to protect existing ownership versus acquire something new. Yet, if an individual believes that the object outside of their control rightfully belongs to them, this would imply that the ‘‘loss’’ of the object took place at some point in the past and the person would be in the domain of losses. The psychological reference point is hence not the objective status quo but rather a mental image of the ‘‘rightful’’ distribution of valued resources (Berejikian 2004). Undoing the ‘‘loss’’ thus becomes a priority, even if it involves highly risky actions, because accepting the objective status quo would mean accepting the certain loss.

Connecting these arguments with those of constructivism implies that the tendency to become emotionally attached to the land people think of as their own sets their reference point to the domain of losses, irrespective of whether the defense of currently held land (i.e., an objective loss) or acquisition of land that someone else is controlling (i.e., an objective gain) is in question. That is, by perceiving the disputed land as rightfully theirs, the people interpret not controlling it to mean a loss—regardless of whether this land ever belonged, or how long ago, to them. Consequently, the people become willing to support risky courses of action in the belief that they would be ‘‘retaking’’ the land.

A series of important inferences follows from the above insights. The most basic one is that the above attitudes and tendencies toward territory are common human responses. As such, they apply to the populations of states, which opens them up for manipulation and exploitation by unscrupulous leaders for personal gain. The leader can manufacture, use, or escalate a territorial conflict with another country in an attempt to manipulate the people’s emotions into becoming willing to give the leader carte blanche or at least a greater benefit of the doubt for taking what under more objective circumstances may be seen as an unnecessary, questionable, and risky action. The end result, the leader hopes, is that via the mechanism of territorial conflict, the population will increasingly support and rally behind them. Importantly, the above indicates that the leader can expect their manipulation to be more successful when territorial issues are at stake, rather than some more poorly defined threats to the country, including low politics issues that can distract people’s attention but not elicit the same level of passion.

Furthermore, because territorial issues are at the heart of human perceptions of identity, they can be used by the leader to overcome societal divisions. The leader can argue that the society as a whole is the ingroup with a common territorial interest and cast the state controlling, or attempting to control, the land that ‘‘rightfully’’ belongs to the leader’s country as the outgroup. Few other issues are expected to provide as strong of a bonding experience for a population. Examples of societies like South Korea, which is plagued by deep political divisions, suggest that in the face of territorial crises such as the dispute over the Dokto Islands with Japan, the society becomes more unified. Territory could therefore be one of the few issues that could, at least temporarily, be used by leaders to overcome internal divisions— including those that may be caused precisely by controversy over the leader’s rule.

The traditional diversionary argument also relies on portraying the diversionary action as protecting a vital national interest. Yet, the leader’s initiation of a crisis with a far-away, unknown-to-the-public foreign enemy (a scenario satirized in the movie Wag the Dog) and over an issue not clearly vital to the national interest would have a hard time capturing the public’s attention and creating belief in—and let alone fervent support for—the leader. After all, many ordinary people know about the diversionary theory, so the leader has to overcome the public’s—and particularly the political opposition’s—natural skepticism that the action is a mere diversion meant to manipulate the populace. The issue of land control, via the above-described mechanisms—stands a much better chance of accomplishing these tasks.

In sum, territorial diversions are able (1) to capture the public’s attention, (2) to tap into the people’s instincts and/or and feelings about their identity, and (3) to help the leader unify a fractured society behind them. The logic of territorial diversion is thus arguably more compelling and plausible than that of the more standard version of the theory. The discussion leads to the following hypothesis.

H1: Domestic unpopularity problems that threaten the leader’s ability to retain effective control over their office are associated with an increased likelihood of territorial conflict initiation.

Given the relative ease with which the leader can exploit the population’s instincts and/or attitudes toward territorial control may make territorial diversion appear a relatively risk-free, no-cost option. Yet, this is certainly not the case. The leader does not know that the diversion will for sure have the desired popularity-boosting effect. They are acting with the hope of a rally, but the rally is by no means guaranteed; prior research generally reports only small and short-lasting rallies (e.g., Lian and Oneal 1993; see also Chiozza and Goemans 2004, 424). Furthermore, engaging in prolonged or frequent diversions would likely outlast the desired rally effect, as the public tires of the issue and costs and casualties mount (Gartner and Segura 1998). The leader is hence expected to use diversion sparingly, such as during times when their leadership abilities are in question—just as the hypothesis suggests. Moreover, the diversion carries with it the inherent risk that the action will not go as planned. Becoming embroiled in protracted, escalating, stalemated, costly, or losing conflicts is likely to hurt the leader’s popularity (Bueno de Mesquita et al. 2003). Their calculus should therefore be affected by a variety of constraints; the key ones are considered control variables and are discussed in the next section.

Research Design

Dependent Variables, Spatial-Temporal Domain, and Method of Analysis

In the diversionary research, diversionary activity is not measured directly but rather by associating governmental use of force with diversionary incentive variables that tap into domestic discontent with the government. I follow a similar approach but focus on uses of military force9 that concern the issue of territorial control. To check the findings’ robustness, I utilize three different operationalizations of my dependent variable. The first two versions rely on the Militarized Interstate Dispute (MID) data set (Ghosn, Palmer, and Bremer 2004), which identifies militarized disputes between countries, their timing, the dispute initiator, whether a territorial revision was sought, and fatality numbers.10 Combining this information, I identify (1) all territorial MID initiations (my main dependent variable) and (2) fatal territorial MID initiations; I use the fatality restriction because disputes involving fatalities may have an easier time capturing the public’s attention and inspiring a rally. Finally, the International Crisis Behavior (ICB) project defines a foreign policy crisis as a situation in which the highest-level decision makers perceive ‘‘a threat to one or more basic values [to their state], along with an awareness of a finite time for response to the value threat, and a heightened probability of involvement in military hostilities’’ (Brecher and Wilkenfeld 2000, 3). The project notes the timing of the crisis, perceived initiator (i.e., in this case the state from which the crisis-related threat is emanating), and whether a territorial threat is involved (i.e., threat of integration or annexation of a part of the target’s territory). By matching perceived initiators with territorial threats, I derive a list of (3) territorial crisis initiations. Each of the three dependent variables enters into the below-defined data set dichotomously, depending on whether the relevant event took place in a given year.

The directed dyadic approach, which can simultaneously capture conditions within the prospective initiator country as well as the identity of and relationships with potential target states, is utilized. Monadic design, popular in early studies of diversion, is equipped to perform only the first task (Bennett and Stam 2000b). With the help of the EUGene software (Bennett and Stam 2000a), I create a directed dyad-year (my unit of analysis) data set of all contiguous (up to 400 miles of water)11 pairs of states. The analyses are restricted to the post-World War II period due to availability of economic data.

Given the dichotomous structure of the dependent variables, I rely on logit for my analyses. Robust standard errors are employed to account for the observations from the same dyad being related. I use the Beck, Katz, and Tucker (1998) binary timeseries cross-section correction to account for the fact that my data are composed of several cross-sections (i.e., dyads) and to deal with potential duration dependence as these cross-sections are observed over time. To save space, the associated years of peace and natural cubic spline (with three interior knots) variables are omitted from the table. And finally, all the right-hand-side variables (with the exception of elections) are lagged by one year, in order to make sure that the presumed causes actually precede the use of force; such a setup is also reasonable as it may take a little bit of time for discontent to spur the leader into a territorial diversion.

The Main Independent Variables

The ideal indicator of the diversionary incentive, the leader’s popularity rating, is either unavailable for a broad range of countries or cannot be trusted as it is subject to governmental manipulation. As a substitute, I rely on two proxy indicators of the leader’s (un)popularity. The first one captures the extent to which the citizens of a country are visibly dissatisfied with their government. I sum the incidents of protests, strikes, and riots from the Cross-National Time-Series (CNTS) Archive (2005) into an index reporting the number of unrest activities in a given country in a given year.12 Pickering and Kisangani (2005; Kisangani and Pickering 2007) have a similar approach. The second indicator, the economic (GDP) growth rate is typically used in the diversionary research (e.g., Hess and Orphanides 1995; James and Oneal 1991; Oneal and Tir 2006; Pickering and Kisangani 2005) because the state of the economy is seen as an important predictor of leaders’ popularity (Hibbs 1987; MacKuen, Erikson, and Stimson 1992). To check the robustness of my findings, I rely on two different sources for the growth rate, Gleditsch (2002), abbreviated below as KSG, and the CNTS Archive (2005).13

Control Variables

I control for several influences that have been found to affect the likelihood of dyadic conflict. To capture countries’ relative power, I use the Correlates of War project’s combined index of military capabilities (Singer 1988) and create a measure that takes the natural logarithm of the ratio of the stronger country’s capabilities to those of the weaker member of the dyad. I control for whether the dyad is democratic by noting whether both member states achieve a score greater than 6 on Polity IV’s (Marshall and Jaggers 2002) scale. Allies may fight each other less because they share common security interests; I control for this with data from Gibler and Sarkees (2004). To capture the potential deterrent effects of trade, I divide the sum of the initiator’s exports and imports with the prospective target by the initiator’s GDP (all from Gleditsch 2002); the measure captures the extent to which the initiator’s economy is dependent on the target. Because for most states the ability to fight is determined primarily by geographic proximity—I control for the effects of distance between the dyad members (Stinnett et al. 2002); see also note 11. Finally, diversions are thought to be the most likely right before elections, because this is when the leaders are the most likely to need a boost in their popularity ratings (e.g., Hess and Orphanides 1995; Smith 1996). I code upcoming elections by using the CNTS Archive (2005).

Results and Discussion

Each Model in Table 1 employs a different combination of territorial conflict (the dependent variable) and economic growth (an independent variable) operationalizations. Starting the evaluation of H1 with the government unpopularity variable, its coefficient is consistently significant and positive in Models 1–6. The likelihood of territorial conflict initiation increases significantly as the government becomes more unpopular, and this finding is robust to all the alternate specifications of the dependent variable. With the hope of deflecting attention from domestic unrest and creating a rally effect, embattled leaders initiate territorial conflicts. By focusing on territorial diversions, my findings thus provide clear support for the detrimental effects of domestic unrest. Other than in Tir and Jasinski’s (2008) work on diversion against domestic ethnic groups, findings for domestic unrest proved to be elusive in Rummel (1963) and Tanter (1966) and inconsistent in Pickering and Kisangani’s (2005; see also Kisangani and Pickering 2007) study. None of these works, however, consider the possibility of territorial diversion.

Empirical support for the economic growth rate is much weaker. The finding that poor economic performance is associated with a higher likelihood of territorial conflict initiation is significant only in Models 3–4.14 The weak results are not altogether surprising given the findings from prior literature. In accordance with the insignificant relationships of Models 1–2 and 5–6, Ostrom and Job (1986), for example, note that the likelihood that a U.S. President will use force is uncertain, as the bad economy might create incentives both to divert the public’s attention with a foreign adventure and to focus on solving the economic problem, thus reducing the inclination to act abroad. Similarly, Fordham (1998a, 1998b), DeRouen (1995), and Gowa (1998) find no relation between a poor economy and U.S. use of force. Furthermore, Leeds and Davis (1997) conclude that the conflictinitiating behavior of 18 industrialized democracies is unrelated to economic conditions as do Pickering and Kisangani (2005) and Russett and Oneal (2001) in global studies. In contrast and **more in line with my findings of a significant relationship** (in Models 3–4), **Hess and Orphanides** (1995), for example, **argue that economic recessions are linked with forceful action by an incumbent U.S. president**. Furthermore, Fordham’s (2002) revision of Gowa’s (1998) analysis shows some effect of a bad economy and DeRouen and Peake (2002) report that U.S. use of force diverts the public’s attention from a poor economy. Among cross-national studies**, Oneal and Russett** (1997) **report that slow growth increases the incidence of militarized disputes, as does Russett** (1990)—but only **for the United States**; slow growth does not affect the behavior of other countries. Kisangani and Pickering (2007) report some significant associations, but they are sensitive to model specification, while Tir and Jasinski (2008) find a clearer link between economic underperformance and increased attacks on domestic ethnic minorities. While none of these works has focused on territorial diversions, my own inconsistent findings for economic growth fit well with the mixed results reported in the literature.15

Hypothesis 1 thus receives strong support via the unpopularity variable but only weak support via the economic growth variable. These results suggest that embattled leaders are much more likely to respond with territorial diversions to direct signs of their unpopularity (e.g., strikes, protests, riots) than to general background conditions such as economic malaise. Presumably, protesters can be distracted via territorial diversions while ﬁxing the economy would take a more concerted and prolonged policy effort. **Bad economic conditions seem to motivate only the most serious, fatal territorial confrontations**. This implies that **leaders may be reserving the most high-proﬁle and risky diversions for the times when they are the most desperate**, that is when their power is threatened both by signs of discontent with their rule and by more systemic problems plaguing the country (i.e., an underperforming economy).

Next, I conduct a series of follow-up tests suggested by an anonymous Reviewer; results based on the reanalysis of Model 1 are presented in the online appendix. Evaluating the implication that territorial diversions are indeed **more likely to result from diversionary conditions than nonterritorial diversions**, I set up a multinomial logit model that contrasts the initiation of territorial MIDs versus nonterritorial MIDs (base outcome). The results show a positive and statistically signiﬁcant coefﬁcient for the government unpopularity variable (ﬁrst column of Table 3), meaning that higher levels of government unpopularity are more likely to produce territorial rather than nonterritorial MIDs. Further checks **include performing rare events logit** (King and Zeng 2001) **and population-averaged logit analyses to verify whether the rare events nature of the dependent variable or cross-sectional characteristics of the data alter the ﬁndings, respectively**. The ﬁndings for the two independent variables **remain unchanged** (see Table 3, columns two and three). Finally, protesting behavior in more populous countries could be considered more ‘‘normal’’ and less threatening to the government, potentially lowering the incentive to divert. Dividing the government unpopularity variable by the log of country’s population (from the Correlates of War National Capabilities data set, Singer 1987) reveals that the population size-standardized government unpopularity variable remains positive and signiﬁcant; see Table 3, ﬁnal column.

Concerning the control variables, the effects of power and distance are consistent with expectations and across the Models in Table 1. Democracy, alliance ties, and trade coefﬁcients have mostly the expected dampening inﬂuence on territorial conﬂict initiation; but only trade exhibits a signiﬁcant impact and only when the dependent variable is the fatal territorial MID (i.e., in Models 3–4). 16 These results are somewhat surprising, but the reader is reminded that the effects of alliance are highly contested (see Maoz 2000), while the impact of trade has not been established in the domain of territorial conﬂict. Similarly, recent research shows that the democratic peace weakens considerably in the context of territorial conﬂict (James, Park, and Choi 2006) and that the democratic peace may be epiphenomenal to territorial peace (Gibler 2007). 17 Importantly, the control variable results imply that some of the related interests (e.g., security, regime ties) may indeed be subordinated to the territorial diversion impetus.

Revisiting the link between regime type and diversion, some scholars argue that democratic leaders have a greater motivation—due to the need for popular support—for diversion (e.g., Gelpi 1997; Russett 1990; Smith 1996). Yet, others (e.g., Downs and Rocke 1994; Miller 1995; Pickering and Kisangani 2005) assert that authoritarian leaders need popular support in order to appear legitimate. Because they cannot derive legitimacy from democratic institutions and elections, they look to diversions to help them achieve this goal. Autocrats can also divert with greater impunity due to the lack of institutional checks and balances. In follow-up tests available from the online appendix, Table 4, I restrict the set of initiator countries in Model 1 to democracies only, autocracies only, all nondemocracies, and all nonautocracies. That the ﬁndings hold suggests **that both democratic and autocratic leaders value territorial diversions**. Nevertheless, resolving the broader debate is beyond the scope of this study.

#### It causes nuclear theft and sales---nuclear war.

Mann ’14 (Eric; 2014; special agent with a United States federal agency, a special assistant for a U.S. Senator and served as a presidential appointee for the U.S. Congress, Graduate Degree in Homeland Security at Georgetown; “Austerity, Economic Decline, and Financial Weapons of War: A New Paradigm for Global Security,” https://jscholarship.library.jhu.edu/bitstream/handle/1774.2/37262/MANN-THESIS-2014.pdf)

The conclusions reached in this thesis demonstrate how economic considerations within states can figure prominently into the calculus for future conflicts. The findings also suggest that security issues with economic or financial underpinnings will transcend classical determinants of war and conflict, and change the manner by which rival states engage in hostile acts toward one another. The research shows that security concerns emanating from economic uncertainty and the inherent vulnerabilities within global financial markets will present new challenges for national security, and provide developing states new asymmetric options for balancing against stronger states.

The security areas, identified in the proceeding chapters, are likely to mature into global security threats in the immediate future. As the case study on South Korea suggest, the overlapping security issues associated with economic decline and reduced military spending by the United States will affect allied confidence in America’s security guarantees. The study shows that this outcome could cause regional instability or realignments of strategic partnerships in the Asia-pacific region with ramifications for U.S. national security. Rival states and non-state groups may also become emboldened to challenge America’s status in the unipolar international system.

The potential risks associated with stolen or loose WMD, resulting from poor security, can also pose a threat to U.S. national security. The case study on Pakistan, Syria and North Korea show how financial constraints affect weapons security making weapons vulnerable to theft, and how financial factors can influence WMD proliferation by contributing to the motivating factors behind a trusted insider’s decision to sell weapons technology. The inherent vulnerabilities within the global financial markets will provide terrorists’ organizations and other non-state groups, who object to the current international system or distribution of power, with opportunities to disrupt global finance and perhaps weaken America’s status. A more ominous threat originates from states intent on increasing diversification of foreign currency holdings, establishing alternatives to the dollar for international trade, or engaging financial warfare against the United States.

#### Commodities are in a supercycle period

Spilker 10/5/21 (Gregor, CME Group “Commodities Continue on a Supercycle Trajectory … For Now”, https://www.thestreet.com/investing/commodities-continue-on-supercycle-trajectory)

In early 2021, many market watchers called the beginning of a new commodities supercycle. There were plenty of positive signals: low rates, fiscal stimulus across developed economies, and pent-up demand just as the world was emerging from COVID-19. The idea was that that demand for commodities would outstrip supply: after a year in lockdowns, consumers had excess savings to spend, and governmental programs on infrastructure and electrification would lead to price rises for raw materials. As we near the last quarter of 2021, how accurate have these forecasts been?

Commodities Rise Continues

First, a look at the data. Using the IMF’s Global Price Index Of All Commodities, we can see that commodity prices in aggregate have continued their rise since the pandemic lows in April 2020. The price rise in commodities since then has so far outperformed the last supercycle, which started in the early 2000s and was driven by emerging markets (China, primarily, but also Brazil, Russia, and India). Back then, commodity prices kept rising for a number of years, until oil peaked in 2008.

On the macroeconomic front, monetary support continues to be strong. Central bankers, most recently Chairman Powell at the Jackson Hole summit, are maintaining an accommodative stance. Most importantly, the consensus opinion is that inflationary pressures, which have emerged in certain pockets of the economy, are transitory in nature.

#### Inflation concerns drive ag stock growth and faith in commodities

Cohne 6/4/21 (David, StockNews.com “2 Agriculture Stocks to Bet on Rising Commodity Prices”, https://investorplace.com/2021/06/2-agriculture-stocks-to-bet-on-rising-commodity-prices/)

One of the big stories in the market this year has been the rise of commodities. The Invesco DB Commodity Index Tracking ETF (NYSEARCA:DBC), which tracks a basket of broad-based commodity futures, is up 28.4% so far this year, compared to the S&P 500’s 12% gain over the same period. Commodity prices have been rising due to the global economic recovery and inflationary concerns. And that has brought attention to agriculture stocks.

While individual commodities typically rise and fall in cycles, when many rise simultaneously, it is referred to as a commodity supercycle. That appears to be the case now. For instance, crude oil surged above pre-pandemic levels. Grain prices, which hit multi-year lows during the heights of the pandemic, have now risen to multi-year highs driven by solid demand.

Rising prices of commodities have been a boon to agriculture stocks. The VanEck Vectors Agribusiness ETF (NYSEARCA:MOO), which tracks agriculture stocks, is up over 19% year to date. Commodity prices may have taken a breather in May but have since resumed their upward trajectory, which should benefit stocks such as Archer-Daniels-Midland Company (NYSE:ADM) and AGCO Corporation (NYSE:AGCO).

#### Mergers themselves abnormally boost stock prices

Khanal & Mishra 21 (Aditya R. Khanal Tennessee State University & Ashok K. Mishra Arizona State University Summary and Conclusion “Mergers in Food and Agribusiness Companies and Stock Price Reactions: Have companies gained in stock returns around merger events”, https://ageconsearch.umn.edu/record/316029/files/NC-1177\_presentation\_Khanal\_v2.pdf)

• We found significant positive cumulative abnormal return around 3% in a 60 day event window. The highest CAAR on window: ( 30,0): 7.35% significantly positive gain is attributable to M&A in this time period.

• We have at least two important observations:

• One one hand, investors acknowledge that significant capital outflow due to acquisition may impact company in short run as indicated by some adjustment in stock returns right after the event day (negative returns after merger for acquiring company is as expected and consistent with overall other sectors

• However, a some higher level consistent returns, higher than benchmark period returns, which are statistically significant indicate that investors value food and agribusiness firm’s acquisition (merger) and expressed the confidence for higher performance after merger.

Summary and Conclusion

• Together, we found overall positive stock price gains attributable to acquiring company’s M&A events in Food and Agribusiness Industry stocks. This means, acquiring companies have potential equity capital gains through stock returns to some level that are attributable due to M&A events.

• Also, based on our pre acquiring price ramp up, stock market investors tend to gain highest in “buy the rumor and sell the news” (merger arbitrage , short selling and price pressure around merger? ( Mitchelle et al., 2004) needs more investigation);

• Future studies: factors such as size and Book to Market effects, analysis and investigations on factors contributing to AR

#### PRECEDENT---the plan introduces the possibility that antitrust law will be reapplied, chilling investment from risk-averse firms.

Okuliar ’20 [Alexander; December 8; J.D. from Vanderbilt University Law School, B.S. in Economics and B.A. in History from The Wharton School of the University of Pennsylvania; U.S. Department of Justice, “Promoting Predictability and Transparency in Antitrust Enforcement and Standards Essential Patents,” <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-okuliar-delivers-remarks-telecommunications-industry>]

The Importance of Predictability and Transparency to Antitrust Enforcement

Good afternoon. It’s a pleasure to join you today, thank you for the invitation. I’d like to begin with some prepared remarks addressing the importance of predictability and transparency to antitrust enforcement, particularly as it relates to standards-essential patents, give an overview of the Division’s recent activity in this space, and then turn to some questions.

Antitrust law can be a very powerful tool to promote economic dynamism and innovation. It establishes important rules regarding how firms may operate in marketplaces across the economy. Firms, in turn, rely on these rules when making all sorts of strategic decisions, from day-to-day concerns to overall operating plans, from pricing or discounting strategies to long-term growth strategies.

For any economy to realize meaningful long-term growth, firms (and consumers) must have confidence in the underlying legal rules governing their existence and behavior. Starting and growing a company is often expensive and risky. Maintaining a business is also costly, and firms are constantly assessing their ongoing viability and potential for growth. Confidence in the basic legal system is, of course, critical. Confidence in specialized regulatory regimes is likewise important. Firms are more likely to engage in costly R&D, and in the kind of expensive, time-consuming experimentation that innovation tends to require, when they are confident they will be rewarded for these investments—that, for example, antitrust laws will not change in the interim between investment and return in a way that deprives the firm from being able to recoup and benefit from its investments.

This innovation and dynamic competition are critical to our modern economy. So the more that we, as enforcers, can do to ensure the basic competition law rules of the road are clear and predictable, the more we can help to preserve competition and to spur economic growth. Not only do firms benefit from this, but so, too, do consumers. They are the beneficiaries of the increased R&D and innovation that can thrive in a reliable regulatory and enforcement regime. Moreover, clear and foreseeable enforcement empowers consumers, who can then more readily understand when unlawful conduct may be occurring, and be better-positioned to identify violations and to protect themselves and others.

Predictability and transparency in antitrust enforcement are important across markets and industries, but are often particularly important at the intersection of antitrust and intellectual property. Both competition and IP laws seek to foster long-term innovation and dynamic competition—which, again, depend on firms continuing to engage in risky and costly efforts today in the hopes of achieving rewards tomorrow. This is true for owners of various IP rights, including standards-essential patent holders.

#### SCOPE---it’s impossible to limit because of inherently economy-wide application AND displaces market self-correction.

Nachbar ’19 [Thomas; June 2019; Professor of Law at the University of Virginia School of Law, JD from the University of Chicago Law School, AB in History and Economics from the University of Illinois; The Antitrust Source, “Book Review: Heroes and Villains of Antitrust,” p. 8]

That regulatory skepticism had a particular salience for antitrust law, which itself is designed to maintain a particular balance between private and government action in markets. 53 Since Adam Smith, the argument of so-called free-market intellectuals has not been that markets are perfect but rather that they are comparatively better at solving problems than governments. Part of the argument is that, in most cases, market forces will drive a firm that has adopted an inefficient practice to shift to a more efficient one, lest it lose more business than it gains from the practice. But if antitrust law outlawed a practice, there is no potential for the market to correct—the practice once outlawed would remain outlawed. 54 And because antitrust law applies to all industries, a practice outlawed for one firm or industry would be outlawed for all firms in all industries, or be interpreted as such by risk-averse firms and their risk-averse lawyers

—not to mention the treble damages that the liable antitrust defendant would have to pay.

Importantly, there would be no way to correct the error. The intuition underlying that broader regulatory skepticism has a particular resonance for antitrust, reflecting antitrust’s own misgivings about monopoly while recognizing that the only true monopoly is government itself. If you can’t trust anyone, you might as well decentralize your distrust. Verizon and AT&T may be big, but at least when they mess up, there’s a possibility for correction; not so when the federal government makes a similar mistake. That skepticism is readily apparent in the Supreme Court’s modern antitrust doctrine. 55

Footnote 55:

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

End of Footnote 55.

#### Plan alienates institutional investors who fear collapse of commodity portfolios—spills over to the broader financial market

Baldi et al 16 (Lucia Baldi, a, ⁎ Massimo Peri,b Daniela Vandone c a Associate Professor of Statistics -Department of Food, Environmental and Nutritional Sciences (DEFENS), University of Milan, Via Celoria 2, Milan, Italy b Assistant Professor of Environmental Economics and Appraisal -Department of Economics, Management and Quantitative Methods (DEMM),University of Milan, Via Celoria 2, Milan, Italy c Associate Professor of Economics of Financial Markets and Intermediaries- Department of Economics, Management and Quantitative Methods (DEMM), University of Milan, Via Conservatorio 7, Milan, Italy “Stock markets’ bubbles burst and volatility spillovers in agricultural commodity market” https://air.unimi.it/retrieve/handle/2434/424277/658646/versione%20uncorrected\_RIBAF\_525.pdf)

Our paper fits in a recent stream of literature on commodity financialization investigating the interconnection between agricultural commodity and stock markets. Given that spillover volatility can be interpreted in the light of rising relationship between markets, we estimate volatility impulse response function between stock and commodity markets comparing a symmetric window before and after the two most important and recent bubble bursts in financial markets – dot.com and 2008 financial crisis. Results show that volatility spillovers from stock markets to commodity markets were negative before and after the dot.com bubble. Conversely, volatility spillovers increased significantly after the 2008 financial crisis, in particular for those commodities – like corn – that are largely traded on stock markets as alternative asset classes and, thus, are more “financialized”. Our results confirm recent empirical findings that underline a rising interrelationship between these markets (Delatte and Lopez, 2013; Tang and Xiong, 2012; Daskalaki and Skiadopoulos, 2011), although with a different and more innovative methodology that focuses on volatility rather than correlation. The implications of our results are relevant. An increasing awareness of institutional investors of these rising correlation dynamics – signalling a likely reduction in the diversification role of commodities in financial portfolios − may slow down investments in commodity indexes, with a reduction in spillover effects. This might benefits commodity markets, given that agricultural commodity’s prices are now determined by financial investors’ strategies, and not only by supply and demand levels (Tadesse et al., 2014; Peri et al., 2013). However, commodities have fully become part of financial markets strategies and it is unlikely that institutional investors completely leave these alternative asset classes.

#### Institutional investment fire sales plummet the economy

Elliott 14 (Douglas J. Elliott, Fellow, The Brookings Institution, Systemic Risk and the Asset Management Industry, May 2014, https://www.brookings.edu/wp-content/uploads/2016/06/systemic\_risk\_asset\_management\_elliott.pdf)

Asset managers control the investment decisions for a substantial percentage of the total assets invested in financial markets. This particularly matters in the U.S. because of the relative importance of financial markets, as compared with more bank-centric financial systems in most of the rest of the world, including Europe, Japan, and China. A crisis in the financial markets can harm the real economy through multiple channels: Credit supply. Crises cause a substantial contraction of the supply of credit and equity funding, reducing economic growth. Wealth effects. Crises also create a significant decline in household wealth with the attendant reduction in spending and slowdown in the economy. Confidence effects. Crises damage consumer and business confidence, leading to lessened business activity and employment. Links to the bank sector. Problems in the financial markets can be transmitted to the banks with which markets are interlinked in a number of different ways, including by reducing the value of bank assets and capital and by tightening bank liquidity conditions by making it difficult to sell certain assets at a reasonable price. Liquidity effects. Money market funds have been a partial substitute for bank deposits and a “run” on such funds could have effects on the economy similar to a bank run, forcing fire sales, blocking credit channels, and harming confidence. Some analysts are concerned that other asset management activities could have similar attributes. Decisions by asset managers affect, or are affected by, these systemic risks principally through two related channels: asset prices and liquidity conditions in financial markets.

Asset managers decide what volumes of specific assets they are willing to buy or sell and at what prices. These decisions are partly a result of analysis by the managers and partly a response to financial market conditions and, importantly, inflows and outflows of funds from their investor clients. One risk related to asset management is the potential for large-scale redemptions from funds during times of market stress. Unwinding positions during turbulent periods may require conducting costly and unprofitable trades. This risk would be exacerbated if investors believe that they will gain an economic advantage by being the first to redeem. 24 There has been such an advantage to some extent for money market funds because of the artificial use of a Net Asset Value of $1.00 per share even when the actual NAV is slightly above or below that amount. In such a situation, the costs of trades in troubled markets could primarily be borne by the remaining investors, creating a “first- mover advantage” to withdrawing funds. 25 The presence of a “first-mover advantage” may distort investor expectations and serve as a source of risk to a fund. 26 In general, redemptions on a scale that threatens financial stability or that triggers heavy selling and price declines in markets have not been observed. According to analysis conducted by the Investment Company Institute, “investors do not redeem heavily from stock and bond funds during periods of market stress and fund portfolio managers are not heavy sellers of portfolio securities in down markets.” 27 Nevertheless, redemption risk remains a concern for asset managers and regulatory authorities insofar as it is presents a legitimate channel through which funds may be exposed to financial shocks. Securities lending programs serve as another channel through which asset managers may touch systemic risk. During the financial crisis, some asset managers that were involved in securities lending programs bore significant losses on cash collateral that had been invested in assets that were severely impacted by the crisis, such as structured investment vehicles and Lehman Brothers notes. 28 Moreover, securities lending programs create another source of redemption risk. Borrowers may seek to return securities if they are concerned about the safety of their collateral in stressful market periods. Since asset managers typically reinvest cash collateral in money markets, in the event that markets have seized up and borrowers demand the return of their collateral, lenders may be forced to sell at a loss assets that have become illiquid in order to return the cash collateral. 29 Asset managers may also touch systemic risk through interconnections with other financial institutions or business lines. According to the OFR, the complex network of interconnections among asset managers and other financial services firms may expose asset managers to risks that arise in other market sectors. 30. 31 Likewise, asset managers may be exposed to risks through interconnections within their own firm or fund complexes. Asset managers that work in a division of a bank or insurance company or that work in an asset management company that offers ancillary services, such as in-house broker-dealers, commodity pool operators, trust companies, or consulting services, may be exposed to risks in other market segments. Asset managers act autonomously in many ways and in others act solely as agents passing through the decisions of their investors. Therefore, it is important in considering systemic risk to separate out the impacts on risk arising from the structure of asset managers and their decision-making processes from those that merely represent the pass- through of decisions by their customers. It will generally be ineffective to try to reduce systemic risk at the asset manager level in those cases where the real determinants are decisions by end-investors. That is, the distinction must be made between exposure to systemic risk, as has been discussed in this section, and creation or amplification of systemic risk. In what ways do asset managers create or amplify systemic risk? It is critical to determine whether the existence of an asset manager causes the total level of systemic risk to be significantly higher than it otherwise would be. This should exclude the effects of simply pooling together systemic risks that would otherwise exist, unless there is an amplification effect caused by the act of pooling. Some read the OFR report to imply that asset managers can create systemic risk by entering into fire sales of troubled asset categories in a time of crisis. A “fire sale” is the sale of an asset at a price below its value that takes place because it is forced in some manner, rather than as the result of a discretionary investment decision that happens to undervalue the asset. It is not clear that this implication was intended by the OFR, but if it was, the key question is whether such fire sales are simply a straight pass-through reflecting choices by end-investors. For example, if mutual funds dumped tech shares during the Tech Crash of 2001, but did so simply by proportionally lowering the size of their holdings in response to investor redemptions from the mutual funds, then it does not seem meaningful to view the asset managers running those funds as having created the fire sales. Thus, asset managers do not bring a fire sale risk unless their mode of operation makes such risks higher than would exist simply due to the changing preferences of their end-investors. This would hold even if the end- investor choices are themselves the result of fire sale conditions. That is, if end-investors want or need to dispose of assets quickly, for whatever reason, this would be reflected in overall financial market conditions whether those investors owned the assets directly or did so through an asset manager. It is theoretically possible that having large amounts of assets pooled together under one asset manager could raise the risk of fire sales, because of an amplification effect. For example, if millions of end-investors entrust their funds to the management of a single asset manager, it is possible that the manager would concentrate their investments in a few assets and create fire sale risks for those assets that would be more severe than would have existed if the end-investors had acted independently or had spread their money across more managers. Of course, higher concentration in an asset at a given manager might be offset by lesser holdings at another manager. For this theoretical risk to exist in reality, it would have to be true that asset managers, as a class, “herd,” or create greater concentration in specific assets, or that asset managers with high concentrations in specific assets are more prone to forced sales. There is an extensive body of theoretical and empirical literature on institutional herding. Institutional investors may exhibit herding behavior for a number of reasons, some of which do not apply to retail investors, including information cascades – that is, inferring information from one another’s trades, 32 relying on similar information or market signals to make investment decisions, 33 the possibility of reputational costs to investing against the crowd, 34 or the presence of competitive pressures. 35 While there is empirical evidence suggesting that institutional investors broadly may exhibit herding behavior, thereby increasing market concentration in specific assets or asset classes, such is not necessarily the case for every type of institutional investor. Mutual funds as a class, for example, tend to exhibit less herding behavior. 36, 37

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#### Solvency deficit also applies to the aff---tribal sovereign immunity precludes federal cases as well

Luke Hasskamp N.D., Partner @ BonaLaw, Tribal Sovereign Immunity: A Defense Available to Individuals, https://www.bonalaw.com/insights/legal-resources/tribal-sovereign-immunity-a-defense-available-to-individuals

Most are probably familiar with the concept of tribal sovereignty; that is, the idea that Native American / Indian Tribes have inherent authority to govern themselves, free of interference by federal or state governments. An essential aspect of tribal sovereignty is tribal sovereign immunity: immunity from lawsuits in federal, state, and tribal courts. More specifically, under federal law, an Indian tribe has immunity, not only from liability, but also from suit. Accordingly, under tribal sovereign immunity principles, an Indian tribe is subject to suit only where (1) Congress has authorized such a suit or (2) the Tribe itself has waived its immunity by consenting to suit. Absent such authorization or consent, courts do not have subject matter jurisdiction over suits against a Tribe. Importantly, these sovereign immunity principles don’t just apply to the Tribe itself. They also extend to entities established by the Tribe, such as governmental agencies, tribal colleges, and casinos. Perhaps most interestingly, sovereign immunity also extends to individuals associated with the Tribe, such as officers and employees, at least in some circumstances. This includes lawsuits brought against individuals for money damages.

#### States can regulate interstate commerce

**DeClercq 7** (Andy DeClercq, J.D. expected, University of Wisconsin Law School, May 2008; M.S.T., Pace University, 2005, FISTICUFFS IN FREE MARKETS: MUNICIPAL EXEMPTIONS TO WISCONSIN ANTITRUST LAW AFTER COUNTY OF MILWAUKEE V. WILLIAMS, 2007 Wis. L. Rev. 1355, y2k)

In 1893, Wisconsin enacted its first antitrust law. This law held closely to the language of the Sherman Act, the federal antitrust legislation passed three years earlier, leading courts and commentators [\*1362] to refer to it as the "Little Sherman Act." Initially, and well into the twentieth century, Wisconsin courts observed a strict separation between state and federal antitrust claims. The state courts adopted this position in accordance with the view of United States Supreme Court Chief Justice John Marshall, who maintained that "the **federal** government and the various **state** governments existed in **mutually exclusive spheres,** with **no** overlap." According to this theory, federal antitrust law applied to cases involving interstate commerce, where the federal government had authority under the Commerce Clause, while state antitrust law applied to intrastate-commerce cases. By 1978, **however**, the U.S. Supreme Court had **made it clear** that this rigid notion of separate spheres of influence **no longer held** and that state antitrust law **may** regulate matters of **interstate commerce**.

[\*1363] This shift in policy affected the reach of both state and federal antitrust laws. States could now apply their antitrust laws more **broadly** to situations affecting **interstate commerce**. And the federal government could expand the reach of its antitrust provisions to cover what would previously have been considered intrastate commerce. Thus, there are now many instances where federal and state antitrust laws overlap and address precisely the same practices.