# 1NC

### 1NC---Infrastructure DA

#### Infrastructure will pass but docket management is key

Ross, 9-27 – RYAN LIZZA, ELI OKUN and GARRETT ROSS. “Poll: Good news for Biden’s agenda,” POLITICO Playbook PM, <https://www.politico.com/newsletters/playbook-pm/2021/09/27/poll-good-news-for-bidens-agenda-494486> -- Iowa

We have some fresh polling results from our weekly collaboration with Morning Consult, and they offer some good news for President JOE BIDEN, whose domestic policy agenda continues to poll above his job approval number, and a warning sign for both parties on a potential shutdown or default. The bipartisan infrastructure bill remains quite popular: 56% support, 27% oppose. We also asked what voters thought about the size of the BIF package, and despite the price tag a majority (57%) thought $1 trillion was the right amount or too little to spend: Do you think that $1 trillion is … ? Too much to spend on U.S. infrastructure: 42% The right amount to spend on U.S. infrastructure: 43% Too little to spend on U.S. infrastructure: 14% We also asked voters who they would tend to blame more if the U.S. were to default on the national debt or if there were a government shutdown. Even though Democrats control Congress and the White House, voters tell us they will spread the blame around. A plurality says they will blame both parties equally, and that’s before this week’s heightened attention to these issues when Republicans plan on filibustering a bill to keep the government open and raise the debt limit. Shutdown … If there was a U.S. government shutdown, would you tend to blame the Democratic Party more, the Republican Party more, or both parties equally? The Democratic Party: 32% Both parties equally: 36% The Republican Party: 24% Don’t know / No opinion: 8% Default … If the United States were to default on the national debt, would you tend to blame the Democratic Party more, the Republican Party more, or both parties equally? The Democratic Party: 31% Both parties equally: 39% The Republican Party: 20% Don’t know / No opinion: 11% One big — if obvious — takeaway: Passing BIF and highlighting the GOP’s lack of support for the spending and debt relief bill is good politics for Biden. Biden this afternoon indicated Democrats’ legislative deadlines could slip: “It may not be by the end of the week, I hope it’s by the end of the week, but as long as we’re still alive — we got three things to do: the debt ceiling, continuing resolution and the two pieces of legislation,” he said. “If we do that, the country’s going to be in great shape.” Biden continued to project confidence: “You know me, I’m a born optimist. I think things are going to go well. I think we’re going to get it done.” Sarah Ferris and the Heather Caygle preview House Dems’ caucus meeting today.

#### Antitrust decks PC and tanks agenda

Carstensen, 21 – Peter C. Carstensen is Chair in Law Emeritus, University of Wisconsin Law School. “The “Ought” and “Is Likely” of Biden Antitrust,” Concurrences, February, N° 1-2021 On-Topic The new US antitrust administration, <https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#carstensen> – Iowa

12. But given a hostile judiciary, the agencies are likely to limit their challenges to the most obvious cases. Important cases will die on the courthouse steps without ever getting into court. To be sure, the agencies are less likely to waste time investigating minor marijuana mergers and to focus resources on more important matters. The emergent judicial demands for detailed proof of actual adverse competitive effects will limit the scope of what can be done. The resources to develop a major case in light of these expectations will be significant and so constrain the agencies further. Thus, while merger enforcement may see an uptick especially where the merger involves two major direct competitors in more than moderately concentrated markets, the incentives to pursue vertical or potential competition cases will be very limited. Similarly, despite the growing recognition of how dominant firms, especially in the high-tech arena, buy up nascent competitors, the current standards for merger analysis will make such challenges very unlikely.

13. Given the American Express decision, the burden of challenging anticompetitive vertical restraints is likely to deter the enforcers from following up on the Dentsply [89] and McWane [90] cases except, where, as in those cases, a clear monopoly existed. Given existing market concentrations in many industries, this will result in the continuation of a plethora of harmful restraints.

14. Similarly, despite bipartisan murmurs about competitive issues, the potential in a closely divided Congress that any major initiatives will survive is limited at best. In part the challenge here is how the Biden administration will rank its commitments. If it were to make reform of competition law a major and primary commitment, it would have to trade off other goals, which might include health care reform or increases in the minimum wage. It is likely in this circumstance the new administration, like the Obama administration’s abandonment of the pro-competitive rules proposed under the PSA, would elect to give up stricter competition rules in order to achieve other legislative priorities.

15. Another key to a robust commitment to workable competition is the choice of cabinet and other key administrative positions. Here as well, the early signs are not entirely encouraging. In selecting Tom Vilsack to return as secretary of agriculture, the president has embraced a friend of the large corporate interests dominating agriculture who has spent the last four years in a highly lucrative position advancing their interests. Given the desperate need for pro-competitive rules to implement the PSA and control exploitation of dairy farmers through milk-market orders, the return of Vilsack is not good news. Who will head the FTC and who will be the attorney general and assistant attorney general for antitrust is still unknown, but if those picks are also centrists with strong links to corporate America the hope for robust enforcement of competition law will further attenuate!

16. In sum, this is a pessimistic prognostication for the likely Biden antitrust enforcement agenda. There is much that ought to be done. But this requires a willingness to take major enforcement risks, to invest significant political capital in the legislative process, and to select leaders who are committed to advancing the public interest in fair, efficient and dynamically competitive markets. The early signs are that the new administration will be no more committed to robust competition policy than the Obama administration. Events may force a more vigorous policy—I will cling to that hope as the Biden administration takes shape.

#### PC is make or break for meaningful climate action

Okun and Ross, 9-7-21 – Eli Okun and Garrett Ross, POLITICO Playbook (PM), “Playbook PM: Biden’s climate/infrastructure challenge,” <https://www.politico.com/newsletters/playbook-pm/2021/09/07/bidens-climate-infrastructure-challenge-494225> -- Iowa

President JOE BIDEN is putting climate change and his infrastructure agenda front and center today as he journeys to New Jersey and New York to survey Ida’s devastating damage across several communities.

It’s a moment that lays bare both the power and the pitfalls of Biden’s approach to this global existential threat.

First, the power: This summer, nearly a third of Americans suffered an extreme weather event fueled by climate change — massive fires in California, flooding throughout the Midwest and Northeast, supercharged hurricanes on the Gulf Coast and so on.

All of which means that as Biden marshals the bully pulpit to spotlight the ways in which climate change is already altering our lives, he has plenty of tangible examples to draw from.

“For decades, scientists have warned of extreme weather — would be more extreme, and climate change was here. And we’re living through it now,” Biden said in New Jersey this afternoon. “We don’t have any more time. … We’re at one of those inflection points where we either act, or we’re gonna be in real, real trouble.”

Now, the potential pitfalls: As congressional Democrats gear up for a crucial few weeks in which they’ll craft their massive $3.5 trillion reconciliation bill, the White House is linking climate disaster directly to its Build Back Better policy agenda — both the spending package and the bipartisan infrastructure bill that already passed the Senate.

That’s where things get dicier. We don’t need to remind you how difficult it will be for Democrats to thread the needle and get these bills to the president’s desk.

— If Biden and Democratic leaders go too big with their climate planks in the infrastructure bill, they risk losing the support of the moderate JOE MANCHIN types. (That, too, faces its own political obstacles: Speaker NANCY PELOSI this morning, when a reporter indicated she’d have to lower the reconciliation price tag to accommodate moderates, simply responded: “Why?”)

— The perils of going too small, on the other hand, are neatly exemplified by this NYT story about electric cars , a key piece of the economy-wide shift ahead that’s necessary to tamp down emissions and combat climate change: “The country has tens of thousands of public charging stations — the electric car equivalent of gas pumps — with about 110,000 chargers. But energy and auto experts say that number needs to be at least five to 10 times as big to achieve the president’s goal,” write Niraj Chokshi, Matthew Goldstein and Erin Woo. “Building that many will cost tens of billions of dollars, far more than the $7.5 billion that lawmakers have set aside in the infrastructure bill.”

With a crammed legislative calendar, the White House will have to keep the pressure on to make sure meaningful climate provisions don’t fall by the wayside — as seems likely to happen with legislation concerning abortion rights, police reform, immigration reform and raising the minimum wage.

— Our colleagues Anita Kumar and Chris Cadelago have more on “Biden’s growing policy backlog” — and the political risks for Democrats if they let down key constituencies.

Asked this morning how he’d win over Democrats on infrastructure, Biden said simply, “[T]he sun is going to come out tomorrow,” per pooler Brian Bennett of Time. That’s true. But he’s just gotta make sure it’s not warming the earth too quickly.

#### Warming causes extinction

Bryce, 20 – Emma, citing Nelson, Roman, and Kemp---Cassidy *Nelson* is Co-lead of the biosecurity team at Oxford), Sabin *Roman* earned a PhD in Complex Systems Simulation from the University of Southampton, and both Roman and Luke *Kemp* are research associates at the Cambridge University. "What Could Drive Humans to Extinction?" Real Clear Science, 7-27-2020, <https://www.realclearscience.com/articles/2020/07/27/what_could_drive_humans_to_extinction.html> -- Iowa

Nuclear war

An existential risk is different to what we might think of as a "regular" hazard or threat, explained Luke Kemp, a research associate at the Centre for the Study of Existential Risk at Cambridge University in the United Kingdom. Kemp studies historical civilizational collapse and the risk posed by climate change in the present day. "A risk in the typical terminology is supposed to be composed of a hazard, a vulnerability and an exposure," he told Live Science. "You can think about this in terms of an asteroid strike. So the hazard itself is the asteroid. The vulnerability is our inability to stop it from occurring — the lack of an intervention system. And our exposure is the fact that it actually hits the Earth in some way, shape or form."

Take nuclear war, which history and popular culture have etched onto our minds as one of the biggest potential risks to human survival. Our vulnerability to this threat grows if countries produce highly-enriched uranium, and as political tensions between nations escalate. That vulnerability determines our exposure.

As is the case for all existential risks, there aren't hard estimates available on how much of Earth's population a nuclear firestorm might eliminate. But it's expected that the effects of a large-scale nuclear winter — the period of freezing temperatures and limited food production that would follow a war, caused by a smoky nuclear haze blocking sunlight from reaching the Earth — would be profound. "From most of the modeling I've seen, it would be absolutely horrendous. It could lead to the death of large swathes of humanity. But it seems unlikely that it by itself would lead to extinction." Kemp said.

Pandemics The misuse of biotechnology is another existential risk that keeps researchers up at night. This is technology that harnesses biology to make new products. One in particular concerns Cassidy Nelson: the abuse of biotechnology to engineer deadly, quick-spreading pathogens. "I worry about a whole range of different pandemic scenarios. But I do think the ones that could be man-made are possibly the greatest threat we could have from biology this century," she said. As acting co-lead of the biosecurity team at the Future of Humanity Institute at the University of Oxford in the United Kingdom, Nelson researches biosecurity issues that face humanity, such as new infectious diseases, pandemics and biological weapons. She recognizes that a pathogen that's been specifically engineered to be as contagious and deadly as possible could be far more damaging than a natural pathogen, potentially dispatching large swathes of Earth's population in limited time. "Nature is pretty phenomenal at coming up with pathogens through natural selection. It's terrible when it does. But it doesn't have this kind of direct 'intent,'" Nelson explained. "My concern would be if you had a bad actor who intentionally tried to design a pathogen to have as much negative impact as possible, through how contagious it was, and how deadly it was.” But despite the fear that might create — especially in our currently pandemic-stricken world — she believes that the probability that this would occur is slim. (It's also worth mentioning that all evidence points to the fact that COVID-19 wasn't created in a lab.) While the scientific and technological advances are steadily lowering the threshold for people to be able to do this, "that also means that our capabilities for doing something about it are rising gradually," she said. "That gives me a sense of hope, that if we could actually get on top [of it], that risk balance could go in our favor." Still, the magnitude of the potential threat keeps researchers' attention trained on this risk.

From climate change to AI

A tour of the threats to human survival can hardly exclude climate change, a phenomenon that (is) already driving the decline and extinction of multiple species across the planet. Could it hurl humanity toward the same fate?

The accompaniments to climate change — food insecurity, water scarcity, and extreme weather events — are set to increasingly threaten human survival, at regional scales. But looking to the future, climate change is also what Kemp described as an "existential risk multiplier" at global scales, meaning that it amplifies other threats to humanity's survival. "It does appear to have all these relationships to both conflict as well as political change, which just makes the world a much more dangerous place to be." Imagine: food or water scarcity intensifying international tensions, and triggering nuclear wars with potentially enormous human fatalities.

This way of thinking about extinction highlights the interconnectedness of existential risks. As Kemp hinted before, it's unlikely that a mass extinction event would result from a single calamity like a nuclear war or pandemic. Rather, history shows us that most civilizational collapses are driven by several interwoven factors. And extinction as we typically imagine it — the rapid annihilation of everyone on Earth — is just one way it could play out.

### 1NC---States CP

#### The fifty states and relevant territories ought to

#### increase prohibitions on those anticompetitive business practices which cause net-harm on one side of platforms.

#### follow uniform enforcement guidelines and coordinate state antitrust cases in parallel fashion through the National Association of Attorneys General

#### increase funding for enforcement of state antitrust laws, including funding for state attorneys general and state courts, through legalizing deficit spending and borrowing to pay for antitrust enforcement

* **adjudicate antitrust cases arising from aforementioned laws in a consistent manner**

#### State antitrust enforcement is constitutional and solves.

First 01 (Harry First, Professor of Law, New York University School of Law, “Delivering Remedies: The Role of the States in Antitrust Enforcement,” *George Washington Law Review*, Vol. 69, Issues 5 & 6 (October/December 2001), pp. 1004-1041)

Of course, neither Illinois Brick, nor the parens patriae provision of the 1976 Act for that matter, spoke to the states' jurisdiction to enforce state antitrust law.5 1 State law antitrust enforcement had coexisted with federal enforcement from the time that the Sherman Act was passed and the constitutionality of such state law enforcement had long been accepted.52 Thus, it should not have been surprising that after Illinois Brick a number of states revisited their own state laws and enacted statutes permitting indirect purchaser suits under state antitrust law.53

The constitutionality of state indirect purchaser legislation was presented to the Supreme Court in California v. ARC America Corp., de- cided in 1989.54 Four states filed federal antitrust actions for damages they had suffered from an alleged nationwide conspiracy to fix the price of ce- ment. Because at least some of their damages were indirect, they appended to their federal cause of action state law claims under their indirect purchaser statutes.5 Following a settlement of all federal and state claims, the states sought to participate in the settlement fund.56 On objection from the direct purchasers, the district court denied the states' indirect purchaser claims to the settlement fund, holding that state indirect purchaser laws were pre- empted by virtue of Illinois Brick.5 7 The Supreme Court reversed. 58

Pointing to "the long history of state common-law and statutory reme- dies against monopolies and unfair business practices," the Court stated that it is "plain that this is an area traditionally regulated by the States. '59 Indeed, "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies."0 That state law might impose liability beyond what federal law provides does not conflict with any federal policy that the Court identified in prior cases. Writing for a unanimous Court, Justice White stated:

When viewed properly, Illinois Brick was a decision construing the federal antitrust laws, not a decision defining the interrelationship between the federal and state antitrust laws. The congressional pur- poses on which Illinois Brick was based provide no support for a finding that state indirect purchaser statutes are pre-empted by federal law.

The Supreme Court's decision in ARC America capped fifty years of judicial and legislative development of the jurisdiction of state antitrust en- forcers. Under federal law the states can now seek money damages for federal antitrust violations that injure them or their citizens as direct purchasers. Under state law they can claim damages suffered from antitrust violations that harm them or their citizens as indirect purchasers (if state law provides for such recoveries). The states may also be able to use consumer protection or unfair competition statutes to require defendants who engage in anticompetitive conduct that harms consumers either to disgorge their profits or to provide restitution to their victims.62 Like anti-trust indirect purchaser claims, these state claims can either be brought individually in state court or included as supplemental claims to federal antitrust violations.

Beyond seeking damages, state enforcers are likewise able to use either federal or state courts to seek injunctive relief to prevent future violations. This includes the right to seek divestitures in merger cases and the right to seek structural relief in monopolization cases. So well accepted is the exercise of this right that its assertion now goes unchallenged by defendants. 63 And, finally, individual states' antitrust laws may contain criminal provisions or civil penalties, which the states can enforce in state court.64

Indeed, at least as a statutory matter, the jurisdictional tools available to the states exceed those available to the federal antitrust enforcement agencies. The Justice Department can sue for its proprietary injuries, but it al- most never does so,65 and it has not sought to assert a parens patriae right to sue for injury to U.S. citizens (nor could it likely do so in light of the 1976 Hart-Scott-Rodino Act).66 Federal law would also presumably prevent suit for damages to the U.S. government as an indirect purchaser. There are no civil penalties available for violations of the antitrust laws,67 and the disgorgement or restitution remedy has only rarely been invoked (by the Federal Trade Commission) and is of uncertain legality.68

Similarly, when compared to private enforcement, state antitrust enforcers have stronger jurisdictional tools. The main advantage is that although the federal parens patriae claim for damages under the Hart-Scott-Rodino Act has procedural protections similar to those provided under Rule 23 for class members, such actions need not meet Rule 23's requirements, such as commonality of claims or adequacy of representation. 69 These issues are, of course, major problems in antitrust class actions.70 On the injunction side, standing presents no problems for the states when they are seeking to protect either their economy in general, or the interests of their consumers; private litigants, however, may still face hurdles.71 And on the investigative side, the states generally have broad power to use compulsory process to investigate for possible antitrust violations prior to filing a suit (similar to federal investigative power72). Private plaintiffs, of course, lack this ability.

#### Multistate cases are effective, coordinated, and can take place in state court.

* History thumps federalism DA
* Coordination allows standard application and guidelines

Lynch 1 (Jason Lynch, B.A. in Political Science and J.D. 2001 from Columbia Law, “Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation,” *Columbia Law Review*, Dec., 2001, Vol. 101, No. 8 (Dec., 2001), pp. 1998-2032, <https://www.jstor.org/stable/11237121NC>)

Over the past two decades, state attorneys general have developed and refined the practice of multistate litigation as a powerful law enforcement tool. In groups ranging from two states to all fifty, the attorneys general now routinely prosecute cases jointly, closely coordinating with each other and sharing legal theories, discovery materials, court filings, litigation expenses, and even staff. The approach has been strikingly effective, and prominent corporations that might otherwise have evaded liability in individual state lawsuits-companies like America Online, Bausch & Lomb, Sears, General Motors, and the major tobacco manufacturers-have been forced to change their business practices and pay significant settlements when faced with the combined power and institutional resources that a multistate lawsuit brings to bear upon them. Critics, in response, have raised alarms and attacked the legitimacy of multistate litigation. This Note analyzes an important aspect of those criticisms that in pressing multistate cases, state attorneys general violate fundamental principles of federalism and separation of powers.

Opponents of multistate litigation have been unrestrained in their attacks. One critic of multistate cases, himself an attorney general, has called the phenomenon "the greatest threat to the rule of law today,"2 and opponents of multistate litigation have begun calling on state legislatures and Congress to restrict the powers of state attorneys general to pursue these cases.3 Critics of multistate litigation believe the practice is objectionable on a number of grounds, among which is that multistate cases impermissibly increase the power of state attorneys general in violation of principles of federalism and separation of powers.4 In the words of one critic, through multistate litigation the states "get together and by agreement create a new government or regime among themselves, re- placing the prerogatives and powers of the constitutionally created federal government."5

Another says: Recent abuses in government litigation have undermined both federalism and the separation of powers. The purpose of the tobacco litigation ... was to establish through the action of several states a national policy that is properly reserved first to each state legislature and then to Congress in the exercise of its enumerated powers.6

Their federalism argument is noteworthy in that it is based on the assertion that through multistate cases the states are encroaching on federal power. Federalism concerns have arisen more commonly, at least recently, in the context of protecting state sovereignty from encroachment by the federal government.7

The critics thus far have made their claims primarily in speeches, policy papers, remarks during panel discussions at think tank conferences, and in newspaper opinion pieces.8 Their analyses are often framed in overheated terms such as, "[o]ur forefathers understood the dangers of unchecked power ... [and the] free market and the cause of human liberty cannot survive much more of this litigation madness."9 Despite this inflammatory mode of argument, these claims should be taken seriously because constitutional arguments against features of multistate litigation are beginning to be made in federal courts.10 Moreover, among those making the arguments publicly are prominent current and former public officials who are likely to wield influence in convincing state legislatures and Congress to consider imposing restraints on the ability of attorneys general to pursue these cases.11 The time is ripe, therefore, for a systematic review of these federalism and separation of powers critiques. Using the decisions of the United States Supreme Court as the benchmark articulation of federalism and separation of powers principles, this Note evaluates critiques of multistate litigation and argues that the prosecution of multistate cases comports with the strictures of federalism and separation of powers. In evaluating the claims made by critics of multistate litigation, this Note also develops and considers a constitutional argument that could be, but has not been, made by them.

Part I reviews the powers and duties of state attorneys general and describes the rise of the multistate litigation phenomenon. This Part emphasizes that what is novel about multistate cases is the degree and quality of interstate cooperation being used to enforce the law. Part II evaluates the claim that multistate litigation violates principles of federalism by examining two types of federalism based limits on state action: permanent limits and contingent limits. Permanent limits on state action, as the la- bel implies, are unchanging and include those expressly stated in the text of the Constitution and those that have been inferred by the Supreme Court from the structure of the constitutional plan. Contingent limits on state action-the boundaries of which may shift as a result of action by Congress-include constitutional prohibitions on state action that may be waived by Congress and limits, such as preemption and the Dormant Commerce Clause doctrine, in areas where there is concurrent federal and state authority.

Part III considers the claim that multistate litigation violates principles of separation of powers. This Part finds that critics of multistate litigation have misconstrued separation of powers doctrine in an attempt to apply it to multistate cases. In fact, separation of powers doctrine has little to say about most multistate litigation. Part III then identifies a facet of multistate litigation that may be relevant to a separation of powers analysis but which critics have yet to consider: namely the enforcement of federal law by state attorneys general. While this facet of multistate litigation is the one most vulnerable to criticism on constitutional grounds, Part III argues that several considerations minimize the concerns raised by a separation of powers challenge to enforcement of federal law by state attorneys general.

I. STATE ATTORNEYS GENERAL AND MULTISTATE LITIGATION

1. Role and Powers of State Attorneys General

The office of attorney general originated in English legal history where the attorney general was the appointed representative of the sovereign before the courts.12 Today, state attorneys general are independent executive officers popularly elected in forty-three states.13 In five of the remaining states, attorneys general are appointed by the governor (Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming); in Maine the selection is made by secret ballot of the legislature; and in Tennessee it is made by the state supreme court.14 The powers and responsibilities of state attorneys general are defined, often in broad terms, by state constitutions and statutesl5-commonly directing attorneys general no more specifically than to "perform duties 'prescribed by law"'-and in most states attorneys general are recognized as possessing all powers exercised by the office at common law.16 The modern attorney general is the chief legal officer of the state, controlling litigation involving the state and per- forming a range of other functions, including provision of legal counsel to the governor and state agencies, oversight of criminal law enforcement, engagement in public advocacy through the initiation of civil enforcement litigation, and the exercise of investigative authority in the prosecution of government misconduct.17

The specific contents of an attorney general's portfolio of powers and duties vary from state to state because state legislatures may play a role in defining the office by statute and through control over the attorney general's budget.18 State court decisions also have shaped the office differently in different jurisdictions. The power to control state litigation, for example, is often at the center of controversy. It is not uncommon for attorneys general and governors (or other state officers) to disagree over litigation posture, and while in most states the attorney general possesses ultimate authority over litigation, a few disputes have produced state case law giving final authority to the governor.19 Generally, however, the attorney general may "exercise all such authority as the public interest re- quires" and "has wide discretion in making the determination as to the public interest.”20

1. The Rise of Multistate Litigation

Traditionally, in exercising their broad prosecutorial powers, state attorneys general brought legal actions against private parties on an individual and intrastate basis. That is, an attorney general would act as a single plaintiff and sue private parties in the courts of that attorney general's state to enforce, for example, state consumer protection and anti- trust laws.21 In some instances, such as those involving federal antitrust law, attorneys general may pursue enforcement actions as federal claims in federal court.22

Beginning early in the 1980s 23 and without much public attention, state attorneys general began cooperating with each other in ways they never had before. Faced with the daunting prospect of prosecuting large, wealthy, and well lawyered corporations-defendants that often have many times the financial and legal personnel resources of even a large attorney general's office-for violations of state law, state attorneys general began to reach across state lines for help. The attorneys general began looking to other states that might be investigating similar complaints against a defendant and, in groups ranging from two states to all fifty, started to prosecute their cases jointly, sharing with each other legal theories, discovery materials, court filings, litigation expenses, and even staff. This type of cooperative law enforcement activity among state attorneys general became known as multistate litigation. In this litigation, each state is the plaintiff in its own case but the coordination among the attorneys general is close.24 Usually, the offices are so closely coordinated that those participating in the case will choose one or two lead states and cede to them primary responsibility for negotiating with the defendant on be- half of all the states involved. Over the past two decades, multistate litigation has grown to become a powerful and commonly used law enforcement tool.

The trend toward increased cooperation among state attorneys general accelerated later in the 1980s with the promulgation by the National Association of Attorneys General (NAAG) of a series of antitrust and consumer protection enforcement guidelines.25 The guidelines informally coordinated state enforcement actions by encouraging attorneys general to follow uniform standards in the exercise of their prosecutorial discretion.26 Around the same time as the appearance of enforcement guide- lines, cooperation among attorneys general became more formal and effective as they began to coordinate their enforcement litigation on an interstate basis, simultaneously pursuing the same causes of action in different states against the same private parties.27

Contributing to the rise of multistate litigation were the policies of the Reagan Administration. When President Reagan took office, the Jus- tice Department quickly terminated antitrust litigation against IBM, an action that foreshadowed the laissez faire antitrust and consumer protection enforcement guidelines that were soon promulgated by the Justice Department and the Federal Trade Commission.28 During the Reagan years, the size of the staff of the FTC was cut in half, and the agency brought just forty-one new consumer fraud cases in 1982, fewer than half the number under President Jimmy Carter two years earlier.29 State attorneys general stepped in to fill what they perceived to be a void in anti- trust and consumer protection enforcement created by the reduced federal presence in these areas.30

While the policies of the Reagan administration created a climate that encouraged state attorneys general to pursue cases on a multistate basis, the eventual rise of multistate litigation as a frequently used enforcement tool by state attorneys general seems in retrospect to have been inevitable. In enforcement actions against national or multinational corporations, individual attorneys general often had been outgun- ned.31 For instance, New York, which has one of the largest attorney general offices in the nation, has fewer than thirty lawyers assigned to consumer fraud and antitrust cases.32 A state attorney general pursuing a case against a major corporation would have to commit all or significant portions of her resources to the case, thereby preventing work on other cases.33 In addition, after the early multistate cases, the state attorneys general saw how interstate cooperation magnified their power and in- creased the effectiveness of their enforcement actions. As Tom Miller, the Attorney General of Iowa, has said, "What we've found is that by coming together, the dynamics of the cases change .... When a corporation discovered it had to face 30 states, instead of one, it suddenly became much more serious about dealing with the issue."34

Another factor that contributed to the rise of multistate litigation during the past two decades was the dramatic expansion of telecommunications technology since 1980. Fax machines only became widely used in the 1980s, and the development of e-mail allowed for more efficient sharing of information and written work product, such as pleadings and legal briefs, than had been possible before. The wide availability of fax and e- mail technology helped relatively small and overworked offices achieve the level of close cooperation required to pursue multistate cases.35

The multistate case against the major cigarette manufacturers that was launched in 1995 was a watershed for this practice. The forty-six state, $206 billion settlement reached with the major tobacco companies in 199836-a settlement with an industry that had never lost a lawsuit against it and that wields significant clout in Congress-underscored how powerful state attorneys general had become when they worked together and drew national attention to their activities. As one observer noted, "Before the tobacco settlement, most people were only vaguely aware of the role of their state A.G..... But now the A.G.'s have a national aware- ness, and a positive one at that. That's a powerful tool. And you can't underestimate that."37 In the years preceding and following the tobacco settlement, the attorneys general have won scores of significant multistate cases.

As an example of their effectiveness, between 1995 and 1997 the attorneys general reached settlements in multistate cases with America On- line, American Cyanamid, Bausch & Lomb, General Motors, Louisiana Pacific, Mazda, Packard Bell, and Sears, Roebuck.38 In addition to producing agreements under which defendants promise to stop the activity targeted by the litigation, such as price fixing or deceptive advertising, multistate cases have produced significant monetary settlements. In 1987, forty-one attorneys general reached an agreement with Chrysler under which the car company paid more than $16 million to customers whose odometers had been tampered with before they bought their cars.39 Sears, facing multistate litigation pressed by fifty states in 1997, agreed to pay $165 million in penalties, refunds, and legal fees in a case concerning the collection of credit card bills from customers who had filed for bankruptcy protection.40 In a multistate case alleging an unlawful tying arrangement under section 1 of the Sherman Act, the attorneys general of thirty-three states attained a settlement under which Sandoz Pharmaceuticals Corporation agreed to pay $20 million, including $10 million in credits to eligible customers and $4 million in attorneys' fees to the states.41 All fifty states and the District of Columbia reached a $7.2 million settlement with Keds Corporation in a case involving allegations that Keds conspired to fix the resale prices of women's athletic shoes.42 And in 2000, generic drug manufacturer Mylan Laboratories reached a settlement with thirty-three states for $147 million in a case that alleged Mylan had unlawfully attempted to corner the market in two drugs.43

1. The Forms of Multistate Litigation and Methods of Cooperation

Multistate cases can proceed in either state or federal court, depending upon whether the claim being pursued by the attorneys general arises under state or federal law. Multistate litigation arising under state law actually consists of multiple cases: virtual mirror images of the same com- plaint, adjusted if necessary to account for minor differences in state law, filed in the courts of each state participating in the litigation. In 1999 and 2000, for example, a lawsuit filed by a single state was followed by lawsuits by attorneys general in twenty-seven states accusing Publisher's Clearing House of deceptive trade practices in the advertising and pro- motion of its sweepstakes.44 When Publisher's Clearing House settled most of the litigation in August 2001 for $34 million and a commitment to change its business practices, it was actually settling separate legal actions that had been pressed collectively by the states.45

By way of contrast, when states file an action in federal court pursuant to authorization under federal law, the states are joint plaintiffs signing the same complaint.46 There is, in these cases, a single action proceeding before a single court. The recent antitrust suit by nineteen states and the District of Columbia against Microsoft followed this model.47

Whether filed pursuant to state or federal law, multistate litigation is the product of close cooperation among the attorneys general who are parties to the lawsuit. In the typical multistate case, the offices of the attorneys general participating in the litigation form a working group that includes staff from each office but is led by a designated lead state.48 This group meets regularly by conference call to discuss strategy, share information developed through each state's investigation, and agree on how they will proceed with the case. The attorneys general also share staff and the costs incurred during the litigation, creating, in effect, a temporary law firm dedicated to a single case that has more resources available to it than any individual office could commit to the matter alone.49

An important form of cooperation among state attorneys general in multistate cases is the sharing of discovery, pleadings, and legal memoranda. Collaboration on these matters and materials prevents redundant effort among participating states and facilitates the recruitment of other states to join litigation.50 Moreover, even though each attorney general individually files an action in her state's court, because each action is based on the same or similar legal theories and discovery, the defendant is faced with what amounts to a single large lawsuit by multiple states and is forced to engage and negotiate with the participating states as a group.51 Importantly, each attorney general retains the authority to end her participation in a suit or reject the terms of a settlement offer.

Cooperation among the attorneys general is facilitated by the nature and activities of NAAG, which provides attorneys general with a ready- made infrastructure for pursuing multistate litigation. Historically, NAAG has been a nonpartisan organization coordinating the activities of its member attorneys general through several meetings each year.52 In addition, NAAG facilitates the coordination of multistate cases through the efforts of its working groups, such as the active and successful NAAG Multistate Antitrust Task Force.53 NAAG even administers a fund from which attorneys general can draw to pay for expert witnesses and other litigation related expenses.54

1. What Is New About Multistate Litigation

At its core, multistate litigation is about interstate cooperation. Most multistate cases can rely on conventional legal theories and need not pre- sent any radical challenge to the legal status quo.55 "What is new about these cases is the unprecedented level of cooperation and coordination between the states bringing them."56 When states bring actions in their courts that are mirror images of actions being brought by other states, their collective enforcement powers are dramatically enhanced.57 Multistate actions possess a critical mass, both in terms of resources poured into the case by the prosecuting states and the magnitude of potential sanctions a defendant faces, that forces defendant corporations to respond, usually in terms of a settlement correcting the behavior about which the attorneys general are complaining and a monetary payment.

Cooperating states also extend the geographical reach of their enforcement powers. The attorney general of a small or mid-sized state, if she can afford to bring an action at all against a major corporation, can, at best, affect the behavior of the defendant in her state alone. Once several states band together, a litigation victory effectively imposes the settlement terms on the defendant on a national basis. If a corporation is forced to change its activities in several states, it is likely to do so in every state in which it operates.58

Through interstate cooperation, the enforcement powers of the state attorneys general have become more potent. Where before the influence of attorneys general stopped at the borders of their states, today groups of attorneys general can affect the behavior of corporations nationally. It is this rather sudden magnification of the power of the states through the vehicle of multistate litigation that has led some to criticize multistate litigation as violating principles of federalism and separation of powers.59

### 1NC---DOJ DA

#### **The DOJ is battling gerrymandering but it’s time and resource intensive**

Beitsch, 9-1-2021, Rebecca, "DOJ issues warning to states ahead of redistricting," TheHill, <https://thehill.com/homenews/administration/570385-doj-issues-warning-to-states-ahead-of-redistricting> -- Iowa

The Department of Justice (DOJ) on Wednesday issued a warning to states ahead of a year of congressional mapmaking that it will pursue cases against jurisdictions that seek to dilute the voting power of various minorities.

The latest guidance from the DOJ signals an administration prepared to take a more aggressive approach in battling gerrymandering.

“We're hopeful that this guidance will give jurisdictions the ability to understand their obligations so that they comply with those obligations without any need for additional enforcement by the Department of Justice,” a senior administration official said on a call with reporters.

“But where jurisdictions don't draw maps that fairly enable all citizens, regardless of race or membership in a language minority, to elect the candidates of their choice — the Justice Department will act,” the official said.

The guidance comes as the Census Bureau has completed its decennial population survey, sharing the data states and local governments will use to draw new political boundaries, including congressional and state legislative districts.

This year will be the first round of redistricting since the 2013 Supreme Court decision in Shelby v. Holder, which gutted Section 5 of the Voting Rights Act that gave the DOJ the right to pre-clear maps in states with a history of racial discrimination.

But the department on Wednesday said it would be ready to go after any jurisdiction that doesn’t meet the “one person, one vote” principle.

The guidance sent to government officials Wednesday breaks down the type of cases the department can bring under Section 2 of the law, which prohibits voting practices that discriminate on the basis of race, color or membership in a language minority group.

That includes any redistricting plan that “minimizes or cancels out the voting strength” of various groups — something often achieved by fracturing a minority group across districts or packing them into one district — as well as whether a jurisdiction has a “history of official discrimination.”

The guidance also takes aim at any states that may seek to redistrict based on the number of U.S. citizens in its boundaries, saying the DOJ “will consider whether any efforts to change the apportionment base for a districting plan to a measure other than total population.”

Doing so would diminish the representation of places with a large migrant population and follows a failed effort by the prior Trump administration to include a question on the census that would ask a resident's citizenship status.

Despite the hope from the DOJ that the guidance will help avoid lawsuits, many redistricting maps often spend years in litigation, with lawsuits at times stretching into the next reapportionment cycle.

The official also noted Wednesday that much of the litigation could be spurred by outside groups — including those that may use the 2020 data to challenge existing maps.

The notice to state and local governments also follows a year in which state governments enacted a number of laws that could restrict access to the ballot.

According to a July analysis from the Brennan Center for Justice at New York University School of Law, 18 states have already enacted 30 laws this year that will make it harder for Americans to vote.

Wednesday’s guidance is the third voting-related guidance released by the Biden administration.

In July, the department issued instructions on post-election audits and a flurry of voting laws passed after the 2020 elections, warning states some of their actions may run afoul of the law.

#### Antitrust decks DOJ resources and time

Mcgill and Overly, 19 – Margaret Harding Mcgill and Steven Overly, "Why breaking up Facebook won't be easy," May 27, *POLITICO*, <https://www.politico.com/story/2019/05/27/breaking-up-facebook-antittrust-1446087> -- Iowa

3) Antitrust cases take time and money

The Justice Department’s antitrust lawsuit against AT&T, and its unsuccessful battle to break up Microsoft, were years-long affairs that started under one presidential administration and ended in another. That means whoever wins the White House in 2020 could well be out of office before a potential case against Facebook is decided or settled.

The AT&T case began in 1974 and ended in 1982, after which the government spent another two years implementing an agreement that split up the company into eight smaller entities.

The government spent another decade in the 1990s and early 2000s waging an antitrust war against Microsoft for anti-competitive behavior, arguing that its operating system and internet browser should be separated. But by the time the court approved a settlement in 2002, requiring changes to the company's business practices but leaving Microsoft intact, the penalties did not have much impact, Verveer said.

“Technology will change, business models will change, consumer preferences will change,” he said. “You could end up at the end of a long process with something that frankly doesn't make very much difference because the world has moved on.”

That's one reason some Facebook critics, including former DOJ antitrust official Gene Kimmelman, argue that imposing restrictions on how social media companies use data could be a more effective strategy than breaking them up.

A lengthy lawsuit against Facebook would also consume a lot of resources at the DOJ, which might have to hire outside attorneys and other experts as it did in the Microsoft case. The expense could even require additional appropriations from Congress, Schwartzman said.

“It is a really daunting enterprise,” Schwartzman said. “The likelihood the Justice Department or Federal Trade Commission would be able to undertake such an activity is remote.”

#### **Checking gerrymandering is key to soft power**

Simon, 8-7 – Jim, Trustee at Institute for Public Relations and former Chief Communications Officer @ Nationwide Insurance, “Is America truly exceptional? Can it be?,” <https://www.dispatch.com/story/opinion/columns/guest/2021/08/07/jim-simon-america-truly-exceptional-can-be/5501016001/> -- Iowa

Improving our electoral system to ensure greater inclusion. Eliminating gerrymandering and achieving true campaign finance reform would do more to level the electoral playing field and rejuvenate our democracy than any other developments. We’re in a race against obstructionism in states passing voter suppression laws; the partial antidote to those laws is egalitarian redistricting.

Favor “soft power” as much as military might in world affairs. As autocracies steeped in suppression and unethical behavior, China and Russia cannot match America’s capacity for moral leadership. Using diplomacy to form and support alliances with countries committed to human rights, transparent government, and business ethics, we can reinforce our role as the chief partner in a partnership of nations committed to democracy and freedom. The collective power of many nations can always defeat the power of one or two.

Achieving these initiatives will enhance America’s image as the most resilient nation on earth and as a beacon of freedom and equality for future generations.

That would be an exceptional legacy.

#### **Soft power checks existential catastrophe**

Raji, 19 – Azita, Senior fellow at the Institute of European Studies at the University of California, Berkeley and served as U.S. ambassador to Sweden from 2016 to 2017. “Sense and Indispensability: American Leadership in an Age of Uncertainty,” *Texas National Security* Review, Vol 3, Iss 1 December, 110–117. <https://tnsr.org/2019/12/sense-and-indispensability-american-leadership-in-an-age-of-uncertainty/> -- Iowa

Part-and-parcel of reforming U.S. diplomacy is communicating its necessity and value to Americans who are often skeptical of what taxpayer dollars purchase at the State Department. America seems more willing to fund what it can count. To borrow Mattis’ words, ammunition is easy to quantify, but soft power is not. It is important to help people understand that America’s military forces aren’t based in Europe out of altruism; they are there to keep the peace in a continent that has spawned two world wars that killed tens of millions, including hundreds of thousands of Americans. America isn’t in the United Nations because it likes getting harangued by its adversaries; it is there to push back against their hostile policies, and to help ensure that conflicts get resolved before they flame out of control and become armed conflicts that drag America in.

American primacy in international affairs has allowed the United States to set standards and reach markets in a way that a less engaged nation never could.17 And American consumers have gained enormously from trade, with access to affordable goods undreamt of when Neil Armstrong was taking big steps on the moon. The benefits to average Americans are real. Policymakers need to work harder to communicate these benefits, while not dismissing concerns about trade out of hand.

Finally, out of reform would come renewal. With faith in America’s ideals renewed, the country would have a newfound confidence in supporting those ideals without hypocrisy, using both hard and soft power. U.S. foreign policy works best when American ideals and aspirations are at its core. But the country would also have to stop turning a blind eye to behaviors that contradict its fundamental values. A “transactional” foreign policy leaves America short-changed because autocracies inevitably gain more from it, and rules-based democracies gain less. If American leaders shrug when autocrats murder journalists or repress their own peoples, America’s natural allies are repelled, and by acquiescing to authoritarianism the country helps corrode the international order. Friend or competitor, ally or enemy, the United States must hold other nations to account when they step over the line. This can take the form of quiet diplomacy and arm-twisting behind the scenes, public rebuke and peer pressure, or even bilateral or multilateral sanctions. But the message should be clear: Autocratic regimes cannot enjoy the benefits of the West while taking actions that undermine it.

Perhaps the first goal for an American foreign policy revival would be to try again on international trade accords. The Obama administration began to negotiate the Trans-Pacific Partnership, signed the Paris Climate Agreement, and advocated for the Transatlantic Trade and Investment Partnership, while the Trump administration withdrew the United States from the climate accord and suspended negotiations on the two trade agreements. But all these agreements had real benefits for the United States, from setting the “rules of the game” for global trade before China can do so itself, to tackling the existential threat of climate change, to forming the world’s largest free trade zone with wealthy nations eager to buy American goods. It’s not too late to resurrect all these agreements or negotiate new ones. Doing so would lay the foundation for years of mutually beneficial economic exchange that would do much to lower the chances of great power warfare.

In the past, America has thrown open its doors to refugees, kept the peace in war-wracked regions, stemmed the tide of AIDS in Africa, and kept the light of freedom alive in hopeless corners of the world. After the unbelievable horror of World War II, the United States helped build an international system that has prevented another global catastrophe. It has become the richest country in the world through trade and helped bring unimaginable levels of prosperity to the rest of the globe.

The United States may have hit a rough patch in its history. But for me, it will always be that gutsy country that dared to dream that a person could walk on the moon. A momentary crisis of confidence doesn’t change the fact that America is a positive force for good in the world.

### 1NC---T CWS

#### Expand requires them to change underlying principles of antitrust, not merely clarify versions of the standard.

Hatter 90 (Terry J. Hatter, Jr., Judge, US District Court, California Central, 1990, “In re Eastport Assoc.,” 114 B.R. 686, Lexis)

[\*\*10] Second, Eastport asserts that the presumption against retroactivity does not apply because the amendment was intended only as a clarification of existing law. HN7 Where an amendment to a statute is remedial in nature and merely serves to clarify existing law, no question of retroactivity is involved and the law will be applied to pending cases. City of Redlands v. Sorensen, 176 Cal. App. 3d 202, 211, 221 Cal. Rptr. 728, 732 (1985). The evidence in this case, however, does not support the conclusion that the amendment to section 66452.6(f) was simply a clarification of preexisting law. The Legislative Counsel's Digest specifically states that "the bill would expand the definition of development moratorium." Senate Bill 186, Stats. 1988, ch. 1330, at 3375 (emphasis added). Since the Legislative Counsel is a state official required by law to analyze pending legislation, it is reasonable to presume that the Legislature amended the statute with the intent and meaning expressed in the Counsel's digest. People v. Martinez, 194 Cal. App. 3d 15, 22, 239 Cal. Rptr. 272, 276 (1987). By its ordinary meaning, the term "expand" indicates a change in the law, rather than a restatement of existing [\*\*11] law. In light of the Counsel's comment, Eastport's argument is unpersuasive.

#### The current “scope of antitrust” is economic goals based on consumer welfare--- “anticompetitive practices” are practices that reduce market wide output below the competitive level where prices equal marginal cost

Hovenkamp 20 (Herbert J. Hovenkamp, James G. Dinan University Professor, University of Pennsylvania Carey Law School and The Wharton School. He also has an h-index of 64 and is a Fellow of the American Academy of Arts and Sciences. In 2008 won the Justice Department’s John Sherman Award for his lifetime contributions to antitrust law. In 2012 he served on the ABA’s Committee to advise the President-elect on antitrust matters., 7-20-2020 “Antitrust: What Counts as Consumer Welfare?” <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3196&context=faculty_scholarship>)

The temptation to use antitrust to achieve broader goals is understandable. The broad and brief language of the antitrust laws incorporate an elastic mandate and is directed at the courts. They can become a vehicle for achieving goals through the judicial system that are more difficult to achieve legislatively. By contrast, the consumer welfare principle is a way of limiting the scope of antitrust to a set of economic goals with consumers identified as the principal beneficiaries.

Most descriptions of the consumer welfare principle refer to prices: the goal of the antitrust laws should be to combat monopolistic prices. Articulating the goal in this way raises conceptual problems when we think about suppliers. For example, the antitrust concern with labor is with wage suppression, which means that wages are anticompetitively low. This can collide with a common misperception, which is that low wages invariably produce low consumer prices.

One thing that buyers and sellers have in common, however, is that both are injured by anticompetitive output reductions. Price and output move in opposite directions. While monopoly involves prices that are too high and monopsony (monopoly buying) involves prices that are too low, both require lower output. As a result, when consumer welfare is articulated in terms of output rather than price, it protects both buyers and sellers, including sellers of their labor.

There are other reasons for preferring output rather than price as the primary indicator of consumer welfare. In most markets, firms have more control over output than they do over price. This is most true in competitive markets, although it is less true as markets are more monopolized. A seller in a perfectly competitive market lacks any control over price but usually has full control over output. A corn farmer cannot meaningfully ask “what price should I charge” for this year’s crop. She will charge the market price. While she has the power to charge less, she has no incentive to do so because she can sell all she produces at the market price. The one absolute power she does have, however, is to determine output. The decision whether to plant 1000 acres in corn, 500, 100 acres or even zero is entirely hers and depends only on her capacity to produce.

The consumer welfare principle in antitrust is best understood as pursuing maximum output consistent with sustainable competition. In a competitive market this occurs when prices equal marginal cost. More practically and in real world markets, it tries to define and identify anticompetitive practices as ones that reduce market wide output below the competitive level. Output can go higher than the competitive level, but then at least some prices would have to be below cost. As a result, the definition refers to “sustainable” but competitive levels of output. If output is too high some firms will be losing money and must eventually raise their prices or exit.

Consumer welfare measured as output serves the customer’s interest in low prices and also in markets that produce as wide a variety of goods and services as a competition can offer. It also serves the interest of labor, which is best off when production is highest. Concurrently, it benefits input suppliers and other participants in the market process. For example, if the output of toasters increases, consumers benefit from the lower prices. Labor benefits because more toaster production increases the demand for labor. Retailers, suppliers of electric components, shipping companies, taxing authorities and virtually everyone with a stake in the production of toasters benefits as well.

Antitrust is a microeconomic discipline, concerned with the performance of individual markets rather than the economy as a whole. It is worth noting, however, that a goal of high output in a particular market contributes to a well-functioning overall economy. For example, macroeconomic measures such as GDP are based on the aggregate production of goods and services in the entire economy under consideration. All else being equal, when a particular good or service market experiences larger competitive output the overall economy will benefit as well.8 That issue would almost never be relevant in any particular antitrust case, but it can be important at the legislative or policy level. Increasingly people have observed a link between competition policy – particularly high price-cost margins – and the performance of the economy as a whole.9

What is not included in consumer welfare under the antitrust laws? First, bigness itself is not an antitrust issue unless it leads to reduced output in some market. That is, the consumer welfare principle is consistent with very large firms. It favors economies of scale and scope.10 To be sure, very large firms can injure small firms that have higher costs or lower quality products. The impact of the consumer welfare principle on small firms is complex, however, and requires close analysis of individual cases. While small competitors of a large low cost and high output firm can be injured, many other small firms benefit, including suppliers and retailers. A good illustration is Amazon, which is a very large firm that generally sells at low prices and has maintained high consumer satisfaction.11 Amazon has undoubtedly injured many small firms forced to compete with its prices and distribution. At the same time, however, Amazon acts as broker for millions of small firms who use its retail distribution services.12 When a very large firm produces more, it creates opportunities for other firms that sell complements, that distribute the products that a large firm produces, or that supply it with inputs. So once again it is important not to paint with too broad a brush. Blowing up Amazon could ruin many small businesses.

As for labor and antitrust, that relationship is also complex and has changed over time. During the early years of Sherman Act enforcement organized labor was widely believed to be a source of monopoly. Many of the earliest antitrust criminal prosecutions were directed at labor unions.13 For example, Eugene Debs went to prison in 1895 as a result of a conviction under the Sherman Act.14 Congress came to labor’s rescue during the New Deal, 15 and the result was the development of a complex labor immunity that today reaches even agreements among employers, provided that they are part of the collective bargaining process.16

But years of anti-union activity largely deprived the unions of the economic power and turned the tables. Most of the antitrust concerns about labor today are with anticompetitive practices that suppress wages, not with worker power to extract higher wages.17 Agreements among employers not to hire away one another employees (“anti-poaching” agreements) are unlawful per se.18 Today a fair amount of litigation is directed at overly broad use of labor noncompetition agreements, which are formally vertical but subject to antitrust attack when they are used by many firms in a market to impede worker mobility.19

#### Violation---the plan does not increase the scope of antitrust because it does not increase prohibitions on activity outside of those prohibited under the consumer welfare standard.

#### Voting issue for limits and ground---DA links like business confidence and innovation require broad expansions to have link uniqueness---gives us no ground against affirmatives that target specific companies or make tiny tweaks.

### 1NC---Economy DA

#### Big Tech rising now---contained antitrust key---assumes thumpers.

Rob Lever 8-15. Writer at TechXPlore. Big Tech rolls on as investors shrug off regulatory pressure. No Publication. 8-15-2021. https://techxplore.com/news/2021-08-big-tech-investors-regulatory-pressure.html

Pressure is rising on Big Tech firms, signaling tougher regulation in Washington and elsewhere that could lead to the breakup of the largest platforms. But you'd hardly know by looking at their share prices.

Shares in Apple, Facebook, Amazon and Google parent Alphabet have hovered near record highs in recent weeks, lifted by pandemic-fueled surges in sales and profits that have helped the big firms extend their dominance of key economic sectors.

The Biden administration has given signs of more aggressive regulation with appointments of Big Tech critics at the Federal Trade Commission.

But that has failed to dent the momentum of the largest tech firms, despite tough talk and antitrust litigation in the United States and Europe, with US lawmakers eyeing moves to make antitrust enforcement easier.

Big Tech critics in the United States and the EU want Apple and Google to loosen the grip of their online app marketplaces; more competition in a digital advertising market dominated by Google and Facebook; and better access to Amazon's e-commerce platform by third-party sellers.

One lawsuit tossed out by a judge but in the process of being refiled could force Facebook to spin off its Instagram and WhatsApp platforms, and some activists and lawmakers are pressing for breakups of the four tech giants.

All four have hit market valuations above $1 trillion, with Apple over $2 trillion. Alphabet shares are up some 80 percent from a year ago, with Facebook up nearly 40 percent and Apple almost 30 percent. Amazon shares are roughly on par with last year's level after breaking records in July.

Microsoft, with a $2 trillion valuation, has largely escaped antitrust scrutiny, even as it has benefitted from the cloud computing trend.

The surging growth has stoked complaints that the strongest firms are extending their dominance and squeezing out rivals.

Yet analysts say any aggressive actions, in the legal or legislative arena, could take years to play out and face challenges.

Fast-moving environment

"Breakup is going to be nearly impossible," said analyst Daniel Newman at Futurum Research, citing the need for controversial legislative changes to antitrust laws.

Newman said a more likely outcome would be multibillion-dollar fines that the companies could easily absorb as they adjust their business models to adapt to problematic issues in a fast-moving environment.

"These companies have more resources and know-how than the regulators," he said.

Dan Ives at Wedbush Securities said any antitrust action would likely require legislative change—unlikely with a divided Congress.

"Until investors start to see some consensus **on where the regulatory and law changes go** from an antitrust perspective, it's a contained risk, and they see a green light to buy tech," he said.

#### Independently, causes uncertainty and decks stable market activity---results in staffing inefficiencies and regulatory capture---takes out the case.

Sacher and Yun 18 (Seth B. Sacher, Ph.D. in Economics from the University of Maryland and Senior Economist at the Federal Trade Commission, and John M Yun, PhD in Economics from Emory, Associate Professor of Law at George Mason University, and the Director of Economic Education at the Global Antitrust Institute. Prior to joining the GAI, he was the Acting Deputy Assistant Director in the Bureau of Economics, Antitrust Division, at the U.S. Federal Trade Commission, “Twelve Fallacies of the 'Neo-Antitrust' Movement,” [*George Mason Law Review*, Vol. 26, no. 5, 2019](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3369013) [George Mason Law & Economics Research Paper No. 19-12](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3369013), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3369013>)

VI. FALLACY SIX: NOT RECOGNIZING THAT ABANDONING AN ECONOMIC WELFARE FRAMEWORK AND RELYING MORE ON POPULIST GOALS TO GUIDE ANTITRUST WILL LEAD ANTITRUST TO DEPEND MORE ON RHETORIC AND RULES OF THUMB

Amidst all the criticism of the consumer welfare standard, it may pay to step back and consider some of the advantages of the standard. One is that it is a standard grounded in economic reasoning and microeconomic foundations. Given its basis in economic reasoning, the consumer welfare standard forces antitrust to rely on rigorous models of consumer and firm behavior. Economic models allow practitioners to focus on the most important explanations for particular phenomena. Models enable one to input relevant and available evidence to see the likely consequences. Moreover, models are transparent and result in testable implications. This does not mean that they are always simple to understand or apply. Transparency, however, forces practitioners to be explicit about their assumptions, which allows others to evaluate those assumptions and how they affect the implications of the model.

Additionally, the consumer welfare standard, as an economic standard, relies on scientific reasoning. This merely means that it provides a means for falsifiability and self-correction. By forcing practitioners to be explicit regarding theories and assumptions, the standard facilitates testing those theories and assumptions against real-world experience and data. If the facts do not support the theories, new theories will emerge and then be tested. It is undeniable that, in this light, antitrust has seen and continues to see enormous changes and improvements in its methodologies.1 28

A real danger of unmooring antitrust from an economic approach based on foundational welfare concepts and replacing it with a vague reliance on populist goals is that antitrust will become reliant on rhetoric and various rules of thumb rather than scientific reasoning. Examples of rhetoric and rules of thumb in the neo-antitrust movement are not difficult to locate; this is also true of antitrust decisions before the explicit formalization of the consumer welfare standard. For example, in discussing Amazon's highly effective distribution system, which it allows third-party merchants to use, Professor Khan states:

The conflicts of interest that arise from Amazon both competing with merchants and delivering their wares pose a hazard to competition, particularly in light of Amazon's entrenched position as an online platform. Amazon's conflicts of interest tarnish the neutrality of the competitive process. The thousands of retailers and independent businesses that must ride Amazon's rails to reach market are increasingly dependent on their biggest competitor. 129

There certainly can be a viable anticompetitive theory regarding Amazon's behavior. An example may be that, under certain conditions, Amazon could leverage its power as a selling platform into related markets. Indeed, such a theory is already part of the current antitrust toolkit. To result in a violation, the theory would also require evidence of likely or actual competitive harm. The concern is not that there is no viable theory of harm; rather it is that Khan seems to be convicting Amazon with no such evidence. Her contention involves no discussion of harm to consumers or competition, merely a rhetorical display arguing that the neutrality of the competitive process has somehow been "tarnished." As Professor Timothy Muris and former FTC General Counsel Jonathan Nuechterlein pointed out, such rhetorical flourishes against A&P underlays much of the jurisprudence behind the Robinson-Patman Act, which the vast majority of observers agree has been a particularly misguided area of antitrust. 130

Dangerously, rhetoric and rules of thumb can support almost any position. As with many of the concerns expressed above, this will lead to increased unpredictability in antitrust. Indeed, with sufficiently powerful-sounding rhetoric, antitrust can be led to take positions that contradict its prime mission: to ensure competition is based on the merits. Finally, many of the benefits of relying on economic reasoning in antitrust will be lost, such as forcing practitioners to be explicit regarding their assumptions. Given that rhetoric is more art than science, it is also likely that antitrust will lose much of its transparency and ability to self-correct.

VII. FALLACY SEVEN: NOT RECOGNIZING THAT THEIR PROPOSALS WILL STRAIN COMPETITION AGENCY RESOURCES, INCREASE UNCERTAINTY, AND MAKE THESE AGENCIES MORE POLITICAL AND SUBJECT TO CAPTURE

Most of those that have worked within, or before, the antitrust agencies, despite their inevitable disagreement with certain actions or policies, are generally very impressed with the high degree of skill, professionalism, and dedication exhibited by the career staff.'3 ' As will be discussed more fully in the context of Fallacy XI below, many proponents of neo-antitrust do not accept the proposition that the antitrust agencies and their staffs function relatively well, in spite of the views of many (on all sides of the political spectrum) who have had experience working within or before the antitrust agencies. Regardless of how neo-antitrust proponents view the agencies, many of their proposals run a serious risk of adversely affecting competition agency performance.

There are a number of objective reasons to expect antitrust agencies to function relatively well. First, antitrust agencies tend to be small relative to many other regulatory agencies and bureaucracies in general. 132 Second, their staffs tend to be highly trained professionals, consisting primarily of lawyers and Ph.D. economists.13 3 Third, they have a well-defined objective (i.e., the consumer welfare standard or some similar standard based on economic reasoning, such as the total welfare standard). Finally, although antitrust is considered a form of regulation, it is distinct from other forms of regulation in that it does not involve a continuing relationship between the regulated firms and the regulator. As a goal, antitrust seeks to enable markets to more nearly achieve certain social objectives on their own.' 3 5

First, advocates of neo-antitrust would like to see the responsibilities of the antitrust agencies expanded in a number of ways. This includes more aggressively enforcing existing antitrust laws, as well as the consideration of issues beyond those currently within that purview. 3 6 Further, many of their proposals, such as requiring data sharing, monitoring markets to prevent tipping, or approving platforms' algorithm changes, 3 7 will require significantly more active market supervision than is currently the case. While many proponents of modern antitrust would agree that the antitrust agencies are underfunded,' 8 there is certainly a point at which expanding the antitrust agencies will have "bureaucratic" diseconomies of scale. Fully following the recommendations of neo-antitrust advocates could very well require many antitrust agencies to expand beyond some critical point, which will inevitably lead to significantly larger bureaucracies and associated inefficiencies.

Second, many of the above proposals would require not only more staff, but also staff with differing expertise from that held by most agency lawyers and economists. For example, monitoring data sharing is far from straightforward, as it is frequently unclear where data begins and technology ends. Similarly, considerations of income inequality or environmental questions may involve tradeoffs beyond the expertise of mere law or economics, such as technology, ethics, or even psychology. While staff of the antitrust agencies will frequently contact market participants and other experts with specialized knowledge on an as-needed basis, it is unknown how well such expertise would function within the long-term framing of antitrust, which has been a legal and economic domain since its inception.

Students of bureaucracies consider a visible and measurable output key for quality control in such organizations. 3 9 Currently, the consumer welfare standard provides such a metric.1 40 Abandoning this metric, as advocated by many proponents of the neo-antitrust movement, and replacing it with vague and numerous populist objectives threatens to make the competition agencies more difficult to manage and assess.

For example, some have advocated that the competition agencies adopt a "public interest standard" similar to what is used by the Federal Communications Commission ("FCC") and other agencies.141 However, after ninety years of use, many think the "public interest standard" remains ill-defined. 142 For instance, the FCC's order related to the Comcast-NBCU merger included a number of conditions unrelated to the acquisition, including requirements to increase local news coverage, expand children's programming, broadcast public service announcements, enhance the diversity of programming available to Spanish-speaking viewers, offer discount broadband services to low-income Americans, and provide high-speed broadband to schools, libraries, and underserved communities.1 43 The danger here is that antitrust enforcement becomes less predictable and, consequently, creates uncertainty, which adversely impacts market activity and investments. Further, it also makes the competition agencies more "political" as the stakes of a practice or transaction become higher for both of the parties involved, as well as third parties. Observers have noted that agencies like media regulators tend to be more "political" than antitrust regulators for a number of such reasons. 144

Finally, as noted above, the goal of antitrust enforcement is not to supervise firm or market behavior, but rather to make infrequent interventions so that markets can more nearly achieve certain socially desirable objectives on their own. Other forms of regulation involve a continuing relationship between the firms being regulated and the regulator. The continuing relationship between regulators and the regulated often leads to what is called "regulatory capture." 45 Proposals put forward by the neo-antitrust advocates to expand the objectives and responsibilities of the antitrust agencies would force these agencies into continuing relationships with certain firms and industries and thereby make them more susceptible to many of the phenomena they claim to eschew.

Further, asking competition agencies to consider issues beyond the competitive process and economic welfare can create discontinuities across firms and in the law.14 Thus, expanding antitrust to encompass greater limitations on firm behavior based on considerations such as income inequality, small-business welfare, full employment, or viewpoint diversity can have a different emphasis depending on the political regime in force at a given moment. As a result, firms that have had a merger or other antitrust review may be subject to different restrictions relative to other similarly situated firms that either have not faced agency review or were subject to antitrust restrictions during an administration with differing priorities.

In sum, while the proponents of neo-antitrust do not regard the antitrust agencies as particularly well-functioning now, many of their proposals have the potential to significantly and adversely affect their performance. They would strain resources by requiring involvement in areas that would expand the scale and scope of the agencies, increase uncertainty, and necessarily make agencies more political and subject to capture.

#### Antitrust expansion causes a wave of additional expansions---tanks the economy

Wayne Brough 6-15. Policy Director at R-Street, Technology & Innovation. Washington wants to weaponize antitrust law to attack “Big Tech” and it is going to backfire horribly. R Street. 6-15-2021. https://www.rstreet.org/2021/06/15/washington-wants-to-weaponize-antitrust-law-to-attack-big-tech-and-it-is-going-to-backfire-horribly/

Solutions in Search of a Problem

As with many other regulatory incursions into the digital world, the renewed push for tougher antitrust laws is a solution in search of a problem. Both Republican and Democratic criticisms of Big Tech raise a litany of issues—from an anti-conservative bias to fake news and hate speech—none of which fall within the purview of antitrust law and anticompetitive behavior. Instead, the new regulatory regime under consideration is a punitive and political attack on politically disfavored corporations. Ultimately, that is the larger battle—abandoning the consumer welfare standard and its focus on demonstrable consumer harm in favor of a politicized regime that allows those in Congress greater control over private companies.

And while tech companies may be the exclusive focus of the current reforms, the scope of the proposed legislation could easily be expanded by a future Congress. Even today, many lawmakers are openly hostile toward a growing list of American businesses. Republicans have been vocal in calling for retaliatory measures against “woke” corporations deemed too progressive in their public stances. If policymakers continue to abandon economic principles, it would not be surprising to see calls for additional antitrust enforcement for any company that makes political waves.

Prior to the adoption of the consumer welfare standard almost 50 years ago, antitrust law was often confusing, economically suspect and even contradictory. In one notorious case, the Supreme Court blocked a merger where the merged company would have had a market share of merely 7.5 percent—hardly an example of market dominance. And economists examining antitrust enforcement prior to the consumer welfare standard found no correlation between antitrust enforcement and a reduction in the welfare losses from monopoly. Further research found congressional influence to be a better predictor of enforcement activity.

The consumer welfare standard helped rationalize antitrust enforcement and the case law that has emerged since its adoption has helped curb the political abuse of antitrust policies. Abandoning the need to identify demonstrable consumer harm would return antitrust law to an era characterized by arbitrary enforcement actions that many in today’s Congress seem to have forgotten. But the increased political oversight that comes with adopting more aggressive tools for antitrust enforcement poses a real threat to consumers, to innovation and to economic growth.

Abandoning the American Way in Favor of a European One

The bills introduced in the House can be interpreted as a turn toward a European approach to competition policy. Last year, the EU passed the Digital Markets Act, and the House proposals sound eerily similar. The EU started by defining “gatekeepers,” something similar to the “covered platforms” in the House bills. Restrictions on self-preferencing, interoperability requirements and other elements introduced in the House all have direct counterparts in the EU’s law.

The EU adopted its laws with a clear target in mind—American tech companies that were dominating markets in Europe and outperforming their European rivals. Politically, it made sense to rewrite the rules of the game in favor of homegrown talent. Among other things, this meant the EU could collect billion-dollar fines from American companies, all in the name of “fair competition.”

But the performance of European companies is probably the best reason not to follow the EU’s lead in redefining how we regulate competition. By virtually every measure, U.S. companies have been more innovative, more dynamic and more profitable than their European counterparts. There are more start-ups in the United States and they have greater access to capital. While the United States and the EU have economies of similar magnitudes, in 2019, U.S. startups had a valuation of $1.37 trillion compared to EU startups with an evaluation of $240 billion.

The rise of Silicon Valley is an American success story. Today the top five companies in the United States based on market capitalization are tech companies. They have led the digital revolution, providing consumers a virtually endless stream of new products at low or even zero cost in many cases. These are signs of a robust market that serves consumers well. It is important to remember that big does not equate to bad—sometimes a firm is large because it is efficient at serving its customers what they want. The tech sector supports 12 million jobs and more than $2 trillion in economic output. Current antitrust laws grounded in the consumer welfare standard are part of the institutional framework that make this possible. Congress should ensure antitrust laws fit best into the modern U.S. economy, but the House proposals are a radical departure that shifts the focus to protecting competitors rather than consumers. They would weaponize antitrust law, provide politicians a greater say in America’s boardrooms and replace economic efficiency with political expediency and preference.

#### Wrecks all sectors of the economy---their impact

Daren Bakst and Gabriella Beaumont-Smith 20. Senior Research Fellow in Agricultural Policy in the Thomas A. Roe Institute for Economic Policy Studies, of the Institute for Economic Freedom, The Heritage Foundation. Policy Analyst for Macroeconomics in the Center for Data Analysis, of the Institute for Economic Freedom. A Conservative Guide to the Antitrust and Big Tech Debate. Heritage Foundation. 12-1-2020. https://www.heritage.org/technology/report/conservative-guide-the-antitrust-and-big-tech-debate

The United States should reward success, not punish it. Yet, the “big is bad” mindset is all about punishment. It would move the country to a misguided federal government intervention of “too big to succeed.” This should be rejected. Some of the criticism of Big Tech is reasonable, but it fails to make the case for changing antitrust law. Conservative critics are right to be worried about censorship, but they should not let this worry lead them to use the wrong tool to address their concerns and thereby make bad policy choices.

Increasing the federal government’s control over the economy by using antitrust law to go after the technology sector would be a bad policy choice. Even worse, many of the changes would not merely affect the technology sector, but all sectors of the economy. Policymakers should recognize that antitrust law is perfectly capable of addressing genuine anticompetitive behavior. Conservatives should be the stalwarts of economic freedom and liberty, fighting back against these measures that could undermine Americans’ freedom and prosperity.

## Platforms

### T/L

#### Can’t solve acquisitions – 1AC Loo

Loo ’18 – Associate Professor at BU Law [Rory Van; Associate Professor, Boston University School of Law and Affiliated Fellow, Yale Law School Information Society Project; 2018; "Making Innovation More Competitive: The Case of Fintech"; UCLA Law Review; https://heinonline.org/HOL/Page?handle=hein.journals/uclalr65&div=7&g\_sent=1&casa\_token=&collection=journals; accessed 8-18-2021]

Unlike the other categories of consumer fintechs, advisory fintechs do not need to directly receive any money from consumers to offer their basic product. The goal of Credit Karma, NerdWallet, Mint, and other advisory fintechs is to help people make all of their financial decisions through a single app.4" These companies learn about users-with permission-by accessing personal bank accounts, credit scores, credit card records, tax returns, and other similar sources of financial information. Users then receive recommendations about credit cards or mortgages with lower fees, savings accounts that pay higher rates, and other products that better meet their needs.41

While the term "fintech" is used here to exclude traditional banks, all major financial institutions have become highly technological. The leading banks are each purchasing fintech startups, forming strategic partnerships, or internally building whiz teams to design new products.42 JP Morgan Chase's Intelligent Solutions Group has over 200 analysts and data scientists and produced about fifty technologies in 2015 alone.43 Goldman Sachs, which has more engineers than Facebook or Twitter, is launching an online lender.44 In light of Wall Street's increasing launch of digital products and adoption of artificial intelligence,45 regulating fintech amounts to regulating the future of finance.

#### **Decks big banks – 1AC Loo**

Loo ’18 – Associate Professor at BU Law [Rory Van; Associate Professor, Boston University School of Law and Affiliated Fellow, Yale Law School Information Society Project; 2018; "Making Innovation More Competitive: The Case of Fintech"; UCLA Law Review; https://heinonline.org/HOL/Page?handle=hein.journals/uclalr65&div=7&g\_sent=1&casa\_token=&collection=journals; accessed 8-18-2021]

B. Private Sector Institutional Dynamics

Fintechs could in theory pose a threat to traditional banks. Almost three quarters of millennials say they would prefer to receive their financial services from technology companies such as Google and Amazon, rather than big banks.46 Convenience, trust, and price all could play important roles in driving customer switching. Individual users, including small businesses, increasingly find dealing with big banks to be time-consuming and frustrating compared to the ease of tailored startup apps.47 In recent years, consumers have grown distrustful of large financial institutions, whose reputations have been battered by subprime mortgage lending, the financial crisis, the LIBOR scandal, and Wells Fargo opening millions of fake accounts in customers' names. 48

#### **International competitors are a theoretical concern**

Loo ’18 – Associate Professor at BU Law [Rory Van; Associate Professor, Boston University School of Law and Affiliated Fellow, Yale Law School Information Society Project; 2018; "Making Innovation More Competitive: The Case of Fintech"; UCLA Law Review; https://heinonline.org/HOL/Page?handle=hein.journals/uclalr65&div=7&g\_sent=1&casa\_token=&collection=journals; accessed 8-18-2021]

Second, in the long term, American financial firms may become more vulnerable to international competition even in domestic markets. Although U.S. licenses can shield banks from foreign fintech challengers today, distributed ledger technologies may change this. Americans are already increasingly using Bitcoin, Ethereum, and other unregulated virtual currencies based on blockchain technology.127 Much is unknown about how such technologies will develop, and the trust offered by a governmentally overseen financial system may prove difficult to replicate. 128 If, however, an era of wide-open global finance arrives, U.S. financial institutions could find themselves suddenly exposed to international competition as never before. Without U.S. regulators to insulate them, U.S. financial institutions made soft by lesser competition would be more prone to lose significant market share to foreign financial institutions than they would be if domestic markets were more competitive.

#### Plan decks competition

Robert D. Atkinson and Michael Lind 18. president of the Information Technology and Innovation Foundation. visiting professor at the University of Texas Johnson School of Public Affairs. Commentary: Who Wins After U.S. Antitrust Regulators Attack? China. Fortune. 3-29-2018. https://fortune.com/2018/03/29/commentary-who-wins-after-u-s-antitrust-regulators-attack-china/

Unfortunately, this kind of reverse industrial policy in the name of antitrust continues. In 2016, the Federal Trade Commission required that the semiconductor maker NXP divest its RF (radio frequency) power business as a condition for its $11.8 billion acquisition of U.S.-based Freescale Semiconductor Ltd. While this was done with a focus on the consumer, it opened up the business for acquisition by the Chinese investment company Jianguang Asset Management Co. Ltd., which has financial backing from the Chinese government. Just like that, thanks to an action undertaken by the U.S. government, critical U.S. technology capabilities went to China.

The lesson from this tale of unintended consequences for current antitrust enforcement is clear: It is time to stop ignoring potential adverse consequences of U.S. antitrust policy for America’s international competitiveness. Antitrust policies may be justified in terms of limiting anti-competitive behavior that hurts other firms in the U.S. economy. But when antitrust judgments weaken U.S. firms, allowing foreign firms and nations to free-ride on American R&D in order to catch up with and sometimes eliminate entire U.S. firms and industries, the result is to enrich other countries at America’s expense.

Maintaining American technological primacy in key industries should be a key consideration of U.S. antitrust policy—not just reducing concentration ratios in particular industries. The Justice Department and FTC appear to have little interest or capacity to consider the effects of their actions on U.S. international competitiveness. Going forward, when they decide to take action affecting a leading U.S. innovation-based firm, experts on the broader national interest in maintaining global competitiveness should have a seat at the table.

It is time for antitrust policy regarding firms in advanced technology industries to be carried out in coordination with the Commerce Department. The alternative is to allow antitrust actions, which are supposed to benefit all Americans, to backfire by helping foreign rivals bring American firms and industries down.

### NoKo

#### Their North Korea scenario makes no sense –

#### Their Loo evidence indicates 99% of transactions run through Visa, AmEx, Mastercard, and Discover – that makes it easier for the US to freeze international assets and monitor transactions – if the plan diffuses transactions across a broader range of companies it makes sanctions enforcement more difficult

#### The first half of this card is about imaging technology, not fintech, and the second half concludes North Korea’s non-fintech related sanction evasion tactics are their most lucrative – additionally the plan doesn’t stop North Korea from using ransomware attacks or mining bitcoin which is what this card says they’re doing

1AC Harrell and Rosenberg 19 – Peter E. Harrell is an adjunct senior fellow at the Center for a New American Security; former Deputy Assistant Secretary for Counter Threat Finance and Sanctions at the U.S. State Department. Elizabeth Rosenberg is a senior fellow and director and director of the Energy, Economics, and Security Program at the Center for a New American Security.

Peter E. Harrell and Elizabeth Rosenberg, “Economic Dominance, Financial Technology, and the Future of U.S. Economic Coercion,” *Center for a New American Security*, 2019, pp. 14-15, http://files.cnas.org.s3.amazonaws.com/documents/CNAS-Report-Economic\_Dominance-final.pdf.

\*\*\*IOWA IS YELLOW

Technology

Technological developments have also played an important role in strengthening U.S. coercive economic leverage. New analytic computer technologies have increased the capacity of both U.S. government agencies and private-sector companies to detect and stop suspected sanctions evasion. Surveillance technologies have also improved in recent years, providing government agencies, reporters, and activists with new tools to track evasion. For example, the recent deployment of sophisticated, low-cost global imaging satellites has improved the tracking of North Korean and Iranian ships involved in sanctions evasion.41 The importance of, and—at least to date and in the short term—the relative lack of alternatives for U.S. technologies, particularly for telecommunications or computing, in global supply chains has also increased U.S. coercive economic leverage, as the ZTE case illustrates.

Other technological developments, however, have had an adverse, if limited, impact on U.S. coercive economic measures. A prominent development has been the rise of cryptocurrencies, such as Bitcoin, which many have used to skirt sanctions. North Korea, for example, has used multiple avenues to obtain cryptocurrencies, including cryptocurrency mining, using ransomware attacks and demanding payment in cryptocurrency, and stealing cryptocurrency by hacking into cryptocurrency exchanges.42 Iranian groups have also relied on cryptocurrencies as a way of facilitating illicit activities. This prompted the U.S. Treasury Department in November 2018 for the first time to publicly issue identifying information for specific digital currency addresses (unique strings of alphanumeric digits identified/associated with specific digital currency wallets) in an effort to freeze Iranian cryptocurrency accounts subject to U.S. jurisdiction and to persuade foreign cryptocurrency exchanges to cease dealing with Iran.43 In October 2018, the U.S. Treasury’s Financial Crimes Enforcement Network (FinCEN) also warned about potential Iranian use of cryptocurrencies in an advisory highlighting a range of illicit Iranian financial activities and sanctions evasion tactics.44 To date, however, the adverse impact of these technological developments on U.S. coercive economic measures has been comparatively small. Furthermore, it has generally been on par with those of other types of criminal activity by sanctions evaders, rather than representing a major new threat. For example, North Korea’s cryptocurrency efforts appear to be significantly smaller in value than many other North Korean revenue-raising activities conducted in violation of sanctions, including selling labor overseas and traditional criminal smuggling. The value of Iranian cryptocurrency schemes is estimated to be in the millions, not billions, of dollars.45 Cryptocurrencies are not widely enough accepted by companies around the world for sanctioned actors to use to them to engage in significant commercial trade, such as selling oil or other commodities on global markets, or to make large-scale purchases of key economic inputs. In addition, U.S. authorities have already demonstrated that they can restrict sanctioned actors’ ability to use cryptocurrencies. Following the November 2018 U.S. Treasury action identifying Iran-linked digital currency addresses, several major cryptocurrency exchanges, including non-U.S. exchanges such as Binance, appear to have decided to withdraw from offering services in Iran.46

Technological developments may have the potential to enable meaningful impacts on U.S. coercive economic measures over the longer term, however. Financial technology developments—new digital ways to demarcate, raise, store, and move monetary value—as a factor in the continuing utility of U.S. coercive economic measures will be discussed later in this paper.

#### Tons of alt causes – coal exports, lack of policymaker expertise, lack of information transparency, labor exports, lack of international political will, global data privacy regulations all thump

### 1NC – Sanctions Turn – NoKo

#### Sanctions are ineffective, but they do cause North Korean nuclear strikes against the US

Albert 18 (Eleanor Albert is a senior writer at the Council on Foreign Relations and a PhD student at George Washington University “What to Know About the Sanctions on North Korea” https://www.cfr.org/backgrounder/what-know-about-sanctions-north-korea//TU-SG)

What are the challenges associated with sanctions? Sanctions evasion. The biggest challenge is enforcement, which is the responsibility of individual states. National authorities may have meager financial resources to inspect shipments at ports of entry, carry out complex investigations, and perform other enforcement activities. Some individuals and entities, motivated by financial gain, are willing to do business with North Korea outside the law. Smugglers take advantage of lax inspections at ports in parts of Africa, the Middle East, and Southeast Asia. Black market activities that often go undetected ensure that shipments elude customs scrutiny and official reporting. China, which accounts for 90 percent of North Korea’s trade, may have little or no political motivation to enforce certain sanctions. A February 2017 report [PDF] by UN experts revealed that China was serving as the lead facilitator of black market North Korean trade, and that Chinese companies were allowing North Korean banks to remain connected to the global financial system. Weak measures. Some foreign policy experts say UN sanctions against North Korea tend to be weak because of the compromises required to garner Chinese and Russian backing. Beijing and Moscow, permanent members of the UN Security Council with veto power, fear outcomes associated with regime change in Pyongyang. “[China] wants to send a message to Kim Jong-un that his nuclear program is unacceptable and to punish bad behavior, but it does not want to trigger North Korea’s collapse or turn its neighbor into a permanent enemy,” said the International Crisis Group’s Michael Kovrig. Emboldening Kim. Tougher sanctions could have the opposite of their intended effect and add urgency to North Korea’s nuclear advancement. The young leader has already conducted more missile and nuclear tests since he took power in 2012 than his father and grandfather combined. Kim may interpret more sanctions as a threat to the survival of the North Korean regime, and could motivate him to take more belligerent actions, like moving on South Korean territory or targeting U.S. territory in Guam.

### 1NC – Iran Prolif Turn

#### Effective sanctions cause Kim to sell to Iran

Kazianis 18 — Harry J. Kazianis, Director of Defense Studies at the Center for the National Interest, 6-19-2018, Date Accessed: 10-24-2018, "US Intelligence Officials: North Korea Will Sell Nuclear Tech To Iran" <https://thehill.com/opinion/national-security/392868-us-intelligence-officials-next-fear-north-korea-will-sell-nuclear>

It gets worse. The Kim family has sold multiple classes of missile platforms to Iran. And, now that the Kim family has missiles that can at least range the U.S. homeland, combined with biting sanctions that are damaging the regime's ability to raise vital revenue, Pyongyang might just be desperate enough to sell its best weaponry, even if it were to damage its budding détente with Washington. Another senior intelligence official, also speaking on background, had another assessment: “It will be just a matter of time before North Korea sells this stuff (ICBM technology) to Iran. We need to prepare for this as it might even already have happened. I want to stress I have no proof of that, but what would you do if your nation was being hurt by sanctions and you can cause America and its allies some pain?” There is ample reason to think Iran would indeed love to acquire such technology. If the Iran Nuclear Deal does completely fall apart, or even if Tehran abides by its provisions with willing non-U.S. partners, acquiring such advanced missile technology — which is not prohibited under the terms of the deal — would be a smart strategic move.

#### Nuclear war

**Kroenig 15** (Matthew Kroenig – deputy director for strategy in the Scowcroft Center for Strategy and Security, tenured associate professor of government and foreign service at Georgetown University, MA and PhD in political science from Cal Berkeley. <KEN> “The History of Proliferation Optimism,” Strategic Studies Institute. http://www.jstor.com/stable/resrep12036.6)

Even in a world of MAD, there is a risk of nuclear war. Rational deterrence theory assumes nuclear armed states are governed by rational leaders who would not intentionally launch a suicidal nuclear war. This assumption appears to have applied to past and current nuclear powers, but there is no guarantee that it will continue to hold in the future. For example, Iran’s theocratic government, despite its inflammatory rhetoric, has followed a fairly pragmatic foreign policy since 1979, but it contains leaders who genuinely hold millenarian religious worldviews and who could one day ascend to power and have their finger on the nuclear trigger. We cannot rule out the possibility that, as nuclear weapons continue to spread, some leader will choose to launch a nuclear war, knowing full well that it could result in self-destruction.

### 1NC – NoKo Sales Turn

#### Effective sanctions force North Korea to sell nuclear materials—nuke terror

Eleanor Albert 18, Senior Writer and Editor at the Council on Foreign Relations, 6/6/18, “North Korea’s Military Capabilities,” https://www.cfr.org/backgrounder/north-koreas-military-capabilities

Though sanctions have curtailed North Korea’s access to materials, it is difficult to enforce and regulate all international cargo deliveries. More recently, there has been a greater push to limit North Korean financial resources in a bid to stunt funds directed to military and nuclear advancements. Some experts and officials have condemned China’s earlier assistance to the North’s ballistic missile program, ongoing trade relationship with North Korea, and lackluster enforcement of sanctions.

Separately, North Korea has a record of missile sales and nuclear technology sharing with countries like Iran, Libya, Syria, Egypt, Vietnam, Yemen, United Arab Emirates, and Myanmar. It has secretly transferred “nuclear-related and ballistic-missile-related equipment, know-how, and technology.” Given North Korea’s economic constraints, fears abound that more nuclear material and knowledge could be sold, enhancing the potential for nuclear terrorism.

#### Extinction

**Buis & Arguello 18** (Emiliano J. Buis – a lawyer specializing in international law. He holds a PhD from the University of Buenos Aires (UBA), a Master’s in Human and Social Sciences from the University of Paris/Panthéon-Sorbonne, and a postgraduate diploma in national defense from the National Defense School. Currently he is a professor in international law at UBA, and co-director of the UNICEN Center for Human Rights in Azul. He is also a researcher and professor at the NPSGlobal Foundation. Irma Arguello – founder and chair of the NPSGlobal Foundation, and head of the secretariat of the Latin American and Caribbean Leadership Network. She holds a degree in physics, a Master’s in business administration, and completed graduate studies in defense and security. Arguello previously worked on nuclear projects for the Argentine. <KEN> “The global impacts of a terrorist nuclear attack: What would happen? What should we do?,” February 21, 2018. DOA: 7/7/18. Bulletin of the Atomic Scientists. https://www.tandfonline.com/doi/abs/10.1080/00963402.2018.1436812?journalCode=rbul20)

The consequences of a terrorist nuclear attack Asmallandprimitive1-kilotonfissionbomb(withayield of about one-fifteenth of the one dropped on Hiroshima, and certainly much less sophisticated; cf. Figure 1), detonated in any large capital city of the developed world, would cause an unprecedented catastrophic scenario. An estimate of direct effects in the attack’s location includes a death toll of 7,300-to-23,000 people and 12,600-to-57,000peopleinjured,dependingonthetarget’s geography and population density. Total physical destruction of the city’s infrastructure, due to the blast (shock wave)andthermalradiation,wouldcoveraradiusofabout 500 meters from the point of detonation (also known as ground zero), while ionizing radiation greater than 5 Sieverts – compatible with the deadly acute radiation syndrome – would expand within an 850-meter radius. From the environmental point of view, such an area would be unusable for years. In addition, radioactive fallout would expandinanareaofabout300squarekilometers,depending on meteorological conditions (cf. Figure 2). But the consequences would go far beyond the effects in the target country, however, and promptly propagate worldwide. Global and national security, economy and finance, international governance and its framework, national political systems, and the behavior of governments and individuals would all be put under severe trial. The severity of the effects at a national level, however, would depend on the countries’ level of development, geopolitical location, and resilience. Global security and regional/national defense schemes would be strongly affected. An increase in global distrust would spark rising tensions among countries and blocs, that could even lead to the brink of nuclear weapons use by states (if, for instance, a sponsor country is identified). The consequences of such a shocking scenario would include a decrease in states’ self-control, an escalation of present conflicts and the emergence of new ones, accompanied by an increase in military unilateralism and military expenditures. Regarding the economic and financial impacts, a severe global economic depression would rise from the attack, likely lasting for years. Its duration would be strongly dependent on the course of the crisis. The main results of such a crisis would include a 2 percent fall of growth in global Gross Domestic Product, and a 4 percent decline of international trade in the two years following the attack (cf. Figure 3). In the case of developing and less-developed countries, the economic impacts would also include a shortage of high-technology products such as medicines, as well as a fall in foreign direct investment and a severe decline of international humanitarian aid toward low-income countries. We expect an increase of unemployment and poverty in all countries. Global poverty would raise about 4 percent after the attack, which implies that at least 30 million more people would be living in extreme poverty, in addition to the current estimated 767 million. In the area of international relations, we would expect a breakdown of key doctrines involving politics, security, and relations among states. These international tensions could lead to a collapse of the nuclear order as we know it today, with a consequent setback of nuclear disarmament and nonproliferation commitments. In other words, the whole system based on the Nuclear Non- Proliferation Treaty would be put under severe trial. After the attack, there would be a reassessment of existing security doctrines, and a deep review of concepts such as nuclear deterrence, no-firstuse, proportionality, and negative security assurances.

### 1NC---Impact D

#### War’s not going to break out on the Korean peninsula

Reiter, 5/24/2018—Samuel Candler Dobbs Professor of Political Science at Emory University [Dan, “Should you worry about a U.S. war with North Korea? Not really.”, Washington Post, [https://www.washingtonpost.com/news/monkey-cage/wp/2018/01/11/should-you-worry-about-a-u-s-war-with-north-korea-not-really/?utm\_term=.3b02f7c77a1d]//spencer](https://www.washingtonpost.com/news/monkey-cage/wp/2018/01/11/should-you-worry-about-a-u-s-war-with-north-korea-not-really/?utm_term=.3b02f7c77a1d%5d//spencer)

Many fear a possible war between North Korea and the United States. Mutual threats and hostility — and boasts about button size! — create an extremely dangerous environment, a powder keg just waiting for a stray match to set it off. But there are plenty of reasons not to panic. In a previous Monkey Cage post, Michael C. Horowitz and Elizabeth N. Saunders explain why structural factors like geography and military capabilities help encourage peace. Consider also the historical record, which suggests that preemptive wars rarely happen. Other crises did not escalate into war Though the powder keg image is powerful, in reality very few wars start this way. It’s rare to see a minor incident like a border clash escalating or a preemptive war break out because one side attacks out of fear that the other side is about to attack. About 20 years ago, I wrote that since 1816, preemptive wars have almost never happened. Further, many dangerous international crises — like the Berlin Crisis in 1958-1961 or the October 1962 Cuban missile crisis — did not escalate into preemptive wars. More recently, the 1994 scare over a second Iraqi invasion of Kuwait did not prompt U.S. preemption. Chinese missile tests off the coast of Taiwan in 1996 did not spark war. And Russia’s recent provocative aerial and naval actions against other nations have not frightened the targets of such actions into preemption. Why don’t preemptive wars happen? Simply, preemptive wars just aren’t that tempting. Leaders usually subscribe to Otto von Bismarck’s observation that such wars amount to committing suicide out of fear of death. Why cause the very thing you hope to avoid? Is a preemptive war over North Korea likely? Not really. Strategic theory suggests that if you really think the adversary is about to attack, and you really think there is an advantage to attacking first, then preemptive war becomes more attractive. Happily, neither condition exists between the United States and North Korea. Most importantly, neither side is likely to preempt because neither side really thinks the other will attack first. The U.S.-North Korean relationship is actually far more stable than most people think. Both sides understand that there is a very wide, bright line separating begrudgingly acceptable behavior from truly unacceptable behavior — the type of actions that might justify escalation to war: Acceptable (if undesirable): North Korean missile and nuclear tests, U.S.-South Korean war games, espionage, minor military actions against South Korea, limited naval clashes, tourist abuse, cyberattacks, belligerent rhetoric and economic sanctions. Unacceptable: U.S. airstrikes on or invasion of North Korea, or North Korean missile attacks on South Korea, Japan or any U.S. territory. Each side knows that as long as it stays on the acceptable side of the line, the other will be unmotivated to take the hugely costly step of launching a war. One side might preempt if it thought the other side was about to take an unacceptable action. However, each side knows that the unacceptable options remain unappealing to the other side, reducing motives to preempt. For instance, the United States considered attacking nascent North Korean nuclear facilities in 1994, an unacceptable action, but concluded that such actions would be hugely costly. These options are far less attractive today, as North Korea likely has dozens of concealed nuclear weapons. For North Korea, unacceptable actions like attacks on South Korea, Japan or America don’t offer much in the way of benefits. Those attacks won’t begin to scratch American military power, won’t allow them to conquer South Korea and of course would invite massive retaliation that would destroy the regime of Kim Jong Un. The madness of Kim and Trump? But some might counter that these rational calculations don’t apply to Supreme Leader Kim and President Trump. This line of argument sees North Korea as a rogue regime led by a man with an itchy trigger finger, easily panicked into attacking out of fear. Conversely, Trump may appear eager to seize an opportunity to demonstrate his dominance. But what does the historical record suggest? North Korea is a harsh and well-armed regime. But it is predictable and rational, including under Kim Jong Un. North Korea certainly makes frightening threats, but its actions remain in the acceptable category. For 64 years, it has not attacked its neighbors, minor clashes aside. And Trump, his bluster notwithstanding, does not act like a gunslinger. One year into his presidency the only major U.S. use of force was the one-off missile attack against Syria in April 2017. North Korea, the United States and South Korea are actually pretty good at preventing miscalculation Could low-level provocations escalate to war? The bad news is that potentially spiraling incidents happen frequently on the Korean Peninsula, such as the December 2017 defection of a North Korean soldier leading to gunfire across the demilitarized zone. The good news is that these events happen so often that both sides are very practiced at avoiding escalation. A Congressional Research Service report listed 163 provocative actions North Korea took from 1958 to 2007, including sinking South Korean ships and assassination attempts on the South Korean president. None of these incidents escalated to a broader shooting war. The escalation risk decreased further this month when North Korea reopened a hotline with South Korea designed to facilitate communication and prevent minor events from escalating. In October, Secretary of State Rex Tillerson revealed that Washington has a number of direct channels of communication with Pyongyang. Conversely, the United States routinely takes provocative actions against North Korea that do not spark war. War games in South Korea involving thousands of U.S. troops are routine. Twice last year, American bombers flew over North Korea itself.

## Conduct

### Turn

#### Foster and Arnold goes neg –

#### The plan deprives companies of the data necessary for AI innovation

Foster and Arnold, May 2020 – Visiting Researcher at the Center for Security and Emerging Technology and Research Fellow at Georgetown’s Center for Security and Emerging Technology (CSET), where he focuses on AI investment flows and workforce trends [Dakota and Zachary, “Antitrust and Artificial Intelligence: How Breaking Up Big Tech Could Affect the Pentagon’s Access to AI” Center for Security and Emerging Technology (CSET), [https://cset.georgetown.edu/wp-content/uploads/CSET-Antitrust-and-Artificial-Intelligence.pdf]//spen](https://cset.georgetown.edu/wp-content/uploads/CSET-Antitrust-and-Artificial-Intelligence.pdf%5d/spen)cer

Data is a core ingredient in AI development, especially for AI algorithms using machine learning approaches (such as neural networks). Currently, in order to build machine learning models that successfully identify patterns, AI researchers need large volumes of data.37 Models trained on larger datasets are more accurate,38 advantaging big firms with more data and users.39 Breaking up these companies would diffuse large datasets, potentially slowing or preventing AI advances that could benefit the Pentagon. Even though datasets amassed by commercial companies may not always have immediate use for the Defense Department, we expect that most of Big Tech’s data can directly or indirectly support innovation relevant to the Pentagon.40

#### The DoD either can’t or won’t contract with small firms – even if they do produce innovative technology it can’t be utilized by the military

Foster and Arnold, May 2020 – Visiting Researcher at the Center for Security and Emerging Technology and Research Fellow at Georgetown’s Center for Security and Emerging Technology (CSET), where he focuses on AI investment flows and workforce trends [Dakota and Zachary, “Antitrust and Artificial Intelligence: How Breaking Up Big Tech Could Affect the Pentagon’s Access to AI” Center for Security and Emerging Technology (CSET), [https://cset.georgetown.edu/wp-content/uploads/CSET-Antitrust-and-Artificial-Intelligence.pdf]//spen](https://cset.georgetown.edu/wp-content/uploads/CSET-Antitrust-and-Artificial-Intelligence.pdf%5d/spen)cer

Contracting with the Pentagon is difficult, expensive, and time-consuming. Smaller AI firms may be less able to navigate the federal procurement process, effectively preventing the Pentagon from accessing their technology. The few DOD programs that do partner with smaller firms are under scrutiny for their efficacy. The high barriers of entry, coupled with an unstable budgetary environment and the high certification costs of federal contracting, favor larger companies.148 Simply put, large firms have more resources and deeper institutional knowledge to bring to the federal contracting process. A number of programs encourage the Pentagon to partner with smaller firms, bypassing traditional obstacles. While the component pieces of large tech firms (Google Search, YouTube, AWS, and so on) would not qualify for these programs, niche AI firms focused on productization and Pentagon-specific AI applications could be eligible. The SBIR and STTR programs help fund new technologies developed by small businesses,149 and OTAs (Other Transaction Authorities) incentivize work with smaller vendors. These newer approaches to federal contracting—with their faster timelines and increased flexibility—suit technology products. Yet in spite of their promise and expansion,150 these programs have yielded mixed results; they would not be feasible options for major AI contracts like JEDI. Five recent audits found the Pentagon does not prioritize small business contracting.151 Other investigations concluded that these “small business” initiatives have disproportionately benefited large companies, channeling contracts to traditional vendors.152 In the long term, the extent to which the Pentagon invests in small businesses and how well existing programs facilitate that relationship remains unclear.

# 2NC

## States

#### Uniformity deficit is backwards---only the CP solves it.

Roach 94 (Robert F. Roach, at the time of writing was an Assistant Attorney General, Section Chief, Antitrust Bureau, New York Attorney General's Office with a J.D. from the Georgetown University Law Center, 1978, “Bank Mergers and the Antitrust Laws: The Case For Dual State And Federal Enforcement,” 36 *Wm. & Mary L. Rev*. 95 (1994), <https://scholarship.law.wm.edu/wmlr/vol36/iss1/3>)

2. State Antitrust Enforcement and Federalism

American federalism embodies more than a redundant system of state and federal law enforcement.95 It involves a system of vertical checks and balances between state and federal government that is as vital to our political system as the horizontal system of checks and balances between the three branches of the federal government. 6 Commentators have noted that the federal government cannot be relied upon to uniformly enforce antitrust laws.97 Over time, federal antitrust enforcement swings between generally liberal and generally conservative policies, depending largely upon the economic philosophy of the White House. These enforcement swings are obvious even when comparing the antitrust enforcement activities of the two recent Republican administrations of Reagan and Bush.9 Moreover, at any given time, the federal government may not be capable of enforcing antitrust laws evenly throughout the states.00 Active, competent state enforcement of antitrust laws fulfills a vital role within the federal system of ensuring the uniform application of the law over time and place. 1

Congress has recognized the need to supplement federal antitrust enforcement. It adopted the private right of action embodied in section 16 of the Clayton Act in large part because of its dissatisfaction with the results of early merger enforcement activities of the federal government under the Sherman Act."2 The funding of state antitrust enforcement by Congress, along with other cooperative federal-state efforts, also reflects the need for state antitrust enforcement as an integral part of the federal system. 1o3

#### Hahn and Farrar conclude that the solution is global antitrust regulations---the plan doesn’t solve that

Hahn and Farrar 02—Robert W. Hahn, Director of the American Enterprise Institute-Brookings Joint Center for Regulatory Studies, and Resident Scholar at the American Enterprise Institute, Anne Layne-Farrar, Senior Consultant with NERA Economic Consulting (“Federalism in Antitrust,” *AEI-Brookings Joint Center for Regulatory Studies*, September 2002, Working Paper 02-9, Revised for *Harvard Journal of Law & Public Policy*, Summer 2003, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=819184)

C. Conflicting Jurisdictional Approaches

As discussed earlier, state involvement in national antitrust enforcement can lead to a jumble of laws for businesses to navigate. With multinational corporations obliged to notify twenty or thirty jurisdictions of merger plans, the jumble of laws can be equally troublesome at the global level as well. 154 This increases uncertainty and costs for businesses and may prevent them from engaging in potentially welfare-enhancing activities such as mergers.155

The solution to this problem would be a uniform set of regulations, but defining global antitrust guidelines that countries could agree upon is a very difficult task. Different countries have different antitrust regulations. Even the United States and Europe, which have cooperated for years on competition policy, have major differences in their theoretical approaches to enforcement. 15 7 Add in Australia, Canada, Japan, and other countries-ninety or so currently have some form of competition laws-and one observes almost as many methods of addressing competition regulation as there are countries.158

#### Cartel model---the federal government lets states enforce nationwide antitrust

Greve 5 (Michael S. Greve, John G. Searle Scholar, American Enterprise Institute; Ph.D. 1987, Cornell University, 2005, “Cartel Federalism? Antitrust Enforcement by State Attorneys General,” *University of Chicago Law Review*: Vol. 72 : Iss. 1, Article 6, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5317&context=uclrev)

Largely in connection with the Microsoft litigation, the antitrust enforcement authority of state attorneys general, in their parens patriae capacity, has generated acrimonious debate.' Perhaps the only point of genuine agreement is the complaint over the lack of reliable empirical evidence on state antitrust enforcement. This Essay attempts to make a modest contribution to the data front and a more ambitious and provocative contribution to the theoretical debate. I present and examine two sets of data:

\* A list of state parens patriae antitrust actions, compiled and kindly made available to me by Judge Richard Posner.4 I combined and cross-checked these cases with parens patriae cases extracted from a similar list of state antitrust cases for the 1993-2002 period, compiled by different means by Michael DeBow.5 So amended, the list (hereinafter, "the PosnerDeBow list") comprises 103 parens patriae actions.

\* Sixty-eight antitrust cases, dating back to 1977, in which states submitted eighty-four briefs amici curiae. (In four cases, different states submitted briefs on either side; in the remaining cases, states submitted briefs at different stages of the litigation.) Robert Hubbard kindly supplied this list;' I have added some briefs from a website and a few obviously "missed" Supreme Court cases.

While these sets of data are still incomplete and, perhaps, unrepresentative, they are at least somewhat more comprehensive than the preceding efforts on which they build. They confirm earlier findings about state antitrust enforcement in two respects: the extraordinary extent of state consensus and cooperation on antitrust matters (coordinated, since 1983, through the National Association of Attorneys General (NAAG) Antitrust Task Force);9 and a pattern of limited, somewhat parochial, state enforcement," interspersed by dramatic and increasingly frequent multistate interventions in high-stakes national antitrust proceedings."

To my mind the most intriguing aspect of the data, however, and the principal subject of this Essay, is not what state attorneys general have done but what they have failed to do. In antitrust federalism's "horizontal," state-to-state dimension,2 attorneys general have almost never invoked antitrust laws to challenge sister states' anticompetitive conduct. In federalism's "vertical," state-to-federal dimension, state attorneys general have consistently advocated a partial surrender of state regulatory autonomy.

Horizontal Antitrust Federalism. Some critics -prominently, Judge Posner-have argued that state enforcers may deploy antitrust law for strategic and parochial purposes, as a means to protect domestic producers and to exploit consumers and producers in other jurisdictions.'3 They may do so either by deploying antitrust law as a sword against out-of-state producers or as a shield for domestic producers (for example, by granting exemptions for export cartels). Either way, one would expect the victimized states to resist the imposition.

But they don't. Consider Parker v Brown," origin of the eponymous Parker or "state action" immunity doctrine, which shields certain anticompetitive state laws and their private beneficiaries against liability under federal antitrust laws. California had established an export cartel par excellence, which supplied some 95 percent of the entire U.S. raisin market and earned virtually its entire surplus profit outside California. And yet, no state protested the imposition in an amicus capacity. (It was the federal government that advocated limits on state cartels with pronounced extraterritorial effects.)5 The Parker example illustrates a general pattern: the evidence shows no clear instance of state resistance to exploitation by other states.

Vertical Antitrust Federalism. As a practical matter, both state and federal antitrust enforcers are constitutionally unconstrained with respect to the scope of their jurisdiction. Each may regulate the full range of private conduct that arguably has price effects within their jurisdictions. Consequently, one would expect rivalry, conflict, and turf protection. But while such federal-state disagreements occurred under the Reagan administration," the general pattern is mutual accommodation. The states have supported both broad federal antitrust authority over purely local transactions and a very narrow view of state action immunity. Conversely, federal agencies have consistently tolerated and sometimes supported state antitrust enforcement, even at considerable cost to national priorities.

These findings are orthogonal to ordinary intuitions about (antitrust) federalism. This Essay explains them as the products of an antitrust enforcement cartel built on extraterritorial exploitation: state governments agree to exploit each other's citizens because that leaves all governments better off (and consumers worse off). The model explains both the extraordinary antitrust consensus among the states and some of their otherwise perplexing legal positions on antitrust federalism. An extension of the model interprets the federal government's accommodation of the states as part of a two-way bargain: states support the federal government's quest for a highly restrictive scope of state action immunity in exchange for federal accommodation of aggressive, extraterritorial state antitrust enforcement. Conversely, the federal government supports state enforcement (even at some cost to coherent national policy) in order to gain state acquiescence to federal enforcement against state-sanctioned cartels. The Conclusion notes the limitations and some implications of this analysis.

#### The Court will side with states, even when there’s direct conflict with federal law

Daniel J. Gifford 95, Robins, Kaplan, Miller & Ciresi Professor of Law at the University of Minnesota Law School, “Antitrust in the Twenty-First Century: Article: The Jurisprudence of Antitrust”, SMU Law Review, 48 SMU L. Rev. 1677, July-August 1995, Lexis

C. The Role of State Attorneys General and State AntitrustLaw

In addition to their role as official enforcers of state antitrust law, the attorneys general of the several states have, as a group, become increasingly active in filing federal antitrust lawsuits. In so doing, the state attorneys general sometimes act cooperatively, joining together as plaintiffs in the same lawsuit. A professional association of the state attorneys general, the National Association of Attorneys General (NAAG), issues sets of antitrust guidelines which over the years have interpreted federal antitrust law somewhat differently from the Justice Department. The antitrust agenda of the federal courts thus reflects both the haphazard influence of privately-instituted actions and the more studied separate agendas of the state attorneys general in addition to the input of the Justice Department. According to one source, the NAAG guidelines played a significant role in the decisions of state attorneys general to bring suit in the Clozapine, Mitsubishi, Panasonic, and American Stores cases.

The state attorneys general often take policy positions different from those of the federal enforcement authorities. State attorneys general have commenced antitrust lawsuits which the federal enforcement authorities have considered and declined to institute. Although the Justice Department and the state attorneys general have developed working and cooperative relationships, it remains true that state attorneys general con- [\*1695] tinue to assert policy positions which differ from those asserted by the federal authorities.

California v. American Stores Co. illustrates the inconsistent policies permeating official enforcement efforts. Enforcement decisions within the federal government are allocated to both the Department of Justice and the FTC. These two agencies, however, have generally worked out an allocation of effort between them, the Justice Department accepting responsibility for certain industries and the FTC accepting that responsibility for others. The state attorneys general, however, constitute another and sometimes inconsistent source of decisionmaking. In the cited case, the FTC reached a settlement with American Stores on a proposed merger. The day following the FTC's final approval of the merger on the basis of that settlement, the state of California brought suit, seeking to enjoin the merger as a violation of federal antitrust law. California was initially successful, obtaining a preliminary injunction against the merger. Although the Ninth Circuit first took the view that injunctive relief was not available in a private action, the Supreme Court ruled otherwise. This ruling vastly expands the potential of private antitrust actions to restructure the marketplace and diminishes pro tanto the role of the federal antitrust authorities in antitrust policymaking. This ruling also provides a major new tool to the state attorneys general as they seek to implement competing policy agendas. In 1992 the State of Minnesota brought suit to block a healthcare merger which had previously been cleared by the Justice Department, forcing the merger participants to accept a consent order. State attorneys general are also more apt to bring suit on vertical price-fixing charges than is the Justice Department.

In addition to the different policy positions on federal antitrust law manifested in the litigating activities of the federal enforcement agencies on one hand and of the state attorneys general on the other, the coherence and integrity of federal antitrust policy is also vulnerable to the antitrust legislation of the states. Most states have enacted an antitrust law, generally on the federal model. During the period when federal antitrust [\*1696] law was used largely to reinforce competitive-market behavior as a normative construct, state antitrust law tended to add additional reinforcement. In recent years, however, the potential for conflict between federal and state antitrust laws has increased.

The transformations of federal antitrust law have had repercussions upon state law. Minnesota, for example, enacted an antitrust law in 1971 which was designed largely to codify the contemporary federal antitrust caselaw. As a result, the provisions of the Minnesota law conflict to a significant degree with the current federal antitrust caselaw which has since undergone a radical transformation. The extent to which state antitrust legislation is vulnerable to federal preemption is unclear, but the Supreme Court has signaled a wide tolerance for inconsistent state legislation in cases involving procedural differences. The Court has expressed broad acceptance of state antitrust laws permitting recoveries which would not be available under federal law. States, for example, are free to enact legislation granting standing under their own antitrust laws to "indirect purchasers" to recover damages for overcharges by their ultimate supplier resulting from monopolistic or cartel-like behavior, even though indirect purchasers have been denied standing under federal antitrust law for reasons of federal antitrust policy. Moreover, defendants can be subjected to liability to indirect purchasers in antitrust counts under state law that are joined with antitrust counts under federal law and are pursued in federal court actions to which both direct and indirect purchasers are parties.

Federal and state antitrust laws potentially diverge on noncompensatory damages. Federal antitrust law specifies that actual damages will be trebled. When the issue arose, however, as to whether punitive damages in unlimited amounts can be assessed under state law for antitrust offenses, the Supreme Court answered in the affirmative. Punitive damages can be assessed in antitrust actions brought in federal court in which counts under both federal and state law are joined. Certainly the Court's recent remedial decisions enhance the status and power of state antitrust laws. They suggest (but as yet inconclusively) that state law may redefine restrictively the areas of substantive behavior which are permitted to business entities under the federal law. [\*1697]

#### The CP is core topic education and is empirically included in antitrust debates.

Robert L. Hubbard 5, Director of Litigation at the Antitrust Bureau of the New York Attorney General's Office, and James Yoon, Assistant Attorney General in the Antitrust Bureau of the New York Attorney General's Office, “How The Antitrust Modernization Commission Should View State Antitrust Enforcement”, Loyola Consumer Law Review, 17 Loy. Consumer L. Rev. 497, Lexis

I. Introduction

State antitrust enforcement, long the subject of spirited debate between its critics and supporters, is now a topic for study by the [\*498] Antitrust Modernization Commission (the "Commission" or "AMC"). The Commission's work, the most recent formal federal review of the antitrust law, may culminate in recommendations concerning state antitrust enforcement.

This article unabashedly argues that the Commission should conclude that state antitrust enforcement has benefited consumers; furthered competition throughout the economy including among antitrust enforcers; contributed significantly to antitrust jurisprudence; and helped make our economic system the envy of the world. Part II discusses how state enforcement has emerged as a topic for consideration by the Commission. Part III defines the role and sets the context of state antitrust enforcement, emphasizing what state antitrust enforcers do. Part IV responds to two major themes of the critics of state antitrust enforcement: first, the political context of the actions taken by state attorneys general merits praise, not criticism; second, states have significantly added to antitrust jurisprudence, both theoretically and practically, as is illustrated by how states have investigated, litigated, and resolved antitrust matters, large and small. Finally, this article discusses how state enforcement has enhanced consumer choice and fostered competition among antitrust enforcers.

II. The Commission and State Antitrust Enforcement

The legislation establishing the Commission does not specify what topics should be covered and does not mention state enforcement. Yet, the legislation's sponsor, Representative F. James Sensenbrenner, prominently mentioned state enforcement in his initial press release about the legislation as one of only three topics within the antitrust laws that merited study. Representative [\*499] Sensenbrenner's comments about states at the Commission's first public meeting were more elaborate. He lengthened his list of topics and characterized state enforcers as "vital," while worrying about "divergent and sometimes inconsistent antitrust standards." State attorneys general recognized that the Commission would likely study state enforcement, by expressing concern that no one nominated to be a Commissioner has state enforcement experience.

As expected, state antitrust enforcement was raised in response to the Commission's broad-based request for suggested topics. An antitrust advocacy group, the American Antitrust Institute, suggested that the Commission probe how state enforcement can be made more effective. The Cato Institute, a non-profit public policy research foundation based in Washington, D.C., suggested that state enforcers be stripped of their parens patriae authority. In a letter to the Commission, Senators Mike DeWine, Chairman, and Herbert Kohl, Ranking Member, of the Senate Subcommittee on Antitrust, [\*500] Competition Policy and Consumer Rights stated that "an examination of the proper role of states in enforcing antitrust law would be an important topic for study."

#### Expansive state antitrust legislation is being pursued---proves it’s a relevant debate that antitrust experts are considering.

Gidley et al. 6-11-21 ([J. Mark Gidley](https://www.whitecase.com/people/j-mark-gidley), former ~~Emory~~ [**Kansas** debater and NDT winner](https://nationaldebatetournament.org/history/winners/) (apologies to Dr. Scott Harris and the Gidleys for our temerity) with J.D. from Columbia, [George L. Paul](https://www.whitecase.com/people/george-l-paul), J.D. from Harvard, [Rebecca Farrington](https://www.whitecase.com/people/rebecca-farrington), J.D. from Berkeley, [Martin M. Toto](https://www.whitecase.com/people/martin-m-toto), J.D. from NYU, [Kathryn Jordan Mims](https://www.whitecase.com/people/kathryn-jordan-mims), J.D. from the University of Virginia, [Michael Hamburger](https://www.whitecase.com/people/michael-hamburger), J.D. from Fordham, all of whom are partners at the international law firm White & Case. [Daniel J. Rosenthal](https://www.whitecase.com/people/daniel-rosenthal), J.D. from the University of Virginia, [Adam M. Acosta](https://www.whitecase.com/people/adam-acosta), J.D. from Howard, [Jaclyn Phillips](https://www.whitecase.com/people/jaclyn-phillips), J.D. from Georgetown, all of whom are associates at White & Case, 6-11-21, “"New York’s Sweeping New Antitrust Bill—Requiring NY State Premerger Notification ($9.2M Filing Threshold) and Prohibiting “Abuse of Dominance”—Inches Closer to Becoming Law,"” White and Case, https://www.whitecase.com/publications/alert/new-yorks-sweeping-new-antitrust-bill-requiring-ny-state-premerger-notification)

While Congress has been the epicenter of an ongoing antitrust debate—with US legislators on both sides of the aisle urging vast reforms—the New York State legislature is pursuing a state bill that would arguably ensnare more conduct and transactions in antitrust law’s web than anything proposed, or existing, at the federal level to date.

The New York Senate Bill, known as the “Twenty-First Century Anti-Trust Act,” would expand New York’s antitrust laws by establishing first-of-its-kind US state premerger notification requirements for mergers with as low as a $9.2 million threshold in New York, prohibiting “abuse of dominance” by companies with market shares as low as 30%, authorizing private class actions, and raising criminal penalties.

On June 7, 2021, the New York State Senate passed the legislation, indicating momentum is growing towards passage. If the Bill becomes law, companies doing business or buying business in New York1will navigate a more demanding state-law regime in addition to abiding by federal law.

Background: “Big Tech” concerns are catalyst for broad state law antitrust reform

A mere week after a US House of Representatives committee held a hearing with executives of several tech companies in July 2020, New York State Senator Mike Gianaris introduced the first version of what is now New York Senate Bill S933A. The original New York Bill sat in the New York State Senate, but on January 6, 2021, Senator Gianaris reintroduced the Bill with revisions. Echoing the separate legislations proposed by US Senators Klobuchar and Hawley, the Bill proposes to modify New York’s State antitrust act, the “Donnelly Act,” to broaden and enhance New York state antitrust prohibitions. This time, the Bill has found momentum: On Monday, June 7, 2021, the Bill cleared its first major legislative hurdle when the New York State Senate passed the Bill by a 43-20 vote along party lines.2

The Bill applies to all industries. But similar to the several antitrust reform bills proposed at the federal level, concerns about purported anticompetitive behavior in the “Big Tech” sector were the spark. According to the Sponsor Memorandum accompanying the Bill, the purpose of the Bill is to address the concern that “[p]owerful corporations, particularly in Big Tech, have engaged in practices such as temporary price reduction with the purpose of forcing competitors to sell their business to them,” and that “[u]nilateral actions that seek to create a monopoly” should be unlawful in New York.3 State Senator Gianaris explained: “[o]ur laws on antitrust in New York are a century old and they were built for a completely different economy,” and “[m]uch of the problem today in the 21st century is unilateral action by some of these behemoth tech companies and this bill would allow, for the first time, New York to engage in antitrust enforcement for unilateral action.”4

The Bill proposes several fundamental changes to New York antitrust law

The current version of the Twenty-First Century Anti-Trust Act would drastically change the antitrust landscape in New York. The Bill would most notably change New York’s antitrust-law in four main ways:

New York would have first-of-its-kind State premerger notification requirements in the US – with a $9.2M filing threshold

If passed into law, the Bill would create a premerger notification requirement for transactions meeting certain criteria provided that the parties have a qualifying presence in New York.5 At the federal level, the Hart-Scott-Rodino Act (“HSR Act”) requires parties to notify the Federal Trade Commission and the Antitrust Division of the US Department of Justice of certain mergers or acquisitions and to observe a waiting period before consummating the transaction.

Only 2 US states have any form of premerger notification, and they are limited. Although Connecticut and Washington have pre-merger notification statutes, these specifically target only healthcare mergers.

But if passed, the Bill would be the first to have a generalized state premerger reporting statute. The proposed New York Bill is not industry specific.6 If passed, the Bill would create separate, generally applicable state premerger notification requirement.

Nexus to New York, filing thresholds – only $9.2M. This new requirement appears modelled on the HSR Act, but has much lower thresholds that would obligate an acquirer to file a notification with the N.Y. Attorney General for many transaction valued at more than $9.2 million if either the acquiring or acquired person has assets or annual net sales in New York in excess of $9.2 million.7 The thresholds are listed as a percentage of certain federal HSR thresholds, which are adjusted annually based on gross national product.

This means that if the Bill is enacted into law, any business in the world that holds more than $9.2 million of assets or has more than $9.2 million of “net annual sales” in New York State—regardless of where headquartered or incorporated—would have to check virtually every transaction for a potential New York State premerger filing.

While the Bill excludes certain transactions from its requirements8 and authorizes the NY Attorney General to issue rules to implement the Bill’s premerger requirement and to exempt transactions not likely to violate the statute, the $9.2 million threshold in the Bill is substantially lower than the current $92 million size-of-the-transaction test for reportability under the federal HSR Act.9 As such, transactions that fall well below the reporting threshold under the federal HSR Act and with seemingly little nexus to New York may still be reportable to the NY Attorney General under the Bill.

60-day notice period for closing (longer than the 30-day HSR period). Moreover, if passed, the Bill presents new timing considerations for parties negotiating reportable transactions. Under the HSR Act, once filings are submitted, there is an initial 30-day waiting period during which the parties can neither close nor take steps to implement control over the other company’s business. The waiting period is 15 calendar days for cash tender offers and acquisitions of assets out of Chapter 11 proceedings.

The Bill, on the other hand, would require notification to be made 60 days prior to closing the acquisition, including for transactions that are also HSR reportable, (although unlike under the HSR Act, the Bill provides no additional waiting period to bar the parties from closing during the pendency of an investigation, should the New York Attorney General open one).10 So for certain acquisitions subject to the HSR Act notification requirements as well as the Bill’s proposed notification, a transaction may be able to close after 30 days under the HSR Act but would need to wait 60 days under the Bill.

This could have severe timing consequences for transactions. For example, parties to a $10 million deal with absolutely no competitive overlap could still be forced to wait 60 days to close.

Penalty for non-reporting. The penalty for noncompliance with the premerger notification obligations of the Bill is $10,000 per day.11

Whether there may be any arguments that the premerger notification requirement in the Bill is in conflict with—and therefore preempted by—the HSR Act is yet to be seen, and will likely turn on the various rules and regulations New York State will have to promulgate to implement this section. But the Connecticut and Washington notification requirements, though notably more limited, are alive and well.

Finally, when considering whether to approve a merger, the Bill would require the NY Attorney General to specifically take into account a merger’s potential effects on labor markets.12

New York would prohibit “abuse of dominance”—a standard that would apply to firms with low market shares—as well as prohibiting monopolization (as under current federal law

New York’s antitrust law, (the Donnelly Act), currently prohibits only antitrust conspiracies, making unlawful only a “contract, agreement, arrangement or combination” in restraint of trade.13 Thus, New York’s antitrust law currently aligns with Section 1 of the Sherman Act (which prohibits anticompetitive agreements), but has no parallel provision for Sherman Act Section 2 (which prohibits monopolization). The proposed Bill, however, seeks to amend the Donnelly Act law to add a new Subdivision 2 that declares unlawful any monopolization, attempted monopolization, or assertion of dominance that restrains trade or commerce.14

Specifically, Subdivision 2, if enacted, would provide that:

It shall be unlawful: (a) for any person or persons to monopolize or monopsonize, or attempt to monopolize or monopsonize, or combine or conspire with any other person or persons to monopolize or monopsonize any business, trade or commerce or the furnishing of any service in this state; (b) for any person or persons with a dominant position in the conduct of any business, trade or commerce, in any labor market, or in the furnishing of any service in this state to abuse that dominant position.

Thus, on monopolization, the Bill seems to be aimed at bringing New York’s antitrust law in line with the Sherman Act, as Section 2 of the Sherman Act prohibits monopolization, but the Bill goes much further.15

If passed, New York would be the first US jurisdiction with an “abuse of dominance” standard. The Bill’s proposed prohibition of “abuse of dominance,” however, adds a concept that does not appear in the Sherman Act and generally appears to be more far reaching. Using language similar to that in Article 102 of the Treaty of Functioning of the European Union, which has been interpreted to prohibit broader conduct that Section 2 of the Sherman Act, the Bill apparently seeks to expand antitrust enforcement in New York along the lines of the European counterpart.

Definition of a “dominant” firm: 40% share for sellers, 30% for buyers. The Bill provides that a “dominant position” can be established by direct evidence (like increased prices or reduced output) or indirect evidence (market share), or a combination of the two.16 As an initial matter, under the Sherman Act, it is uncommon for plaintiffs to attempt to prove monopoly power through direct evidence at all, let alone do so successfully. Under the Bill, if the direct evidence is sufficient to show a dominant position, conduct that “abuses” that dominant position is unlawful without regard to a defined relevant market (or the conduct’s effects in that market). This means that an antitrust plaintiff need not define a “relevant antitrust market,” as is the normal first step of an antitrust rule-of-reason analysis under the Sherman Act.17

As to indirect evidence of a “dominant position,” the Bill provides that a market share of 40% or greater for a seller and 30% or greater for a buyer will be “presumed” to have a dominant position.18 In contrast, it is unlikely that a market share of less than 70% is sufficient as a matter of law to prove the existence of monopoly power under Section 2 of the Sherman Act.19

Conduct prohibited as “abuse” of dominance. The Bill does not fully itemize what kinds of conduct constitute an “abuse” of a “dominant” firm’s position, but broadly provides that conduct that “tends to foreclose or limit” the ability of competitors (or potential competitors) to compete is unlawful. The Bill provides several examples, including “leveraging a dominant position in one market to limit competition in a separate market,” and “refusing to deal with the effect of unnecessarily excluding or handicapping actual or potential competitors.”20 The Bill adds that “abuse” of a “dominant position” in a labor market includes, “but is not limited to,” imposing restrictive covenants, or covenants not to compete on employees, or restricting the ability of workers to disclose their wages and benefits.21 The Bill also empowers the NY Attorney General to adopt rules on what constitutes abuse of dominance and issue guidance as to how the AG will interpret market shares and relevant market conditions for a finding of abuse of dominance.22

Importantly, many of these practices are not illegal under federal law and the Bill could capture conduct that is nothing more than hard-nosed competition generally agreed by economists to lead to lower prices and benefits to consumers. Thus, the Bill appears inconsistent with decades of federal law establishing that antitrust is designed to protect competition, not competitors.23

Pro-competitive effects not a defense. In addition, the Bill provides that “[e]vidence of pro-competitive effects shall not be a defense to abuse of dominance and shall not offset or cure competitive harm.”24 This is in sharp contrast to federal law, under which challenged conduct is generally evaluated under the rule of reason and thus procompetitive effects must be considered in assessing whether that conduct is unlawful. By attempting to remove procompetitive effects from the analysis, the Bill may be interpreted to have the effect of creating per se liability for any “abuse” of a “dominant position,” even though under federal law and state law today per se liability applies only to a small subset of conspiratorial conduct.25

In sum, if the Bill is passed, there is a risk that it could prohibit broad swaths of conduct that is not unlawful under the Sherman Act, which contains no language prohibiting the “abuse” of a “dominant position.” Further, any such “abuse” may be interpreted to subject the offender to per se liability, no matter how much the procompetitive effects of a course of conduct outweighed its allegedly anticompetitive effects, thereby depriving all market participants of significant benefits merely because some deleterious effects came along with them. Finally, the Bill appears to dramatically increases the power of the State’s chief antitrust regulator, the AG, apparently granting her the authority to declare any conduct (by large enough companies) to be an unlawful “abuse” of a “dominant position,” simply by adopting a rule banning such conduct.  As we said, this Bill would enact drastic changes.

 Enhances criminal penalties for antitrust violations

The Bill would amend Section 341 of the Donnelly Act, which provides for criminal penalties for violations of Subdivision 1 (prohibiting an agreement in restraint of trade) and Subdivision 2(a) (prohibiting monopolization) of the proposed Bill. If passed, a violation of the Donnelly Act would now constitute a class D felony.26

For individuals, the Bill increases the maximum fine from $100,000 to $1 million, and the maximum imprisonment term from 4 years to 15 years.27 For corporations, the Bill increases the maximum fine from $1 million to $100 million.28 And for any type of defendant, the Bill would expand the statute of limitations for criminal violations from 3 to 5 years (not retroactive).29

Permits NY State antitrust class actions and recovery of treble damages

Finally, the Bill amends the Donnelly Act to explicitly permit class actions and the recovery of treble damages.30 Currently, antitrust class plaintiffs cannot seek treble damages for Donnelly Act violations (and it is an open question whether plaintiffs can bring a class action for Donnelly Act violations at all).31 But if the Bill passes, class-action plaintiffs will likely be eligible to seek treble damages for antitrust violations in New York.  The availability of class actions and treble damages in antitrust cases is particularly notable in an “Illinois Brick repealer” state, like New York, which permits indirect purchasers to bring antitrust claims (not permitted in federal antitrust cases, pursuant to the Supreme Court’s Illinois Brick decision). The Bill does, however, instruct courts to take steps to avoid duplicative recovery for direct and indirect purchasers, and permits a defendant to prove that damages were “passed on” as a partial or full defense to damages by either direct or indirect purchasers.32

Although the Bill adds a right of class action, it does not change the 4-year statute of limitations, effectively cutting any class-action damages at 4 years prior to filing, just like any individual action.33

What’s Next for NY Bill S933A?

Having passed the New York State Senate, the Bill was pending in the New York State Assembly when the legislative session ended on June 10. When the session resumes, the Bill will need to pass both the Senate (again) and the Assembly without amendment to reach the Governor and be signed into law. Although we will likely have to wait until next year to see if the Bill ultimately passes, and in what form, Senator Gianaris plans to continue to push the Bill towards law next session.34 The Bill appears to have support from New York enforcers—New York Attorney General Letitia James expressed support for the Bill when it was first introduced last year, noting that it is “aggressive” and modeled after Europe’s approach to “abuse of dominance.”35

And there could be legal challenges, even if passed. Even if the Bill becomes law in New York, legal challenges could be brought to strike down or neutralize provisions, including for areas that may be in conflict with federal law, or provisions that are vague and ambiguous.

But if this “aggressive” Bill passes and survives challenges, it has the potential to greatly expand the scope of antitrust enforcement under New York law. It may also signal a trend as other states continue to zero in on the tech industry other large companies.

In particular, if every state had its own unique premerger notification requirement, it would create an almost impossible thicket, even for the most complementary and commonplace transactions, and as such companies in all industries should continue to monitor these developments. And similarly, if “abuse of dominance” becomes the law in many states, private plaintiffs and state enforcers may become emboldened to bring more cases involving single-firm conduct.

The Bill also serves as a reminder that companies need to be mindful not just of potential changes in the federal antitrust laws, but to state laws as well, which may change faster than at the federal level and be even more sweeping in reach.36

#### Uniform state antitrust law answers a question based in the literature---here’s an advocate.

Hanson and Kalinowski 63 (John J. Hanson, B.A.., Mississippi College, LL.B., University of Virginia, member of the ABA Subcommittee on Private Antitrust Litigation, and Julian O. von Kalinowski, A.B. University of Denver and LL.B. Harvard University, Chairman of the ABA Committee on State Antitrust Laws, 1963, “The Status of State Antitrust Laws with Federal Analysis,” 15 *W. Rsrv. L. Rev*. 9 (1963), <https://scholarlycommons.law.case.edu/caselrev/vol15/iss1/4>)

Is A UNIFORM STATE ANTITRUST LAW DESIRABLE?

The renewed vigor which has been demonstrated by the various state enforcement agencies, coupled with the multitude of state antitrust statutes, brings into sharp focus the question of whether there should be a uniform state antitrust law.

Any analysis of the problem must first start with a consideration of the basic objectives of antitrust laws. It has been said that "antitrust is a distinctive American means of assuring the competitive economy on which our political and social freedom under representative government in part depends.""' 5 The economy of the United States is one essentially based upon the free enterprise system. Access to the market place and the fostering of market rivalry are basic tenets of economic organization. Antitrust is thus concerned with the promotion and protection of competition as a matter of public policy.

Fundamentally, our basic antitrust policy, as interpreted by the Supreme Court in Northern Pac. Ry. v. United States,"' rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

It is erroneous to say, however, that antitrust policy is oriented toward a single goal. On the contrary, as Kaysen and Turner said:

Antitrust policy may serve a variety of ultimate aims. We can divide the aims against which any policy proposal may be tested into four broad classes: the attainment of desirable economic performance by individual firms and ultimately by the economy as a whole; the achievement and maintenance of competitive processes in the marketregulated sector of the economy as an end in itself; the prescription of a standard of business conduct, a code of fair competition; and the prevention of an undue growth of big business, viewed broadly in terms of the distributions of power in the society at large."117

How best are these aims to be achieved? The answer to this might be found in posing a threshold question. Is there a need for state antitrust laws at all? As our study has indicated, most state statutes were enacted years ago before expansion of the commerce power took place. Until recent years, state antitrust laws have received little attention while, on the other hand, federal law has been developing at an outstanding rate. Its influence has been felt strongly in all walks of our economic life." 8 The scope of the federal law cannot be underestimated. It could be said that the present pervasive application of federal law leaves little reason for state antitrust laws; and that the instances in which state antitrust regulation will conflict with federal provisions will increase. Several additional arguments also have been advanced for removing antitrust from the states. These arguments run somewhat as follows: (1) The experience and capabilities of the federal judiciary and enforcement agencies, developed during the period of state inactivity, suggests that federal laws are better equipped to achieve the results that are being sought; (2) the private treble damage does not suffer since a treble damage action usually is available under the federal law no matter how local the restraints; (3) the state can recover for damages to the public under federal law; (4) exclusion of state control would eliminate the problem of double penalties in dual prosecution." 9

We believe that reliance upon the pervasive scope of federal law as a reason for abrogating state antitrust law is unfounded and ill-advised.

Although it is said that Congress used all of its power to reach restraints affecting interstate commerce, 2' there are areas of restraints it did not reach. Thus, in recent years, the Sherman Act has been held inapplicable to situations involving a conspiracy to exclude competition in the operation of local taxicabs;. 2' a combination of plastering contractors and employees to allocate and monopolize plastering contracts in Chicago;. 2 a price fixing combination of drive-in theatres; 3 and a combination to drive a newspaper engaged in legal advertising out of business.124

As one court recently observed:

However, despite the increased thrust of federal commerce power as business operations become more interrelated and complex, the courts have consistently required that in order for federal antitrust jurisdiction to be sustained the effect on interstate commerce of an alleged antitrust violation in a local area must be direct and substantial, and not merely inconsequential, remote or fortuitous. 125

There are numerous local activities which still are beyond the reach of federal law; such as those involving the local rendition of services, i.e., real estate brokers, dry cleaning establishments, building trades, local printing, and the like. Moreover, even as to those cases which theoretically are within the reach of federal law, federal agencies have admitted that they cannot deal comprehensively with the problem. 2

The argument that federal courts and enforcement agencies are better equipped to achieve the objectives of antitrust laws is not persuasive. Whether the federal enforcement agencies have the expertise which has been attributed to them is open to question. More important, however, there is a diversity of local economic conditions and business problems existing in many of the states, and the states are better equipped to deal with local questions than are their federal counterparts.

The real deficiency in state antitrust law does not lie in inadequacy or lack of expertise of the enforcement authorities, but in whether the state really wants an antitrust law at all. As Professor Rahl recently pointed out:

The most important suggestion may be made at the outset very quickly. It is that for most of the states which now have a law, however antique it may be, a resolution of the legislature directing the Attorney General to enforce it and appropriating some money for that purpose would mean more than a carload of new substantive provisions. For the basic deficiency now is not lack of an ideal statute, but lack of a decision as to whether the state really wants any antitrust law at all.12 7

This is the real key to the problem. The authors believe that state antitrust laws are desirable to carry out basic antitrust policy, that state antitrust can form an integral part of overall antitrust policy, and that federal law alone is not equal to the task.

This brings us back to the question initially propounded. Should there be a uniform state antitrust act?

Analysis of the various statutes demonstrates that many of them use antiquated language such as "pools" and "trusts," are verbose, and are riddled with archaic passages. Nevertheless, to some degree there are discernible common threads. Most of them outlaw price fixing, allocation of markets, limitation of production, group boycotts, and other commonly recognized anti-competitive restraints. The case law that has developed on these subjects has been surprisingly good overall and fairly uniform in approach. These factors provide a sound basis or starting point for a uniform law.

The authors believe that not only is there a need for a uniform law, but that one would be desirable. At the moment, there are 153 state statutes which can be characterized as antitrust in nature. Many of these statutes deal with such complex economic issues as mergers, exclusive arrangements, and price discriminations. The mistakes of federal laws have been parroted in their state counterparts. Repeated again is the strangulation of basic antitrust objectives by the soft competition concepts espoused in the Robinson-Patman Act. The recent Hawaiian statute is a striking example of this businessman's nightmare.

The renewed vitality of state antitrust enforcement already has begun to develop inefficient duplication of effort by federal and state authorities, with dual investigation and prosecution of the same persons for the same acts.'12 The burden on the businessman will increase and he will be required to operate at his peril, dependent upon the peculiarities of various state statutes and the whims of enforcement officials.

Even more important, the basic objectives of antitrust law are in serious danger of being frustrated, and our national economy may be gravely affected if the states should turn their enforcement guns on complex economic areas.

The adoption of a uniform state antitrust act will abate these dangers. Obviously, we cannot expect Utopia. The authors recognize that there are inherent difficulties in a proposed uniform act of this nature. There is the question of accommodation between federal and state authorities. This is particularly difficult because of dual enforcement within the federal scheme by the Department of Justice and the Federal Trade Commission. This problem at least can be partially solved by close cooperation between federal and state authorities in developing areas of prime responsibility. Basic guidelines could be laid down. Cooperation between federal and state authorities already has been initiated within the existing structure of the laws.'29 There is no reason why this could not be expanded.

Another inherent difficulty is that of uniformity of enforcement and approach. This question could be asked. How can a single law handle widely varying conditions in some fifty states? The authors' analysis of state antitrust decisions has demonstrated that this problem is more theory than reality. It has been noted that there is no substantial inconsistency between state and federal antitrust decisions, except those decisions emanating from the state of Texas relating to exclusive dealing and exclusive territorial arrangements. There exists no reason why a simple uniform law would change this pattern. Indeed, if the uniform law were to exclude exclusive dealing and exclusive territorial arrangements - and the authors urge that it do so - then the inconsistency which now exists would be removed.

This raises the question as to what the uniform law should include. In general, it is felt that the law should have as its main thesis the outlawing of the traditional per se type of offenses, i.e., price fixing, group boycotts, allocation of markets, and production control. As to other restraints, it should retain the flexibility of the rule of reason. It should not include the types of offenses found in Clayton Act or Robinson-Patman Act. The act should provide adequate investigatory and remedial powers.

As to investigatory powers, it is felt that, at maximum, the uniform act should provide a provision comparable to the federal civil investigative demand and limited to compelling the production of documents of persons under investigation.

With respect to remedial powers, the authors recommended that: (1) any provision dealing with forfeiture of the charter of a corporation found to have violated the law be discretionary; (2) that it provide for civil sanctions in lieu of criminal sanctions; and (3) that treble damages to injured private persons be discretionary instead of mandatory.

Within the above framework an effective state antitrust act can be drafted, one that would remove the businessman's burden of compliance with ambiguous, verbose statutes and inform him of the line of conduct that is forbidden.

State antitrust law stands at a crossroad. It can assume a responsible role in our federal system of government and become an integral part of our overall antitrust policy, or it can proceed along the road of confusion and darkness. It has the opportunity to benefit from the experience of the past and to help shape the road of antitrust law for the future. As Mr. Justice Holmes once said:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious . . . have had a good deal more to do than the syllogism in determining the rules by which men should be governed. 130

To paraphrase the words of Holmes, antitrust law has had the experience of important segments of our economic life. It is time to take advantage of that experience.

## AI Turn

#### Excess capital---Large companies have more excess capital to invest in R&D

Foster and Arnold, May 2020 – Visiting Researcher at the Center for Security and Emerging Technology and Research Fellow at Georgetown’s Center for Security and Emerging Technology (CSET), where he focuses on AI investment flows and workforce trends [Dakota and Zachary, “Antitrust and Artificial Intelligence: How Breaking Up Big Tech Could Affect the Pentagon’s Access to AI” Center for Security and Emerging Technology (CSET), [https://cset.georgetown.edu/wp-content/uploads/CSET-Antitrust-and-Artificial-Intelligence.pdf]//spen](https://cset.georgetown.edu/wp-content/uploads/CSET-Antitrust-and-Artificial-Intelligence.pdf%5d/spen)cer

If R&D spending drives innovation, firms that can spend more on R&D— presumably large ones—will generally hold an edge in innovation. A postbreakup AI sector could be less innovative as a result. Large tech companies do in fact spend more on R&D both in absolute and relative terms. According to PricewaterhouseCoopers, in absolute terms, Amazon and Alphabet were the world’s top two corporate R&D spenders in 2018, with Samsung, Intel, Microsoft and Apple in the top ten.62 In terms of relative R&D spending—the percentage of total firm expenses spent on R&D—large tech companies remained among the highest spenders, led by Facebook (33 percent) in fifth place globally.63 Alphabet and Microsoft, which each spent 20 percent, and Amazon (13 percent) ranked among the top thirty. The smallest firm (based on total operating expenses) of the top 100 global relative R&D spenders was NXP Semiconductors, a Dutch firm with $6.8 billion in operating expenses.64

#### Smaller firms invest far less in cyber-security – turns case

Foster and Arnold, May 2020 – Visiting Researcher at the Center for Security and Emerging Technology and Research Fellow at Georgetown’s Center for Security and Emerging Technology (CSET), where he focuses on AI investment flows and workforce trends, also quoting Nick Clegg; Facebook’s Head of Global Affairs [Dakota and Zachary, “Antitrust and Artificial Intelligence: How Breaking Up Big Tech Could Affect the Pentagon’s Access to AI” Center for Security and Emerging Technology (CSET), [https://cset.georgetown.edu/wp-content/uploads/CSET-Antitrust-and-Artificial-Intelligence.pdf]//spen](https://cset.georgetown.edu/wp-content/uploads/CSET-Antitrust-and-Artificial-Intelligence.pdf%5d/spen)cer

Contain: Are significant breakthroughs more likely to proliferate from small firms? Finally, we consider the “containability” of national-security relevant AI products. Technology matters in national security only when it creates asymmetries: if stolen or leaked, breakthrough technologies don’t provide their owners with the same strategic advantage. Would defense-related AI innovations from smaller AI companies be more likely to leak or otherwise proliferate, offsetting any potential national security advantage for the United States? We acknowledge that some intangible AI advances, such as open-source machine learning libraries, may not be easily containable. However, more task-specific AI applications embodied in physical systems, including security relevant applications, are less likely to be shared openly. In addition, to the extent software and other AI intangibles develop clear and immediate implications for defense and strategic balance, we expect national security actors would increasingly look to limit their proliferation with tools such as export and investment controls or cybersecurity mandates.154 While costly and imperfect, these tools could slow diffusion to some extent. Less research exists on the proliferation of dual-use technologies such as AI than on tech innovation and acquisition, and relevant “facts on the ground” change rapidly. As a result, this section is more provisional than the others and our discussion illustrative, rather than comprehensive. We first focus on cyberespionage, a major means of technology transfer. We explore whether smaller firms invest less in cybersecurity, which could increase their vulnerability. Similarly, we consider targeting: Are smaller firms easier targets for cyberattacks? Or does their size help them fly under the radar? We then consider technology transfer by means other than cyberwarfare, such as traditional human collection. Although these non-cyber means are gaining attention, more research is needed to determine how firm size might affect them. 1. Does scale affect the resources a company invests in cybersecurity? Smaller AI firms might invest less in cybersecurity, making them and their products more vulnerable. Cybersecurity is expensive, and trade secret theft occurs primarily through cyberattacks.155Although big companies have a larger attack surface and more points of vulnerability, they also have the Center for Security and Emerging Technology | 32 ability to invest in cybersecurity. By contrast, small firms often lack the cybersecurity resources to defeat sophisticated, state-sponsored hackers. The top U.S. tech firms lead in domestic absolute spending on IT, which includes cybersecurity.156 Facebook’s Head of Global Affairs, Nick Clegg, claimed that “the resources that we will spend on security and safety this year alone [2019] will be more than our overall revenues at the time of our initial public offering in 2012. That would be pretty much impossible for a smaller company.”157 Not coincidentally, smaller businesses run a greater risk of cyberattack,158 and they are less likely than large companies to identify the source.159 Because of their size and access to larger companies through the supply chain, smaller firms are lucrative cyberattack targets.160Moreover, if smaller, post-breakup companies increasingly work on defense-relevant products, they will become more salient targets for foreign actors. Cybersecurity breaches generally result from internal mistakes rather than foreign government activity,161 yet “Defense Technology” and “Information and Communication Technology” are two of six industries identified by the National Counterintelligence and Security Center as the most likely targets for foreign intelligence collectors.162

#### Breaking up big tech fails to help small businesses

Zachary Karabell, 20. WIRED contributor and president of River Twice Research. “Don't Break Up Big Tech.” January 23, 2020. https://www.wired.com/story/dont-break-up-big-tech/

It’s debatable whether antitrust enforcement has **ever** been particularly effective. Even a charitable reading of its legacy suggests that the first effect of disrupting Big Tech might be to enrich the oligopoly’s shareholders, which is certainly not what advocates would want. In fact, as I argued in that earlier WIRED column, industrial conglomerates often spin off businesses strategically. For instance, United Technologies is about to cut loose its multibillion-dollar divisions Otis Elevators and Carrier (one of the world’s largest HVAC companies) as a means of unlocking shareholder value. One wonders why Silicon Valley executives haven’t gone down this path; perhaps the mantras of integration and a hubristic belief that they will never actually be forced to break up has shut down consideration of those strategies. Would a forced breakup at least be effective at dispersing power? Let’s say that Facebook were strong-armed into disassembling itself. Its logical components would be legacy Facebook (individual pages), Facebook for business, Instagram, WhatsApp, and Oculus. You might be able to slice it even thinner, but assume Facebook would become five companies. Facebook currently has a market capitalization of just over $600 billion. That total market cap wouldn’t be divided equally among the five new companies; WhatsApp might struggle given its lack of discernible income, while Instagram might soar. It’s likely, however, that the resulting businesses would have a combined valuation greater than $600 billion, assuming it follows past patterns and that the tech industry remains robust. Now imagine each of the Big Tech giants gets disassembled in this way. We might end up with a landscape of 30 companies instead of half a dozen. A quintupling of industry players would, by definition, create a more competitive field. But competition in the antitrust framework, stretching back to the original Sherman Anti-Trust Bill in 1890 and then subsequent legislation such as the Clayton Bill in 1914, is not a virtue or need in and of itself. It is the means to a set of ends—namely, “economic liberty,” unfettered trade, lower prices, and better services for consumers. By itself, competition does not guarantee anything. Meanwhile, it’s hard to see how going from six companies to 30 would give consumers any more choice of services or more control over their data, or how it would help to nurture small businesses and lower costs to consumers and society. Perhaps there would be openings for companies with different business models, ones that brand themselves as valuing privacy and empowering individual ownership of data. This can’t be ruled out, but the nature of data selling and data mining is so embedded in the current models of most IT companies that it is very hard to see how such businesses could thrive unless they charged more to consumers than consumers have so far been willing to pay. In the meantime, the 30 new megacompanies would still have immense competitive advantages over smaller startups.

#### Breaking up big tech doesn’t solve competition

Ken Fisher, 21. Founder, Executive Chairman and co-CIO of Fisher Investments, authored 11 books and is a widely published global investment columnist. “Don't Break Up Big Tech - Let the 'Invisible Hand' Do It.” August 4, 2021. https://www.realclearmarkets.com/articles/2021/08/04/dont\_break\_up\_big\_tech\_-\_let\_the\_invisible\_hand\_do\_it\_788500.html

Break up Big Tech! So cry pundits and politicos alike. They claim these humongous firms stifle competition and innovation while greedily gobbling endless profits. With Congress relatively gridlocked, the sweeping regulation critics seek is unlikely. It’s also unnecessary, even harmful. Why? Big Tech’s wild success doesn’t thwart competition. It sparks it! This feature of capitalism’s “invisible hand” will eventually keep today’s titans in check while creating innovation—without wrecking markets. Here is why. Since COVID-driven shutdowns forced economic activity online, soaring Tech stock market values turbocharged calls for a sector takedown. The S&P 500’s six largest constituents are in Tech or Tech-like industries (like Amazon and Facebook). Their market value: almost $9 trillion—nearly 25% of the S&P. Critics fear a new Gilded Age of behemoth “trusts” dominating everything down to your hangnail—an ogre-ish oligopoly. State governments and competitors already target Apple, Facebook and Google with antitrust lawsuits. Democrats and many Republicans back slews of new regulations of varied forms. All this in the name of boosting competition. As I have long preached from here to Timbuktu and back, markets hate uncertainty. So if governments will whack the ogres, why are these targeted Tech titans’ stocks so hot? Gridlock! As I explained in March, Congressional Democrats’ tiny margins mean the slightest dissent kills legislation. Some California Democrats already oppose Tech clampdowns they fear threaten their state’s major employers and state tax revenue. Regulation proponents have little time: Few Congressional sessions remain before the fiscal year’s September 30 close, with dastardly debt ceiling issues, infrastructure babble and reconciliation spending dominating debate. Then midterm campaigning starts. Many in ideologically 50 – 50 districts will shun big changes lest they irk swing voters—doubly true in more than a dozen states where pending redistricting leaves constituencies literally undetermined. Then, too, the ogre’s kajillionaire founders, managers and assistant flunky ogres will surely pour enough cash into election campaign coffers to buy their way out of any proposed legislative purgatory. I am being facetious saying that, but there are shreds of reality in it. Markets won’t ignore this. They pre-price everything we all know. After early-year lag, US Tech stocks soared 16.6% since mid-May, trouncing the S&P 500’s 8.6%. The Tech-like Interactive Media & Services industry—part of the Communication Services sector and home of social media firms and search engines—jumped 23.3%. The Consumer Discretionary sector’s Internet & Direct Marketing Retail industry is up 15.6%. Translation: Markets see past the nonsense. Trust them. Markets are far more trustworthy than politicians or pundits. Still, never fear: a failed Big Tech crackdown doesn’t mean America slinks toward any form of anticompetitive FAANG-dominated future. Should problems be real (as opposed to the imagined-yet-consensus view common among the elitist crowd), in time, capitalism’s “invisible hand” will throttle these firms’ power better than any regulations could—just as modern economics’ founder Adam Smith envisioned. Hugeness doesn’t eliminate competition, Smith found—it inspires it. If the ogres get out of hand, that motivates new firms seeking disruptive opportunity. It just takes time. If these danged ogres gouge customers, provide shoddy products or fail to innovate and compete, customers inevitably take their business to the new disruptors who seemingly appear by magic from nowhere to nibble away the ogres from their hangnails up. Don’t take Smith’s word for it—or mine. Consider the 50 years through 2019’s end, to eliminate pandemic skew. In 1969, IBM was America’s largest public firm. Its $41.5 billion market cap dwarfed second-place AT&T’s $26.7 billion. General Motors, Eastman Kodak, Exxon, Sears, Texaco, Xerox, GE and Gulf Oil followed, in that order. A decade later, half of that top 10 turned over. IBM was still #1, but by just $1 billion over AT&T. The oil industry dominated, riding repeat Arab oil crises’ surging prices to claim 6 of the top 10 spots. Fast forward to 1999. Dominant Microsoft now tripled IBM’s market cap. Eastman Kodak, Xerox and Sears? Relics. The oil industry had transformed—only newly merged Exxon Mobil cracked America’s 10 biggest stocks. Chevron—less than a third of Gulf and Texaco’s combined market value in 1969—had swallowed up the former and was about to gobble the latter. Showing actual antitrust action lacked the invisible hand’s power, AT&T remained the 8th-largest public firm even after regulators made it ditch Ma Bell. By 2019, IBM wasn’t even among America’s 50 largest firms. Only 2 of 1999’s biggies—Microsoft and Walmart—remained top 10. Microsoft did despite continual antitrust threats—proving they aren’t auto-bearish. Free markets drive this constant top tier churn and burn. Too big is actually its own arteriosclerosis. Excess bigness creates bureaucracy—which morphs pretty darned pronto into bureaucrazy. New competitors disruptively emerge with newer technology disrupting via better products or greater efficiency—making the ogres’ offerings rusty relics. That is what capitalism does. Always! If you don’t believe that, you have a long-term personal investing future worse than any ogre could deliver. Those unable to adapt fade. New leaders replace them. The advances provide consumers endless benefit. It will happen to today’s Tech titans. Not overnight, of course. But look beyond myopic visions skewed by recency bias to grasp the invisible hand’s power. Gradual shifts let markets digest changes bit-by-bit, giving investors abundant time to adjust. So don’t sweat legislative or regulatory threats. Meanwhile, love today’s Big Tech stocks. But not forever. Adam Smith’s invisible hand will come. Just be patient in stock market time, not politician and newspaper time.

## Sanctions

#### Tons of alt causes – coal exports, lack of policymaker expertise, lack of information transparency, labor exports, lack of international political will, global data privacy regulations all thump

Elizabeth 1AC Rosenberg, Elizabeth Rosenberg Former Senior Fellow and Director, Energy, Economics and Security Program, CNAS, and ​Neil Bhatiya Former Adjunct Fellow, Energy, Economics, and Security Program, CNAS, March 4, 2020, Busting North Korea’s Sanctions Evasion, <https://www.cnas.org/publications/commentary/busting-north-koreas-sanctions-evasion>

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The Problem is Growing North Korea raises money to support its nuclear and ballistic missile programs in various ways. Some methods are relatively new, even for seasoned North Korea watchers, and exploit countries and economic areas where there is very little, or absolutely no, awareness about their exposure to North Korean illicit activity. The Kim regime maintains a sophisticated offensive cyber capability, which it uses to steal financial resources and move money around the global banking system. In the past, hacking groups credibly linked to North Korea have successfully penetrated central banks, cryptocurrency exchanges, and some of the largest corporate banks in the world. The United Nations North Korea Panel of Experts has accused North Korea of stealing up to $81 million from Bangladesh’s Central Bank and laundering the money through casinos in the Philippines. These North Korean criminals have also hacked ATMs in more than 11 countries, stealing hundreds of millions of dollars. Other North Korean–linked entities have sold information technology services, including website and application development services, to firms around the world as a strategy to covertly raise funds for Pyongyang’s illicit aims. Financial institutions are often reluctant to admit that they have been hacked, which makes it difficult for the financial community to absorb lessons learned and harden institutions from future intrusions. Conversely, governments, including the United States, suffer from poor interagency coordination and a lack of institutional knowledge and awareness of North Korea’s malicious cyber activities. Most high-level U.S. policymakers and members of Congress lack basic familiarity with the underlying technology and North Korea’s cyber heist and hacking activities, which makes developing policy and regulatory proposals to counter it difficult. This ignorance is coupled with a government aversion to share useful information with the private sector. North Korea conducts illicit ship-to-ship transfers of energy resources in violation of United Nations sanctions. The transfers include the import of refined petroleum products, which serves as essential inputs for North Korea’s domestic economy. North Korea also exports coal, including to United Nations Security Council members China and Russia, in violation of the sanctions. An international network of shipbrokers, trading companies, and maritime operators aids North Korea in these efforts. Much of this activity takes place in international waters, making it difficult for the United States and its partners to shut down completely such activity. North Korean laborers have long operated worldwide, in violation of United Nations Security Council Resolutions enacted in 2017 to curtail such activities. At the peak of North Korean laborers working abroad, 100,000 workers generated about $2 billion a year for the regime. The majority of workers had been concentrated in Russia and China, which the United States has frequently accused of lax enforcement. A deadline for repatriating all North Korean laborers came and went in December 2019, with reports suggesting that these workers continued to be employed in these countries. Future United Nations Panel of Experts reports will likely highlight continuing violations of the rules against employing North Korean overseas laborers. All told, these strategies potentially deliver hundreds of millions to billions of dollars to North Korea. (United Nations estimates of cyberactivity alone state the total proceeds could be “up to 2 billion,” although the methods North Korea uses makes it difficult for analysts to say with certainty that North Korea’s hackers have been able to move all of that money back to Pyongyang). Through organized and persistent sanctions evasion, this rogue nation has shown the world that it is possible to sustain and continue to develop its nuclear weapons capability in the midst of severe economic constraints. Indeed, the broad nature of the sanctions regime is moving Pyongyang to successfully invest significantly more resources to improve and diversify its revenue generating and financial movement strategies. North Korea is gaining major ground in its use of cyber technologies to finance and conduct illicit operations because the international community is so weak at developing countermeasures in the cyber sector. As for the tradecraft North Korea uses to stay miles ahead of global banks, companies, and regulators, the regime relies on technological tools of the trade as well as networks of trusted agents that constantly update aliases, shell companies, and front men. The Office of Foreign Assets Control (OFAC), the agency that leads sanctions implementation and enforcement for the U.S. government, works hard to keep up. It regularly discloses new aliases for North Korean proliferation agents, as well as new individuals engaged in this activity. The Financial Crimes Enforcement Network (FinCEN), the Financial Intelligence Unit of the United States, has also distributed advisories on North Korean typologies for illicit fundraising. But it is impossible for federal offices to collect, declassify, and publicly disclose the full array of North Korean sanctions evaders and proliferation fundraisers. Also, by the time that the U.S. government names them in formal sanctions actions, the North Korean agents have changed aliases, locations, and front companies. Nevertheless, this information disclosure is important, not least because it makes painfully clear that North Korea never paused aggressively fundraising for its nuclear and missile programs when Chairman Kim and President Trump met in Singapore in June 2018. Though they may have committed to a diplomatic process, which included pledges to temporary freezes in bomb and missile testing, North Korea’s track record over the last few years demonstrates that it never intended to halt its race for a bigger and more lethal nuclear arsenal. A significant problem in the current environment is the inadequate international control regime to spot and stop North Korea’s money trail, particularly its blind spot on North Korea’s malicious, highly active, and unfortunately very successful cyber and information technology activities. Given all of these challenges, is it even possible to halt the financing of proliferation by this dangerous nuclear state? As a theoretical legal and regulatory matter, the answer is yes. However, such an effort would require two exceedingly difficult-to-achieve goals for every country. It must be every country because universal enforcement is essential to avoid circumvention and dodging by North Korea. The requirements are: real, high-level political will, and greater technical capacity to implement and enforce U.N. sanctions and other financial controls on North Korea and North Korean-linked entities. The international community cannot allow the daunting challenge of making true progress to impede North Korea’s illicit money trail be an excuse for inaction. A small cadre of innovative thinkers from the financial industry and law enforcement community are figuring out targeted strategies for better catching North Korean financing of proliferation, notwithstanding today’s deficit of political will and technical capacity. Scaled up, these strategies could have an outsized impact in catching North Korean criminals and proliferators. Moreover, a handful of well-placed policy shifts in leading economies, starting in Washington, D.C., can also have a big effect. What’s the Plan? We know that the challenges are large. So, what’s the plan? First, the international community must more accurately diagnose the problem. How is North Korea raising and moving money right now? Some bank compliance officials describe the effort to answer this question as looking for a needle in a stack of needles. Essentially, they suggest that scanning hundreds of millions of financial transaction records and pieces of client data against sanctions blacklists, and the known aliases for the blacklisted North Koreans, is a fool’s errand. But other compliance officials in banking, global shipping, manufacturing, and insurance think the way to spot North Korean footprints lies in getting away from list-checking. They are pioneering approaches to create big lakes of data and sophisticated algorithmic methods, improved by machine learning and overseen by expert humans, to hunt down, and ultimately spot in real time, North Korean patterns of activity. Policymakers can augment these with declassified intelligence and produce shareable reports to inform other governments and companies also tracking proliferation finance. Analysts describe these efforts as exercises in behavioral analytics, trained on tracking North Korean financial footprints. And this work can create a feedback loop for national governments and the private sector to respond to the threats. A few pathbreaking global firms are putting into practice these behavioral analytic models for tracking North Korean proliferation. They run into significant problems coping with data privacy rules that make it difficult to share data across borders and between institutions. Also, they cope with the skepticism of financial regulators and supervisors who are slow to get comfortable with these new analytics and require a lengthy process to validate computer models. This slow and skeptical approach can be a drag on innovation and creative strategies to catch North Korean proliferators. Regulators are right to be cautious and to demand that companies to rigorously protect themselves and their customers from North Korean abuse. No global company should let up on sanctions pressure on North Korea for as long as the rogue regime presents a proliferation and regional destabilizing threat. But tough regulation and compliance should be compatible with innovative approaches to catching and halting North Korean proliferators. Along with better understanding the problem, a second element to undercut North Korean financing of proliferation is for policymakers to embrace innovative approaches to tracking illicit finance as a top and public priority. Only through an evident sense of urgency can policymakers make it a top priority for companies. Companies will take their cue from clear, unambiguous law and regulation. Furthermore, if done right, policymakers will create the space for safe information sharing and a culture of collaboration to identify and halt the money trail for the nuclear threats emanating from North Korea. Dialing up the ingenuity through new policy approaches for identifying and sharing information on financing of proliferation is essential to stop North Korea’s money trail. In fact, it might be the only real path for progress when the diplomatic process between the United States and North Korea has stalled out and against the backdrop of Kim’s threats of renewed provocations.

#### Pathways to tech are inevitable

Chen 17, Research Assistant at the Shanghai Institutes for International Studies (Jiawen, Why Economic Sanctions on North Korea Fail to Work?, https://www.worldscientific.com/doi/pdf/10.1142/S2377740017500300 )

Given the measures of economic sanctions, it is apparent that one potential causal path of economic sanctions is to seek to weaken North Korea’s capabilities to materialize the weapon programs (see Fig. 4). Notably, the needed materials, technological assistance and personnel are highlighted as the focus of restrictions. In this sense, sanctions are expected to deny North Korea’s access to the actual material basis of the programs, which, in turn, can form a significant level of sensible pressure should North Korea continue the nuclear buildup, and even force them to abandon the plan. However, if curbing actual capabilities is seen as the goal, the targets of the previously-mentioned measures are clearly misplaced. Indeed, limited access to relevant materials, arms and technology constitutes a challenge for North Korea’s nuclear plan. However, as long as Pyongyang has sufficient government revenue, it can continue to support transfer of physical and non-physical program-related assets.

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This can be done through underground economic networks such as the black market and smuggling, which are widespread in the era of globalization and difficult to regulate. In fact, the UN has noted such facts. For instance, as shown in the civil wars in some countries, since they are usually “fought with small arms and light weapons... [while] the international trade in weapons such as these is difficult to regulate and verify, especially since much of it is conducted on the black market,” there have been a decreased use of arms embargo by the UN in stopping internal warfare.

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#### US and EU led international norms result in multiple threats of extinction – China-Russia led international order resolves them

Igor Ivanov President of the Russian International Affairs Council (RIAC), “Russia, China and the New World Order”, June 19th 2018, https://russiancouncil.ru/en/analytics-and-comments/analytics/russia-china-and-the-new-world-order/

The state visit of the President of the Russian Federation, Vladimir Putin, to China and the talks he held with the President of the People’s Republic of China, Xi Jinping, marked an important milestone in the establishment of a new type of relations between the two nations, both of which have acquired an obvious strategic importance. These relations are growing stronger against the background of the continuing degradation of the entire system of international relations, the intensification of geopolitical contradictions, and the narrowing of the space in which constructive cooperation can take place. A new item has been added to the list of security threats facing the world today, a list which traditionally includes confrontations in cyberspace, terrorism, the proliferation of weapons of mass destruction, illegal migration, etc., and that item is the trade wars unleashed by the U.S. administration in all directions. This has landed yet another very dangerous blow to the architecture of the world order, which was rather shaky to begin with. In such an extremely complex and unpredictable situation, it would seem difficult to make decisions of strategic importance – and not only for Russia and China, but for the global community as a whole. Yet we can see how a new edifice of Russia–China cooperation that meets all the requirements of the 21st century is being built with each passing year thanks to the consistent policy implemented by both leaders. As per tradition, the Russian and Chinese leaders summed up the results of the development of bilateral relations over the past year and discussed in detail both the achievements already made and the ambitious goals for the future that will further enhance cooperation across all areas. While the bilateral dimension of Russia–China relations is important in and of itself, special attention ought to be paid to the discussion of more general matters concerning the current global situation and issues of the emerging new world order that took place during the visit. The heightened interest in those topics is understandable. Russia–China relations are not developing in a vacuum, and the dynamics and prospects of these relations moving forward are largely contingent on the global political and economic situation as a whole. This situation may generate both additional opportunities and new limitations for both nations and may reduce or increase external risks; its evolution will inevitably have a serious impact on what Moscow and Beijing focus on and how they set their priorities, including in bilateral relations. It would not be an exaggeration to say that the previous Yalta-based global political system has been all but destroyed in the two decades since the end of the Cold War. Yet nothing has been devised to replace it. The world is increasingly sliding towards chaos, which now threatens not just individual nations or regions, but the entire international community. History has taught us that humanity’s transition from one world order to another has been always driven by the accumulation of new production technologies, with wars and revolutions usually acting as a catalyst. Today, a critical mass of new technology for yet another civilizational breakthrough has been accumulated, yet a new cycle of wars and revolutions may prove deadly not only for individual countries, but for humanity. That is why it is extremely important to break this established cycle of world history in order to transition to a new level of civilizational development without another global cataclysm. In these new conditions, the traditional centres of global politics are unable to play a leading role in establishing a new world order. The United States is deeply politically polarized, and no one can reliably predict when or how that chasm will be bridged. Accordingly, no long-term, balanced, or consistent foreign policy can be expected to come from Washington any time soon. The European Union is struggling with a fundamental internal crisis of its own, or more precisely, a whole set of structural, financial, economic, political, and even value crises. Thus, Brussels will most likely continue to focus on resolving its multiple internal issues for a long time to come, rather than on building a new world order. Other leading global political players have their own problems that are preventing them from taking charge of designing new rules of the game for the modern world. In this sense, Russia and China enjoy a substantial advantage over the other global centres of power. First of all, unlike the divided and politically polarized Western societies, the public in Russia and China are politically consolidated and united in their attitudes towards the most important global problems. The 19th National Congress of the Communist Party of China and the latest presidential elections in Russia have reiterated this sustainable public consensus and the high level of stability. Secondly, thanks to the specific features of their political development, Russia and China are capable of building policies that strategically plan for years or even decades ahead, something that Western democracies simply cannot do. At the same time, the current global situation requires long-term planning and comprehensive approaches, rather than ad-hoc tactical solutions. Thirdly, Russia and China have accumulated wide-ranging and multi-faceted experience developing bilateral cooperation. This cooperation is unique in many of its dimensions and may be, in phases, building what may be labelled “A New Type of Great Power Relations.” There is no doubt that this experience will prove useful in a wider multilateral format too. Over the past two decades, Russia and China have been promoting the idea of a “multi-polar world” as the most sustainable, dependable, and fair structure for international relations. However, much joint work still needs to be done to shape a holistic concept for building such a “multi-polar world.” This needs to be done fast, as time is running out for a structured rebuilding of international relations to take place. It can be said that the multilateral mechanisms established over the past two decades with the active participation of Russia and China, such as the SCO, BRICS, and EAEU, might become integral parts or elements of a future international structure. At the same time, the Russia–China conversation should also include such issues as the restoration of global governance, the reform of the United Nations and other international institutions, the renewal of international law, and a new understanding of globalization and interdependence. This conversation is not going to be short or easy, even between such close partners as Russia and China. Let us not forget that, while Russia and China obviously share close stances on key global policy issues, they still have different historical experiences and different positions in the system of international relations, and their current priorities are not entirely aligned. Yet such an open conversation is especially needed today, as the world is approaching a point of bifurcation: either the restoration of global governance at a new level, or an acceleration towards anarchy and chaos. The joint statement signed following the talks between President of the Russian Federation Vladimir Putin and President of the People’s Republic of China Xi Jinping said that both countries would “promote international relations of a new type based on the principles of mutual respect, fairness, mutually beneficial cooperation, and the building of a community of a single fate for humanity, as well as facilitate the establishment of a more just and rational multipolar world order on the basis of equal participation of all nations in global governance, adherence to international law, equal and indivisible security, mutual respect, consideration of each other’s interests, and a refusal of confrontation and conflicts.” Obviously, not everything in the world depends on Russia and China. If the situation develops according to the worst-case scenario and our Western partners are not willing or able to change their obsolete approaches to global politics, Moscow and Beijing will inevitably have to think about further strengthening bilateral cooperation up to a point where their relations become those of allies. The negotiations with President Xi Jinping that took place during President Vladimir Putin’s state visit to China have demonstrated in a convincing manner that the Russia–China partnership is not only an example of modern international relations, but it also plays an increasingly substantial role in maintaining strategic balance and stability in the world.

#### Global governance is collapsing – the China-led model shores it up, the plan’s US-led model crushes it

Heath, 18 – Timothy, Senior International Defense Research Analyst at Rand. “China Prepares for an International Order After U.S. Leadership,” Lawfare, <https://www.lawfareblog.com/china-prepares-international-order-after-us-leadership> -- iowa-rubaie

At China’s Central Foreign Relations Work Conference—an infrequently-held high level strategy session on the nation’s foreign policy—convened on June 23, 2018, Chinese leaders issued an array of foreign policy directives designed to strengthen the activist foreign policy outlined by Xi at the previous foreign affairs work conference held in 2014. Since that previous conference, key geopolitical developments have added to the urgency with which Chinese leaders view their country’s role in global governance. In Beijing’s estimation, these developments have also increased the possibility that China will face a power transition with the United States in coming years—and in response, Chinese officials are laying the groundwork to manage that transition and ensure a leading role for their country in the emerging international order. Deterioration of Global Governance Since 2014, the decline in the quality of global governance has continued unabated. Multilateral international institutions such as the United Nations and International Monetary Fund have proven unable to overcome persistent slow economic growth, the challenges of climate change, violations of long-standing norms—such as Russia's seizure of Crimea—and the seemingly irresolvable crises of both transnational terror and mass migration in the Middle East. The European Union faces a potential break up and escalating trade tensions threaten to upend the global economy. To Beijing’s eyes, the international order is deteriorating at a moment when China’s need for international stability and security is greater than ever. As the second largest economy in the world, China’s interests now span the globe, opening a broad array of vulnerabilities. The country surpassed the United States as the largest importer of oil in 2014. Its trade dependence surged to nearly 60 percent of gross domestic product in 2006 before receding slightly in recent years. According to Foreign Minister Wang Yi, last year 130 million Chinese citizens traveled abroad and 30,000 enterprises are located in other countries – some in dangerous locations. For years, China relied on the efforts of Western countries to control transnational threats and ensure international stability while minimizing its own commitments, raising frequent accusations of “free riding.” But the Western powers’ fraying grip on global leadership has rendered this approach increasingly untenable: in the last two years, China has faced the stunning Brexit vote in 2016; the election of U.S. President Donald Trump on an anti-globalization platform and Trump’s subsequent withdrawal of the United States from the Trans-Pacific Partnership; and the surging popularity of populist leaders across the industrialized West. Surveying the political turmoil engulfing the industrialized west, State Councilor Yang Jiechi observed in November 2017 that it had become “increasingly difficult for Western governance concepts, systems, and models to keep up with the new international situation.” Western-led global governance, he argued, had “malfunctioned,” and the accumulation of “various ills” showed the system had reached a point “beyond redemption.” Jin Canrong, a well-known professor at People’s University, similarly commented, “The needs for governance keep rising,” but “European countries and the United States appear to be powerless because they are saddled with many problems.” Few countries are well-positioned to fill this gap in global governance. Most developing countries simply remain too weak to assist. Among the larger developing countries—such as Brazil, India, Russia, China, and South Africa (known collectively as BRICS)—Brazil’s economy is struggling to gain traction following a steep downturn in 2015; India’s efforts to expand a basic infrastructure and reduce red tape have stalled; and the gasping Russian economy has shrunk to a size smaller than that of South Korea. China appears to be the only plausible country that can offset weaknesses in Western power. China’s economy is growing at a slow, but still strong, six to seven percent, although at the cost of accumulating debt and other accumulating threats to long-term growth. Chinese official media reports suggest that the country appears to have achieved basic modernization faster than its leaders anticipated. As the Chinese Communist Party’s mouthpiece, the People’s Daily, stated in a February 2018 commentary, the 19th Party Congress’ designation of strategic goals for 2035 showed that China had “basically realized modernization 15 years ahead of schedule.” China Steps Up to Fill the “Governance Deficit” In response to what Chinese media commentary have called a “global governance deficit,” authorities are viewing with urgency issues of “global governance.” The Politburo has held two study sessions on the topic, on Oct. 12, 2015 and Sept.12, 2016. At the latter event, Xi hinted at the erosion of Western power and the concomitant rise in Chinese national strength, stating that the “structure of global governance depends on the international balance of power.” He declared that China “must make the international order more reasonable and just to protect the common interests of China and other developing countries.” At the foreign affairs work conference held in June 2018, Xi incorporated the core elements of his vision for global governance from the previous foreign affairs work conference. For example, the “community of common destiny”—an ideal in which countries tolerate one another while carrying out dialogues to resolve differences peacefully and maintain a system of global trade and investment—remains a centerpiece of Xi’s vision, as does the concept of a global network of partnerships —both of which he raised at the previous conference. A closer look at Chinese diplomatic activity and writing by top officials since 2014 provides some insight into how Beijing intends to make these ideas a reality. Central to China’s approach is the establishment of values and norms that prioritize the values and interests of the developing world over those of the developed world. Chinese officials have stepped up activities to co-opt international institutions, build coalitions of similarly-minded political allies, and extend influence operations to shape global discourse in China’s favor. Values and Norms Fundamental to China’s conception of global governance is the establishment of new norms to guide international behavior. In Xi's words, “China must lead the reform of the global governance system with the concept of fairness and justice,” and Chinese commentators make clear that international law should be “implemented on the basis of the norms of fairness and justice” as defined by Chinese authorities. In a December 2017 People’s Daily article, Foreign Minister Wang Yi explained the meaning of the terms “fairness” [公平·] and “justice” [正义], which Wang stated should become “norms” [准则] for the international community. Wang described fairness in terms of expanding rights and influence on the part of developing countries, declaring, “We will support the expansion of the representativeness and the right of speech of developing countries.” He added that China will also “speak in defense of justice for developing countries” and “push forward the international order towards a fairer and more rational direction.” In the same article, Wang defined “justice” in terms of the upholding of international laws and principles centered on a United Nations that itself upholds the interests and values of China and other developing countries. “Justice,” Wang explained, requires “opposing the interference in the internal affairs of other countries and opposing the act of imposing one's will on others.” Justice also requires China to “support the United Nations in playing a core role in international affairs.” As a norm, China seeks a “just” order in which all countries “abide by the charter, purpose, and principle of the United Nations, and follow international law as well as generally-accepted principles of international relations.” Co-opting International Institutions Chinese leaders have directed efforts to increase the country’s influence within and through existing institutions such as the United Nation, G20, and the International Monetary Fund. Where existing institutions prove insufficiently responsive, authorities have set up rival versions— such as the Asian Infrastructure Investment Bank, which serves an alternative to the Asian Development Bank. The Chinese government has prioritized efforts to renovate and lead organizations featuring greater representation by developing countries. Illustrating this logic, a 2017 People's Daily commentary noted a “decreasing efficiency” in “international economic mechanisms with the Group of Seven as the center.” It hailed instead Chinese involvement in the G20 and BRICS, which it depicted as more responsive and effective. Within each institution, Chinese officials have directed more efforts to dominate agenda- and rule-setting. In a 2017 interview with People’s Daily, Foreign Minister Wang Yi described how Chinese officials at a 2014 Asia-Pacific Economic Conference meeting put forward “more than half of all proposals” for action as an example of how the country’s “agenda-setting power has been strengthened.” The same article also noted that a meeting of the G20, countries “with guidance from Xi Jinping” formulated “guiding principles” and mechanisms to cope with issues such as economic growth, multilateral investment, and climate change. The article cited this as an example of China’s focus on “rule setting.” In a separate article, Wang Yi also hailed Chinese efforts to set rules and agendas in international organizations regarding space, cyberspace and polar regions. Building a Coalition of Supporters Officials have provided more insight into the global network of partners that Xi hinted at in 2014. Chinese authorities have not only sought to strengthen government-to-government ties with many countries, but have also increased engagement with select political and non-government groups, whom they hope can steer governments towards policies favorable to China. Chinese authorities have emphasized the importance of relations with both the developing world and countries in Asia. At the 2014 work conference, Xi stated China should “speak for developing countries.” And in 2013, China held its first central work forum on diplomacy to the Asia-Pacific region. But as Beijing contemplates greater international leadership, it has increasingly prioritized building international coalitions to support Chinese power. At the recently-concluded foreign policy central work conference, Xi declared that “great efforts should be made to deepen unity and cooperation with developing countries.” He described the “broad masses of developing countries” as “our natural allies” in the international community. Although it should be emphasized that the use of “allies” does not denote anything resembling traditional military alliances, the mention was still notable as the first time a Chinese leader had discussed in public the formation of political coalitions to advance Chinese foreign policy goals and international leadership since perhaps the Cold War. But developing countries do not necessarily support a unified agenda or the exercise of Chinese power—as is evident in the disunity of the BRICS and other government-to-government organizations. This is a vulnerability that Chinese explanations of the idea of “partnership” ironically confirm. Wang Yi has explained that the “salient characteristics” of partnerships consist of “respect for sovereignty, independence, and territorial integrity” and that partnership “respects people’s independent choice of social systems and developments.” This description makes clear that the basis for unity among so disparate and diverse a set of governments will unavoidably prove fragile, rendering efforts to mobilize coordinated action extremely difficult. To overcome this limitation, Chinese authorities have sought to build more durable and reliable partnerships that can guide the policies of other governments, promote norms favored by China, and encourage pro-China popular sentiment in other countries. At the 2018 work conference, Xi described foreign relations work as a “systemic project” involving “political parties, the government, people’s congresses, the military, local authorities, and the public.” Of special importance, perhaps, is the effort to extend the Chinese Communist Party’s (CCP) outreach to various social groups in other countries, including the Chinese diaspora. The elevation of the United Front Department within the CCP in 2018 underscores the importance of this line of work. The CCP’s focus on political parties outside China likewise seems tied to issues of global governance. In 2015, a special conference convened by the International Conference of Asian Political Parties (ICAPP) reportedly involving 60 delegates from over 30 countries, signed a document in support of the Belt and Road Initiative—a massive Chinese-led infrastructure investment and trade initiative designed to deepen integration of the Eurasian landmass—that called for a “regional financial cooperation system” and infrastructure building to connect the region. In a 2016 speech, CCP Central Committee Secretariat Liu Yunshan stated political parties should “strengthen their guidance of public opinion.” He also pointed out that “political parties shape countries' philosophies, policies, and positions on global economic governance.” Similarly, an October 2017 article by the CCP's International Liaison Department describes how exchanges between political parties can serve as a “stabilizer” in the state-to-state relations, explaining that “in-depth ideological exchanges” between the CCP and other parties could “spur the other side on to establish a correct and rational cognition about China.” In 2017, China held a high level conference focused on building relations between the CCP and other political parties. At that event, Xi stated that the CCP is “willing to work with other political parties around the world” for the purpose of advancing China’s goal of “building of a community of common destiny.” Xi added that over the coming five years, the CCP intends to invite 15,000 members of foreign political parties to China for exchanges. The CCP reportedly has kept regular contacts with more than 400 political parties and organizations in about 160 countries and regions. Political party connections can also prove valuable as channels for building consensus on norms and values favorable to Chinese international leadership. In 2014, the Chinese Communist Party hosted its first summit with other world political parties, which it hailed as “The CPC in Dialogue with the World.” According to a concept paper from the event, a copy of which has been posted on website of the Global Foundation, an Australian think tank, the dialogue explored topics such as, “How can political parties of all types throughout the world work together to jointly participate and guide innovative development in global economic governance?” The concept paper stated that a primary purpose of such discussions was to “build consensus” around such issues. Shaping International Discourse Chinese theorists consider influence over the language, vocabulary, ideas and concepts used to discuss international issues—known as “discourse power” [话语权]—to be an important attribute of global power. “Only when Chinese diplomatic discourse is generally prevalent internationally,” noted Yang Jiemian, a prominent scholar at the Shanghai Institute of International Studies, “will China exert the influence and play the role of a great power.” Chinese scholars argue that the country’s discourse power remains weak, but assess that it will grow as China’s strength waxes and Western power wanes. As Yang stated, “The core values of China’s diplomatic discourse is presently still relatively weak, but it will ultimately become part of the mainstream.” Officials agree on the importance of this dimension of international influence. In the 2017 People’s Daily interview, Wang Yi cited Xi’s speech praising globalization and criticizing protectionism as examples of the country’s “discourse power,” noting the speech earned “praise by the international community.” Wang also noted how documents in the United Nations have begun to incorporate Chinese proposed concepts such as the “community of common destiny” as evidence of the growing international receptiveness to Chinese ideas, concepts, and proposals. Authorities have also stepped up outreach to foreign think tanks, academics, and scholars to socialize Chinese concepts, ideas and policy proposals. International media has raised awareness of some of the more sensational developments, such as efforts by officials to buy foreign media, suppress rival diaspora voices, and carry out “influence operations” through Confucius Institutes and Chinese student associations. However, perhaps more fruitful from China’s perspective are the networks of scholars and researchers engaged in issues of interest to China, such as the “eSilk Road” think tank network that supports the Belt and Road Initiative. China Prepares for Power Transition For years, Chinese commentators and scholars dismissed talk of a “bipolar order” or “G2”—but attitudes appear to be changing. In a 2018 interview, Tsinghua University's Yan Xuetong envisioned a coming bipolar order. He rejected the idea that China could equal U.S. power in the next 10 years, but coyly refused to speculate on which country might prove superior after that period. Other Chinese experts similarly acknowledge China remains too weak to challenge the United States in the near term, but avoid publicly speculating on the longer term and instead advocate increased efforts to shore up the country’s comprehensive strength and global leadership. Chen Xiangyang, an expert at the China Institutes of Contemporary International Relations, stated in June 2018 that, “China is not yet strong enough to counter the existing major powers which continue to play important international roles.” He recommended that China “act rationally and promote global cooperation” and “make efforts to avoid a vicious competition and arms race.” Although Chinese officials and scholars seek to avoid an open challenge to U.S. leadership, leaders seem to believe in a growing possibility that China could eclipse the United States as a global power some day. Statements by top leaders evince uncertainty and some anxiety about how the United States may respond to this possibility. In a startling acknowledgment of this sensitive issue, Xi directed greater efforts to study power transitions at the recent foreign affairs work conference, calling for “in-depth analysis of the law of how the international situation changes when the world comes into its transitional period.” In language tellingly omitted from English translations, Xi indirectly referred to potential disruptions and uncertainties in the U.S.-China relationship, stating that in light of the “accelerated development of multipolarization,” it had become necessary to “attach great importance to the tendency of extensive adjustments in major-country relations” (emphasis added). Anticipating the possibility of a transfer in power, China is positioning itself to thwart any effort by the United States to mobilize an anti-China coalition. In addition to Beijing’s buildup of military and economic power, official media have in recent years cast China as the responsible, law-abiding authority acting in conformity with the United Nations while depicting the United States as a “lone wolf” that opposes the will of most countries. In a 2017 speech expounding on China’s vision for “global security governance,” Xi denounced unnamed countries for “building security on the turmoil of another country.” A People’s Daily article on the speech criticized “Western countries” for using “rule of law" as a “tool to achieve their own interests on security issues.” Similarly, a typical Xinhua commentary excoriated the recent U.S. withdrawal from the United Nations Human Rights Council, which it decried as the “latest move of unilateralism.” The commentary declared the withdrawal “once again highlights Washington's disregard of the UN's authority and objectives.” This is not mere rhetoric. Presaging a likely tactic, Chinese authorities appear to be cultivating coalitions of countries to oppose the United States in its escalating trade war. China’s strategy aims to deter war with the United States while also steadily undermining U.S. authority in global institutions and discourse and building a broad base of political support around the globe. For the time being, the United States retains advantages in its technological leadership, economic strength, military prowess, and impressive array of alliances and partnerships across the globe. But success is hardly assured. Continued domestic political conflict, deep social polarization, and fracturing alliances threaten to mire the United States in gridlock and infighting. If it is to maintain its position and compete effectively against China, the United States will need to access its reservoirs of tenacity, imagination, and resourcefulness to shore up its alliances; bolster its leadership in international institutions; and reinvigorate its global vision.

#### China can overtake the U.S. in the hierarchy of international prestige without conflict – economic and normative factors make hegemonic war unlikely

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This article will focus on this ongoing power contest in Asia and beyond. I will anchor my account in the concept of prestige—what Robert Gilpin calls the ‘reputation for power’4—and, where appropriate, contrast it with its manifestations in the past. I argue that the current geopolitical competition between the United States and China is best viewed as a competition over the hierarchy of prestige, with China seeking to replace the US as the most prestigious state in the international system within the next 30 years. Although the competition is a global one, with China having made significant economic and political inroads into Africa, Latin America and even Europe, Asia is where China must establish its ‘reputation for power’ in the first instance. China seeks the top seat in the hierarchy of prestige, and the United States will do everything in its power to avoid yielding that seat, because the state with the greatest reputation for power is the one that will govern the region: it will attract more followers, regional powers will defer to and accommodate it, and it will play a decisive role in shaping the rules and institutions of international relations. In a word, the state at the top of the prestige hierarchy is able to translate its power into the political outcomes it desires with minimal resistance and maximum flexibility.

I shall also make two subsidiary points. First, that states' obsession with prestige is nothing new: it was as evident 100 years ago as it is today. In the years preceding the two world wars, the rising power's (Germany's) struggle to ascend the prestige ladder and the established power's (Britain's) unwillingness to give way were major contributors to both conflicts.5 The second subsidiary point I will make is that while the kind of power transition we are witnessing today has historically been ‘settled’ through a major hegemonic war—to decide who sits atop the hierarchy of prestige—I wager that this outcome is unlikely in the case of the current China–US competition. In contrast to the conditions prevailing before the two world wars, technological, economic and normative developments since 1945 have made the costs of hegemonic war so prohibitive that the next power transition is more likely to be peaceful than violent.

#### Democracy destroys the environment

Mark Beeson 17, Professor of Political Science and International Relations, University of Western Australia “Coming to Terms with the Authoritarian Alternative: The Implications and Motivations of China’s Environmental Policies”, https://www.academia.edu/35572508/Coming\_to\_Terms\_with\_the\_Authoritarian\_Alternative\_The\_Implications\_and\_Motivations\_of\_Chinas\_Environmental\_Policies?auto=download

One of the more established ideas in the lit- erature about environmental politics is that there is a relationship between economic de- velopment and environmental consciousness. As living standards rise, the argument goes, the demand for better environmental manage- ment and the capacity to provide it increases, and environmental problems decline as a con- sequence (Beckerman 1992). However, there is generally a good deal of skepticism about the existence of a clear relationship between environmental problems such as pollution and rises in income (Stern 2004), despite some ev- idence showing a positive correlation in Asia (Apergis & Ozturk 2015). Even more impor- tantly for the purposes of this discussion, there are more generalised doubts about which polit- ical system is best placed to actually deal with such issues, whatever the overall standard of living may be. While there is a good deal of persuasive ev- idence that democracies are associated with enhanced concern about, and interest in, ad- dressing environmental problems (Neumayer 2002), the tangible consequences of different political structures are more ambiguous. On the one hand, there is the inevitable paradox that wealthier, generally more democratic, societies inevitably have a bigger environmental footprint and do more damage than their poorer counterparts—whatever their political system (Li & Reuveny 2006). Indeed, one of the more striking features of the current international economic order is ‘ecologically unequal ex- change’ (Moran et al. 2013), in which the wealthier world outsources some of its envi- ronmental problems and impacts to the global south. Japan is, perhaps, the quintessential ex- ample of a country with a vastly improved do- mestic environment, but one that has been largely achieved at the expense of its neighbors in the region (Dauvergne 1997). On the other hand, it is evident that many democracies have great difficulty either overcoming powerful, entrenched domestic interests and generally following through on policy commitments, no matter how well intentioned they may be. As former Vice President Al Gore points out: The inability of America’s democracy to make difficult decisions is now threatening the nation’s economic future—and with it the ability of the world system to find a pathway forward toward a sustainable future.... US self-government is now almost completely dysfunctional, incapable of making important decisions necessary to reclaim control, of its destiny’ (Gore 2013: 119/20). It is in this context of an international rollback of democratic reform on the one hand (Diamond 2008), and the simultaneous failure to deliver on environmental commitments in many of the world’s leading democratic na- tions on the other (Klein 2014), that there has been a growing interest in EA. For some observers (see Beeson 2010), EA is a possible, even likely, response to intensifying environmental problems on the part of governments that are either already au- thoritarian, or which may find sustaining democratic rule increasingly difficult in the face of mounting problems. In this context, it is impor- tant to recognise that EA does not have to be judged more effective in managing environ- mental problems for it to persist. For others ob- servers, however, EA is potentially a superior basis for public policy. Gilley (2012: 288), for example, argues that EA ‘can be provision- ally defined as a public policy model that con- centrates authority in a few executive agencies manned by capable and uncorrupt elites seek- ing to improve environmental outcomes’. This definition is reminiscent of the so-called ‘de- velopmental state’ that was pioneered by Japan and reproduced with varying degrees of success across much of Asia—including China (Beeson 2014). The key question in this context is does China have the requisite ‘state capacity’, especially in the form of ‘uncorrupt’, technocratically competent elites to match or even outperform its democratic counterparts?

#### **Democracy destroys the environment – extinction – try or die for authoritarianism**

Daniel, Poli Sci @ University of Leeds, 12

(Charles, To what extent is democracy detrimental to the current and future aims of environmental policy and technologies?, POLIS Journal Vol. 7, Summer 2012)

This is exactly what Mark Beeson suggests in his argument for the coming of environmental authoritarianism. He acknowledges the fact that individual liberty has led to ‘environmentally destructive behaviour’ (Beeson 2010: 276). Whilst democracy has allowed for a more open discussion on environmental issues as well as raising awareness, there has been too much trust put on ecological enlightenment through education. For Beeson, this ‘relies too much on an optimistic, naïve view of human nature’ (Beeson 2010: 282), the idea that an attitude of respect, through the emergence of a shared cosmopolitan rhetoric will produce environmental improvement is wide of the mark. As Beeson rightly points out, the ‘sobering reality’ is that as the human population continues to grow, consuming resources on an unprecedented scale, ‘policy-makers will have less and less capacity to intervene to keep damage to the environment from producing serious social disruption’ (Beeson 2010: 283). Liberal democracy, through the necessities dictated by a capitalist economy has built its survival on the continued exploitation of environmental resources to a point where an attempt to gain control of this practice has become almost impossible. The article, whilst not wholly advocating the Asian political model (indeed Beeson highlights the fact that China is a ruthless exploiter of its own natural environment and sets a poor example for the rest of the continent), is appropriately pessimistic towards the success of liberal democracy. It therefore seems rational to put forward soft authoritarianism as a viable alternative: for it avoids trust in the individual, taking a negative view of human nature and advocates the need for state control, particularly surrounding urgent policy issues like the environment. Whilst it is difficult to accept, it may be the case that ‘good forms of authoritarianism, in which environmentally unsustainable forms of behaviour are simply forbidden, may become not only justifiable, but essential for the survival of humanity’ (Beeson 2010: 289).

#### Even if some warming is inevitable, stopping tail-end risk prevents extinction

Roberts 8-7-2018 (David, “This graphic explains why 2 degrees of global warming will be way worse than 1.5,” *Vox*, <https://www.vox.com/platform/amp/energy-and-environment/2018/1/19/16908402/global-warming-2-degrees-climate-change?__twitter_impression=true>)

By delaying the necessary work of decarbonization, we are consigning millions of people in tropical regions to less food and in the Mediterranean to less water — with all the attendant health problems and conflict. We’re allowing more heat waves and higher seas. We’re giving up on the world’s coral reefs, and with them the hundreds of species that rely on them. And even then, the decision will still face us: 2 degrees or 3? Again, it will mean more heat waves, more crop losses, more water shortages, more inundated coastal cities, more disease and conflict, millions more suffering. And even then, the decision: 3 degrees or 4? The longer we wait, the more human suffering and irreversible damage to ecosystems we inscribe into our collective future. But there’s no hiding, no escaping the imperative to decarbonize. It must be done if our species is to have a long-term home on Earth.

#### DPT scholarship is bankrupt and entirely lacking in real world applicability – democracy is being eroded by capitalism and collapsing in on itself – their theorizing doesn’t assume this degradation

Christopher Hobson 17, Associate Professor in the School of Political Science and Economics, “Democratic Peace: Progress and Crisis”, http://sci-hub.la/https://www.cambridge.org/core/journals/perspectives-on-politics/article/democratic-peace-progress-and-crisis/6D5D0A222F4BE800EBED9A555F0593A5#

When work on democratic peace first emerged it contributed to the revitalization of liberal thought and represented an important contribution to the social sciences. Yet innovation has been replaced by stagnation, with Barkawi proposing that the democratic-peace research program has become “degenerative” insofar as it “no longer creates or explains novel facts.”82 An overriding concern with methodological rigor has resulted in an increasingly monochrome literature, divorced from the most significant debates surrounding democracy. This is a prime example of the larger trend towards methodological questions dominating in IR, something that senior scholars from a range of theoretical traditions have voiced misgivings about.83 Reflecting on this state of affairs, Robert Keohane observes that the relentless pressure of more and more sophisticated quanti- tative methods continues . . . . All too often . . . they [methods] are used unimaginatively to address, in somewhat more precise ways, issues that are already well-understood, while new or more significant developments, since they seem less amenable to such methods, are ignored.84 Sanford Schram echoes this conclusion, suggesting that due to an excessive concern with method, “social science has diminished its ability to conduct research in ways that people can use to better understand and do something about what is happening in their society and economy.”85 What Keohane and Schram both point to is the limited value of work that remains defensible within the restricted parameters it sets for itself, but has little to contribute to the way we formulate and respond to fundamental questions in politics. This is certainly the case with democratic-peace research, which operates with an excessively narrow conception of how IR should be studied and what qualifies as valid scholarship. The result is the odd situation where the largest body of work on democracy in IR has remarkably little to say about democracy’s contemporary fortunes and future place in the world. It appears that democratic-peace scholars can no longer see the proverbial forest from the trees. Coding and correlation are debated ad infinitum, while little attention is given to growing economic inequality, voter alienation, a decline in traditional parties, rising populism, and a wide array of related trends that raise serious doubts about the health of established democracies. Democratic-peace re- search has remained largely oblivious to these trends, yet as shown here, these developments are directly relevant for structural and normative arguments. Engaging with these issues means overturning the unexamined assumption that states at the heart of the zone of peace will remain democratic. Not only does such a linear conception of history fail to correspond to democracy’s much more uneven past, it overlooks the possibility that established democracies may disappear, weaken drastically, or undergo great change. The collective failure to seriously consider the possibility that the Soviet Union might collapse should serve as a warning against such comfortable thinking.86 Perhaps the Trump presidency might finally prompt democratic peace scholars to begin taking demo- cratic decline more seriously. The argument made here points towards a different way of studying democracy’s role in international politics, but the conclusions can be adapted to match with the dominant mode of democratic-peace research. For example, Edward Mansfield and Jack Snyder have argued that the zone of peace does not extend to transitional democracies, which may actually be more war-prone.87 This logic could be extended to considering democracies in decline, asking whether they will behave more like transitional or established democracies. On this point, Leonardo Morlino has developed a sophisticated framework for measuring the quality of democracies, classifying them in relation to rule of law, accountability, participation, competition, responsibility, freedom, and equality.88 This allows him to distinguish between a range of imperfect democracies: inefficient, irresponsible, passive, stuck, illegitimate, reduced, unequal, and minimal.89 Connecting this to work on democratic peace, it could be worth considering whether some failings or weaknesses in democracy are more consequential than others for international behavior. These are just some examples of the way a more complex—and more empiri- cally accurate—account of democracy and its role in international politics could be developed. It is not sufficient, however, to simply expand the remit of neopositivist scholarship by adding a few new research questions. There is a need for greater openness to work that commences from different ontological, epistemological, and methodological positions.

#### This card is long, but it’s worth it – democracies cause more war than autocracies.

Sebastian Rosato 11, Associate Professor of Political Science at the University of Notre Dame, “On the democratic peace”, http://dlx.b-ok.org/genesis/2080000/7ac79f376c806b791801221b260dbeee/\_as/[Coyne,\_Christopher\_J(editor);\_Mathers,\_Rachel\_L(E(b-ok.org).pdf

15.3 EVALUATING THE CLAIM In this section, I evaluate the empirical claims at the core of democratic peace theory. I nd scant support for both of them. Democracies do go to war with one another and attempts to prove that they do not have the unintended consequence of making the no war claim uninteresting. Moreover, there is little evidence that democracies are less likely to engage each other in militarized disputes than other pairs of states because of their shared regime type. The finding is either statistically insignificant or explained by factors other than democracy. 15.3.1 War The claim that democracies rarely if ever go to war with one another is either incorrect or unsurprising. A careful review of the evidence suggests that contrary to the assertions of democratic peace proponents, there have been a handful of wars between democracies and these can only be excluded by imposing a highly restrictive definition of democracy. This would not pose a problem were it not for the fact that by raising the requirements for a state to be judged democratic, the theory’s defenders reduce the number of democracies in the analysis to such an extent that the finding of no war between them is wholly to be expected. Democratic wars There is considerable evidence that the absence of war claim is incorrect. As Christopher Layne (2001, p. 801) notes, “The most damning indictment of democratic peace theory, is that it happens not to be true: democratic states have gone to war with one another.” For example, categorizing a state as democratic if it achieves a democracy score of six or more in the Polity dataset on regime type – as several analysts do – yields three inter-democratic wars: the American Civil War, the Spanish–American War and the Boer War.6 This is something defenders of the theory readily admit – adopting relatively inclusive de nitions of democracy, they them- selves generate anywhere between a dozen and three dozen cases of inter- democratic war. In order to exclude these anomalies and thereby preserve the absence of war claim, the theory’s defenders restrict their definitions of democracy. In the most compelling analysis to date, Ray (1993, pp. 256–9, 269) argues that no two democracies have gone to war with one another as long as a democracy is de ned as follows: the members of the executive and legislative branches are determined in fair and competitive elections, which is to say that at least two independent parties contest the election, half of the adult population is eligible to vote and the possibility that the governing party can lose has been established by historical precedent. Similarly, Doyle (1983a, pp. 216–17) rescues the claim by arguing that states’ domes- tic and foreign policies must both be subject to the control of the citizenry if they are to be considered liberal. Russett, meanwhile, argues that his no war claim rests on de ning democracy as a state with a voting franchise for a substantial fraction of the population, a government brought to power in elections involving two or more legally recognized parties, a popularly elected executive or one responsible to an elected legislature, requirements for civil liberties including free speech and demonstrated longevity of at least three years (Russett 1993, pp. 14–16). Despite imposing these de nitional restrictions, proponents of the democratic peace cannot exclude up to ve major wars, a gure which, if con rmed, would invalidate the democratic peace by their own admission (Ray 1995, p. 27). The first is the War of 1812 between Britain and the United States. Ray argues that it does not contradict the claim because Britain does not meet his su rage requirement. Yet this does not make Britain any less democratic than the United States at the time where less than half the adult population was eligible to vote. In fact, as Layne (2001, p. 801) notes, “the United States was not appreciably more democratic than unreformed Britain.” This poses a problem for the democratic peace: if the United States was a democracy, and Ray believes it was, then Britain was also a democracy and the War of 1812 was an inter-democratic war. The second case is the American Civil War. Democratic peace theorists believe the United States was a democracy in 1861, but exclude the case on the grounds that it was a civil rather than interstate war (Russett 1993, pp. 16–17). However, a plausible argument can be made that the United States was not a state but a union of states, and that this was therefore a war between states rather than within one. Note, for example, that the term “United States” was plural rather than singular at the time and the con ict was known as the “War Between the States.”7 This being the case, the Civil War also contradicts the claim.8 The Spanish–American and Boer wars constitute two further excep- tions to the rule. Ray excludes the former because half of the members of Spain’s upper house held their positions through hereditary succession or royal appointment. Yet this made Spain little di erent to Britain, which he classi es as a democracy at the time, thereby leading to the conclusion that the Spanish–American War was a war between democracies. Similarly, it is hard to accept his claim that the Orange Free State was not a democ- racy during the Boer War because black Africans were not allowed to vote when he is content to classify the United States as a democracy in the second half of the nineteenth century (Ray 1993, pp. 265, 267; Layne 2001, p. 802). In short, defenders of the democratic peace can only rescue their core claim through the selective application of highly restrictive criteria. Perhaps the most important exception is World War I, which, by virtue of the fact that Germany fought against Britain, France, Italy, Belgium and the United States, would count as ve instances of war between liberal states in most analyses of the democratic peace.9 As Ido Oren (1995, pp. 178–9) has shown, Germany was widely considered to be a liberal state prior to World War I: “Germany was a member of a select group of the most politically advanced countries, far more advanced than some of the nations that are currently coded as having been ‘liberal’ during that period.” In fact, Germany was consistently placed toward the top of that group, “either as second only to the United States . . . or as positioned below England and above France.” Moreover, Doyle’s assertion that the case ought to be excluded because Germany was liberal domesti- cally, but not in foreign a airs, does not stand up to scrutiny. As Layne (1994, p. 42) points out, foreign policy was “insulated from parliamentary control” in both France and Britain, two purportedly liberal states (see also Mearsheimer 1990, p. 51, fn. 77; Layne 2001, pp. 803–807). Thus it is di cult to classify Germany as non-liberal and World War I constitutes an important exception to the nding. Small numbers Even if restrictive definitions of democracy enable democratic peace theorists to uphold their claim, they render it unsurprising by reducing the number of democracies in any analysis. As several scholars have noted, there were only a dozen or so democracies in the world prior to World War I, and even fewer in a position to fight one another. Therefore, since war is a rare event for any pair of states, the fact that democracies did not fight one another should occasion little surprise (Mearsheimer 1990, p. 50; Cohen 1994, pp. 214, 216; Layne 1994, p. 39; Henderson 1999, p. 212).10 It should be a source of even less surprise as the number of democracies and the potential for con ict among them falls, something that is bound to happen as the democratic bar rises. Ray’s su rage criterion, for example, eliminates two great powers – Britain and the United States – from the democratic ranks before World War I, thereby making the absence of war between democracies eminently predictable.11 A simple numerical example should serve to illustrate the point. Using a Polity score of six or more to designate a state as a democracy yields 716 purely democratic dyads out of a total 23240 politically relevant dyads between 1816 and 1913. Assuming that wars are distributed according to the proportion of democratic dyads in the population and knowing that there were 86 dyads at war during this period, we should expect to observe three democratic–democratic wars between the Congress of Vienna and World War I.12 If we actually observed no wars between democracies, the democratic peace phenomenon might be worth investigating further even though the di erence between three and zero wars is barely statisti- cally signi cant.13 Increasing the score required for a state to be coded as a democracy to eight – a score that would make Britain democratic from 1901 onwards only and eliminate states like Spain and the Orange Free State from the ranks of the democracies – makes a dramatic di erence. The number of democratic dyads falls to 171, and the expected number of wars is now between zero and one. Now the absence of war nding is to be expected. In short, by adopting restrictive de nitions of democracy, proponents of the democratic peace render their central claim wholly unexceptional. In sum, proponents of the democratic peace have unsuccessfully attempted to tread a ne line in order to substantiate their claim that democracies have rarely if ever waged war against one another. On the one hand, they admit that inter-democratic war is not an unusual phenomenon if they adopt relatively inclusive de nitions of democracy. On the other hand, in their attempts to restrict the de nition of democracy and thereby save the nding they inadvertently make the absence of war between democracies trivial. 15.3.2 Militarized Disputes There are at least two reasons to doubt the claim that pairs of democra- cies are less prone to con ict than other pairs of states. First, despite their assertions, it is not clear that democratic peace theorists have established the existence of a powerful association between joint democracy and peace. Second, there is good evidence that factors other than democracy – many of them consistent with realist expectations – account for the peace among democratic states.14 Significance Democratic peace theorists have yet to provide clearcut evidence that there is a signi cant relationship between their independent and dependent vari- ables, joint democracy and peace. It is now clear, for example, that Maoz and Russett’s analysis of the Cold War period, which claims to establish the existence of a joint, separate peace, does not in fact do so. In a reas- sessment of that analysis, which follows the original as closely as possible save for the addition of a control for economic interdependence, Oneal et al. (1996) nd that a continuous measure of democracy is not signi cantly correlated with peace. Moreover, a supplementary analysis of contiguous dyads – those that experience most of the con icts – also nds no signi - cant relationship between a continuous measure of joint democracy and peace whether a control for economic interdependence is included or not. This nding is particularly damaging because democratic peace theorists argue that “most theoretical explanations of the separate peace imply a continuous e ect: the more democratic a pair of states, the less likely they are to become involved in con ict” (Oneal and Ray 1997, p. 752). Oneal and Ray (1997, pp. 756–7) conclude that the original Maoz and Russett nding does not survive reanalysis because it is based on a joint democracy variable that, although widely used, is poorly calculated and constructed, and they therefore propose a new democracy measure that they claim does achieve statistical signi cance. Their new measure of joint democracy uses the democracy score of the less democratic state in a dyad on the assumption that con ict is a function of the regime type of the less constrained of two interacting states. This “weak link” speci cation appears to provide powerful support for the democratic peace nding: “As the less democratic state becomes more democratic, the likelihood of con ict declines. This is clear evidence of the paci c bene ts of democ- racy.” The new variable provides “corroboration of the democratic peace” (Oneal and Ray 1997, pp. 764–5). Oneal and Russett concur with this conclusion in a separate analysis that also uses the weak link assumption. An increase in democracy in the state that is “freer to resort to violence, reduces the likelihood of dyadic con ict” (Oneal and Russett 1997, p. 279). Although the weak link measure is widely accepted as the gold standard in studies of the relationship between democracy and a variety of inter- national outcomes, it does not provide evidence that joint democracy is signi cantly related to peace. Even as they developed it, Oneal and Ray admitted that the weak link was not a pure measure of joint democracy. What it really revealed was that the probability of con ict was “a func- tion of the average level of democracy in a dyad . . . [and] also the political distance separating the states along the democracy–autocracy continuum” (1997, p. 768, emphasis added). The problem, of course, is that the logics advanced to explain the democratic peace refer to the e ects of democracy on state behavior; none refer to the e ects of political similarity. Thus ndings generated using the weak link speci cation – which is to say all the major assessments of the democratic peace – may not actually support the central democratic peace claim that it is something about the norms and institutions of democracies that enables them to remain at peace. This is precisely the conclusion that Errol Henderson reaches in his compelling assessment of Oneal and Russett’s work. His analysis repli- cates theirs precisely with two minor modi cations: he includes only the rst year of any dispute because democratic peace theory is about the incidence of disputes, not their duration, and he introduces a political similarity variable in order to disentangle the e ects of joint democracy and political distance on con ict. His central result is striking: democracy “is not signi cantly associated with the probability of dispute onset.” “What is apparent from the results,” he concludes, “is that in the light of quite reasonable, modest, and straightforward modi cations of Oneal and Russett’s . . . research design, there is no statistically signi cant relation- ship between joint democracy and a decreased likelihood of militarized interstate con ict” (Henderson 2002, pp. 37–9). Mark Souva (2004) reaches essentially the same conclusion in an analysis of the relationship between domestic institutions and interstate con ict using the weak link speci cation. In a model that includes variables for political and economic institutional similarity, both of which are signi cantly associated with peace, there is no signi cant relationship between joint democracy and the absence of con ict. Other factors There is considerable evidence that factors other than democracy account for the peace among democratic states. As a prelude to elaborating on this point, a few words are in order about the temporal scope of the nding. It is generally agreed that there is scant evidence of mutual democratic paci sm prior to 1945. Henry Farber and Joanne Gowa (1995, p. 143) adopt the most extreme position, claiming that democratic dyads were signi cantly more likely to ght between 1816 and 1913 than other pairs.15 However, even proponents of the theory admit that there is no clearcut evidence for a democratic peace before the Cold War. Thus Oneal and Russett (1999b, pp. 226–7) nd that if they exclude all but the rst year of the wars in their sample – a move that is wholly appropriate given that the theory refers only to the incidence of con ict – there is scant support for the democratic peace between 1870 and 1945. Elsewhere, they are more bullish about the democratic peace, arguing that double democratic “dyads . . . were the most peaceful after about 1900,” though it is worth noting that this period constitutes a small fraction of the entire multipolar era for which data are available (1816–1945) (Oneal and Russett 1999a, p. 28). This is not surprising. As Russett (1993, p. 20) observes, the nineteenth century was a period of “very imperfect democracy,” therefore we should expect to nd a number of inter-democratic rivalries, violent con icts and, as some have suggested, even wars. When coupled with the fact that there were few democracies in the world at the time, this observation suggests that we are unlikely to nd a democratic peace before 1945. There is widespread agreement that, in contrast to the pre-World War II period, there is good evidence of a democratic peace during the Cold War. Henderson (2002, p. 15), for example, describes the postwar period as “the period within which the democratic peace is most evident.” Indeed, even Farber and Gowa (1995, p. 145) admit that “after World War II, there was a marked and statistically signi cant lower probability of disputes short of war between democracies.” Proponents of the theory attribute this to two changes at mid-century: the number of democratic states increased mark- edly, and democratic norms and institutions became stronger and more entrenched, thereby exerting a greater restraining e ect on con ict (Maoz and Russett 1993, p. 627; Oneal and Russett 1997, p. 273). The problem for democratic peace theory is that there are several factors other than democracy that plausibly account for the peace among democratic states after World War II. Farber and Gowa (1995), for example, attribute the democratic peace not to joint democracy, but to alliance ties brought on by the Cold War conflict. Proponents of the democratic peace respond by claiming that in their analyses joint democracy is still related to peace even when controlling for alliance ties. But Henderson (2002, p. 134) refutes this claim, noting that in his replication of Oneal and Russett, “alli- ance membership, more than joint democracy, contributed to peace in the postwar era.” Crucially, Farber and Gowa and Henderson demonstrate that it is not shared democracy that causes democracies to ally with one another in the rst place – thus democracy does not have even an indirect e ect on peace. Another research tradition argues that the inter-democratic peace can be attributed to economic factors, specifically economic interdependence and development. Solomon Polachek, for example, nds that “introduc- ing trade explains away democracy’s impact” on con ict in his analysis of interstate disputes between 1958 and 1967. “Democracy per se does not reduce con ict. Instead a more fundamental factor than being a democ- racy in causing bilateral cooperation is trade” (1997, p. 306, emphasis in original). Similarly, Erik Gartzke (2007) nds that adding variables for nancial and monetary integration and economic development to the standard Oneal and Russett model renders the e ect of joint democracy insigni cant. Thus he concludes that “capitalism, and not democracy, leads to peace” (2007, p. 180). Mousseau (2009) makes a similar argu- ment, claiming that it is advanced capitalist states – he refers to them as contract intensive economies – rather than democracies that do not ght one another. His analysis suggests that the democratic peace is spurious – contract intensive economies caused democracy and peace between 1961 and 2001 (2009, pp. 53–4). Scholars have come up with several other purported causes of the demo- cratic peace that do not t neatly into the security or economic categories. For Gartzke (2000), the finding can be attributed to the fact that democracies tend to have similar preferences. Adding a control for “preference affinity” makes the relationship between democracy and peace insignificant. Importantly, there is only a modest correlation between preference affnity and democracy. Thus he concludes that, contrary to the views of his critics, the e ect of preferences on con ict is not largely a by-product of regime type. His results “challenge the notion that the democratic peace is due largely, or even substantially, to democracy” (2000, p. 209).16 Douglas Gibler (2007, p. 529), meanwhile, concludes that the democratic peace is “in fact a stable border peace.” After adding a control for stable borders on the assumption that the removal of territorial issues has a pacifying e ect on interstate relations, Gibler nds that democracy has little or no e ect on con ict. Most of these findings – and therefore the postwar peace among democracies – can plausibly be explained by realism. The argument goes as follows. Beginning in 1945, the United States found itself in a life and death struggle with the Soviet Union. In order to compete and ultimately prevail in that contest, Washington implemented a two-pronged strategy. First, it established a far-reaching network of military alliances to resist Soviet aggression wherever it might occur. Second, it created an open economic order designed to generate enough wealth to fund the military e ort and to combat communist subversion. In other words, it was the exigencies of the Cold War that generated the alliances, economic integra- tion, advanced economies, and perhaps even the preference a nity that scholars have found to be powerfully associated with the peace among democracies since 1945.17 In sum, there are good reasons to doubt the claim that democracies are less likely to engage each other in violent disputes short of war than other pairs of states. The evidence that there is a signi cant relationship between joint democracy and peace is not strong. Moreover, scholars have uncov- ered several other factors that plausibly account for the peace among democracies, many of which can be explained by realism. 15.4 THE CAUSAL MECHANISMS Proponents of the theory have developed two sets of causal mechanisms to explain the democratic peace. The rst focuses on the e ect of democratic norms on foreign policy behavior. The second attributes the separate peace to the e ect of democratic institutions. 15.4.1 Norms The normative argument begins with the premise that democratic leaders are socialized to act on the basis of democratic norms whenever possible. These norms stress the importance of nonviolent con ict resolution and negotiation in a spirit of live-and-let-live. Because they have been socialized to adhere to these norms, democratic elites try to adopt them in the international arena if they can. Consequently, democracies trust and respect one another when a con ict of interest arises. They respect one another because they believe that the other is committed to the same norms of behavior and is therefore worthy of accommodation. And they trust one another because they believe that the other respects them and is normatively proscribed from using violence. Together these norm exter- nalization and trust and respect mechanisms make up the normative logic (Russett 1993, pp. 31–5; Dixon 1994, pp. 16–18; Weart 1998, pp. 77–8, 87–93). The normative logic also explains why democracies are not especially peaceful toward non-democracies. Antagonists that are not democratic are not trusted because they are presumed not to respect democracies and because their leaders are not inclined toward peaceful con ict resolution. And they are not respected because their domestic systems are unjust. Thus democracies will act violently toward non-democracies in order to defend themselves from attack, to preempt aggressive action, or in order to introduce human rights and representative government (Doyle 1983b, pp. 323–37; Russett 1993, pp. 32–5). 15.4.2 Institutions Although there are several variants of the institutional argument, all of them begin with the premise that democratic leaders are accountable to a wide variety of social groups that may, under various conditions, oppose the use of force. Their accountability derives from their desire to remain in o ce, from the fact that there are opposition parties ready to capital- ize on unpopular policies, and from the fact that democratic publics can periodically remove leaders who are judged not to have acted in their best interests. In addition, the freedom of speech and open political processes that are characteristic of democracy make it possible for the public to rate the government’s performance. In short, democratic institutions make it possible for publics to monitor and sanction their leaders (Lake 1982, pp. 25–6; Russett 1993, pp. 38–40; Owen 1997, pp. 41–3). Conscious of their accountability, democratic elites will only use force abroad if there is widespread support for doing so. This support is vital if they are not to be removed from o ce for waging an unpopular war or to encounter opposition from various social groups for committing the state to a costly violent con ict. Democratic peace theorists focus on four spe- ci c groups that must be mobilized to support a war: the general public, constituencies that bene t from an open international economic order, opposition parties and liberal opinion leaders. These groups are likely to oppose war because it is costly in terms of blood, treasure, or expected pro ts, because they can gain electorally from doing so, or because they deem it morally unacceptable (Doyle 1983a, pp. 229, 231–2; Russett 1993, pp. 38–9; Owen 1997, pp. 19, 37–9, 45–7; Schultz 1998, pp. 831–2). Six causal mechanisms ow from the elite accountability claim, each of which traces a di erent path to peace between democracies. The rst two suggest that democracies are constrained from using force in the interna- tional arena. According to the public constraint mechanism, democratic elites shy away from the use of force in response to the public’s aversion to war, which is itself driven by a reluctance to incur the costs associated with large scale interstate violence. The group constraint mechanism is similar: democratic leaders carry out the wishes of various antiwar groups. Thus in a stando involving two democracies both sides are constrained, believe the other also to be constrained and seek an agreement short of war (Bueno de Mesquita and Lalman 1992, pp. 155–8; Russett 1993, pp. 38–40). Two further mechanisms focus on the claim that accountability makes democratic leaders slow to resort to force. According to the slow mobi- lization mechanism, persuading the public and potential antiwar groups to support the use of force is a long, complex process and therefore democracies cannot mobilize quickly. This is also the core of the surprise attack mechanism, which also notes that the mobilization process takes place in the open, thereby precluding the possibility that a democracy can launch a surprise attack. In a crisis involving two democracies, then, the antagonists have the time to come to a mutually acceptable agreement and can negotiate without fearing attack (Russett 1993, pp. 38–40; Bueno de Mesquita, Koch and Siverson 2004, pp. 256–7). The fth mechanism zeroes in on the advantages that democracies have in revealing information about their resolve in a crisis. Because they are accountable to their citizens and can expect opposition parties to oppose unpopular policies, democratic leaders are cautious about escalating a crisis or launching a war. In fact, they will only ght if the stakes in a con ict are important to them. This provides valuable information to an opponent: if a democracy refuses to back down or escalates a crisis, then it is resolved. In purely democratic crises, then, both states will have good information about the other’s resolve, are unlikely to misrepresent their own resolve and can reach a settlement without risking war (Schultz 1998, pp. 840–1; Bueno de Mesquita et al. 1999, pp. 802–803). The nal mechanism focuses on democratic expectations of victory. Because they are accountable to their citizens and various domestic groups, democratic leaders will only choose to ght when they believe that their chances of victory in the ensuing war are high. It follows that when two democracies face o against one another, the odds that both believe they have a good chance of prevailing in battle are exceedingly low. Therefore pairs of democracies in a crisis will negotiate rather than ght (Bueno de Mesquita et al. 1999, p. 799; Bueno de Mesquita 2006, p. 640). These mechanisms also explain why democracies ght nondemocracies. Leaders of nondemocratic states are not as accountable as their democratic counterparts and are therefore less constrained, quicker to act, unable to signal their resolve and prepared to ght even when their chances of victory are modest. This being the case, democracies are likely to use force against nondemocracies for three reasons: they may have to ght in self- defense; they may conclude that they have to preempt aggressive action by striking rst; or because they misread their opponents’ resolve, they may mistakenly believe that peaceful bargains are not available (Lake 1982, pp. 26–30; Bueno de Mesquita and Lalman 1992, pp. 158–60; Russett 1993, pp. 38–40; Bueno de Mesquita 2006, p. 640). 15.5 EVALUATING THE CAUSAL MECHANISMS 15.5.1 Norms The causal mechanisms that comprise the normative logic do not appear to operate as stipulated. The available evidence suggests that democracies do not reliably externalize their domestic norms of con ict resolution, nor do they tend to treat each other with trust and respect when their interests clash. Externalization Democracies have often failed to externalize their domestic norms of conflict resolution

. These norms justify the use of force under only two conditions: self-defense, and intervention to prevent gross human rights violations or impose democracy. However, there is good evidence that democracies have frequently waged war for reasons other than these.18 Between 1815 and 1975, Europe’s most liberal states fought 33 “imperial” wars against previously independent polities, and 33 “colonial” wars against their own possessions. None of the imperial wars can be justi ed in terms of self-defense. Several, such as the First Opium War (1839) and Dutch–Achinese War (1873), were driven by the desire for pro t or in order to extend a sphere of in uence. Another set of cases that includes the British–Afghan War (1838) and the Franco–Tunisian War (1881) was driven by imperial competition: a liberal great power conquered an independent people in order to prevent it falling into the hands of another state. Some commentators justify these as defensive wars, arguing that the democracy in question was attempting to protect its empire. However, most were preventive rather than defensive: there was no imminent threat to either Afghanistan or Tunisia, for example. Moreover, in launching these wars Britain and France eschewed an obvious liberal alternative to conquest such as o ering the non-European entity a defensive alliance. A nal set of cases, including the British–Zulu War (1838) and Franco- Tonkin War (1873), involves wars fought against independent peoples bordering democratic empires. Several of these have also been erroneously categorized as defensive. In most cases, the democratic imperial power acted preventively or deliberately provoked the non-European polity into attacking as a prelude to conquering it. And in the few cases where the non- European power initiated the war it, and not the democracy, was acting in self-defense. Nor were any of the wars, colonial or imperial, fought in order to prevent human rights violations or inculcate liberal values. All of the colonial wars were waged expressly to perpetuate autocratic rule. The imperial wars, meanwhile, simply had the e ect of replacing indigenous illiberal governments with European authoritarian rule. Where this rule was not direct, the Europeans supported local autocratic elites, thereby e ectively underwriting autocratic rule. In short, there is good evidence that the norm externalization mecha- nism does not operate as advertised. Britain and France, generally viewed as classic examples of liberal states, have frequently violated liberal norms in their foreign a airs, thereby casting doubt on the claim that democracies externalize their internal norms of con ict resolution. As Dan Reiter and Allan Stam (2002, p. 151) note, “The essential parts of the norms explana- tion argue that democracies engage in wars out of fear of exploitation by nondemocratic states. However, the initiation of wars of empire against weaker states to expand democracy’s interests and in uence at the expense of weaker societies is inexplicable from the liberal norms perspective.” Trust and respect Democracies do not have a powerful inclination to treat each other with trust and respect when their interests clash. Good evidence for this claim comes from a review of American interventions to destabilize fellow democracies during the Cold War. Three features of these cases warrant attention. First, all of the regimes that the United States sought to undermine – Iran (1953), Guatemala (1954), Indonesia (1957), British Guyana (1961–64), Brazil (1961, 1964), Chile (1973) and Nicaragua (1984–90) – were established or edgling democracies and all were replaced by authoritarian regimes. Second, although the interventions were often justified as attempts to combat communism, none of the targets were communist, intended to impose a communist model, or were actively courting the Soviet Union. In other words, the United States did not trust and respect other democracies even when the issues at stake were relatively minor. Third, in the cases of Iran, Guatemala, Brazil and Chile support for democracy appears to have been subordinated to naked economic interests. Democratic peace theorists deny that these examples damage the theory. First, they argue that the target governments were not su ciently demo- cratic. Second, they argue that the United States government acted cov- ertly precisely because of democratic norms: the public would have viewed overt action as illegitimate. Thus the cases do not contradict the theory. Neither argument stands up to scrutiny. In some instances, the targets may not have been fully democratic, but they were more democratic than the regimes that preceded or succeeded them. As for the claim that the covert nature of these operations actually supports democratic peace theory, it is worth noting that the theory explicitly asserts that it is the leaders of democracies who are most likely to be socialized to and abide by liberal norms. That they did not do so and misled a liberal public is a powerful indictment of the theory. But this is of little consequence: whether or not normative considerations a ected the type of violence employed, the fact is that the United States, perhaps the most liberal state in the system, did not trust or respect these states, even though they were democratic, and used military force in order to destabilize them. Further evidence against the trust and respect claim comes from several analyses of diplomatic crises involving Britain, France, Germany and the United States. Layne looks at four crises where democratic states almost went to war with each other and concludes that they o er scant support for the mechanism: “In each of these crises, at least one of the democratic states involved was prepared to go to war. . . In each of the four crises war was avoided not because of the ‘live and let live’ spirit of peaceful dispute resolution at democratic peace theory’s core, but because of realist factors” (Layne 1994, p. 38).19 Similarly, Stephen Rock (1997) nds little evidence that shared liberal norms helped to resolve any of the nineteenth century crises between Britain and the United States. In later cases, where they do appear to have contributed to resolving divisive con icts, “liberal values and democratic institutions were not the only factors inclining Britain and the United States toward peace, and perhaps not even the dominant ones” (Rock 1997, p. 146). In short, the trust and respect mechanism does not appear to work as speci ed. Faced with these anomalies, democratic peace theorists argue that democracies will only trust and respect one another if they perceive each other to be democratic. This is only a convincing amendment, however, if democracies tend to form coherent, accurate, and stable opinions of the regime types of other states. They do not. Even John Owen (1997), in his sympathetic analysis of the democratic peace, is forced to admit that, more often than not, liberal elites fail to form coherent or accurate assessments of the regime type of their adversaries. Meanwhile, Oren (1995) has shown that these assessments are far from stable: democracies frequently redefine who is or is not democratic and they do so based on strategic considera- tions rather than on the democratic attributes of those states. Thus the introduction of perceptions has done little to strengthen the democratic peace case. 15.5.2 Institutions The available evidence suggests that the institutional argument does not work as speci ed. For one thing, democratic leaders are no more accountable than their autocratic counterparts. Nor does the evidence support the institutional mechanisms that purportedly ow from democratic account- ability. Pacific publics and antiwar groups rarely constrain decisions for war, democracies are not slow to mobilize or incapable of surprise attack, democratic states are not especially good at revealing their resolve in a crisis, and they are not especially likely to win their wars. Accountability It is generally accepted that democracies do not ght each other, but autoc- racies do. Therefore, if accountability is a key mechanism in explaining the separate peace between democracies, democratic leaders must be more accountable than autocratic leaders. If they are not, then accountability – the key to all the institutional arguments – cannot be a prime cause of the democratic peace. In assessing whether leaders are accountable, proponents of the demo- cratic peace focus exclusively on their chances of losing o ce as a result of waging a losing or costly war (Bueno de Mesquita et al. 1999, p. 794). Logically, however, accountability depends on a leader’s likelihood of removal and the costs that he or she will incur when removed. It is not clear, for example, that leaders who are likely to be voted out of o ce for prosecuting a losing or costly war, but are unlikely to be exiled, impris- oned or killed in the process will feel more accountable than leaders who are unlikely to lose o ce, but can expect severe punishment in the unlikely event that they are in fact removed. Put somewhat di erently, it is not clear that their expected costs, which are a function of the likelihood that they will be removed and the costs they will incur if they are removed, are substantially di erent.20 If we focus on expected costs, democrats do not appear to be more accountable than autocrats. An analysis of the fate of all leaders in all the wars in the Correlates of War (COW) dataset, reveals that demo- cratic leaders who lose a war or embroil their state in a costly war are marginally more likely to be removed from o ce than their autocratic counterparts (37 percent to 35 percent), but considerably less likely to be exiled, imprisoned, or killed (5 percent to 28 percent).21 Thus there is little evidence that democratic leaders face greater expected costs for waging losing or costly wars and are therefore more accountable than their auto- cratic counterparts. Giacomo Chiozza and Hein Goemans reach a similar conclusion in their examination of how defeat in war a ects the tenure of democratic and nondemocratic leaders between 1919 and 1999. Defeat in war does not significantly affect the tenure of democrats, but does significantly reduce the tenure of autocrats (Chiozza and Goemans 2004, p. 613). Similarly, in her analysis of domestic audience costs, Jessica Weeks (2008, p. 59) nds that leaders in most nondemocracies are just as accountable as their democratic counterparts. Faced with this argument, democratic peace theorists provide alterna- tive evidence that democratic leaders are more accountable than their autocratic counterparts. Noting that democracies rarely lose their wars, proponents of the democratic peace assert that this must be because they are more accountable than autocrats and therefore tend to choose winnable wars. (Slantchev, Alexandrova and Gartzke 2005, p. 461). There are several problems with this new body of evidence. First, it does not contradict the nding about the fate of leaders described above. That body of evidence, which provides a more direct test of the accountability claim, suggests that there is little di erence between democrats and autocrats in terms of accountability. Second, as I argue below, there is little evidence that democracies are more likely to win their wars than autocracies, and scant support for the claim that democrats carefully select wars that they can win because they are aware of their accountability. As Michael Desch (2003, p. 188) points out, democratic peace theorists are content to “infer” careful selection “rather than directly testing these propositions.” Public constraint The claim that public opinion can be expected to restrain leaders considering war suffers from several weaknesses. First, only a tiny fraction of the public is likely to experience the costs of war directly and therefore have a reason to oppose a conflict. Excluding the World Wars, democratic fatalities in war have tended to be quite low. In 60 percent of cases, losses amounted to less than 0.01 percent of the population, or 1 in 10 000 people. Indeed, the casualty rate only exceeded 0.1 percent, or 1 in 1000 people, in 6 percent of cases. As for militarized disputes, Britain and the United States have su ered less than one hundred total battle fatalities in 97 percent of them. Thus the vast majority of citizens do not experience the costs of war. Moreover, those who are directly a ected – the families and friends of mili- tary personnel – are the least likely to oppose a war. Because most democ- racies have professional standing armies and members of the military sign up voluntarily, they and those close to them tend to be imbued with a pow- erful spirit of patriotism and self-sacri ce, and they are therefore unlikely to speak out against a government that chooses to go to war. Second, cost aversion is often trumped by nationalism. The growth of nationalism is one of the most striking features of the modern period. Its e ect is so powerful, in fact, that ordinary citizens have repeatedly demonstrated a willingness to ght and die in order to defend their state and co-nationals. This being the case, it is likely that if they believe the national interest is at stake, as it is in most interstate con icts, the citizens of democracies will ignore the costs associated with a decision for war. Third, democratic leaders can often lead the public rather than follow it. Their reputation as foreign policy experts and their privileged access to relevant information give them ample opportunity to stoke nationalistic fervor, shape public opinion and suppress dissent despite the obligation to allow free and open discussion.22 There is good evidence that cost considerations are often trumped by nationalism or elite entrepreneurship. Between 1815 and 1991, the world’s ve most militarily active democracies – the United States, Britain, France, India and Israel – went to war 30 times. In half of those cases, they were the victims of aggression and therefore we should not be surprised that their publics reacted in a nationalistic fashion or were persuaded to support decisions for war. In the other fteen cases, however, there was no obvious threat to the homeland or vital national interests. Nevertheless, on 12 of these occasions (80 percent) the outbreak of war was greeted by a spontaneous and powerful nationalistic response, or in the absence of such a response, leaders persuaded the public to support the use of force. This kind of reaction has been common even in clashes between democracies. The available evidence reveals that public opinion was highly bellicose and nationalistic on at least a dozen occasions where democracies came to the brink of war with one another. Group constraint For the group constraint mechanism to be a plausible explanation of the democratic peace, there must be good evidence that antiwar groups will, more often than not, dominate the policy process. There are theoretical and empirical reasons to doubt this claim. As far as theory goes, it is gen- erally agreed that groups that are better organized and have more at stake in a given situation are more likely to in uence policy. This being the case, there is no reason to believe that pacific groups will generally prevail over bellicose ones. When it comes to issues of war and peace, international traders and the military industrial complex will both have a great deal at stake and are likely to be equally well organized. The historical record also suggests that prowar groups often win out in the foreign policy process. Owen (1997) identi es four nineteenth century examples in which the American political elite was deeply divided about going to war and finds that in each case the prowar group won out over the antiwar group. Similarly, Jack Snyder (1991) provides abundant evidence of bellicose groups capturing the foreign policy making process in Britain and the United States over the last 200 years. Imperialist groups managed to dominate British policymaking in the middle of the nineteenth century due to “their apparent monopoly on expertise and e ective organization.” The US case is even more damaging to the group constraint claim. Despite a consensus against involvement in “high cost, low bene t endeavors” the United States became embroiled in Korea and Vietnam as a result of coalitional logrolling among prowar groups (Snyder 1991, pp. 206, 209). In short, it is not clear that paci c interest groups tend to dominate the democratic policy process even in the most mature and stable democracies. There is also little evidence for the other implication of the group con- straint claim, namely that group constraints must be weaker in autocra- cies than in democracies. If the mechanism is to explain why democracies remain at peace but autocracies do not, then there must be good evidence that democratic leaders face greater group constraints. The evidence sug- gests, however, that autocratic leaders often respond to groups – themselves or their supporters – that have powerful incentives to avoid war. One reason for autocrats to shy away from con ict is that wars are expensive and the best way to pay for them is to move to a system of con- sensual taxation, which in turn requires the expansion of the franchise. In other words, autocratic leaders have a powerful incentive to avoid wars lest they trigger political changes that may destroy their hold on power. Another reason to avoid war is that it allows civilian autocrats to maintain weak military establishments, thereby reducing the chances that they will be overthrown. Di erent considerations inhibit the war proneness of mili- tary dictators. First, because they must often devote considerable effort to domestic repression, they have fewer resources available for prosecuting foreign wars. Second, because they are used for repression their militaries often have little societal support, which makes them ill equipped to ght external wars. Third, military dictators are closely identi ed with the military and will therefore be cautious about waging war for fear that they will be blamed for any subsequent defeat. Finally, time spent fighting abroad is time away from other tasks on which a dictator’s domestic tenure also depends. Thus there may be fewer groups with access to the foreign policy process in autocracies – in extreme cases only the autocrat himself has a say – but these often have a vested interest in avoiding war. This being the case, it is not clear that group constraints are weaker in autocracies than they are in democracies. Slow mobilization There is scant support for the claim that democracies are slow to use force because of the complexity of mobilizing multiple domestic groups behind the war e ort. American presidents, for example, have routinely circumvented or ignored the checks and balances that are supposed to restrain their decisions to use force. For proof we need look no further than the following fact: most of the 200 American uses of force in the last two centuries were authorized unilaterally by the president and only ve of them were wars declared by Congress. Presidents have circumvented the democratic process in several ways: by asserting that national security is more important than observing the constitution; by rede ning the action in question as anything but a war, thereby obviating the need for consulta- tion; by putting troops in harm’s way in order to spark a wider con ict; and, at times, by simply ignoring Congress. Even the passage of the War Powers Resolution (1972), which was designed to make war decisions subject to open debate, has had little e ect. When presidents have deter- mined that national security depends on swift and decisive action they have been willing to bypass the democratic imperatives of open debate and consensus decision making. That this kind of behavior is routine in perhaps the most democratic state of the last two centuries suggests that slow mobilization is not a feature of democracies as a whole. Surprise attack There is also scant support for the claim that democracies are less able to launch surprise attacks. There have been ten surprise attacks since 1939, two of which have been launched by democracies – the British–French–Israeli attack on Egypt in 1956 and the Israeli initiation of the Six Day War (1967). Because there are so few cases, it is impossible to determine whether this nding is signi cant, but it is worth noting that democracies have made up approximately one-third of the state years since 1939, which suggests that they are as likely to launch surprise attacks as nondemocracies. Moreover, there does not appear to be a great deal of evidence for the claim at the core of the surprise attack mechanism, namely that democracies cannot keep their war deliberations secret. The United States kept its decision for war from the British before the War of 1812, Lord Grey did not publicize his agreement to defend French Channel ports before World War I and Roosevelt did not reveal his agreements with Churchill prior to World War II. In short, demo- cratic leaders will eschew open debate and maintain secrecy whenever they believe that doing so will improve their chances of military success. Information Democracies do not appear to be especially good at revealing their level of resolve in a crisis. The rst reason is that although their open politi- cal systems can provide a great deal of information, this is not the same as providing good information. In a standoff against a democracy, the other state will receive signals from numerous sources, including the government, the opposition, interest groups, public opinion and the media. Discerning which signal is representative of the democracy’s true position is likely to be a di cult task. There is good evidence for this claim. In their analysis of seven interstate crises between 1812 and 1969, for example, Bernard Finel and Kristin Lord (1999) nd that democracies do indeed provide a great deal of information, but also that its sheer volume has either confused observers or served to reinforce prior misconceptions. Democratic peace theorists have responded that opponents are not con- fused by the multitude of signals that they receive from democracies. If the opposition party supports the government then the democracy is commit- ted, otherwise it is not. It is not clear, however, that the opposition’s stance in a crisis reveals a great deal about a democracy’s resolve. For one thing, the opposition almost invariably supports the government either as a result of the familiar “rally round the ag” e ect or because the administration persuades it to do so. In fact, as Kenneth Schultz (2001, p. 167) has shown, opposition parties support their governments’ deterrent threats 84 percent of the time. What this means is that democracies are rarely able to signal their level of resolve – since the opposition almost always supports the government, opponents glean little information when they see an opposi- tion party doing exactly that. Nor do they gain valuable information when the opposition party opposes the government. On the few occasions that opposition parties have opposed military action, thereby presumably sign- aling that the democracy is not resolved, the government has instead gone ahead and initiated hostilities. Presidents Madison, Truman, and George H.W. Bush and Prime Minister Anthony Eden, to name a few, all went to war despite resistance from their respective opposition parties. In short, there does not appear to be a strong correlation between declarations by opposition parties and decisions for war. Victory For the victory mechanism to explain the democratic peace there must be good evidence that democracies win most of their wars and that their victory propensity can be attributed to the fact that they carefully select wars they can win.23 All else equal, democracies are not more likely to win their wars than autocracies. As Alexander Downes (2009) has shown, the evidence that democracies are more likely to win their wars is critically a ected by two debatable choices: the decision to code all states that did not initiate a war as targets and the exclusion of all wars that ended in draws. When he divides states into initiators, targets and joiners, and adds draws to the dataset, he nds that democracies are not signi cantly more likely to win their wars. Thus the nding does not appear to be robust. Desch (2002) reaches a similar conclusion using a di erent approach. Focusing only on cases that provide fair tests of the war-winning proposition, he con- cludes that the “historical data do not strongly support the triumphalists’ claim that democracies are more likely to win wars than nondemocracies” (Desch 2002, p. 20). Nor is there strong support for the claim that democratic leaders care- fully select wars that they can win because they are aware of their domestic accountability. In his statistical analysis of war decisions, Desch (2003, pp. 187–92) nds that democracy has one of the smallest e ects of any vari- able on whether a state wins a war that it initiates. His case studies of dem- ocratic war initiations buttress this nding: in half of the cases, democratic leaders’ decisions for war were not a ected by calculations of accountabil- ity or the operation of a robust marketplace of ideas. Meanwhile, Downes (2009) nds little evidence for the corollary of the careful selection argu- ment, namely that democracies will shy away from wars that they are not con dent of winning. Finally, democracies appear to engage in as many costly wars as autocracies, thereby suggesting that they are not especially selective about the wars that they ght. In conclusion, the causal mechanisms that purport to explain the democratic peace do not appear to operate as stipulated by the theory’s proponents. Democracies do not reliably externalize their domestic norms of con ict resolution and do not trust and respect one another when they have a con ict of interest. Moreover, democratic leaders are not more accountable than their autocratic counterparts, democratic publics are not reliably peaceful, paci c groups do not have privileged access to decision- making and democracies are not especially slow to mobilize, incapable of surprise attack, adept at revealing their resolve, or good at ghting wars.

#### Democracy causes great power nuclear war – backsliding solves

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(Harald, Democracy, Peace, and Security, Lexington Books pp. 44-49)

My own proposal for solving the problem. developed together with my colleague Jonas Wolff (Müllcr 2004. Muller/Wolff 2006). turns the issue upside down: We do not start with explaining mutual democratic peacefulness, but its opposite. the proven capability of democracies to act aggressively against non-democracies. We note that—apart from self-defense where there is no difference between democracies and non-democracies——democratic states go to war—in contrast to non-democracies—to uphold international law (or their own interpretation thereof), to prevent anarchy through state failure, to “save strangers” when dictatorships massacre their own people, and to promote democracy. None of these acts is likely to find its target in a democracy. Since the use of force by democracies is hardly possible without public justification, even the rhetorical use of the said reasons will not stand public scrutiny when uttered against a democracy—people will not believe it, War other than for self-defense thus can only be fought by democracies against non-democracies because against a fellow democracy justification would fail. Because whether this is the case or not to a degree that justifies war as the ‘ultimate means” must rely on practical judgments. and practical judgments can differ among even reasonable people. democracies might disagree whether or not the judgment applies in specific cases. Democracies also show variance in that regard due (o a systematic. political-culturally rooted different propensity to judge situations as justifing war or not, and to participate in such wars (Gels et al, 2013). It should also be noted that, given the continuum between autocracy, anocracy and democracy, whether a given state is a democracy or not can be subject to interpretation. and this interpretation may even change over time (Oren 1995, Hayes 2013). The fact is that there are a couple of fairly warlike democracies, and that the democracies participating most frequently in military disputes (apart from the special case of Israel) are, by and large. major powers such as the United States, the United Kingdom. France. or India. This pattern is important to keep in mind when the question of the utility of democratic peace for today ‘s world problems is to be answered. Transnational terrorism, failed states, civil wars and the like dominate the international agenda on war and peace. At the classical level of international relations, in the relationships among major powers. developments arc undcr way which potentially pose an even greater threat than this diverse collection of non-interstate problems presently does. We are living in an era of rather rapid and disturbing power change (Tammcn et al. 2000). The United States are still the leading power of the world with unprecedented militany and economic poer. But others are coming closer: China. India. Braiil and Indonesia, China is at the top of this cohort, All major power changes chal lenge existing structures and thus contain the potential for great disturbance. The leading power may start to fear for its dominant position and take measures to ensure its position at the lop. These actions may frustrate emerging powers and even lead to the perception that their security is endangered. which would motivate counter-measures that further propel a political escala tion spiral. An increasingly focused competition in which a true power change appears increasingly possible. that is. a change of position at the top of the international hierarchy, has an even greater risk potential. If the inherent dangers are not contained—which remains always a possibility major power war may ensue defying all propositions that major war has become obsolete or that nuclear deterrence will prevent this calamity once and for all. Of course, states can grow peacefully into roles of higher responsibility. status and influence on the world stage. There arc no natural laws saving that changes in the world’s power structure must end in war, despite all distur bances and ensuing risks (Rauch 2014). The less conflict an emerging power experiences with established ones, and with peer challengers that emerge simultaneously, the better the chances that the rise will travel a peaceful trajectory. Looking through this lens. thc relations of only one emerging power with the present hegemon appear to be partially conflict-pronc. and seriously so: it concerns the pair China/United States. The Iwo great powers are rivals for preponderance in East and South East Asia and eventually for being the number one at the global level. There is also Chinese resentment stemming from the US role in China’s past as a victim of Western imperialism. On the other hand. China’s authoritarian system of rule and ensuing violations of human and political rights trigger the liberal resentment discussed in the first part of this chapter. which is rooted particularly strongly in US political culture. The Chinese—US relationship is thus thc key to a peaceful. tense or even violent future at the world stage. A small group of major powers. Including the United States and China, is interconnected today by a complex conflict system. China has territorial claims against Japan, South Korea, Vietnam. the Philippines. Brunci. and India which it pursues by a variety of means, not shying away from the limited, small scale usc of militan force in some cases, notably against obviously weaker counterparts (Ellcman ci al. 2012). China’s relation (o wards Japan is the one most burdened by China’s past as a victim of Japanese oppression and related cruelties, and the propcnsit of the conservative part of Japan’s elite to display cavalier attitudes towards this past or even sort of celebrate it (as through visits to the notorious Yasukuni shrine hosting the remnants of war criminals) only adds to anti-Japanese feelings in China (Russia. another great power. also openly pursues a revisionist agenda. as vividly shown in the recent Crimean move, but these territorial ambitions are not part of the most virulent conflict complex in Asia). Territorial claims are always emotionalized and dangerous. Territorial claims by a major power bear particular risks, because threatened countries look for protective allies which are, by necessity, major powers with the capability to project power into the region of concern. The great power claimant and the great power protector then position themselves on the opposite sides of the conflict. A classical constellation of great power conflict results that looks far more traditional than all the talk about post-modern global relations in which state power struggles fade into oblivion would suggest. In the Asian conflict complex that structures the shape of the US—Chinese contest (Foot/Walter 201 1). Japan. South Korea and the Philippines arc for mall allied ith the United Slates. India and Vietnam today entertain rda (ions ith the United States that can be depicted as cordial entente, already include military cooperation, and might move further towards an alliance. depending on deelopmens in Asia. The United States is also a protector of Taiwan. officially a Chinese province, factualh an independent political entity. and the main object of Chinese interest because of the unfinished agenda of national re-unification. Given the enormous asymmetries between China and Taiwan. the latter’s independence depends fully and unambiguously on the US guarantee. Russia and China have a fairly ambivalent relation with each other that is officially called a strategic partnership. Ambiguous as this relationship is, it is predictable that the more the West and Russia are at loggerheads, the closer the Russian—Chinese relations might become. On the other hand. Chi na is the stronger partner and harbors not completely friendly feelings to wards Moscow. as Russia took part in China’s humiliation during the imperi alist period no less than the United States did. Russian fears concerning covert immigration into Eastern Siberia and demographic repercussions and political consequences that might result therefrom add to the uneasiness. China and India arc natural rivals for regional preponderance in Asia (Gilbov/Hcginbotham 2012). Both arc developing rapidly. with China still ahead. Territorial disputes. India’s liospitalit Lo TibeLan exiles including the Dalai Lama. China’s close relation to Pakistan and a growing naval rivalry spanning the Indian Ocean from the Strait of Malacca to Iranian shores (Garofano/Dew 2013) run parallel to rapidly growing economic relations and ostensible efforts lo present the relationship if not as amiable then at least as partner-like. The United States, China, Russia and India even today conduct a multi- pronged nuclear arms race (Fingar 2011: Gangul /Thompson 2011: O’Neill 2013. Müllcr 2014). In this race, conventional components like missile de fense. Intercontinental strike options, space-based assets and the specter of cbcr war play their role, as does the issue of extended dcterrcncc The general US militar’ superiority induces Russia and China to improve their nuclear arsenals, while India tries not to be left too far behind the Chinese in terms of nuclear capability. Pakistan and North Korea ork as potential spoilers at the fringe of this arms race. They are not powerful but thc arc capable of stirring up trouble, whenever they move. In tems of the military constellation, the most disquieting development is the drafting of pre-emptive strategies of a first (most likely conventional) strike by the United States and China, on either side motivated by the per ceived need to keep the upper hand early in a potential clash close to Chinese shores (such as in the context of a Taiwan conflict). China is building up middle-range ballistic capabilities to pre-empt US aircraft carrier groups from coming into striking distance and to desiroy US Air Force assets in Okinawa. while the United States is developing means to neutralize exactly these Chinese capabilities. They are steering towards a hair-trigger security dilemma in which the mutual postures cry out for being used first before the enemy might destroy them (Goldstein 2013: Le Miôre 2012). It cannot be excluded that this whole conflict system might collapse into two opposing blocks one da the spark for a major violent cataclysm could even be lighted by uncontrolled non-state actors inside some of the powers. or—in analogy to the role of Serbia in 1914— a ‘spoiler” state with a particularly idios ncralic agenda. Pakistan. North Korea or Tai an arc con ceivable in this role. Even Japan might be considered, if nationalism in Nippon grows further and seeks confrontation with the old rival China. If anything. this constellation does not look much better than the one which drove Europe into World War I a century ago. and it contains a nuclear component. To trust in the infallibility of nuclear deterrence in this mufti- pronged constellation needs quite a lot of optimism Can democratic peace be helpful in this constellation? Our conflict system includes democracies—the United States, India, Japan. Indonesia and non- democracies such as China. Russia, and Vietnam, but not necessarily on the same side. Should the European theater become connected to the Asian one through continuous US—Russian disputes and a Russian—Chinese entente. defective democracies like Ukraine and Georgia may feature rather importantly as potential triggers for a worsening of relationships. While democracy is useful in excluding certain conflict dyads in the whole complex, such as India and the United States. Japan and the United States. Japan and India. from the risk that they might escalate into a violent conflict, and as democratic peace is pacifying parts of the world. such as South America or Europe. it helps little in disputes between democracies and non-democracies. To the contrary: as discussed above, democracies have a more or less moral-emotional inclination to demonize non-democracies once they dis agree, and to feel a missionary drive to turn them democratic. This might exacerbate the existing, more interest-based conflicts between democracies and non-democracies, and it creates fears in the hearts of autocratic leaders that they might be up for democratization sooner or later. The close inter- democratic relations which democratic peace tends to produce, in turn, only exacerbate these fears as democracies tend to be rich, well organized, and powerful and dispose together of much more potent military capabilities than their potential non-dcnwcratic counterparts. Rather than helping with peace. the inter-democratic consequences of the democratic peace tend to exacerbate the security dilemma which exists between democracies and non-democracics an way. This non-peaceful dark side of democratic peace has escaped the attention of most academic writings on this subject and certainly all political utterances about democratic peace in our political systems. But democratic militancy is the Siamese twin of democratic peace as the Bush Administration unambiguously taught us (Gels et al. 2013: Müllcr 2014b).