# 1AC

## 1AC---Banking

### 1AC---Financial Technology ADV

#### Contention 1 is FINANCIAL TECHNOLOGY.

#### The present lack of systemic risk accounting in financial antitrust permits the creation of fintech-bank hybrids, depresses disruptive fintech innovation, AND restricts US fintech competitiveness.

Rory Van Loo 18, Associate Professor, Law, Boston University. Affiliated Fellow, Information Society Project, Yale Law School, "Making Innovation More Competitive: The Case of Fintech," UCLA Law Review & Discourse, Vol. 65, No. 232, February 2018, Lexis.

Technology challengers are providing digital alternatives to traditional financial institutions. PayPal and related startups transfer funds with the press of a button. Automated assistants can, with access to consumers' personal data, recommend a tailored credit card, bank account, or loan with lower rates. 1 Other consumer industries, such as electronics, music, and books, have seen Fortune 500 companies dissolve and profits fall in the face of innovation. 2 In contrast, the largest banks have steadily gained market share. 3 One explanation for this outcome is that banks are publicly subsidized and insulated from competition. Although legal scholars have recognized banking competition shortcomings, 4 they have yet to pay sustained attention to the intersection between competition policy and the recent wave of digital innovation, often known as "fintech." Nor have they, to my knowledge, analyzed how regulators' organizational design and mission conflict undermine financial competition.

This Article outlines how fintech alters the competition policy analysis and argues that existing agencies are inadequate to respond. The advent of fintech changes the analysis and raises the stakes for getting competition right in three main ways. First, digital innovation faces additional entry barriers. Unlike European authorities, U.S. regulators have declined to offer banking licenses to fintechs. 5 Additionally, big banks have blocked fintechs from accessing customers' account information even when customers approve--a potentially debilitating setback for a new service predicated on tailored advice. 6 These barriers extend recent scholarly calls for greater attention to exclusion in antitrust 7 and help explain why fintech startups--despite reinventing the customer interface--generally partner with rather than compete against banks. 8

Second, fintech creates new connections between competition policy and systemic risk, defined as the chance that one financial institution's failure could cause a chain reaction of institutional failures and spark a financial crisis. 9 Scholars have argued that fintech increases systemic risk in securities trading, by creating new mechanisms for sudden and coordinated mass market movements. 10 Those inquiries have not focused on consumer products, but if advisory fintechs gave similar advice to large numbers of consumers, they could produce their own kind of unpredictable mass market movements. 11 More concentrated advisory fintech markets make coordinated conduct more likely, which implicates antitrust policy. 12

Additionally, banks' size and interconnectedness can contribute to systemic risk. Yet the largest banks have been purchasing fintechs uninhibited by merger reviews. 13 Whereas even the biggest banks today have around 10 percent of the share of deposits, a single technology firm has captured 60 percent or more of the market in social networking (Facebook), searches (Google), and music downloads (Apple). 14 If banks' share in various markets were to approach those of leading technology companies, the confluence of finance and technology could create new systemic risks. In the alternative, if fintechs were to offer cheaper online banking products, fintechs might shrink the largest banks. Industry reports estimate that $ 4.7 trillion, or about onethird of bank revenues, are vulnerable to such fintech competition. 15 The downsizing of banks would reduce the chance that if one of them fails "the world's financial system c[ould] collapse like a row of dominoes." 16 In sum, the right competition policy could provide a partial market solution to the problem of "Too Big To Fail" banks, 17 while an inept competition policy could create dangerous fintech-bank hybrids.

Finally, the U.S. economy may miss out on consumer welfare gains, and cede market share to international firms, if its competition policy fails to pivot for the fintech era. Fintech has the potential to lower prices, expand access to finance, and improve efficiency. 18 Yet U.S. consumer fintech products have advanced at a slow pace compared to those in countries as diverse as China, Kenya, Sweden, and the U.K. 19 Slower innovation is potentially problematic in its own right, and is additionally concerning given that blockchain and related technologies are threatening to break down borders. Borderless finance could in the future pit American financial firms made soft by years of protectionism against foreign counterparts made leaner and more innovative by their home markets.

Navigating this technological upheaval would be difficult for regulators even with a strong institutional framework, but the current one has considerable drawbacks. Competition authority for consumer financial products is scattered across at least five agencies. Two antitrust divisions, at the Department of Justice (DOJ) and the Federal Trade Commission (FTC), share general authority across diverse consumer financial and non-financial industries. Statutory design and a lack of in-house financial expertise limit their role. 20

Three agencies, the Federal Reserve, the Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency (OCC), lead competition regulation for banks. 21 A tension arises because these regulators must simultaneously pursue a more pressing mission: preserving the stability of the financial system. 22 Bank regulators' main tool for stability is preventing banks from failing, among other means by making sure banks have adequate capital reserves and are not engaging in excessively risky behavior. 23 Regulators are not supposed to insulate banks from more innovative competitors. To the contrary, in analyzing new licenses, one of the OCC's official goals is to "foster healthy [market] competition." 24 But allowing new fintech startups to compete fully could weaken big banks, 25 and "politicians and bank regulators could not survive if they were to permit those institutions to fail." 26 As currently administered, banking regulators' dual mission subsumes competition under stability.

This Article proposes a regulatory reorganization analogous to what has been done many times before to remove mission conflict. 27 Most tellingly, prior to the 2008 financial crisis, banking regulators carried a dual mission of protecting consumers and ensuring financial stability. This pairing subordinated consumer protection to stability. 28 To solve this problem in the wake of the subprime mortgage crisis, 29 Congress launched a new agency, the Consumer Financial Protection Bureau (CFPB). 30 The CFPB took over most of stability regulators' consumer protection powers but has no stability mission. 31 Just as Congress revived consumer protection by separating it from stability duties, Congress should do the same for competition. Whether housed in a new or existing agency, an unconflicted entity would improve the chances that consumer credit products rise and fall based on market value rather than regulatory favoritism.

Part I of this Article gives an overview of fintech and explains why new technology entrants might be expected to pose a challenge to traditional financial institutions in open markets. Part II discusses the evidence that competition is failing in consumer finance, paying particular attention to the intersection with fintech. Part III explains the stakes in calibrating competition policy, including the opportunity for consumer welfare gains, expanded access to credit for low-income households, and a safer banking system.

The heart of the Article, Part IV, outlines the institutional design flaws in the current regulatory framework, and examines new potential locations for competition leadership. One possibility, granting the CFPB competition authority, would produce a "twin peaks" model with prudential regulation separate from a single entity charged with both consumer protection and competition. 32 Another possibility, a new financial competition agency, would yield a triple peaks model with separate regulators for competition, consumer protection, and stability. Regardless of the model chosen, the Federal Stability Oversight Council (FSOC) should play a coordinating role to ensure that stability remains part of the competition analysis. The conclusion briefly considers other heavily regulated industries to which analogous institutional analyses might apply, such as securities, telecommunications, and energy.

I. THE FINTECH CHALLENGE TO BANKS

In 2015, Jamie Dimon, CEO of JP Morgan Chase, the largest U.S. bank, wrote a letter to shareholders warning that "Silicon Valley is coming." 33 Fintech brings together two of the most powerful industries, technology and finance, as potential competitors and collaborators. This Part surveys fintech, provides a definition, and assesses the evolving competitive dynamics between new and traditional financial firms.

A. Defining Fintech

From a product perspective, fintech services can be broken down into those offering credit, processing payments, giving advice, managing assets, issuing currencies, and helping with legal compliance. This Article focuses on consumer services such as bank accounts, payments, financial advice, and loans. These services are each worthy of separate sustained treatment beyond the distinctions drawn below, but my core thesis implicates all of them in important ways.

An important institutional distinction is that between fintechs and traditional financial firms. Fintech is used here to refer to the relatively new category of companies whose business models are based on digital products. The term leaves out legacy banks, like Citibank and Wells Fargo, which may now offer similar products but whose services originally lacked a digital component.

This definition does not preclude fintechs from operating as banks, but most in the United States are neither banks nor bank holding companies. 34 Since they do not have banking licenses, any money fintechs hold for consumers must not be for deposits, but instead for other purposes--such as transferring or lending. Fintechs are, however, clouding the very nature of what it means to be a bank. PayPal, the biggest fintech focused on financial products, holds enough money in its customers' accounts to be the twentieth largest bank. Yet in the United States, PayPal is not licensed as one. Consumers use legacy bank accounts and credit cards to get money into their PayPal accounts. Accountholders can then use PayPal to transfer money among individuals and businesses. PayPal also offers loans through partner institutions and gives financial advice. But PayPal's nonbank status and subsequent lack of FDIC deposit insurance means that if PayPal went bankrupt, consumers would likely not get their money back. 35

Fintechs can be of any size. Four of the ten largest U.S. companies, Google, Apple, Amazon, and Facebook, all have built payment systems and made other inroads into finance. 36 Despite the participation of large technology companies, the main drivers of fintech innovation have been the thousands of startups attracting billions of dollars in investment each year. Startup business models are novel, diverse, and shifting. One of the earliest fintech areas was peer-topeer lending, in which companies link individuals who have money to those who want it. 37 Most of the original peer-to-peer companies have already grown beyond their origins and now engage in more familiar "marketplace lending." 38 They receive money from banks to lend to individuals, and their innovations have spread to other areas, such as sophisticated analytic tools for estimating borrowers' creditworthiness. 39

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. 40 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.

B. Private Sector Institutional Dynamics

Fintechs could in theory pose a threat to traditional banks. Almost threequarters 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

Innovation helps explain why publicly traded companies are disappearing at a faster rate today than ever before--six times as fast as forty years ago. 49 Online startups have even thrived in other heavily regulated industries, such as transportation and gambling. 50 Convenience and lower costs have driven some of this success, and many fintechs offer similar advantages. 51 Furthermore, unlike some industries that Silicon Valley has invaded, finance lacks a meaningful physical component. This makes the base products inherently vulnerable to digital competition. Traditional banks' infrastructures--including their legacy information systems and physical branches--inhibit their ability to rapidly respond to disruption.

Since Dimon's 2015 warning, however, the dynamics between fintech and traditional firms appear to have shifted. Entrepreneurs who started out wanting to do to banks what Amazon did to retail have wound up licensing their technology to banks. 52 As one industry observer puts it: "What was once perhaps an adversarial relationship has warmed . . . ." 53 Many no longer see an existential threat in fintech. Instead, they believe that "[i]t is most likely that the small fintech companies will be subsumed" by large financial institutions. 54

II. THE COMPETITION SHORTCOMINGS

A given fintech's decision of whether to challenge or join banks will depend in part on whether regulations and market dynamics give it a real chance to compete. Competition is extremely difficult to measure, and economic models inadequately consider important factors, such as innovation. 55 To assess the hypothesis that a lack of competition inhibits fintech, this Part surveys the evidence related to entry barriers, customer switching, anticompetitive prices, and the relative pace of U.S. innovation.

A. Entry Barriers

When firms face excessive barriers to entering a market, competition can stagnate, raising prices and lowering innovation. 56 Although part of the problem is simply the large amount of regulation, 57 fintech has faced two further entry barriers: traditional firms' ability to block market access and the difficulty in obtaining a federal bank license.

Legacy financial institutions can limit some fintechs' operations through control of data. Most notably, advisory fintechs rely on access to both personal and general product data. 58 Some banks' response has been to block or limit fintechs' access to customer accounts, thereby making it harder for fintechs to provide tailored advice. 59 Legacy institutions can also block fintechs from collecting online product information by using laws never intended for such a purpose, including trespass to chattel, the Digital Millennium Copyright Act, 60 and the Computer Fraud and Abuse Act. 61 As a result, advisory fintechs cannot on their own provide comprehensive financial advice to their users. In order to access crucial data, fintechs may need to prioritize big banks' interests over helping consumers switch.

Some legacy firms can also limit market access through their dominant market positions. Over 99 percent of all credit card transactions run through the Visa, American Express, Mastercard, and Discover networks. 62 Many commentators have documented credit card companies' ability to engage in exclusionary conduct, such as vertical restraint clauses that prevent merchants from using other payment methods. 63 Although credit card companies may not be able to use those same tactics against payment fintechs, their strong market positions could enable them to deploy other tactics. They have, for instance, instituted "Honor All Cards" rules requiring merchants to accept their contactless payments as a condition of accepting plastic cards. These rules arguably "foreclose entry to those digital wallets that . . . do not use the credit card networks for payments." 64

The second major category of entry barriers comes not from business conduct, but from government gatekeepers that issue licenses. Federal banking licenses are important in part because they give banks preemption from many state laws. The burden of complying with fifty different states' laws and bank examination processes would be heavy. For example, to move funds on their own as nonbanks, fintechs would need to obtain money transfer licenses in each state. 65 Preemption is also becoming increasingly meaningful as some states--especially those with many traditional financial institutions, such as New York and Connecticut--erect licensing barriers targeted at blocking fintech startups. 66 Finally, bank licenses provide the ability to receive customer deposits, which can be used to originate a loan or other credit product at a lower cost.

Some fintechs surely decide not to seek bank licenses out of a strategic choice between bank and nonbank regulation. 67 Still, those wanting to compete head-on with banks have limited prospects because the extension of new banking licenses has slowed to a near halt. 68 A rare fintech entrepreneur who went through the license application process was rejected multiple times and endured a much lengthier timeline than would a traditional bank. 69 Although some regulatory caution is warranted for new business models, a freeze in licensing is counter to market interests and may ultimately increase systemic risk. 70

Amazon did not need help from Walmart, Target, and other retailers to sell directly to consumers. Uber did not need existing taxi companies, nor did Airbnb need existing hotels, to operate. 71 In contrast, entry barriers have so far largely meant that fintechs "are not going to get anywhere unless they find a federally chartered bank. . . . The banks are holding the cards." 72 B. Limited Consumer Switching

Consumers' ability to find and switch to the best products is vital for competition. Fintechs promise to improve this process significantly, 73 but transaction costs are high for financial products such as credit cards and loans. Costs include the time needed to understand complex financial products, wait for the results of applications, and fill out lengthy forms to open and close accounts. Nearly half of home buyers consider only one mortgage quote, and are slow to refinance even when considerably lower rates are available. 74

The credit card industry further illustrates financial products' stickiness. After consumers sign up for a credit card with a teaser rate, most never switch even when they would save money by doing so. 75 Even when consumers complete lengthy applications, about 70 percent are denied. 76 The need to wait for a new credit card in the mail, then cancel the old account, and then activate the new one by calling introduces further obstacles. Economists have found that substantial credit card switching costs enhance financial institutions' market power and contribute to "the failure of competition in the credit card market." 77 C. Anticompetitive Prices

Perfect competition is a theoretical concept and not expected of actual markets. Instead, competitive markets should push firms to "price near a measure of their costs." 78 Prices above this level, though not illegal and extremely difficult to measure precisely, 79 can indicate markets are not "sufficiently competitive." 80 Numerous studies of consumer finance prices indicate insufficient competition.

The Credit Card Accountability, Responsibility, and Disclosure Act of 2009 (CARD Act) 81 set limits on practices, such as certain fees, that had brought credit card companies billions of dollars in revenues. 82 In a more competitive market, credit card companies would have been expected to respond to the elimination of those fees by increasing other fees, thereby passing the costs of the new regulations on to consumers. 83 Instead, the CARD Act is estimated to have saved consumers $ 11.9 billion. 84 Related studies have found that banks were unable to pass on about $ 14 billion from the Durbin Amendment in the Dodd-Frank Act, which lowered banks' revenues from interchange fees. 85

Other studies have looked at the price effects of concentrated ownership. Among the largest banks, the same three institutional investors own 16.7 percent of JP Morgan Chase, 15.9 percent of Bank of America, 16.4 percent of Citigroup, and 14.8 percent of Wells Fargo. 86 A recent study found a "causal link from [this horizontal ownership] to higher prices for banking products." 87 The precise anticompetitive mechanism requires further examination, but other empirical analyses have concluded that investors "might be able to exert forms of power over the companies held in their portfolios." 88

Horizontal ownership concentration can be also found among fintech startups, which are typically funded by a small group of wealthy investors--often individuals, but also venture capitalists, private equity firms, and hedge funds. 89 Additionally, large banks hold ownership stakes in fintech. The largest U.S. bank by assets, JP Morgan Chase, has invested in many fintech startups that provide competing products. 90 Since big banks' purchases of small startups can provide crucial funding, economies of scale, and geographic reach to new products, it would be premature to conclude that horizontal ownership of fintech startups harms markets. Nonetheless, it is an area of potential concern.

Other studies have estimated the pricing effects of industry consolidation. Between 2000 and 2010 alone, the largest five banks increased their share of U.S. financial assets from 30 percent to about 50 percent. 91 Economists have connected market consolidation to lower deposit rates received by consumers on their bank account balances, 92 as well as higher rates paid by consumers for personal loans 93 and mortgages. 94 Mergers drove much of this consolidation. 95

A recent economics study provides additional perspective on prices. Technological advances in most other industries have significantly reduced the costs of products. But by some measures financial services cost the same today as in the Gilded Age, when banks had great market power and before computers existed. 96

D. International Technology Gap

Adoption of consumer financial technologies has proceeded more slowly in the United States than in many other countries. Mobile banking in the United States is reportedly years behind global counterparts. 97 Almost one billion Chinese consumers deposit money, make payments, and transfer funds on their phones, and Chinese fintechs have a comparable number of customers as do legacy banks. 98

The gap between the United States and some countries may result from the United States having a basic financial infrastructure that is sufficiently functional, which makes improvements less necessary. That sufficiency does not explain the gap with European countries, such as Germany, with comparably functional infrastructures. 99 In Australia, contactless payments already account for almost 40 percent of the value of credit card transactions, 100 compared to a miniscule portion of the U.S. market. 101

Cross-country comparisons are limited due to the many variables for which it is impossible to control. Still, U.S. companies have led global digital innovation in most industries, launching the first major search engines, social networks, and transportation platforms. Google, Facebook, Uber, and other technology companies leveraged their leadership with U.S. consumers to achieve similar success abroad. 102 The gap between the United States and global fintechs is especially striking because it is the inverse of how other digital markets have progressed.

III. THE STAKES

This Part focuses on the stakes of developing effective competition policy in light of the opportunities and challenges presented by fintech. Understanding the stakes is important because policymakers and regulators can contribute to competitive shortcomings in myriad ways. In addition to the outright blocking of fintechs discussed above, 103 "the current Too Big To Fail policy . . . convey[s] an inappropriate and inefficient competitive advantage to big banks; it provides them with artificially cheap funding . . . ." 104 Also, regulators' merger decisions have in part determined the size of big banks. 105

These competition decisions are not made in isolation. The policy designer must decide how to allocate limited resources among different regulatory goals, and must consider the possibility that pursuing one mission will undermine others. The point here is not that competition should win out over other major financial regulatory goals that currently receive greater attention, such as consumer protection and stability. An understanding of the stakes of competition is crucial to informed decisions about whether and how to advance competition in light of those other goals. As this discussion will show, competition policy is important not only in its own right for the economy, but also for how it can advance consumer protection and stability.

A. Financial Stability

Competition policy can help lessen systemic risk. Consider, for instance, what would happen if fintechs were unable to truly compete with traditional banks, whether due to laws or anticompetitive conduct by businesses. A bank's main options are to develop fintech internally, establish strategic partnerships with a fintech, or purchase a fintech.

Each of these paths would be distorted by the fintechs' inability to operate independently. Internally developing technology becomes more feasible for the bank because any fintech must find an existing bank. After finding a bank, it would need to integrate operations with an outdated structure. This dependence on banks' legacy systems introduces a delay. Due to the delay, banks choosing to develop fintech internally would have more time to recruit talent and perhaps even reverse engineer a fintech app's interface.

Additionally, the market value of the fintech would be lower because its standalone growth potential would be limited. This would disincentivize entrepreneurs from launching fintechs. It also would make it easier for banks to hire top talent away from fintechs, which would have fewer resources to offer employees, including a lower upside for any employee stock options. Negotiations for strategic partnerships would similarly put fintechs in a weaker bargaining position than if they had a standalone option.

It would be difficult for an observer to know what precise effect competition policy was having. Banks would be competing with each other, rapidly developing innovative products or acquiring other firms, which could be seen as signs of vibrant competition. In reality, it could simply be that laws restricting licenses or access to data were enabling incumbents to free ride off of challengers' innovation. Or it could be that big banks' ownership stake in various fintechs was shaping product development in directions less likely to disrupt banks.

What would be the stability implications? Technology companies often obtain market shares over 60 percent, considerably higher than the leading banks today, which have closer to 10 percent of deposits. 106 Extreme concentration in digital products can result from network effects, which occur when a product is more valuable as more people use it, as is the case for Facebook or a telephone. 107 The extent of network effects in various fintech markets remains to be seen but some would be likely. 108

In this scenario, the leading banks would likely benefit from any network effects generated by fintech. Even five or ten percentage points of additional market share would make what are already seen as systemically risky financial institutions more dangerous. Inept competition policy would thus compromise stability by failing to allow fintechs to compete in the first place, thereby ensuring that banks can grow significantly.

An alternative reality can be imagined in which fintechs gain success without depending on banks. They might, for instance, successfully lobby for a better licensing regime or rules that give them access to data. As banks lose customers and anticompetitive profits, they would become smaller. If banking agencies were doing their jobs, the loss of customers would unfold in an orderly manner. Fintech competition could thereby lessen systemic risk, which is no small feat given the bipartisan concerns about big banks and the lack of consensus about how to shrink them. 109

Independent fintechs create their own manner of threat to stability. Over time, an independent fintech could become so giant and interconnected that its failure could destabilize the financial system, particularly if it held a license allowing it to accept federally insured deposits. Or an advisory fintech with 60 percent of the market could give similar advice to large numbers of consumers, creating unpredictable movements. To be sure, great concentration is not necessary for innovation to destabilize. Financial institutions did not need to capture such high portions of credit default swaps for those instruments to contribute to the 2008 financial crisis. 110 Fragmented traders' automated algorithms combined in unexpected ways to wipe out a trillion dollars in stock market value in only a few seconds during the 2010 "Flash Crash." 111 Nonetheless, concentrated fintech markets could create additional dangers from coordinated mass financial movements or systemically important fintech institutions.

Future crises are unpredictable. The main point is that competition policy can be a valuable ally for financial stability in the fintech era. Ignoring competition policy can lead to missed opportunities for reducing familiar risks in the short term and can create new threats in the long term.

B. Consumer Welfare

The "excessive rents and poor overall efficiency" in finance can harm consumers and produce a deadweight loss for the economy. 112 The magnitude of loss from financial inefficiency is unknown, but finance accounts for about 7 percent of U.S. GDP 113 and 25 to 50 percent of all corporate profits. 114 Economists have recently found substantial innovation competition benefits in other heavily regulated industries. Recent studies concluded that new airline entrants' leaner business models lowered ticket costs by 28 percent and that Uber improved driver utilization by 50 percent. 115

Fintech has the potential to do the same for various consumer credit products. Whereas traditional lenders' expenses are about 5 to 7 percent of outstanding loans, startups have reportedly gotten that number closer to 2 percent. 116 They also charge on average four times less for transferring more moderate sums of money than do banks. 117

In assessing these reports, it would be ideal to factor in the differential costs of regulation, and it is possible that some startups are setting unprofitably low prices to gain market share. But lower fintech prices are at least partly driven by efficiency-improving factors. Digital intermediaries have begun to make it easier for borrowers to compare the price of mortgages, which the CFPB has recognized as advancing its consumer protection goals. 118 Others have increased the speed at which payment accounts can be opened to a matter of minutes, and the time to process a loan from a week to seventy-two hours. 119 If these innovations expand broadly, the reduction in switching costs could not only improve market efficiency, but also save individual consumers thousands of dollars annually on credit card and mortgage payments. 120

Disintermediation is another potential driver of increased consumer welfare. Payment processing fintechs have successfully removed expensive banks as intermediaries in other countries. 121 One disintermediation innovation is blockchain, a distributed ledger technology that some believe will transform finance as fundamentally as the Internet transformed communications. 122 The technology's structure makes it usable by anyone sufficiently skilled, potentially enabling even transacting parties with limited resources to bypass the traditional banking system to transfer funds. 123 There is reason to be skeptical of some of the claims about likely gains from blockchain. 124 Nonetheless, it presents a potential mechanism for removing inefficient intermediaries, assuming those intermediaries are protected neither by law nor by anticompetitive conduct.

C. International Competitiveness

Less efficient and innovative U.S. financial services are problematic not only in isolation, but also from an international perspective. Scholars and regulators have inconclusively debated whether banks need to be big to maintain their international competitiveness. 125 Less well-recognized is how a lack of domestic competition may undermine U.S. financial firms' global competitiveness. Foreign financial firms may gain an edge by being subject to greater competition in their home markets, thereby being forced to innovate more and operate leanly. This creates two potential problems. First, reduced domestic competitiveness may make the United States less able to enter foreign markets. The U.S. economy has benefited in recent years from billions of dollars in revenues earned abroad by Google and other leading digital companies. 126 Given the growing portion of the global economy taken up by finance, the fintech lag could constitute a large-scale missed opportunity for U.S. firms to strengthen the economy by bringing in revenues earned abroad.

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.

D. Distributional Implications

About 7 percent of all U.S. households and 18 percent of African American and Latino households are unbanked, which means they lack access to a federally insured bank account. 129 The unbanked pay considerably more for financial services, such as four dollars to cash a twenty-dollar check. 130 Among many contributors, 131 it can be disproportionately expensive for banks to process smaller transactions. The time spent approving and processing a loan, for instance, is similar regardless of loan size. 132 Access is further impaired because payday lenders, pawn shops, and other fringe lenders serving the unbanked often do not give information to credit reporting agencies. 133 The lack of a credit history in turn diminishes access to low-cost credit alternatives, a problem "exacerbated by the strong interaction of race and class in the communities where fringe operators have a significant presence." 134

In theory, fintechs' lower operating costs and automation offer a partial solution by making it cheaper to provide services for smaller value loans and bank accounts. Additionally, fintechs have developed new mechanisms for predicting the creditworthiness of low-income households, including those who lack credit records. 135 Some fintechs are even using their networks to help recently unemployed borrowers of various wealth levels find jobs, making borrowers more likely to pay back loans. 136

Outside of the United States, in areas with less developed financial infrastructures and higher fintech adoption rates, mobile banking has reportedly extended financial access to millions of previously unbanked persons. 137 In probably the most comprehensive study to date, the Federal Reserve concluded that online lenders extended access to credit where it was insufficiently available. 138 Account-level data also indicated that two fintechs, Lending Club and Y-14M, had used "alternative information sources [to allow] some borrowers who would be classified as subprime by traditional criteria to be slotted into 'better' loan grades and therefore get lower priced credit." 139 At a minimum, assuming appropriate consumer protection laws are in place, innovation has the potential to reduce financial inequality.

IV. THE ORGANIZATIONAL FRAMEWORK

The discussion so far has shown that the U.S. economy may be poised to miss out on significant gains, and incur new risks, without strong competition policy. Realizing the full benefits of innovation would mean preventing anticompetitive mergers, cracking down on exclusionary conduct, and extending appropriate licensing.

#### Innovation in financial tech is key to effective sanctions AND international standard-setting.

Anja Manuel & Kevin Bassney 21, Co-Founder, Rice, Hadley, Gates & Manuel LLC. Director, Aspen Security Forum; Director, Rice, Hadley, Gates & Manuel LLC. Schwarzman Scholar, Tsinghua University, "Rational Regulation Is Key to Us Competitiveness In The Fintech Race," TechCrunch, 11/04/2021, https://techcrunch.com/2021/11/04/fintech-regulation-us-china/.

With all the focus on the great technology race between the U.S. and China, little attention has been paid to an area with enormous implications: Who will lead the innovation and, therefore, control the technology behind international payments systems?

This race matters for two reasons.

First, Western countries’ leadership in international payments allows them to enforce sanctions against bad actors like Iran and North Korea. If Chinese solutions gain the dominant foothold in the developing world, this will become much harder.

Second, if the West leads in fintech, it can set reasonable world standards for this new field, such as protecting the environment, preventing illicit cross-border transactions and safeguarding consumer privacy. Reasonable and clear regulation is exactly what responsible U.S. companies — who don’t want to operate in a “Wild West” environment — have been asking for but not receiving.

In the meantime, China has taken the global lead in mobile payments, both in sophistication and scale. Ant Financial, AliPay, WeChat Pay and others comprise the world’s most advanced mobile payments market. For example, Alipay has over 1.3 billion users and more customers outside of China than all of PayPal’s user base. In aggregate, the $45 trillion in mobile transactions volume that Chinese merchants process annually is twice as large as what MasterCard, Visa and PayPal process each year combined.

In addition to these Chinese private sector innovations, the Chinese government has also developed the world’s most advanced central bank digital coin and has completed over 70 million transactions — totaling over $5 billion in revenue — since it was launched earlier this year. The digital yuan is a centralized currency supported by the full faith and credit of the Chinese government, versus traditional cryptocurrency, which is speculative. While the stated goal of the digital yuan is financial inclusion to help those Chinese without bank accounts, the currency’s centralized nature allows the Chinese government to monitor every transaction and restrict access if the Chinese citizen has a low score on the country’s social credit system.

If these Chinese leapfrog technologies gain an international following, they could make it very difficult for the West to enforce sanctions on bad actors, as former Treasury official Justin Muzinich and others have pointed out. Currently, the United States and its allies enforce international sanctions on Iran and North Korea, for example, by preventing Western companies from doing business there and halting banks from facilitating payments to these countries through the Society for Worldwide Interbank Financial Telecommunications (SWIFT) system and correspondent banking relationships.

Responsible fintech companies in the U.S. (including those that service crypto), also fully comply with “know your customer” and anti-sanction regulations. Due to the size and scope of the American financial system, this has been an effective deterrent to illicit behavior.

With the advance of the digital yuan and Chinese payments platforms, companies wouldn’t need U.S. or other Western banks to facilitate these payments and so sanctions would become very difficult to enforce and illegal payments by terrorists and criminals easy to hide. A combination of AliPay, other advanced payments platforms and the Chinese digital yuan could begin to circumvent this system. Sigal Mandelker and others have pointed out that due to the onerous regulations Western governments have asked banks to follow to create “correspondent banking relationships,” 75% of big U.S. and European banks are reducing the number of these relationships. This erodes America’s ability to influence international banks and crack down on illegal behavior.

Beyond sanctions, Western governments have other reasons to shape the rules of the new digital financial system. Current banking practices have many safeguards in place to protect against abuse. The West can only set similar standards for these technologies if we are in the lead. For example, the West will want to prevent criminals and terrorists from transferring money anonymously through cryptocurrencies like Bitcoin and others. Western governments should also set up safeguards that protect small-time investors from getting scammed, such as what happened when the Ethereum network fueled the initial coin offering trend in 2017-2018.

Finally, environmental regulations are needed. Digital currencies based on “proof of work (PoW),” such as Bitcoin, use an enormous amount of computing power which requires electricity and thus, creates massive carbon emissions. Mining Bitcoin, for example, which still uses the PoW model, uses about as much electricity per year as the entire country of Norway. In fact, multiple reports have explained that Tesla’s purchase of $1.5 billion in bitcoin may have erased a significant portion of the carbon emissions gained from that year’s sales of electric vehicles.

These issues must be considered thoughtfully. But speed is of the essence. China understands the power in being the leading mover in key technologies and actively seeks to create world standards. For example, China has already contributed digital currency ideas to create global standards that would govern how data is transferred between financial institutions, such as for payments, credit cards and securities trading.

Unfortunately, the U.S. is falling behind since its own regulation of this space is a mess. An alphabet soup of regulatory agencies such as the CFTC, SEC and others have struggled to wrap their heads around regulating blockchain, cryptocurrencies and other fintech innovations.

#### An effective sanction regime resolves nuclear conflict and other existential risks.

Joshua Zoffer 20, Investor at Cove Hill Partners, Fellow at New America, JD Candidate at Yale University Law School, AB from Harvard University, “To End Forever War, Keep the Dollar Globally Dominant”, The New Republic, 2/3/2020, https://newrepublic.com/article/156417/end-forever-war-keep-dollar-globally-dominant

In early 2016, Obama Treasury Secretary Jack Lew cautioned that the dollar’s dominance as a global currency rested, in part, on the U.S. government’s reluctance to fully weaponize it. If foreign markets and governments “feel that we will deploy sanctions without sufficient justification or for inappropriate reasons,” he warned, “we should not be surprised if they look for ways to avoid doing business in the United States or in U.S. dollars.” Lew’s case stemmed from the more fundamental view that the dollar’s international role is “a source of tremendous strength for our economy, a benefit for U.S. companies and a driver of U.S. global leadership”—in other words, a role worth keeping. This view is emblematic of American financial governance since the Second World War. U.S. economic analysts, especially at the Treasury, have jealously guarded the dollar’s role and the many benefits it offers: the ability to run large deficits at low cost and disproportionate influence over the structure of the global economy, among others.

Yet in their recent article in The New Republic, David Adler and Daniel Bessner argue the U.S. should abandon these advantages. In their view, the dollar’s role has encouraged American militarism and should be relinquished to curb such behavior. Dollar hegemony is not without cost, but to renounce it would be a profound mistake. Adler and Bessner’s view neglects the sizable economic benefits the dollar’s role confers on the U.S., as well as its possible use as an antidote to military adventurism. It ignores the enormous good that can be done with deficit spending, much of which has gone to the American military but could instead fund progressive programs. And it elides the inability of the U.S. and its global trading partners to shift away from dollar dominance without creating worldwide financial distress. Adler and Bessner are right that the U.S. has misused its privilege, but Washington should not abandon it; rather, American leaders should seek to transform it.

Generations of American policymakers have been right to protect the dollar’s key currency role for economic reasons. Most notably, dollar hegemony affords the U.S. the ability to run large and prolonged budget and balance-of-payments deficits. The dollar represents 62 percent of allocated foreign exchange reserves, is used to invoice and settle roughly half of world trade, and accounts for 42 percent of global payments. Because governments, banks, and businesses worldwide need lots of dollars, the world market always stands ready to absorb new U.S.-dollar-denominated debt without charging higher interest rates.

Adler and Bessner correctly point out that the rest of the world considers the dollar’s role as the world’s reserve currency to be an “exorbitant privilege,” a term coined in the 1960s by then French Finance Minister Valéry Giscard D’Estaing. The ability to spend beyond its means has enabled the U.S. to fund its impressive military might, whether one views that power as the fountainhead of Pax Americana or the source of illegitimate military adventurism.

But these economic benefits go beyond just deficits. The demand for dollars also pushes up the dollar’s value against other currencies, enhancing American purchasing power and offering consumers access to imports on the cheap. The dollar’s role also means American firms rarely need to do business in foreign currencies, reducing transaction costs and exchange-rate risks.

More broadly, America’s central economic role gives it outsize influence at crucial moments. At the height of the financial crisis that began in 2008, the Federal Reserve was able to inject vital liquidity into the global financial system by selectively offering dollar swap lines to trusted foreign central banks. Dollar hegemony enabled the U.S. to act swiftly, effectively, and on its own terms.

In addition, the dollar’s role offers a potent alternative to kinetic military action as a means of pursuing foreign policy objectives. The dollar’s broad use means access to dollar liquidity—which in turn requires access to the U.S. financial system—is essential for foreign governments and businesses. For foreign banks, especially, being cut off from dollar access is essentially a death sentence. That makes sanctions that do so a powerful tool in the international arena.

In 2005, for example, the U.S. used the dollar to strike a devastating blow against North Korea without firing a single shot or even formally enacting sanctions. Using authority provided by Section 311 of the Patriot Act, the Department of the Treasury crippled Banco Delta Asia, a bank accused of facilitating illegal activity by the North Korean government, by merely threatening to cut off its access to the American financial system. Deposit outflows began within days; within weeks the bank was placed under government administration to avoid a full collapse. Pyongyang was hit hard, as other banks ceased their business with it to avoid meeting the same fate.

Similarly, though the Trump administration has worked hard to undo it, the Joint Comprehensive Plan of Action with Iran to limit the development of nuclear weapons was made possible, in part, by painful dollar sanctions that brought Iran to the table. Far from being a proximate cause of military conflict, the dollar’s central global role has often been used to contain adversaries without military intervention.

Still, skeptics are right to point out that the dollar’s role has indirectly funded American interventionism and that dollar sanctions have been overused, provoking the ire of American allies. But these facts suggest we should use our dollar power to forge a more progressive U.S. order, not abandon the advantage altogether. America’s exorbitant privilege need not fund warships and missiles: The same low-interest borrowing could be used to fund a new universal health care system, expand access to higher education, or pursue any number of large-scale social policy objectives, including financing global public goods that no other country or consortium of countries is prepared to fund, such as climate change mitigation.

#### Absent US standard-setting, it devolves to digital currency wars and collapses the dollar.

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By many accounts, the United States and China are engaged in an emerging Cold War.1 Yet the contours of this war are markedly different than the US-USSR competition from the 1940s to the 1980s. China and the US are highly economically interdependent.2 Both countries have also engaged in active economic statecraft. Each seeks both economic and strategic gain through an array of trade and industrial policies and investment regulations to bolster high technology industries.3 We believe that one area, digital currencies, will be a key area of future competition and conflict between the two countries. This conflict will also likely spill over to other countries and private actors.4

With respect to digital currencies, analysts and policymakers have focused primarily on the technological, economic and regulatory implications of cryptocurrencies such as Bitcoin. Yet this focus ignores the rapid development of other important digital currencies.5 Governments increasingly support digital currencies through economic statecraft such as China’s digital yuan. More generally, governments seek to regulate and sometimes intentionally displace the private actors who originated private digital currencies like cryptocurrencies.

We focus on two issues here: First, we look at the national-security implications of digital- currency competition. Second, we examine the factors that drive state intervention to create or regulate digital currencies. If successful, the digital yuan stands to challenge the US privilege in borrowing, a unique freedom the country has leveraged to avoid political and economic issues of trade adjustment costs. Digital alternatives to the US dollar may also undermine the capacity of the US to enforce sanctions across the world. An alternative reserve currency opens the possibility of new debt regimes, evidenced by China’s explicit goal of linking the digital yuan to its already-expansive network of Belt and Road Initiative lending partners. Beyond these factors, digital currencies also open new attack surfaces in hostile interstate relations, especially given the cybersecurity concerns associated with digital ledgers. To analyze government motivations to address these concerns, we examine a set of factors that will likely drive economic statecraft in digital currencies, including technological and market factors, domestic structures, and system and international regime characteristics.

We begin with a brief history of digital currencies. We then turn to a detailed examination of the national-security characteristics of digital currencies that are relevant to global competition. Next, we explore how an economic statecraft lens can help us better understand the motivations and prospects for intervention in this sector. We conclude with a discussion of how this emerging digital currency war will likely affect US-Chinese relations, and the related implications for other countries and private actors in the global economy.

The Evolution of Digital Currencies

In the midst of the global financial crisis of 2008, an anonymous individual published the proof-of-concept for Bitcoin, the first actualized cryptocurrency, online, promising a radical form of money requiring no interpersonal trust or government oversight.6 In the 12 years since, Bitcoin has seen prolific adoption as a payment system and store of value, and more importantly, it has triggered rapid evolution in alternative forms of cryptocurrencies across the world.7 Digital currencies have now scaled beyond initial use cases like Bitcoin and other private cryptocurrencies to adoption and innovation among firms and banks, and most importantly, by sovereign governments. In January 2019, 70 percent of central banks responding to a survey by the Bank for International Settlements indicated ongoing or planned work on sovereign digital currencies.8

This trend toward sovereign digital currencies is due in large part to pressures that have arisen from other kinds of digital currencies, like cryptocurrency. Cryptocurrencies have evolved in technical design over time, iteratively responding to the economic externalities and government responses to prior versions. For example, early decentralized cryptocurrencies like Bitcoin raised government concerns around criminal financing and money laundering, as well as skepticism around their use as a store of value given their market price volatility.9 In response, rather than simply accepting decentralized cryptocurrencies for payment, companies began issuing initial coin offerings, a private digital asset which allows firms to offer digital coins for goods or services, in lieu of stocks, to raise money.10 New firms also emerged offering “stablecoins,” cryptocurrencies designed to maintain a stable price against a fixed target currency or asset, in explicit response to government concerns on price volatility.11

Whereas the US and other Western countries have seen the proliferation of private applications, as with cryptocurrencies and initial coin offerings, China has made by far the most progress on its sovereign central bank digital currency.12 These trajectories of digital currency development have had two-way spillovers linked directly to the broader US-China economic conflict. Libra, Facebook’s proposed private digital currency, placed pressure on China to hasten its digital currency pilot.13 Similarly, China’s research into a sovereign digital currency has pressured the US Federal Reserve and many other central banks to start pilots of their own.14

Implications for National Security

Emerging competition around sovereign digital currencies is significant for interstate economic and security relations. Here, we identify four important security implications, although we do not argue that these are exhaustive. While our discussion is predominantly centered on US-Chinese conflict, we also briefly discuss the implications of these tensions for other middle- and smaller-power states.

First, central bank digital currencies may function in part as reserve assets. This threatens the position of the US dollar as a globally hegemonic reserve currency, especially if new sovereign digital currencies produce more liquid money markets with greater confidence. As a result, the advent of central bank digital currencies is a direct threat to the “exorbitant privilege” the US has of importing goods in its own currency and thereby avoiding costly adjustments.15 The consequences of this shift would be enormous. Much of the domestic and military expenditures of the US are byproducts of its capacity to incur larger volumes of debt than it might otherwise be able to without this privilege.16 While many observers note that the bar for fully unseating the US dollar as a hegemonic currency is high,17 this is arguably not the threshold where a challenge to exorbitant privilege would arise. Even a regionally hegemonic digital yuan would introduce constraints on the dollar and begin similarly empowering China.

Second, central bank digital currencies are being explicitly designed with an eye toward cross-border payments. Many of these instruments are built to operate on their own networks as a function of their underlying ledger technology, meaning they may not be processed through the Society for Worldwide Interbank Financial Telecommunication (SWIFT) network.18 The US relies heavily on this network to employ one of its most powerful foreign economic policy tools: sanctions. The creation of sovereign digital currencies that operate outside of this network thus diminishes US capacity to enforce sanctions and increases the opportunities for states to defy US sanctions when issued.19 Indeed, this is an openly stated priority for many states that disavow the use of US sanctions to enforce increasingly political goals. Ironically, several of these dissenting states are traditional US allies in Europe.20 The race to develop central bank digital currencies thus introduces critical standard-setting issues such as the global regulation of payments over new digital currency networks and norms around how they may be strategically enforced.

Third, central bank digital currencies offer new means of denominating international debt. In line with growing discontent over a hegemonic US dollar, countries may be increasingly interested in alternative lending parties and instruments. The transition from a dollar-denominated global debt market to one that includes central bank digital currencies may undermine the American capacity to implement strategic priorities through its lending programs. On the one hand, a digital yuan may be more appealing to borrowers than traditional yuan-denominated debt, especially if it can address liquidity shortfalls in traditional lending instruments.21 On the other hand, a digital yuan may accelerate China’s accumulation of power in institutions like the International Monetary Fund (IMF), which has demonstrated interest in central bank digital currencies as new lending instruments.22 The growing conflict over central bank digital currencies introduces clear externalities for indebted countries across the world, and holds clear impacts for the debt-security nexus that the US has leveraged to maintain predominance in global lending.

Fourth, central bank digital currencies require some degree of internet-based communication among members of the digital currency network. This necessarily introduces entirely new attack surfaces in monetary politics — namely the potential for cyberattacks on a country’s currency system.23 Given the increased use of cyberattacks in hostile interstate relations, which have escalated from US interventions in Iranian nuclear plants to Russian attacks on US electrical grids,24 this is a serious threat that could cause potentially catastrophic damage to a country’s economy. This is arguably the clearest link between sovereign digital currencies and national security and introduces pressing concerns about conflict in this domain. The associated standards that will emerge alongside competition in digital currency design choices will determine the difference between a world in which currencies are immediately weaponized for economic attacks and civil unrest, and a world in which there is consensual oversight and enforcement against this threat.

Promoting Digital Currencies through Economic Statecraft

How might we better understand some of the driving factors that influence state intervention in digital currencies? Drawing on work on new economic statecraft by Aggarwal and Reddie, we focus on five factors likely to influence government action in digital currencies: technological characteristics, market characteristics, domestic structure, international regimes and the structure of the global system.25 Each can be further broken down in terms of their likely impact.

In terms of technological externalities, key features include dual-use, externalities and appropriability. We have already seen that what might appear to be a commercial enterprise can have important national security implications. In terms of externalities, currencies are the lifeblood of national and global economies, and thus technological developments in this realm have obvious spillovers to the real economy. Finally, in terms of appropriability, while Bitcoin was original and unique, we have seen that its technology could be readily copied and innovated upon. This has meant that firms can recreate digital currencies like cryptocurrency in more centralized formats, increasing state control with fewer responsibility-bearing targets to oversee. This has also meant that states can recreate the technical design of cryptocurrencies in a digital currency format that enjoys sovereign privileges of government monopoly over supply and adjustment. In short, these characteristics leave ample room for state intervention in private and sovereign applications.

With respect to the market, we focus on competitors, security of supply, barriers to entry and economies of scale. First, we see a few but growing number of private and government competitors in formal digital currency markets. This has led to government interest in both learning from and managing private digital currencies, such as cryptocurrencies, increasing pressures both to regulate private markets and create a government market. In terms of security of supply, while efficiency concerns were an important driver in the development of private digital currencies such as cryptocurrencies, we now see increasing government concerns about security of supply and technical control of systems related to these digital currencies. While barriers to entry are low for basic digital currencies, more sophisticated versions require significant knowledge and capital. Finally, economies of scale clearly exist. Akin to software products such as social media, we also find significant network externalities arising with different kinds of digital currencies. This means that competition and economic statecraft operate differently among different digital currencies. Decentralized types such as Bitcoin leave few tools to regulators beyond outright bans, but market density among digital currencies produces internal competition from low barriers to entry. While competition among private digital currencies is shaped by regulatory standards within a state, sovereign digital currencies see more anarchic conflict over technical design among a fixed pool of relevant actors — central banks competing to achieve various policy priorities.

We next turn to domestic structures and the relationship between governments and private actors. Initially, Bitcoin and its competitors were seen as a rejection of government control over private financial markets. Yet the narrative of domination by private actors in liberal democracies has been challenged by Chinese efforts — and likely success — in developing a digital yuan. This has significant implications for the emerging digital currency wars, especially in terms of how private and public digital currencies will develop under different economic and political systems. Indeed, while Western central banks have been partnering with financial technology firms to research and design central bank digital currency prototypes, the Chinese central bank more unilaterally undertook its own research with a state-run center and whole-of-state control of the broader digital currency market.

Turning to global regulatory efforts, norms are only beginning to develop on how one should handle digital currencies, and the creation of rules is likely to be far behind. Without mutually agreed constraints on the creation, management and regulation of digital currencies, we are still in the “Wild West” phase of the market. The absence of accepted regional or global regulatory mechanisms is therefore likely to increase government incentives to use economic statecraft to gain an edge on competitors. By extension, this increases interstate co-operation on sovereign digital currency interoperability, which will ultimately determine the winners and losers of the digital currency war.

Lastly, with respect to global systemic characteristics, US-China competition has led to an increasingly bipolar world. While some attribute this to belligerence by President Donald Trump and the aggressive behavior of President Xi Jinping, there appears little prospect of a reversal in this trend. Xi is likely to remain in power for the foreseeable future. Further, Joe Biden is unlikely to shift US policy back toward engagement under the naïve “China will become a democracy with growing interdependence” view put forward by liberal market-focused economists. Thus, on this score, we are likely to see an intensification of economic statecraft — both on the part of the US and China, as well as other large and middle powers — in private and sovereign digital currencies.

The Future of Digital Currency Competition

What is the likely future of digital currency competition? We argue that four main trends are likely to continue. First, states will continue to intervene in private digital currencies like cryptocurrencies and initial coin offerings. While we have already seen active engagement by more and less liberal states in suppressing corners of the digital currency market that threaten state priorities, this is likely to intensify as interstate conflict around digital currencies become more common. Specifically, we should not only expect state intervention to continue across types of digital currencies, but we should also expect this to be increasingly linked to the impact of that intervention on competing or co-operative peers.

Second, we should expect debate over a global or regional framework for state intervention to be especially intense given the absence of current digital currency regimes and norms. While some international institutions have spearheaded efforts to begin global standard-setting on digital currencies, as the IMF has done with stablecoins and the FATF with cryptocurrencies, these are unlikely to mitigate competitive strategic intervention without broad consensus on the nature and enforcement of these eventual standards and rules. Given the limited scope of their substantive mandates and the currently contested nature of digital currencies, international organizations like the World Trade Organization (WTO) and IMF will likely have little impact.

Third, we should expect more states to engage in this emerging digital currency conflict over time, including states that are not actively engaged with digital currencies. This is due not only to the likely proliferation of this technology, but also because of the externalities that non-participating states will face from the interoperabilities between digital currencies and other traditional financial instruments. As such, these spillovers will increasingly incorporate other states into this digital currency conflict, producing patterns of balancing and bandwagoning, thus yielding coalitions of different states divided among preferences for global digital currency norms, standards and rules.

#### Malware spreads between interlinked systems---causing use or lose pressures AND nuclear use.

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The vulnerability of nuclear forces and C3I systems creates the risk of inadvertent escalation: that is, escalation resulting from military operations or threats that are not intended to be escalatory. So-called crisis instability, for example, could arise if a state were afraid of being disarmed more or less completely in a preemptive strike by an adversary, whether or not such fears were well founded.4 In the most extreme case, “use-’em-or-lose-’em” pressures could lead the state to employ nuclear weapons, conceivably in its own preemptive attempt to disarm its adversary, but more likely in a limited way to try to terrify the opponent into backing down. In less extreme scenarios, a state afraid of being disarmed might take steps–issuing nuclear threats, for example, or dispersing mobile nuclear forces– that raised the likelihood of nuclear use later.

This danger is likely to be exacerbated by any cyber vulnerabilities affecting nuclear forces and C3I systems. Most directly, the existence of such vulnerabilities could intensify existing fears of being disarmed–fears that are already acute in China and Russia (as well as in Pakistan and, most likely, North Korea).5 However, because of their unique characteristics and effects, cyber threats could create at least three qualitatively new mechanisms by which a nuclear-armed state might come to the incorrect conclusion that its nuclear deterrent was under threat. First, the purpose of cyber interference could be misinterpreted. In particular, espionage could be mistaken for an attack. Second, a cyberattack could have a more significant effect than intended. Malware implanted into information technology (IT) systems associated with non-nuclear weapons could accidentally spread into more sensitive nuclear-related systems, for instance. Third, the initiator of a cyber operation could be misidentified. An operation carried out by a third party, for example, could be misattributed by one state in a bilateral confrontation to its opponent. What makes these pathways so pernicious is that the catalyst for escalation could appear to its initiator to be a relatively benign action.

To make matters worse, such pathways could lead to inadvertent escalation even if the target of the cyber interference were not afraid of being completely disarmed. Today at least, this description fits the United States. If, in a conflict against Russia, say, the United States wrongly concluded that its strategic early-warning system was under cyberattack, it might reason that Moscow was seeking to undermine U.S. missile defenses, which use early-warning data, prior to launching a nuclear attack.6 Given that U.S. declaratory policy explicitly highlights the option of a nuclear response to non-nuclear attacks on nuclear C3I assets, such a “misinterpreted warning” might lead Washington to use nuclear weapons.7 But even if it did not, its response, which might include nuclear threats, could still be escalatory.

My focus here is narrowly limited to inadvertent cyber threats against, or interference with, one state’s nuclear forces or C3I systems by another nuclear-armed state (C3I systems encompass not only communication capabilities, but also the intelligence, surveillance, and reconnaissance capabilities, including early warning, that would be critical to decision-making). To be sure, cyber vulnerabilities probably create other escalation risks too, though, in my judgment, they are less serious.8 For example, while no state would likely try to detonate another’s nuclear weapons, a nihilistic terrorist group might (though it is unclear whether such a group could obtain the requisite cyber capabilities). Separately, vulnerabilities associated with conventional forces or their C3I systems could increase the likelihood of a conventional war’s escalating to a higher level of violence, thus making nuclear use more credible.9

Cyber interference with nuclear forces and C3I systems can involve two (not mutually exclusive) types of operations: espionage and attack. Cyber espionage involves collecting data from a target IT system without otherwise damaging it. A cyberattack involves undermining the operations of the target system, typically by compromising the integrity or availability of data. Cyber tools suitable for surveilling or attacking nuclear forces or C3I systems have innumerable differences from noncyber tools, which are themselves quite varied. Six of these differences are particularly salient to the risk of inadvertent nuclear escalation.

First, cyber espionage offers the potential to obtain information about an adversary’s military forces and operations that cannot plausibly be obtained in any other way. By accessing an adversary’s C3I systems directly, cyber tools may be capable of exfiltrating exceptionally sensitive information, such as the locations of mobile delivery systems. This is not to suggest that cyber surveillance is infallible. As a security measure, for example, a state could choose not to track the movements of its mobile delivery systems (or it could do so only approximately). Alternatively or additionally, it could try to use a cyber intrusion in its networks to feed misinformation to the adversary. In spite of these and other limitations, however, cyber espionage almost certainly offers unique advantages. For example, no practical constellation of high-resolution surveillance satellites in low Earth orbit could provide continuous coverage of a given location on Earth’s surface.10 Cyber surveillance, by contrast, may allow for continuous monitoring of an adversary’s military posture.

Second, cyber weapons offer an unparalleled capability to manipulate the data that go into decision-making. Other types of weapons, by destroying or disabling sensors or communication systems, can also deny data to decision-makers. However, their use generally alerts the target to the fact it is under attack. By contrast, if a well-designed cyber weapon is used, a loss of data may appear to be, say, the result of a malfunction, potentially allowing the attacker to conduct surprise follow-on attacks. Even more significant, cyber weapons can be used to feed false information to decision-makers. For example, the Stuxnet virus, which was reportedly developed by the United States and Israel, was designed not only to destroy centrifuges at Iran’s Natanz enrichment plant, but also to hinder plant operators from discovering the cause of these failures by producing falsely reassuring readings on monitoring equipment.11 In a similar vein, sophisticated cyber weapons offer a unique capability to shape an adversary’s perception of a battlefield by feeding misinformation into C3I systems.12 To be sure, information operations have always been a part of warfare. However, cyber weapons represent a sea change because their effects can be tailored with great precision in real time, and because they could be used to directly influence the perceptions of high-level decision-makers.

Third, cyber operations–whether conducted for espionage or offensive purposes–can present particularly significant risks of unanticipated collateral effects, that is, of affecting IT systems other than the intended target.13 Noncyber weapons can, of course, lead to collateral damage. Yet such effects are inherently constrained by geography. Moreover, the likelihood of physical collateral damage can be often quantified, at least to some extent (military planners may be able to estimate, for example, the probability of an incoming weapon missing its military target and hitting a nearby civilian facility).14 The risks of collateral effects in cyberspace are much more difficult to estimate. Minimizing such effects relies, in part, on detailed intelligence about the target network and on connections between it and other networks. Obtaining the requisite intelligence is potentially much more difficult than identifying what surrounds a target in physical space (as is verifying that the resulting picture is complete). To complicate matters further, sophisticated malware must generally be tailored to each target and, if revealed, will become ineffective once the adversary can clean its networks and fix whatever exploit was used to gain access. As a result, the effects of cyber weapons cannot usually be understood through testing, further increasing the likelihood of unanticipated collateral damage (simulations can be used but they are only as good as the available intelligence on the target).

Fourth, in peacetime, malware used to enable a cyberattack may often be inserted into an enemy’s networks–but not activated–in the hope that it will remain undetected and thus can be used in a potential future crisis or conflict. (In theory, not only can a vulnerability in an operational IT system be exploited in this way, but so too could security weaknesses in the supply chain for the system’s components.) Noncyber weapons, by contrast, are generally used as and when the decision to authorize a strike on a particular target is taken.15 One consequence of this difference is that, if a state discovers dormant malware in its networks, it can be faced with the challenge of attributing it–that is, identifying which entity is responsible for its implantation–before activation. The equivalent challenge rarely arises with the kinds of noncyber weapons typically used in interstate warfare (though it does arise in irregular warfare or counterterrorism with unexploded ordnance).

Fifth, and relatedly, cyberattacks are generally easier to conceal than other forms of attack. As a result, decision-makers may be more inclined to authorize them. In fact, if the goal is for a cyber weapon to have either a persistent effect or an effect when triggered at some future time, the malware used in the attack must remain hidden to be effective because exposure could enable the adversary to take countermeasures.

Sixth, and finally, distinguishing between offensive operations and espionage is significantly more challenging in cyberspace than in other domains.16 To be sure, the line dividing espionage and offensive operations in physical space is not always entirely clear. Aircraft–unmanned aerial vehicles (UAVs), in particular –are used for both surveillance and offensive operations. But the distinction is much murkier in cyberspace. One challenge is that identifying the purpose of a piece of malware–understanding whether it can be used for espionage, offensive purposes, or both–can be time-consuming. In a fast-moving conflict or crisis, this process might move slower than decision-making. Moreover, even if a state quickly and confidently established that a piece of malware could be used solely for espionage, it could not be confident that whatever vulnerability was used to introduce the malware would not also be exploited for offensive purposes–at least until it had identified and fixed the vulnerability.

States can threaten each other’s nuclear forces through a combination of offensive “counterforce” operations to target nuclear-weapon delivery systems preemptively, and air and missile defense operations to intercept whatever remained. The United States openly acknowledges it would seek to limit the damage it would suffer in a nuclear war.17 Russian doctrine is believed to embrace a similar concept.18 India may be moving in the same direction.19

The question of whether, in practice, a state could actually succeed in limiting the damage it would suffer in a nuclear war to an extent that decision-makers would consider meaningful is currently a subject of considerable debate.20 However, from the perspective of inadvertent escalation, what matters is not whether damage-limitation operations would actually prove effective, but whether a potential target believes they might. In this context, Chinese and Russian fears that the United States is seeking the capabilities–non-nuclear capabilities, in particular–to negate their nuclear deterrents could prove escalatory in a crisis or conflict by generating “crisis instability,” that is, pressures to use nuclear weapons before losing the capability to do so.21 And even though the United States is not concerned today about the possibility of being disarmed, Washington appears to be less sanguine about the future, given growing threats to its C3I assets, in particular.

Cyber capabilities could contribute to damage-limitation operations in two distinct ways. First, cyber espionage could prove useful in collecting intelligence that might increase the effectiveness of counterforce attacks and air and missile defenses, especially if complemented by effective analytic tools for synthesizing large amounts of data from multiple sources.22 If cyber espionage helped reveal the locations of mobile weapons, for example, it could enable preemptive attacks against them. And if it helped to reveal targeting data, it could assist defenses in intercepting missiles and aircraft after launch.

Second, cyber weapons could be used, alongside other capabilities, to conduct counterforce strikes. A hypothetical cyber “kill switch” that could permanently shut down an adversary’s nuclear C3I systems would certainly be attractive to any state with a damage-limitation doctrine. In practice, this kind of perfect capability seems fanciful, not least because a state could find analog or even nonelectronic ways to use its own nuclear forces given enough time (in fact, some states may even prepare such means in advance). At best, therefore, a cyberattack could be a “pause button” that delayed an adversary’s ability to use its nuclear weapons. Real cyber weapons are likely to be still less effective, however. All nuclear-armed states likely operate multiple C3I systems with some degree of redundancy between them. Cyber operations would probably not prove equally effective against these different systems, potentially delaying the target from using some elements of its nuclear forces for longer periods of time than others.

Even given these limitations, however, cyberattacks could still assist with damage limitation. They could buy more time for counterforce operations to attrite an opponent’s nuclear forces and reduce the coherence of any retaliatory attacks, somewhat simplifying the task of air and missile defenses. Moreover, the potential for cyberattacks to shape an adversary’s perceptions could prove valuable. For example, an attacker might try to “blind” its adversary’s early-warning system just before launching counterforce strikes on its nuclear forces.

Just how effective cyber-enabled damage-limitation operations might prove in an actual conflict is far from clear, not least because of the difficulty of testing cyber weapons. That said, any state that has made the enormous investments necessary to develop damage-limitation capabilities is likely to spend relatively modest additional sums on developing complementary cyber tools, and it might reach a different conclusion about their potential efficacy. Even more important, from the perspective of inadvertent escalation, its potential adversaries might do so too.

China, in particular, appears to be concerned about cyber-enabled damage limitation. Summarizing the thinking of their peers on this subject, two Chinese scholars, Tong Zhao and Li Bin, have concluded that “Chinese analysts have demonstrated an acute awareness of the potential vulnerabilities of the country’s nuclear C3I system, particularly against cyber infiltrations.”23 Russian views have been less aired. In fact, a dichotomy has emerged in what little public discussion there has been. For example, three respected experts, including a former general officer in Russia’s Strategic Rocket Forces, have recently played down the threat, arguing that “because the command-and-control systems of strategic nuclear forces are isolated and highly protected, they are, in all probability, not vulnerable to cyber attacks.”24 At about the same time, however, another influential Russian scholar argued that, among the emerging non-nuclear technologies that could threaten nuclear forces, “probably the most dangerous development is cyber weapons, which could be used for non-nuclear disarming and decapitating attack by completely paralysing the entire command-and-control system.”25 News reports that Russia has created cyber defense units for its nuclear forces suggest that the Russian military may be less than sanguine about the cyber threat.26

Fears about cyber-enabled damage limitation may be particularly pernicious because of the potential difficulty of detecting a cyberattack. A sophisticated cyberattack on nuclear forces or C3I systems could conceivably occur without being detected. In the extreme case, a state might only find out that it had been attacked when it attempted to launch nuclear weapons and discovered that its ability to do so had been impeded in some way. If a state believed that it would be unlikely to detect an ongoing cyberattack, then it could rationally conclude that it might be under attack even in the absence of attack indicators. The simple belief that an opponent had highly sophisticated cyber capabilities could, therefore, precipitate a false positive–the incorrect assessment that an attack was underway–by itself. By contrast, if a state’s nuclear forces were under assault from kinetic strikes, the target would likely be aware. To be sure, it is still not entirely impossible that a state could wrongly come to believe it was under kinetic attack. Early-warning systems, for example, have produced false warnings of incoming ballistic missile strikes.27 But mistakes of this kind could be identified once the incoming weapons ceased to exist (though the window of time before they disappeared could be particularly dangerous).

To make matters worse, a state that was concerned about its nuclear forces and C3I systems coming under cyberattack might be inclined, especially in a crisis or conflict, to interpret ambiguous indicators in the worst possible light. For example, if one of its nuclear C3I systems malfunctioned because of, say, bad design or aging components, it might wrongly attribute the failure to a cyberattack (in fact, the temptation among operators to do so might be particularly strong if they would otherwise be held responsible for an internal failure). Regardless of precisely how it arose, however, a false positive that occurred in a crisis or conflict could generate significant escalation pressures.

Concerns about the potential for cyber operations to enhance the effectiveness of damage limitation can have effects beyond generating crisis instability at a time of heightened tensions or during a conflict. In peacetime, such concerns may induce nuclear-armed states to take steps to try to ensure that nuclear weapons could be employed when duly ordered in a crisis or conflict, even at the expense of exacerbating the danger of inadvertent or unauthorized use. Concerned states, for example, could remove permissive action links–electronic “locks” designed to prevent the unauthorized use of nuclear weapons–because of the perceived danger that they could be hacked and thus subverted to prevent authorized use.28

Alternatively or additionally, states could make plans to predelegate the authority to use nuclear weapons down the chain of command to guard against the possibility of the communication links serving national leaders being severed. The dangers of predelegation depend, in part, on the degree of flexibility afforded to commanders in determining whether and how to use nuclear weapons. Nevertheless, certain risks are inherent in any model. A localized communications failure might be mistaken for an attack, for example, leading to inadvertent use.29 Predelegation also increases the risk of unauthorized use because a field commander could order the use of nuclear weapons in a scenario in which he or she was not permitted to do so. This danger becomes greater as more people are granted launch authority. In this respect, cyber threats could promote a particularly dangerous form of predelegation by inducing a state to entrust launch authority to the relatively large number of lower-level officers who are capable of issuing a launch order without electronic communications.

Surveillance operations in cyberspace, even if conducted exclusively for defensive purposes, pose unique risks of escalation. Cyber surveillance of an adversary’s nuclear forces can serve purposes besides damage limitation. In any dyad involving two nuclear-armed states, each has a strong incentive to monitor the status of the other’s nuclear forces at all times–and particularly during a crisis or conflict–including for the exclusively defensive purpose of spotting any preparations for nuclear use. Several intelligence collection techniques, including overhead imagery and signals intelligence, are likely used for this purpose. Given the potentially unique advantages of surveillance in cyberspace, however, states may see good reason to adopt it alongside these other approaches, especially if they judge that the likelihood of cyber espionage being detected is small.

Depending on the sophistication of the malware used and the target’s defenses, the true likelihood of being detected may or may not be small, but the consequences of being caught could be significant. In fact, if the target detected ongoing cyber espionage of networks associated with its nuclear forces or C3I systems, inadvertent escalation could result from either of two concerns that are distinct from those that might plausibly be generated by other forms of surveillance.

First, even if the target of cyber interference were convinced that the operation was being conducted exclusively for the purpose of espionage, it might worry that the data being collected could be used against it in damage-limitation operations. Intelligence collection in physical space could also enable damage limitation, but it differs from cyber surveillance in one critical respect. In a crisis or conflict, a state would generally have no way of knowing whether or not countermeasures against physical surveillance (such as camouflage or concealment) had proved effective–unless its nuclear forces were successfully attacked. By contrast, if it detected an ongoing effort to collect intelligence through its C3I networks, it would know definitively that at least some of its cyber defenses had failed. This realization might lead the state to fear that attacks on its nuclear forces were imminent.

Second, because of the difficulty of rapidly distinguishing cyber espionage from a cyberattack, espionage against nuclear forces or C3I systems would risk being misinterpreted as an attack. In theory, the use of armed UAVs for surveillance of an adversary’s nuclear forces could generate a similar risk. However, a state motivated by purely defensive considerations would have strong and obvious reasons not to use armed UAVs in this way.

The risks resulting from cyber espionage being mistaken as an attack would depend on who had initiated the operation and who was the target. China or Russia might assess that U.S. cyber surveillance was actually an offensive effort intended to undermine–or, more likely, give Washington the option of undermining– Beijing’s or Moscow’s ability to launch nuclear weapons, thus potentially generating crisis instability. By contrast, because Washington is apparently more confident in the survivability of its nuclear deterrent, cyber espionage directed against U.S. nuclear forces or C3I systems would be less likely to have the same result. Nonetheless, such operations would likely be of real concern to Washington and could, for example, be misinterpreted as a prelude to nuclear use by China or Russia.

Even if the two states involved in a crisis or conflict did not engage in any kind of deliberate cyber interference with one another’s nuclear forces or C3I systems, one of them might wrongly conclude that the other had. Such a misperception, which could be the result of collateral effects or third-party action, could also induce escalation through crisis instability or misinterpreted warning.

A state that eschewed cyber operations of any kind against an opponent’s nuclear forces or C3I systems might still launch such operations against adversary military networks involved exclusively in non-nuclear operations. If, because of design flaws, imperfect intelligence, or mistakes in execution, the malware used in such attacks spread and infected networks that were involved in nuclear operations, the target might conclude that its nuclear forces or C3I systems were under deliberate cyberattack or cyber surveillance.

There could be collateral effects even if a state’s networks for nuclear operations were entirely isolated; air-gapping (physically isolating one particular network from others) is, after all, not a cyber security panacea.30 Moreover, achieving perfect isolation could prove difficult in practice.31 To give but one reason, every nuclear-armed state, apart from the United Kingdom, has dual-use delivery systems, which can be used to deliver nuclear or non-nuclear weapons. Such delivery systems represent a potential point of contact between the C3I systems supporting nuclear operations and those supporting non-nuclear operations.

In practice, some nuclear-armed states–perhaps many or even all of them– have not tried to isolate their nuclear C3I systems. The United States, for example, has a number of dual-use C3I assets for communications and early warning that support both nuclear and non-nuclear operations.32 Other nuclear-armed states, including China and Russia, may as well, but are less transparent.33 Because the networks supporting dual-use C3I assets are likely to be connected directly to others involved in non-nuclear operations, there may be a particularly high risk of their being subject to collateral effects.

#### Collapse of the dollar causes immediate lash-out---nuclear war.

Ken Jorgustin 14, MA in Political Science, History, and Economics from the University of West Florida, Retired Master Sergeant in the United States Air Force, Graduated Number One at the Academic Instructor School Air War College, Maxwell AFB, “The Coming Collapse of The Dollar, and A Time for War”, 12/26/2014, https://tinyurl.com/y32yc6o8

In my opinion we are witnessing an Empire end-time struggle of the U.S. dollar hegemony over the world – the result of which may become the end of the dollar as we know it and grave financial pain for the American citizen, or even worse, World War 3.

You’ve probably seen or heard the word ‘hegemony’ before. But what is hegemony? Hegemony is the political, economic, or military predominance or control of one state over others. We are seeing before our eyes – the most critical clash of our time – the increasingly desperate attempts to sustain global dollar hegemony and dominance. What you need to know is that this ongoing battle is coming closer to a tipping point. The dollar is going to collapse. One day.

You better do what you can to understand what’s really going on – to see through the propaganda and misinformation – and to prepare and protect yourself from the results of a global chess game and perhaps soon to be ‘checkmate’.

You’ve heard that desperate people do desperate things, but will we (the pawns) be led to major war while the protected elite call the shots? There is a looming collapse of the dollar and it will be caused by losing it’s reserve currency status. When the ‘currency war’ fails, the elites in desperation will lead us to the next major world war – which might even go nuclear. Why? Because the U.S. is not ‘playing’ with an Iraq this time. This time it’s playing with Russia, a major nuclear power with a strong military, in alliance with China. This time it’s different…

While the dollar is in a temporary rally, don’t be fooled. While the chess game may even take one to three years to play out till checkmate, once the ‘king’ is tipped over, once the dollar goes, the United States ’empire’ status is finished. Believe me – I do NOT wish for American hardship, as I am an American – but it’s just how I see the unfolding right now – and while I hope we do not suffer because of it, I do prepare for the uncertainty.

In case you didn’t know, the reason we (the United States) are able to sustain astronomical deficits, mind-boggling national debt, seemingly limitless spending on government and it’s programs, is because the dollar is the world’s currency reserve. For those who have not been paying attention, this notion has been slowly slipping, and is being challenged and seen for what it really is – and is facing serious challenges ahead. In fact serious is not strong enough a word – more like desperate.

The thing is, the elites are running out of moves in this chess game. Their spending policies (while having enabled an enormous dependent class of serfs), have destroyed much of the middle class – who themselves are just a paycheck or two away from serfdom. When the dollar falls down – even just a teetering – the tipping point will have been reached as the systemic house of cards collapses on itself while a state of anarchy erupts in the United States. The elites know this and they will do anything to keep it going until the very end. This is where our new apparent ‘enemy’ comes in… Russia.

The United States is making an enemy of Russia.

You see, any nation that has chosen to NOT use the dollar as a currency medium of exchange is first hit with economic sanctions. If that doesn’t work they’re hit with attempted government overthrow by way of internal (provoked and assisted) revolution. If that doesn’t work, the bombs start dropping. The problem is, and the illustrating fact that the United States is so desperate, is that we’re doing it to Russia. We’re in phase 1 and 2 right now. Phase 3 will not end well.

#### The plan limits implied immunity to clarify current judicial confusion---that resuscitates a balanced, antitrust approach to financial institutions that maximizes innovation.

Howard Shelanski 18, Professor, Law, Georgetown University. Partner, Davis Polk & Wardwell LLP, "Antitrust and Deregulation," Yale Law Journal, Vol. 127, No. 1922, May 2018, Lexis. [italics in original]

Three years after *Trinko*, the Court decided *Credit Suisse Securities (USA) LLC v. Billing*. 86 The plaintiffs in *Credit Suisse* claimed that the defendants violated Section 1 of the Sherman Act, which prohibits "every contract, combination . . . , or conspiracy, in restraint of trade," 87 by setting securities prices through joint conduct that went beyond what securities laws allow. 88 They also alleged that the defendants had violated antitrust and securities laws by impermissibly engaging in tying and similar activities. 89 Importantly, the Court accepted as given that the securities law did, and "inevitably" would, render defendants' conduct unlawful, so in principle there was no conflict between the antitrust claims and the regulatory statute. 90 The Court nonetheless held that even where a correctly construed antitrust claim would not actually conflict with regulation, the antitrust claim could still be barred on potential conflict grounds. 91 The Court reasoned that "only a fine, complex, detailed line separates activity that the SEC permits or encourages (for which respondents must concede antitrust immunity) from activity that the SEC must (and inevitably will) forbid." 92 Therefore, the Court expanded the notion of plain repugnancy to incorporate not just the genuine conflict that arises when antitrust could bar conduct that regulation might allow, but even conflict between antitrust and regulation that could arise only from judicial mistake or confusion.

*Credit Suisse* thus went beyond prior implied immunity cases to establish a rule that blocks some claims even when they rely on legitimate antitrust principles, are consistent with securities laws, and, correctly read, would not interfere with the applicable regulatory scheme. Where the underlying conduct is similar enough to regulated conduct that a judge might confuse the two and create a conflict with regulatory authority, the Court chose to err on the side of barring antitrust claims.

The effect of *Trinko* and *Credit Suisse* was to render antitrust and regulation more like substitutes and less like complements. The competitive practices, market structure, and market performance of regulated industries are thus more likely to develop without the constraints of antitrust, reflecting instead the potentially different requirements and prohibitions of a regulatory agency's competition-related rules. With antitrust less able to act in parallel or as a complement, the enforcement of competition in regulated industries will depend on the nature of the relevant rules, the agency's commitment to enforcement, and the kinds of sanctions the agency can impose. As agencies repeal such rules or back off from actively administering them, the resulting competition enforcement gap could be greater because antitrust has been sidelined as an available supplement or complement. The doctrinal shift in the relationship between antitrust and regulation that resulted from Trinko and Credit Suisse therefore magnifies the competition enforcement consequences of strong deregulatory cycles.

A strong reading of *Trinko* and *Credit Suisse* could lead to significant displacement of antitrust enforcement by regulation or perhaps by the mere existence of a statute that authorizes competition-related regulation. 93 By contrast, a narrow, pragmatic reading of the cases could still leave reasonable scope for complementary antitrust enforcement in regulated markets. Wherever courts eventually draw the complement/substitute line between antitrust and regulation, however, the Supreme Court's decisions create a doctrinal mechanism through which federal courts reduce the availability of antitrust actions when regulation comes into the market. During cycles of increased regulation, therefore, courts and defendants will push antitrust in the countercyclical direction of less enforcement. On the other hand, during a deregulatory cycle in which rules go dormant or disappear, it is up to the antitrust agencies themselves to identify and counter potential enforcement gaps.

II. WHY ANTITRUST SHOULD STEP UP WHEN REGULATION STEPS BACK

The previous Part discussed why aggressive deregulation is likely to create gaps in competition enforcement. This Part argues that antitrust enforcement should run counter to deregulation and step in to fill those gaps. Before turning to the specific reasons for antitrust and regulation to move in different directions, however, a threshold question is whether it is realistic to expect the same administration that weakens regulation to strengthen antitrust enforcement. The available evidence suggests that such an expectation is not unreasonable, although there may be differences across different types of antitrust cases.

As a general matter, antitrust enforcement and regulatory activity have historically changed only modestly with new political administrations, 94 even if campaign rhetoric has sometimes promised otherwise. 95 For example, measures of merger enforcement by the antitrust agencies do not change predictably or consistently with political cycles. Figures 5 and 6 below show that the number of "second requests"--which the agencies issue when their initial investigation of a merger does not resolve concerns over harm to competition--were lower under Clinton than under George H. W. Bush, and were much lower than under the famously deregulatory Reagan Administration. Meanwhile, the number of merger challenges--refusals to allow a merger to go forward as originally proposed even after a second request--rose under George W. Bush from their level under Clinton. To be sure, the data show merger enforcement to have become more stringent under Obama than under either Bush, but if that change from a Republican to a Democratic administration fits with conventional predictions, the change from Clinton to Bush did not.

Looking beyond mergers to enforcement against anticompetitive conduct shows somewhat greater, but still not clear, consistency across administrations. It might not have been surprising that the Democratic Clinton Administration pursued a monopolization case against Microsoft or that the Republican Bush Administration issued a report skeptical of pursuing antimonopoly cases under Section 2 of the Sherman Act 96--later withdrawn by the Obama Administration. 97 But the Obama Administration also closed the most significant Section 2 investigation that it undertook, that of Google, without taking any enforcement action. 98 Meanwhile, arguably the most significant antimonopoly case the U.S. government has ever taken, the break-up of AT&T, occurred under Reagan, 99 resolving a suit the DOJ initially filed under Ford. 100 These examples as well as the broad merger enforcement measures discussed above certainly mask complexity in the antitrust changes that occur across political administrations, but that complexity is the essential point: one cannot assume that Republican administrations will consistently or systematically be weaker on antitrust enforcement than will Democratic ones.

[Figures omitted]

Indeed, the record of the antitrust agencies under the Trump Administration over its first year stands in some contrast to the administration's hard rollback of regulation. The FTC challenged the proposed merger of DraftKings and Fan-Duel, and declined to terminate an investigation into Qualcomm's allegedly anticompetitive patent licensing practices. 103 The DOJ challenged an already consummated merger between Parker-Hannifin and Clarcor even after that transaction had gone through a filing at the Obama DOJ without action or objection by the agency. 104 Most surprisingly, perhaps, the DOJ went to court to block AT&T's proposed acquisition of Time Warner in the first court challenge to a vertical merger in decades. 105 Notably, the Obama Administration allowed a very similar merger between Comcast and NBC-Universal to occur with conditions on the combined firm's post-merger conduct--conditions the Trump DOJ declined to entertain in the case of AT&T. 106 Interestingly, it was consistency with deregulatory principles--DOJ's refusal to accept conduct remedies that would require ongoing government oversight and intervention--that ultimately led it to challenge the merger in court.

Similarly, as the FCC was preparing to repeal the Open Internet Order, the Trump Administration's Acting FTC Chairperson stated, "Fortunately, we don't need prescriptive regulation . . . . [T]he FTC can challenge harmful non-neutral practices on a case-by-case basis under its antitrust authority . . . ." 107 Whatever one thinks of the FCC's deregulatory decision on network neutrality, this is the right response for antitrust enforcement, and the FTC should follow through if anticompetitive behavior takes place. While time will tell if this perhaps unexpected enforcement under Trump continues, the above actions again show that weak antitrust enforcement does not necessarily follow from a deregulatory administration. Given the evidence that an administration's regulatory and antitrust enforcement policies need not be the same, this Part returns to the normative question of advisability and discusses four reasons why antitrust policy should be countercyclical to deregulation.

First, since consumer welfare declines when markets are anticompetitive, antitrust should be available to enjoin anticompetitive practices that deregulation might allow. Second, antitrust enforcement has potential advantages over regulation and, in many settings, might govern competition more efficiently and effectively than regulation. The regulated markets in which antitrust has those advantages will become apparent only if antitrust authorities fill the gaps left by repealed or unenforced rules. Third, enforcing antitrust in markets where the government has reduced regulation or enforcement would give courts the opportunity to interpret the reach of Trinko and Credit Suisse. Cases that demonstrate enforcement gaps in deregulating markets could lead courts to limit the circumstances under which the two forms of intervention are mutually exclusive substitutes and clarify where they can operate as complements. Finally, political attention and activism have increasingly focused on economic competition and antitrust enforcement, with a variety of proposals advocating the incorporation of broader public interest criteria into antitrust and making competition enforcement more rule-based. Assessing the costs and benefits of such proposals depends at least in part on having an accurate baseline picture of what antitrust can already do with its existing tools and authorities. If antitrust enforcement retreats along with regulation during a deregulatory cycle, it could leave an inaccurately weak impression of what antitrust could already accomplish, which could distort policy decisions when political cycles turn.

A. Preserving Consumer Welfare

Antitrust in recent decades has focused increasingly on promoting consumer welfare, although there is debate over what that criterion should mean. 108 While consumer welfare has come to be framed in terms of efficiency--keeping output high and prices low--a broader conceptualization could incorporate other factors like employment security, viability of small businesses, wage levels, and other things that affect economic well-being. Over the course of antitrust law's doctrinal development, courts at times found the antitrust statutes to have some of these objectives, even when they were at odds with economic efficiency. For example, courts protected competitors from efficient expansion by dominant firms and stopped mergers in highly fragmented markets--markets in which consolidation could lower costs and reduce prices for consumers. 109 Moreover, antitrust was historically concerned not just with how market power translated into price effects but also with how it translated into political power. 110 For reasons beyond the scope of this Feature, but well-examined by a variety of scholars, over time the definition of consumer welfare in antitrust has become an economic one: enforcement focuses on preventing anticompetitive conduct that raises prices, reduces output, and limits consumers' choices. 111

This focus of antitrust on efficiency objectives divorced from considerations of firm size, political effects, impacts on competitors and workers, or consequences for health and safety 112 has again become the subject of vigorous and important debate. 113 While the debate has several strands, two critiques are particularly relevant. First, antitrust has not done a good enough job on its own terms of achieving its efficiency objectives; second, the objectives of antitrust should return to a broader definition of consumer welfare that takes into account effects of economic power other than those on price and output levels. 114 The first critique certainly supports this Feature's argument that antitrust enforcement should be a countercyclical force to protect competition during deregulation; if one views antitrust enforcement as already having fallen short, then failure to close gaps left by repeal or nonenforcement of competition-oriented rules will only worsen the situation. For proponents of the second critique, antitrust enforcement promoting efficient performance of formerly regulated markets is likely to be less satisfying, especially if the repealed regulation achieved some of the broader objectives advocated by some antitrust critics.

Indeed, regulation sometimes displaces the objectives of antitrust altogether in the pursuit of other social benefits to which pure efficiency objectives are irrelevant or an impediment. From a consumer welfare perspective, society can lose from repeal of either kind of regulation: repeal or nonenforcement of competition-promoting rules could create the previously discussed enforcement gap; and repeal of competition-limiting rules could leave in place anticompetitive practices or market structures without the compensating benefits that regulation had facilitated. In either case, even if antitrust does not replace some benefits that a given rule had achieved, antitrust enforcement can provide valuable, even if only partial, compensating benefits in the wake of deregulation: antitrust would either prevent a gap in the competition enforcement previously implemented by rule or would restore competition enforcement sacrificed for a different social objective no longer pursued by a regulatory agency. For consumer-welfare reasons, deregulatory periods are therefore the wrong time for a conservative turn in antitrust policy, even if one disagrees with the current consumer-welfare approach of antitrust enforcement.

For example, consider again the FCC's Open Internet Order. The central purpose of that order was to ensure that the networks that connect end-users to the Internet do not harm competition among the upstream suppliers of content and services to those end users. 115 The networks therefore could not discriminate in favor of some content providers over others through differential terms of transmission to the networks' subscribers. Since repeal of the Order, networks no longer face a clear prohibition against providing differing terms of access to different content providers. While differences in transmission speed need not be anticompetitive, they could be in some cases. For example, a network that provides both internet access and its own proprietary video service might attempt to gain market share by slowing down rival, unaffiliated video services. 116 Unless the antitrust agencies investigate such alleged cases, it will be up to market forces to stop networks from engaging in anticompetitive conduct. While such forces might prove sufficient, antitrust provides an important safeguard for consumers and competition.

B. Testing Comparative Advantages of Antitrust and Regulation

A longstanding debate examines the comparative advantages of antitrust and regulation. The late Cornell economist Alfred Kahn, the architect of airline deregulation in the Carter Administration, wrote that "society's choices are always between or among imperfect systems, but that, wherever it seems likely to be effective, even very imperfect competition is preferable to regulation." 117 Kahn does not address antitrust in that quotation, but it suggests that he would find antitrust law's more targeted, case-by-case approach to governing competition to be preferable to regulation. Indeed, Kahn elsewhere wrote, while expressing his "belief in vigorous enforcement of the antitrust laws," that "the antitrust laws are not just another form of regulation but an alternative to it--indeed, its very opposite." 118 Then-Judge Stephen Breyer has similarly stated that "antitrust is not another form of regulation. Antitrust is an alternative to regulation and, where feasible, a better alternative." 119

The comparisons that Breyer and Kahn made were, in context, mostly between antitrust and rate regulation, where the agency was trying to protect consumers from monopoly pricing. 120 But some of these criticisms, including "high cost; ineffectiveness and waste; procedural unfairness, complexity, and delay; unresponsiveness to democratic control; and the inherent unpredictability of the end result," apply to most kinds of regulation. 121 Regulation might well be worthwhile despite those potential drawbacks, but certain attributes--ex post and case-by-case enforcement, judicial oversight with the government bearing the burden of proof--make antitrust enforcement less vulnerable to those critiques.

Regulation can also be comparatively slow to adapt to new market conditions, and that delay can affect an entire regulated industry. 122 Antitrust authorities also might fail to foresee relevant market changes, but their actions typically affect only one discrete case and they generally have flexibility, as conditions change, to modify relevant consent decrees and decline to pursue similar investigations or sanctions. 123 It is harder for government agencies to make changes to established regulatory programs, 124 making regulation more likely than antitrust to outlast the problems it was implemented to solve. Regulation's delayed adaptation to changing conditions can be costly, 125 especially as markets transition to more competitive structures. 126 As Michael Boudin, a former DOJ antitrust official (and later federal judge) put it, "regulation almost always will be very difficult to dislodge, even if it proves mistaken. Almost any regulatory regime will develop a constituency, armed with congressmen and self-interested bureaucrats . . . [and] become[] the foundation on which private arrangements are constructed, arrangements that cannot easily be discarded." 127

As discussed, the comparative drawbacks of regulation do not mean that antitrust is without its faults. 128 On the whole, however, Breyer captured the consensus that, where feasible, antitrust is a preferable alternative to regulation. 129 The key question, then, is: when is antitrust a "feasible" alternative? One way to reframe the question is this: when will antitrust do a good enough job governing market performance in otherwise-regulated industries that policymakers can avoid the more prescriptive, administrative process of promulgating regulations to solve perceived market failures? That is a question that can be better answered if antitrust enforcement steps into the gaps left by deregulation.

C. Clarifying Legal Precedent

The Supreme Court's decisions in *Trinko* and *Credit Suisse* are susceptible to broad and narrow interpretations. Federal courts could apply the judicial-confusion rationale of Credit Suisse to block almost any complicated antitrust claim that some court might misinterpret in some way that conflicts with regulation. But the decision provides little guidance on how likely judicial confusion between permissible and impermissible conduct must be, or how likely it must be that such confusion will interfere with regulation, before a court bars an antitrust claim.

With respect to the first question, the Court in *Credit Suisse* found the conduct challenged by the plaintiff to be similar to conduct allowable by the Securities and Exchange Commission, creating the risk that the trial court might mistakenly bar the allowable conduct by finding it illegal under antitrust law. 130 The Court did not, however, provide much guidance on how similar the conduct subject to an antitrust complaint must be to the conduct permissible under regulation in order for lower courts to bar the antitrust claim. Defendants are therefore likely to argue that courts should preempt antitrust on confusion grounds in less plausible circumstances than those that existed under the specific facts of *Credit Suisse*. It is perhaps helpful for antitrust plaintiffs that the very lower courts that the Credit Suisse majority found so inexpert and error prone are those that will interpret and apply the decision, as they might have incentives to narrow the zone of their presumptive incompetence. 131 Bringing cases in which the antitrust claims are clearer, and the applicability of regulation to the conduct being challenged less direct, would provide federal courts with opportunities to clarify and limit the scope of that zone.

With respect to conflict, the Court appears to find it enough that a regulatory agency has the authority to allow the conduct that courts might prohibit under antitrust law. 132 The opinion does not address how courts should apply *Credit Suisse* where the agency has declined to exercise its regulatory authority. For a potential conflict to exist, is it sufficient that the agency's statutory authority remains available, even if the agency has repealed rules implementing that authority? In such cases, the likelihood of conflict between mistaken application of antitrust law and actual exercise of regulatory authority is more remote. Meanwhile, the effect of blocking antitrust is to leave firms in the sector without oversight from either regulators or antitrust authorities. Bringing cases where a regulator has repealed, declined to promulgate, or stopped enforcing rules with which the antitrust action could allegedly conflict--all of which are likely during a pronounced deregulatory cycle--would test the limits of Credit Suisse in court. The results of such cases could be to narrow *Credit Suisse* to circumstances in which an agency in fact exercises, or is likely to exercise, its statutory authority in a way that could conflict with antitrust.

*Trinko* is similarly subject to both broad and narrow interpretations. As mentioned, the problem with *Trinko* is not the result it reaches as to the particular claim and question presented to the Court. Rather, its danger lies in its potential to bar legitimate antitrust claims on the presumption that antitrust has little incremental value where a regulatory structure already addresses competition. The possibility of such an interpretation arises because Trinko featured three important factors that might be absent in other regulatory settings. First, the competition rules under the 1996 Act imposed stronger monopoly constraints than did Section 2 of the Sherman Act. 133 Second, the FCC had issued a set of rules that directly regulated the anticompetitive misconduct alleged in the case. 134 Finally, the FCC actively administered these duty-to-deal regulations under the 1996 Act. 135 The Court, however, did not identify any of these factors as necessary either to its ruling in Trinko or its future application, opening the door to varying interpretations of the Court's opinion.

A situation in which "[t]here is nothing built into the regulatory scheme which performs the antitrust function," where the Court would allow antitrust enforcement, 136 differs significantly from the very specific, actively enforced competition regulation of the 1996 Act. But the Court does not tell us how close to "nothing" the competition-oriented regulation must be before antitrust can play a role in the marketplace. The problem is particularly important in markets undergoing deregulation, where change may be gradual and piecemeal. Indeed, the very rules at issue in *Trinko* gradually weakened and then ceased to exist within a few years, even though the underlying statutory authority remained in place. In cases where such piecemeal deregulation occurs, or where an agency simply stops enforcing its rules, it is unclear at what point the incremental value of antitrust is high enough that it can be enforced in the deregulating market. Significant anticompetitive harm could occur if the agency is deregulating over time, but antitrust can supplement the weakening regulatory structure only when there is "nothing" left of that structure to govern competition. As with *Credit Suisse*, well-grounded antitrust challenges in markets undergoing deregulation could present lower courts with good cases through which to limit *Trinko* to its particular circumstances while narrowing the sweep of the decision's prudential recommendations. Such a narrowing would be good for antitrust enforcement generally, but is particularly important for the availability of antitrust to counter a strong deregulatory cycle.

### 1AC---Corporate Crime ADV

#### Contention 2 is CORPORATE CRIME.

#### The nature of systemic financial service institutions silos the sector from any form of oversight. That results in a vast array of criminal conduct and destroys public trust in government.

Joel Slawotsky 15, Lecturer, IDC Radzyner Law School. Lecturer, Academic Center for Law and Business. Lecturer, Colman Business School. Lecturer, Haim Striks Law School, "Reining in Recidivist Financial Institutions," Delaware Journal of Corporate Law, Vol. 40, No. 280, 2015, Lexis.

Vibrant and trustworthy financial markets are the cornerstone of American economic prosperity. 1 As titanic financial institutions wielding immense power and influence, financial services corporations, investment houses, and banks are at the epicenter of these markets. 2 Financial institutions that engage in criminal behavior weaken the United States because law-abiding financial institutions are also crucial for upholding American international relations and foreign policy. 3 Exemplifying this crucial link between finance and American international relations, "U.S. foreign policy is increasingly targeting financial activity by criminals, enemy states and individuals in sanctioned regimes." 4

Unfortunately, financial institutions have demonstrated a systemic disregard for U.S. laws and international sanctions, repeatedly engaging in severe illegal conduct. 5 Numerous financial institutions have become serial lawbreakers, 6 violating not only civil, but also criminal laws. 7 The fact that well-known financial institutions--the global leaders of capitalism--are repeat offenders speaks volumes to the entrenchment of such criminal behavior. 8

Recently announced settlements and fines reveal that financial institutional misconduct is widespread, deeply embedded, and broad based. 9 For example, in June 2014 a global bank, BNP, plead guilty to criminal charges that resulted in a huge penalty--nearly $ 9 billion--for violations of U.S. sanctions against rogue states. 10 In August 2014, Bank of America agreed to pay almost $ 17 billion to resolve mortgage fraud claims that are alleged to have caused or contributed to the 2008 financial crisis. 11

The BNP and Bank of America settlements are merely two examples of numerous multi-billion dollar fines imposed on large financial institutions. 12 In addition to multi-billion dollar settlements, there have been a host of "lesser" fines and settlements for illegal activity encompassing a broad range of culpable conduct, including purposeful evasion of sanctions against rogue regimes, 13 intentional fraudulent market manipulation of key interest rates 14 and foreign exchange rates, 15 money laundering for drug traffickers and terrorists, 16 providing private wealth management to dictators to enable despots to loot their national treasures, 17 and fraudulent conduct with respect to market rigging. 18

Deeply troubling is that, despite lawless behavior and the extensive fines imposed nearly a decade ago, financial institutions have repeatedly engaged in illegal conduct. 19 Many of the same financial institutions fined recently were among the firms sanctioned in the previous "[h]istoric settlement" hailed as imposing substantial penalties and which was going to reform financial institutions. 20 Indeed, only ten years ago, regulators assured investors that wide-scale fraud was being severely punished and would not reoccur. 21 In 2003, former SEC Chairman William H. Donaldson ("Donaldson") claimed, "[t]hese cases reflect a sad chapter in the history of American business--a chapter in which those who reaped enormous benefits from the trust of investors profoundly betrayed that trust." 22 As former New York Attorney General Eliot Spitzer ("Spitzer") stated, "[t]his global settlement is one of the largest effected by securities regulators to date. It fulfills our promise to help restore integrity to the marketplace and investor confidence in our system." 23 However, as will be discussed below, the very same financial institutions purportedly chastened by the "historic settlement" continued to engage in illegal behavior in the years immediately following their "chastening." 24

Thus, the existing regime of punishment and deterrence of outrageous criminal fraud is malfunctioning, and the fraud and deceptive dealings are not being deterred. 25 Senator Elizabeth Warren has commented on the current system's failure: "When big financial institutions are not deterred from breaking the law--when, in fact, they have a financial incentive to break the law--then that's what they will do." 26 Similar to a hypothetical traffic violator who causes road accidents but continues to drive and rack up monetary fines, financial institutions serially violate the law and simply pay a fine. 27

The current prosecutorial and regulatory regime relevant to financial institutional misconduct is broken. New revelations of wrongdoing are exposed on a rather frequent basis. 28 Even after a "prolonged" period of relative quiet, government regulators and prosecutors eventually discover and investigate new wrongdoing of financial institutions. 29 Promises of "vigorous enforcement" are followed by settlement discussions that result in "substantial" monetary penalties. 30 Incredibly, despite the substantial penalties imposed, some recidivist financial institutions do not take long to revert to their criminal activities: both Barclays and UBS are being investigated for violating recent agreements with U.S. prosecutors, conduct befitting racketeers, not corporations. 31

The actors in this surreal drama seem to have a vested interest in continuing the saga. 32 Financial institutions are apparently not sufficiently punished, as the public experiences repeated fraud. 33 There is an apparent reluctance to truly punish these financial institutions. A former SEC litigator criticized the agency for its lack of enthusiasm in prosecuting financial institutional misconduct. 34 According to the attorney, senior regulators at the SEC "were more focused on getting high-paying jobs after their government service than on bringing difficult cases." 35 The recurring misconduct of financial institutions indicates insufficient punishment relative to their profits, resulting in a lack of incentive to change behavior. 36 Inertia and an unwillingness to amend the broken system are evident. 37

The current regulation and government policy have led to a system wherein financial institutions commit crimes and are not meaningfully punished, which naturally builds public distrust. 38 Fines, which are essentially paid by the shareholders rather than the directors or officers, are ineffectual. 39 Apparently, the current system is encouraged to continue because it provides significant benefits to the principal actors involved: regulators, prosecutors, government coffers, and the institutions whose profits dwarf the penalties imposed. 40

However, a tipping point has either been reached or will soon be attained. A growing number of Americans perceive that large financial institutions are corrupt and that the government is complicit in their unethical behavior. 41 There is a deep sense that financial institutions fail to play by the existing rules. 42 The American public perceives such corporations as wielding undue influence that effectively immunizes them from punishment. 43 Free market capitalism and shareholder value--based corporate governance, which has led to great prosperity in the United States, is under considerable criticism. 44

An increasing number of Americans also feel disenfranchised from the "system," and many believe the economy is "rigged" and that "Too Big to Fail" ("TBTF") and "Too Big to Jail" ("TBTJ") corporations have an unfair advantage over ordinary citizens. 45 The Occupy Wall Street movement ("OWS"), the popularity of Bitcoin and other virtual currencies, and the rising number of Americans who believe in conspiracy theories symbolize a growing distrust of big corporations, government, and the free market. 46 "The resulting lack of clarity fuels indiscriminate resentment toward 'bankers' as a class and supports the narrative that highly placed executives are above the law." 47 In response, there are calls to break up the biggest banks to avoid repeated fraudulent activity. 48 Presidential hopeful Bernie Sanders has also been a vocal opponent of large banks and has called for major reform: "If Congress cannot regulate Wall Street, there is just one alternative. It is time to break these too-big-to-fail banks up so that they can never again destroy the jobs, homes, and life savings of the American people." 49

These sentiments are no longer the banter of fringe political rhetoric: the President of the New York Federal Reserve, William Dudley, has made similar statements. 50 Dudley has questioned whether "the sheer size, complexity and global scope of large financial firms today have left them too big to manage." 51

The public perception is that a palpable double standard exists wherein large financial institutions engage in criminal activity with immunity from prosecution. 52 There is a vital need to restore a level and fair justice system for all citizens--including large financial institutions. 53 A new model of punishment and deterrence must be effectuated to deter recidivist financial services corporations from serially violating the law.

As the Supreme Court ruled in Citizens United, corporations have rights like individuals. 54 Therefore, corporations should be subject to punishment like individuals. As a serial traffic violator loses driving privileges, 55 so should a repeat corporate financial institutional offender forfeit its right to engage in business. This article proposes that financial institutions violating certain types of laws, with the requisite intent, should in effect have their licenses revoked by having their businesses sold to competitors. 56 Similar to traffic violators who initially pay fines but after repeated infractions have their right to drive suspended or revoked, serial recidivist financial institutions should lose their right to conduct business.

However, due to the latent potential for severe economic damage, this penalty should be imposed only under specific guidelines. 57 The license would not be "lost" with the resulting chaos arising from a breach of investor confidence. 58 The license of a serial violator would in effect be re-distributed to the defendant's competitors. 59 The proposal defines serial violations as at least three convictions of specific federal laws conducted either intentionally or with reckless disregard within a ten-year time frame. If a settlement is reached prior to trial, then the conviction itself--the guilty plea--will be sufficient to constitute a violation.

The article proceeds as follows. Part II of this article describes the current problems arising from financial institutional malfeasance. 60 It focuses on the incentives to act corruptly, rising public discontent and distrust, and the tremendous cost to stakeholders and the economy. 61 Part III describes the rampant criminal behavior in which financial institutions engage. 62 Such behavior includes cooperation with and support of rogue states and actors 63 and institutional financial fraud, such as LIBOR manipulation and sub-prime mortgages. 64 Part IV explains how the current system of deterrence has failed and proposes a new system for punishing and deterring illegal conduct by financial institutions. 65 Part V provides closing remarks. 66

II. THEMULTIPLE PROBLEMS ARISING FROM THE CURRENT SYSTEM

This section provides a brief description of the endemic fraudulent conduct and its ramifications. This section also discusses reasons for the systemic recurring nature of the wrongdoing.

A. Examples of Illegal Conduct

Numerous global financial institutions have effectively become habitual crooks. 67 HSBC is a prime exemplar.

HSBC . . . understood the subtleties of--and [was], apparently, fully invested in--money laundering for drug kingpins and terror cells, while ignoring U.S. sanctions established against rogue nations. HSBC's US unit managed to position the brand in this way by accepting $ 7 billion of dollars [sic] from Mexican drug cartels, conducting 25,000 Iranian transactions totaling over $ 19 billion in just one week, and helping Saudi banks with terror financing for groups like al-Qaeda. 68

Another example of a financial institution that in essence has acted as a criminal enterprise is JPMorgan, which disclosed in 2013 that it was the subject of numerous investigations alleging it has been involved in various financial schemes. 69 The bank admitted it was the target of eight federal investigations for activities ranging from possible bribery of foreign officials in Asia to allegations of improper mortgage-bond sales. 70 In January 2014, after investigations into its involvement in corruption, sub-prime fraud, and LIBOR rigging, JPMorgan agreed to pay $ 2 billion to resolve charges that it aided and abetted the mammoth Madoff Ponzi fraud. 71

Credit Suisse provides another illustration of a titan of capitalism turned criminal. 72 Large-scale tax evasion requires sophisticated financial services. 73 In 2014 Credit Suisse was fined $ 2.6 billion for enabling thousands of U.S. clients to intentionally hide at least $ 10 to $ 12 billion in income from the IRS. 74 This was not a small backroom operation consisting of one or two "rogue" employees. 75 Rather, Credit Suisse dedicated a large number of employees to this undoubtedly highly profitable niche business. 76 Credit Suisse utilized 1,800 employees who falsified documents and engaged in other actions designed to allow their clients to purposely violate the law. 77 According to a U.S. Senate Report, "Credit Suisse helped clients cheat the IRS by opening accounts under false names, avoiding the mail when delivering account statements and servicing clients in the U.S. or Switzerland." 78

Another example is Barclays, whose "new" CEO, Antony Jenkins, 79 admitted in early 2013 that the bank's business culture incentivized profitable illegal conduct. 80 Jenkins pledged to overhaul Barclay's corporate culture and "commit[]" Barclays to "integrity." 81 According to Jenkins, "[t]here will be no going back to the old ways of doing things . . . . We get it. We are changing the way we do business, we are changing the type of business we do and we are setting out a new course." 82 Despite this promise, New York's Attorney General filed a complaint in June 2014 alleging a widespread serial pattern of lies and fraud with respect to trading that continued as recently as April 2014. 83

B. The Current System Is Broken

Financial institutions act corruptly, apparently oblivious to any consequences. 84 The belief that the imposition of monetary fines is simply a cost of doing business is well supported. 85 First, the profits garnered from the illegal activity may dwarf the fine. 86 If the fines are a fraction of the windfall of illegal profits, then a strong incentive exists to continue to misbehave. For example, presuming the LIBOR manipulation rigged rates on trillions of dollars of commercial and consumer loans, the profits from such scheming will dwarf the penalty. 87 If a company manipulated the LIBOR rate by 0.25% on a portfolio of $ 4 trillion dollars of loans, then the resulting $ 10 billion rigged-interest differential would be large enough to make "crime pay." A former SEC insider referred to the fines and settlements with financial institutions as a "tollbooth on the bankster turnpike." 88

Indeed, following the "massive record" $ 9 billion fine imposed on BNP, the bank stated the enormous sum "won't force it to reduce its dividend or derail growth plans." 89 Indeed, BNP boasted that the fine would not affect the bank 90 and that it would "retain its licenses and expect[ed] 'no impact' on its operational or business capabilities." 91 Often, punishments involving the suspension or revocation of privileges and licenses are waived, thus further eliminating any real punishment to the bottom line. 92

Second, the "cost" of the fines is not completely paid by the offending financial institution. 93 Costs and expenses may be insurable and are generally tax-deductible. 94 Further, any uncovered costs can also be "legally laundered" into the economy either through higher service costs or reduced value to consumers. 95 Moreover, typical agency corporate governance proves that crime pays. 96 Even presuming arguendo the corporation had to pay fines from its own coffers, years of illegal profits will likely have led to large raises and bonuses for the senior managers who initiated, approved, or ratified the misconduct. The senior managers may not care about fines the corporation may have to pay at some future point--the loss is principally borne by the company and/or its shareholders at the time the penalty is imposed. 97

Third, there is almost no criminal prosecution for the officers and directors who initiate, approve, or ratify misconduct. 98 Since there is little risk of a prison sentence, 99 the managers who decide to act criminally are not personally punished and are only rewarded for bad conduct. 100 As U.S. Senator John McCain has noted, these fines are levied on the corporation, and there has been precious little criminal prosecution of the senior managers involved in the illegal conduct. 101 The lack of individual criminal accountability following the 2008 financial crisis is instructive:

The senior executives who played leading roles in the 2008 financial crisis [breathed] a sigh of relief: If any committed crimes, the statute of limitations [ran] out for most of them [in 2014]. It's safe to say nobody will go to jail. . . .

Even where the government has demonstrated that crimes occurred in and around the crisis, individual culpability has been notably lacking. From 2009 through May 2014, federal prosecutors filed or threatened criminal charges in 21 separate actions against major financial companies, which admitted to such misdeeds as laundering hundreds of millions of dollars for Mexican and Colombian drug traffickers, systematically lying about their borrowing costs, and devoting hundreds of employees to helping U.S. citizens commit tax fraud. 102

The lack of criminal charges is mystifying. In contrast to the lack of prosecution over recent criminal misconduct, the 1980s banking misconduct witnessed numerous criminal prosecutions. 103

After the savings-and-loan bust of the 1980s, more than 1,000 people were charged, and more than 100 company officers and directors served prison terms. The accounting and other corporate scandals of the early 2000s led to criminal charges against at least 30 top-level executives, most of whom were convicted or pleaded guilty. 104

The lack of prosecution for the current misconduct, which dwarfs the savings-and-loan fraud of thirty years ago, encourages criminal behavior.

Fourth, the government reaps substantial revenue from the imposition of fines. 105 "Large corporations have demonstrated a willingness to pay eye-popping sums, at shareholders' expense, to avoid the uncertainty and embarrassment of extended trials." 106 Therefore, ironically, federal and state governments may benefit from the illegal activities of financial institutions.

Fifth, a "cottage industry" has developed between investigated corporations and former government prosecutors and regulators. 107 For example, JPMorgan's chief counsel, Stephen Cutler, was a former chief of enforcement at the SEC. 108 In another illustration, the former Justice Department counsel, Lanny Breuer ("Breuer"), accepted a vice-chairman position with a reported $ 4 million annual salary at a large law firm representing some of these investigated financial institutions. 109 Interestingly, Breuer has been heavily criticized "for not bringing cases against the banks and executives at the center of the [financial] crisis." 110 Eric Holder, whose tenure was marked by investigations over the vast financial institutional scandals, has accepted a partnership at a large law firm that represents clients being investigated for wrongdoing. 111 "Holder, who left office in April, is giving his critics a new round of ammunition by returning to Covington & Burling, the Washington-based law firm with a corporate clientele that has included Bank of America, Citigroup, JPMorgan Chase and Wells Fargo." 112

The prospect of a lucrative, post-government, large-firm employment offer may constitute a corrupting inducement. "Prosecutors with limited resources, no matter how dedicated to justice they may be, can't ignore the attractions of such negotiated settlements: more headlines, more money for victims and federal coffers, less risk of failure, and better statistics with which to impress bosses and potential employers in the private sector." 113 The perception, and in fact reality, is that government regulators have a vested self-interest to "go easy" on financial institutions. 114 Corroborating this truth, a former SEC enforcement attorney bluntly stated, "I have had bosses, and bosses of my bosses, whose names we all know, who made little secret that they were here to punch their ticket . . . . They mouthed serious regard for the mission of the commission, but their actions were tentative and fearful in many instances." 115

Not only American financial institutions hire regulators; it is a global phenomenon. 116 For example, "Morgan Stanley and Banco Santander SA are hiring executives from the U.K. markets regulator for their London operations, as banks look to the watchdog for staff to see them through--and keep them clear of--probes." 117 Other financial institutions also engage in this practice:

Banks targeted by the markets watchdog have been increasingly hiring its alumni. Six months after settling claims Barclays Plc manipulated interbank offered rates, the bank hired the man who led the watchdog during the probe. Hector Sants joined the London-based lender in 2013 to a newly created job as head of compliance and government and regulatory relations. Royal Bank of Scotland Group Plc., also fined for rate rigging, named the regulator's former managing director of supervision Jon Pain as head of conduct and regulatory affairs in August. 118

The current governance system incentivizes prosecutorial and regulatory tolerance rather than aggressive enforcement and punishment. The fines are substantially smaller than the profits generated by violating the law. Moreover, the legal defense fees are generally tax-deductible as a business expense, and fines may be also. None of the individuals responsible are imprisoned, and no officer or manager has to disgorge illegal gains. From a corporate governance perspective, financial institutional fraud is a perfect storm of management agency conflicts. The managers of the business can potentially reap immense short-term raises and bonuses knowing the expenses, if any, will be borne by the shareholders. Since the potential windfall of salary and bonuses dwarfs the possibility that their own shares will lose value--and the amount of loss would be a tiny fraction of the gain--there is no incentive to refrain from engaging in illegal activity.

C. Lack of Vigorous Prosecution

The U.S. government's prosecutors and regulators have displayed great reluctance to aggressively pursuing financial institutional wrongdoing. 119 Senator Elizabeth Warren is a vocal critic of the lack of vigorous criminal prosecution:

Today, the Department of Justice doesn't take big financial institutions to trial--ever--even when financial institutions engage in blatantly criminal activity. Instead, DOJ uses what it calls deferred prosecution agreements and non-prosecution agreements, in which it asks the offending firm to pay a fine and to work with the government to come up with a plan for doing better in the future. 120

Attorney General Eric H. Holder ("Holder") conveyed a sobering connotation when he stated that the government could not prosecute some corporations because doing so might result in severe damage to the economy. 121 In other words, Holder's remarks suggest that large financial institutions can cross the line and commit criminal acts knowing that the government is reluctant to prosecute these institutions because of the potential adverse ramifications on the economy. 122 Holder stated that the reticence to prosecute "is a function of the fact that some of these institutions have become too large . . . . It has an inhibiting impact on [the government's] ability to bring resolutions that I think would be more appropriate." 123

Echoing these sentiments, Lanny Breuer, Chief of the Justice Department's Criminal Division, noted the risk to the general economy arising from aggressive prosecution:

We are frequently on the receiving end of presentations from defense counsel, CEOs, and economists who argue that the collateral consequences of an indictment would be devastating for their client. In my conference room, over the years, I have heard sober predictions that a company or bank might fail if we indict, that innocent employees could lose their jobs, that entire industries may be affected, and even that global markets will feel the effects. 124

The statements of these key Justice Department officials are unsettling for two reasons. First, some financial institutions may have become so entrenched in the American economy that the U.S. is indeed so dependent on their wellbeing that fraudulent indiscretions are overlooked. "Bigger" is thus certainly "better" when it comes to engaging in malfeasance. 125 That certain financial institutions have become so entrenched could also bode ill for American democracy:

When that other Roosevelt--Teddy Roosevelt--broke up the monopolies, he did it in large part because those giant companies threatened our democracy. Big corporations, Roosevelt said, should not have the power "to interfere in politics in order to secure privileges to which [they are] not entitled." Our economy suffers when those who can hire armies of lobbyists and make huge political contributions can decide what the financial cops can and cannot do. Our democracy suffers when Congress puts the interests of a handful of giant banks ahead of the needs of 320 million American citizens. If the big banks keep calling the shots, they will own both our economy and our democracy. 126

Second, by so admitting, the United States has provided large financial institutions an incentive to commit criminal wrongdoing since they are armed with the knowledge that their misconduct is essentially immune from prosecution. 127 The government is signaling that there is no reason to stay within the boundaries of the law since violating the law brings tremendous profit to the financial institution and there is no fear of being prosecuted. 128 In fact, the larger the financial institution, the more it is exempt from compliance with the law. 129 Thus, ironically, the larger the company, the less likely it will be prosecuted, despite the inherently more extensive damage that a major global business can inflict. 130

There are valid points to the argument that overly fervent prosecutions can lead to harsh economic consequences. 131 Should a large institution be indicted, many clients can be expected to find other institutions. The Enron saga provides a useful context. 132 Enron's accounting firm, Arthur Andersen, was convicted in 2002 of obstruction of justice. 133 In 2005, the United States Supreme Court reversed the conviction. 134 However, the damage was done from the outset of the indictment. 135 Upon the issuance of indictment, most of the firm's clients left and, despite being ultimately cleared, the firm remains a shadow of its former self. 136 Arthur Anderson's indictment demonstrates the dangers attendant to criminal prosecution of financial institutions. 137

Accordingly, post-Enron, prosecutors have focused criminal litigation on smaller companies. 138 When confronted with serious wrongdoing on the part of large corporations, prosecutors focus on Deferred Prosecution Agreements ("DPA"). 139 "[B]y using DPAs, the DOJ avoids the potential collateral consequences of indictment and conviction while obtaining structural reforms and the corporation's aid in prosecuting individual corporate officers. In exchange, the DOJ gives up the increased deterrent effect of actually prosecuting the corporation itself." 140 However, these types of resolutions were not intended to provide cover for financial institutional racketeering:

These kinds of agreements were originally created to deal with low-level, non-violent individual offenders, but they have now been transformed beyond recognition to create get-out-of-jail-free cards for the biggest corporations in the world. 141

Ironically, it is the large global criminal actor that most likely will reap the benefit of a DPA. 142 Furthermore, financial institutions that serially commit crimes reap the benefits of subsequent DPAs, further entrenching the lack of incentive to stop criminal activity:

No firm should be allowed to enter into a deferred prosecution or non-prosecution agreement if it is already operating under such an agreement--period. Any firm that enters one of these agreements should have to pay--as a mandatory minimum--fines at least equal to every dime of profit generated as a result of their illegal activity. And we should change the legal standards so that there is some meaningful judicial review of whether these agreements are appropriate. 143

Notwithstanding the risks, the argument of TBTF or TBTJ financial institutions must be re-evaluated in light of the extraordinary serial criminal activity. 144 While aggressive prosecution may pose risks, ardent criminal conduct must be deterred. Moreover, it is imperative to note the recurring nature of the misconduct and the misplaced hype surrounding the "historic" settlements over a decade ago that were supposed to ensure that financial institutions stopped engaging in illegal conduct. 145 The facts of the "historic" $ 1.4 billion settlement in 2003 with numerous financial institutions are quite instructive. 146 According to the accompanying SEC Press Release, "[i]n addition to the monetary payments, the firms are also required to comply with significant requirements that dramatically reform their future practices . . . ." 147

Former SEC Chairman Donaldson remarked that the settlement reflected a new chapter in fairness and integrity:

The hallmark of our business and financial system is that the rule of law must prevail and when wrongdoing occurs, it must be confronted and punished. Today we do just that. . . . These cases reflect a sad chapter in the history of American business--a chapter in which those who reaped enormous benefits from the trust of investors profoundly betrayed that trust. These cases also represent an important new chapter in our ongoing efforts to restore investors' faith in the fairness and integrity of our markets. 148

Likewise, former Attorney General Eliot Spitzer claimed that wide-ranging structural reforms would restore integrity:

This global settlement is one of the largest effected by securities regulators to date. It fulfills our promise to help restore integrity to the marketplace and investor confidence in our system. The wide-ranging structural reforms to firms' research operations will empower investors to use securities research in a practical and meaningful way when making investment decisions. 149

A former North American Securities Administrators Association ("NASAA") President, Christine Bruenn, stated, "We're hopeful that the settlement announced today will help restore the faith and trust of wary and cynical investors." 150

Then-National Association of Securities Dealers ("NASD") Chairman and CEO Robert Glauber made similar optimistic comments:

Today marks an ending, but even more, a beginning. Because in finalizing this settlement, we take a giant step on the road to restoring and renewing investor confidence. The final resolution we announce today is a good one for everyone, everywhere, who has a stake in the integrity of the U.S. capital markets. 151

Former New York Stock Exchange ("NYSE") Chairman Dick Grasso boasted, "I am absolutely certain that we will come out of this period with a stronger system that puts the interests of the investing public first." 152

These statements, in historical context, are almost surreal. Over a decade ago, regulators proudly proclaimed that "the rule of law must prevail" and that "we take a giant step on the road to restoring and renewing investor confidence." 153 One would think these prosecutorial and regulator statements were referring to the substantial scandals and frauds of recent years. Incredibly, these comments were made in 2003 and simply underscore the failure of the current model of punishing large financial institutions. 154 Many of the very same financial institutions that were allegedly taught a lesson in 2003 are involved in the current plethora of illegal conduct. 155 JPMorgan, UBS, Goldman Sachs, and Merrill Lynch (now Bank of America) were all involved in the supposedly historic settlement that was touted as the foundation of a "stronger system" to prevent fraudulent conduct. 156 These same financial institutions have been shown to continually engage in rogue banking and criminal conduct. 157

Incipient indications that the U.S. government may be shifting to a more litigious position regarding corrupt financial institutions have begun to appear. 158 In a video posted to the Justice Department's website in May 2014, Holder stated that the government is aggressively reviewing financial institutional misconduct "that could result in action in the coming weeks and months." 159 Holder, attempting to retract the potential damage of his previous TBTJ remarks, stated, "I intend to reaffirm the principle that no individual or entity that does harm to our economy is ever above the law. . . . There is no such thing as 'too big to jail.'" 160 Holder was evidently alluding to the guilty pleas of Credit Suisse, BNP, and Citigroup. Yet, a closer examination of these three so-called prosecutions reveals that aside from headline-grabbing fines, not much has been affected. Indeed, business as usual continues.

According to Holder, "BNP Paribas went to elaborate lengths to conceal prohibited transactions, cover its tracks and deceive U.S. authorities. . . . If sanctions are to have teeth, violations must be punished." 161 Prosecutors called BNP "the worst offender." 162 Incredibly, despite being the "worst offender," BNP bragged that the fine would have no effect on its operations. 163 Moreover, BNP obtained a waiver from a ban that would have prevented the bank from operating as an investment adviser. 164

Despite claims that no one is above the law and promises of aggressive prosecutions, the outrageous misconduct relative to the Forex manipulation provides another example of extremist prosecutorial leniency. Prosecutors expressed concern at the defendants' Forex rate rigging:

The scheme was a "brazen display of collusion," Attorney General Loretta Lynch said in a statement. "This Department of Justice intends to vigorously prosecute all those who tilt the economic system in their favor, who subvert our marketplaces, and who enrich themselves at the expense of American consumers," she said. 165

Yet, incredibly, despite the brazen fraud, and the prosecutors' stated intentions, the defendants were permitted to simply pay a fine and continue business as usual: "All of the banks that pleaded guilty said they received needed waivers from the Securities and Exchange Commission to continue managing mutual funds and raise capital quickly, a person familiar with the matter told Bloomberg." 166

Credit Suisse similarly demonstrates the abject failure of the current system. Credit Suisse helped thousands of Americans evade taxes. Credit Suisse admitted that its criminal misconduct "spanned decades." 167 Yet, prosecutors and regulators actively sought to mitigate the defendant's damages. 168

Last week, the Securities and Exchange Commission also voted to grant Credit Suisse a temporary exemption from a federal law that requires a bank to hand over its investment-adviser license in the event of a guilty plea, according to two of the people briefed on the matter. That decision effectively spares Credit Suisse from one of the harshest repercussions of pleading guilty. 169

Another example is Citigroup, which agreed to resolve mortgage-fraud claims for approximately $ 7 billion. Holder referred to the conduct as "egregious" and stated the bank confessed to its wrongdoing in "great detail." 170 Notwithstanding the "egregiousness," and its "detailed confession," the Justice Department agreed to release claims relating to collateralized debt obligations ("CDOs"). 171 "In a boon for Citigroup, the deal with the Justice Department forgoes any potential cases against the bank related to [CDOs], which were often tied to mortgages." 172 Not surprisingly, the bank's shares went up three percent upon the announcement, 173 and the CEO was pleased with the outcome. 174 It seems that despite the severity of the wrongdoing, there is no anticipated substantive negative effect on the bank.

In addition to the lack of meaningful penalty imposition, it is crucial to note that financial institutions suffer no consequences. As mentioned earlier, BNP boasted that the settlement will not affect its operations. 175 In other words, it will continue to do business. This underscores a crucial fact that government regulators often grant waivers of penalties. 176 Sometimes, a financial institution deserves to be disqualified from conducting specific transactions. Yet, despite the deserved penalty, disqualification waivers are routinely granted. 177 Waivers are often extended by regulators based upon concerns that imposing restrictions could have deleterious effects on the financial institution, as well as "other parties." 178 Waiving punishments serves to corroborate the suspicion that large institutions are above the law. Senator Warren has sharply criticized the propensity of the SEC to grant waivers and to fail to pursue civil charges:

The SEC is even worse. The SEC rarely takes any big institutions to trial, and it also fails to use other tools in its enforcement toolbox. For example, the SEC grants the status of "Well-Known Seasoned Issuer" to certain companies that it believes are uniquely trustworthy. That status allows these companies to access the capital markets more easily. By law, the SEC is supposed to revoke this privilege if a company receives a criminal conviction or violates the anti-fraud provisions of the federal securities laws. But more often than not, the SEC waives this automatic revocation, and passes up yet another opportunity to meaningfully deter future misconduct. 179

In a dissent from granting a waiver, SEC Commissioner Kara M. Stein ("Stein") forcefully articulated the disadvantages in granting waivers. 180 According to Stein, "the Commission's action to waive [its] own automatic disqualification provisions arising from RBS' criminal misconduct may have enshrined a new policy--that some firms are just too big to bar." 181 Moreover, "[s]uffice it to say, this is egregious criminal conduct with far-reaching consequences in the United States, in the markets the Commission oversees, as well as in global financial markets. This factor weighs strongly against granting a waiver." 182 Stein adds that:

Over the years, Congress and the Commission have adopted numerous disqualification provisions, intended to protect investors and the markets from "bad actors." Yet the Commission routinely waives them. We need to step back and think broadly about what these provisions are intended to accomplish, and ask ourselves--are we achieving the intended goals? Are they being fairly applied to all firms and individuals? Large institutions should be treated no differently, neither better nor worse, than small and medium-sized issuers.

. . . These disqualification and bad actor provisions have the potential for deterrence at large institutions that no one-time financial penalty could ever wield. Yet, we repeatedly relieve issuers of the supposedly automatic consequences of their misconduct.

Our website is replete with waiver after waiver for the largest financial institutions. Some large firms have received well over a dozen waivers of one sort or the other over the past several years. One large financial firm alone, in a 10 year period, has received over 22 different waivers--often making the argument that it has a "strong record of compliance with federal securities laws." 183

Essentially, large financial institutions have acted as lawbreakers, yet are not truly punished. BNP is the archetype exemplar. 184 Indeed, BNP shares soared the day after the settlement. 185 "The firm said in a statement it will retain its licenses and expects 'no impact' on its operational or business capabilities." 186

The perception has developed that a double standard exists whereby financial institutions are not adequately prosecuted:

Perhaps the most interesting part of the prolonged and leak-filled dance leading up to the expected criminal charges has been the effort to assure that the banks will stay in business after they plead guilty. Credit Suisse is expected to admit that it helped Americans evade taxes, and BNP Paribas is expected to admit that it did business with countries blacklisted by the United States. Regulators will not enforce statutes that would seem to bar the banks from some activities.

To put it another way, the Justice Department has gone to great lengths to guarantee that convicted banks will not be treated as criminals.

In being treated that way, the banks will receive the same breaks other banks have come to expect when they are caught violating rules or laws. 187

The fact that financial institutional misconduct is not vigorously prosecuted and is often accompanied by waivers of penalties 188 is not surprising. Prosecutors and regulators have an incentive not to deliver a serious blow to defendants who can offer them lucrative private sector employment. 189 As discussed above, a revolving door exists whereby senior government lawyers and regulators are often subsequently hired by financial institutions. 190

D. Public Perception of Unfairness

When large financial institutions repeatedly violate laws and apparently get away with it, the public responds, as expected, with cynicism and distrust. 191 Commentators have noted the disconnect between popular notions of the consequences associated with guilty pleas and those experienced by large financial institutions:

For most people, pleading guilty to a felony means they will very likely land in prison, lose their job and forfeit their right to vote.

But when five of the world's biggest banks plead guilty to an array of antitrust and fraud charges as soon as next week, life will go on, probably without much of a hiccup. 192

A myriad of political, economic, and social problems stem from the perception, let alone the reality, that large financial institutions repeatedly commit fraud and get away with it. 193 One of the main reasons for this belief is the lack of meaningful prosecution of corporate offenders or their directors and officers. 194

A direct outcome of the misconduct is increased distrust of governmental and social institutions. 195 Significant segments of the public are convinced that there is an inequitable element to justice in America. 196 This reaction is to be expected in light of the government's repeated failure to rein in rogue conduct. 197

Protest movements, such as OWS, and the attacks on Google buses illustrate tremendous frustration and resentment: 198

Even as the tech companies extend their global reach and jostle to own the future, their hometown is turning from admiration to anger. The buses, which illegally use city stops, have become an unlikely rallying point. First, people were priced out of their homes, activists say; now they are being pushed off the streets.

Demonstrators regularly block the shuttles. Last week, a group of activists stalked a Google engineer at his East Bay house, urging the masses to 'Fight evil. Join the revolution.' 199

Anger at banks' behavior has been a motivating factor of OWS. 200 Distrust of financial institutions is at a high level. "Almost half of the public thinks the sentiment at the root of the [OWS] movement generally reflects the views of most Americans." 201

Gallup results only further emphasize the growing animosity toward banks in America. Never before 2009 had more Americans expressed more distrust than trust in banks. That has not only been the norm for three years now, but the gap is widening.

Gallup, [which] has been tracking confidence in banks for over thirty years now, notes the steady decline of confidence in their release, pointing out that 60 percent of Americans had at least "quite a lot" of confidence in banks in 1979. That fell to 30 percent in the early 1990s, but then steadily rose to 53 percent in the [mid-2000s].

The percentage of Americans with a good deal of trust in banks has been nearly halved since 2007 . . . . 202

Approximately half of Americans believe the economic system is unfair. 203 In contrast, twenty years ago only a third of Americans believed the American economic system was unfair. 204

Perhaps even more disturbing is a recent Gallup poll that found that only 52 percent of Americans thought that there was a lot of opportunity for people who worked hard. In response to the same question in 1952, 87 percent of Americans thought there was plenty of opportunity for someone who worked hard. 205

In addition to lack of faith in government and social institutions, another negative outcome is that financial institutional fraud may have caused the severe global financial crisis. 206

E. Fraud as a Cause of the Financial Crisis

A growing body of evidence indicates that financial institutional fraud played a prominent role in the 2007-2009 financial crisis. 207 The economic toll was harsh, and the United States still reels from the effects of the "Great Recession." 208 Estimates are that the financial crisis may have cost the United States up to $ 14 trillion:

Washington turned a blind eye as risks were packaged and re-packaged, magnified, and then sold to unsuspecting pension funds, municipal governments, and many others who believed the markets were honest.

Not long after the cops were blindfolded and the big banks were turned loose, the worst crash since the 1930s hit the American economy--a crash that the Dallas Fed estimates has cost a collective $ 14 trillion. 209

The largest financial institutions "have played a substantial role [in causing the crisis], by deceiving the investors who ultimately purchased mortgage-backed securities." 210 Fraudulent conduct is linked to the financial crisis:

The global financial crisis, it is now clear, was caused not just by the bankers' colossal mismanagement. No, it was due also to the new financial complexity offering up the opportunity for widespread, systemic fraud. Friday's announcement that the world's most famous investment bank, Goldman Sachs, is to face civil charges for fraud brought by the American regulator is but the latest of a series of investigations that have been launched, arrests made and charges made against financial institutions around the world. Big Finance in the 21st century turns out to have been Big Fraud. 211

The financial crisis was not an act of nature: it was a man-made economic assault that cost millions of jobs, evaporated billions of dollars in retirement savings and put our nation in its worst economic tailspin since the Great Depression. 212 The most culpable entities responsible for the recent financial crisis were the financial institutions. 213 "Without the banks providing financing to the mortgage brokers and Wall Street while underwriting their own issues of toxic securities, the entire pyramid scheme would never have got off the ground." 214 As noted by U.S. District Court Judge Jed Rakoff, the evidence strongly suggests that recidivist financial institutions proximately caused the financial crisis:

[T]he Financial Crisis Inquiry Commission, in its final report, uses variants of the word "fraud" no fewer than 157 times in describing what led to the crisis, concluding that there was a "systemic breakdown," not just in accountability, but also in ethical behavior.

As the commission found, the signs of fraud were everywhere to be seen, with the number of reports of suspected mortgage fraud rising twenty-fold between 1996 and 2005 and then doubling again in the next four years. As early as 2004, FBI Assistant Director Chris Swecker was publicly warning of the "pervasive problem" of mortgage fraud, driven by the voracious demand for mortgage-backed securities. 215

Interestingly, the 1930s depression was also largely caused by financial institutional fraud. 216 The bank-caused depression led to the enactment of the Glass-Steagall Act, which prevented banks from using deposits to underwrite private securities and sell them to their own customers--until it was repealed in the 1990s. 217 Without the separation of banking and underwriting, banks will likely repeat the profitable practice of originating bad quality debt and marketing the "toxic assets" to customers locally and globally. 218 Senator Warren has introduced legislation in support of a new Glass-Steagall in order to effectively break up large banks:

Despite the progress we've made since 2008, the biggest banks continue to threaten our economy. The biggest banks are collectively much larger than they were before the crisis, and they continue to engage in dangerous practices that could once again crash our economy. 219

As noted above, a remarkable contrast exists between the recent episodes of fraud and a similar one in the 1980s known as the "savings and loan debacle." 220 Although the latter was a tiny fraction of the recent frauds with respect to both losses and the amount of fraud, it resulted in over 1,000 felony convictions. 221 Such dichotomy also contributes to the public's lack of faith in corporate America and the justice system.

F. "Incidental" Economic Costs: Legal Expenses, Fines, and Damage to the Economy

Financial institutional fraud is immensely costly. 222 Indeed, the costs have been staggering. 223 The resolutions alone (not including legal fees) generally include a substantial fine. 224 For example, in October 2013, JPMorgan reached an agreement to resolve claims of mortgage security fraud with the U.S. Justice Department. 225 The settlement included payment of "$ 4 billion in relief for unspecified consumers and $ 9 billion in payments and fines . . . ." 226

JPMorgan has paid more than $ 1 billion to five different regulators in the past month to settle probes into botched derivatives trades . . . . It also settled unrelated claims it unfairly charged customers for credit-monitoring products.

The bank faces an investigation into its hiring practices in Asia. It's also the subject of a probe by Manhattan U.S. Attorney Preet Bharara into claims it abetted Bernard Madoff's Ponzi scheme . . . . 227

The U.S. Justice Department later announced it was preparing more suits against financial institutions in 2014. 228 At that time, some banks had already rejected settlements, almost guaranteeing additional suits. 229 The actual costs to the financial institutions are mind-boggling.

"The six biggest U.S. banks, led by JPMorgan Chase & Co. and Bank of America Corp., have piled up $ 103 billion in legal costs since the financial crisis, more than all dividends paid to shareholders in the past five years." 230 This sum represents various litigation expenses as well as fines and settlements: 231

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That's the amount allotted to lawyers and litigation, as well as for settling claims about shoddy mortgages and foreclosures, according to data compiled by Bloomberg. The sum, equivalent to spending $ 51 million a day, is enough to erase everything the banks earned for 2012. 232

The amount has now been updated and is $ 125 billion. 233 "The fines will add to the spiraling cost to banks for cleaning up past misdeeds. Globally this is expected to reach about $ 125 billion if JP Morgan agrees a $ 13 billion deal with the U.S. authorities over mortgages." 234 Moreover, these estimates do not reflect the "newer" investigations into the foreign currency ("Forex") market rigging which have already led to numerous guilty pleas and fines:

Probes into allegations that traders rigged foreign-exchange benchmarks could cost banks as much as $ 41 billion to settle, Citigroup Inc. analysts said.

Deutsche Bank AG is seen as probably the "most impacted" with a fine of as much as 5.1 billion euros ($ 6.5 billion), Citigroup analysts led by Kinner Lakhani said yesterday, estimating the Frankfurt-based bank's settlements could reach 10 percent of its tangible book value, or its assets' worth.

Using similar calculations, Barclays Plc could face as much as 3 billion pounds ($ 4.8 billion) in fines and UBS AG penalties of 4.3 billion Swiss francs ($ 4.6 billion), they wrote in a note first sent to clients on [October 3rd]. 235

While the legal costs alone are staggering, the overall losses to various stakeholders will likely dwarf the legal expense. 236 The immense costs and fees incurred since the global financial crisis exceeds the amount these financial institutions have paid in dividends. 237 The wrongdoing among the European banks is equally costly: 238

Several lenders added to their litigation provisions in the third quarter, indicating that more settlements with clients and regulators are due to conclude.

Deutsche Bank co-Chief Executive Officer Anshu Jain raised his bank's reserves by 1.2 billion euros at the end of September from three months earlier, telling investors on a conference call to expect settlements "in the near future." 239

European-based banks have a slightly lower but equally astounding legal expense bill:

The $ 77-billion legal tab is less than the $ 103 billion the six biggest U.S. banks had allotted as of late August to lawyers and litigation, as well as for settling claims for shoddy mortgages and foreclosures since the start of 2008, according to data compiled by Bloomberg. 240

The banks' expense tab does not include payments for U.K. mortgage and interest rate derivatives. 241 In addition to the direct payments for legal fees and fines, banks incurred serious indirect costs as well. 242 "The payments have hurt banks' profit and slowed efforts to build capital. Future penalties may prompt firms to delay boosting dividends or buying back stock . . . ." 243

While the total legal expense bill of approximately $ 200 billion through 2013 is astonishing, 244 global financial institutions are likely to eventually pay substantially more. According to KBW's analysis, "[LIBOR] probes could cost global investment banks $ 46 billion and investigations into manipulating currencies could trigger another $ 26 billion . . . . That's in addition to settling claims over faulty mortgages with the Federal Housing Finance Agency, which may total $ 24 billion . . . ." 245 Moreover, it is likely that "[b]anks will be contending with litigation for several years . . . ." 246

The above section described the extensive structural problems in the regulatory and prosecutorial architecture with respect to financial institutional misconduct. 247 The next section focuses on the systemic nature of unlawful conduct. It first discusses the enabling of rogue actors to commit violations of international law 248 and then describes financial market misconduct, including rate rigging, market manipulation, and fraud. 249

III. THE PERVASIVE EXTENT OF FINANCIAL INSTITUTIONAL CRIMINAL BEHAVIOR

The criminal behavior of the financial services industry is not limited to a specific area of misconduct. 250 To the contrary, corrupt behavior is widespread and envelops a wide array of conduct. Iconic financial institutions involved in serious wrongdoing include: JPMorgan ($ 13 billion); 251 BNP ($ 10 billion); 252 Citigroup ($ 7 billion); 253 HSBC ($ 1.9 billion); 254 Standard Chartered ($ 667 million); 255 ING ($ 619 million); 256 Credit Suisse ($ 536 million); 257 Lloyds TSB Group ($ 350 million); 258 and Barclays ($ 298 million). 259

The first sub-section discusses the vital role played by financial institutions in providing services to a host of rogue actors. These financial services have enabled dictators to loot their nations and maintain repressive regimes. 260 Additionally, financial institutions have engaged in money laundering and banking services for terrorists and global drug dealers. 261

A. Financial Institutional Collaboration with Rogue Actors

Financial institutions have enabled egregious violations of international law. 262 Dictators, terrorists, and narcotics gangs all require sophisticated financial services which large financial institutions are eager to perform--for a hefty profit. 263 Even human smugglers are valued clients of large financial institutions: "Major banks, including Bank of America Corp., JPMorgan Chase & Co. and Wells Fargo, have been used as financial conduits for the smuggling industry, according to evidence in a federal criminal case against a gang of 15 human smugglers and warrants from prosecutors in Arizona, Maryland and Texas." 264 Financial institutions are vital for the smuggling business: "'Human smuggling is a big business,' says Stephen Adaway, chief of the U.S. Homeland Security Investigations unit for human smuggling in Washington. 'And they couldn't operate on the scale they do without the banks.'" 265

The systemic violations of the law and the frequency of mischief demonstrate an entrenched and accepted business practice. 266 Financial institutions also allow rogue actors to finance activities and loot their national treasuries. 267 Spiriting away large amounts of money and parking these assets offshore requires the services of financial institutions. 268

The vital relationship between international law violators and financial markets is well established. 269 For example, in the aftermath of Nazi Germany's invasion of Norway in 1940, the U.S. Department of the Treasury established the Office of Foreign Funds Control (the "FFC") to block securities and foreign exchange transactions. 270 The U.S. Department of the Treasury later established a successor to the FFC, the Office of Foreign Assets Control (the "OFAC"), thereby demonstrating the vital importance of financial institutions to rogue actors. 271 The OFAC's mission is to disable rogue actors' access to global banks through enforcement of sanctions and blocking of assets. 272 Moreover, the OFAC works in tandem with other nations to enforce international sanctions. 273 Access to financial services is crucial to international law violators, and the following sub-sections detail the partnering between financial institutions and rogue actors.

1. Rogue States and Despots

Partnering with despots and dictators is highly profitable and can result in staggering profits from a single client. 274 "For almost ten years, [Standard Chartered Bank] schemed with the Government of Iran[,] . . . reaping . . . hundreds of millions of dollars in fees." 275 Indeed, the revenue must be astonishing, given that major international financial institutions repeatedly break the law despite knowing the risks of being caught and fined. To large financial services entities, doing business with rogue actors may simply be a cost of doing business. 276

HSBC also understood the subtleties of--and were, apparently, fully invested in--money laundering for drug kingpins and terror cells, while ignoring U.S. sanctions estabslished against rogue nations. HSBC's U.S. unit managed to position the brand in this way by accepting $ 7 billion of dollars from Mexican drug cartels, conducting 25,000 Iranian transactions totaling over $ 19 billion in just one week, and helping Saudi banks with terror financing for groups like al-Qaeda. 277

An example of the array of fee-generating services can be gleaned from the Senate subcommittee report on HSBC. HBUS, HSBC's U.S. affiliate and the nexus for HSBC's international network of banks, made enormous profits providing accounts for 1,200 banks world-wide. 278 "Called correspondent banking, HBUS provides these banks with U.S. dollar services, including services to move funds, exchange currencies, cash monetary instruments, and carry out other financial transactions." 279 Clearly, for HSBC, providing services to rogue actors was highly profitable.

New York financial regulators found that Standard Chartered Bank earned huge fees doing business with Iran. 280 "For almost ten years, [this bank] schemed with the Government of Iran and hid from regulators roughly 60,000 secret transactions, involving at least $ 250 billion . . . ." 281 In addition, numerous banks that had vowed to desist from engaging in business with Iran have in fact not done so:

[e]xact figures on the volume of transactions aren't publicly known, . . . the [Wall Street] Journal's review shows that European banks have billions of euros in long-term trade-finance contracts in Iran. The dealings are a sign of Iran's continued access to the global financial system despite U.S. efforts to isolate Iran, and contradict a perception among some observers that the banks have cut ties to Iran completely. 282

The U.S. Senate investigation on financial crime is instructive in demonstrating the extensive mutually beneficial connection between dictators and financial institutions. 283 The investigation revealed a wide array of exemplars demonstrating how global financial institutions have profited from the plundering of national wealth. 284 The Senate Report unequivocally states that banks are the facilitators of asset transfers and money laundering. 285

In one example, a political strongman ruling Equatorial Guinea transferred large sums out of the country:

[O]ver a two-month period in 2006, Mr. Obiang was able to move $ 73 million from Equatorial Guinea into the United States using wire transfer systems operated by Wachovia Bank; and over a four-year period from 2002 to 2006, he was able to move $ 37 million through wire transfer systems operated by Citibank. 286

The Senate Report described how financial institutions aided Obiang in carrying out his scheme:

This case history shows how a controversial political figure, from the ruling family of a country plagued by corruption, moved vast amounts of wealth into the U.S. financial system, by employing American professionals such as attorneys, real estate and escrow agents to help him bypass U.S. [financial] controls, and by taking advantage of U.S. wire systems unequipped to screen out high-dollar transfers sent by . . . from high-risk countries. Over a four year period, from 2004 to 2008, Teodoro Obiang was able to move over $ 100 million in suspect funds into or through the [U.S.] financial system. 287

Another section of the Senate Report described similar occurrences:

Federal law requires U.S. financial institutions to identify the name and address of the originator of each wire transfer . . . . Yet from 1999 to 2003, Bank of America allowed accounts for Pierre, Sonia, and Vincente Falcone to receive over $ 3.6 million in wire transfers from unnamed clients using accounts in such known secrecy jurisdictions as the Cayman Islands, Luxembourg, and Switzerland. From September 2001 to December 2003, the Monthigne account also received a series of payments from hidden "clients," ranging from $ 100,000 to $ 400,000 at a time, most often from "one of our clients" using a UBS account in Singapore. In just over two years, the payments to Monthigne added up to nearly $ 2.5 million. 288

The investigation by the U.S. Senate on the relationship between financial institutions and former Chilean dictator Augusto Pinochet 289 is equally compelling:

Riggs Bank had secretly opened accounts for the former President of Chile, Augusto Pinochet, created offshore corporations for him, accepted about $ 8 million in suspect deposits, and secretly couriered millions of dollars in cashiers checks to him in Chile. In 2005, a supplemental report by the Subcommittee showed that Mr. Pinochet and his family members had opened a secret network of over 125 accounts under a variety of names at financial institutions operating in the United States. 290

According to U.S. Senator Carl Levin, "[s]ome banks actively helped [Pinochet] hide his funds, [and] others failed to comply with U.S. regulations requiring banks to know their customers." 291

The former dictator of Gabon, El Hadj Omar Bongo ("Bongo"), looted and transferred money from his nation. 292 With the assistance of financial institutions, Gabonese national wealth was looted and transferred into the United States, generating fees to the facilitating financial institutions. 293

Nigeria's former President Sani Abacha ("Abacha"), a leader who looted his nation, 294 also formed a mutually profitable relationship with his numerous business partners: global banks and investment houses. 295 The Chairman of the Swiss Banking Commission noted that "[t]he mere fact that significant assets of dubious origin, from people close to former Nigerian President Sani Abacha, were deposited at Swiss banks is highly unsatisfactory and damages the image of Switzerland as a financial centre . . . ." 296

Abacha believed in diversification and spread the billions of looted funds into numerous locales besides Switzerland, enabling many banks to profit from the looting. 297 In addition to Swiss banks, Abacha also used U.K. banks to facilitate his financial crimes. 298 "Britain's financial watchdog, the Financial Services Authority, revealed that 23 London banks had handled $ 1.3 [billion] belonging to family and friends of General Abacha." 299 Among the other looting profiteers were "Germany's Deutsche Bank and Commerzbank, France's BNP Paribas and Credit Agricole as well as Switzerland's leading banks, Credit Suisse and UBS[,] . . . HSBC, Barclays and NatWest. American banks Goldman Sachs, Merrill Lynch and Citibank also feature in the list . . . alongside several Nigerian banks." 300

The Bank of Credit and Commerce International ("BCCI") provides another example of a rogue bank earning immense profits by partnering with terrorists, dictators, and an array of criminal clients:

BCCI's criminality included fraud by BCCI and BCCI customers involving billions of dollars; money laundering in Europe, Africa, Asia, and the Americas; BCCI's bribery of officials in most of those locations; support of terrorism, arms trafficking, and the sale of nuclear technologies; management of prostitution; the commission and facilitation of income tax evasion, smuggling, and illegal immigration; illicit purchases of banks and real estate; and a panoply of financial crimes limited only by the imagination of its officers and customers. 301

According to Transparency International's former director, Jerome Pope, "The international banks, the western businessmen who bribe to get the contract, those who are in cahoots with all the millionaires, they are all up to their eyeballs in what is taking place. When it comes to moral standing, everybody belongs in the gutter together." 302 The extent of funds lost through these systems is staggering:

In Kenya, $ 4 billion disappeared during the presidency of Daniel Arap Moi's 24 years in power. . . . The country's Central Bank was looted, money was stolen by making fictitious payments on foreign debt, kickbacks were collected on all public contracts and when that didn't supply enough cash, politicians awarded themselves phony contracts. 303

Gabon is yet another nation that has been plagued with severe corruption and is a failed state. 304 Gabon's former President Omar Bongo ruled for over four decades until his death in 2009. 305 Although Bongo came from poverty, over his time in power he managed to accumulate an incredible fortune by taking advantage of his position. 306 One method through which Bongo and his family stole Gabonese funds was through U.S. accounts opened by his first wife, an American citizen, using either her maiden name or the name of a trust she established in California. 307

The examples above demonstrate that financial institutions have partnered with dictators, despots, and failed regimes in the pursuit of earning profits.

2. Profiting from Narcotics Trafficking

U.S. federal and state governments have numerous laws criminalizing drugs, and there are powerful federal laws targeting drug trafficking. 308 Globally, most nations have laws against drug trafficking. 309 International drug trafficking is enabled by access to financial institutions that reap enormous profits doing business with these illegal organizations. 310 "Federal and state authorities are investigating a handful of major American banks for failing to monitor cash transactions in and out of their branches, a lapse that may have enabled drug dealers and terrorists to launder tainted money . . . ." 311 In one example, nearly $ 400 billion of illegal drug-generated profits were laundered through the banking system. 312 According to a U.S. federal prosecutor, "Wachovia's blatant disregard for our banking laws gave international cocaine cartels a virtual carte blanche to finance their operations . . . ." 313

According to Antonio Costa, the former executive director of the United Nations Office on Drugs and Crime, international criminal gangs were not merely laundering money but were influencing the banking system as such funds were a major source of cash during a liquidity crisis. 314 He stated that "[s]ome of the evidence put before his office indicated that gang money was used to save some banks from collapse when lending seized up," raising troubling questions about the influence of crime on the economic system at times of crisis. 315 Narcotics have caused severe harm to the United States. 316 "After 40 years, the United States' war on drugs has cost $ 1 trillion and hundreds of thousands of lives, and for what? Drug use is rampant and violence even more brutal and widespread." 317 Global drug cartels, particularly those that market drugs in the United States, substantially affect the United States, yet financial institutions enable them. 318

3. Profiting from Terrorism

Terrorism is a business, and terrorist groups may in fact be organized as corporate affiliates. 319 The business of terrorism requires access to financial markets for money laundering purposes and wiring abilities; funds available for investment require money management skills. 320 All of these services are fee generators. 321 U.S. Southern District Attorney Preet Bharara stated, "Money is the lifeblood of terrorist and narcotics organizations, and while banks which launder money for terrorists and narco-traffickers may be located abroad, today's announcement demonstrates that those banks and their assets are not beyond our reach . . . ." 322

Money laundering facilitates terrorism since money is the key to such activity. 323 "Money laundering is the process of disguising criminal proceeds and may include the movement of clean money through the United States with the intent to commit a crime in the future (e.g., terrorism)." 324 Banks are central to money laundering. 325 As such, terrorist groups may be highly desirable and lucrative clients of financial institutions since these groups deal in large sums of money. 326 As detailed above, financial institutions have played a key role in propping up despots and failed states and, in so doing, have profited substantially from their rogue clients. 327 Moreover, by providing services to sanctioned nations and other bad actors, the institutions have not merely violated U.S. laws, but also have aided and abetted various human rights abuses and violations of international law. 328 As the next sub-section discusses, financial institutional misconduct has also involved fraud committed with respect to financial instruments. Numerous end-users, such as governments, consumers, and commercial clients, have been economically damaged by the misconduct. 329

#### Organized crime is metastasizing through increased integration with financial institutions.

Marcus A. Boyd & Samuel Henkin 22, Head, Geospatial Analysis, National Consortium for the Study of Terrorism and Responses to Terrorism, University of Maryland; Senior Faculty Specialist & Researcher, Geospatial Research Unit, National Consortium for the Study of Terrorism and Responses to Terrorism, University of Maryland, "TOC as a Growing Threat to Regional, Global Security," Global Security Review, Vol. 2, No. 8, January 2022, pg. 32-34. [TOC = Transnational Organized Crime]

Transnational organized crime (TOC) is a significant and growing threat to the security of the United States and a major security challenge in other critical regions of the world. TOC continues to expand dramatically in size, scope, and influence with major destabilizing effects. In recent years, TOC entities have embraced new, and often violent, practices and advanced strategies to circumvent the traditional norms of legal economies and evade security interventions often operating through a vast economic system of dark networks and economies—illicit and illegal sourcing, labor inputs, production, products and services, supply chains, and consumer operations.1 Within these clandestine systems, TOC entities are expanding their operations, diversifying their activities, as well as exploiting the increased blurring between illicit and licit activities. The rapid evolution of TOC entities in the past 15 years has engendered a more convoluted, violent, and destabilizing convergence of threat vectors challenging security regimes in detecting, disrupting, and dismantling the (il)licit and (il)legal of transnational criminal enterprises.

The Shadow Economy of Transnational Organized Crime

The typical consumer only ever experiences the point of sale for the illicit/illegal good. They do not see the hierarchical structures and transnational trade that undergirds their purchase. The shadow economy, as Medina and Schneider notes, goes by many names and, depending on how it is defined, represents a significant share of global GDP. For example, among 158 states the average size of a state’s shadow economy relative to their GDP was 31.9% between 1991 and 20152 . By some estimates revenues generated by transnational crime are estimated to be worth as much as $2.2 trillion annually3 . This, of course, does not account for the countless other goods and services illicitly and/or illegally produced and purchased around the world not captured in estimates.

In this piece, we will demonstrate the general hierarchical structure of TOC entities that promulgate a significant proportion of the shadow economy and, in turn, how the existing legitimate economic structures make TOC entity activities profitable and difficult to curtail. At their core, TOCs are driven by market forces and opportunity, and they seek to maximize and sustain profits, similar to licit businesses. Yet while TOC entities operate like other legitimate businesses, albeit with (il)legal/ (il)licit goods and services, they actively work to circumvent, evade, and ignore economic norms exercising corrupt, exploitative, and violent means to perpetuate their profit maximization.

The shadow economy consists of two different economies: The illicit economy and the illegal economy. The illicit economy is akin to the informal economy, that is, activities that are largely legal—selling food and other goods. These activities become illicit when they are done “extra-institutionally;” meaning the proceeds are not taxed and are not “recorded” by the government, or the proper permits and other bureaucratic operating requirements are not met. None of these activities are captured in national GDP estimates.4 Conversely, the illegal economy consists of productive activities that run counter to domestic and/or international law. Some illegal productive activities (e.g., production of narcotics and drugs) are profitable enough to indirectly impact GDP, while others typically do not.

TOC entities thrive in the shadow economy because they are institutionally adept at navigating between the (il)licit and the (il)legal. In a recent radio interview, sociologist Federico Varese who primarily focuses on Mafia hierarchy, suggested that TOC entities are three conjoined entities: 1) producers of goods and services; 2) traffickers of the goods; and 3) overall TOC governance actors.5 TOC governance exists to unify existing shadow economy structures in a similar fashion as a corporation would vertically integrate its supply chain. More specifically, TOC entities in Latin America have become polycrime entities,6 embracing multiple types and forms of criminality. Increasingly, TOC entities are structured in such a way to encourage polycrime activity. This is particularly relevant to narcotraffickers, but is also applicable to other criminal entities for whom narcotics production, trafficking, and/or distribution are not their primary type of activity.7 These entities now have decades of experience in illicit and illegal practices that benefit multiple different types of transnational criminal activity. With transnational networks in place, weapons trafficking, human trafficking and/or smuggling, intellectual property crime, counterfeit products, and counterfeit drugs all become viable productive activities.8

We suggest that there is a fourth role within TOC entities: the “violence worker.” Violence workers are those members of TOC entities that use violence to enforce (bureaucratic) order. Violence workers appear organically, and become specialized, in the ranks of producers, traffickers, and governors, and work to reinforce TOC goals through the use of violence. The “order-enforcement” exercised by violence workers functions as a determined logic of coercion and violence aimed to define the extent of TOC governance.9 Significantly, order-enforcement requires a substantial balancing act so that the fear constituted by TOC vio lence workers creates economic opportunities without fully delegitimizing their standing, especially those that blend illicit and licit activities, or draws significant attention from state interventionary forces.10 In other words, violence workers employ order-enforcement to normalize TOC entities’ claims of legitimacy to govern and operate across their territories. As TOC entities grow and diversify, violence workers have become more indispensable.

For some organized criminal entities, violence workers mainly serve a productive role, meaning that they manage “strong arm” activities like extortion, protection rackets, burglaries, and robberies. In more sophisticated polycrime transnational organized criminal entities, violence workers commit similar activities, and involve violence specialization, like firefights (tiroteos), assassinations (asesinatos), and raids (incursiónes) at varying levels of intensity and tactical action, to ensure successful trafficking operations.11 The economic gains from rudimentary violence work are rather insignificant compared with the funds received from successful trafficking operations. Moreover, varying levels and intensity of violence maintained by violence workers across all scales of TOC activity engenders a “criminal governance” that functions in opposition to and often in collusion with the state’s capacity to govern, occupying an occluded space between everyday criminal (bureaucratic) activity and violent conflict.12

Borrowing from Mancur Olson’s work, violence workers who support TOC entities are disinclined from participating in what Olson termed “roving banditry” because as “stationary bandits,” they are economically successful and not raising the ire of state entities that could counter their efforts. However, when states flex their muscles and challenge TOC sovereignty, it incentivizes violence workers to organize against state forces and civilian populations to maintain the entity’s existing business practices. Even though violence workers are indispensable to TOC entities in stimulating and maintaining illicit practices, (semi-) legitimate economic structures and individuals, socalled “facilitators”, make TOC activities even more profitable by crossing the between the shadow economy and global economy to serve legitimate customers and TOC entities alike.13 Facilitators serve wittingly, and sometimes unwittingly, to connect TOC entities to legitimate economic structures, like offshore bank accounts and shell corporations, in order to sustain growing polycrime infrastructures. Violence workers and facilitators both function to advance perpetuation of TOC activities and their profitability underpinning the foundations of the shadow economy.

Recent TOC Trends

In the past, TOC entities largely remained regional in their operational scope with strict hierarchical structures. Today, TOC entities are more variable and volatile embracing new, and often violent, operational strategies increasing not only their diversification of illicit activities, but also, the density of those illicit activities. Additionally, TOC entities increasingly engage in illicit activities that transgress territories and borders of a single state. This expansion poses serious threats to neighboring states and their citizens, generating both direct and indirect economic harm, affecting social structures, like public health, and hindering the development and stability of states.14 Notable trends in TOC that present significant challenges today include:

1. Fragmentation: TOC fragmentation has led to increasingly adaptable, agile, and competitively violent criminal organizations with varying structures and wider networks.
2. Geographical expansion: TOC expansion has led to greater contestation over illicit inputs, routes, and markets globally.
3. Diversification: TOC entities are diversifying their criminal portfolios, thus increasing their criminal density, seeking greater profits, consolidation of markets, and safeguarded supply chains.
4. Legitimate entanglement: TOC entities are becoming increasingly entangled with legitimate businesses and actors, including state actors (e.g., corrupt security force personnel), and especially, banking institutions to launder money.
5. Specialization: TOC entities pursue cross-national specialization, forging networked criminal connections at regional and global scales.
6. Virtual: There is an increasing role of cyber capabilities in TOC as TOC entities exploit online dark networks (i.e., the dark web) and licit online economic platforms, to sell goods and services.

The most indelible issues we face when countering TOC involve the metastasizing and merging of regional entities into global juggernauts. The initial Medellín and Cali cartels were transnational because they produced their goods in Colombia and Bolivia and they were transported to, and sold in, the United States. Yet we have seen subsequent Mexican cartels— Sinaloa and Loz Zetas, for example—expand their reach globally partnering with European, Asian, Australian, and African organized criminal entities to reshape the drug trade.15 This has been evident most recently in the mixing of Mexican and European assets to produce highly refined crystal meth that has taken over the European recreational drug scene. In late 2020, police raids in The Netherlands discovered a professional crystal meth lab that was truly global: Mexicans cooked the meth using Dutch-made equipment and chemicals sourced from China. The recent raids have uncovered links to the Jalisco New Generation Cartel (CJNG), one of the newer and most violent Mexican cartels.16 CJNG and the Sinaloa cartel have also been linked to the recent proliferation of fentanyl that has fueled the opioid epidemic in the United States over the last few years.17 Cartels send envoys to China to purchase dual use precursor chemicals and/or bulk shipments of fentanyl, and then ship those to Mexican ports, like Lázaro Cardenas, where cartel members take possession of the material for further processing, trafficking, and then vending.18 These methods, at the current economy of scale, make these operations incredibly profitable. The profitability and global nature have led to increases in violence brought about by difficulties managing the hierarchy across global space in addition to the opportunity to earn profit at all levels.

Conclusion

These characteristics of TOC entities—the increasingly global scope of their reach, the institutionalization of violence, and the fine line between illicit and illegal—have profound implications for the global economy. The implications of the capacity and capabilities to counter TOC profoundly shape if, when, and how these current and emerging trends continue to produce violent and destabilizing consequences. The growth in criminal density and geographical expansion of TOC entities across various regions in the world, including the U.S. Southern Border, will only continue to produce instability. As TOC entities form more sophisticated networks and means of transnational operation, it is necessary to consider ways to enhance data collection, analysis, and information sharing capabilities across states to keep pace with the rapidly changing dynamics of TOC activities, and to address gaps in policy and practice to counter TOC.

#### It causes extinction.

Dr. Michael Miklaucic 13, Adjunct Professor of U.S. Foreign Policy at American University, and of Conflict and Development at George Mason University, Director of Research, Information and Publications at the Center for Complex Operations (CCO) at National Defense University, Jacqueline Brewer, 07/05/2013, “Convergence: Illicit Networks and National Security in the Age of Globalization,” Government Printing Office, Google Books

Public-Private Partnerships to Combat Illicit Trade and Illegal Economy  
The illegal economy poses an existential threat when it begins to create criminalized markets and captured states, which launches a downward, entropic spiral toward greater insecurity and instability. In countries that have been corrupted by criminal networks, market- and state-building become less attainable, economic growth is stunted, efforts toward development and poverty eradication are stifled, and foreign direct investment is deterred.

The United States is supporting the OECD, the World Economic Forum (WEF), and other international partners to provide knowledge-based platforms for international public and private stakeholders to raise awareness of the threat posed by illicit trade and illegal economy to economic growth, development, and global security, and to share experience on practical approaches to the control of illicit activities as well as of the negative externalities of the illicit economy. Engaging the public and private sectors through innovative public-private partner-ships will be particularly important for securing the integrity of the global supply chains and for ensuring long-term sustainable licit commerce and productive markets.

The steep rise in mobility of goods, people, capital, and information that has accompanied globalization is largely comprised of lawful and beneficial exchanges, but an increasing share is illicit. Criminal entrepreneurs and illicit networks sometimes use or exploit legitimate businesses and legitimate global supply chains to carry out financial frauds, industrial espio-nage, money laundering, and other illicit activities. Hundreds of billions of dollars of revenue from these activities flow through the global economy every year, distorting local economies, diminishing legitimate business revenues, deteriorating social conditions, and fueling conflicts.

#### AND institutions uniquely enable state and non-state actors to acquire nuclear capabilities.

Togzhan Kassenova 20, PhD, Nonresident Fellow, Nuclear Policy Program, Carnegie Endowment, "The Exploitation of The Global Financial Systems for Weapons of Mass Destruction (WMD) Proliferation," Carnegie Endowment for International Peace, 03/04/2020, https://carnegieendowment.org/2020/03/04/exploitation-of-global-financial-systems-for-weapons-of-mass-destruction-wmd-proliferation-pub-81221.

When it comes to preventing WMD proliferation, we need to be conscious of both state and non-state actors. North Korea continues to procure sensitive goods for its nuclear and missile program in defiance of sanctions. Iran is procuring missile-related goods. Agents working on behalf of Syria have sought chemical goods on the commercial market. Several groups, such as Al Qaeda and ISIS, demonstrated interest in acquiring a WMD capability. We do not have a full picture of who might be interested in obtaining a WMD capability in the future.

2. How Proliferation Networks Operate

Stealing or buying a ready-made weapon is a next to impossible feat. The main path to a WMD is to procure components, material, and technology and then build a weapon. Because most goods usable in a WMD program are dual-use in nature, with indispensable civilian purposes, they are available on the international commercial market.

The international community attempts to minimize the risk that trade in dual-use and military goods entails. The international export control regimes and national export control systems are designed to regulate trade in sensitive items by requiring traders to obtain licenses. Additionally, the international and unilateral sanctions regimes target known proliferators.

The goal of proliferators and their agents is to acquire goods that can contribute to WMD programs without being caught. Proliferators and their networks continue to defy both export controls and sanctions.

Proliferation networks come in all sizes and shapes. They can be small or large, loose, or more organized. Those buying WMD-related goods can be directly connected to proliferator states, or they can do it purely for profit by inserting themselves into the illicit market to make money.

Proliferators have perfected methods that help them stay under the radar.3 One of the standard techniques they use is to buy goods that are slightly below the controlled threshold. This means that unless exporting companies are incredibly vigilant,4 they would not apply for an export license and subject transaction to government scrutiny. However, these slightly inferior goods can still be used for nefarious purposes.

There is another method proliferators use to avoid government oversight and licensing—they pretend they are ordering goods for a domestic company. In such cases, supplier companies do not have to apply for licenses.

To avoid export controls and sanctions, proliferators lie about the end-use and end-user and hide behind front and shell companies all the time. They never declare that they are buying components for North Korea’s nuclear program, Iran’s missile program, or Syria’s chemical arsenal. For example, they can tell a supplying company they need goods for scientific research or other peaceful purposes. In 2006, an Iranian company ordered sensitive bioresearch equipment from Norway purportedly for a scientific laboratory. On closer look, an attentive Norwegian supplier determined that the equipment Iranians sought was technically superior to what would be necessary for a civilian lab and that it did not fit the physical layout of the laboratory.5

Increasingly, shipping companies and vessels are used prominently in sanction evasion. For example, Iran and North Korea falsify documents, reflag vessels, and switch off automatic identification systems to avoid being discovered in the process of illicit transfers of goods.6

Supplier companies that provide goods to proliferators can be complicit or not complicit. Larger companies have resources to implement strong internal compliance programs that help them detect any suspicious orders. But some companies, especially smaller ones, do not have resources to invest in compliance and remain negligent. In some cases, supplier companies or individuals within know precisely what they are doing. They do it either because of ideology (to support a sanctioned state) or for profit. In one notorious case, a U.S.-based company MKS Instruments sent pressure transducers to its subsidiary in China after duly applying for a U.S. export license, thinking that the goods would be used in China. The co-opted employee of the MKS Instruments’ subsidiary ordered transducers from an unsuspecting parent company and pretended they would be used by Chinese companies but planned all along to ship those goods to Iran.7 Pressure transducers can be used in uranium enrichment centrifuges, making possible the production of fissile material that can also be used in a nuclear weapon.

Proliferators prefer to buy good quality goods – mostly from the U.S., European, and Asian suppliers. This means that in most cases, they have to pay for those goods through the formal financial system, making financial institutions part of their proliferation schemes.

3. CHALLENGES AND OPPORTUNITIES FOR FINANCIAL INSTITUTIONS

Proliferators use formal financial institutions for two main purposes: (1) to pay for procurement of WMD-related goods; (2) to fundraise, launder and move money associated with proliferation activity (for example, this can apply to money that ends up paying for the WMD activity or to profit generated as a result of supplying proliferator states).

#### Finance is at the heart of any nuclear project.

Michelle Gallant 21, PhD, Professor, Law, Manitoba Law Reform Commission, University of Manitoba, "Inquiring into the Global Anti-proliferation Financing Strategy," in Nuclear Non-Proliferation in International Law, Chapter 5, Vol. 6, 2021, pg. 136-145.

The critical development in the control discourse is the adoption and development of anti-proliferation financing initiatives. As with any project or human endeavour, beneficial or malevolent, finance, and financial intermediation, is usually a constituent ingredient. The establishment of a local restaurant requires some investment and the assurance of food and other materials often relies, to ensure delivery, upon financial services. The same is true of the quest to secure deadly weaponry. The purchase requires resources and the delivery of the weaponry relies upon financial intermediation. The development of nuclear weapons, the mobilization of a State-based nuclear weapons programs, demands the acquisition of technology, materials and expertise. In an inter-connected world, each element typically requires some assistance from international financial machinery. Nuclear technology, materials and expertise cannot readily migrate from the United States to Iran without some facilitative financial assistance.

If the acquisition of weapons of mass destruction was simply a matter of local national interest, global ordering would not be an issue. National law, national strategies and nationally-based intervention would be well-suited to its management. Proliferation has never been uniquely local. From the initial development of the atomic bomb, mitigating procurement, mitigating the threat, has been something which, by its very nature, demands a co-ordinated international response. States have long been the chief proliferation agitators, with tussles, feuds and wars between these behemoths the reason that the international ordering originally became essential. Nor is access to destructive weapons by individuals, as opposed to States, something to which national ordering can readily attend. Particularly in a modern era of international terrorism, foreign-based terrorists, and collisions between national policy and external ambitions, it is to international forums, and to global regulation of proliferation-related finance, to which the development of any sensible strategy must look to seek any measure of effective governance.

Moreover, within the strict confines of the control of proliferation, the financial piece often presents as a newly minted tactic. Non-proliferation has long sought to deter the co-optation of human ingenuity into destructive pursuits. An enhanced focus on financial matters, banking, financial activity, funding and funding mechanisms is something more modern. It materialized, as a manner of intervention, in the early hours of the twenty-first century, in response to discrete proliferation-related incidents as well as broad-based concerns with international terrorism.2

It is important to understand that the waging of war on financial enablement did not begin with proliferation. Finance, financial relationships and financial intermediation have long been a battlefield. The opening of a new chapter on proliferation management is part of lengthier story, of which it is important to take account. Before finance grew to be characterized as something which abetted procurement, pernicious relationships between international finance and evil were well-known. That perniciousness, in turn, spawned collective efforts to discourage the fomenting of crime through global financial machinery.

Eighty years ago, international ordering had very little to say about connections between financial activity and evil. Although there were festering internecine battles related to international tax flight, a product of the rising welfare State and struggles to avoid the reach of national tax masters, international financial activity was, for the most part, perceived as a pristine engine of growth and prosperity, an apparatus essential to a productive global environment.3 World War II and the Third Reich’s reliance on discrete Swiss-based financial pathways gave reasons for pause.4 Acute controversy over bank secrecy, the opacity doctrine at the heart of the recriminations levelled at a neutral Word War II Switzerland, bred a certain contempt for international financial machinations.5 It signalled loudly, for the first time in the modern era, something of perilous financial intermediation. The epoch did not, however, result in any global action.6

A half century later, the interweaving of a different evil with the global financial system, or the general idea that finance and financial facilitation were, if not the cause of problems, significant enablers, catalysed action. The 1970s and 1980s instilled an appreciation of connections between the trade in illegal drugs and the global financial system. Money laundering, a term which had hitherto had no place in global discourses, was identified as an enabler of drugs trafficking.7 Allegedly, copious amounts of drugs proceeds were ‘washed’ or ‘cleansed’ through the financial system. This ‘cleansing’ was blamed for fuelling the drugs enterprise and for endangering the stability of the global financial system.8

Whereas World War II failed to mobilize system-wide resistance to financial facilitation, the trade in illegal drugs did. A 1988 convention established an approach which has since become a dominant theme of global control.9 The convention, which contained specific, novel, provisions attentive to finance and financial intermediation related to drugs trafficking, became the cornerstone of the modern global regulation of relationships between finance and crime. It spoke of a new control approach, one fixated upon finance and financial intermediation.

Once the initial seeds were sowed, the idea of countering connections between finance and evil swiftly became a popular disciplinary theme. The 1988 Convention mandated the criminalization of the laundering of illicit drugs proceeds.10 Through a subsequent series of conventions, broad-based actions against finance and financial intermediation, followed.11 The centring of financial prohibitions related to drugs matured into prohibitions against the generic phenomenon of ‘serious crime’.12 That which was initially tied specifically to illegal drugs gradually became a strategic methodology applied to corruption, to terrorism, and to organized crime.

This sphere of financially-focused resistance is known as global anti-money laundering law. As a strategy, it loosely divides into two parts: the criminalization of the money laundering, the ‘cleansing’ or ‘washing’ of criminal earnings and the confiscation, or forfeiture, of the same; and money laundering prevention, detection and enhanced transparency. The first part broadly mandates the creation of offences linked specifically to the financial aspects of crime (money laundering offences) and facilitates the ability of States to seize and confiscate financial resources related thereto. The second part, prevention, detection and transparency, stands as perhaps the more critical development with respect to disabling international financial facilitation. It responds directly to the permissive status identified with the 1970s, 1980s, and earlier, the idea that money possibly linked to crime readily filtered—anonymously and freely—through the financial system. Prevention, detection and transparency rules include the enhanced domestic governance of financial institutions and other financial intermediaries, the reporting of suspicious transactional activity, the keeping of financial records, the fuller identification of customers, the establishment of a central regulatory financial authority and the domestic policing of transactions entering and entering countries, and transactions exceeding certain thresholds.13 The general ordering of prevention, detection and transparency rules has, in many ways, come to supplant the convention-based mandates through the mobilization of movements, public and private actors. 14

Thusly understood, proliferation did not precipitate battles against finance and financial enablement. The focus on proliferation, which was largely ushered in by a series of Security Council resolutions, placed another evil within a twentieth century containment paradigm. Its configuration differs, in a material respect from global anti-money laundering; money laundering regulation is principally rooted in international conventions whereas anti-proliferation finance governance is rooted in Security Council instruments. Nonetheless, the disciplinary theme pre-dates its explicit absorption into the weapons of mass destruction discourse.

5.3 Specific Triggering Events

If the severity of the risks posed by underlying phenomenon drove global financially-focused containment, presumptively weapons of mass destruction ought to have first secured measures attentive to finance. The threat of a nuclear strike poses a far greater threat to human security than the assorted risks associated with drugs trafficking. The maturation of generic money laundering regulation first may say something of disordered understandings as to the peculiar evils which finance services. Despite, the presence of a credible method for confronting international criminal phenomenon certainly meant that when specific procurement incidents galvanized global attention, tethering finance was a natural response.

The explicit inclusion of proliferation financing into financial control narratives was spurned by specific procurement-related incidents. These triggers can be loosely categorized into two camps; State defiance of non-proliferation law; and fear of terrorists accessing weapons of mass destruction. With respect to the first camp, it was Iran and the Democratic People’s Republic of Korea defiance of international injunctions.15 When initial sanctions, put in place to halt nuclear weapons program, proved inadequate, this triggered reinforcement and the placing of specific financial constraints.16

Fear of procurement by terrorists, and the modern phenomenon of terrorism contributed. From World War II onward, proliferation was conventionally understood to be, or at least principally treated as, a State-based game: nuclear weapons competency or the possession of biological or chemical weaponry was something in which States engaged. Given the costs and complexity involved in weapons development, and the heightened political power attached to their possession, States were the primary rogues. September 2001 spoke of destructive capacity that might be levelled by non-State actors, terrorists. Of course, September 2001 spoke directly to the conversion of presumptively docile technology to vile purposes—the conversion of airliners into powerful weapons. Nonetheless, it fuelled a fearsome spectre that had long animated the periphery of the proliferation discourse, that more adequate controls needed to be developed to deny individuals, or groups, access to weapons of mass destruction.17 And in February 2004, just 3 months before new financial ingredients were put in place, information came to light about a rogue Pakistan-based lab allegedly heavily involved in the stealth marketing of nuclear wares.18

5.4 The Global Anti-proliferation Instruments

As a broad interventionist strategy, anti-proliferation financing attacks financial transactional activity related thereto. It is a control methodology centred on finance and financial intermediation. In species, no different than the over-arching global strategy within which it nestles—the generic realm of anti-money laundering law—it contemplates denying financial enablement.

For the most part, the strategy is housed in a sequence of United Nations Security Council resolutions. This sequence greatly leavened the strategy, largely because it emanates directly from the authoritative Security Council organ. A piece directly referable to finance, which is sometimes ignored, had taken root in the 2007 Convention on Nuclear Terrorism.19 This convention is the product of particular concerns about the convergence of nuclear materials and terrorism rather concerns related to other weaponry.20 Article 7 of the convention provides that States take all practical measures necessary to prevent and counter the commission of nuclear-terrorism related offences including prohibiting knowingly financing these offences.21 The thrust of this instrument is not finance, or financial dimensions—unlike, for example, the explicit financial pith of the terrorist financing convention.22 It is the only piece related to proliferation finance that is convention-based.

The sequence of SC resolutions inspired by specific proliferation threats establishes a ‘two-tiered’, or State-based and non-State actor, approach to proliferation finance.23 The State-based approach responds to State proliferators, to threats posed by States. The resolutions are known as imposing ‘targeted financial sanctions’.24

They fit within the general sphere of ‘targeted sanctions’, the means the Security Council uses, short of authorizing military action, to enforce compliance with international law.25 In that regard, they are specifically moored to individual States.26

The other approach, equally forged by the Security Council, contemplates nonState actor governance. It is sometimes called activity-based governance because it imposes rules related to proliferation as an activity, or a phenomenon.27 It is not harnessed to States. This piece is distinctly centred on, or relevant to, the terrorist discourse. It is contained largely in a single resolution, SC Resolution 1540 (2004) although its particular references to finance, or financial aspects, are few and relatively oblique.28

The content of SC Resolution 1540 contrasts rather starkly with State-based proliferation finance governance. The State-based measures attach a litany of financecentric measures.29 The regime functions, in part, on the basis of a list of ‘sanctioned entities’, persons or entities known to be associated with specific States and their weapons ambitions.30 Governance explicitly captures the freezing of funds, financial assets and economic resources owned, or controlled by, ‘sanctioned entities’ and any entities acting under the direction of, or thereto;31 covers the exercise of enhanced diligence with respect to the policing of financial activity;32 and entails the policing of financial transactions linked to the provision, manufacture, maintenance or use of prohibited arms.33 Equally, the sanctions demand that all States prevent the provision of financial services, or transfer through their jurisdictions, of any finance or assets linked to proliferation;34 and command that financial entities not extend financial credit, or financial assistance, to sanctioned entities.35 The rules prohibit the establishment of banks, and correspondent accounts;36 demand the limiting and closure of bank accounts;37and deny the legitimacy of cash transactions.38 The measures sever all matter of proliferation-related financial services including insurance related to shipping and transport.39

In short, State-based constraints are comprehensive. By contrast, Resolution 1540s direct references to finance are two-fold: it mandates the prohibition of non-State actor engagement with proliferation—manufacture, possession, use, development and transport—and engagement with attempts to participate in these as an accomplice, assist or finance them;40 it demands the establishment of export and transshipment controls and controls on providing funds and services related thereto such as financing. 41 In the sequence of related non-State actor SC edicts, the only other mention of finance and proliferation merely underscores the need for greater attention to proliferation finance.42

Significantly, with respect to content, State-actor finance-centric governance, as enunciated in the sequence of relevant resolutions, is elaborate, detailed, and specific. The non-State apparatus, as it pertains to finance, is imprecise, or, at least, less elaborate than its counterpart.

Apart from these central SC instruments, and the article in the Nuclear Terrorism Convention, other projects advance proliferation financing laws. Countering proliferation financing bridges two spheres: non-proliferation and money laundering. Both are relatively mature initiatives. In the money laundering sphere, the most influential actor in Financial Action Task Force (FATF).43 An inter-governmental body conceived in 1989 to protect the integrity of the financial system from money laundering threats, it is a policy-making body.44 In 1990 it released a series of recommendations on the prevention of money laundering which are largely modelled on related conventions. These underwent several iterations, re-configured in 2001 to accommodate resolution 1373—terrorism—and most recently, revised to incorporate the spate of proliferation-finance related SC resolutions.45 Over the course of time, these recommendations acquired the status of de facto, international law.46 They are the standards against which domestic compliance—in relation to terrorist finance, money laundering, and proliferation financing—are conventionally measured.

In terms of universalizing financial norms, FATF recommendation 7 incorporates State-based proliferation financing.47 This incorporation places State-based governance within the de facto mandatory order. Curiously, the recommendations are ambivalent towards the integration of the financial content of Resolution 1540. Recommendation 7, excludes, or is equivocal towards, resolution 1540.48 References to Resolution 1540 only occur in the FATF’s ‘non-binding’ guidance.49 Notably, too, the list of ‘designated categories of offences’ to which the FATF apparatus applies does not include ‘proliferation’.50

The only other work that specifically picks up finance is the statement of principles adopted by the Global Initiative to Combat Nuclear Terrorism (GICNT).51 Convened in 2006 as an informal mechanism through which to promote efforts related to controlling nuclear terrorism, the principle confirms a commitment to denying financial resources to terrorists.52

5.5 Financing Profiles: Between Money Laundering and Proliferation Financing

In the generic sense that international financial devices and practices service any evil, there is no pertinent difference between the financing of proliferation and the financial dimensions of other global evils. Financial opacity is a theme that animates all modern crime narratives. In World War II, it was Swiss bank secrecy, anonymous—numbered—bank accounts—coupled with a cultural disposition towards financial discretion. In the post-war years, a host of devices, vehicles, and practices came to associated with tax evasion, drugs trafficking, and corruption. Strong national commitments to confidentially, ‘shell companies’, ‘off-shore trusts’, the anonymity of ‘beneficial owners’, chains of corporate entities and sophisticated, complex, multi-jurisdictional transactions came to acknowledged as the tools of criminal financial enablement. Procurement relies on similar devices, practices and complex structures.53

In at least once crucial sense, however, a piece of the proliferation financial profile that differs. Weapons of mass destruction can be built rather than acquired as readymade weaponry. Suppressing proliferation finance can involve detecting transactional activity related to materials and expertise. Some materials are intimately connected to procurement—nuclear-related materials. Others are known as ‘dual use’ goods, goods with lawful uses which are also used in the construction of weapons of mass destruction.54 This difference is unique to proliferation financing.

#### Rapid proliferation causes nuclear war.

Andrew Futter 21, Associate Professor, International Politics, University of Leicester. Director of Research, Politics & International Relations, University of Leicester, "Nuclear Proliferation and Nuclear Ages," in The Politics of Nuclear Weapons, Chapter 4, pg. 73-80. edited for OCR errors.

In the Second Nuclear Age, the greatest risk no longer appears to be from a large-scale confict between major powers (although this possibility always remains) but instead from regional instability in the Middle East, South or Northeast Asia, or even a non-state actor armed with a nuclear weapon (see Chap. 9).18 This threat has been exacerbated by the spread of Weapons of Mass Destruction technology, and particularly the combination of nuclear and ballistic missile capabilities to new actors across the globe. Ultimately, the central theme of the Second Nuclear Age is that the spread of the bomb, along with the means to build and deliver nuclear weapons, to new actors has changed the central dynamics of the global nuclear order, and consequently we may no longer be able to rely on the nuclear thinking and toolkit that helped us to survive the First Nuclear Age. In the words of Fred Ikle, writing in 1996:

Half a century after it began, the nuclear drama has reached the conclusion of its frst act—a rather happy ending in spite of the gloomy prospects for civilization that darkened the stage at the outset. This respite, though, is not a lasting redemption from the dangers of nuclear warfare.19

The Nuclear Proliferation Debate: Optimists and Pessimists

The thinking that led to a conceptualisation of nuclear history into two distinct nuclear ages is also reflective of the broader debate about the role of nuclear weapons in international politics. In essence, the relative stability, or at least the lack of major interstate war, of the First Nuclear Age gave rise to the notion that nuclear weapons had helped to “keep the peace” during the Cold War, and that horizontal nuclear proliferation might therefore be stabilizing. This is based on the theory of the nuclear revolution (discussed in the next chapter) and specifically the notion that the advent of nuclear weapons fundamentally changed warfare, because no rational actor would want to risk attacking an adversary if they could retaliate with nuclear weapons. Tus, a certain level of stability might be achieved between nuclear-armed states that might not otherwise exist. However, this view of nuclear history, and of the stabilizing potential of nuclear weapons, is challenged by those who believe that vertical nuclear proliferation and a reliance on rationality and luck are not a good basis for international politics and security. They also question the post-hoc view that nuclear weapons were the main reason that the Cold War didn’t turn hot and warn against using this potentially flawed analogy today.

The concern that nuclear weapons will spread to new actors that characterize the Second Nuclear Age has provided the backdrop for the nuclear proliferation debate. The question at the heart of this debate is whether nuclear proliferation to new actors will stabilize or destabilize international politics and whether nuclear proliferation makes inter-state, and possibly nuclear, war more or less likely. This subject is at the center of a discussion between two political scientists, Kenneth Waltz and Scott Sagan. The debate can be succinctly explained as follows:

Kenneth Waltz argues that fear of the spread of nuclear weapons is exaggerated: “More may be better” since new nuclear states will use their weapons to deter others from attacking them. Scott Sagan argues that the spread of nuclear weapons will make the world less stable: “more will be worse” since some new nuclear states will engage in preventive wars, fail to build survivable forces, or have serious nuclear weapons accidents.20

We can think of this debate as being split between proliferation optimists and proliferation pessimists and centring on the wisdom and reliability of Mutual Assured Destruction as a mechanism for stability and security (see Chap. 5). Kenneth Waltz is seen as the champion of the nuclear proliferation optimists, and Scott Sagan for the pessimists. Te central tenets of these two positions are explained below:

The proliferation optimists hold that horizontal nuclear proliferation should not necessarily be viewed as automatically destabilizing. As Kenneth Waltz explained in 1981:

Those who dread a world with more nuclear states do little more than assert that more is worse and claim without substantiation that new nuclear states will be less responsible and less capable of self-control than the old ones have been. … Such fears have proved unfounded as nuclear weapons have slowly spread. I have found many reasons for believing that with more nuclear states the world will have a promising future.21

This is partly because:

New nuclear states will confront the possibilities and feel the constraints that present nuclear states have experienced. New nuclear states will be more concerned for their safety and more mindful of dangers than some of the old ones have been.22

Ultimately, this viewpoint believes that “Nuclear weapons reasonably used make wars hard to start.”23 As such, the spread of nuclear weapons—in certain circumstances—should actually be welcomed, and retaliatory nuclear deterrence and MAD does and should remain the bedrock of global nuclear relations.

The proliferation pessimists contend that horizontal nuclear proliferation can only ever lead to an increase in nuclear dangers and the possibility of nuclear use. Pessimists point to a number of factors that make horizontal proliferation potentially dangerous: the growth of the threat posed by nuclear terrorism and illicit nuclear networks (see Chap. 8); the possibility of nuclear accidents; the difficulties of ensuring civilian control and safe and secure command and control of nuclear weapons (see Chap. 5); the specter of preventive war against aspirant nuclear states (see Chap. 8); the problem of building survivable second strike forces; and the fact that stability through proliferation rests on actors always behaving rationally at all times.24

Foremost amongst these however is a critique of the misplaced belief that nuclear weapons helped keep the peace during the First Nuclear Age. In the words of Sagan, writing in 2006:

Deterrence optimism is based on mistaken nostalgia and a faulty analogy. Although deterrence did work with the [United States and] the Soviet Union and China, there were many close calls; maintaining nuclear peace during the Cold War was far more difficult and uncertain than US ofcials and the American public seem to remember today.25

Proliferation pessimists focus on the problems of organisational culture and the fact that new nuclear actors are perhaps more likely to experience nuclear accidents. As Scott Sagan explains, “professional military organisations— because of common biases, infexible routines, and parochial interests—display organisational behaviors that are likely to lead to deterrence failures and deliberate or accidental nuclear war”.26 Newly armed nuclear states might also be less likely to be able to prevent unauthorized use because they lack the positive mechanisms of strong civilian control.27 Consequently, pessimists argue that retaliatory nuclear deterrence (and MAD) may not represent the panacea that it is held to be by proliferation optimists. We can compare and contrast these views in Table 4.5 below:

Nuclear Latency and Virtual Nuclear Arsenals

While only a small number of states have taken the decision to build nuclear weapons, (and the vast majority have decided not to) the peculiarities of nuclear technology means that there exist a number of states theoretically capable of building nuclear weapons at short notice should they chose to, but which are not currently considered to be nuclear armed states. These states possess their own civilian nuclear programmes, often including the ability to produce highly enriched uranium or plutonium 239 and have a relatively advanced military infrastructure that could be used to develop a nuclear weapon (for more on this see Chap. 11). While these states may not be able to build a working bomb overnight (or in total secrecy), they could probably do so in a relatively short space of time should they choose to—although estimates of this vary from case to case and amongst experts. These states are known as virtual nuclear weapons states or threshold nuclear weapons states because they adopt a position referred to as nuclear latency. As Anver Cohen and Joseph Pilat explain:

Virtual weapons are indeed a reality of physics and cannot be ignored, because knowledge, experience, materials and other requirements to make nuclear weapons are widespread. A continuum of virtual capabilities exists, ranging from general technology difusion and the existence of nuclear energy programmes to conscious decisions to develop or maintain militarily signifcant nuclearweapons capabilities.28

[Table omitted]

Nuclear latency remains one of the biggest proliferation challenges facing the international community today

The complication with nuclear latency stems from the fact that the technology needed for a civilian nuclear power programme is very similar to that needed to produce fissile material for a bomb, and because some military hardware designed for non-nuclear weapons systems can be modified to deliver nuclear weapons (aircraft or missiles for example). Te problem is compounded by the central bargain of the 1968 Nuclear Non-Proliferation Treaty whereby all states that have signed the Treaty as Non-Nuclear Weapons States have a right to produce their own civilian nuclear energy (for more on the NPT see Chap. 8). As a result, states can move fairly close to acquiring a nuclear “breakout” capability without actually undermining the NPT or breaking international law (this is at the heart of the current controversy over Iran’s civilian nuclear programme and whether or not that is being used as a cover to develop nuclear weapons). With hundreds of civilian nuclear facilities and powerplants operating in dozens of countries worldwide,29 the challenge of nuclear latency is ever present. According to the then Director of the Atomic Energy Agency, Mohammed ElBaradei in 2010:

Some estimates indicate that 40 countries or more now have the know-how to produce nuclear weapons, which means that if they have the required fssile material—high enriched uranium or plutonium—we are relying primarily on the continued good intentions of these countries.30

While ElBaradei’s statement should not necessarily be interpreted as meaning that all of these states will or could easily build nuclear weapons, it does underline the importance of this challenge. Indeed, and despite the Fukushima nuclear disaster in Japan and the decision taken by Germany in 2011 to phase out civilian nuclear power,31 the global trend could be toward more rather than less nuclear power generation in the future (for the implications of this see Chap. 11).

In theory, any country with an active civilian nuclear industry and a modern weapons programme could build a nuclear bomb, although this would not be a straightforward task for any nation that decided to do so. The best-placed states to do this have full control of the nuclear fuel cycle, i.e. they can enrich the fuel for (uranium) and/or separate the by-products of nuclear fssion (plutonium). States that operate a civilian nuclear power capability but have to buy nuclear fuel from abroad are far less of a proliferation risk, although because plutonium is a by-product of uranium fssion (see Chap. 2) these civilian power plants must be closely monitored by the relevant international authorities, such as the International Atomic Energy Agency (IAEA). However, technological capabilities are only one dynamic of proliferation and must of course be matched with the political will required to build a bomb. Developing a nuclear warhead small enough to be placed on a missile and that can survive the pressures of fight and possibly atmospheric re-entry for example is a very difcult task, although by no means insurmountable for a modern state. In general, a nation wishing to move from latency to full nuclear weapons capability would meet signifcant challenges, not least keeping the programme secret from the international community and the International Atomic Energy Agency (the world’s nuclear watchdog).

Below are a number of examples of states that we might consider as having various degrees of nuclear latency:

* Japan. Japan is usually held up as the model of a latent nuclear weapons state because it has an advanced civilian nuclear industry, the ability to produce highly enriched uranium or plutonium (in addition to the large stockpiles it already has) and a modern military. Given the geopolitical tensions in Northeast Asia, the threat that Japan may decide to “go nuclear” is ever-present, although most observers suggest that there is little enthusiasm for such a move, and Japan remains a key member of the Non-Proliferation Treaty. However, Japan could probably build a deliverable nuclear weapon if it chose to within a relatively short space of time (maybe less than a year).32 As Mark Fitzpatrick noted in 2019, “Te biggest obstacles to a Japanese nuclear weapons program aren’t technical or logistic; they are political, legal, and cultural.”33
* South Korea. South Korea operates a number of civilian nuclear power plants and has expressed an interest in acquiring the technology necessary to control the nuclear fuel cycle (it can’t currently enrich uranium or reprocess plutonium).34 It also theoretically has the infrastructure and manufacturing base to support a nuclear weapons programme.35 Like Japan and Taiwan, South Korea sits in a potentially volatile region and future changes could drive the case for a bomb. South Korea also previously hosted US tactical nuclear weapons on its territory during the Cold War (until 1991) and is believed to have entertained the idea of a home-grown nuclear weapons efort in the past.36 Te likelihood of a future nuclear-disarmed North Korea and the credibility of the US-extended guarantee are probably the key variables in any future move toward acquiring the bomb.37
* Taiwan. Taiwan is not a member of the Non-Proliferation Treaty given its unique status in international society and has previously had an indigenous nuclear weapons programme in the 1970s. While it is not currently believed to have enrichment or reprocessing capabilities, Taiwan does have specific regional concerns that could lead to arguments for a nuclear weapons capability, but the costs of doing so are possibly too high for the time being (US opposition, international condemnation, or even a Chinese pre-emptive strike). Taiwan would probably also need to build a suitable missile and warhead.38 As Arthur Ding suggested in 2012, “Despite the logic that strategic logic might dictate the acquisition of a modest nuclear arsenal. Taiwan is unlikely to develop nuclear weapons.”39 But this could of course change in the future.
* Brazil. Brazil possesses all the major elements needed to produce fissile material for a bomb (from an indigenous supply of uranium ore to enrichment and the ability to fabricate nuclear fuel) but currently lacks the means to deliver nuclear weapons should it choose to build them, although it has previously had a nuclear bomb programme (see Chap. 10). Brazil is also an active member of the Non-Proliferation Treaty and is seen as an unlikely future nuclear weapons state at the time of writing.40
* Iran. Iran is a member of the Non-Proliferation Treaty, but it has long been suspected that its nuclear programme could be designed for military purposes. Iran appears to be seeking to achieve full control of the nuclear fuel cycle, which would mean an ability to produce highly enriched uranium and plutonium, and has a large military, including a relatively advanced ballistic missile programme. Iran is perhaps the biggest concern for future proliferation due to its current geopolitical situation,41 and especially after the US withdrew from the Joint Comprehensive Plan of Action in 2018 (for more on Iran and the Iran Nuclear Deal see Chap. 7).
* Saudi Arabia. Sitting at the heart of a region with ever-changing security requirements—not least the possibility of a nuclear-armed Iran on its doorstep, coupled with a perceived decline in US influence, and with an advanced infrastructure and burgeoning economy, Saudi Arabia represents a serious nuclear proliferation concern.42 Saudi Arabia has only a rudimentary civilian nuclear infrastructure, but it is rumoured to have close nuclear ties with Pakistan and other Gulf Emirates states that do.43 It also has the resources to support a nuclear weapons programme.

#### All prior barriers to acquisition have been extinguished.

Matthew Bunn 21, James R. Schlesinger Professor, Practice of Energy, National Security, & Foreign Policy, Harvard Kennedy School. Co-Principal Investigator, Project on Managing the Atom, Belfer Center, Harvard Kennedy School, "Twenty Years After 9/11, Terrorists Could Still Go Nuclear," Bulletin of the Atomic Scientists, 09/16/2021, https://thebulletin.org/2021/09/twenty-years-after-9-11-terrorists-could-still-go-nuclear/.

Unfortunately, that possibility was all too real. Investigations after the attacks uncovered focused al Qaeda efforts to get nuclear, biological, and chemical weapons. The nuclear program reported directly to Ayman al-Zawahiri, now the leader of the group, and got as far as carrying out crude but sensible conventional explosive tests for the bomb program in the Afghan desert. Weeks before 9/11, Osama bin Laden and Zawahiri met with two senior Pakistani nuclear scientists and discussed how al Qaeda could get nuclear weapons.

But that was then. Today, both al Qaeda and another major jihadist terror group, the Islamic State, have suffered tremendous blows, with their charismatic leaders dead and many others killed or captured. A US-led counterterrorism coalition destroyed the Islamic State’s geographic caliphate in Iraq and Syria. In recent years, many terrorist attacks have not been much more sophisticated than driving a van into a crowd. Al Qaeda has not managed to carry out a single successful attack in the United States since 9/11. Is a terrorist nuclear attack still something to worry about?

The short answer, unfortunately, is “yes.” The probability of terrorists getting and using a nuclear bomb appears to be low—but the consequences if they did would be so devastating that it is worth beefing up efforts to make sure terrorists never get their hands on a nuclear bomb’s essential ingredients. To see the possibilities, we need to look at motive, capability, and opportunity.

Motive. Violent Islamic extremists desperately want to strike back at the “crusader forces” who have inflicted such punishing blows on their organizations. And both the Islamic State and al Qaeda would like a spectacular action to put them firmly back at the forefront of the violent Islamic extremist movement. Years ago, al Qaeda spokesman Sulaiman Abu Ghaith argued that because Western actions had killed so many Muslims, al Qaeda had “the right to kill four million Americans, one million of them children.” That kind of hatred still festers. (Abu Ghaith is serving a life sentence in a US prison.)

Nuclear explosives are only one of the paths to mass slaughter that terrorists have pursued. Nuclear efforts must compete for terrorists’ attention with tried-and-true conventional weapons, biological weapons—whose dangers the pandemic has highlighted—chemical weapons, and more. Many of these other types of weapons would be easier for terrorists to acquire, and so their use may be more likely. But the history-changing power of a mushroom cloud rising over a major city has proved attractive to terrorists in the past and may again.

Capability. Government studies make clear that if a sophisticated, well-funded terrorist group got hold of the needed plutonium or highly enriched uranium (HEU), they might well be able to put together a crude nuclear bomb. Unfortunately, it does not take a Manhattan Project to build a bomb, when you have weapons-usable fissile material. Indeed, the group needed to make a crude bomb might not have a footprint much bigger than the 9/11 attackers had. Despite the enormous destruction that has been rained on al Qaeda and the Islamic State over the last 20 years, a cell of terrorists could be working on a nuclear project even now, somewhere far from US attention and drone strikes.

The intense counterterrorism campaigns of the last two decades have surely reduced terrorists’ ability to plan and carry out such a complex effort. But we simply do not know what capability might remain. The Taliban’s rapid return to power in Afghanistan could add to that capability, making that country a terrorist haven again—but there are many other largely ungoverned or terrorist-controlled places where such a project could be undertaken.

And the capability side of the equation can change at remarkable speed. In January 2014, the US intelligence community did not mention the Islamic State in its annual assessment of threats to US security. By summer, the group had seized much of Iraq and Syria and declared a global caliphate.

Opportunity. Fortunately, around the world, security for plutonium and HEU is far better than it once was, making it far harder for terrorists to get their hands on the needed ingredients for a bomb. More than half of all the countries that once had such material on their soil have gotten rid of it. While stolen HEU or plutonium was once showing up in parked cars and airplane luggage racks in Europe, there hasn’t been a major seizure of potential nuclear bomb material for a decade now.

Nevertheless, with the Obama-era nuclear security summits now far in the rearview mirror, the momentum of nuclear security improvement has slowed. There is still a need to ensure that nuclear weapons, materials, and facilities are protected against the full range of plausible threats—especially from insiders, who appear to pose the biggest nuclear security problem. The rise of domestic violent extremists in the United States and other advanced democracies makes the insider threat even more challenging. There is still a need for realistic tests and assessments of nuclear security systems’ real capabilities against intelligent adversaries looking for ways to beat them. And there’s still a need to strengthen nuclear security culture—to make sure the staff and guards at nuclear facilities are giving security the priority it needs, day-in and day-out.

#### Even without attack, the heightened threat of terror breaks the taboo---nuclear war.

Dr. Li Bin 09, Director of the Arms Control Program at the Institute of International Studies at Tsinghua University, Bachelor and Master Degrees in Physics from Peking University, and Dr. Nie Hongyi, MA from China’s National Defense University and Ph.D. in International Studies from Tsinghua University, “An Investigation of China – U.S. Strategic Stability”, World Economics & Politics, Number 2, <http://www.ucsusa.org/sites/default/files/legacy/assets/documents/nwgs/Li-and-Nie-translation-final-5-22-09.pdf>

The nuclear taboo is a kind of international norm and this type of norm is supported by the promotion of the norm through international social exchange. But at present the increased threat of nuclear terrorism has lowered people’s confidence that nuclear weapons will not be used. China and the United States have a broad common interest in combating nuclear terrorism. Using technical and institutional measures to break the foundation of nuclear terrorism and lessen the possibility of a nuclear terrorist attack can not only weaken the danger of nuclear terrorism itself but also strengthen people’s confidence in the nuclear taboo, and in this way preserve an international environment beneficial to both China and the United States. In this way even if there is crisis in China-U.S. relations caused by conflict, the nuclear taboo can also help both countries reduce suspicions about the nuclear weapons problem, avoid miscalculation and thereby reduce the danger of a nuclear war.

#### AND a lack of trust ignites multiple hotspots---each goes nuclear.

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On August 11, 2017, President Trump tweeted: “Military solutions are now fully in place, locked and loaded, should North Korea act unwisely. Hopefully Kim Jong Un will find another path!”1 This message followed months of escalating rhetoric and military posturing between the United States and North Korea. The crisis became acute enough that, near the height of tensions in July 2018, polling showed that 60 to 75 percent of Americans were worried about the possibility of war between North Korea and the United States within the following six months.2 Tweets from President Trump often drove or narrated the crisis, adding fears that instantaneous, direct, 280-character threats could lead directly to nuclear war. As former acting undersecretary of defense for policy Brian McKeon testified at a Senate Foreign Relations Committee hearing on presidential nuclear authorities, “The statements the president makes through his Twitter account no doubt cause concern and confusion on the other side of the Pacific. . . . I’ll be very worried about a miscalculation based on continuing use of his Twitter account with regard to North Korea.”3

As this case illustrates, the new global information ecosystem may be having an important impact on the evolution of international crises. Widespread access to social media on a global scale has accelerated news cycles in traditional media and made it easier to spread mis information and disinformation. Intemperate, ill-considered, and impulsive outbursts have become an important part of crisis dynamics. In the decade since the founding of Facebook and Twitter, social media have added new arenas to conflicts in the Persian Gulf region among Iran, Saudi Arabia, and their respective allies; among Russia, Ukraine, and NATO; between nuclear-armed India and Pakistan; and, as we have just considered, among North Korea, Japan, South Korea, and the United States.4 If we were to include information operations meant to influence governments and publics, we could extend the list of cases to include Russian interference in elections in the United States, the United Kingdom, Germany, Spain, Italy, and France; operations by the Venezuelan government against its neighbors in South America; and operations between China and its neighbors in East Asia.5 Some of these crises involve nuclear-armed powers. Were one of these crises to spin out of control, the outbreak of nuclear war could have a catastrophic impact on humanity. Even a modest exchange involving one hundred relatively small warheads has the potential for producing a nuclear winter with dramatic effects on global climate and the prospects for human survival.6

While disinformation and misinformation have always been part of conflict, the chapters in this volume outline how the new global information ecosystem has created conditions for the spread of disinformation, misinformation, and other malign information in ways that threaten crisis stability, even nuclear crisis stability. Scholars of crisis stability have had well-established frameworks with which to analyze deterrence, decision making, and the role of public opinion in foreign policy. These approaches principally rest on rational actor models. While they acknowledge that misperception and miscalculation can have an impact on crisis stability, they tend to assume that leaders will make policy decisions rationally and analytically, based on the best available evidence and with the national interest foremost in mind.7

Social media and their disruptive effects are cause to reassess how existing analytical and theoretical frameworks for understanding crisis stability might be affected by the evolution of today’s information ecosystem. This volume fills a gap on whether, when, and how social media could contribute to international conflict—including deterrence failure and nuclear war. In particular, it makes four contributions.

First, it incorporates findings from cognitive psychology and decision analysis into analyses of how leaders and publics receive, process, and act on information, misinformation, and disinformation in the emerging global ecosystem. It highlights how social media have an impact on how much information individuals receive, how they receive it, and, in turn, how these factors affect and may increase the likelihood of engaging in heuristic thinking (i.e., intellectual shortcuts) to manage the overwhelming volume of information available.

Second, the authors in this volume examine how cyber-enabled influence operations may be deliberately conducted via the new tools made available in the present information environment to take advantage of human cognitive biases and affect the perceptions, preferences, and decisions of both publics and leaders in times of crisis.

Third, this volume examines how the intersection of human propensity to heuristic thinking and cognitive bias may have a dangerous impact on international crisis stability. Such mental shortcuts are common to decision making. The emerging global information ecosystem, combined with deliberate influence operations designed to affect leader and public perceptions, could further wear on leaders during crises—potentially even those involving major nuclear powers and the risk of war.

And fourth, this volume assesses the limits of what adversaries may actually be able to accomplish in the present information environment, including the risk that influence operations may cause blowback on the perpetrators. In addition, public preferences may actually be fairly resilient in the long run in the face of deliberate attempts to influence mass opinion, even if these may have an impact in the short run.

Human Cognition, Heuristic Thinking, and Implications for Crisis Stability

Digitization and global communication technologies make generating and sharing new information possible at an unprecedented speed and scale. Social media platforms provide vehicles (in many cases tailored to take advantage of human cognitive biases) via which to maximize the impact of targeted persuasion. Each year, more people around the world are part of this information ecosystem, as mobile phone penetration globally is estimated to reach five billion users in 2019 (and there is no reason to expect this trend to slow down).8 The transformation of the global information ecosystem is not just about speed, ease, or scale of communication. It has crucially democratized information production and information dissemination. Moreover, it is increasingly apparent that the new global communications ecosystem is producing new opportunities to influence humans by playing on traditional cognitive biases that we use to process information. Audiences could be more susceptible to such efforts when faced with time pressure, high volumes of information, and appealing post-truth narratives that are preferred by significant segments of the global public instead of evidence-based journalism and policies. Taken together, these trends call into question whether traditional models of crisis stability, which assume rational decisions made by elites based on the best available evidence, are an accurate way to understand the likely evolution of future international conflicts.

In chapter 2, Rose McDermott explores the psychology of the post-truth political environment. Applied to the political environment, post-truth denotes “circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief.” Absent special mental discipline, story and narrative are more important in shaping a person’s views than empirical fact or logically reasoned conclusions—and this applies both to ordinary citizens and to leaders. Importantly, McDermott argues that most people will regard a plausible story as true, whether or not it is in fact true. McDermott also points out two exacerbating factors. First, the decline of public trust in institutions and expertise has left individuals on their own to gather information and to make judgments about what to believe for themselves. Second, the rise of social media as primary information sources means that those who rely on such sources do not have the benefit of intermediaries who fact-check and place information in context. In this environment, people are far more likely to fall back on their own intuitive thinking, which places much higher value on factors such as simplicity, familiarity, consistency with prior belief, and how many other people appear to believe the same things. Analytical evidence-based thinking will struggle to keep pace.

Paul Slovic and Herb Lin consider the psychology of nuclear decision making, especially during crisis. Such decisions involve the highest possible stakes. The authors point to several psychological phenomena that affect nuclear decision making. Psychic numbing refers to a devaluation of life when large numbers of deaths are contemplated—the death of one innocent civilian is regarded as a tragedy, whereas the death of a million is merely a statistic. Indeed, in some cases, the death of millions is regarded as less tragic than the death of a few. Psychological devaluation of life likely underlies the ability of nuclear planners and decision makers to proceed in ways that they believe to be consistent with laws of war that are intended to minimize harm to innocent civilians. Tribalism reflects an “us versus them” mindset, enabling “us” to hate “them.” Tribalism enables the dehumanization of the enemy and treatment of the enemy in ways that do not seem to violate the laws of war. Decision makers often avoid making trade-offs between competing values, such as the value of protecting national security versus protecting noncombatant enemy civilians. Rather than finding a common currency to evaluate trade-offs, they will often prioritize different values and focus on achieving those of highest priority. Thus, a decision maker may well favor security objectives over lifesaving objectives because the former are more defensible. Combined with the affordances of social media (such as their use of short, simple messages and evocative visual and auditory content), the existence of such psychological processes means that social media messages are more likely to be processed with fast, intuitive thought rather than with reflective, deliberate thought. The same is true of leaders and decision makers who are active social media users, and they are just as likely to be pushed by their social media usage into fast, intuitive thought. Slovic and Lin conclude that where such leaders are concerned, exposure to social media may well increase the likelihood of taking rash action and of premature use of force.

Cyber-Enabled Influence Operations: The Impact of Disinformation on Leaders and Publics

The present revolution in the global information ecosystem has made propaganda cost effective again. Manipulating information with the intent to persuade is a tried-and-tested part of warfare, and skeptics are right to note that there is nothing new about propaganda per se.9 But the current information environment substantially reduces barriers to the conduct of information operations not just for great powers but also for small and middle powers as well as for nonstate actors. Unlike offensive cyberoperations—which require substantial investments in sophisticated cybercommands, recruitment of scarce hacking talent, and maintenance of up-to-date cyberweapons based on fresh exploits—information operations are much more affordable.10 As we learned from the investigation into Russian targeting of US elections, influence operations may cost millions of dollars, but they need not cost tens or hundreds of millions of dollars.11 Moreover, operations can be conducted on platforms made available largely for free by major social media platforms, designed to be used by the general public with the most minimal training. Lowering costs along all dimensions enables a wide array of states, great and small, and nonstate actors such as political parties and civil society organizations to conduct influence operations cheaply. In addition, states traditionally seem to treat influence operations as falling short of the threshold of armed conflict (more akin to subversion), which means that even great powers have avoided responding to such attacks by other state actors with military force. Since costs are low, both in financial terms and in terms of the likelihood of retaliation, we should expect the widespread use of influence operations intended to affect the behavior of leaders and publics, even against the great powers and even by weaker actors in the international system.

Misinformation and disinformation on social media have the potential to contaminate information flows, which could affect behavior during crises, as Mark Kumleben and Samuel Woolley show in chapter 4. People increasingly turn to social media for information during emergency situations, which creates an opening for nefarious actors to exploit that information ecosystem. For example, during a military crisis, an adversary could use a variety of computational propaganda techniques to interrupt and confuse information flows on social media in order to encourage publics and leaders to behave in a way that suits the adversary’s interests. Kumleben and Woolley explain some of the more important of those techniques and give an overview of how they have been used in political conflicts. The cases that the authors use illustrate the potential effects of misinformation and disinformation during military crises. The 2018 false missile alert in Hawaii is a useful hypothetical on how computational propaganda could provide an adversary with a cost-effective means to erode a target state’s civil defenses and interrupt its ability to mobilize resources. Political leaders might also be susceptible to digital information operations during crises. The microtargeting of Jeremy Corbyn by members of his own 2017 Labour Party campaign staff shows that disinformation on social media could affect political decision making. By showing how computational propaganda has the power to affect behavior, Kumleben and Woolley highlight the strategic importance of the information ecosystem during crises.

State and nonstate actors are already engaged in information operations designed to affect interstate relations, as Kate Starbird outlines in chapter 5 in this volume. Using the techniques analyzed by Kumleben and Woolley, these actors are conducting influence operations online to influence political discourse and generate false information, most likely with the intention of generating confusion and mistrust among their adversaries and competitors. Starbird’s work outlines how deliberate efforts by state actors, such as those aligned with Russia, can influence broader online conversations and activism among sympathetic audiences. In the case of NATO, both alt-right and fringe conservative voices and international far-left activists converged on a shared anti-alliance message that was influenced and driven in part by state-sponsored online actors working via social media. There is a pattern of state actors and state-backed trolls infiltrating authentic online and social media–based activist communities on both the right and the left to reshape their activities so that they unwittingly support state-sponsored messages and objectives, in this case Russia’s anti-NATO activities. The long-term impact of these activities remains to be seen, but they are already shaping conversations about and among major international actors, in this case NATO, possibly shaping the future strategic environment in ways that could undermine popular support for alliance activities to deter Russia.

The Risks to International Crisis Stability from the Global Information Ecosystem

During the Cold War, government leaders of the major nuclear powers received information from military and intelligence services that, while of course vulnerable to many errors, was nonetheless subject to a process designed to produce verifiable data on which leaders could base decisions. Publics received information via gatekeepers, whether in the form of official or private media, that also subjected information to a vetting process, admittedly not always designed to produce truth but at least to produce consistency and a consensus view of reality among audiences.

Publics and leaders are today exposed to masses of unverified information produced at high speed and distributed at high volume for next to no cost. It is much easier to produce polarization in target populations, to spur storms of public opinion to influence enemy leaders, to leak information deleterious to adversaries, and to conduct influence operations designed to target the psychology of enemy publics. Moreover, the same techniques, as Kristin Ven Bruusgaard and Jaclyn Kerr suggest, can target leaders, affecting perceptions of crises and of adversaries’ intentions. We already know that major government officials pay attention to social media, and they are also subject to the same effects from the global information ecosystem as the publics they lead. This raises the real possibility that influence operations may become an additional contributing factor to growing crisis instability in the world today.

In fact, the deployment of post-truth information during crises may contribute to escalation dynamics in dangerous and unpredictable ways. In the current information environment and given human propensity for heuristic thinking, deployment of convenient half-truths, rumors, or “extra-factual information,” as Kelly Greenhill argues, is attractive because it is a powerful mobilizer of public opinion and can magnify signals of resolve in international crisis. But precisely because it is so powerful and provocative, it can lead adversaries to escalate rather than back down. It can alarm public opinion among adversaries, putting opponents in the position of having to resort to their own escalation and provocation or else appear weak. In addition, as Jeffrey Lewis also documents in chapter 8, there is the possibility that both the general public and elites in the provoking country will come to believe extra-factual information, making it difficult to build off-ramps from international crises for fear of appearing weak or losing face. It may become difficult or impossible to “walk back” or discredit extra-factual information in a global information environment too prone to magnifying human heuristic thinking and spreading information that is appealing even if untrue.

#### The plan eliminates the barrier to effective management of financial institutions, restores trust in institutions, AND salvages the rule of law. Any adherence to the present requires actively partaking in the Midas formula.

Sharon E. Foster 15, Associate Professor, University of Arkansas, School of Law, "Too Big to Prosecute: Collateral Consequences, Systemic Institutions and The Rule of Law," Review of Banking & Financial Law, Vol. 34, Spring 2015, Lexis.

II. The Rule of Law

There are many different definitions for the term "rule of law." 80 However, despite this difficulty in attempting to define the term, the plethora of definitions have certain commonly accepted principles. 81 These commonly accepted principles include: (1) no disparate treatment that favors the government and others in positions of power; 82 (2) no politicization of the law, meaning that the law is "not subject to political bargaining or to the calculus of social interests"; 83 and (3) legal certainty so people will know how to conduct their affairs. 84 All three of these principles are "second order principles" in that they have to do with the implementation of the "first order principles" of law. 85 For example, a law against fraud is a first order principle of law. 86 The second order principles, or "rule of law principles," 87 would require that the law against fraud be applied equally, in a non-political fashion, and that the people understand the fraud law so they can act accordingly. 88 Therefore, the rule of law has significant relevance to decisions of whether or not to prosecute; 89 constitutional law, such as equal protection 90 and due process; 91 procedural rules; 92 and rules of evidence. 93 This section examines the three commonly accepted principles of the rule of law articulated above including disparate treatment, politicization, and certainty. 94

A. Disparate Treatment

The most consistent principle under the rule of law is that of no disparate treatment; that there should be equal treatment under the law. 95 Accordingly, second order principles should ensure that first order principles of law are equally and fairly applied. 96 Certainly, gross violations of the rule of law due to corruption, such as bribery, would be an example of disparate treatment undermining the rule of law. 97 Favoritism due to political power and wealth are also examples, 98 as is "discriminat[ion] against certain groups." 99 However, often disparate treatment is rationalized in an attempt to justify the conduct such as the economic necessity justification for the collateral consequences policy. 100

One could take a Kantian, categorical imperative, approach to this rule of law principle holding an absolute position against disparate treatment. 101 In this sense, the rule of law reflects elements of Kant's categorical imperative, 102 for purposes of this Article, defined as follows: "I ought never to act except in such a way that I could also will that my maxim should become a universal law." 103 This maxim, stated simply, requires one to consider what the world would be like if everyone acted the same way. 104 For example:

[A] person in financial distress considers whether he should borrow money without repaying it. His maxim would be to engage in the pretence of promising while secretly intending not to repay the loan. Kant argues that this maxim would not lend itself to universalization, because if everyone engaged in fraudulent promising, their inconsistent behavior would destroy the institution of promising. Therefore, absent a consistent universalization of his maxim, there would be no way for the actor to take the (non-existent) law-like nature of his maxim as the determining ground of his action. 105

Accordingly, while certain conduct may result in greater benefits to a few, such conduct would be just only if those who are not so fortunate still experience an improvement to their situation. 106

This universal approach eliminates disparate treatment, but needs to be applied in the context of desirable social goals. This does not imply that the ends justify the means, which does not require a universal approach. Rather, it requires establishing desirable conduct (first order principles of law) and then enforcing individual responsibility for that conduct (second order principles of law) in a manner creating universal advantages.

While the universal approach to the rule of law reflects a Kantian categorical imperative with respect to first order principles of law, such a proposition if taken to its logical extreme would impose a rather rigid legal system. As a practical matter, such an absolutist position is not possible given the frailties of human nature. 107 Thus, the main goal should be that the legal system is not viewed by people as arbitrary and capricious. 108

Disparate treatment due to wealth is viewed as arbitrary and capricious and is of particular concern today with respect to the shrinking middle class 109 as well as the failure to prosecute systemic institutions. 110 Wealth is not a categorical imperative in terms of equal wealth for all, but the manner in which one acquires or maintains wealth may infringe upon elements of the rule of law demanding equality. Thus, obtaining or maintaining wealth due to disparate treatment of first order principles of law would violate the rule of law. 111

Disparate wealth seems, to some degree, inevitable 112 particularly in a free market economy where innovation and productivity is promoted by economic incentives. Some may be more motivated than others by such incentives. What is important for rule of law purposes is that first order principles of law are applied fairly and equally by the second order rule of law principles so as to ensure equal wealth opportunity to the greatest extent possible. 113 Accordingly, it is critical that the economic incentives are free from artificially created preferences and barriers. 114 In this regard, the rule of law and free market principles are in accord. However, where there is a decline of the rule of law there is a negative impact on the free market system and equal economic opportunity as economic activity is directed in a discriminatory fashion justified on the grounds of necessity. 115 But the short-term advantages of expediency often come at the high price of long-term harm to the rule of law, which includes long-term economic harm. 116

B. Politicization

The rule of law may not be politicized. 117 By that I mean first order principles of law "are not subject to political bargaining or to the calculus of social interests." 118 To some extent, this aspect of the rule of law overlaps disparate treatment where first order principles of law are applied to some classes, but not others. 119 The main distinction here is that the disparate treatment in the politicized context is motivated by political objectives such as quid pro quo or harm to some for an alleged greater good.

To ensure the rule of law is not politicized, the legal system must be governed by first order principles of law, not power brokers. To achieve this independence of the political process and other extraneous pressures, integral parts of the legal system, such as the police, prosecutors, and the judiciary, must be independent from the political process. 120

C. Legal Certainty

Many commentators on the rule of law have opined that a critical rule of law factor is that people should know and understand the laws. 121 This is important with regard to fostering the human dignity of autonomy to plan for one's future and guiding conduct in accordance with societal expectations. 122 Optimal legal certainty requires that laws be promulgated in such a fashion as to provide people access to them and that the laws are clear so people can understand what is expected of them. 123 Uncertainty in the law creates a chaotic, unstable environment, as people do not know what is expected of them and further undermines the rule of law because uncertainty promotes arbitrary power, abuse of discretion, and disparate treatment. 124

Absolute legal certainty is neither obtainable nor desirable. 125 It is not obtainable because even if the laws are accessible, people may choose not to take the time to familiarize themselves with the law. 126 Additionally, people may be unable or incapable of comprehending even clearly promulgated laws or be frustrated by externalities. 127 Even if these natural or socially created impediments were not much of a factor to the general understanding of the law, because language has inherent ambiguities, some vagueness is inevitable. 128 Absolute legal certainty is not desirable because there may be certain, limited situations where the exercise of controlled discretion is desirable to achieve important goals. 129 Accordingly, legal certainty is a matter of degree, with greater certainty desirable to promote the rule of law. 130

D. International

As this Article addresses the rule of law issue with regard to collateral consequences being considered for systemic institutions, it is important to address the rule of law in the international context as these systemic institutions have a global presence. The rule of law in the international context has been addressed by the United Nations and is defined as follows:

[The rule of law] refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency. 131

Additionally, the United States Department of State and the U.S. Agency for International Development jointly developed a similar definition for their justice-sector foreign assistance programs:

"Rule of law" is a principle under which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, independently adjudicated, and consistent with international human rights principles. 132

Both of these definitions of the rule of law in the international context include elements addressing disparate treatment ("equally enforced"), politicization ("all persons, institutions and entities, public and private, including the State itself, are accountable to laws," and "equally enforced"), and certainty ("publicly promulgated"). 133 While the politicization and certainty issues may be generally treated in a similar fashion as domestic situations, the main principle to avoid disparate treatment in the international business context is achieved by "national treatment." 134

National treatment requires the application of lex loci protectionis (the law of the place of protection); 135 the policy that "a foreign firm that conducts business in a local market should receive national treatment, that is, the foreign firm should be treated no less favorably than a domestic firm operating in like circumstances." 136 For example, in the United States, national treatment has been applied to the financial services sector through the International Banking Act of 1978:

Except as otherwise specifically provided in this chapter or in rules, regulations, or orders adopted by the Comptroller under this section, operations of a foreign bank at a Federal branch or agency shall be conducted with the same rights and privileges as a national bank at the same location and shall be subject to all the same duties, restrictions, penalties, liabilities, conditions, and limitations that would apply under the National Bank Act to a national bank doing business at the same location . . . . 137

While national treatment seems to be a rule of law norm in the international context, 138 including the financial services sector, 139 and has been adopted in United States financial services laws, 140 the European Union has adopted a "comparable treatment" approach for financial service institutions:

Under the comparable treatment requirement, a [foreign] country whose banks participate in the European Union's banking market must provide European Union banks with "effective market access comparable to that granted by the [Union] . . . ." If it appeared to the Commission that a [foreign] country was not giving European Union banks comparable treatment, the Commission could submit proposals to the European Union Council for authority to negotiate with [the foreign] country. Thus, if European Union banks were not allowed in a foreign country to do everything they were allowed to do in the European Union, punitive action was possible. 141

Comparable treatment specifically calls for disparate treatment in violation of the rule of law by allowing for punitive action against foreign banks to which domestic banks would not be subject.

E. Rule Through Law

The rule of law tradition articulated above does not have universal acceptance internationally in that some states have a very different rule through law tradition. The Anglo-American rule of law tradition puts the law above government. 142 However, the Continental tradition is the rule through law where the law is an instrument through which the government accomplishes certain goals. 143

The rule through law approach more closely resembles situational ethics than the Kantian categorical imperative as the ends justify the means. In general:

Situational ethics allows for the contingent nature of human relationships, infinite possibilities, "the dynamic nature of interacting events, and the evolving contextual circumstances." . . .

A situational ethicist is also aware of community standards as reflected in the laws, but may be "willing to compromise those standards if doing so would seem to better serve a greater good or purpose." . . . It is the "contextual appropriateness" of the act, not whether the act is good or evil, which is the focus for a situational ethicist. Rules are not ignored; however, circumstances allow deviation, provided the greater good is served. Of course, the down side to openended situational ethics is ad hoc judgment, a lack of categorical rules which provide certainty, and a sense of a lack of fairness in the legal system. 144

This goal driven, utilitarian approach of the rule through law may have certain efficiencies but it also has the potential to promote certain individuals or groups over others in times of crisis as well as in corrupt systems. 145 Further, it is inconsistent with the international rule of law as articulated by the United Nations as well as the Anglo-American tradition in that it may allow for disparate treatment, politicization, and lack of certainty by being goal driven. 146 Increased discretion, or ad hoc judgments, increases the probability of disparate treatment, politicization, and uncertainty in the legal system. 147

While this may appear to be in contradiction to the international and Anglo-American rule of law system, some have argued that the rule of law has eroded or completely disappeared from Anglo-American jurisprudence. 148 This has resulted in more of a rule through law system, thus eliminating some of the second order principles of law conflicts between the systems, but at the expense of the rule of law principles. 149

III. The Conflict Between Collateral Consequences and the Rule of Law

The DOJ policy of collateral consequences is a rule through law approach and has resulted in a very public backlash. 150 It has been perceived to be a policy of disparate treatment, politicization of the law, and one that creates uncertainty in the legal system. 151 We see evidence of this perception in the media, Congressional actions, academic discourse, and polls. 152 Additionally, in the international context there is a perception of disparate treatment, politicization of the law, and uncertainty with the use of DPAs with guilty pleas for foreign systemic institutions, but not with regard to domestic systemic institutions. 153

A. Disparate Treatment

The policy of collateral consequences, as articulated by the DOJ, does provide for disparate treatment in that it allows prosecutorial discretion to treat systemic institutions differently from non-systemic institutions and individuals. 154 So the problem of disparate treatment is real in the sense that there is a policy that allows it. The DOJ has not provided specific instances where collateral consequences were dispositive in a decision not to prosecute nor where they were considered; although it has been stated that they were used in rare circumstances indicating that collateral consequences have been an influence. 155 But equally, if not more, important is the public perception of disparate treatment. 156

To be clear, I am discussing here public perceptions, not whether criminal prosecutions were or are viable under the law. Perceptions are important for confidence in and legitimacy of the legal system. 157 Further, given the fact that a great deal of evidence of this criminal activity is not available for public view, the public is left to perceive issues of fairness. 158 Even the non-collateral consequence reasons given for this failure to prosecute have a negative public perception and rule of law ramifications. For example, the statement, "do not prosecute systemic institutions because they can out-attorney the U.S. attorneys," 159 creates a system where the motivation to settle lies with the U.S. attorneys for fear that they will lose cases brought against systemic institutions. When it comes to people with little or no means to defend their case, the motivation to settle, indeed on not so generous terms, shifts to the defendant. 160 This disparate treatment creates an unfair system based on wealth rather than justice. 161 Regarding the "it's so complex" argument, 162 this not only creates disparate treatment based upon size and complexity, but it also undermines the rule of law since it reduces legal certainty for the victims of the alleged fraud. 163 Finally, the "what they did was unethical, but not illegal" argument is highly debatable, 164 and has only added to the distrust of the legal system due to the lack of credulity. 165 However, this Article is focused on public perceptions and the effect on the rule of law, not whether there was any criminal conduct.

Certainly, the DOJ recognizes the importance of public perception 166 and the current problem of the public perception of disparate treatment. 167 It would be difficult to miss the strong public perception that systemic institutions and their upper management are immune from prosecution due to disparate treatment. The media, Congressional actions, academic discourse, and polls evidence this perception. 168 It is not so much the fact that some people are discussing this topic; it is the sheer volume and diversity of sources that causes concern.

For example, a Google search of media sources indicates 2,520,000 hits when the search term "'wall street' prosecutions" is used. 169 For "too big to jail" there are 263,000 hits. 170 An example of media content regarding this issue includes the following from a Washington Post blog post:

So, yeah. Zero Wall Street CEOs are in jail. But we did promise you a list:=

1. No one.

2. LOL.

3. Wall Street's lawyers are amazing.

4. Etc. Etc.

It's not that federal government tried to prosecute a bunch of them but lost the cases. There were no serious efforts at criminal prosecutions at all. 171

Congressional actions include hearings specifically addressing the too-big-to-jail issue. 172 Additionally, some members of Congress have expressed concern about the reality of disparate treatment. For example:

As for academic discourse, some argue that there has been disparate treatment for systemic institutions, but that this is starting to change. 174 Others argue that there is no evidence in procedural or substantive law that disparate treatment exists. 175 Some seem to acknowledge disparate treatment, but argue that it is justified by proper consideration of externalities, like economic impact, and that the non-prosecution of bankers from systemic institutions is often explained by lack of evidence or the difficulty of white-collar prosecutions generally. 176 Finally, some argue that systemic institutions are provided with an implied immunity from prosecution. 177 While there are a wide variety of opinions about the reality of disparate treatment, all of the academic discussion, either expressly or implicitly, acknowledges the public perception that there is disparate treatment in favor of systemic institutions.

As for polls, there are none as of the date of this Article that directly ask the public if it perceives systemic institutions or their executives as "too big to jail." However, a 2013 Reuters/Ipsos poll indicates that 53% do not believe Wall Street bankers have been sufficiently prosecuted for their role in the financial crisis. 178 A 2013 Pew Research poll indicates that the public views the government's economic policies as largely benefitting "large banks and financial institutions (69%), large corporations (67%), and wealthy people (59%)." 179 Additionally, recent polls indicate declining trust and confidence in the legal system. 180 While a more specific polling question would be beneficial, the public perception evidenced by the media, Congressional action, and academic discourse, together with the information provided by the polls, indicate that the collateral consequences policy is not well perceived.

B. Politicization

As defined above, politicization of the law examines if first order principles of law are "subject to political bargaining or to the calculus of social interests." 181 In the case of collateral consequences, the stated policy makes clear that first order principles of law are subject to the calculus of social interests. Specifically, the United States Attorneys' Manual states that prosecutors should consider such social interests as "disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public." 182 Further, prosecutors are instructed to consider "non-penal sanctions" other government agencies may invoke, such as "potential suspension or debarment from eligibility for government contracts or federally funded programs such as health care programs." 183 As for political bargaining, there is no known direct evidence relating to the DOJ, but there is a strong public perception of politicization. Again, when looking at the media, Congressional actions, academic discourse, and polls, we see evidence of this public perception. 184

In the media, as noted above, a Google search of media sources indicates 2,520,000 hits when the search term "'wall street' prosecutions" is used and 263,000 for "too big to jail." 185 Many of these hits include perceptions of politicization of the system. For example, that the government has an incentive to look the other way when it comes to bank fraud due to the revolving door; 186 that some settlements between the DOJ and systemic institutions are the results of "back-door agreements between the Obama administration and Wall Street's top banks"; 187 that political contributions contribute to the lack of prosecutions; 188 and that the result of the failure to prosecute

is a public perception that the big banks and their leaders will never have to answer fully for the crisis. The shameless pursuit of Wall Street campaign donations by both political parties strengthens this perception, and further undermines confidence in the rule of law. 189

With regard to Congressional actions, it is understandably difficult to find evidence of Congress' perception that first order principles of law are subject to political bargaining as this would require an acknowledgement of potential legal and ethical violations. Still, some in Congress have acknowledged that the public's perception is that Wall Street has too much influence over Congress. 190 As for first order principles of law being subject to the calculus of social interests, there are numerous instances where Congress and specific members of Congress have expressed concern that the lack of prosecutions of systemic institutions and high ranking executives of systemic institutions are due to the social interest of avoiding negative impacts on the economy. 191

Academic discourse relating to the politicization issue is not so prolific. Most seems to focus on issues such as the pros and cons of DPAs, including disparate treatment concerns. 192 Those that address politicization issues focus more on the social interests aspect, rather than the political bargaining issue. 193 However, some commentators suggest political bargaining as a reason for the failure to prosecute by pointing out circumstantial evidence, such as the adoption of DPAs as the preferred method of dealing with criminal violations by systemic institutions at the height of the financial crisis in the summer of 2008 when systemic institutions feared for their survival, 194 and deliberate avoidance of criminal prosecutions by the DOJ. 195

There are no polls directly on point regarding collateral consequences politicizing prosecutions. However, recent polls do indicate that a large majority of the public believes systemic institutions have too much influence over the political system. 196 Considering all of the various sources and the plethora of materials, it is difficult to deny that there is a public perception that the collateral consequences policy has politicized the legal system.

C. Certainty

Laws relating to systemic institutions and, in particular the financial services sector, as well as the structure of systemic institutions, have been described as complex, contributing to the difficulty in prosecuting systemic institutions. 197 For example, the Dodd-Frank Wall Street Reform and Consumer Protection Act is indicative of the uncertainty problem, consisting of over eight hundred pages of unintelligible language, which did little more than require regulatory agencies to promulgate more regulation. 198 While people have access to Dodd-Frank, 199 it was also promulgated in such a fashion that most people would not care to access it given its over eight hundred pages, nor understand it if one was ambitious enough to attempt to read it. This is the buried in transparency problem; make the laws voluminous, complex, and costly to administer to ensure the laws will not be understood and to discourage the public from legal relief in the courts. 200 The buried in transparency problem is particularly applicable to laws relating to systemic institutions, and the uncertainty problem is further exacerbated by the policy of collateral consequences by increasing prosecutorial discretion.

Prosecutorial discretion, the decision of who to charge and the scope of the criminal charges, has been given broad deference by the United States Supreme Court. 201 This is partly due to separation of power concerns between the executive and judicial branches, 202 as well as the concern that the judiciary is ill-equipped to second-guess prosecutorial decisions. 203 There are some constitutional limits to such discretion under the Equal Protection clause of the United States Constitution, but the courts will apply the rational basis test 204 and prosecutorial discretion is presumed to have a rational basis due to the Court's concern that subjecting prosecutors to such oversight may "chill law enforcement" and "undermine prosecutorial effectiveness." 205 Additionally, wide latitude is generally allowed under the Equal Protection Clause for economic policy, 206 which one could call the policy of collateral consequences based upon the fear of economic harm. Theoretically, a decision on who to prosecute based upon "an unjustifiable standard such as race, religion, or other arbitrary classification" 207 and vindictive prosecutions, 208 would be an abuse of discretion and violate the Constitution. Realistically, a finding of such abuse of discretion is rare. 209

Given the limited review of prosecutorial discretion, the policy of collateral consequences as applied to systemic institutions is highly questionable as it has increased prosecutorial discretion, decreased legal certainty and, hence, undermined the rule of law. This policy has contributed to the lack of certainty and trust in the political, legal, and financial systems, because there is little certainty that the laws will be enforced. 210 This lack of trust, real or perceived, is critical as recognized by the DOJ itself in its United States Attorneys' Manual at section 9-28.100 211 and recent court decisions suggesting some oversight of DPAs may be warranted. 212

D. International Context

Evidently sensitive to the accusations of failure to prosecute systemic institutions, the DOJ has recently announced several DPAs where there were guilty pleas. 213 However, only foreign banks, primarily their subsidiaries, have been sacrificed and only after steps were taken to mitigate any regulatory collateral consequences. On December 19, 2012, the Japanese subsidiary of UBS, a Swiss systemic financial service institution, pled guilty to wire fraud in relation to the LIBOR interest rate fixing scandal. 214 On February 6, 2013, the Japanese subsidiary of the Royal Bank of Scotland, a British systemic financial service institution, pled guilty to wire fraud in relation to the LIBOR interest rate fixing scandal. 215 On May 19, 2014, the DOJ obtained a settlement with a guilty plea involving Credit Suisse, a Swiss systemic financial service institution accused of criminally violating U.S. tax laws. 216 The settlement with Credit Suisse included regulatory waivers of collateral consequences so Credit Suisse would be able to continue to do business in the United States. 217 On June 27, 2014, the DOJ and BNP Paribas S.A., a French systemic financial service institution, entered into a plea agreement where BNP Paribas pled guilty to criminal charges in violation of U.S. sanctions laws, including transactions totaling at least $ 4.3 billion that benefitted Sudan, Iran, and Cuba. 218 Sentencing negotiations were conducted with various state and federal regulators to mitigate the collateral consequence of revoking its license to do business in the United States. 219 As of the date of this Article, there have been no DPAs with guilty pleas by United States systemic institutions. 220 Although this is disparate treatment in theory, the reality of this tactic is to obtain the same effect as DNPs with no guilty plea--the avoidance of collateral consequences by back room agreements with regulatory agencies. 221

While foreign systemic financial service institutions have received the benefit of the collateral consequences policy, 222 which would be in accord with the principles of national treatment, it appears as though there is disparate treatment in requiring these foreign systemic institutions, or at least their subsidiaries, to plead guilty while not requiring the same of domestic systemic institutions. 223 It is, perhaps, too early to draw conclusions and, indeed, there is a dearth of materials on this subject at this point in time. However, if the pattern persists, concerns about disparate treatment, politicization, certainty and, hence, the rule of law will be implicated.

IV. The Consequences of Collateral Consequences

This is the Court of Chancery; which has its decaying houses and its blighted lands in every shire; which has its worn-out lunatic in every madhouse, and its dead in every churchyard; which has its ruined suitor, with his slipshod heels and threadbare dress, borrowing and begging through the round of every man's acquaintance; which gives to monied might the means abundantly of wearying out the right; which so exhausts finances, patience, courage, hope, so overthrows the brain and breaks the heart, that there is not an honourable man among its practitioners who would not give--who does not often give--the warning, "Suffer any wrong that can be done you rather than come here!" 224

The above quotation from Charles Dickens' Bleak House vividly describes the collateral consequences of undermining the rule of law: a lack of trust in the legal system. In this short quotation we see elements of disparate treatment, politicization, and lack of certainty as discussed in Part III above. 225 This is the consequence of a policy of collateral consequences; by undermining the rule of law, it undermines trust and legitimacy in political, legal, and financial institutions and harms the economy as discussed below.

A. Lack of Trust in the System

The failure to prosecute systemic institutions due to fear of collateral consequences to the economy has created a public perception of unfairness and a lack of trust in the political, legal, and financial systems. 226 This lack of trust undermines the efficacy of the legal system 227 and confidence in the government. 228 This, in turn, is critical to both political and economic stability. 229

The lack of trust in the United States political and financial system is well documented in several polls. In 2011, an NBC/Wall Street Journal poll indicated that 76% of Americans believed that financial and political institutions favored the wealthy. 230 Similarly, there is a decline of public confidence in the judicial system 231 as well as the legislative and executive branches of government. 232 This lack of trust has economic repercussions and has been attributed by some as the cause for the slow recovery and continued fragility of the economy. 233

B. Economic Impact

A critical problem with the policy of collateral consequences is that the lack of trust in political, legal, and financial systems generates harm to the economy. 234 This is ironic as the stated justification for not prosecuting systemic institutions was a concern that the collateral consequence of such prosecutions would be significant economic harm. 235 But, as systemic institutions have not been prosecuted, the concern that to do so would cause economic harm is pure speculation, 236 while the concern that the failure to prosecute has caused economic harm does have evidence to support it.

Trust is critical for efficiently expanding commerce, which is necessary for a vibrant economy. 237 Trust reduces transaction costs and high trust societies exhibit better performance and more successful development. 238 In societies where institutions are not punished for cheating, low trust and increased poverty are more likely. 239 Trust is also important for financial markets 240 and necessary for economic recovery. 241 For example, Iceland took a different approach to the financial crisis that decimated its economy: it prosecuted those responsible for financial crimes, which increased trust and economic growth. 242

The notion that trust is critical to a vibrant economy is a well-known principle in a free market system, which requires access to reliable information. 243 A lack of or misleading information will distort the market and undermine the free market system. 244 Indeed, Thomas Hoenig, director of the Federal Deposit Insurance Corporation and former president and chief executive of the Tenth District Federal Reserve Bank in Kansas City, Missouri stated:

I suggest that the problem with SIFIs [systemically important financial institutions] is they are fundamentally inconsistent with capitalism . . . . They are inherently destabilizing to global markets and detrimental to world growth. So long as the concept of a SIFI exists, and there are institutions so powerful and considered so important that they require special support and different rules, the future of capitalism is at risk and our market economy is in peril. 245

Hoenig's statement reflects the economic reality that systemic institutions require market intervention by the government to exist, thus undermining capitalism and free market principles. 246 As with disparate treatment discussed above, 247 it is not possible to apply a categorical imperative of absolutely no government intervention in the market, nor is such a state of affairs necessarily desirable. However, some markets are more free than others and the public perception is that we got the balance between no intervention and too much intervention wrong, in favor of too much intervention for systemic institutions. 248 We have socialized the markets, at least with regard to systemically important institutions, while claiming to maintain a free market system. 249 We have implemented disparate treatment to prop-up institutions that the free market would have eliminated. 250 Not only has the government intervened by bailouts and ongoing surreptitious subsidies for systemic institutions, 251 but the application of collateral consequences as a policy for systemic institutions is market intervention to the extent it encourages criminal conduct, such as fraud, that affects the quality of information disseminated to the markets. 252 This creates informational asymmetries, which harms the markets. 253 But, more importantly, these policies have harmed trust in our political, legal, and financial systems by undermining the rule of law.

V. Solutions

There are at least four possible solutions: (1) do nothing; (2) eliminate systemic institutions; (3) eliminate the policy of collateral consequences; or (4) apply a universal collateral consequences policy.

To do nothing requires either an acceptance of the premise that the DOJ is correct in its application of collateral consequences to save the economy or apathy. Assuming the former, one would have to believe that the information the DOJ has received from systemic institutions and their economists is valid and that such failure to prosecute will vanish when the economy is healthy. Public perception does not support the assumption that the information the DOJ has received from systemic institutions and their economists is valid. Indeed, the reality of the situation is that there are too many conflicts of interest to reasonably expect the public to accept such a premise. 254 The revolving door between systemic institutions and their regulators is well documented. 255 The political contributions flowing from Wall Street to the legislative and executive branches of government is also well documented. 256 The information provided to the DOJ in making its decision whether to prosecute or not due to collateral consequences comes, in part, from the systemic institutions under investigation. 257 I doubt they would agree that indictment was a good idea. Finally, there is the conflict of interest problem in the economics profession. 258 Evidently, this profession does not have ethical rules regarding conflicts of interest, leaving economists free to sell their analysis to the highest bidder. 259

Second, we can eliminate systemic institutions, alleviating the concerns that prompted the policy of collateral consequences. This solution also has economic benefits, such as providing a more efficient, free market economy 260 and, potentially, restoring trust in some of our political institutions by reducing the flow of cash from Wall Street to Washington D.C. If systemic institutions did not exist, there would be no need to provide subsidies to prop them up and recycle the subsidies in the form of political contributions. 261 This would enhance free markets and promote competition on a level playing field. Additionally, smaller institutions would be more manageable, thus eliminating the excuse given by senior management that they did not know what was going on regarding criminal activity 262 and, possibly reduce such criminal activity. Fewer DPA agreements coupled with management knowing what is going on would certainly go a long way in deterring criminal activity. 263 While I support this solution as economically efficient and in line with the rule of law, I fear this will not be accomplished until we go through another financial crisis, which, with the current system, is inevitable. Too much has been done to maintain the status quo. 264

Of course, some have argued that maintaining the status quo, including systemic institutions, is necessary for international competition as other states still have such institutions, 265 which are economically efficient due to economies of scale. 266 Unlike the contra argument, these assertions are not supported by evidence. 267 Some may argue that it would be against free market principles to have the government intervene to break-up systemic institutions. Perhaps, but this could be accomplished by free market principles; simply eliminate the subsidies and prosecute the criminals and see what the invisible hand of the market will do. 268

### 1AC---Plan

#### Plan: The United States federal government should limit the implied immunity doctrine by prohibiting anticompetitive business practices by systemic financial service institutions.

### 1AC---Solvency

#### Contention 3 is SOLVENCY.

#### The plan prohibits anticompetitive financial institutions under antitrust laws by incorporating systemic risk analysis.

Sharon E. Foster 10, Associate Professor, Law, University of Arkansas, "Too Big to Fail – Too Small to Compete: Systemic Risk Should Be Addressed Through Antitrust Law but Such a Solution Will Only Work If It Is Applied on An International Basis," Florida Journal of International Law, Vol. 22, No. 31, April 2010, Lexis.

III. The Antidote to Too Big to Fail is Antitrust

As a preliminary matter it must be said that the financial services sector is not exempt from antitrust laws. More critically, however, is that there is nothing in antitrust statutory law nor case law that would prevent the use of systemic risk analysis for purposes of divesting a firm that is too big to fail or preventing a merger. Antitrust has always been available as an antidote for too big to fail through divestiture and merger review; however, some believe that antitrust law would have to be reformed before it is applicable. 126 That is simply not the case.

A. Financial Service Firms are not Exempt from Antitrust Laws

Antitrust law is clearly applicable to commercial banking. 127 Investment banking may have a partial, implied exemption because of: "(1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; and (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct." 128 This does not appear to pose a problem for Sherman § 2 nor Clayton § 7 application to systemic risk.

With respect to insurance, there is an express federal exemption for the "business of insurance" if it is also "regulated by State law." 129 So, to the extent a firm is engaged in all three financial services, it can be sued for antitrust violations regarding its commercial and investment banking businesses but there may be an exemption from antitrust law regarding its "business of insurance" that is regulated by State law.

B. The Origins of Too Big to Fail

The too big to fail doctrine seems to have first been articulated in the Continental Illinois situation in the early 1980s. In the mid-1970s the management of Continental Illinois decided upon a growth strategy that focused on commercial and industrial lending. 130 For the short term, this growth strategy seemed to work with Continental Illinois's share prices and return on equity going up. 131 But this was a risky plan as Continental Illinois's loan-to-asset ratio was very high. 132 This risk, as it turned out, did not pan out. As Continental Illinois's debtors began to default, its share prices began to decline and it became apparent that, in the name of growth, Continental made some bad loans. 133 Corporations and large financial institutions with deposits at Continental Illinois, the seventh largest bank in the nation at the time, 134 became nervous about the stability of the bank and so started to pull out their money. Regulators feared a bank run and that Continental Illinois's failure would cause systemic failure as many small banks had deposits at Continental Illinois and they could fail if Continental Illinois were allowed to fail. As a result of this concern, the regulatory authorities stepped in with loans and attempted to find a merger partner. When no partner was found, the regulators bought Continental's bad debt and the Federal Deposit Insurance Corporation (FDIC) fully protected all of Continental Illinois's depositors regardless of the limits on deposit insurance. 135

C. Systemic Risk Analysis

Decades after the Continental Illinois crisis there are still no set rules or formulas for too big to fail; just a patchwork of laws for the benefit of regulatory agencies to invoke the doctrine when they believe there is risk of systemic failure. 136 Systemic failure is, in essence, the domino effect; 137 if the insolvent institution in question poses the risk of taking down other institutions if allowed to fail, and that scenario would have a significant negative impact on the domestic economy, the government will step in to prevent the failure of the insolvent institution. 138

The bail-out, or public funds funneled into the insolvent too big to fail institution, is one method the government may utilize to prevent systemic failure. Another method is merger. Here, the government regulators find a relatively healthy institution to take over the insolvent one. When a large bank becomes insolvent in addition to the systemic failure problem, the potential cost to the FDIC insurance fund may be so high that the regulators feel compelled to force a merger or provide bail-out funding to keep the bank solvent until a permanent solution can be found. 139 In the current economic crisis, the government utilized the bail-out and forced merger to avoid systemic failure and introduced a third - systemic risk in bankruptcy reorganization. 140

D. Will Systemic Risk Analysis Work in an Antitrust Context?

A solution to the too big to fail problem is to consider the possibility that a firm that is too big to fail is too big to exist. 141 Conventional wisdom seems to believe that allowing firms that pose systemic risk to fail, bankrupting them out of existence, is not the proper solution given the potential dire economic repercussions. 142 Perhaps, but that does not mean that there is no choice but to allow them to exist. If systemic risk is considered in the antitrust analysis, particularly under Sherman § 2 and Clayton § 7, divestiture may be used to break-up firms that pose such a systemic risk and mergers involving firms that pose systemic risk would not be allowed to go forward. 143

A proposal to include a systemic risk analysis in antitrust law seems to be rather controversial with some arguing that it cannot be done under current antitrust law. 144 Such a conclusion seems to be based, in part, on an assumption that, in order to have violated Sherman § 2 or Clayton § 7, a defendant must have a certain level of market share or the market must be highly concentrated. Neither statutory law nor case law limits antitrust analysis in such a fashion. 145 Indeed, the primary policy behind antitrust law in the United States is to promote free markets and eliminate anticompetitive practices. 146 A systemic risk analysis allows for the fulfillment of this policy.

E. Systemic Risk Analysis and Sherman § 2

Sherman § 2 provides, in pertinent part: "Every person who shall monopolize, or attempt to monopolize, . . . any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, . . ." 147

The verb "monopolize," as used in Sherman § 2, means to improperly obtain a dominant position in the market so as to exclude actual or potential competition. 148 "Practice short of complete monopoly but which tends to create a monopoly and to deprive the public of the advantages from free competition in interstate trade offends the policy of the Sherman Act." 149

The Supreme Court has held that a person may have "monopolized" under Sherman § 2 if it is established that there is: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. 150 This Article focuses on the first prong of this test; monopoly power, as the second prong does not need to be determined using a systemic risk analysis.

"Monopoly power" 151 has been defined as "the power to control prices or exclude competition" and may be inferred from a predominant market share. 152 This power to control prices or exclude competition has often been called market power, 153 so one may have monopoly power if one has sufficient market share to infer market power. Market share is determined by ascertaining the percentage of control of a product (product market) within a specified geographic area (geographic market). 154

Although case law allows the inference of monopoly power from market share evidence, market share is merely a surrogate for monopoly power because monopoly power is difficult to determine. 155 So if a person has a sufficient market share, it may be inferred that he has monopoly power giving him a dominant position in the market so as to have the power to control prices or exclude actual or potential competition in violation of Sherman § 2. But is there another way to prove monopoly power as defined by the Supreme Court? Case law is silent on an alternative approach, but does not preclude the possibility.

F. Too Big to Fail and Monopoly Power

As a matter of economic reality, when a firm creates a systemic risk it is deemed too big to fail and the government intervenes with public funding, merger approval, and expedited bankruptcy. 156 Conversely, any competitors not too big to fail are allowed to fail and are thus excluded from competition. 157 Further, a firm that is too big to fail has an improper competitive advantage that is likely to result in the control of prices and exclusion of competition in that it can take greater risks than other firms without suffering the consequences of poor judgment. 158 Such a situation does not promote efficiency, nor is it the type of "risk taking that produces innovation and economic growth." 159 If monopoly power is indeed required for a Sherman § 2 violation, it would be difficult to assert that a firm that is a systemic risk does not have monopoly power when it can have such a direct impact on prices and competition.

G. Systemic Risk Analysis Allows for Price Control

If we are to continue defining monopoly power as the power to control prices or exclude competition, the first thing we must ask is "Does a systemic risk analysis establish a tendency to be able to control prices?" An institution that is a systemic risk can control prices in some industries because consumers know that that institution will not fail, and hence will be around to service a product or, in the case of financial services, will be there to pay accounts. Let us look at two examples from the current economic crisis, General Motors and Bank of America.

In the General Motors case, the too big to fail argument rested, in part, on the argument that failure in terms of filing for bankruptcy was not an option because, even under Chapter 11 reorganization, consumers would not buy a GM car if they thought GM might not be there to honor warranties. 160 While GM did ultimately file for bankruptcy under Chapter 11 reorganization after receiving bail- out funds, it did so with the government's assistance to ease the process, the government's guarantee of warranties to ease consumer fears, and the government's cash for clunkers program to help sales post-bankruptcy. 161 The other two domestic automobile manufactured in the United States, Ford and Chrysler, received similar governmental assistance while international competitors such as Honda and Toyota do not seem to be considered for bail-out monies, government guarantees of warranties, or bankruptcy preferences. How does this affect the ability to control price? With the government providing support, GM sales managed to improve despite all of its financial problems while Toyota and Honda sales declined. 162 Such government intervention off-sets the cost of doing business for GM thus allowing GM to sell its product at a lower price than its competitors without similar government subsidies. There is a plethora of evidence that government subsidies enhance a firm's ability to control price. 163

As for the Bank of America example, once again we have the price controlling phenomenon of government subsidization of the too big to fail firm. 164 Specifically, a year after Bank of America received its government subsidy for being a systemic threat to the economy it raised its fees to its customers while smaller banks that were not subsidized by the government had to lower their fees in order to compete because customers would rather deal with a too big to fail bank than one the government would let fail. 165

H. A Too Big to Fail Firm May Eliminate its Competitors

Certainly, a too big to fail firm has a competitive advantage in that it is, in essence, insured or subsidized by the government so it will not be allowed to fail. For example, in the financial services sector from January 1, 2009 to October, 2009, 89 FDIC financial services firms have been allowed to fail 166 while too big to fail financial institutions were bailed-out with public funds and allowed to buy failing institutions with public bail-out money further exacerbating the concentration level problem. 167 When the empirical evidence so clearly establishes an elimination of competitors that is not a natural consequence of efficiency, innovation, and free market forces but rather an unfair competitive advantage a market share analysis is not necessary. 168

Accordingly, a firm that is too big to fail may violate Sherman § 2 because it has unacceptable monopoly power. Further, from a broader antitrust policy point of view, too big to fail firms skew the free market due government intervention. More could be done to promote a free market by utilizing antitrust law to eliminate systemic risk than by attempting to manage the risk through regulation. 169

I. Mergers Under Clayton § 7 and Too Big to Fail

In enacting Clayton § 7 and its amendments, Congress was concerned with arresting concentration trends before they became a problem sufficient to constitute a violation of the Sherman Act. 170 "Thus, a merger may violate § 7 of the Clayton Act merely because it poses a serious threat to competition and even though the evidence falls short of proving the kind of actual restraint that violates the Sherman Act, . . . ." 171 Clayton § 7 provides, in pertinent part:

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. 172

"Congress used the words 'may be substantially to lessen competition,' to indicate that its concern was with probabilities, not certainties." 173 It is a "prophylactic measure" 174 intended to prevent the anticompetitive effects in their incipiency. 175 While Congress did not specify any test to be used in determining whether a proposed merger may substantially lessen competition, 176 courts have recognized the relevance of economic data, 177 including market share, 178 and concentration levels. 179 However, statistics concerning market share and concentration levels are not conclusive indicators of anticompetitive effects. 180 Rather, a merger has to be viewed functionally, in the context of its particular industry 181 and take into account a particular market's structure and history. 182

The method of determining market share has already been discussed above. Market concentration may be determined by a dramatic increase in the Herfindahl-Hirschman Index (HHI) as articulated in the U.S. Department of Justice, Merger Guidelines § 1.5 (1997). 183 However, the Merger Guidelines are not binding upon courts. 184 Further, "the Guidelines neither dictate nor exhaust the range of evidence that the Agency must or may introduce in litigation." 185

The problem with merger analysis when it comes to the financial services sector is that there has been little Court guidance in this area since Philadelphia Bank 186 in 1963 and Connecticut National Bank 187 in 1974. Economic realities have greatly changed since the Court has expressed an opinion in these cases. From the 1970s through 2000 banking has changed from a "cluster of [banking] products" 188 in limited regions to one stop shopping financial services supermarkets that are nationwide and, in some cases, worldwide. 189 Despite this change in economic realities, regulatory agencies have continued to review mergers in the financial services sector, as if we still had "banks" with a simple cluster of banking products, conducting regional business as in the days of yore. 190 This has resulted in questionable economic data input for market share and concentration level analysis and the approval of many mergers, which has, in turn, increased concentration levels 191 and resulted in the creation of firms that are too big to fail. 192 Nothing in the statutory or case law requires a court to blind itself to these economic realities. 193

J. Systemic Risk Analysis

It has been argued that the mere fact that a firm's failure is likely to cause a catastrophic effect on the market should be enough to find a substantial lessening of competition. 194 This holistic approach may negate the need to determine the relevant market due to the nature of the systemic failure causing cross-market reductions in competition. Thus, if there is systemic risk there is a probability of a violation of Clayton § 7. But the Supreme Court in Brown indicated that it was critical to determine the relevant market in order to determine if there is a probability of a substantial lessening of competition. 195 Accordingly, it may still be necessary to identify the product and geographic market.

Although the structure of the U.S. banking market has certainly changed since Philadelphia Bank, 196 the Court there broadly defined the product as "various kinds of credit" and services. 197 Economic reality would dictate that this would now include investment banking, commercial banking, and insurance. Because the assets held by a financial services institution is a measure of the credit and services it can extend, courts should consider, for product identification purposes, the assets held by a financial services firm in the relevant geographic market. 198

As for the geographic market, the Court in Philadelphia Bank held that this is the area where the bank operates and the customer can reasonably turn for services. 199 Currently, the three largest financial services firms in the United States, J.P. Morgan, Bank of America, and CitiGroup, do business through-out the United States. 200 These three firms control approximately 44% of the financial services assets in the United States. 201 This is especially significant given the fact that concentration levels are growing. 202 Further, there is already some evidence that this size market share has substantially effected competition as the larger banks can, and have, raised prices (fees) to their customers with impunity. 203 Smaller banks cannot compete because they have to pay more to borrow money and do not have the "safety net" of too big to fail. 204 The concern of over concentration meant to be addressed by Clayton § 7 has been realized. 205 Finally, Clayton § 7 was intended to be prophylactic. As we can see, systematic risk problems may cause an increase in concentration levels, a reduction in competition and an increase in prices. Accordingly, systemic risk analysis is a factor that should be considered in a merger review.

#### Those institutions possess such a large size, interconnectedness, AND lack of substitutability to constitute an unacceptable risk. Only antitrust can resolve it.

Sharon E. Foster 11, Associate Professor, University of Arkansas School of Law, “Systemic Financial-Service Institutions and Monopoly Power,” 60 Cath. U.L. Rev. 357, 2011, lexis.

[\*358] The financial crisis of 2008 gave rise to considerable debate regarding the causes of the crisis and prevention of its future occurrence. 2 However, affirmative assurance that such a financial crisis never happens again is highly unlikely. Certainly, the Dodd-Frank Wall Street Reform and Consumer Protection Act does not purport to ensure a similar financial crisis never happens again, despite rhetoric to the contrary, because it protects systemic financial-service institutions that were at the heart of the 2008 financial crisis. 3 As long as systemic financial-service institutions exist, there is a strong probability that another financial crisis will occur and that a taxpayer-financed government-bailout will be necessary. 4 Indeed, the Dodd-Frank Wall Street Reform and Consumer Protection Act anticipates such an event. 5

[\*359] Though the Act protects the cause of the 2008 financial crisis, another financial crisis can be mitigated through the application of antitrust law, specifically § 2 of the Sherman Antitrust Act (Sherman Act), an anti-monopolization law. 6 Section 2 of the Sherman Act prohibits monopoly power acquired or maintained through anticompetitive conduct. 7 Accordingly, the application of § 2 to a systemic financial-service institution will depend on whether the institution has monopoly power and, if so, whether such power was acquired or maintained through anticompetitive conduct.

This Article begins by examining the origins of § 2 of the Sherman Act and its evolution, exploring its aim to meet the goals of modern, economic policy. The passage of § 2 invoked a populist approach, which reflected the concern that a concentration of private wealth is dangerous to democracy. 8 Though this remains a concern today regarding systemic financial-service institutions, the populist approach was never fully embraced by the courts. Instead, the economic-efficiency approach, which used antitrust law to address market failure and to maintain and promote a free market system, became the dominate doctrine.

Section II of this Article illustrates how systemic financial-service institutions do not serve economic efficiency well and, indeed, exacerbate market failure and encourage more government intervention through bailouts. Accordingly, applying § 2 of the Sherman Act to systemic financial-service institutions is not incompatible with either the populist or the economic-efficiency approach.

Section III then discusses the application of § 2 liability to systemic financial-service institutions as a solution to the recent, financial crisis and as a means to prevent another crisis. Notably, this application has elicited little discussion, likely due to the belief that any one systemic financial-service institution does not have a sufficient market share to establish the monopoly power necessary to implicate § 2 liability. However, the courts have never limited monopoly power to a market-share analysis. 9 This Article proposes that monopoly power can be established by the negative externality that systemic financial-service institutions can create. This negative externality is an extorted government subsidy that is not available to nonsystemic financial-service institutions, which results in an anticompetitive environment, monopoly prices, and consumer harm. This Article concludes that such power is acquired or maintained through anticompetitive conduct--specifically deliberate acts aimed to obtain systemic status.

[\*360] The recently passed Dodd-Frank Wall Street Reform and Consumer Protection Act does not contain a specific antitrust immunity provision. 10 Section IV addresses the possibility that, even if systemic financial-service institutions have monopoly power and such power is acquired or maintained through anticompetitive conduct, the courts nevertheless might find an implied immunity because of the regulatory nature of the industry. This section goes on to conclude that, although courts are reluctant to apply antitrust law to regulated industries, recent experience with inadequate regulatory oversight should prompt courts to reconsider this trend and apply antitrust law absent Congressional direction otherwise.

Next, Section V discusses judicial hurdles associated with the application of § 2 of the Sherman Act to systemic financial-service institutions, including the problems of quasi-implied immunity, cyclical government enforcement, a lack of judicial understanding of the economic theories underlying antitrust law and the financial-services sector, the expense of litigating antitrust cases, the potential resultant social and economic burdens, and the potential side effects created if systemic financial-service institutions are required to divest and cannot compete with foreign, systemic financial-service institutions. But, though applying § 2 to systemic financial-service institutions may create substantial problems, the possible prevention of a future financial crisis outweighs the potential consequences of applying § 2. In fact, a more radical approach may be required to guarantee financial stability.

Finally, Section VI addresses some of the shortfalls of exclusively relying on regulatory oversight and reform to resolve the problem of systemic financial-service institutions, especially when reform does not work to eliminate these institutions. Specifically, the recently passed regulatory reform will possibly mitigate some of the negative effects of systemic financial-service institutions if problems are caught in time. However, the regulation fails to eliminate risks that may circumvent the preventative measures. This is not to say that regulatory reform is undesirable, rather that it is merely a limited remedy that should be augmented with antitrust law.

I. HISTORY OF THE POLICY OF U.S. ANTITRUST LAW

As long as there has been trade, there have been attempts to monopolize. Laws relating to restraints on trade can be traced back to the ancient Roman period. 11 Competition laws pertaining to restraints on trade evolved into [\*361] middlemen laws and were known as forestalling, regrating, and engrossing. 12 These laws primarily dealt with enhanced prices created by the use of middlemen or tactics that reduced supply. 13 Initially, laws addressing monopolies were limited mostly to special grants or letters patent given by the crown for the exclusive right to manufacture or sell a good. 14 Though the middlemen laws in England were repealed in 1772, and common law aspects were abolished in 1844, 15 case law relating to restraints on trade continued to develop. 16 As such, the development of economic theories appertaining to supply and demand emerged along with economic theories relating to monopolies. 17

From this English common law, the United States developed its antitrust law. 18 The Congressional Record containing the debates leading to the passage of the Sherman Act in 1890--the first antitrust act in the United States--indicates a concern with restraints on trade similar to English common law concerns. 19 However, U.S. antitrust law also reflects the unique social, political, and economic situation in the United States during the late nineteenth century. 20

When Senator John Sherman first introduced the bill that declared trusts and combinations in the restraint of trade unlawful on December 4, 1889, it did not include single party offenses, known as Sherman Act § 2 monopolization offenses. 21 The original bill prohibited arrangements that tended to "prevent full and free competition . . . and all arrangements . . . which tend to advance [\*362] the cost to the consumer." 22 After introduction, the bill was referred to the Senate Finance Committee, which developed a substitute bill that Senator Sherman presented on March 21, 1890. 23 Much of the debate regarding the substitute bill revolved around Congress's constitutional power to legislate trade as supplied by the Interstate Commerce Clause. 24 The legislative history indicates that Senator Sherman did not intend to concentrate private economic power in the hands of a few who could control prices and thereby harm consumers; 25 rather Senator Sherman meant to permit federal courts to hear matters that affected interstate and international commerce on the same common law basis as state courts, 26 in part because he did not ascribe to the economic argument that more efficient production reduced prices to consumers. 27

Debate on the bill continued on March 27, 1890, again with a focus on the constitutionality of the proposed legislation, and the matter was referred to the Judiciary Committee. 28 The Judiciary Committee reported back on April 8, 1890, with an amended bill that substantially became the current Sherman Antitrust Act. 29 This version of the bill did not include specific reference to consumers and incorporated the unlawfulness of monopolization provision in § 2. 30 Although considerable debate took place regarding this bill, most of it centered on amendments relating to the damage provisions, which Congress ultimately rejected. 31 Prior to its final passage, however, an interesting exchange took place between Senators George F. Edmunds and John Edward Kenna regarding monopolization. Senator Kenna was concerned that deeming monopolization unlawful would penalize one who, solely by "his own skill and energy," obtained an innocent monopoly. 32 Senator Edmunds responded that such a result would not occur if the individual did not buy off his adversaries or obtain possession of all of the goods in question. 33 Senator Hoar took the position that the bill's use of the term "monopoly" merely reflected an intent to [\*363] codify the common law's stance on restraint of trade, so as to make it equally bad for one to restrain trade as it is for two or more entities to do so. 34 Ultimately, the Senate passed the bill on April 8, 1890, without further amendment by a vote of fifty-two to one, with twenty absent. 35

The House of Representatives considered the bill on May 1, 1890, where, because of the international aspect of the bill, the debate focused on protective tariffs and whether these were conducive to the creation of trusts. 36 Additionally, the record reveals public outrage over the concentration of private wealth into the hands of a few. 37 At that time, as now, there was great public outcry regarding overreaching interest rates on mortgages and the price of necessities, which indebted the common people and further concentrated private wealth into the hands of a few. 38

Many legal scholars and authorities support the populist position that United States antitrust law was premised on political and social values, such as the fear that the concentration of private wealth in the hands of a few is dangerous to democracy. 39 This populist view of the purpose of antitrust law is also [\*364] supported by scholars of economic history and political science. 40 Indeed, the political cartoons of the time certainly suggest a public sentiment that private economic wealth was undermining the democratic process:

Image 1 41

Additionally, some court opinions support the populist view by articulating concerns regarding the concentration of wealth in the few. 42

[\*365] Despite historical evidence to the contrary, some argue that the sole policy behind antitrust law is to increase economic efficiency. 43 The economic-efficiency argument stems from the Chicago School antitrust analysis, which gained judicial recognition in the 1960s and, some would argue, became a dominant theory in the 1970s and 1980s. 44 The Chicago School and post-Chicago School of economic theory do not represent the first time economic theory played a role in the policy of antitrust law, however. For example, in the first Supreme Court decision regarding the Sherman Act, United States v. E. C. Knight Co., the Court was faced with the legality of a sugar trust. 45 Although the Court's decision ultimately focused on defining interstate commerce and found that manufacturing monopolies did not involve commerce, the Court indicated in dicta that economic considerations are relevant to the issue of monopolization: "[i]n the view which we take of the case, we need not discuss whether, . . . according to political economists, aggregations of capital may reduce prices, therefore the objection to concentration of power is relieved . . . ." 46

Though it appears that economic considerations have always played a role in antitrust law, it is fair to say that, given its evolution over the years, 47 antitrust law changes to reflect current political, social, and economic realities. 48 Accordingly, as the Chicago School and post-Chicago School theory of economic efficiency gained political and social prominence, some antitrust scholars advocated the mathematical certainty of economic efficiency as a means to achieve legal certainty. 49 Unfortunately, the mathematical certainty [\*366] of modern economic theory, as reflected in national economic policy, has recently proven unreliable because humans do not act with mathematical certainty. 50 Fortunately, the Supreme Court has never fully abandoned a more holistic approach to the problem of antitrust law. 51 In fact, in Spectrum Sports, Inc. v. McQuillan, the Court held:

The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest. 52

The financial crisis of 2008 was the result of a market failure. 53 The question facing Americans today--and the question this Article addresses--is whether antitrust law may be utilized to correct some of the problems that caused the financial crisis of 2008.

Certainly, some of the initial goals of antitrust law were intended to address the problem of a concentration of private economic power, though the problem still exists today. 54 But, history also suggests that preserving the free market is an important goal of antitrust law, and, in fact, it has played a critical role in the development of antitrust law. 55 The reason for this dichotomy of antitrust theory is simple: the two goals are not mutually exclusive. Both the populist view that the concentration of private economic power undermines the democratic process 56 as well as free-market economic theory raise concerns about the propriety of government intervention. 57 In the 2008 financial crisis, the government intervened to rescue systemic financial-service institutions. 58 The populist perspective would likely posit that this government intervention came at the request of systemic financial-service institutions and was granted [\*367] on generous terms due to their political power. 59 Alternatively, under the free-market economic theory, a firm that took unreasonable risks should fail, not receive a government bailout. 60 As the Supreme Court pointed out in Spectrum, antitrust law is aimed at protecting the public from the failure of the market. 61 Systemic financial-service institutions that have a propensity for creating market failure harm the public 62 and violate both the populist and economic efficiency theories of antitrust law. 63

II. THE INEFFICIENCIES OF SYSTEMIC FINANCIAL-SERVICE INSTITUTIONS

Systemic financial failure is a domino effect 64 because an institution, market, or instrument can cause widespread distress in the financial system or overall economy. 65 In this regard, systemic financial [\*368] failure market failure is market failure. 66

Several different market-intervention methods have been utilized to address systemic financial failure caused by systemic financial-service institutions. A "bailout," through which the government funnels public funds into a systemic financial-service institution, is one method used to rescue the economy from systemic financial failure. 67 Another method used is merger, where the government finds a relatively healthy institution to take over the weaker one. 68 Although in the short term such methods may soften the consequences of a systemic financial failure, the long-term effects have a high-cost impact on competition in a free market in at least three ways. First, bailouts skew competitive markets by injecting government aid into systemic financial-service institutions, but not into nonsystemic financial-service institution competitors. 69 This not only creates the moral hazard of rewarding bad judgment, but it also amounts to a subsidy and creates an unfair advantage by providing the systemic financial-service institution with publicly funded insurance against failure. 70 Second, the merger method consolidates systemic [\*369] financial-service institutions, which exacerbates the consequence of any failure of the remaining systemic financial-service institutions. 71 Finally, these methods undermine the basic tenets of free-market theory because the government saves an institution the market deemed unfit. 72

III. SYSTEMIC FINANCIAL SERVICE-INSTITUTIONS AND § 2 OF THE SHERMAN ACT

Though financial-reform laws and regulation have not addressed the possibility of eliminating systemic financial-service institutions through antitrust law, international financial reform has raised the possibility of mitigating the situation through merger review. For example, the Treaty on the Functioning of the European Union recognizes that state aid may distort free markets by creating an unfair trade advantage. 73 Although the treaty provided for extraordinary measures to address the financial crisis in 2009, 74 such as mergers between large financial-services institutions and state aid (bailout money), the European Union's Competition Commission will require some divestiture of these institutions once the financial markets have stabilized. 75 However, these measures are responsive and do not reflect a policy to [\*370] eliminate, or prevent the formation of, systemic financial-service institutions before they require state aid. 76

In the United States, there has been a slow, but growing, recognition of the prudence of addressing the problem of systemic institutions through antitrust law. 77 J. Thomas Rosch, a Commissioner for the Federal Trade Commission--one of the U.S. federal agencies charged with antitrust enforcement--indicated the possibility of addressing systemic financial-service institutions through domestic antitrust law. 78 This suggestion initially received criticism, 79 but it has garnered support over time, at least with respect to addressing systemic financial-service institutions through merger law and regulatory reform. 80

The critical question is: will current antitrust law, in particular § 2 of the Sherman Act, work? Theoretically, the answer is "yes," if the courts properly define a systemic financial-service institution and apply case precedent defining monopolization. But this would require the courts to recognize the economic reality that market share alone is insufficient to determine monopoly power in the case of systemic financial-service institutions.

A. Defining Systemic Financial-Service Institutions

The Financial Stability Board (FSB), an international financial organization consisting of "[n]ational and regional authorities responsible for maintaining financial responsibility . . .; [i]nternational financial institutions; . . . and [i]nternational standard setting, regulatory, supervisory and central bank bodies," 81 along with the International Monetary Fund and Bank for International Settlements, has identified three key characteristics of systemic institutions that provide a good starting point for defining the entities. 82 These are:

[\*371] 1. Size. The determination of size takes into account on- and off-balance-sheet items, the institution's assets, transactions, and general risk exposure. 83 These characteristics are then analyzed with regard to the business model used and the complexity of the institution itself. 84 A systemic institution's potential for problems in the case of failure is often connected to the size of activity in a market. 85

2. "Lack of substitutability." Generally, certain types of infrastructure-like services provided by a systemic institution to other institutions are of systemic importance. 86 When an institution provides a voluminous amount of services, the fact that these institutions have no adequate substitutes is of great concern. 87

3. Interconnectedness. This refers to the aforementioned domino effect, in which a systemic institution's potential failure will have immediate and sizeable effects on a large number of other significant institutions. 88 This is also known as counterparty risk. 89

Additionally, the FSB identifies a number of important considerations that supplement these three criteria. 90 One of these is leverage. 91 Leverage involves the interaction of relatively illiquid, risky assets and large amounts of short-term funding, all of which creates great potential for disruptive failures. 92 It is often understood as a ratio of debt to equity. 93 Together, these criteria and characteristics give rise to an analysis of systemic significance. 94 The FSB posits that "[t]he ideal model-derived measure of systemic impact would be built on the basis of a macroeconomic model that includes a developed financial sector to capture the macro-financial linkages, but also a description of the network of links between financial institutions and markets." 95 With [\*372] this, the FSB has identified four concepts that are helpful in analyzing specific systemic financial institutions: size, interconnectedness, leverage, and systemic significance. 96

The FSB criteria relating to a systemic financial institution were derived from a survey of central bankers and represent a general consensus regarding key characteristics of a systemic institution. 97 Additionally, these characteristics correspond with what most commentators have stated regarding systemic institutions. 98 Finally, the FSB characteristics are the same characteristics articulated in financial regulatory reform in the United States. 99 By applying the FSB model to situations in the past where the United States determined that a financial-services institution was systemic and warranted government intervention, we can determine the relative systemic risk of a financial institution.

1. An Example from the Past: Continental Illinois

A famous example of a systemic financial-institution is Continental Illinois National Bank (Continental). 100 In 1984, fearing the failure of the seventh-largest bank in the United States, regulators bought Continental's bad debt, and the Federal Deposit Insurance Corporation (FDIC) fully protected all of Continental's depositors despite the limits on deposit insurance. 101 Applying the characteristics of a systemic institution to Continental at the time of the crisis reveals the following:

[\*373] 1. Size. Continental had approximately $ 40 billion in total assets in 1983. 102 All U.S. banks had $ 2.05 trillion in total assets in 1983. 103

2. Interconnectedness. A total of 2,300 banks invested in Continental. 104 Sixty-six of those banks, with total assets of $ 5 billion, "had more than 100 percent of their equity capital invested in Continental." 105

3. Leverage. 20:1. 106

4. Systemic Significance. The Gross Domestic Product (GDP) in 1983 was $ 3.5 trillion. 107 Using the formula that assets + (assets x leverage) + interconnectedness = potential exposure, the calculation works out as follows:

$ 40,000,000,000 + ($ 40,000,000,000 x 20) + $ 5,000,000,000 = $ 845,000,000,000. The U.S. economy may be calculated by looking at banking assets plus GDP--$ 2,049,018,000,000 + $ 3,500,000,000,000 = $ 5,549,018,000,000. Accordingly, the exposure of funds resulting from Continental's financial structure was 24.1% of GDP and 15.2% of GDP combined with U.S. banking assets.

2. Example from the Past: Long-Term Capital Management

In 1998, the hedge fund Long-Term Capital Management (LTCM) was about to fail. 108 Again, the government intervened, fearing a systemic event. 109 The same characteristics as applied to LTCM demonstrate the following:

1. Size. LTCM had $ 126 billion in total assets in 1998. 110 All U.S. banks had $ 5,283,300,000,000 in assets in 1998. 111

2. Interconnectedness. At least $ 3 billion. 112

[\*374] 3. Leverage. 55:1. 113

4. Systemic Significance. The GDP in 1998 was $ 8,694,600,000,000. 114 When applying the formula above, assets + (assets x leverage) + interconnectedness = potential exposure, the following results: $ 126,000,000,000 + ($ 126,000,000,000 x 55) + $ 3,000,000,000 = $ 7,059,000,000,000. In 1998, the U.S. economy--banking assets plus GDP--was $ 13,977,900,000,000 ($ 5,283,300,000,000 + $ 8,694,600,000,000). Accordingly, exposure was 81% of GDP and 50.5% of GDP combined with U.S. banking assets.

Based upon these two examples, when the sum of a financial institution's assets, leverage, and interconnectedness reaches around 15.2% of GDP plus U.S. banking assets, the U.S. government will intervene. This intervention is usually in the form of a capital infusion and a guarantee to the institution's creditors that they will be made whole at the expense of U.S. taxpayers. 115

B. Section 2 of the Sherman Antitrust Act

Once it has been determined that a financial-service institution is systemic, the next question is whether it violates § 2 of the Sherman Act. As indicated above, a systemic financial-service institution runs afoul of general antitrust principles, such as those reflected by the populist and economic-efficiency theories. 116 But, is it possible that a single systemic financial-service institution can monopolize trade or commerce in violation of § 2? Based on the foregoing analysis, the answer is yes.

Section 2 of the Sherman Act provides, in pertinent part: "[e]very person who shall monopolize, or attempt to monopolize, . . . any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." 117 The verb "monopolize," as used in § 2, means to improperly obtain a dominant position in the market so as to exclude actual or potential competition. 118 And, a federal judge stated that "[a] practice short of complete monopoly but which tends to create a monopoly and to deprive the [\*375] public of the advantages from free competition in interstate trade offends the policy of the Sherman Act." 119

The U.S. Supreme Court held that a monopoly under § 2 is established if there is "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." 120

1. Monopoly Power

The first prong of § 2 of the Sherman Act test is "monopoly power," 121 which the Supreme Court defined as "the power to control prices or exclude competition." 122 Traditionally, courts have relied upon empirical evidence of monopoly power, or, in the absence of empirical evidence, they have conducted a market-share analysis to determine if a monopoly exists. 123

Market share is determined by ascertaining the percent control of a product (product market) within a specified geographic area (geographic market). 124 If the market share reaches a certain level, courts will infer market power (monopoly power), 125 which is the power to control prices or exclude competition. 126 Additionally, courts have required significant entry barriers to prevent new competition from entering the market. 127

Despite this, courts have not held the market-share analysis to be the exclusive method for determining monopoly power. 128 Indeed, the economic [\*376] theory, which influences courts regarding antitrust analysis, 129 recognizes that a pure market-share analysis is misleading. 130 For example, a pure market-share analysis inaccurately assumes a Pareto-optimal market, 131 and it ignores the effects of externalities. 132 That said, applying a market-share analysis would seem to indicate that a systemic financial-service institution with less than thirty-three percent market share has little chance to be found as possessing monopoly power. 133

a. Market Share and Monopoly Power

The market-share analysis provides a relatively simple test that can be understood and applied in the litigation context. But, to apply a market-share analysis, the court must first define the product market. This seemingly simple question turns out to be extremely complicated.

i. Product Market

Under a market-share analysis, a broadly defined product market will result in a lower market share than a narrowly defined one. For example, a firm may have only fifteen percent of the shoe market, but have seventy-five percent of the work-boot market. Such a firm would probably have the ability to control prices or eliminate competitors in the work-boot market, but not the overall shoe market.

To a large extent, the product market depends upon the elasticity of the demand curve. 134 A product is elastic when consumers turn to a substitute when an original product's price increases. 135 Thus, a firm with a high market share in an elastic market may have less market power than a firm with less [\*377] market share in an inelastic market. 136 Accordingly, in a Sherman Act analysis, a court may ask, for example, if a customer seeking a work boot would substitute it for a different type of shoe. To the extent the answer is "yes," the product market would be elastic. Although courts certainly take elasticity into consideration, 137 their ability to correctly define the product market, including what properly constitutes a substitute, has been questioned. 138

The product market for financial services has fluctuated over time. Initially, the Glass-Steagall Act of 1933 had the effect of separating investment banking and commercial banking. 139 Given this distinction, the Supreme Court, in United States v. Philadelphia National Bank, defined "product market" for commercial banking as "various kinds of credit . . . and services." 140

[\*378] In the nearly five decades since the Court's Philadelphia National Bank decision, the product market has changed significantly because of the repeal of the Glass-Steagall Act in 1999. 141 As a result, banks are currently allowed to conduct both commercial banking and investment banking. 142 This suggests a more elastic product market because customers are no longer limited to commercial banks for some services and investment banks for others. Despite this major development, the Philadelphia National Bank product-market definition of 1963 remains unchanged. However, the Philadelphia National Bank rule allows for adjustments to reflect trade realities. The Court stated, in pertinent part, "[i]n sum, it is clear that commercial banking is a market 'sufficiently inclusive to be meaningful in terms of trade realities.'" 143 If economic reality is applied to the essence of the Philadelphia Bank rule, it becomes evident that the cluster of products and services offered solely by the commercial banks in 1963 are offered by a variety of financial-service institutions today. 144 Accordingly, the product market should be singly defined for purposes of financial-service institutions, and should no longer be divided between commercial and investments banks.

This economic-reality approach would seem to broaden the product market and reduce market share as well as the ability to establish monopoly power. However, the functional interchangeability of these financial-service institutions suggests otherwise, that a more elastic product market does not end the problem. As the court found in FTC v. Staples, submarkets may exist within the broader product market for purposes of product-market definition and, hence, monopoly power. 145 The application of a submarket analysis narrows the product-market definition and increases market share. Indicia used by the courts to determine if a submarket exists include: "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized [\*379] vendors." 146 The court in Staples noted that these were "practical indicia," thereby permitting a finding that a submarket exists in situations where some, but not all, of the indicia are present. 147 For example, in Staples, where the focus was on sensitivity to price change, the court noted that office-supply superstores, such as Staples, Office Depot, or OfficeMax, only viewed each other as competitors in consumable office supplies and did not consider other non-office supply superstores, such as WalMart. 148

Applying the Staples indicia, it is apparent that systemic financial-service institutions constitute a submarket. This denotation has the effect of increasing market share by narrowly defining the product market as a submarket. This is accomplished by first considering the Dodd-Frank Wall Street Reform and Consumer Protection Act's treatment of systemic financial companies as separate economic entities that have separate prudential requirements, capital requirements, and methods to wind-down a failed systemic financial-service institution. 149 Second, the large size of systemic financial-service institutions permits them to carry out large, complex business transactions for their distinct customers. 150 Third, systemic financial-service institutions charge higher interest rates for loans and higher fees to customers, while paying lower interest rates to customers on consumer saving and checking accounts than do nonsystemic financial-service institutions. 151 Finally, systemic financial-service institutions raise fees with little-to-no regard for the business actions of nonsystemic financial-service institutions. 152 All these factors suggest a submarket in financial services offered by systemic financial-service institutions.

Of course, there has been much criticism of the submarket analysis, specifically contending that it pays insufficient attention to the relevant market's ability to charge monopoly prices. 153 Indeed, these critics present a compelling argument to the extent that the submarket theory does not reflect [\*380] economic reality expressed in terms of ability to control prices or eliminate competitors because it creates too narrow a market, therefore increasing the probability of false positives. However, given the fact that many commentators and most regulators seem to differentiate between large, medium, and small banks, there is a conception in the trade that bank size somehow correlates to the economic reality of bank markets. 154

ii. Geographic Market

"Geographic-market area" is defined as the area where a hypothetical monopolist could effectively control prices. 155 In the financial-services sector, the Supreme Court last defined the geographic market in a 1970 bank-merger case, which applied the Philadelphia National Bank case. 156 Since then, the geographic market has greatly changed because of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994. 157 In the past, the Supreme Court held that banking was local in nature:

The proper question to be asked in this case is not where the parties . . . do business or even where they compete, but where, within the area of competitive overlap, the effect . . . on competition will be direct and immediate. . . . This depends upon "the geographic structure of supplier-customer relations." . . . The factor of inconvenience localizes banking competition as effectively as high transportation costs in other industries. 158

[\*381] Although this observation may reflect the economic reality of the time, much has changed in banking since the 1960s. Today, banking is national in nature and, in some instances, international. Electronic banking reduced the necessity of a local bank for many, and commercial banking has expanded into previously forbidden areas of investment banking and insurance. 159 Accordingly, the Court's analysis in Philidelphia National Bank of the geographic market for banking is inapplicable today, especially regarding systemic financial-service institutions, which reach throughout the nation and, in some cases, the world. 160

Fortunately, the Supreme Court recognized that precedent does not require courts to be "blind . . . to economic realities." 161 In the case of systemic financial-service institutions, the national market reflects the reality of how they build and conduct their business. 162 These institutions engage in national planning, are regulated on a national level, and conduct activities in many states. 163 Though one could argue that, under this construct, the geographic market should be the world because systemic financial-services institutions conduct their business on a global basis, such a conclusion depends on the particular institution. Most domestic systemic financial-service institutions have a majority of their assets in domestic, not international, sources. 164 Because the domestic GDP serves as the target for a systemic financial-services institution's achievement of a negative externality of public [\*382] insurance against risk, the national market is a more likely "economic reality" than an international market.

However, the expansion of the geographic market from a local to a national one dilutes monopoly power. 165 As the borders of the geographic market expand, so do the potential market participants, which reduces market power under a market-share analysis. This reduction, coupled with the aforementioned struggle to define the product market, suggests that a systemic financial-service institution would not be found to possess monopoly power under the traditional market-share analysis. Rather, a new approach is required to establish the monopoly power of a systemic financial-service institution.

C. Negative Externalities and Monopoly Power

Given the less-than-optimal application and result of a market-share approach to monopoly power, an alternative method focusing on negative externalities is desirable and feasible under the current law concerning § 2 of the Sherman Act. This Article proposes that systemic financial-service institutions possess monopoly power by virtue of their systemic nature. 166 Though the analysis may depend upon the industry, systemic financial-service institutions can, and have, controlled prices and eliminated competitors. 167

1. The First Prong of§ 2 of the Sherman Act: Possessing Monopoly Power

Section 2 of the Sherman Act has two elements. 168 The first is "the possession of monopoly power in the relevant market." 169 Before delving into monopoly power, it is necessary to explore externalities generally. Externalities may be positive or negative. A positive externality occurs when [\*383] the acts of one person bestow a benefit on another. 170 A negative externality occurs when the acts of one person impose a cost on another. 171 Negative externalities that are not internalized through legislation or regulation create a Pareto-imperfect market, reducing the costs to the producer and increasing the costs to others. 172 The cost reduction does not necessarily result in cost savings to consumers, although it may. 173 When a firm has significant cost savings through externalities and its competitors do not, the firm enjoying the benefit of the negative externalities is able to control prices with a smaller market share. 174

Systemic financial-service institutions benefit from the negative externality of public insurance against risk. 175 This insurance is in the form of government intervention through bailouts, aimed at preventing the systemic financial service institution from failing. With such insurance, the cost of which the public bears, systemic financial-service institutions are free to take high risks with corresponding higher profits and can avoid the traditional free-market punishment for taking unreasonable risks. 176 Firms that can externalize costs have an unfair advantage over firms that cannot. 177 Specifically, a systemic financial-service institution can take greater risks, which results in higher profits and an enhanced ability to control prices with a smaller market share than courts normally required in antitrust litigation. 178

Additionally, the power to exclude competitors is often tied to the excluding firm's ability to raise its rivals' costs. 179 As the global financial crisis of 2008 [\*384] has demonstrated, systemic financial-service institutions have the ability to extort government aid, which reduces the costs of their poor judgment, but relatively increases the costs to their competitors. 180 Empirical evidence has established that this dynamic has the effect of eliminating competitors; 140 FDIC nonsystemic financial-services institutions failed in 2009. 181 During the same time period, the government bailed out systemic financial-service institutions with public funds. 182 These institutions were then allowed to buy other failing institutions with the public-bailout money, which served to compound the problem. 183 The ability of systemic financial-service institutions to eliminate competitors, coupled with the ability to control prices, is indicative of monopoly power.

2. The Willful Acquisition or Maintenance of Monopoly Power: Conduct Prong

The second prong of a Sherman § 2 analysis is "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." 184 "Simply possessing monopoly power" is not enough. 185 The Supreme Court has interpreted antitrust law narrowly to safeguard "risk taking that produces innovation and economic growth." 186 The conduct examined in this Article is the intentional quest of systemic financial-service institutions to become systemic in order to increase the likelihood of a government bailout if excessive risk taking results in a financial crisis. To date, no cases indicate that such conduct is or is not "willful acquisition or maintenance of monopoly power" as required by the Sherman Act, but the underlying antitrust premise of efficiency supports the proposition that such conduct is anticompetitive. 187

The type of conduct indicative of "willful acquisition or maintenance" has variously been described as "exclusionary," 188 "predatory," 189 and [\*385] "anticompetitive." 190 Specifically, it is "behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." 191 A firm does not further competition on the merits when its actions are predicated on some basis other than efficiency. 192

Examples of the type of conduct that have met these requirements in the past include "below-cost prices that drive rivals out of the market and allow the monopolist to raise its prices later and recoup its losses"; 193 "limited circumstances in which a firm's unilateral refusal to deal with its rivals can give rise to antitrust liability"; 194 tying arrangements where a firm requires a customer to purchase a tied product in order to purchase the tying product; 195 fraudulent patent procurement; 196 acquisition of competitors; 197 and restrictive agreements. 198 These examples are illustrative and do not create an exhaustive list; rather, industries employ a myriad of anticompetitive conduct. 199

On the other hand, the Supreme Court has not found illicit conduct when facts indicated price cuts that were not below costs and were used by the company merely to increase business. 200 Further, in price-cutting cases, the Court has expressed concern regarding overzealous antitrust enforcement that could chill competition 201 and harm consumers who benefit from the lower [\*386] prices. 202 Additionally, the Court has been reluctant to find monopolistic conduct in cases where a firm refused to deal with its rivals, finding instead that, as a general rule, firms are free to deal with whomever they please. 203 Finally, the Court has allowed tying arrangements where there is economic efficiency in selling products as a package. 204 To summarize, courts will not "act as central planners, identifying the proper price, quantity, and other terms of dealing." 205 They will, however, intercede when the conduct is predicated on an economically meritless attempt to usurp control of a market. 206

Evidence suggests that systemic financial-service institutions actively seek systemic status in order to obtain a government bailout if their risk taking proves to be in poor judgment. 207 Upon achieving this status, a systemic financial-service institution can leverage at a higher ratio and take greater risks, resulting in higher profits than their nonsystemic competitors because they are not faced with the economic downside to such risks, namely bankruptcy. 208 In a free market, innovation and risk taking is tempered by the reality of bankruptcy, creating a balanced, vibrant, rational market rather than a chaotic, irrational market.

The overarching question is: is deliberately becoming systemic efficient? The Supreme Court has equated efficiency with the theoretical possibility of pro-competitive effects. 209 Perhaps some economists would argue the [\*387] efficiencies of systemic financial-service institutions, but, to date, most argue the opposite. 210

Economies of scale could be efficient for antitrust purposes, 211 as could marketing 212 and distribution efficiencies. 213 But all of these "efficiencies" seem to be premised on a theory of free enterprise--a free market theory that aims to minimize government intervention. 214 In contrast, systemic financial-service institutions seek government intervention through bailouts, a contradiction of the free-market theory. 215 Because antitrust enforcement is also government intervention, the ultimate question becomes: which form of government intervention is more efficient--bailouts or antitrust enforcement?

In balancing efficiencies between bailouts and antitrust enforcement, Judge Learned Hand's negligence formula is instructive. Negligence exists if the burden of preventing a harm (B) is less than the probability that an actor's conduct will result in injury (P), multiplied by the gravity of that injury (L); accordingly, negligence exists if B < PL. 216 As applied to financial reform, efficiency exists if the burden of eliminating a systemic financial-service institution (B) is less than the probability (P) of systemic financial failure (L). It follows that, even if the probability of systemic financial failure can be lowered by managing systemic financial-service institutions, the harm may remain unacceptable relative to the burden of eliminating systemic financial-service institutions through divestiture. In other words, a systemic financial-service institution may be so risky, eliminating--rather than managing--it may be prudent.

[\*388] IV. ANTITRUST AND IMPLIED IMMUNITY IN REGULATED INDUSTRIES

In certain arenas, such as the insurance industry, Congress provides express immunity from antitrust laws. 217 In other regulated industries, Congress expressly preserves antitrust enforcement. 218 But, when legislation is silent on the immunity issue or merely provides a general savings clause, the courts have to consider the issue of implied immunity. 219 Until recently, the possibility of implied immunity from antitrust laws for regulated industries was of little concern. 220 The Supreme Court stated the following in Gordon v. New York Stock Exchange, a case involving securities law: "Repeal of the antitrust laws by implication is not favored and not casually to be allowed. Only where there is a 'plain repugnancy between the antitrust and regulatory provisions' will repeal be implied." 221

However, the Court relaxed the "plain repugnancy" standard in the more recent decision of Credit Suisse Securities (USA) L.L.C. v. Billing. 222

In Credit Suisse, the Court again addressed the issue of implied antitrust immunity in the context of securities law. 223 The Securities Act of 1933 had a general savings clause, 224 but no clause expressly saving antitrust law. 225 The Court, using an implied immunity analysis, applied a four-part test:

(1) an area of conduct squarely within the heartland of securities regulations; (2) clear and adequate SEC authority to regulate; (3) active and ongoing agency regulation; and (4) a serious conflict between the antitrust and regulatory regimes. We therefore conclude that the securities laws are "clearly incompatible" with the application of the antitrust laws in this context. 226

Some suggest that the change in language from Gordon's "plain repugnancy" test to Credit Suisse's "clearly incompatible" test reflects a broader approach by the Court regarding implied immunity, permitting an expanding application of antitrust immunity in cases involving securities [\*389] laws. 227 After this, it remains to be answered whether the Court would extend the Credit Suisse test to banking law.

#### That successfully deters present AND future criminal conduct.

Joel Slawotsky 15, Lecturer, IDC Radzyner Law School. Lecturer, Academic Center for Law and Business. Lecturer, Colman Business School. Lecturer, Haim Striks Law School, "Reining in Recidivist Financial Institutions," Delaware Journal of Corporate Law, Vol. 40, No. 280, 2015, Lexis.

The existing remedy for illegal conduct perpetrated by financial institutions is woefully ineffective. The practice, wherein financial institutions systemically violate the law and the resulting profits dwarf the imposed penalties, has bred disenfranchisement and disdain among the American public. 444 Large corporate profiteers and the racketeers themselves--managers, executives, and directors--bear little or no risk of meaningful criminal prosecution or imprisonment. 445 Moreover, prosecutors are averse to criminally pursuing large financial institutions. 446 Their hesitation is motivated by concerns for large-scale economic consequences:

The government has been reluctant to bring criminal charges against large corporations, fearing that such an action could imperil a company and throw innocent employees out of work. Those fears trace to the indictment of Enron's accounting firm, Arthur Andersen, which went out of businesses after its 2002 conviction, taking 28,000 jobs with it. Ever since, prosecutors have increasingly relied on deferred-prosecution agreements, which rebuke companies without threatening their health. 447

While the prosecutors are averse, the schemes continue and the criminal conduct enriches the financial institutions. 448 The public correctly perceives that the TBTF and TBTJ financial institutions have no meaningful incentive to change and will continue to scheme. 449 The current regime of regulation and penalty assessment is outmoded and unsustainable. What should be the response to rampant corrupt behavior?

Corporations, as juridical organizations, can be prosecuted 450 and subject to an array of sanctions, such as fines and disgorgement of profits. 451 For corporations whose main goal is to engage in criminal acts, the law provides for the "execution" of the business. 452 Many call for prosecutors to become more aggressive and for regulators to cease waiving penalties. 453 Yet, as outlined above, 454 prosecutors and regulators have great personal incentive to not overly punish a financial institution. Thus, demands for more aggressive prosecutorial action may not prove substantially beneficial.

So what is the alternative? Under what circumstances is ordinary fine imposition inadequate? The U.S. Sentencing Guidelines ("Sentencing Guidelines") provide a useful perspective. 455 Pursuant to the Sentencing Guidelines, certain acts of outrageous misconduct justify a departure from the ordinary guidelines and call for punishment that exceeds the norm. 456 Among the types of actors that warrant extraordinary punishment are (1) actors that endanger national security, 457 (2) serial criminals, 458 and (3) actors that threaten financial markets. 459 Accordingly, misconduct that impinges on the national security of the United States, is perpetrated by repeat offenders, or imperils the stability of financial markets should be treated differently.

Financial institutional misconduct closely tracks these types of outrageous misconduct. There is a match between the categories listed in the Sentencing Guidelines and a substantial amount of financial institutional wrongdoing. 460 The institutional misconduct has enabled sanctions avoidance, terrorist enterprises, failed states, looting of national wealth, noncompliance with U.S. tax laws, LIBOR rate rigging, mortgage fraud, market manipulation, and may have proximately caused--or at the very least contributed to--the severe global financial crisis. 461 Thus, to a large extent, the misconduct imperils the national security of the United States and threatens American financial markets. 462 Moreover, many of the institutions are repeat offenders, making them serial criminals. 463 In a stunning display of serial criminality, financial institutions have violated agreements with U.S. prosecutors; for example, Barclays--the bank that former CEO Jenkins promised had changed its ways--was caught violating an agreement with the U.S. Justice Department. 464 In another example, UBS was caught violating its agreement, and the U.S. Justice Department is scheduled to nullify the settlement:

The U.S. Justice Department is set to rip up its agreement not to prosecute UBS Group AG for rigging benchmark interest rates, according to a person familiar with the matter, taking a new step to hold banks accountable for repeat offenses.

The move by the U.S. would be a first for the industry, making good on a March threat by a senior Justice Department official to revoke such agreements and putting banks on notice that these accords can be unwound if misconduct continues. 465

In sum, the misconduct of many financial institutions mirrors the list in the Sentencing Guidelines for defendants whose actions deserve extraordinary punishment. 466

Financial institutions will not have an incentive to act legally unless they risk losing their right to profit or risk having senior managers, officers, or directors imprisoned. 467 As long as these punishments are off the table, there is precious little incentive to rein in misconduct. 468 By allowing the culprits to remain in business, the incentive to cease criminal activity is low:

Perhaps the most interesting part of the prolonged and leak-filled dance leading up to the expected criminal charges has been the effort to assure that the banks will stay in business after they plead guilty. Credit Suisse is expected to admit that it helped Americans evade taxes, and BNP Paribas is expected to admit that it did business with countries blacklisted by the United States. Regulators will not enforce statutes that would seem to bar the banks from some activities.

To put it another way, the Justice Department has gone to great lengths to guarantee that convicted banks will not be treated as criminals.

In being treated that way, the banks will receive the same breaks other banks have come to expect when they are caught violating rules or laws. 469

Financial institutions must be more adequately punished to create a strong enough disincentive to break the law. However, liquidating the financial institution would risk engendering another Enron. A middle approach may be effective.

Financial institutions that commit certain misconduct within a certain time parameter should be sold off to their business rivals. 470 The U.S. Congress should pass legislation that mandates federal courts to dissolve a financial institution whose misconduct falls within the three categories listed in the Sentencing Guidelines. 471 These corporations should be broken up and sold to business competitors. 472 Additionally, their managers and directors should be banned from employment with any successor entity. 473 Convictions, including guilty pleas, would count as violations. 474 Three violations committed within a ten-year time frame should trigger the penalty. 475

This punishment would accomplish several goals. First, the punishment will serve as a clear deterrent from engaging in such behavior. 476 Second, it would remove the senior managers and officers from positions of authority in the successor company hopefully preventing repeat abuse. 477 Third, it would stop the culture of fraud and flouting of the law in the company as it is absorbed by another entity. 478 Fourth, it would likely impede the executives from finding employment in the entire sector as other financial institutions would be loath to hire individuals responsible for the "almost" ultimate sanction. 479 Fifth, it would cause the managers and officers to lose their jobs, which will affect them personally. 480 Sixth, it will potentially reduce the losses to be borne by the shareholders for future misconduct. 481 Seventh, it will reduce the discretionary waivers that prosecutors and regulators can award because of their self-interest in future employment. 482 A federal judge will likely not be subject to the same enticement and lure of future employment with financial institutions. 483

What about the possible negative outcomes? First, senior managers and officers who wish to engage in criminal conduct for a large profit will not be deterred. There exists a potential for such large profits to be created and short-term bonuses awarded, that even severe punishment would not deter every individual. In other words, financial institutions will continue to some extent to engage in criminal behavior. But it should reduce the frequency of criminal conduct because some who would have engaged in the same will be deterred. Second, liability exposure is a latent risk that requires due diligence. 484 By being sold to competitors, an entity becomes a successor and may be liable for the predecessor's hidden misdeeds, which may reduce the price the acquiring entity is willing to pay, thus reducing value to shareholders. 485 Third, illegal conduct may potentially be not prosecuted at all as prosecutorial discretion empowers the government to simply choose not to prosecute. 486 Fourth, settlement of prosecutions with a guilty plea may be discouraged since under the proposal a settlement and guilty plea is counted as a conviction resulting in possible defense verdicts or dismissals. 487

# 2AC

## FinTech ADV

### AT: Sanctions K

#### Sanctions are not dominated by any one theory.

SE 21, MSc, International Economics. MSc, Public Economics, "Is There Any Evidence That Socialist Systems Are/ Were Constrained by Capitalism and This Is the Main Cause for Its Demise?" Economics, 12/20/2021, https://tinyurl.com/y957mf8e.

The premise f the question is somewhat flawed. Embargos &/or sanctions are not capitalist policies. Next embargos definitely hurt prosperity of socialist countries, but it is definitely not the only reason why the economic system is not successful in delivering high material standards for its people.

Full Answer:

I want to explore the assertion often made by proponents of socialism, that socialism did indeed not work only because it was constrained by capitalism

I think the premise of this question is somewhat flawed. Capitalism is poorly defined in economics but Pocket Oxford English Dictionary (11ed edited by M. Waite) defines capitalism as followed:

An economic and political system in which a country's trade and industry are controlled by private owners for profit, rather than by the state.

under the dictionary definition of capitalism, trade embargo, such as the embargo of Cuba is literally anti-capitalist policy. Embargos are implemented by government, they are government intervention not result of operation of markets. They are also not done for profit but as geopolitical interventions.

So the premise that it was the capitalism constraining socialism is flawed, if US would be antagonistic power operating socialist economy embargoing Cuba, then the embargo would still isolate Cuba in exactly same way.

However, let us set the flawed premise aside, since we can easily modify your question a question whether socialism was constrained by the non-socialist governments and it would still be reasonable question to ask.

Any country, socialist or not, will be hurt by trade restrictions. Free trade is generally beneficial because it allows countries to specialize in what they can do best, have larger variety of goods and services, take advantage of economies of scales, it has dynamic effect on technology development and so on (see discussion of this in Krugman et al International Economics Theory and Policy pp 35-36,64-77, 250-253). Even in cases where open trade might not be the first best policy, rent seeking, lack of timely information, informational asymmetries and principal agent problems make free trade often the best possible practical policy for country to pursue (see Krugman 1987).

Consequently, being excluded from participation in free trade will definitely significantly hurt country's economy (although it is worth noting many socialist countries deliberately pursued autarky (i.e. no trade) so it is not clear if let's say Cuba would become free trading nation in absence of embargo). For example, USSR explicitly tried to achieve autarky and maximum level of self-sufficiency (Armstrong 1948). In 1985 the exports+ imports share of GDP was estimated to be only 4% for USSR (Keefe et al 1991) which is basically nothing.

Next in your question you specifically ask if these embargos and sanctions are the only or main reason for demise of socialist economies.

That is highly unlikely for numerous reasons.

* before fall of the USSR in 1980 more than 1/3 of the world (by population) was socialist or socialist aligned, and another 1/3 was unaligned. USSR was also not having sanction put on itself by every democratic country, most of it was USA and UK (see this data by Peterson Institute). Moreover, USSR had its own sanctions against western democratic countries which have mixed but predominantly capitalist economies and they did more or less fine.
* Also, just on a face of it the argument that socialism failed because USA and UK refused to trade with socialist countries seems to be flawed. If every socialist economy needs a capitalist trading partner to sustain itself then socialism is not generally viable economic system. There has to be something else added to the argument to make trade with capitalist nations in that particular time period necessary and not general precondition for success of socialist states that must be present at all times.
* As pointed out by Giskard, in his excellent comments, one could argue here that the problem was relative factor abundance that west had too much capital and socialist countries too much labor. However, this could not be major factor in their demise. While there are certainly gains from trade to be made trade between capital abundant and labor abundant countries, most trade flows cannot be explained simply by different factor abundance (Krugman et al. International Economics pp 128-134). Patterns of trade and gains from trade crucially depend on many other factors such as comparative advantage, network effects etc., so this could not be the primary reason why they would need to trade with USA or UK (although for sure it would help at least a bit). In addition, there were some minor socialist nations that had relatively large capital stocks (see O'Rourke and Williamson (2017) in The Spread of Modern Industry to the Periphery since 1871 ch4). While no substitute for larger nations like USA or UK, it still makes the factor abundance argument weaker.
* Trade is two way street capital abundant countries benefit from trading with labor abundant countries (see Krugmant et al, International Economics Ch 5). So by putting the sanctions on trade with USSR, USA and UK harmed themselves as well. This being said one could still say, they might not suffered equally. It is hard to estimate counterfactual gains from trade between USSR and USA for each party, but a priori there is no reason to even think that USSR suffered more from USA not willing to trade with it. It might well be other way around.
* Core economic characteristic of socialist economies such as state ownership of all factors of production itself is economically inefficient. In economics, it is accepted that countries with good 'inclusive' institutions, such as strong property rights, are more productive and able to develop faster (or even develop at all) than countries with bad 'extractive' institutions, such as forced labor (see Acemoglu 2008, Acemoglu & Robinson 2000a, 2000b, 2001, 2006, 2008; Olson 1984, Bates 1981, 1983, 1989 and sources cited therein)
* Strong property rights, free access to labor markets, free enterprise are all examples of very important inclusive institutions that help economies to prosper and grow. Some of these institutions are not compatible with socialist economies (e.g. free enterprise, strong property rights).
* Historically most socialist countries implement price controls instead of letting prices be determined by market. This in itself is not core feature of socialism (like autraky which is also not in definition of socialism), but for some reason its popular policy omnipresent in all socialist economies.
* Both historically and in the present price controls are generally speaking (there might be few rare exceptions) unmitigated disaster (see Guenette 2020 for more recent overview, or Schuettinger and Butler 2011 for some historical perspective). Non-market prices lead to chronic shortages or waste for goods and services.

For example, China itself started experiencing strong robust growth and economic progress only once it eschewed, direct government ownership of most of the factors of production, price controls, opened itself to foreign investment etc (see Wang and Coase, 2012).

Thus while various sanctions and embargos from democratic countries definitively did not help socialist countries, they are hardly the major factor disrupting socialist economies, generally speaking. The effect is of course heterogenous Cuba likely suffered from sanctions more than USSR, but the socialist economic system as implemented in USSR was effectively imposing economic self-isolation anyway. It also had wider institutional and policy problems that hardly can be ascribed to the sanctions (e.g. I doubt one could show there is any relationship between USA sanctions and USSR having price controls).

## Corporate Crime ADV

## OFF

### Perm---2AC

#### That solves best.

Gar Alperovitz & Steve Dubb 12, Gar Alperovitz, author of America Beyond Capitalism, is Lionel R. Bauman Professor of Political Economy at the University of Maryland and Co-Founder of the Democracy Collaborative; Steve Dubb is Research Director of the Democracy Collaborative, “The Possibility of a Pluralist Commonwealth and a Community-Sustaining Economy,” prepared by the Democracy Collaborative at the invitation of the organizing committee for the American Sociological Association’s 2012 annual meeting, 2012, https://democracycollaborative.org/sites/default/files/downloads/paper-alperovitz-dubb12%25281%2529.pdf

It is increasingly obvious that the United States faces systemic problems. When protestors occupy Wall Street and Ben Bernacke, the Chairman of the Federal Reserve, not only responds to the protestors, but actually casts the actions of the protestors in a favorable light, it is clear these are not ordinary times: Testifying to the Joint Economic Committee of Congress, Bernanke observed that the protestors “blame, with some justification, the problems in the financial sector for getting us into this mess, and they’re dissatisfied with the policy response here in Washington. And at some level, I can’t blame them.”1

Income and wealth disparities have become severe and corrosive of democratic possibilities. The economy is in tatters. Unemployment, poverty, and ecological decay deepen day by day. Corporate power now dominates decision-making through lobbying, uncontrolled political contributions, and political advertising. The planet itself is threatened by global warming. The lives of millions are compromised by economic and social pain. Our communities are in decay.

Is there any way forward?

For the most part, serious scholars and activists have addressed the possibility of progressive change in capitalist systems from one of two perspectives: The “reform” tradition assumes that corporate institutions remain central to the design and structure of the system and that “politics” in support of various “policies” (e.g. taxation, spending, incentives, regulation) will contain, modify and control the inherent dynamic of a corporate dominated system. Liberalism in the United States and social democracy in many countries are representative of this tradition. The “revolutionary” tradition assumes that change can come about only if the major corporate institutions are largely eliminated or transcended, usually but not always by violence— often precipitated by a crisis collapse of the system, leading to one or another form of revolution.

But what happens if a system neither “reforms” nor collapses in “crisis”?

This is essentially where the United States finds itself today. Put slightly differently, we believe the United States is entering a potentially decades-long period characterized by a situational logic of this kind. In a context of “neither reform nor crisis collapse” very interesting strategic possibilities may sometimes be viable. Such possibilities are best understood as neither “reforms” (i.e. policies to modify and control, but not transcend corporate institutions) nor “revolution” (i.e. the overthrowing of corporate institutions), but rather a longer term process that is best described as an evolutionary reconstruction - that is, systemic institutional transformation of the political economy that unfolds over time.

Like reform, evolutionary reconstruction involves step-by-step nonviolent change. But like revolution, evolutionary reconstruction changes the basic institutions of ownership of the economy, so that the broad public, rather than a narrow band of individuals (i.e., the “one percent”), increasingly owns more and more of the nation’s productive assets.

We suggest that such processes of evolutionary reconstruction are becoming observable in many parts of the current American system, and that they are likely to become of continuing— and potentially system-altering—force over time.

One area where this logic can be seen at work is in the financial industry. At the height of the financial crisis in early 2009, for example, some kind of nationalization of the banks seemed possible. It was a moment, President Obama told banking CEOs, when his administration was “the only thing between you and the pitchforks.”2 The President chose to opt for a soft bailout engineered by Treasury Secretary Timothy Geithner and White House Economic Adviser Lawrence Summers; but that was not the only choice available: Franklin Roosevelt attacked the “economic royalists”3 and built and mobilized his political base. Obama entered office with an already organized base and largely ignored it.

When the next financial crisis occurs - and in the judgment of many experts, it will, perhaps soon - a different political resolution with more systemic changing consequences may well be possible. (If not the next crisis, the one after that, or the one beyond...) One option has already been put on the table. In 2010, thirty-three Senators voted to break up large Wall Street investment banks that were “too big to fail.”4 Such a policy would not only reduce financial vulnerability; it would alter the structure of institutional power.

Nor is an effort to break up banks, even if successful, likely to be the end of the process. The modern history of the financial industry—to say nothing of anti-trust strategies in general—suggests that the big banks, even if broken up, will ultimately regroup and re-concentrate as ‘the big fish eat the little fish’ and restore their domination of the system. So what can be done when “breaking them up” fails?

The potentially explosive power of public an- ger at financial institutions was evidenced in May 2010 when the Senate voted by a stunning 96-0 margin to audit the Federal Reserve’s lending (a pro vision included ultimately in the Dodd-Frank legisla-tion)—something that had never been done before.5 Traditional reforms have aimed at improved regula- tion, higher reserve requirements, and the channel ing of credit to key sectors. bring into play a spectrum of sophisticated proposals for more radical change offered by figures on both the left and right. For instance, a “Limited Purpose Banking” strategy put forward by But future crises may conservative economist Laurence Kolticoff would impose a 100% reserve requirement on banks.6 Since banks typically provide loans in amounts many times their reserves, this would transform them into modest institutions with little or no capacity to finance speculation. It would also nationalize the creation of all new money as Federal authorities, rather than bankers, directly control system-wide financial flows.

On the left, the economist Fred Moseley has proposed that for banks deemed too big to fail “permanent nationalization with bonds-to-stocks swaps for bondholders is the most equitable solution...” Nationally owned banks, he argues, would provide a basis for “a more stable and public-oriented banking system in the future.”7 Most striking is the argument of Willem Buiter, the Chief Economist of Citigroup no less, that if the public underwrites the costs of bailouts, “banks should be in public ownership...”8 In fact, had the taxpayer funds used to bail out major financial institutions in 2007-2010 been provided on condition that voting stock be issued in return for the investment, one or more major banks would, in fact, have become essentially public banks.9

Nor is this so far from current political tradition as many think. Unknown to most, there have been a large number of small and medium-sized public banking institutions for some time now. They have financed small businesses, renewable energy, coops, housing, infrastructure and other specifically targeted areas. There are also 7,500 community- based credit unions. Further precedents for public banking range from Small Business Administration loans to the activities of the U.S.-dominated World Bank. In fact, the federal government already operates140 banks and quasi-banks that provide loans and loan guarantees for an extraordinary range of domestic and international economic activities. Through its various farm, housing, electricity, cooperative and other loans, the Department of Agriculture alone operates the equivalent of the seventh largest bank in America.10 And just recently, under pressure from American business, Congress re-authorized the Export-Import Bank to support U.S. trading interests.11

The economic crisis has also produced widespread interest in the Bank of North Dakota, a highly successful state-owned bank founded in 1919 when the state was governed by legislators belonging to the left-populist Nonpartisan League. Between 1996 and 2008, the bank returned $340 million in profits to the state.12 The Bank enjoys broad support in the business community, as well as among progressive activists. Legislative proposals to establish banks patterned in whole or in part on the North Dakota model have been put forward by activists and legislators in Oregon, Massachusetts, Illinois, Maryland, Washington, Minnesota, Florida, Vermont, Idaho, Hawaii, Louisiana, and Virginia. Campaigns to create similar institutions have been launched in Maine and California. 13 In Oregon, with strong support from a coalition of farmers, small business owners, and community bankers, and backed by State Treasurer Ted Wheeler, a variation on the theme —“a virtual state bank” (i.e., one that has no storefronts but channels state-backed capital to support other banks) may be formed in the near future.14 How far the various strategies may develop is likely to depend on the intensity of future financial crises, the degree of social and economic pain and political anger in general, and the capacity of a new politics to focus citizen anger in support of major institutional reconstruction and democratization.

That paradoxically a long era of social and economic austerity and failing reform might open the way to more populist or radical ‘evolutionary reconstructive’ institutional change—including various forms of public owner-ship—is also suggested by emerging developments in health care. Here the next stage of change is already underway. At first, it is likely to be harmful, characterized by Republican efforts to cut back the mostly unrealized benefits of the Affordable Care Act, passed in 2010. The first stages, however, are not likely to be the last. Polls show overwhelming distrust of and deep hostility toward insurance companies. We can also expect growing public anger to be fueled by media accounts of stories like that of Gambino Olvera, an uninsured paraplegic, who was dumped on skid row in nothing more than a soiled hospital gown by Hollywood Presbyterian Hospital in 2007.15

Cost pressures are also building up—and, critically, in ways that will continue to undermine U.S. corporations facing global competitors, forcing them to seek new solutions. The federal Center for Medicare and Medicaid Services projects health care costs to rise from the 2010 level of 17.5 percent of GDP to 19.6 percent in 2019.16 It has long been clear that the central question is to what extent, and at what pace, cost pressures ultimately force development of some form of single-payer system —the only serious way to deal with the underlying problem.

A new national solution is ultimately likely to come about either in response to a burst of pain-driven public outrage, or more slowly through a state by state build up to a national system. Massachusetts, of course, already has a near universal plan, with 99.8 percent of children covered and 98.1 percent of adults.17 In Hawaii, health coverage (provided mostly by non-profit insurers) reaches 91.8 percent of adults in large part because of a 1970s law mandating low cost insurance for anyone working twenty hours a week.18 In Vermont, Governor Peter Shumlin signed legislation in May 2011 creating “Green Mountain Care,” a broad effort that would ultimately allow state residents to move into a publicly funded insurance pool—in essence a form of single-payer insurance. Universal coverage, dependent on a federal waiver, would begin in 2017 and possibly as early as 2014.19 In Connecticut, legislation approved in June 2011 created a “SustiNet” Health Care Cabinet directed to produce a business plan for a non-profit public health insurance program by 2012 with the goal of offering such a plan beginning in 2014.20 In all, nearly 20 states will soon consider bills to create one or another form of universal health care.

One can also observe a developing institutionchanging dynamic in the central neighborhoods of some of the nation’s larger cities, places that have consistently suffered high levels of unemployment and underemployment, with poverty most commonly above 25 percent. In such neighborhoods democratizing development has also gone forward, again paradoxically, precisely because traditional policies — in this case involving large expenditures for jobs, housing and other necessities — have been politically impossible. “Social enterprises” that undertake businesses in order to support spe-cifc social missions now increasingly comprise what is sometimes called “a fourth sector” (different from the government, business, and non-proft sectors). Roughly 4,500 not-for-proft community development corporations are largely devoted to housing development. There are now also more than 10,000 businesses owned in whole or part by their employees; nearly three million more individuals are involved in these enterprises than are members of private sector unions. Another 130 million Americans are members of various urban, agricultural, and credit union cooperatives. In many cities, important new “land trust” developments are underway using an institutional form of nonproft or municipal ownership that develops and maintains low- and moderate-income housing.21

Although the financially stressed popular press covers very little of this, the various institutional efforts have also begun to develop innovative strategies that suggest broader possibilities for change. In Cleveland, Ohio, an integrated group of worker-owned companies has developed, supported in part by the purchasing power of large hospitals and universities. 22 The cooperatives include a solar installation and weatherization company, an industrial scale (and ecologically advanced) laundry, and soon a greenhouse capable of producing over three million heads of lettuce a year. The Cleveland effort, which is partly modeled on the 85,000-person Mondragon cooperative network, based in the Basque region of Spain, is on track to create new businesses, year by year, as time goes on. However, its goal is not simply worker ownership, but the democratization of wealth and community building in general in the low-income Greater University Circle area of what was once a thriving industrial city. Linked by a community-serving non-proft corporation and a revolving fund, the companies cannot be sold outside the network; they also return ten percent of profts to help develop additional worker-owned frms in the area.

A critical element of the strategy, moreover, points to what is essentially a quasi-public sector planning model: Hospitals and universities in the area currently spend $3 billion on goods and services a year—none, until recently, from the immediately surrounding neighborhood. The “Cleveland model” is supported in part by decisions of these substantially publically fnanced institutions to allocate part of their procurement to the worker-co-ops in support of a larger community-building agenda. The taxpayer funds that support programs of this kind do double duty by helping, too, to support the broader community through the new institutional arrangements. The same, of course, is true for a range of municipal, state, and other federal policies available to local businesses, including employee-owned frms.

Numerous other cities are now exploring efforts of this kind (including Atlanta, Pittsburgh, Amarillo, Texas, and the metropolitan Washington, D.C. area.) Related institutional work is now underway, too, through the leadership of the United Steelworks, a union that has put forward new proposals for a coop-union model of ownership.23

Another innovative enterprise is Market Creek Plaza in San Diego. A project of the Jacobs Center for Neighborhood Innovation, Market Creek Plaza is a mixed use commercial-retail-residential development, anchored by a Food 4 Less supermarket. The project was conceived, planned, and developed by teams of community members working with the Jacobs Center. Together they assembled a diverse package of public and private funding for the $23 million Phase I project (ultimately, the total value of the project, which involves master planning and redevelopment of a total of 52 acres of land, is estimated to reach $700 million in public and private investment).24

Market Creek Plaza is also a green project, and aims to expand to become a transit-oriented village with 800 units of affordable housing and extensive facilities for nonprofit organizations. The project has restored 1,400 linear feet of wetlands, while generating 200 permanent jobs (70 percent filled by local residents), provided 415 residents with a 40-per-cent ownership stake in the project, and generated $42 million in economic activity (in 2008).25

Yet another arena of institutional growth involves municipal development. By maintaining direct ownership of areas surrounding transit station exits, public agencies in Washington, D.C., Atlanta and other cities earn millions capturing the increased land values their transit investments create. The town of Riverview, Michigan has been a national leader in trapping methane from its landfills and using it to fuel electricity generation, thereby providing both revenues and jobs. There are roughly 500 similar projects nationwide.26 Many cities have established municipally owned hotels. There are also nearly 2,000 publicly owned utilities that provide power (and, increasingly, broadband services) to more than 45 million Americans, in the process generating $50 billion in annual revenue. Significant public institutions are also common at the state level. CalPERS, California’s public pension authority helps finance local community development needs; in Alaska, state oil revenues provide each citizen with dividends from public investment strategies as a matter of right; in Alabama, public pension investing has long focused on state economic development (including employee owned firms).1

Although such local and state ownership is surprisingly widespread, it can also be vulnerable to challenge. The fiscal crisis - and conservative resistance to raising taxes - has led some mayors and governors to sell off public assets. In Indiana, Governor Mitch Daniels sold the Indiana Toll Road to Spanish and Australian investors.27 In Chicago, recently retired Mayor Richard Daley privatized parking meters and toll collection on the Chicago Skyway, and even proposed selling off recycling collection, equipment maintenance, and the annual “Taste of Chicago” festival.28

(How far continuing financial and political pressure may lead other officials to attempt to secure revenues by sell- ing off public assets is an open question. On the other hand, public resistance to such strategies, although less widely publicized, has been surprisingly strong in many areas. Toll road sales have been held up in Pennsylvania29 and New Jersey30, and newly elected Chicago Mayor Rahm Emanuel recently rejected an attempt to privatize Midway Airport as previously attempted by Daley.31 An effort to transfer city-owned parking garages to private ownership in Los Angeles also failed when residents and business leaders realized parking rates would spike if the deal went through.32)

At the heart of the paradoxical strategies of development in these varied and increasingly widespread illustrations is one or another form of democratized owner-ship—a form at the national, state, municipal and neighborhood level that stands in contrast to traditional ideas that only corporations or private businesses can own and manage productive wealth.

Nor should it be forgotten that at the height of the recent financial and economic crisis two of the nation’s largest manufacturing corporations— General Motors and Chrysler—were nationalized because the alternative was all but certain to be the collapse of the heart of the U.S. manufacturing economy in general.

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How far might evolutionary reconstructive developments of these various kinds go if ongoing difficulties continue to create ever deepening pain and traditional policies, both liberal and conservative, fail to deal with growing social and economic pain?

One thing is certain: traditional liberalism, dependent on expensive federal policies and strong labor unions, is in a moribund state in the United States. The government no longer has much capacity to use progressive taxation to achieve equity goals or to regulate corporations effectively. Congressional deadlocks on such matters are the rule, not the exception. At the same time, ongoing economic stagnation or mild upturns followed by further decay—and “real” unemployment rates in the 15-16 percent range—appear more likely than a return to booming economic times.

Our contention is that, in fact, a different kind of progressive change is emerging—one that involves an extended, slow and difficult transformation of institutional structures and power. Such efforts, over time, are also likely to offer possibilities for the bolstering of progressive political relationships. Liberal activists and policy-makers since the time of the New Deal and the Great Depression have implicitly assumed they were providing one or another form of “countervailing power” against large corporations. With the decay of this approach, evolutionary reconstructive efforts aim either to weaken or displace corporate power. Strategies like anti-trust or efforts to “break up” big banks aim to weaken corporations by reducing their size. Public banking, municipal utilities and single-payer health plans attempt slowly to displace privately owned companies. At the same time, communitybased enterprises offer local public officials alternatives to paying large tax-incentive bribes to big corporations.

To be sure, a several decade long developmental trajectory of “evolutionary reconstruction” may fail to alter fundamental institutional relationships and political power balances, or result in only modest changes, as have most kinds of top-down national reforms. The era of stalemate and decay might simply continue and worsen. Like ancient Rome, the United States could simply decline, falling into the status of a nation fundamentally unable to address its social ills...

The alternative possibility—that a painful and sustained era of stalemate and decay may allow for the development and ultimate politicization of a coherent new long-term progressive strategic direction—is not to be dismissed out of hand, however. Such a direction would build upon the remaining energies of traditional liberal reform, animated over time by new populist anger and movements aimed at confronting corporate power, the extreme concentration of income, failing public services, the ecological crisis, and military adventurism. And it would explicitly advocate the slow construction of new institutions run by people committed to developing an expansively democratic polity—an effort that could give political voice to the new constituencies emerging alongside the new developments, adding a new, potentially powerful and growing element in support of longer term progressive change.2

#### Root cause explanations of international politics fail---a methodologically pluralist understanding of IR is best.

Roland **Bleiker 14**, Professor of International Relations, University of Queensland, “International Theory Between Reification and Self-Reflective Critique,” International Studies Review, 16(2), 6-17-2014, p.325-327

This book is part of an increasing trend of scholarly works that have embraced poststructural critique but want to ground it in more positive political foundations, while retaining a reluctance to return to the positivist tendencies that implicitly underpin much of constructivist research. The path that Daniel Levine has carved out is innovative, sophisticated, and convincing. A superb scholarly achievement. For Levine, the key challenge in international relations (IR) scholarship is what he calls “unchecked reification”: the widespread and dangerous process of forgetting “the distinction between theoretical concepts and the real-world things they mean to describe or to which they refer” (p. 15). The dangers are real, Levine stresses, because IR deals with some of the most difficult issues, from genocides to war. Upholding one subjective position without critical scrutiny can thus have far-reaching consequences. Following Theodor Adorno—who is the key theoretical influence on this book—Levine takes a post-positive position and assumes that the world cannot be known outside of our human perceptions and the values that are inevitably intertwined with them. His ultimate goal is to overcome reification, or, to be more precise, to recognize it as an inevitable aspect of thought so that its dangerous consequences can be mitigated. Levine proceeds in three stages: First he reviews several decades of IR theories to resurrect critical moments when scholars displayed an acute awareness of the dangers of reification. He refreshingly breaks down distinctions between conventional and progressive scholarship, for he detects self-reflective and critical moments in scholars that are usually associated with straightforward positivist positions (such as E.H. Carr, Hans Morgenthau, or Graham Allison). But Levine also shows how these moments of self-reflexivity never lasted long and were driven out by the compulsion to offer systematic and scientific knowledge. The second stage of Levine's inquiry outlines why IR scholars regularly closed down critique. Here, he points to a range of factors and phenomena, from peer review processes to the speed at which academics are meant to publish. And here too, he eschews conventional wisdom, showing that work conducted in the wake of the third debate, while explicitly post-positivist and critiquing the reifying tendencies of existing IR scholarship, often lacked critical self-awareness. As a result, Levine believes that many of the respective authors failed to appreciate sufficiently that “reification is a consequence of all thinking—including itself” (p. 68). The third objective of Levine's book is also the most interesting one. Here, he outlines the path toward what he calls “sustainable critique”: a form of self-reflection that can counter the dangers of reification. Critique, for him, is not just something that is directed outwards, against particular theories or theorists. It is also inward-oriented, ongoing, and sensitive to the “limitations of thought itself” (p. 12). The challenges that such a sustainable critique faces are formidable. Two stand out: First, if the natural tendency to forget the origins and values of our concepts are as strong as Levine and other Adorno-inspired theorists believe they are, then how can we actually recognize our own reifying tendencies? Are we not all inevitably and subconsciously caught in a web of meanings from which we cannot escape? Second, if one constantly questions one's own perspective, does one not fall into a relativism that loses the ability to establish the kind of stable foundations that are necessary for political action? Adorno has, of course, been critiqued as relentlessly negative, even by his second-generation Frankfurt School successors (from Jürgen Habermas to his IR interpreters, such as Andrew Linklater and Ken Booth). The response that Levine has to these two sets of legitimate criticisms are, in my view, both convincing and useful at a practical level. He starts off with depicting reification not as a flaw that is meant to be expunged, but as an a priori condition for scholarship. The challenge then is not to let it go unchecked. Methodological pluralism lies at the heart of Levine's sustainable critique. He borrows from what Adorno calls a “constellation”: an attempt to juxtapose, rather than integrate, different perspectives. It is in this spirit that Levine advocates multiple methods to understand the same event or phenomena. He writes of the need to validate “multiple and mutually incompatible ways of seeing” (p. 63, see also pp. 101–102). In this model, a scholar oscillates back and forth between different methods and paradigms, trying to understand the event in question from multiple perspectives. No single method can ever adequately represent the event or should gain the upper hand. But each should, in a way, recognize and capture details or perspectives that the others cannot (p. 102). In practical terms, this means combining a range of methods even when—or, rather, precisely when—they are deemed incompatible. They can range from poststructual deconstruction to the tools pioneered and championed by positivist social sciences. The benefit of such a methodological polyphony is not just the opportunity to bring out nuances and new perspectives. Once the false hope of a smooth synthesis has been abandoned, the very incompatibility of the respective perspectives can then be used to identify the reifying tendencies in each of them. For Levine, this is how reification may be “checked at the source” and this is how a “critically reflexive moment might thus be rendered sustainable” (p. 103). It is in this sense that Levine's approach is not really post-foundational but, rather, an attempt to “balance foundationalisms against one another” (p. 14). There are strong parallels here with arguments advanced by assemblage thinking and complexity theory—links that could have been explored in more detail.

### AT: Endless War Impact

#### No endless war---too many constraints.

John Mueller 21, Adjunct Professor of Political Science and Senior Research Scientist at the Mershon Center for International Security Studies, "Hedging, Risk, Arrogance, and the Iraq Syndrome," in The Stupidity of War: American Foreign Policy and the Case for Complacency, Chapter 8, 02/17/2021, pg. 200-206. language edited.

Public Opinion and the Iraq Syndrome

One popular explanation for the American public’s palpable unwillingness to countenance military involvement in the Syrian civil war in 2013 was that the country was slumping into a deep isolationist mood, and there was concern about a new isolationism or a growing isolationism or a new non-interventionist fad.23 In contrast to those envisioning a new isolationism, some commentators, including such unlikely soulmates as Andrew Bacevich, Robert Kagan, John Mearsheimer, Rachel Maddow, Gregory Daddis, and Vladimir Putin, have variously maintained that we have seen the rise of a new American militarism in the last decades or that Americans congenitally hail from Mars.24

But both perspectives are flawed.

The American people have not become isolationist: they have not come seriously to yearn for full withdrawal from the world. However, they have long had a deep and abiding wariness about costly and frustrating military engagements.

And the militarism perspective, it seems to me, extrapolates far too much from the wars in Afghanistan and Iraq. These ventures – the 9/11 wars – have proved to be aberrations from usual patterns, not portents of the future. Although they demonstrate that Americans remain willing to strike back hard if attacked, they do not indicate a change in the public’s reticence about becoming militarily involved in other kinds of missions – or errands.

Instructive is an examination of the long-term trends in a set of poll questions designed to tap “isolationism.” Three versions are mapped in Figure 8.1. 25 They document something of a rise in wariness about military intervention after the Vietnam War and then, thereafter, a fair amount of steadiness punctured by spike-like ups and downs in response to events including 9/11 and its ensuing wars. In the wake of the disastrous military interventions in Iraq and Afghanistan, “isolationism” as measured by these poll questions has gone back to about where it was in the aftermath of Vietnam.

The poll question with the longest pedigree has been asked at least since 1945: “Do you think it will be best for the future of this country if we take an active part in world affairs, or if we stayed out of world affairs?” The question seems to have been fabricated to generate an “internationalist” response. In 1945, after all, the United States possessed something like half the wealth in the world and scarcely had much of an option about “taking an active part in world affairs,” as it was so blandly and unthreateningly presented. The authors of the poll question got the number they probably wanted: so queried, only 19 percent of poll respondents in 1945 picked the “stay out” or “isolationist” option. As can be seen in the figure, however, high levels of “isolationism” can be generated if the question is reformulated by asking respondents whether they agree or disagree that “We shouldn’t think so much in international terms but concentrate more on our own national problems and building up our strength and prosperity here at home.” In that rendering, the option of staying out of world affairs is only implied, and measured “isolationism” consistently registers 30 or 40 percentage points higher.

Diagram

Description automatically generated with medium confidence

In the years following 1945, the “stay out” percentage rose a bit to around 25 percent, but it had descended to 16 percent in 1965 in the aftermath of the 1962 Cuban missile crisis and as the war in Vietnam began. The experience of that war pushed it much higher – to 31 to 36 percent as part of what has been called the “Vietnam Syndrome.”

The percentage has stayed at around that level ever since except for some spike-like jolts upward or downward. There was a downward dip during the Gulf War of 1991, at the end of which, as noted in Chapter 3, the war’s chief author, President George H. W. Bush, grandly concluded a speech by trumpeting, “By God, we’ve kicked the Vietnam Syndrome once and for all.” Within weeks, however, the “stay out” option had regained its previous attractiveness. There were also interesting spikes suggesting a wariness about military interventions abroad when troops were sent to Bosnia in late 1995 and at the time of the Kosovo conflict in 1999. In these instances, the spikes were upward, even though no American troops were lost in either venture and even though both were deemed successful, at least in their own terms, at the time.

In the current century, the “stay out” percentage dropped to 14, its lowest recorded level ever, in the aftermath of 9/11. It rose the next year, and then plunged downward again in 2003 and 2004 – the first two years of the Iraq War. By 2006, however, it had risen to post-Vietnam levels, where it has roughly remained although a related question, asking whether the United States “should mind its own business internationally” while letting “other countries get along as best they can on their own,” did reach new – or almost new – highs in 2013. 26

Given the bland attractiveness of the “take an active part in world affairs” option, it is impressive that around a third or more of the public since Vietnam has generally rejected it to embrace the “stay out” option. However, this should probably be taken to be more nearly an expression of wariness about costly military entanglements than as a serious yearning for full withdrawal from the world, or “isolationism.” There is, for example, no real indication that Americans want to erect steely trade barriers.27 And polls continually show that the public is far more likely to approve foreign ventures if they are approved and supported by allies and international organizations.28 Real isolationism should be made of sterner stuff.29 As Christopher Preble puts it succinctly, “for the most part, Americans want to remain actively engaged in the world without having to be in charge of it.”30

John Mearsheimer argues that the public has become less enthusiastic about acting as the world’s police~~man~~.31 However, it does not seem that it has ever been very enthusiastic: there has always been a deep reluctance to lose American lives or to put them at risk overseas for humanitarian purposes. That perspective is seen most starkly, perhaps, when Americans were asked in 1993 whether they agreed that “Nothing the US could accomplish in Somalia is worth the death of even one more US soldier.” Fully 60 percent expressed agreement.32 This is not such an unusual position for humanitarian ventures. If Red Cross or other workers are killed while carrying out humanitarian missions, their organizations frequently threaten to withdraw no matter how much good they may be doing. Essentially what they are saying is that the saving of lives is not worth the deaths of even a few of their service personnel.33

Thus, civil warfare and vicious regimes have not actually inspired a great deal of alarm except when they seemed to present a direct threat to the United States. As a result, few have inspired military intervention. Rather, the most common official pattern about such situations has been, as suggested earlier in this book several times, vast proclamation followed by half-vast execution.

For example, the United States did a great deal of bloviating about the civil war in Bosnia in the early 1990s, but it held off intervention on the ground until hostilities had ceased. Even then, the public was anything but enthusiastic when American peace keeping soldiers were sent in, and enthusiasm did not rise even when it turned out the atmosphere remained “permissive” and the troops were met with little or no hostility.34 Indeed, about the only time the public chose to pay much attention to the war in Bosnia, a venture much publicized and much agonized over by elites and by the media in the 1990s, was when an American airman was shot down behind enemy lines and when American troops were dispatched to the area to police the situation.35

Intervention in Kosovo in 1999 was by bombing alone, and in Somalia, the United States abruptly withdrew when 19 of its troops were killed. The United States, like other developed nations, mostly remained studiously distant from genocide in Cambodia in 1975–79 and Rwanda in 1994 and from catastrophic civil war in Congo after 1997 or in South Sudan after 2013. 36

In many respects the Libyan effort of 2011 was quite a bit like the campaign in Somalia in 1992–93: after some initial success, troops and direct military involvement were pulled back when things began to go awry. The reluctance is most evident in the supportive, but distant, response to rebels in the calamitous Syrian civil war.

In general, then, those who suggest there has been a surge of militarism put far too much weight on the temporary successes of the stridently hawkish neoconservative movement in the early part of the George W. Bush administration. In fact, there has never been much support for sending American troops into hostile situations in the last decades – or maybe even century – unless there was a decided provocation. In the 9/11 cases, opinion was impelled not by a propensity toward militarism, but, as with entry into World War II, by an outraged reaction to a direct attack on the United States. Even at that, as seen in Chapter 4, Bush was unable to boost support for going to war with Iraq in his campaign to do so in 2002–3 despite the fact that there was little opposition from the Democratic leadership. Even support for the once-popular, 9/11-induced war in Afghanistan waned. Using the same poll question, initial support for that war was some 15 percentage points higher than it had been at the start of the wars in Korea, Vietnam, and Iraq, but, like those wars, support gradually declined as American casualties were suffered.37

People, contrary to a large literature, do not seem to be readily manipulable by opinion elites or by the media on such issues. As noted in Chapter 5, the Obama administration dramatically proposed military action in response to chemical weapons use in Syria, and leaders of both parties in Congress rather quickly fell into line. Nonetheless, the public was decidedly unwilling even to support the punitive bombing of Syria – a venture likely to risk few if any American lives – out of concern that it would lead to further involvement in the conflict there.38

Leaders may propose, but that does not mean public opinion will move in concert – that people will necessarily buy the message. And on the occasions when they do, it is probably best to conclude that the message has struck a responsive chord, rather than that the public has been manipulated.39 If George W. Bush was unable to boost support for invasion during the runup to his war in Iraq, neither was his father able to do so, despite strenuous efforts, for going to war against Iraq in Kuwait in the runup to the 1991 Gulf War as discussed in Chapter 3. On the other hand, public concern about international terrorism, as discussed in Chapter 7, has not altered much in the two decades since 9/11 even though there have been multiple reasons to have expected an erosion of concern to take place.

After Vietnam, there was strong desire – usually called the Vietnam Syndrome – not to do that again. And, in fact, there never were other Vietnams for the United States during the Cold War. The administration was kept by Congress even from rather modest anti-Communist militarized ventures in Africa and, to a lesser extent, in Latin America – though there was bipartisan support for aiding the anti-Soviet insurgency in Afghanistan, a venture, however, that did not involve sending American troops.

A rather comparable Iraq, or Iraq/Afghan, Syndrome now seems likely.40 Christopher Dandeker parses the situation succinctly: “the interventions in Afghanistan and Iraq represent the high-water mark of the Western belief that states can successfully use military force to intervene in the affairs of failed, rogue, or other states to achieve ambitious foreign policy goals.” Further, “the difficulties of achieving success in these interventions, even when ‘success’ is modestly defined, have shaken confidence and belief in the value of intervention among Western political and military elites and publics.” Dandeker also argues that “military interventions will continue,” but they will be different from those in Iraq and Afghanistan and “more like the Libyan example of 2011.”41 As noted above and in Chapter 5, however, the behavior in the Libya venture is not all that new. It is similar to the one in Somalia in 1993 – initial success and then rather abrupt and unsentimental withdrawal as things begin to fall apart.

Although support for one tactic, direct military intervention, declined after Vietnam, the general policy of maintaining somewhat lesser exertions in dealing with the perceived Communist threat continued to be supported and a huge military continued to be extravagantly financed although it had little to do. And something like that seems likely in the case of today’s monsters. There will be general support in principle for policies intended to deal with proliferation and international terrorism, but not so much for militarized ventures of invasion and particularly of occupation.42

The US military seems to be on much the same page. In its defense priority statement of January 2012, the Defense Department firmly emphasized (that is, rendered in italics) that “U.S. forces will no longer be sized to conduct largescale, prolonged stability operations.” Later, when President Donald Trump suggested that “the military option” might be appropriate for dealing with the problems entailed by Venezuela (which had systematically destroyed itself but was occasionally belligerent and defiant), his defense secretary at the time, James Maddis, simply responded, “The Venezuelan crisis is not a military matter.”43 As David Sanger puts it, “America is out of the occupation business.”44 Although there was some backward creep after 2014 in response to the ISIS menace as discussed in Chapter 5, this basic policy perspective does not seem to have changed. Overall, as many military people have come increasingly to appreciate, many problems simply cannot be solved by military means.

The public also seems to be increasingly capable of containing the notion that it is the destiny of the United States to lead the world. The American record on this score, actually, is less than stellar. Out of sympathy over 9/11, NATO countries did more or less “follow” the United States into the invasion of Afghanistan. However, over time the “leader” lost its followers as the occupation increasingly became a debacle. And, when the United States tried to get support for its ill-destined invasion of Iraq in 2003, only the British and the Australians signed up to join its tiny “coalition of the willing.” Most countries, including especially France, tried to dissuade the United States from the misguided venture – a true sign of friendship if not of blind followership. As noted earlier, for its prescient advice and its efforts to pacify the chief primate, France’s effrontery was met with humorless derision in the United States Congress when a fat-laced accompaniment to hamburgers was relabeled “freedom fries.” At that, Australia soon left the Iraq misadventure and so, later, did the United Kingdom where outraged parliamentarians from the party of invasion-supporting Prime Minister Tony Blair used the episode to destroy his political career. In the runup to Iraq, the United States, using not only “leadership” but bribery, also tried to get NATO ally Turkey to let it use its territory for bases for the invasion and failed. In an earlier decade, the United States had also tried to entice (aka “lead”) some of its “followers” to help it out in the Vietnam War, with only modest success.

Although fully two-thirds of Americans continued to favor greater US involvement in the global economy in 2013, only 46 percent deemed it “very desirable” for the United States to exert strong leadership in world affairs – the lowest level ever registered by the poll question. In the same poll, only 11 percent of Europeans said they felt that way: the dominated, it would appear, do not seem to have gotten the message.45 In a speech at West Point in 2014, President Barack Obama self-importantly contended that “the question we face is not whether America will lead but how we will lead.”46 Perhaps the American (and European) people can be forgiven for worrying about the results.

At the same time, the American military – despite its substantial record of failure – continues to receive high approval ratings in public opinion surveys. It’s just that the public does not seem to want it actually to be used very much and then mainly (or only) when it espies a clear threat to the United States. And even where there was substantial public fear about a threat, as with ISIS, the military, anticipating that support even for popular ventures like that might well wane as American battle deaths were suffered, deemed it wise to configure troop deployments in a manner that minimized American casualties. If that happens, public support may not rise, but attention will wane. The ability to use drones and, as in Kosovo, to fight from distances like 40,000 feet fits this perspective.

Militarized interventionist internationalism above a very modest level, then, may well be dead – whether the inspiration for such interventions is liberal or neoconservative. However, it may never have actually been alive either – the public has never really bought the notion that American lives should be lost for humanitarian purposes, to spread democracy, or to make the world safe for others.

### AT: Antitrust Link

#### Competition is not monolithic---only recognizing its role in determining well-being and reappropriating it solves.

Maurice E. Stucke 12, Douglas A. Blaze Distinguished Professor of Law at the University of Tennessee College of Law, J.D. from the Georgetown University Law Center, "Reconsidering Antitrust's Goals," Boston College Law Review, Vol. 53, March 2012, accessed via Lexis

In antitrust, competition, however defined, is not the ultimate end. Competition instead represents the means "to achieve broader government objectives for the economy or for a given industry." 292

If competition is not an end, but a more efficient (or democratic) means to achieve other goals, then three implications arise. First, there must be one or more ultimate goals, with perhaps other intermediary goals. Second, one must have a form of competition in mind, and understand how and under what circumstances one's conception of competition can promote or impede one's ultimate objectives. Third, one must understand how the formal legal and informal institutions can promote one's conception of competition.

As an initial premise, competition's ultimate goal is to improve well-being. 293 Competition can be bitter, but we take such bitters to improve [\*597] overall well-being, not simply to be left miserable. If, as a result of our competition policy, our physical and mental health deteriorates, our isolation and distrust increases, and our freedom and self-determination decrease, then the policy is not worthwhile. A competition policy, which simply involves a rush for scarce resources, in which many are trampled or left scrambling for the scraps, would appeal to the few who captured the resources. So our conception of competition (as defined in part by our competition policy) must promote (or at least not impede) overall well-being.

Some will ask whether this is too much to ask of antitrust. Let competition policy improve the allocation of scarce resources, reduce the costs of goods and services, and maximize overall wealth. Leave well-being to individual choice or supplementary governmental policies. We do not require other laws, such as the U.S. Food and Drug Administration regulations on frozen cherry pies, 294 to promote overall well-being. Why should antitrust bear this burden?

One premise of our economic system of private enterprise is the importance of free competition. The Small Business Act's policy declaration summarizes this philosophy:

The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. 295

This policy statement by Congress incorporates three important premises. First, competition does not exist independently of the legal and informal institutions. As economist R.H. Coase said, "[T]he legal system will have a profound effect on the working of the economic system and may in certain respects be said to control it." 296

[\*598] Second, the types of competition (fair versus unfair) can vary depending on the legal and informal institutions. 297 The phrase "competition on the merits" invariably involves normative considerations of unfair competition. 298 The legal and informal institutions provide the rules of the game necessary for that type of competition to function effectively 299 and thereby affect the market participants' incentives. 300 As Douglass North notes, "How the game is actually played is a consequence of the formal structure (e.g., formal rules, including those set by the government), the informal institutional constraints (e.g., societal norms and conventions), and the enforcement characteristics." 301 A market's performance characteristics are a function of these institutional constraints. The rules will define the opportunity set in the economy. Changing the rules can lead to different outcomes. 302 If the antitrust laws reward (or are indifferent to) monopolization, monopolies will be the likely outcome in markets conducive to monopolization. 303

Third, some types of competition ("full and free") promote overall well-being. Other types of competition, such as the "exploitation of child labor, the chiseling of workers' wages, the stretching of workers' [\*599] hours, are not necessary, fair, or proper methods of competition" 304 and hinder well-being. 305

Accordingly, legal institutions (including antitrust law) 306 and informal ethical, moral, and social norms 307 can promote overall well-being to the extent that they promote fair competition and deter unfair competition. Consequently, the stronger our belief in the importance of preserving and expanding fair competition to promote overall well-being, the greater antitrust's role in defining and deterring unfair competition. The Supreme Court describes the antitrust laws in general, and the Sherman Act in particular, as "the Magna Carta of free enterprise." 308 The Court has argued that antitrust laws "are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." 309 Thus, antitrust promotes fair competition that, in turn, will promote overall well-being. 310

If antitrust's ultimate goal is to promote well-being, we must then address what constitutes "well-being." Webster's Dictionary defines "well-being" as "the state of being happy, healthy, or prosperous." 311 But being prosperous or healthy does not necessarily mean greater happiness. Well-being, as the Organisation for Economic Co-operation and Development (OECD) found, is multi-faceted. Promoting well-being entails [\*600] promoting (1) material well-being (income and wealth, housing, and jobs and earnings) and (2) quality of life (health status, work and life balance, education and skills, social connections, civic engagement and governance, environmental quality, personal security, and subjective well-being). 312

Should antitrust law then promote (1) only material well-being or (2) both material well-being and quality of life? Advances in the literature of happiness economics will enable policymakers to tailor governmental policies to promote well-being (or at least minimize sources of unhappiness, such as unemployment, mental illness, or inadequate health care). 313 It is apparent, however, from the available evidence that one cannot maximize well-being by maximizing only one component.

After one's basic needs are met, the economic literature shows, increasing income and wealth does not significantly increase well-being. 314 One of the few well-being metrics in which America excels is material well-being. The average household disposable income in the United States in 2008 was $ 37,690 per year, and average U.S. household's financial worth was an estimated $ 98,440--much higher than the OECD averages of $ 22,284 and $ 36,808, respectively. 315 Increasing aggregate material well-being will not necessarily increase overall well-being. 316 If a larger pie means greater wealth inequality, the wealthier [\*601] will not necessarily be happier, 317 and there will be greater incentives for the wealthy to use the law to safeguard their interests. 318 Promoting wealth maximization (to the exclusion of other values) can also promote status competition, selfishness, and envy, and can marginalize other values correlated with greater happiness. 319 Thus, the greater issue is fairness, namely how well the resources are distributed. 320

Income inequality in the United States increased significantly during the past antitrust policy cycle. 321 The United States has "the fourth highest rate of income inequality and relative poverty (17.3% of people [are] poor compared to an OECD average of 11.1%) in the OECD." 322 Other policy challenges involve quality-of-life issues, such as work and life balance, 323 social connections, 324 safety, 325 and environmental quality, [\*602] including how efficiently the United States uses its natural resources. 326

Consequently, in developed countries like the United States, an antitrust goal to maximize wealth (to the exclusion of other goals) will not necessarily increase (in fact, can even reduce) overall well-being. To maximize well-being, any competition policy must balance the promotion of material well-being with quality-of-life factors, such as freedom and self-determination, while not deterring the exercise of compassion and interpersonal relationships.

Such a policy is not difficult to imagine. Competition in dispersing political and economic power can increase economic opportunity and personal autonomy, 327 a key predictor of happiness. 328 Citizens can choose to purchase from (and work for) firms that align with their personal, religious, and ethical values. 329 When a firm engages in exploitative, unfair behavior, a competitive market provides alternatives. 330 Positive sum competition provides richer social connections as people use their personal "vigor, imagination, devotion, and ingenuity" to help [\*603] others. 331 In promoting productive and dynamic efficiencies, antitrust can promote sustainable consumption and production. Greater productive efficiency can increase leisure time, which employees can use to contribute their unique skills to community volunteer work. 332 In enabling these activities, which are correlated generally with healthier and happier people, competition can promote well-being.

#### Antitrust and the ALT are complimentary, NOT exclusive.

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Democrats are waking up to the realities of economic power. Less than a decade ago, the subject was taboo. Even with the economy in ruins, Democratic leadership saw no option beyond neoliberalism. But since the 2016 primaries, a split has opened up in the party. With it has come a resurgence of antimonopoly politics that neoliberal leaders can no longer ignore.

At first blush, it looks like antimonopoly heightens the conflict between socialists committed to overcoming capitalism and establishment centrists seeking to save it from populist attacks on the left and right. But antimonopoly once contributed to mobilization, coalition building, and sustained reform across the liberal-left spectrum, and it might do so again today.

The Antimonopoly Tradition

Democracy and markets are fragile and demanding systems, easily corrupted by formidable concentrations of power. The antimonopoly tradition recognizes this fragility, and it makes no sharp distinction between economic and political power. Excessive concentrations of political power undermine economic prosperity no less than excessive concentrations of economic power corrupt democracy. The problem for law and public policy in a democracy with markets seems simple: how to check the constant tendency to concentrated power. There’s no clear-cut way to do that, because those who seek to attain power and lock in privilege are endlessly inventive. Under the right conditions, institutions designed to check power can be used to opposite ends. As a result, antimonopoly is far more than an ideology. It is a political project that requires vigilance, action, and constant adaptation.

Reformers have drawn on the antimonopoly tradition—which is far more wide-ranging than just antitrust, a set of policies designed to prevent predatory competition and break up concentrations of economic power—throughout U.S. history. In the 1830s, Jacksonians used it to authorize privatization, dismantling the Second Bank of the United States because it locked in the privilege of an overweening aristocracy. Abolitionists in the 1840s and 1850s drew on the antimonopoly tradition to dismantle the slave power. In the 1880s, populists enacted state antitrust laws to check the growth of corporate power. In the first decades of the twentieth century, Progressives went further, breaking up corporate power and boosting countervailing forces in government, unions, and proprietary enterprise. In the New Deal, the antimonopoly tradition broke the power of banks and industrial corporations and paved the way for regulation, collective bargaining, and welfare provision. In the 1940s, liberals drew on it to outlaw discriminatory pricing and check the predatory power of chain stores. In the 1950s and 1960s, antitrust administrators broke up patent monopolies, opening the way to high technology.

The antimonopoly tradition, as this sketch demonstrates, has enabled diverse political projects. In the first Gilded Age, it provided a challenge to laissez-faire constitutionalism—the legal doctrine that markets were autonomous from politics, and that property and contracts always protected individual liberty. In today’s Gilded Age, the antimonopoly tradition confronts market fundamentalism: the belief that liberty is best realized in market transactions insulated from democratic interference; that it is possible to organize markets effectively without government supervision; and that we ought not worry about concentrations of economic power, either because they are efficient or temporary.

The turn to market fundamentalism had a major impact on the practice of antitrust, severing it from its roots in the antimonopoly tradition. The University of Chicago–trained lawyer Robert Bork, who published The Antitrust Paradox in 1978, convinced Reagan’s Justice Department that antitrust blocked efficient forms of business organization. Left alone, corporations and capital markets could decide better than government regulators whether mergers, hostile takeovers, outsourcing, or breaking up and selling off corporate assets would serve consumers. If the result was concentrated power, so be it. In time, the Democrats agreed that the only goal of antitrust was to protect consumers. By 1992, antitrust had disappeared from their platform for the first time in a century.

The resurgence of the antimonopoly tradition among Democrats indicates a sea change in how they approach economic governance. Rather than limiting debate to after-the-fact redistribution, they have begun to ask how markets and business organizations can be structured to check concentrations of power. Many Democrats are converging on a platform to rebuild a more democratic economy, even as they disagree in fundamental ways over what that means, who should benefit, and how to achieve it. Still, the antimonopoly tradition’s shared appeal could open new possibilities for party politics and reform. This might seem overly optimistic, but a closer look at how the antimonopoly tradition has informed three ideological factions within the Democratic Party—democratic socialists, (neo)liberals, and antimonopolists proper—illustrates the potential for a broader politics focused on challenging concentrated power and building a more democratic economy.

Democratic Socialists

The antimonopoly tradition has already seeped into contemporary democratic socialist politics. From Bernie Sanders’s presidential campaign to the Movement for Black Lives and the Green New Deal, socialists have combined the antimonopoly tradition with class analysis in a mixture fertile for reform.

On its face, the antimonopoly tradition seems at odds with socialism. Why improve markets when they are the site of labor exploitation? Why promote competition when it drives down labor and environmental standards worldwide? Isn’t the resurgence of antitrust yet another effort to save capitalism and coopt the socialist left? All of this might be true, if contemporary socialists conceived of socialism as a uniform system of public ownership of the means of production. But although they seek to decommodify critical areas of economic life (healthcare, education, and housing), many socialists advocate a mixture of economic forms: strong unions, co-determination, labor councils, employee stock ownership plans, cooperatives, credit unions, family farms, and community land trusts. Where public ownership is not a clear substitute for private economic power, many socialists have turned to the antimonopoly tradition to destabilize and prevent that power from accumulating.

Consider socialist proposals for banking. Many prominent democratic socialists support a return to Glass–Steagall, a classically antimonopoly solution to corporate power, rather than public ownership of banking. As Supreme Court Justice Louis Brandeis wrote in Other People’s Money and How Bankers Use It in 1914, allowing bankers to speculate on the savings of depositors was a conflict of interest. It fostered excessive risk-tasking, turned banking into a casino, enriched a small elite, and divided the interests of Wall Street from Main Street. The framers of Glass–Steagall hoped to check these tendencies. In the aftermath of the financial crisis, Sanders called not to nationalize banks that were too-big-to-fail but to break them up. The opposite, he argues, has occurred. The bailouts and the Dodd–Frank Act made banks bigger, fewer, and more powerful.

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Socialists combine antimonopoly analysis of banking with class-based, anti-racist, and communitarian action. Black communities, for example, cannot be revitalized without a national credit fund and policies to support locally owned and run black banks. Worker-owned enterprise, cooperatives, and geographically rooted enterprise cannot thrive without renewed attention to community development and rural banks, local credit unions, and revolving credit funds. Socialists acknowledge that none of these alternatives are possible or sustainable without checking the power of the largest financial institutions in the first instance.

Socialists have a similar approach to agricultural policy. Sanders’s plan to revitalize rural America combines class and antimonopoly analysis. The monopolization of agriculture, reads his plan, has devastated family farms and rural communities. In pork production alone, consolidation resulted in an 82 percent decline in the number of hog farms in Iowa between 1982 and 2007. Worse still, corporate agriculture has turned formerly independent farmers into a dependent class through an exploitative system of vertical integration. Dominant meatpackers and chicken processors have taken ownership of livestock. They let out contracts to ranchers and farmers to raise it for cut-rate prices, under rules that foist cost and risk onto the producer. Machinery monopolies make it illegal to for farmers to repair their own equipment. Chemical giants routinely sue farmers for breach of patents.

The first line of defense in Sanders’s plan is not public or collective ownership but to “Enact and enforce [Teddy] Roosevelt-style trust-busting laws to stop monopolization of markets and break-up existing massive agribusiness; Place a moratorium on future mergers of large agribusiness corporations and break-up existing massive agribusinesses;” and enforce rules against exploitive vertical contracts.

The goal of these antitrust policies is not to unleash the free market, but to ensure that farmers receive fair prices and share risks with packers, processors, wholesalers, retailers, and consumers. This mixture of checks on the power of corporations and fair pricing among smaller producers is what Brandeis called “regulated competition.” The goal is to channel rivalry away from the sorts of predatory tactics enacted by big meatpackers into improvements in production processes and products. Like the Green New Deal, which promises to ensure “a commercial environment where every businessperson is free from unfair competition and domination by domestic or international monopolies,” Sanders’s plan promises to improve production by working with farmers and ranchers to remove greenhouse gas emissions from agriculture.

Liberals

Liberals have also begun to draw on the antimonopoly tradition. Among the current Democratic presidential candidates, Amy Klobuchar is the best example of this tendency. A proud student of Robert Bork, Klobuchar is the ranking member of the Subcommittee on Antitrust, Competition Policy and Consumer Rights of the Senate Judiciary Committee.

For all Klobuchar’s commitment to “make antitrust cool again,” she worked hard to keep it walled off from the antimonopoly tradition until very recently. In 2016, Klobuchar introduced two bills to improve antitrust administration. The first made it easier to block mergers that increased consumer prices, lowered product quality, excluded competitors, undermined innovation, or unfairly lowered prices, and shifted the burden of proof from the state to corporations proposing mergers. The second bill, co-sponsored by nine Democrats, was designed to improve Federal Trade Commission (FTC) and Department of Justice (DOJ) capacities to serve consumers.

At the Open Markets Institute, where Barry Lynn and his colleagues have sounded the siren on monopoly power for more than a decade, Klobuchar’s proposals were met with appreciative skepticism: they raised consciousness but perpetuated the failed 1980s idea that the purpose of antimonopoly law is to protect consumers. Antitrust law, they insisted, was written to serve a variety of “political economic goals, primary among these being the defense of democratic institutions from consolidations of power and the defense of the market structures that promote the distribution of opportunity and wealth.”

More recently, Klobuchar has rekindled the antimonopoly tradition. Monopoly power, she now admits, can oppress workers and subcontractors even if consumers are served by low prices. Liberals call this sort of economic domination “monopsony” (or buying power). Klobuchar has promised to scrutinize it as much as consumer domination and to press for antitrust action in two industries where a small number of powerful corporations have suppressed wages and labor unions: airlines and rails.

Klobuchar is not the only Democratic liberal cautiously revisiting the antimonopoly tradition. Neoliberals like Hillary Clinton and Virginia Senator Mark Warner have begun to see monopoly power as an obstacle to their cherished motors of economic growth: entrepreneurship and technological innovation. Where they once blamed democracy and regulation for economic stagnation, they have begun to ask how monopolists use their deep pockets and political power to suppress entrepreneurship, competition, and technological responses to pressing problems like poverty and climate change. During the 2016 campaign, Clinton complained not only that monopolists exacted excessively high prices on pharmaceuticals, air travel, and internet access; she highlighted how they suppressed wages, blocked start-ups, and killed innovative small competitors. She promised to stop corporate concentration anywhere it unfairly limits competition, to close loopholes in the law that protect incumbent businesses, to direct the DOJ and the FTC to study the relationship between market consolidation and stagnating incomes, and to beef up antitrust enforcement. Even Joe Biden, no critic of economic power in the Senate, has expressed his support for more aggressive antitrust enforcement. Like Sanders, his “Plan for Rural America” promises to protect small- and medium-sized farmers and ranchers from the power of chemical, packing, and seed monopolies. Though Biden has yet to fulfill his promise to roll out an antitrust plan, it is hard to imagine he will produce one weaker than Clinton’s in the current political climate.

Antimonopolists

For some Democrats, like Elizabeth Warren and her allies in the Open Markets Institute, the antimonopoly tradition is so central to their politics that they may be thought of as antimonopolists. They have led the drive to bring antimonopoly tradition back into Democratic Party politics. At the time of the bank bailout and the passage of the Dodd–Frank Act, it was Warren who first said that if the nine largest banks were too big to fail, they should be broken up. And, among party leaders, it was Warren who argued most forcefully that the repeal of Glass–Steagall under Clinton had contributed to the financial crisis.

Warren is an antimonopolist who loves markets. She is a is a lawyer who, unlike the Clintons and Klobuchar, resisted indoctrination by Bork’s law-and-economics movement. Although she flirted with these ideas early in her career, studying bankruptcy convinced her that “reality is a lot messier than these theories.” The majority of people who declared bankruptcy, she learned, were thrown into turmoil by health issues, unemployment, or personal crisis, not because they were reckless borrowers. Studying bankruptcy, moreover, revealed the larger problem of the vast expansion of consumer credit to compensate for stagnant wages. Just as progressive legal realists developed a critique of labor contracts a century before, Warren came to view credit contracts as corrupted by structural inequalities. Lenders exploited their power to deceive and manipulate borrowers, collude among themselves, and threaten delinquents.

Warren’s conclusions placed her in opposition to the powerful alliance of conservative legal scholars, foundations, and the financial services industry. She debated bankruptcy law with the dean of the Chicago Law School and fought the credit card industry’s efforts to tighten bankruptcy restrictions. Appointed by Congress to monitor the bank bailout in 2008, Warren saw political corruption, predatory business behavior, and monopoly power everywhere she looked.

Like Progressive Era antimonopolists before her, Warren insists that markets are not self-regulating entities autonomous from law and politics. Markets either have good rules or bad rules, either enforced or unenforced. The design and enforcement of these rules make markets more or less egalitarian. In more egalitarian markets, people are likely to make bargains that made them better off; power is more likely to be temporary and less likely to corrupt politics. In autocratic markets, theft becomes legitimate and might makes right.

If structural inequalities undermine the good markets can do and corrupts politics, then it is not enough, say, to improve the FTC’s capacity to monitor Amazon, as liberal technocrats suggest. Amazon amassed and locks in its power by serving as a platform for its vendors and as a competitor to them. It monitors their successes, copies them, and then favors its own subsidiaries until it drives competitors into the ground. When Warren says break up Amazon, she means it should not be allowed to be a platform for other businesses and a competitor against them simultaneously.

The antimonopoly tradition acknowledges the inventiveness of the powerful. That means it is necessary to build countervailing power in the state and civil society. If Congress outlaws mortgages or credit cards whose interest rates can be raised without notice, lenders will invent new predatory instruments—hence the need for a Consumer Finance Agency to monitor fraudulent behavior.

Cory Booker, a child of the black petit bourgeoisie, has also expressed antimonopolist convictions. He watched his parents’ funeral home get driven out of business by predatory competition from corporate chains. The same story, he notes, can be told for black banks, insurance companies, and retailers. Unlike Warren, who came to antimonpolism through professional conviction, Booker came to it the way many Americans have historically: through concrete experiences of predatory competition, which threatened livelihoods, communities, independence, and, in his case, racial self-determination.

Common Ground?

While history has convinced me that antimonopolists better understand the development of U.S. political economy than either Marxists or liberals, it has also convinced me that every political project has its blind spots. Antimonopoly and liberal politics do not address class sufficiently. Socialist proposals are mostly unconcerned about innovation. Liberals are far too complacent about power. Each also has its strengths. Socialists show us how monopoly power oppresses labor, liberals how it impedes innovation and public problem solving, and antimonopolists how we can use existing legal and cultural resources to counter concentrated power and build a more democratic economy.

The antimonopoly tradition has energized a wide spectrum of people in the orbit of the Democratic Party. Combined with other political projects, it can help mobilize young people, small business, minority voters, non-college whites in the Midwest, and rural voters. It is a mistake to gag any version of it, because doing so has the potential to suppress mobilization across the diverse coalition that is the only weapon Democrats have against the Republican Party.

Democrats at war with themselves would do well to keep the antimonopoly tradition’s focus on power and building a more democratic economy in mind, independently and together. Sometimes this will necessitate vigorous debate. At other times, it will necessitate tolerance. Sometimes it will mean the same reforms, such as reinvigorating Glass–Steagall, will be interpreted differently by factions engaged in different political projects. And sometimes, it will mean surprising collaborations, like the one between Bernie Sanders and Chuck Schumer to regulate corporate stock buybacks.

For socialists, liberals, and antimonopolists alike, reinvigorating the antimonopoly tradition will require more than just words. Otherwise mistrust will fester. Socialists will have to support some policies that favor entrepreneurship. Liberals will have to stand up to powerful donors who will be subject to antitrust action. Antimonopolists will have to accept some solutions to monopoly power besides antitrust, such as public ownership or utility regulation. A Democratic Party that figures out how to use the antimonopoly tradition to forge a durable coalition for a more democratic economy may have a bright future.

### AT: FinTech Leadership Link

#### China is actively worse than the US---proves their fintech leadership is worse.

Jessica C. Weiss & Jeremy L. Wallace 21, Assistant Professor, Political Science, Yale University; Associate Professor, Government, Cornell University, "Domestic Politics, China's Rise, and the Future of The Liberal International Order," Cambridge Core, 02/09/2021, pg. 5-8.

How do the domestic politics of an authoritarian state such as the PRC affect whether it seeks to engage or reshape the international order as it grows in power and influence? Do the CCP’s ambitions extend beyond changing “the distribution of authority and rights” to challenging the “underlying principles of liberal order,” as Ikenberry asks?28 At a basic level, the PRC is likely to follow the United States in privileging its own domestic interests and relative power within the global hierarchy.29 Yet the PRC is undeniably different from the United States in a number of ways that put it at odds with core principles of the LIO.30 On the one hand, the PRC has been a staunch defender of Westphalian principles of respect for territorial sovereignty as well as the UN charter, the principle of non-intervention, and the present configuration of the UN Security Council (UNSC). The PRC also helped shape, and ultimately signed on to, a more narrow conception of the “Responsibility To Protect” (R2P) principle authorizing international intervention to prevent genocide and crimes against humanity.31 On the other hand, four characteristics of contemporary CCP rule are at odds with the LIO as a rules-based order that privileges democracy, free enterprise, and individual political freedoms.

First, the CCP has emphasized the role of the state over private enterprise, even though it was the introduction of markets and economic liberalization after Mao’s death that unleashed China’s economic miracle. China’s brand of state capitalism —including subsidies, nonmarket barriers, and other preferential policies that have curtailed reciprocal market access—has been responsible for much of the international backlash against China’s trade practices and participation in the WTO. China has also made financial, technical, and infrastructural assistance available to governments that do not meet the liberal political and economic conditions set by traditional lenders.32

Second, the CCP has opposed the elevation of individual political rights and has regarded civil society organizations and transnational nongovernmental organizations (NGOs) and activists with suspicion, fearing that they might challenge the CCP’s domestic rule. In opposing the 1997 Ottawa Treaty banning land mines, for example, the Chinese government viewed the involvement of NGOs in the negotiation of a key document with distrust.33 In the development arena, Chinese loans and grants have also sought to enhance state capacity. As one study of China’s information and communications technology (ICT) investments in Africa noted, other donors typically select the most appropriate actors to advance a particular development objective, “be it a local NGO, a private company, or a specific ministry,” whereas China “has preferred an actor-based approach, seeking to increase the capacity of the state”—including the installation of AI-powered surveillance systems.34

Third, the CCP has demonstrated a clear preference for “rule by law” over “rule of law.” Laws in China have proliferated, but the CCP has redoubled its commitment to using the law to carry out its objectives rather than allowing the law to constrain its discretion.35 On 30 June 2020, following a months-long standoff with a broadly popular movement for the defense of Hong Kong’s freedoms, the PRC National People’s Congress passed a national security law penalizing secession, subversion, organization and perpetration of terrorist activities, and collusion with foreign actors, including acts committed by anyone, anywhere in the world. By operating above the Basic Law, Hong Kong’s mini-constitution, the National Security Law has been widely regarded as ending the “one country, two systems” model that was expected to provide Hong Kong with a “high degree of autonomy” until 2047.36 In response to British accusations that China had violated its commitments under the 1984 Joint Declaration, Chinese Ambassador Liu Xiaoming insisted that China has always upheld its international obligations and that “the copyright of ‘one country, two systems’ belongs to Chinese former leader Deng Xiaoping, not the Sino-British Joint Declaration.”37 As developments in Hong Kong show, the CCP’s willingness to refine and reinterpret its legal commitments indicates that it is unlikely that the CCP will rely heavily on rule-based restraints to legitimize its international leadership.

Fourth, the CCP has promoted a more ethno-nationalist vision of its rule: suppressing expressions of ethnic and religious identity with foreign ties, particularly Islam and Christianity, and appealing to foreign citizens of Chinese descent to love the motherland. This turn toward ethnic nativism rather than civic nationalism raises concerns about the CCP’s willingness to tolerate individual differences and identities38 and respect foreign governments’ sovereignty over their putative citizens. And it feeds doubts that a hegemonic China will want to preserve an interconnected world in which international actors and ideas have opportunities to “penetrate” the leading state and shape its choices in ways that render them more acceptable to other states.39

These attributes suggest that the CCP’s interests fundamentally conflict with the more demanding components of political liberalism, particularly the elevation of individual political rights above state sovereignty. That said, the leaders of post-Mao China have not sought to export a universal ideology or form of government, avoiding an irreconcilable conflict between China’s rise and the defense of democracy.40 As for economic liberalism, there are greater tensions between China’s state-led mode of authoritarian capitalism and the first form of economic liberalism, premised on unfettered domestic markets, free trade between countries, and few constraints on international capital and foreign investment. But a form of re-“embedded” liberalism in which states have discretion to cushion the impacts of free trade could be more compatible with the CCP’s desire for a stronger state role in the economy.41 Finally, with regard to liberal institutionalism—governance via principled multilateralism—China has had a mixed record, working within some institutions to advance its interests (the World Bank, International Monetary Fund [IMF], UNSC, WTO, for example) while flouting others (including the rejection of the International Tribunal for the Law of the Sea [ITLOS] ruling on the South China Sea).42 The CCP’s preference for bilateral negotiations over multilateralism suggests that although China may become an increasingly ambitious stakeholder within existing institutions, its major new international initiatives, such as the Belt and Road Initiative, are unlikely to take the form of self-binding multilateral agreements that limit sovereign discretion.43

### AT: FinTech Bad Link

#### Only the plan enables challenges to commodification.

Ajda Pistotnik 19, researcher and project manager at EnaBanda, She has been working on Monitoring of Public Finance by focusing on Slovenian Public Debt and Household indebtedness. As being part of degrowth movement she edited special edition on Degrowth for the Journal for the Critique of Science in 2018, and was a member of the Organizing Team for 2016 International Degrowth Conference in Budapest, “The Future Is Now ‒ Think Degrowth,” EnaBanda, Summer 2019, http://enabanda.si/wordpress/wp-content/uploads/2016/06/Enabanda-ekonomija-dolga-poro%C4%8Dilo-o-dogodku-165x235mm-SPLET.pdf

Instead of ending poverty and wars, and instead of addressing the multifaceted crises facing humanity at their root causes, the „debt State“ is content just to manage them. Not just through surveillance and by policing protests, but also through our indebtedness. The threat of violence — be it in home repossessions, wage decrease or austerity — is needed to maintain the creditor-debtor relation (Roos 2016). Debt keeps the public obedient to those in power and mobilises it to work to pay off debts and taxes. In this environment, practices such as debt cancellation have become a taboo, while non-payment of debts is associated with humiliation and the loss of social rights (Cuttilias and others 2015:185).

The globalisation or deregulation of finance since the 1960s has liberated financial capitalism from democratic oversight and regulation by accountable governments. It has led to the creation of global markets in money, as well as property, trade and labour (Pettifor 2018). Moreover, the design of the current monetary system, in which banks create the majority of new money when they lend, tends to create high levels of private debt (debt of households and businesses) as well as of public debt (Positive Money 2018). However, without the illusion of wealth generated by easy access to credit cards, mortgages, consumer credit and car loans, there would be little left of the middle class these days. A similar false impression of wealth appears at the global scale. The richest economies in the world actually produce very little. Their consumption largely relies on the provisions of international credit and continuous inflow of cheap goods from the Global South (Cuttilias and others 2015).

In order to reverse these unequal power relations at the heart of the debt economy we have to identify what created them in the first place. The debt economy has come into being because governments have come to rely on borrowing from the bondholding class instead of taxing it. In this context, the debt State has to seriously deal with the problem of inequality; progressive tax reform would need to be combined with substantial increases in social spending and other degrowth actions, which would be most effectively enacted through basic and maximum income, free public services, job guarantee and work sharing, shorter working week, public money and similar measures (Hager 2016).

In support of the debt economy, the European Union concerns itself solely with the efficiency of markets and their competitiveness, while its member States blindly trust in the redistribution of wealth through “trickle-down” economics. Their goal remains the same – ultimate economic growth masked as “sustainable”, “green” or “inclusive”, but growth nonetheless. Even though social and climate-related issues are interlinked, government policies still address them separately, as if they were not born out/of the same system – the free market system whose only end is economic growth accompanied by unrestrained corporate interests and growing power of finance. Such aggressive approach to achieving economic growth at any price has led to social instability and environmental crisis, and ultimately threatens democracy (Conte and others 2018).

Increasing concentration and centralization of the financial system makes all stakeholders in society – countries, businesses and households – increasingly dependent on financial institutions. In the EU, there are around 7000 financial institutions with the EU banking system not only the lar- 6 gest, but also one of the fastest growing in the world. Moreover, USA’s top five banks (and all banks are global in their activity) control 47% of all global banking assets, while the top 1% of mutual funds hold 45% of assets (Pettifor 2018). No wonder, then, that these banks are too big to fail.

While the bank size issue has already been pointed out as problematic, the idea for their decentralization and fragmentation has fully lost momentum in political debates, and little has been said about reforms of the banking system. Massive sums have been used for bank bailouts when in fact they should have been spent to fight ecological collapse, climate change and social inequality. Moreover, very little of this money has reached the productive economy as it was predominantly used to buy up corporate and government bonds (Steinfort 2019). Consequently, the legacy of the financial crisis is reflected in public rejection and distrust, not only in the financial industry, but, more significantly, in its regulators.

When the majority of new money is pumped into property and financial markets at a greater rate than can be accommodated by increase in supply, house prices rise much faster than incomes (Jackson and Dyson 2013). Moreover, additional bank lending causes the economy to grow and house prices to rise (Positive Money 2018).

Organization of society is currently based on the idea of markets as sole generators of wealth. Therefore, a critical view of GDP challenges the very concept of market economy. That said, replacing the concept of GDP is not a technical, but a political project (D‘Alisa, Demaria and Kallis 2015). However, if we are to speak of a new age, the Anthropocene, which requires rethinking of the old practices, this means we should also rethink the political and come up with new political action. The new age may mean the expiry of political polarization between the global and local, left and right (Latour 2018); it may also mean values and principles different from those that we inherited from the French Revolution. It would not be a bad idea to re-examine them. The new era definitely requires new terminology to better understand social relations, as well as a new conceptual framework to advocate for a different society.

One of the mechanisms facilitating civil society participation in the monitoring of public finance is public debt audit. Its political role rests on two basic requirements: transparency and democratic control over the State by the public. Its aim is not only to democratize knowledge and mobilize society in the quest for transparency in relation to the debt process, it is also to strengthen social participation in pursuit of an economic model that is more equitable and respectful of human rights and the environment. For that reason, borrowing should always take into account that people are not to be burdened by debt that does not benefit society (Cutillas 7 and others 2015). It is argued that “from a degrowth perspective, the goal is not how to re-launch growth and pay off debts, but how to distribute fairly the costs of a jubilee adjustment. Citizen-run debt audits are essential for determining which debts are legitimate and which are not (D‘Alisa, Demaria and Kallis 2015:14).” The option to pursue a unilateral suspension of payments long featured prominently in the policy toolkit available to heavily indebted countries, especially during times of crisis. The question, then, is why this alternative is no longer being considered in the era of financial capitalism (Roos 2019).

However, to facilitate civic participation in defining the purpose of finance and shaping its rules for its operation and control we should be aware of: the complexity of finance, the absence of transparency and the lack of understanding. If the public cannot understand the benefits of a reformed financial system and the importance of personal engagement or the engagement of civil society in implementing improvements, it is much less likely to participate in these processes of defining and shaping of finance (Fazi 2016, Pistotnik 2018).

We need a degrowth transition now. Linking our struggles against ecological collapse and other forms of exploitation to the efforts to rebuild radically fairer financial systems is vital to transform our economies. In this respect, policies should be daring and should shift their philosophy from growth at all costs to encouraging an economy with greater equality, high levels of wellbeing, and decarbonisation (Positive Money 2018). With this new imagery we want to spark trust and nurture alliances, as they provide the foundation for fleshing out radical, but feasible money and finance models that can help us build a just transition into degrowth, the future we want (Steinfort 2019).

### AT: Nukes Link

#### It’s not violent to say nukes are inherently dangerous---the AFF breaks down imperialist assumptions by reorienting towards the insecurity of the US arsenal.

Hugh **Gusterson 18**. Anthropologist at George Washington University, focusing on nuclear culture, international security and the anthropology of science. 02-28-18. “Democracy, Hypocrisy, First Use.” Nuclear Age Peace Foundation. https://www.wagingpeace.org/democracy-hypocrisy-first-use/

I’m an anthropologist. In my view, what holds the arms race in place and keeps it going is what Elaine Scarry has called a “mental architecture.” That mental architecture makes it seem natural and normal to many that tens of thousands of nuclear weapons exist on hair-trigger alert. How did that mental architecture arise? For over 30 years now, I’ve been in dialogue with nuclear-weapon scientists at both the Lawrence Livermore National Lab and the Los Alamos National Lab. If you’re an anthropologist, you always try to be sympathetic to the people you study, to explain to others how their worldview makes sense. Many of these scientists have become friends whom I like and respect. But my writing about these scientists, and about American nuclear culture more generally, also asks how beliefs that seem to me mythical and profoundly mistaken became for weapons professionals and for the broader American public what the French social theorist Roland Barthes calls “falsely obvious.” Two of these myths are widely subscribed to by both liberals and conservatives. The two myths purport to explain why some countries can be trusted with nuclear weapons and some can never be, and lead many to believe that nuclear weapons protect a liberal democratic international order. They also lead many to take it for granted that the president of the United States can condemn North Korea for testing a missile the very same week that the US tests a ballistic missile, and no one says, “Wait a minute, isn’t that hypocritical? Isn’t there a double standard there?” The first myth is that the US is a democracy in the fullest sense of the word, and that nuclear weapons protect this democracy. When I say to my students, “You know the US is not really a democracy, right?” they say “You’re crazy, Professor.” They won’t even argue about it, because to them it’s obvious the US is a democracy. What is a democracy? The Oxford English Dictionary definition is it’s “government by the people; that form of government in which the sovereign power resides in the people as a whole and is exercised either directly by them as in small republics of antiquity or by officers elected by them.” The US Constitution states that “Congress shall have power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land or water.” The OED definition and the US Constitution make clear that in a democracy, one autocratic figure should not have sole authority to declare war. But in reality, as President Nixon famously told a group of congressmen, “I can go in my office and pick up a telephone, and in 25 minutes, millions of people will be dead.” A president of the United States made that boast—there is nothing less democratic. As Elaine Scarry says, “A momentous shift in the nature of government, the home population’s power of and responsibility for self-defense, has been lifted away from them and condensed into the head of government.” The second myth is that the US is a modern country with the maturity and rationality to possess nuclear weapons, unlike developing countries, and unlike countries in the Global South. I call this way of looking at the world nuclear orientalism. It characterizes countries in Asia, Africa, Latin America as too infantile, too immature, and too irresponsible to be trusted with nuclear weapons. Nuclear orientalists—that is to say, most of us—see developing countries as lacking the democratic self-control required of nuclear powers. They present developing countries as seeking nuclear weapons for vanity or to gain attention and not for legitimate reasons of self-defense. And they believe that fanatics are more likely to control nuclear weapons in developing countries, especially Muslim countries, than in developed ones. The frame of nuclear orientalism takes it for granted that Muslim leaders could destroy the world in a fit of fanaticism. Here are some examples, deliberately chosen from both the left and the right. At the Livermore Lab, where I did my fieldwork, I was given a pamphlet that stated, “Smaller nations with deep-seated grievances against each other may lack the restraint that was exercised by the US and the USSR.” Here is Kenneth Adelman, who was an official in the Reagan Administration: “The real danger comes from some miserable Third World country which decides to use these weapons either out of desperation or incivility.” These comments take it as given that Third World countries are not like us. In that same spirit here is a very recent example from Forbes magazine: “Nuclear weapons are one of those sovereign rights that should not be granted to autocratic leaders. Because of this adherence to core values, global public opinion trusts Western democracies to have nuclear weapons and to use them in a defensive manner.” By contrast, the author of the Forbes article points out that “North Korea’s sovereignty inheres in just one man.” But remember Richard Nixon’s boast that he could exercise a similarly autocratic sovereignty. Many of these discussions assume that public opinion has a greater force in the West than in developing countries. For example, Bill Potter, a liberal arms control analyst at the James Martin Center for Nonproliferation Studies, has written, “Adverse domestic opinion may also serve as a constraint on the acquisition of nuclear weapons by some nations. Japan, West Germany, Sweden, and Canada are examples of democracies where public opposition could have a decided effect on nuclear weapons decisions. … The fear of adverse public opinion, on the other hand, might be expected to be marginal for many developing nations without a strong democratic tradition.” What I find fascinating about an expert on nuclear weapons and nuclear history writing this is that Britain, France, and the United States all made the decision to acquire nuclear weapons with absolutely no democratic debate. There was no debate in the public sphere, nor in those countries’ legislatures. These decisions were not subject to democratic decision making, yet even highly informed people continue to take it, falsely, as obvious that they were and are. And consider US media coverage of India’s and Pakistan’s nuclear tests in 1998. Michael Krepon, the liberal cofounder of the Stimson Center, said that India’s tests “weren’t done for security purposes,” despite the fact that India has a nuclear-armed China on its border. Instead, he said, India tested nuclear weapons “for reasons of domestic politics and national pride. … We have street demonstrations to protest nuclear weapons. They have them to celebrate them.” In other words, the US is serious, India is frivolous. More recently, the New York Times opined, using language usually reserved for children: “Maybe North Korea is just jealous of all the attention that Iran has been getting as a result of Tehran’s recent nuclear bad behavior and craves a spotlight of its own.” Nor is the New York Times alone in this view: “Whenever the North Koreans act up, one has to assume in part at least that they are trying to get the world’s attention.” That’s from Robert Einhorn, who was special advisor on nonproliferation and arms control to the secretary of state from 2009 to 2013. Cartoons often make these assumptions even more visceral; many portray Kim Jong-un as a child who wants attention and can’t be trusted with nuclear weapons. Today, our mental architecture is being destabilized because the US has a president who disturbingly resembles the most cartoonish versions of Kim Jong-un; Trump also seems like a child who wants attention and can’t be trusted. The dichotomy between a responsible, mature, rational, democratic United States and autocratic, impulsive, childish, irresponsible North Korea, Pakistan, Iran, or India is breaking down. Since President Trump won the election, students in my classes have begun to say things that they would not have said before. They are starting to ask, “He couldn’t just use the weapons on his own, right? There must be some way of constraining him?” I have to tell them that, in theory at least, he can use the weapons on his own. Students who used to reject out of hand my arguments about nuclear orientalism are now giving them a second look in the era of Trump, who made comments like this one in a speech to the United Nations: “The United States has great strength and patience but if it is forced to defend itself or its allies we will have no choice but to totally destroy North Korea. Rocket Man is on a suicide mission for himself.” This is an open boast from the president of the United States that he is considering committing genocide. If we want to move toward a better, safer world, we have to start to realize that Americans have no monopoly on maturity and rationality. We should look in the mirror of Donald Trump and ask ourselves what it says about the United States that it was capable of electing such a human being as president. We should question our own smugness about how safe nuclear weapons are in our leader’s hands. Given that any country can end up with an irrational, autocratic leader at some point, the only world safe from nuclear war is a world where nuclear weapons have been abolished.

#### They invert the error, which is worse.

Scott D. **Sagan 95**. Assistant professor of political science at Stanford University. 1995. “The Spread of Nuclear Weapons: A Debate.” p.115-116.

There are two basic kinds of errors that one can make in assessing nations other than one's own. The first error is rooted in ethnocentrism. This is a common mistake Americans make when looking at others: we too often assume that other nations are less competent, less intelligent, and less rational than the United States. Kenneth Waltz has performed an important service in this regard: his analysis of nuclear proliferation is a valuable corrective against such ethnocentrism and the blind spots it can create among both scholars and government officials. He is absolutely correct, in my view, to criticize a number of proliferation pessimists who argue, in effect, that the United States has been perfect in handling nuclear weapons (but others will not be), that the United States can control these awesome weapons forever (but no one else can), or that the United States has utterly unproblematic civil-military relations (but no one else does). Waltz's analysis should serve as a constant reminder of how dangerous it is in international affairs to assume, to put it crudely, that the United States is smart, but that other nuclear states are or will be stupid. The second basic error, however, is the opposite: to assume that others are better than we are. This is, I believe, the central problem with Kenneth Waltz's arguments about the consequences of proliferation. He now appears to accept many of the arguments made by scholars who have studied the operational accidents and near-accidents, conflicts in civil-military relations, and other organizational problems experienced by the United States during the Cold War. Yet he maintains that other states will do better, will be smarter, will learn more quickly, will, in short, avoid the kinds of errors that we have suffered in the past. I believe, in contrast, that there are both strong theoretical reasons and emerging empirical evidence to expect that new states will not avoid such problems. New nuclear powers may not make exactly the same mistakes as their predecessors; but they are likely to make their own serious errors, and some will be deadly.

### AT: Heg Bad Impact

#### U.S. leadership is locked in---the material base of primacy is overwhelming

Carlo Catapano 21, PhD Candidate in International Studies at the University of Roma Tre, MSc in International Relations of the Americas at UCL, “Book Reviews: Unrivaled: Why America will Remain the World’s Sole Super-power, by Michael Beckley. Ithaca: Cornell University Press, 2018, pp. 231.”, Interdisciplinary Political Studies, Volume 7, Number 1, p. 249-252

Despite the many contrasting opinions on the trajectory of US power and the forthcoming structure of the international system, a conventional wisdom seems to have emerged in the literature, which suggests that the era of US unipolarity is fading and China is ready to step up as a superpower able to equal – or even substitute – US primacy in terms of material capabilities. Michael Beckley’s work counters this widespread interpretation and tackles the empirical observations on which it rests. It does so by pursuing an accurate criticism of the gross indicators (like GDP or military spending) conventionally employed to measure state power, and by proposing an alternative methodology to evaluate states’ capabilities in net terms.

Without considering the costs that countries face for protecting their territories and populations, he argues, gross indicators tend to overstate the capabilities of large and populous countries. Accordingly, Beckley proposes (Chapter 2) to deduct three types of costs (production, welfare and security costs) to the gross indicators of states’ economic and military resources. From this operation, it derives a net measurement of one country’s power that – Beckley maintains – is more accurate and revealing than classic indices. To prove this point, he offers a recalculation of the capabilities of the great powers involved in prolonged, militarized rivalries over the last two centuries and shows that – when their resources are measured in net terms – the power asymmetry between them is an effective means to predict their failure or success. The best examples are the major conflicts involving China and Russia in the nineteenth and twentieth centuries such as the two Opium Wars between China and Britain or the Russian-German rivalry culminated in WWI, to name but a few. In terms of gross indicators, China and Russia represented the strongest side in all the conflicts considered; nevertheless, they have always been defeated. By counting state capabilities differently, in fact, however, those countries’ net power position com-pared to their rivals (either Britain, Japan, or the US) was considerably weaker; it is exactly this gap in net resources – Beckley argues – that explains their defeats.

Moving on to the emerging rivalry between China and the United States, Beckley acknowledges that the Asian giant is its most likely challenger. However, his detailed evaluation of Beijing’s economic and military resources leaves no room for doubts: China lags behind the US on almost every net indicator, and the gap between the two is unlikely to vanish any time soon. This conclusion is surprising if one considers the constant references – in academia and the media – to China’s rise and the Asian century. Beckley points out the weaknesses of the Chinese economy (Chapter 3), the hidden costs for a large, populous and developing country that are not included in gross estimates, and the various advantages that the US economic system still owns despite the limited growth of the post-2008 period.

Similarly, he compares (Chapter 4) the net military capabilities of the two powers by subtracting, for example, the costs to maintain security at home from their overall military assets. Also, he addresses the geopolitical factors that separate the US and Chinese ability to project their military power abroad. From this analysis, it emerges that China’s position is severely constrained by the high costs paid to assure its internal security and the defense of its national borders as well as by the welfare costs associated to the large number of troops composing the People’s Liberation Army. Beckley argues that China’s rising military capabilities are also constrained by the continued presence of US outposts in the region and the improvements made by China’s neighbors to their own military forces. Overall, this assessment leaves few chances for Beijing to obtain the regional hegemony that it would need to challenge the US on a global scale.

Beckley’s analysis also indicates the path forward (Chapter 5), starting from the rejection of the theories usually employed to predict the fate of US power (balance-of-power theory and “convergence” theory). All indicators suggest that the US will retain its role of leading global power in the coming years, notwithstanding China’s uninterrupted rise. Beckley is eager to point out, however, that this conclusion should not be confused with the praise of American superiority or invincibility. At no point, does his analysis suggest that Washington’s primacy is uncontestable or destined to last forever. Instability with weaker countries, unnecessary wars, internal polarization and disunity, can all produce unpredicted losses and undermine the position of the most powerful country in the world (Chapter 6). Beckley’s argument, therefore, consists in a re-evaluation of the sources of power that have guaranteed the US primacy since the end of the Cold War. Those same sources still place the United States in a category of its own, apart from the other great powers of the system. This book’s claim, in the end, is about the duration of the unipolar era, which it predicts will last more than usually expected, not about the infallibility or moral virtues of US power.

A few years later on the publication of this book, its central tenets are even more relevant. Events such as Trump’s nationalist policies, the trade war with China, the COVID-19 outbreak seem to have accelerated history and the shift away from the post-Cold War unipolar configuration. Beckley’s work, however, invites to reject simplistic predictions about the dismissal of US primacy. The decline in Washington’s global influence as well as the retrenchment from its international responsibilities do not necessarily mean that its net position in terms of material capabilities has collapsed or that a condition of power parity with China has finally emerged. Even if outcomes are not favorable to US interests, it does not mean that US power has vanished. This is a relevant reminder for policymakers in both Washington and Beijing.

### AT: ALT

#### Revolution necessitates violent retaliation, causes spiraling global conflict, and reifies the systems they ‘reject.’

Dr. George Lawson 11, Associate Professor, International Relations, London School of Economics and Political Science, “Halliday's Revenge: Revolutions and International Relations,” International Affairs, Vol. 87, No. 5, pg. 1069-1071, September 2011, JSTOR. edited for OCR errors and language differential.

Third, Halliday took seriously the major claim of revolutionaries: that because the international system (whether understood as capitalist, imperialist or a mixture of the two) was the fundamental source of their oppression, the legitimacy of revolutions rested on establishing a novel, more emancipatory system in its place. As a result, revolutionary states saw their struggles not as contained within the limits of state borders, but as transcending existing boundaries. Marx and Engels, for example, thought that communism could not exist 'as a local event. The prole-tariat can only exist on the world-historical plane, just as communism, its activity, can only have a world-historical existence.'10 Lenin makes this point starkly: 'global class, global party, global revolution' ( Weltklasse , Weltpartei, Weltrevolution).11 And Che Guevara turned it into a battle-cry of anti-imperialism in his 'Message to the People of the World':

How close and bright would the future appear if two, three, many Vietnams flowered on the face of the globe . . . what difference do the dangers to a human being or people matter when what is at stake is the destiny of humanity. Our every action is a battle cry against imperialism and a call for the unity of the peoples . . . Wherever death may surprise us, let it be welcome.12

The centrality of international oppression to the analysis of revolutionaries, Halliday argued, meant that revolutionary movements ran counter to the ground rules of international order (sovereignty, international law and diplomacy), proclaiming ideals of 'universal society' and world revolution. Revolutions challenged international order in a number of ways, ranging from disrupting existing patterns of trade and alliances to questioning underlying rules, norms and principles. To take one example, the challenge of the Bolshevik Revolution was at once short term (prompting the withdrawal of Russian forces from the First World War), medium term (in the provision of support for allied states) and long term (in the establishment of a systemic alternative to market democracy). As Halliday argued, revolutionary states forced Great Powers to act by challenging their credibility as Great Powers. In other words, in order to justify their position at the apex of the international system, Great Powers were required to quell revolutions.13 As such, counter-revolution was not an instrumental reaction to moments of revolutionary upheaval, but a process hard-wired into the fundamentals of international relations itself.14

The fourth international component of revolution lay, for Halliday, in its close association with war. As Stephen Walt notes, revolutions intensify the prospect of war in three ways.15 First, revolutions provide a window of opportunity for states to improve their position vis-a-vis other states, for example by seizing territory, attacking a state previously protected by the old regime, or generating conflict between the revolutionary state and its rivals. In particular, because revolutionary regimes are beset by civil strife and elite fracture, other states may seize the chance to attack the revolutionary regime. Second, this 'window of opportunity' generates 'spirals of suspicion' as the uncertainty produced by the revolution heightens levels of insecurity that, in turn, raise perceptions of threat.16 Finally, revolutionary states seek to export their revolution, both as a way of shoring up their fragile position at home and because of their ideological commitment to an alternative international order. Concomitantly, counter-revolutionary states assume both that revolution will spread unless it is 'strangled in its crib', and that revolution will be relatively easy to reverse.17 This 'perverse combination' of insecurity and overconfidence heightens the prospects of interstate conflict.18 By increasing uncertainty and fear, by altering capabilities and by raising threat perceptions, revolutionary states begin a process which, quite often, leads to war.

For Halliday, therefore, revolutions are always international events: revolutions have international causes, revolutionaries seek to export their revolution abroad, and revolutions share a close relationship with both counter-revolution and war. In this sense, revolutionary states exhibit a particular form of 'revolutionary sovereignty', one which legitimizes domestic [autocracy] autarchy and international intervention simultaneously. However, as Halliday recognized, the effects of revolutions on the international system are uneven. Hence, while the Bolshevik Revolution ushered in over 80 years of conflict between state socialism and market democracy, it is difficult to see many large-scale ramifications that arose from the Mexican or Ethiopian revolutions. At the same time, there is a paradox at the heart of the relationship between revolutionary states and the international system: revolutionary states must establish relations with other states and coexist with the system's rules, laws and institutions, even while professing to reject these practices. As such, pressures to conform provide a counterweight to claims of self-reliance and international contestation. Despite challenging existing patterns of interaction and hierarchy, revolutionary states play their part in reproducing regimes governing trade, alliance formation and security. Indeed, the often tenuous nature of revolutionary regimes, besieged from without and within by counter-revolutionary forces, means that they take claims to domestic sovereignty and state security seriously. As such, they often serve to strengthen the very states system that they seek to undermine. Although this is some way short of domesti-cation or 'socialization, in order to function as states revolutionary states give up many of their revolutionary aims.19

Halliday did not merely see revolution as an important topic for IR; he also thought that IR had much to offer sociological and historical accounts of revolution. First, international factors (defeat in war, the vicissitudes of the market and shifting alliance structures) often precipitated and prompted revolutionary crisis. Second, international actors played a major role in encouraging revolutions via arms, aid and the power of example. Finally, revolutionary foreign policies were committed to the export of revolution, albeit with mixed success. As such, IR scholarship aided the general study of revolution by making apparent its modular features: the 'period of grace' offered to revolutionary regimes as foreign powers assessed its challenge; 'active confrontation' as this challenge was met by counter- revolution and war; and finally, long-term 'accommodation' as both sides of the conflict took part in symbiotic, if unequal, exchanges.20 The history of international relations also demonstrated that, for all the 'voluntarist delusions' of revolutionaries from Trotsky to Guevara, the particular contexts in which revolutions emerged meant that emulation was, at best, a remote possibility.21

#### You cannot undo militarism without the AFF.

Fred Block 18, Emeriti / Research Professor Department of Sociology, University of California Davis, leads the Center for Engaged Scholarship, “Financial Democratization and the Transition to Socialism,” May-June 2018, <https://ssc.wisc.edu/~wright/929-utopias-2018/wp-content/uploads/2018/01/Block-Democratizing-Finance-April-2017.pdf>

1. Introduction.

Recent events in Greece have suggested the possibility of a surprising convergence between radical financial reform and socialist politics. Since 2010, Greece has been the most serious European victim of austerity policies that have produced high unemployment and economic misery. On January 25, 2015, Syriza-- a left-wing party opposed to austerity-- won the Greek parliamentary election and was able to form a government. What followed were months of painful negotiations with the Troika—the European Commission, the European Central Bank, and the International Monetary Fund –over the terms of a new loan that Greece needed if it was to stay in the Eurozone. The Syriza finance minister, Yanis Varoufakis, a leftist economist, became extremely unpopular with the Troika negotiators because of his insistence that Greece be released from years of painful austerity. His resignation was required before a new bailout that involved continuingh austerity was finalized.

After leaving the government, Varoufakis revealed that his department had been working on a contingency plan if Greece could not come to terms with the Troika. The plan was a response to the threat that the European Central Bank would stop providing lines of credit to Greece’s banking system which would mean that Greek banks would have to close their doors and the resulting absence of credit would bring the entire economy to a standstill.

Varoufakis and his team planned to use the nation’s tax identification system to construct a parallel credit system that could function while the Greek banking system was out of commission. In the absence of checks, individuals and businesses would be able to pay their bills by having this newly created parallel banking system debit or credit their tax account by the amount required. Presumably, those with large debt positions would have to pay some interest, but many of those who were economically active would see their debits offset by inflows of payments from others. Once this system was in place, ordinary economic activity could continue even without a banking system, and it might even be possible to reverse years of austerity in Greece if those running the parallel system made access to credit available at favorable interest rates. Some businesses that had been previously starved for credit could conceivably expand their operations. In short, this was a plan to use the government’s authority to create a public system of credit creation.

To be sure, this plan was never implemented and its mere existence was seized upon by other political parties in Greece to tell voters that the Syriza government was reckless and dangerous. Nevertheless, the incident is important because it represents a rare moment of convergence between two political and intellectual currents that have been deeply at odds for many decades. The first is the tradition of Marxian socialism that has historically adopted quite orthodox positions on questions of finance. Polanyi argues, for example, in The Great Transformation that after World War I, socialist intellectuals were virtually unanimous in advocating a return to the Gold Standard and even when socialist parties won national elections, they were usually quite reluctant to engage in deficit financing or other unorthodox policies. 5

The second tradition is more heterogeneous; it includes thinkers of both the right and the left who imagined that redesigning the mechanisms through which credit is allocated in the economy could be a path to significant economic and political improvements. 6 We can call this group radical financial reformers; representative figures include C.H. Douglas who inspired “social credit” parties in a number of English speaking countries and various left-wing proponents of local money systems based on labor time. 7 In The General Theory, John Maynard Keynes pays tribute to Silvio Gesell, a German-born thinker who lived for a time in Argentina and proposed the concept of stamped money.8 Currency would lose its value unless it was stamped each month and the cost of the stamps would provide a powerful incentive against hording.

With a few notable exceptions, there has been little love lost between these two traditions.9 For one thing, fascists in the 1920’s and 1930 often made use of these alternative credit ideas to attack existing financial elites and to attract the support of disillusioned leftists. Ezra Pound, for example, was influenced by both Douglas and Gesell and their views helped to inform his idiosyncratic embrace of Mussolini. But the deeper issue is that Marxists have generally argued that the only way to transform the financial system is by ending the system of private property. They have viewed attempts to tinker with the organization of the financial or credit system as a diversion from the struggle to gain control over the means of production.

But the Syriza incident suggests that in the current period characterized by an accelerating process of financialization of economies around the world, there is now a possibility of a creative synthesis between these two traditions. This essay will go even further to suggest that radical financial reform might provide the means to overcome the formidable barriers to a democratic transition to socialism. In parallel with the concerns of the Syriza finance ministry, elected left governments from the 1930’s onward have had to contend with capital flight and capital strikes when they try to implement measures that threaten the interests of property holders. The result of these resistance efforts is generally a downturn in economic output that undermines political support for the leftist government. As Wright has argued the difficulty of getting through these periods of diminished output has repeatedly frustrated democratic socialist advances.10

But what if an elected left government were able to implement an incremental program of financial reforms that began to create a parallel financial system that existed alongside the existing financial structures? It might be possible that after these parallel financial institutions had grown over some years, the left government would be able to survive a direct conflict with propertied interests because the historic weapons of capital strike and capital flight would no longer be sufficient to cause a sharp economic downturn. In other words, if radical financial reform could weaken the structural power of capital to resist a broader program of socialist transition, it might be the key strategic tool that advocates of socialism have long sought. In this sense, the democratization of finance would be the paradigmatic real utopia because over a decade or two, it could transform the balance of power in the struggle to shape the social order.

2. What has Changed.

There are three basic reasons that a synthesis between socialist theory and financial reform is now feasible. The first is the dramatic shift in the role of large corporations in developed market economies. This shift is particularly visible in the United States where one scholar has written a book entitled, The Vanishing American Corporation. 11 The basic idea is that the corporations that dominated the U.S. economy a generation ago employed hundreds of thousands of people in giant factories and huge headquarters buildings. But this is no longer the case. Large manufacturing firms such as General Motors have drastically reduced their global labor force through the adoption of new production technologies. Newly dominant corporations are exemplified by Facebook and Apple. Facebook employs fewer than 13,000 people and Apple has only about 66,000 employees in the U.S. 12 To be sure, they accomplish this leanness in different ways. Facebook relies on hundreds of millions of users to produce content while Apple relies on subcontractors in Asia to produce most of its products. But the end result is the same; the share of total employment provided by large corporations has been falling precipitously for decades.

Moreover, the new technologies have also created expanded opportunities for small and medium-sized enterprises. Part of this is the decomposition of production processes as large firms increase their reliance on subcontractors and various forms of outsourcing. But another part is that declining capital costs put sophisticated technologies in the reach of small firms. Current possibilities range from people making a living by buying and selling things on E-Bay or renting out units on Airbnb to people developing new smart phone apps to highly specialized and tiny manufacturing firms that sell their products over the internet. At the same time, a cultural interest in healthy and organic food has also led to a proliferation of new restaurants and small businesses selling specialty foods and beverages.

These trends mean that most people are now either self-employed, work in the public sector and nonprofits, or in business firms with fewer than 500 employees. To be sure, many of those who are self-employed or work in small firms might still be directly dependent on large corporations, working for them as subcontractors or franchisees or hoping that their small firm might ultimately be bought out by a larger firm. Nevertheless, the result is still an economy that is substantially more open to bottom up initiatives than was true thirty or forty years ago.

Yet at the same time, the financial system has been moving in the opposite direction towards greater centralization in giant firms. This has been particularly acute in the banking sector where a handful of giant banks now control a wildly disproportionate share of all consumer deposits. 13 This creates a large financing gap because these giant institutions have very little interest in the time-intensive work of providing loans to small and medium sized enterprises. The result is a large and growing disjuncture between expanding entrepreneurial opportunities and a financial system that is preoccupied with giant transactions in large money markets. This gap means that for the first time since the heroic days of agrarian populism in the late 19th century and early 20th century, 14 the issue of financial reform to make low cost credit available to millions of people has the potential to motivate large scale social movement pressures.

So there is a political opportunity at the same time that the corporate community’s capacity to resist reform pressures has fallen. In earlier decades, when the biggest corporations were responsible for a large share of total employment, their political clout was much greater. Their threat to reduce investment and to shut down factories could almost instantly produce mass unemployment. Now, however, with their diminished payrolls, such threats are less compelling. These big firms have become much more reliant on political allies in Congress and the White House to protect them from reform initiatives that threaten their power. But this shift is a source of vulnerability because pro-business politicians can suffer big electoral defeats.

A second factor that facilitates this synthesis between socialism and radical financial reform is that at the current stage of economic development, investment in infrastructure has become an increasingly large element of total investment. 15 There are basically four reasons for this. The first is the accelerated processes of urbanization that have concentrated human populations in cities. In contrast to towns and rural areas, urban agglomerations require much more infrastructure per capita in order to manage flows of goods, people, energy, water, and sewage. Second, new technologies of transportation and communication tend not to displace earlier ones so there need to be simultaneous investments in multiple systems. In transportation, we now require infrastructure spending for water-borne transport, roads, railroads, air travel, and space travel. In communications, we have land lines, broadcasting, cable systems, mobile phones, the internet, and plans for a much more advanced system for transmitting vast amounts of digital data. Third, most infrastructure projects—both maintenance and new construction-- are relatively labor intensive as compared to manufacturing and this drives up their relative cost. Finally, climate change is necessitating major new investments designed to protect populations from deadly storms and rising sea levels.

The growing magnitude of infrastructure investment creates a huge problem because most infrastructure spending has features of a public good. This means that private firms, acting alone, are usually unable or unwilling to make these investments. Governments end up building infrastructure themselves, contracting with private firms to do the actual building, working out regulatory formulae that guarantee profits to private firms that make needed infrastructure investments, or resorting to public-private partnerships that assure private interests a future income stream for helping to finance the infrastructure. The difficulty is that resistance to higher taxation across the developed market societies means that governments at all levels find it increasingly difficult to finance needed infrastructure spending no matter which of these strategies they choose.

A logical solution to this problem has emerged in countries such as Brazil and Germany that have state investment banks. 16 Such banks are defined as off-budget entities, so their debt is not included on the government’s balance sheet, but they have a franchise to create credit. So these institutions are able to make very large investments in infrastructure projects with both other public sector partners and with private firms. Even in the United States with its deep hostility to violations of the separation between government and the market, President Obama pressed for the creation of a national infrastructure bank that would emulate what Germany and Brazil have done. While Congress has refused to cooperate, this is an indication that the issue of infrastructure spending has put on the political agenda a major reform of the financial system.

The third factor that facilitates a new synthesis between socialism and radical financial reform is that we now have available a better understanding of how the credit system works than the perspectives used by earlier generations of left theorists. This new understanding is what Robert Hockett has outlined in his contribution to this volume. It is basically the franchise theory of credit creation. The argument is that in the modern era of central banks as lenders of last resort, the state basically grants a franchise to private actors to engage in the process of credit creation. Without the state’s ultimate agreement to protect these franchise holders from failure, they would not be able to engage in the process of creating credit out of thin air. But this process of credit creation is essential or otherwise economic activity would quickly decelerate in the absence of access to credit at reasonable rates.

The critical feature of the franchise model is that it makes clear where power actually lies. As franchisees, the private financial intermediaries that create credit are obviously dependent on the government. Without the franchise arrangement, the risky activity of credit creation would sooner or later lead them to fail. However, these institutions also have a very strong interest in hiding the reality of this dependence because government authorities must also regulate the financial sector and place limits on the riskiness of their portfolios. Since the banks and other financial institutions make greater profits by taking on higher levels of risk, they are constantly facing conflicts with regulators about the appropriate level of risk. 17 Their main strategy for gaining leverage on the regulators is by insisting that the dependence runs in the opposite direction. They do this by arguing that banks and other financial institutions engage in the critical task of intermediation—connecting lenders and borrowers. They further claim that if they are unable to engage in the vital task of intermediation, economic activity would slow to a crawl and government revenues would fall precipitously. It follows that financial intermediaries must be granted maximal freedom to direct credit where it is needed. Excessive regulation of finance will “kill the goose that lays the golden eggs.” Of course, this argument gains force because of the widely believed idea that the fastest route to prosperity is to depend on the selfregulating dynamic of markets.18

Since the franchise model cuts through this ideological haze, it opens up a whole set of alternative policy options. One is to replace the current framework of financial regulation with the public utility model. That model is based on the idea that in providing a private firm with the monopoly rights to provide electricity or natural gas to homes and businesses in a certain geographical area, it is appropriate for regulators to control the amount of profit that the firm can earn from that business. In exchange for giving a particular financial institution the franchise to create credit, the government should set a maximum amount of profit that the firm could earn. Such an approach would have the great advantage of discouraging financial institutions from taking on higher levels of risk since they would not be able to retain profits in excess of the government set ceiling.

The more radical option is for the government to expand the category of franchisees that are authorized to create credit to entities that are not organized to pursue profitability. This can happen in two ways. One is for the government to create in-house franchisees which would be public sector agencies that have the ability to create credit. The other is to encourage the creation of organizations, organized by local or state governments, or nonprofit institutions that would be credit creating franchisees. In both these scenarios, granting the franchise would have to be accompanied by regulatory measures since public or nonprofit entities would still have incentives to engage in irresponsible or unsustainable credit creation.19 But as we have argued, the United States has already implemented parts of this radical scenario. Moreover, the unsuccessful Obama proposal to create a national infrastructure bank is essentially the idea of the government creating another in-house franchisee.20 Hence, the changes that are proposed here represent not something fundamentally new, but simply expanding the scale of what already exists.

Another strength of the franchise model is that it makes clear how much agency governments already exercise in shaping their nation’s financial system. Let us take by way of comparison the apparel industry. In the case of apparel, government actions including trade policies, labor policies, tax policies, and so on are likely to influence the way the industry has evolved, but very often this influence occurs at the margin. The choices made by entrepreneurs and firms, within the context of government policies, make a huge difference in determining how much production occurs domestically, whether that production is oriented towards fashion and high end consumers or to mass markets, and the mix of cutting edge technology and skilled or unskilled labor that are used for production.

In finance, in contrast, government policies tend to exert a much stronger influence over the evolution of the industry. There are some legacy institutions that have continued in some form since the 19th century, but the specific role that they play in the 2010’s generally has less to do with their historic emphases than on recent government policies. In the U.S., for example, there was a very long history of a highly diversified banking sector with thousands of small and medium sized banks. But that changed in the 1980’s when the Reagan Administration decided that insufficient industry concentration was hurting the competitiveness of U.S. banks in the global economy. 21 Government policies drove a huge wave of mergers and takeovers over a quarter century that ended up with a handful of giant banks controlling more than 50% of all consumer deposits. In Germany, in contrast, a very different set of government policies worked to preserve a tripartite structure in which the terrain was divided among private banks, landesbanks (state banks), and cooperative banks.22

The point is that even theorists who draw on a Marxian framework for understanding the dynamics of capitalism have to acknowledge what we can call the relative autonomy of the financial superstructure.23 The logic of extracting surplus value at the point of production does not dictate a particular form or structure for a society’s financial system. There is great diversity in the structure of financial institutions in different developed market societies with some relying heavily on public sector financial entities and others demonstrating considerable regulatory effectiveness in keeping destabilizing speculative finance in check. In short, state policies have been and continue to be critical in determining what a nation’s financial industry looks like. All of this suggests that reform initiatives in this sphere could be successful.

3. The Problem of Socialist Transition.

The recent experience of Greece’s Syriza government exemplifies the problem faced by leftist parties that have promised their supporters a definitive break with “capitalism” defined as the rationality of a market economy based on the pursuit of profit. Such governments generally have faced a combination of domestic and foreign opposition that fundamentally weakens the domestic economy with the usual result that the leftist government retreats from its transformational agenda. Chile in 1973 represents the exception where the elected government persisted in its project, but mounting domestic turmoil provided the excuse for a U.S.-backed military faction to cease power. One way or the other, every time an electoral path to socialism has been attempted, it has ended in defeat.

Wright has theorized this problem in terms of the “transition trough” that an elected socialist government is likely to face.24 While the new administration is elected with a promise to raise living standards for a majority of the population, domestic and foreign resistance generally leads to an economic downturn that inevitably erodes the government’s support because the promised increases in output and more equitable distribution are not occurring. So the critical issue is whether there are means by which both the depth and the duration of the transition trough can be minimized. If the trough is shallower and briefer, the chances are greater that the government can consolidate its domestic support and move forward with its transitional program. But assessing this issue requires a more careful view of why and how the transition trough emerges in the first place.

The trough is generally created through the confluence of domestic and global pressures. At home, resistance to the government’s proposals means that businesses and wealthy individuals are likely to forego new investments and large firms might begin layoffs in anticipation of weakening demand. At the same time, both foreign and domestic groups are likely to start shifting liquid capital out of the country in anticipation of a fall in the value of the national currency. The government’s ability to offset this capital flight with increased foreign borrowing is likely to be limited because of the hostility of international banks and global organizations. The result is invariably a currency crisis where the government has to take action to prevent a dramatic fall in the value of the nation’s currency.25 While the government might impose controls to slow the flight of capital, it usually has to raise domestic interest rates in an effort to slow the outflows. But the tighter monetary policy generally has the effect of further slowing domestic economic activity so that the transition trough becomes even deeper.

This combination is powerful because the domestic and foreign opponents are able to continue the pressure month after month. It makes sense for firms to withhold investment and make do with lower profits for a year or longer in order to defeat the leftist threat and guarantee larger profits in the future. At the same time, the outflows of capital are likely to continue, so the government has little respite from the ongoing currency crisis. The possibility of a reformdriven domestic economic expansion gets pushed off into the future as the transition trough becomes longer and deeper.

However, the kinds of financial reforms proposed here have the capacity to reduce the severity and duration of the transition trough. The central mechanism is the expansion of the not-for-profit portion of the financial system and the shrinking of the for-profit segment. The nonprofit financial institutions could be expected to maintain and expand their lending so as to blunt any kind of investment slowdown by large firms and for-profit financial institutions. Given the growing importance of infrastructure spending and the fact that employment by large corporations has already dropped precipitously, there is a distinct possibility that expanded lending by the more democratic financial institutions would maintain employment levels at pretransition levels.

But even if there was little or no domestic investment slowdown, the pressures of capital flight would continue. But it is here that the growing size of the nonprofit financial institutions would become relevant. Not only would they be reluctant to participate in the capital flight, they would also have the ability to increase their borrowing abroad to offset the pressures on the national currency. So, for example, a public infrastructure bank and large nonprofit investment banks, for example, with an established track record of operating effectively would retain their capacity to borrow on global capital markets. They might in this transition period have to pay a somewhat higher rate of interest, but their increased borrowing could give the government some respite from pressures on the currency.

Moreover, if the level of domestic economic activity did not fall substantially during the transition, the government would have more legitimacy in denouncing the flight of capital as a deliberate effort at economic sabotage. As long as the economy was doing reasonably well, the claim that investors were shifting capital abroad to protect themselves from economic disaster would be less credible. This would create a political context in which the government could legitimately impose more effective capital controls to slow the outflows. The combination of those controls and increased international borrowing by large nonprofit banks might be sufficient to avoid a currency crisis.

With this additional breathing room, the left government might be able to sustain its reform agenda long enough that the electorate would begin to experience real gains. If a reform-driven economic expansion were to begin, then some of the domestic and foreign opponents might decide that a boycott strategy no longer made sense. As some private firms and international lenders began to relent, the government would have growing room to maneuver and its economic successes would grant it greater economic legitimacy. Once past the transition trough, there would still be the possibility of reversals, but some of the critical reforms could become firmly institutionalized.

This is the core claim for why radical financial reform represents a real utopia. It could make it possible for an elected leftist government to make the transition trough shallow and short enough that the government could survive and win the next election. But this still leaves open the question of how the left government would organize the stages of its reform projects and shape the rhetoric it uses for both its base and its opponents.

The Strategy of Transition

The strategy proposed here includes two distinct stages that are likely to play out over a ten to twenty year period. In the first stage, the left pushes through a program of radical financial reform that is designed to dramatically expand the scope and reach of the nonprofit financial sector. However, those reforms will inevitably take some years to mature as some newly created institutions take root and grow and as some already existing institutions expand their operations. The maturity of the parallel financial institutions is absolutely essential for the ability of a left government to eventually withstand the transition trough. In other words, the left wants to postpone a direct confrontation with domestic and foreign opponents until the nonprofit financial sector has reached critical mass. So how could this play out strategically and rhetorically?

The critical rhetorical element is that the left political movement needs to embrace the Polanyian definition of socialism as the subordination of markets to democratic politics.26 This formulation indicates that there is no single moment of transition from a profit-oriented economy to a socialist economy; it is rather an evolutionary process through which there is an ever greater and deeper extension of democracy into economic decision making. This formulation also highlights that the movement is firmly committed to protecting democratic institutions and democratic norms including competitive elections fought against parties with very different political commitments. Within this framework, the movement can be quite open with its opponents and its supporters that it is committed to a gradual and deep socialist transition that will preserve democratic institutions and practices.

The movement then explains that one of the most important planks in its socialist agenda is the democratization of the financial system. The arguments are made that the existing financial system, despite being underwritten and guaranteed by the government, serves oligarchic interests and fails to work for the vast majority of the population. The promise is made that while there will be some tightening of the regulations of private financial firms, those firms will continue to operate only now they will face direct competition from a network of nonprofit financial institutions. Since the theorists of the market always stress the value of competition, what could be wrong with subjecting entrenched financial firms with some healthy disruption by new market entrants?

Once the movement raises the banner of radical financial reform, the idea is to create a broad movement that includes small and medium sized businesses who can be persuaded of the advantages of radical financial reform with the argument that in a democratic society, finance should also be organized democratically. After some years, the movement would win an election and it would then be able to implement its financial reform agenda. There would, of course, be opposition from the existing financial institutions, but they would not be expected to escalate their opposition to a full scale confrontation. Since the movement had gained broad public support for its proposals, the financial interests would risk even harsher regulations if they escalated the confrontation and still ended up losing.

The victorious movement would also pursue other reforms that are familiar in the repertoire of social democracy. This would include enhanced programs to transfer resources to people in the bottom half of the income distribution, the strengthening of labor rights, measures to combat racial and gender inequality, improved environmental regulations, a push to increase democratic participation in governance, and modest increases in taxation on corporations and the rich. The movement would, however, avoid pursuing reforms that directly challenged the power of big business such as very large tax increases or reforms to require corporate boards to be restructured to include stakeholders such as employees and customers. The movement would stress its commitment to incremental improvements that made the economy work for all citizens.

The idea in this phase would be to avoid provoking a major confrontation with business and owner interests both domestically and internationally. If the scenario of capital flight and capital strike began to unfold, the movement would retreat while working to hold on to the financial reforms that it had implemented. It would, in effect, for the next period of ten to twenty years bide its time while the reforms were producing an incremental restructuring of the financial system. Even in the likely event that the movement was voted out of office during this period, the new decentralized system of financial institutions would continue to grow since they were meeting real needs of a variety of constituencies.

When the movement felt that the time was right, it would campaign for office with a promise to make deeper reforms that would challenge the power of the rich and large corporate entities. This is when issues of restructuring corporate governance or a major escalation of redistribution through the tax system would be on the agenda. In short, the movement would provoke a confrontation in the hope that the transition trough would be short and shallow. Having weathered this storm, the movement would then be able to create an economy that truly worked for all citizens.

#### Alt can’t spill out or effectuate change.

Jennifer Sterling-Folker 15, University of Connecticut, “All Hail to the Chief: Liberal IR Theory in the New World Order”, International Studies Perspectives, Vol. 16, 2015, pg. 40-49

Alternatively, we could become even more radical in our diversities and challenges, by rejecting participation in all forms of disciplinary practice and/or staging a full-frontal assault on the liberal analytical edifice. Doing so remains true to alternative normative and epistemological commitments, but prior frontal assaults (by IR postmodernists and feminists, for example) do not instill much hope in successfully shaking the foundations. As Taliaferro bluntly observes, “by waging war on positivism, rationality, and realism, postmodernist scholars have marginalized themselves” so that “instead of engaging” with postmodernists, “most scholars (even their fellow constructivists) are quite content to ignore them” (2001:260). This outcome is as much about the epistemological and normative commitments of the discipline as it is about postmodernism and, in any case, it is a pattern of all post-Cold War IR theorizing, not just postmodernism. As Sylvester notes, “debate, once thought of as a disciplinary sport, is now mostly confined to within-camp issues” and “collaboration across camps is not the norm” (2013:615). The result, as she observes, is that, “ironic as it might be, the professional IR camp scene today can seem conservative even as it is liberating: there is a whiff of neoliberal privatization and self-aggrandizement in its smoky air.” Hence, radical assaults are defused by becoming disciplining camps themselves, inwardly focused and thereby ensuring their own marginalization within the larger disciplinary context dominated by liberalism.

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#### Antitrust is key.

Maurice E. Stucke 12, Associate Professor, University of Tennessee College of Law; Senior Fellow, American Antitrust Institute, “Occupy Wall Street and Antitrust,” 85 S. Cal. L. Rev. Postscript 33, 2012, lexis.

B. CONCERNS OVER CONCENTRATED ECONOMIC POWER TODAY

Few trust businesses to do what is right. But, in many countries, even fewer trust their governments. 65 The crisis in capitalism also reflects a crisis in confidence in the government. This is understandable. Once power and wealth are concentrated, economic power translates into political power, and governmental policies are directed to preserve the status quo. 66

In the late 1800s, dominant firms enlisted the government to protect their market power with high tariffs. 67 The McKinley Tariff of 1890 was enacted the same year as the Sherman Act. On average, it increased tariff rates by nearly 50 percent for many American products. 68 The tariffs protected the domestic monopolies and cartels from competition, and helped transfer income from consumers to producers. 69 As Jeffrey A. Frieden observed, "the growth of the Sugar Trust, the Steel Trust, and other oligopolistic combines would have been impossible without America's high tariff barriers." 70

Today, corporations and trade groups spend billions of dollars lobbying the government. 71 Lobbying makes economic sense since it can [\*43A] affect outcomes. 72 The Supreme Court worsened the situation when it substantially weakened the limitations on corporate political spending, and thereby vastly increased the importance of pleasing large donors to win elections. 73

The taxpayer bailouts of the major financial institutions, automobile manufacturers, the insurer AIG, and other large corporations exposed how the economically powerful have every desire to use the government to protect their economic interests. 74 As Frank Pasquale observed,

[Occupy Wall Street] points to a fundamental problem in today's economy: a finance class that has used connections and power, rather than hard work and productivity, to make a fortune. . . . It is crony capitalism at its worst, a mockery of the ideals that supposedly animate its defenders. 75

Today, the six largest financial institutions are "too big and too integral to fail" ("TBTF"). Ironically, as a result of mergers during the financial crisis, they became even bigger, 76 and the industry became more concentrated as nonbank mortgage lenders exited. 77 The six institutions have paid financial penalties, but likely will avoid significant punishment [\*44A] for their misrepresentations, subprime mortgages, and high credit card interest fees and rates. 78

Although some disagree, 79 TBTF is an antitrust issue. First, competition cannot be characterized as robust when four banks control 34 percent of national deposits, account for over half of the general purpose credit card purchase volume, and originate and service more than one of every two mortgages in America. 80

Second, TBTF firms distort market competition and raise entry barriers. If a firm, overconfident in its risk assessment models, seeks more leverage, then ideally industry regulators, creditors, and shareholders prevent such overleveraging. But if the firm is deemed TBTF, the dynamics change. The firm has greater incentive (and freedom) to take excessive risks. 81 Shareholders and creditors know of the firm's implicit government guarantee, and will not punish this risk taking: if the risky investments work in the firm's favor, they benefit. If the risky investments fail, the government's implicit guarantee forecloses the possibility of market exit. 82 The government guarantee itself has value in reducing the firm's borrowing costs. 83 The TBTF firms thus enjoy a significant competitive advantage over smaller rivals, which can fail. 84 Smaller firms cannot undertake such risk and profit when the bets pay off. Without a government guarantee, the smaller firms incur higher costs to borrow money. So, smaller banks have a [\*45A] significant incentive to merge so that they too become too big and too integral to fail.

Some argue that governmental subsidies pervade our economy. But the competitive distortion here arises primarily from mergers to TBTF. In any merger, the government must assess whether the merger's effect "may be substantially to lessen competition, or to tend to create a monopoly." 85 If the courts and enforcers consider only the merger's claimed efficiencies and not all the political, social, and economic costs arising from mergers to TBTF, their review is woefully incomplete. 86 As former Federal Reserve Chairman Alan Greenspan, among others, recommended, "If they're too big to fail, they're too big. . . . In 1911 we broke up Standard Oil--so what happened? The individual parts became more valuable than the whole. Maybe that's what we need to do." 87

III. WHATEVER HAPPENED TO ANTITRUST?

Antitrust policy historically sought to prevent the concentration of economic power. 88 Before the rise of the Chicago School's neoclassical economic theories, antitrust considered the social, moral, political, and distributional ramifications of firm size upon the economy and distrusted the concentration of economic wealth. 89 Despite the Sherman Act's inconsistent enforcement over the past century, it embodied at least a competitive ideal of curbing the concentration of economic power and serving as the last obstacle to complete industrial autocracy. 90 President Franklin D. Roosevelt, for example, observed that cartels and monopolies flourished in pre-war Germany because of the absence of antitrust laws and a lack of popular distrust of the concentration of power and monopolies. 91

To prevent concentrated economic power, the antitrust laws [\*46A] historically believed in maintaining competitive market structures, rather than regulatory dictates. 92 As Alfred Kahn wrote, the "essential task of public policy in a free enterprise system should be to preserve the framework of a fair field and no favors, letting the results take care of themselves." 93 By the 1960s, antitrust for some was "complex, difficult, and boring." 94 Although bigness was not per se illegal, 95 there was strong bipartisan support to enforce the Clayton Act with the aim of arresting concentration in its incipiency. 96

With an emphasis on structural banking regulations 97 and antitrust merger review, the Court in the 1960s characterized the federal supervision of banking as one of the most, if not the most, successful systems of economic regulation. 98 Commercial banking at that time was diffused through many independent, local banks, rather than concentrated in a few nationwide banks, as in England and Germany. 99 Commercial banking was subject to various state and federal governmental controls. 100 Add to that antitrust merger review, which, consistent with the legislative intent of the 1950 amendments to the Clayton Act, sought to arrest anticompetitive tendencies and trends toward concentration in their incipiency. 101 The Court noted the "virtual disappearance of bank failures from the American economic scene." 102

Antitrust in the 1960s significantly differs from today's policies. One positive development, over the past forty years, is that mergers' likely efficiencies, once viewed with suspicion, are now seen as a benefit. One negative development is the contraction of antitrust review, which contributed to the market failure in the financial services industries. [\*47A] Antitrust policy historically distrusted the concentration of economic power. After the Chicago School, however, even monopolies were characterized as beneficial. 103

With lax merger review and banking deregulation, beginning in the 1980s, the financial services industry underwent a wave of record-setting mega-mergers. 104 Around four hundred to five hundred banks each year between 1986 and 1998 ceased to exist independently. 105 As the financial sector became more concentrated, by the 1990s, the U.S. Department of Justice's Antitrust Division ("DOJ") no longer considered trends of concentration and arresting competitive problems in their incipiency. Instead, the DOJ typically examined the bank merger's anticompetitive risks with respect to the exercise of market power in narrowly defined geographic markets. Focusing on short-term static price competition (such as whether the banks postmerger may raise rates for specific categories of borrowers in particular cities), the DOJ did not consider market trends and the merger's impact on the efficiency, competitiveness, and stability of the overall financial system.

Consequently, in the $ 70 billion merger of Travelers Group, Inc. and Citicorp in the 1990s, the United States heard numerous complaints that Citigroup would have an undue aggregation of resources and that the deal would create a firm too big to be allowed to fail. 106 In dismissing these concerns, the Federal Reserve and DOJ saw no evidence of how the size or breadth of Citicorp's activities would allow it to distort or dominate price competition in any narrowly defined antitrust market; the Federal Reserve [\*48A] firmly believed the federal agencies had extensive experience in developing a comprehensive, risk-based supervision plan to effectively monitor Citibank. 107

IV. CURRENT ANTITRUST PARADOXES

Antitrust policy currently suffers several paradoxes. One paradox is that despite the quest for a single economic goal, U.S. antitrust policy today lacks any clear unifying goal. Competition officials can agree that prohibiting certain egregiously anticompetitive behavior (such as price-fixing) promotes their goal (whether it is consumer welfare, efficiency, or economic freedom). But these restraints were condemned when antitrust recognized multiple social, political, and economic goals.

A second paradox is that the Supreme Court of late has complained about the state of antitrust litigation (for example, the interminable litigation, inevitably costly and protracted discovery phase, and its fear over the unusually high risk of inconsistent results by lower courts), but the Court itself has created this predicament. 108 Over the past thirty years, the Court increasingly relied on its fact-specific weighing standard, the rule of reason, and a vague economic goal (consumer welfare) that accommodated different personal values and interpretation, and often pointed to no particular course of action.

A third paradox is, as Eleanor Fox describes, the efficiency paradox: "by trusting dominant firm strategies and leading firm collaborations to produce efficiency, modern U.S. antitrust protects monopoly and oligopoly, suppresses innovative challenges, and stifles efficiency." 109 While recognizing dynamic competition as more important, antitrust agencies and courts have "tended to avoid dynamic efficiency analysis," focusing instead on a static price competition and productive efficiencies. 110 Courts and antitrust agencies applied a light touch to merger review under a fear of false positives and a belief that most mergers promote efficiencies, even though the empirical literature suggests the contrary. 111 While recognizing [\*49A] an efficiencies defense, antitrust enforcers and courts did not account for postmerger inefficiencies or the competitive distortions in creating TBTF firms. 112

A fourth paradox is the economic power paradox. Our constitutional framework seeks to distribute power, rather than promote its concentration. Despite the historical concerns about concentrated economic power, antitrust enforcers and courts over the past thirty years "no longer concern[ed] themselves with preventing bigness, and indeed tend[ed] instead to encourage large-scale enterprise for efficiency's sake." 113 While we saw in nature the benefits of diversity, 114 we disregarded in one of our more important industries, the financial services markets, the dangers of concentration and systemic risk. 115 Despite the public and governmental concern about protecting small businesses from unfair competitive tactics, and the importance of small companies in promoting dynamic efficiencies, the Verizon Communications Inc. v. Law Offices of Cutis V. Trinko, LLP 116 Court praised monopolies.

A fifth paradox is that while trust, fairness, and prosocial behavior are vital to the functioning of a market economy, 117 antitrust policy ignores these values and views market participants as amoral self-interested profit-maximizers. 118

A sixth antitrust paradox, observed Jesse Markham, is that the government's "laissez-faire policies" over the past thirty years "led to unprecedented government intervention in the private sector." 119

[\*50A] V. CONCLUSION

The concerns in Standard Oil resonate today. One would expect Occupy Wall Street protesters to question current antitrust policies. But antitrust's relevancy has declined since the 1970s. As one example, antitrust, other than a savings clause, 120 is absent in the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, which ostensibly seeks to promote financial stability by improving accountability and transparency in the financial system, to end "too big to fail," to protect the American taxpayer by ending bailouts, and to protect consumers from abusive financial services practices.

The vested interests have little incentive to change the status quo. As Frieden described of the plantation societies in Latin America and the American South, their governments "were rarely willing or able to encourage the socioeconomic development--of infrastructure, finance, and education--needed to allow the productive forces of the society as a whole to be brought to bear." 121

But if competition is more a political than economic concept, then one promising note is the business literature. After the financial crisis, business scholars are reconsidering capitalism, "one imbued with a social purpose." 122 In the past, the concepts of sustainability, fairness, and profitability generally were seen as conflicting. 123 But these concepts are seen as reinforcing under the principle of shared value, which "involves creating economic value for society by addressing its needs and challenges" and enhances "the competitiveness of a company while simultaneously advancing the economic and social conditions in the communities in which it operates." 124 Profits can be attained not through exploitation (for example, creating demand for harmful or useless products), but through collaboration and trust and in better helping consumers solve their problems. Sustainability, rather than a cost, represents an opportunity for companies to improve productivity and societal welfare.

[\*51A] So capitalism is in crisis. But the Occupy Wall Street protesters, like many Americans, are not seeking socialism or totalitarianism. 125 Instead, they want to redefine capitalism to one imbued with a moral purpose, whereby they use their talents for the betterment of others.

### AT: FinTech Link

#### 1. No impact---it isn’t intrinsically violent.

Mikaël Ringuette 18, Director for North America at Affinda, BSc in Computer Science from Université du Québec à Montréal, BS from Laval University, “Why the Blockchain is the Holy Grail of Indigenous Communities”, Medium, 4/11/2018, https://medium.com/idgo/why-the-blockchain-is-the-holy-grail-of-indigenous-communities-aa48893c3e97

Why the Blockchain is the Holy Grail of Indigenous Communities

All the excitement about blockchain comes for many reasons. It features trackable and irreversible transactions, allowing all participant to agree without argument.

If talking specifically about smart contracts, they don’t require any third-party, are self-executing and self-enforcing. In other words, they act as impartial judge without requiring any intervention.

With those features, many would think of it as an ideal tool for an utopian society.

A perfect fit

Blockchain has been put on the spotlight as potential solution for poverty, air pollution & climate change, identities and governance.

After consulting with leaders of indigenous communities, we found out that they were plague will all of those issues. We decided to use our 4 years of expertise in blockchain tackle all of those problems at once. The result is IDGO project.

1. Poverty: Indigenous communities account for approximately 370 million peoples, 5% of the world population, but 15% of the extreme poor. It’s a major issue and traditional activities of indigenous peoples have less and less value because of the competition from modernization. Basically, the current realistic solutions takes their cultural heritage apart and force them to blend with the masses. That’s tragic and blockchain can help to stop the bleeding. See solutions

Why focus indigenous communities and not focus on poverty itself?

The causes of poverty always vary and a solution for a group might be useless for another. We found out a common solution for indigenous communities: tourism. Most indigenous communities reside on isolated, beautiful land: perfect gateways. Moreover, their unique culture is an attraction in itself. We want to leverage something they already own or can easily develop for the benefit of the whole community. This will be used to fuel the communty’s identity, social finance and infrastructure.

2. Pollution: Indigenous rarely have the infrastructure to recycle and take care of trash. Moreover, tourists and industries bring much garbage with them and leave it in the indigenous communities. This is the main concern of our first participating indigenous community.

If we take France as example, the country took countless measure to reduce the sources of pollution of all kind and increase the beauty of the land for tourists.

Among those measures, there is public servant cleaning the streets in Paris, limitation on the height of buildings — reducing visual pollution, underground cabling — leaving even France’s country side free of electricity poles and strict regulations so that all regions keep their traditional architecture and colors.

Those measures not only added to the beauty of the country, they greatly encouraged the safekeeping of the culture and identity of every single region in France. The cultural heritage ‘patrimoine’ was not only safer, it flourished.

It is not for no reason that France is the most visited country in the world.

Indigenous communities hold just as much potential than the most picturesque village of France.

They have the land, it simply needs to be cleaned.

They have the architecture, it simply need to be restored.

They have the culture and identity, it simply need to be protected and promoted. See solutions

3. Identity: Robbing the indigenous of their identity, this is what most nations have been doing in the past, and some are still doing today.

We use identity so much that we often don’t realize how important it is. Identification is essential to confirm a person, his competence, his certification, his credit rating, his criminal history, etc. Providing identification to indigenous is still very difficult and expensive.

They rarely have government office close by and they don’t have access to most of the services related to identity. This is a serious bottleneck for finance, for promoting one’s products and for establishing contracts between individual. With a decentralized blockchain owned by the community, this can be turned into an advantage. See solutions

4. Governance: Relying on a faraway government only lead to frustration for indigenous communities. Even the most benevolent governments cannot understand the problems of remote communities.

Indigenous communities have a trump card that can be used with blockchain: their leaders. In isolated communities, leaders are people that are known by everyone. They earn the respect of their comrades and elders.

They earn the admiration of the younger generations. Because of their devotion to their community, they can fully leverage the blockchain to promote self-governance. See solutions

IDGO Solutions

IDGO didn’t focus on a single app to solve a specific issue. This strategy would greatly hinder the originality and innovation that indigenous peoples themselves can bring. Rather, we decided to create a blockchain platform that can be implemented in each community and will be owned by each community. This platform includes many tools as described below, but more importantly, it can be developed much further with the input of indigenous communities.

1. Digital Identity: This was the first solution developed in IDGO. We so far created the indigenous ID card and the tourist passport. The digital identity is the based on which everything can be developed for indigenous communities: voting system, finance, governance, contract, etc.

The tourist passport allows tourists or individuals to promote their favorite communities. All profit from the tourist passport will belong the community issuing it. This income will belong to the whole community and therefore will be used for the needs of the many rather than the wants of the few.

2. Community token: This is the mean by which the indigenous community can develop their own financial system. As the name imply, each community have their own and unique token. Because it is managed by the indigenous community, only their members or their approved partners/tourists can use the token. This allow them to transact directly P2P and open up for countless financial application otherwise inaccessible.

3. Social finance: Our blockchain platform will allow many financial applications at zero entry cost. Among them, we are working on a decentralized credit system. This will allow members to loan their extra token within a pool to those in need to borrow.

This will greatly simplify the microfinance within the community while increasing the accessibility for loan. Moreover, the loans within community where members all know each other will be a safeguard against any abuse or scam. This is only an example of financial service possible with the blockchain. We will work continuously with the communities to develop more applications fitting every community.

4. Governance: With the integration of all previous solutions, the indigenous community can gain much independence for their daily activities. Furthermore, all extra revenue from tourists with the adoption of IDGO with be available to the community as a whole. With the strong leadership of indigenous community, the main concern of the community will be the first to receive more financial support to be solved. For this reason, we expect the implantation of IDGO on Orchid Island to be a help for their major trash issue.

Conclusion

As explained above, there are many solutions available on blockchain to face environmental and social issues. The frenzy of ICO in 2017 imply too many “one to solve them all” type of solution.