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T Prohibit

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

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

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

#### Only per se illegality prohibits a practice---rules of reason prohibit anticompetitive effects for individual acts, or instances of ‘practice.’

John Paul Stevens 90, Justice, Supreme Court of the United States, “FTC v. Superior Court Trial Lawyers Ass'n,” 493 U.S. 411, Lexis

LEdHN[3C] [3C]LEdHN[14] [14]Equally important is the second error implicit in respondents' claim to immunity from the per se rules. In its opinion, the Court of Appeals assumed that the antitrust laws permit, but do not require, the condemnation of price fixing and boycotts without proof of market power. 15 The opinion further assumed that the per se rule prohibiting such activity "is only a rule of 'administrative convenience and efficiency,' not a statutory command." 272 U.S. App. D. C., at 295, 856 F. 2d, at 249.This statement contains two errors. HN10 [\*\*\*\*42] The per se [\*433] rules are, of course, the product of judicial interpretations of the Sherman Act, but the rules nevertheless have the same force and effect as any other statutory commands. Moreover, while the per se rule against price fixing and boycotts is indeed justified in part by "administrative convenience," the Court of Appeals erred in describing the prohibition as justified only by such concerns. The per se rules also reflect a long-standing judgment that the prohibited practices by their nature have "a substantial potential for impact on competition." Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 16 (1984).

[\*\*\*\*43] LEdHN[15] [15]As we explained in Professional Engineers, HN11 the rule of reason in antitrust law generates

"two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality -- they are 'illegal per se.' In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." 435 U.S., at 692.

[\*\*\*873] "Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable." Arizona v. Maricopa County Medical Society, 457 U.S. 332, 344 (1982).

[\*\*781] LEdHN[16] [16] [\*\*\*\*44] The per se rules in antitrust law serve purposes analogous to per se restrictions upon, for example, stunt flying in congested areas or speeding. Laws prohibiting stunt flying or setting speed limits are justified by the State's interest in protecting human life and property. Perhaps most violations of such rules actually cause no harm. No doubt many experienced drivers and pilots can operate much more safely, even at prohibited speeds, than the average citizen.

[\*434] If the especially skilled drivers and pilots were to paint messages on their cars, or attach streamers to their planes, their conduct would have an expressive component. High speeds and unusual maneuvers would help to draw attention to their messages. Yet the laws may nonetheless be enforced against these skilled persons without proof that their conduct was actually harmful or dangerous.

In part, the justification for these per se rules is rooted in administrative convenience. They are also supported, however, by the observation that every speeder and every stunt pilot poses some threat to the community. An unpredictable event may overwhelm the skills of the best driver or pilot, even if the [\*\*\*\*45] proposed course of action was entirely prudent when initiated. A bad driver going slowly may be more dangerous that a good driver going quickly, but a good driver who obeys the law is safer still.

#### Voting issue---key to link uniqueness and preventing bidirectionality on an otherwise virtually unlimited topic

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T Subsets

#### ‘Core antitrust laws’ must be economy wide---the aff only effects a subset

Gerber ’20 [David; October; Distinguished Professor of Law at Chicago-Kent College of Law, Illinois Institute of Technology; Oxford Scholarship Online, Competition Law and Antitrust, “What is It? Competition Law’s Veiled Identity,” Ch. 1, p. 14-15]

C. A Core Definition

The Guide uses the terms “competition law” and “antitrust law” to refer to a general domain of law whose object is to deter private restraints on competitive conduct. We look more closely at the terms:

1. “General”—The laws included are those that are applicable throughout an economy and thereby provide a framework for all market operations (there are always some exempted sectors). Laws dealing only with specific markets (e.g., telecommunication) do not play that role.

2. “Domain of Law” here refers to a politically authorized set of norms and the institutional arrangements used to enforce them.

Is it law—or is it policy? The relationship between “competition law” and “competition policy” is not always clear. Often the terms are used interchangeably, but there can be important differences between them. Both can refer to norms used to combat restraints on competition, but they represent two different ways of looking at the relevant laws, and the differences can influence how norms are interpreted and applied. “Law” implies that established methods of interpretation are used to interpret and apply the norms and that established procedures are the sole or primary means of enforcing and changing the norms. In this view, the norms are a relatively stable component of a legal system. Thinking of those same norms as “policy,” on the other hand, implies that they are a tool of whatever government is in power and that it can use and modify them as it wishes.

3. “Restraint” refers to any limitation imposed by one or more private actors that reduces the intensity of competition in a market.

4. “Competition” refers to a process by which firms in a market seek to maximize their profits by exploiting market opportunities more effectively than other firms in the market.

#### Substantial’ means in totality of circumstances

U.S. First Circuit Court of Appeals ’98 [United States Circuit Court; August 25; Federal Appeals Court of the First Circuit; Southwestern Learning, “Court Uses ‘Totality of Circumstances’ for Test of Substantial Abuse by Debtor,” http://www.swlearning.com/blaw/cases/court\_uses.html]

Decision Affirmed. The court joins other circuits in adopting the "totality of the circumstances" test as the measure of substantial abuse under the Bankruptcy Code. This is a flexible standard adopted by Congress to allow bankruptcy courts to consider the factors involved in each case and to prevent abuse of Chapter 7 filings. When there is evidence that the consumer can pay their debts, there is likely to be found substantial abuse.

#### Voting issue---creates a moral hazard to rush to small non-controversial tweaks that shreds limits and ground

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T Exemptions

#### The scope of antitrust law is exclusively bounded by exemptions and immunities

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Specific Long Term Plans to Strengthen Committee

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

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

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

#### ‘Expand’ must make more expansive---NOT merely clarify existing principles

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

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

#### The AFF just intensifies the application of antitrust to already covered activities---it does NOT curtail an exemption or immunity

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

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Capitalism K

#### The 1AC invests in a form of neoliberal governmentality necessary to sustain global capitalism

Lebow ‘19 [David; Lecturer on Social Studies at Harvard University and lawyer; “Trumpism and the Dialectic of Neoliberal Reason,” Perspectives on Politics 18(2):380-398, doi:10.1017/S1537592719000434.]

I. Neoliberal Reason

As Michel Foucault and others have argued, neoliberalism entails far more than an economic doctrine favoring deregulated markets.4 It is a novel form of governmentality—a rationality linked to technologies of power that govern conduct, not just through direct state action but through liberty itself.5 Not isolated to the traditionally demarcated sphere of economics, neoliberal society entails a whole economic-juridical order.

The central program of neoliberal governmentality is the absolute generalization of competition as a universal behavioral norm. Whereas in liberal thought, the root principle of capitalism was exchange of equivalents, for neoliberal reason it is competition entailing inequality. The key result of market processes goes from specialization to selection. The competitive market is the exclusive site of rationality. It processes information, indicated by price, and is the only mechanism of producing knowledge, defined as what is profitably utilizable. Because consumers are free to refuse inferior goods or services, the price mechanism of the market system ensures optimal solutions and maximal satisfaction of preferences.

Liberal capitalism, as Karl Polanyi argued, required the construction of “fictitious” commodities like land and labor.6 These abstract, exchangeable factors of production had to be disembedded from concrete non-market social relations, norms, and values. Instead of merely disembedding commodities, neoliberalism intervenes to make competitive mechanisms regulate every moment and point in society. It strives to build an empire of market choice that invades every domain of life, and deposes all other social, political and solidaristic institutions and values.

Neoliberalism does not allege that markets are natural; competition must be constructed. Rather than endorsing laissez-faire overseen by a night watchman, it stipulates a strong state engaged in permanent vigilance, activity, and intervention to maintain artificial competition. It must not plan outcomes, which would upset the market’s innate rationality, and must be insulated from political disturbances. Economic interventionism leads down the road to serfdom; fascism and unlimited state power are its necessary results. A “minimum of economic interventionism” on the “mechanisms of the market” must be accompanied by “maximum legal interventionism” on the “conditions of the market.”7 Fixed, formal rules make up an economic constitution that inhibits planning, repulses political disruptions, and impartially safeguards competition. The state is the executor of the market and growth is the basis of public legitimacy. Governance depoliticizes public power, promotes ostensibly post-ideological technical problem-solving by experts, and relies on “best-practices” that dissolve the distinction between public and private organization.8

Unlimited generalization of competition yields an enterprise society in which calculations of supply/demand and cost/benefit become the model of all social relations. Neoliberal reason renders homo economicus, based on this model of the enterprise, the exhaustive figuration of human subjectivity. The center of economic thought shifts from labor and processes of production, exchange, and consumption to human capital and rational decision-making under conditions of scarcity. Capital is everything that can generate future income; wages are reconceived as income from capital. Labor is no longer comprehended as a commodity exchanged for a wage, but as a combination of human capital (the worker’s education and abilities) and the income stream it generates. This neoliberal subject is an aggregate of human capital who invests in his own income-generating abilities.

Neoliberalism replaces the invariant identity of the moral person as a rights-bearing citizen with a formally empty receptacle filled up through enterprising choices. It brushes aside models of freedom as self-rule achieved through moral autonomy or popular sovereignty.9 In the neoliberal “democracy of consumers,” individual consumers together constitute the sovereign that monopolizes the issuance of legitimate commands.10 Sovereign will is expressed not through political channels, but by choices in the “plebiscite of prices.”11 Whereas producers have particular interests like protectionism, consumers have a consensual and common interest; all favor the impartial functioning of market processes. In the neoliberal free society, consumers exercise their right to choose in complete independence.

II. From Keynesian State Capitalism to Neoliberal Deregulation

Situating the 2008 crisis in a historical account of American political and economic development clarifies its broader significance. The early twentieth-century Progressives were disdainful of what they took to be the chaos and waste of fin de siècle laissez-faire society. They strove to build a new American state that would replace the structural and rights-based formalisms of the nineteenth century with direct democracy and expert administration. It took the Great Depression and New Deal to bring into full bloom the Progressive commitment to pragmatic rationality. Thereafter, the “policy state” was authorized to pursue designated social goals and develop the means to accomplish them.12 The slew of New Deal innovations included state oversight of labor negotiations, invigorated antitrust, Keynesian countercyclical deficits to stimulate demand and increase purchasing power, an expansive public sector sheltered from the business cycle, aggressive banking regulation, and social insurance. Regulation and redistribution ensured the conditions necessary for an economic system based on capital accumulation, private property, and corporate profit to endure.

To many, the differences between the New Deal and Nazi political economies appeared less significant than their common response to monopoly capitalism. Both erased boundaries between state and society by politicizing the private sphere and authorizing public bureaucracies to rationalize crisis-prone economies. Frankfurt School member Friedrich Pollock suggested that this common “state capitalism” had solved the contradiction between the forces and relations of production, and thus overcome the economy’s crisis tendencies. It seemed to him that management had become merely technical and “nothing essential” had been “left to the laws of the market.”13 Worries abounded that the private law sphere of property and contract was necessary for individual freedom. Despite salient differences between Nazi and New Deal state capitalism, many feared that intervention into society was a waystation to domination. Unease about the specter of American despotism motivated development of mechanisms to ensure that interventionism did not devolve into arbitrary rule.14 Expertise was one justification and limitation of the policy state. Authority could be safely delegated to a new corps of public-spirited administrators because their scientific knowledge would not only make them effective, but also counsel restraint. Enduring misgivings led later to new laws of administrative process. The procedural state was legitimated by its defenders as being a substantively value-neutral and instrumentally rational machine serving goals set by society. Regulatory decision-making was shunted into the abstruse procedures of courtrooms and bureaucracies. Defenders of the state emphasized that its processes of allocating authority were neutral, impartial, and open to all. The balanced accommodation of all interest groups seeking to exercise influence would yield an equilibrium corresponding to the public interest.15

The intermeshing of state and society through interest groups, agencies, and professionalized parties marginalized the public. The sovereign public opinion that Progressives had hoped would rationalize government gave way to the rationality supposedly inherent in processes of public law, public-private negotiation, and regulated markets. The state was endowed with a diffuse legitimacy in exchange for a growing economy, broad distribution, and ongoing household capacity to consume.16 The Keynesian welfare settlement pacified the working class, protecting the market economy from more radical political pressures. Newly available, mass-produced commodities encouraged leveled-down notions of citizenship as welfare clientelism and privatistic consumption. As the state expanded and routinized, the initial politicization of private property relations through public intervention developed into depoliticized economic management by lawyers and social scientists organized by administrative and judicial processes.

The terms of the social contract preserving the coexistence of capitalism and democracy had been set. In exchange for a pacified citizenry and depoliticized regulatory authority, the policy state promised to deploy instrumental reason to sustain both capital accumulation and widely distributed capacity to consume (supported, always, by the exclusion of African Americans). During the decades of postwar growth, these twin responsibilities seemed attainable and compatible. Capitalism functioned smoothly enough and potentially delegitimating inequality was clipped by inflation, tax-based welfare, and collectively negotiated wages. But in the late 1960s and early 1970s, weakening growth, stagflation, trade deficits, and the collapse of Bretton Woods revealed that state capitalism had not solved the problems of economics. As the Great Depression had enabled construction of the instrumentally rational policy state, economic disturbances in the 1970s opened the breach into which neoliberal reason entered to reconfigure the political economy. Rather than shielding rational policy-making from political pressure and assuring broadly distributed welfare, neoliberalism promised growth driven by depoliticized markets freed from regulation and downwards redistribution. Believing in the optimal rationality of competitive markets, neoliberals sought to reinvigorate capital accumulation through deregulation, lowered taxes, financialization, privatization, and market expansion.

Liberating accumulation from the restrictions and obligations incurred under state capitalism might have imperiled capitalism’s peace treaty with democracy. For deregulation to proceed without impairing the system’s legitimacy, the quid pro quo—depoliticization for consumption—had to continue. Over the ensuing decades, as Wolfgang Streeck explains, the state “bought time” by finding new ways to generate illusions of widely distributed prosperity that prolonged the capacity of the lower and middle classes to consume.17 Each successive attempt exhausted itself, leading to new and escalating disturbances. In the 1970s, inflation safeguarded social peace by compensating workers for inadequate growth until stagflation ended this mode of buying time. A subsequent reliance on public debt enabled the government to pacify conflict with borrowed money. Rising debt and balking creditors delimited this phase, which was brought to a definitive close with the Clinton administration’s social spending cuts and balanced budgets. In a final stage that dawned in the 1980s but grew increasingly paramount over time, debt-based support of purchasing power was privatized. Household spending was financed through mortgages, student loans, and credit cards. This “privatized Keynesianism” buoyed consumption up through 2008, despite cuts to social spending, falling wages, and tightening employment markets.18

#### Capitalism structurally necessitates militarism, ecocide and technological dystopia---each causes extinction

Foster ‘19 [John; Sociology Professor @ Oregon; February 1; “Capitalism Has Failed—What Next?” *The Monthly Review*, Volume 70, Issue 9, <https://monthlyreview.org/2019/02/01/capitalism-has-failed-what-next/>]

Less than two decades into the twenty-first century, it is evident that capitalism has failed as a social system. The world is mired in economic stagnation, financialization, and the most extreme inequality in human history, accompanied by mass unemployment and underemployment, precariousness, poverty, hunger, wasted output and lives, and what at this point can only be called a planetary ecological “death spiral.”1 The digital revolution, the greatest technological advance of our time, has rapidly mutated from a promise of free communication and liberated production into new means of surveillance, control, and displacement of the working population. The institutions of liberal democracy are at the point of collapse, while fascism, the rear guard of the capitalist system, is again on the march, along with patriarchy, racism, imperialism, and war.

To say that capitalism is a failed system is not, of course, to suggest that its breakdown and disintegration is imminent.2 It does, however, mean that it has passed from being a historically necessary and creative system at its inception to being a historically unnecessary and destructive one in the present century. Today, more than ever, the world is faced with the epochal choice between “the revolutionary reconstitution of society at large and the common ruin of the contending classes.”3

Indications of this failure of capitalism are everywhere. Stagnation of investment punctuated by bubbles of financial expansion, which then inevitably burst, now characterizes the so-called free market.4 Soaring inequality in income and wealth has its counterpart in the declining material circumstances of a majority of the population. Real wages for most workers in the United States have barely budged in forty years despite steadily rising productivity.5 Work intensity has increased, while work and safety protections on the job have been systematically jettisoned. Unemployment data has become more and more meaningless due to a new institutionalized underemployment in the form of contract labor in the gig economy.6 Unions have been reduced to mere shadows of their former glory as capitalism has asserted totalitarian control over workplaces. With the demise of Soviet-type societies, social democracy in Europe has perished in the new atmosphere of “liberated capitalism.”7

The capture of the surplus value produced by overexploited populations in the poorest regions of the world, via the global labor arbitrage instituted by multinational corporations, is leading to an unprecedented amassing of financial wealth at the center of the world economy and relative poverty in the periphery.8 Around $21 trillion of offshore funds are currently lodged in tax havens on islands mostly in the Caribbean, constituting “the fortified refuge of Big Finance.”9 Technologically driven monopolies resulting from the global-communications revolution, together with the rise to dominance of Wall Street-based financial capital geared to speculative asset creation, have further contributed to the riches of today’s “1 percent.” Forty-two billionaires now enjoy as much wealth as half the world’s population, while the three richest men in the United States—Jeff Bezos, Bill Gates, and Warren Buffett—have more wealth than half the U.S. population.10 In every region of the world, inequality has increased sharply in recent decades.11 The gap in per capita income and wealth between the richest and poorest nations, which has been the dominant trend for centuries, is rapidly widening once again.12 More than 60 percent of the world’s employed population, some two billion people, now work in the impoverished informal sector, forming a massive global proletariat. The global reserve army of labor is some 70 percent larger than the active labor army of formally employed workers.13

Adequate health care, housing, education, and clean water and air are increasingly out of reach for large sections of the population, even in wealthy countries in North America and Europe, while transportation is becoming more difficult in the United States and many other countries due to irrationally high levels of dependency on the automobile and disinvestment in public transportation. Urban structures are more and more characterized by gentrification and segregation, with cities becoming the playthings of the well-to-do while marginalized populations are shunted aside. About half a million people, most of them children, are homeless on any given night in the United States.14 New York City is experiencing a major rat infestation, attributed to warming temperatures, mirroring trends around the world.15

In the United States and other high-income countries, life expectancy is in decline, with a remarkable resurgence of Victorian illnesses related to poverty and exploitation. In Britain, gout, scarlet fever, whooping cough, and even scurvy are now resurgent, along with tuberculosis. With inadequate enforcement of work health and safety regulations, black lung disease has returned with a vengeance in U.S. coal country.16 Overuse of antibiotics, particularly by capitalist agribusiness, is leading to an antibiotic-resistance crisis, with the dangerous growth of superbugs generating increasing numbers of deaths, which by mid–century could surpass annual cancer deaths, prompting the World Health Organization to declare a “global health emergency.”17 These dire conditions, arising from the workings of the system, are consistent with what Frederick Engels, in the Condition of the Working Class in England, called “social murder.”18

At the instigation of giant corporations, philanthrocapitalist foundations, and neoliberal governments, public education has been restructured around corporate-designed testing based on the implementation of robotic common-core standards. This is generating massive databases on the student population, much of which are now being surreptitiously marketed and sold.19 The corporatization and privatization of education is feeding the progressive subordination of children’s needs to the cash nexus of the commodity market. We are thus seeing a dramatic return of Thomas Gradgrind’s and Mr. M’Choakumchild’s crass utilitarian philosophy dramatized in Charles Dickens’s Hard Times: “Facts are alone wanted in life” and “You are never to fancy.”20 Having been reduced to intellectual dungeons, many of the poorest, most racially segregated schools in the United States are mere pipelines for prisons or the military.21

More than two million people in the United States are behind bars, a higher rate of incarceration than any other country in the world, constituting a new Jim Crow. The total population in prison is nearly equal to the number of people in Houston, Texas, the fourth largest U.S. city. African Americans and Latinos make up 56 percent of those incarcerated, while constituting only about 32 percent of the U.S. population. Nearly 50 percent of American adults, and a much higher percentage among African Americans and Native Americans, have an immediate family member who has spent or is currently spending time behind bars. Both black men and Native American men in the United States are nearly three times, Hispanic men nearly two times, more likely to die of police shootings than white men.22 Racial divides are now widening across the entire planet.

Violence against women and the expropriation of their unpaid labor, as well as the higher level of exploitation of their paid labor, are integral to the way in which power is organized in capitalist society—and how it seeks to divide rather than unify the population. More than a third of women worldwide have experienced physical/sexual violence. Women’s bodies, in particular, are objectified, reified, and commodified as part of the normal workings of monopoly-capitalist marketing.23

The mass media-propaganda system, part of the larger corporate matrix, is now merging into a social media-based propaganda system that is more porous and seemingly anarchic, but more universal and more than ever favoring money and power. Utilizing modern marketing and surveillance techniques, which now dominate all digital interactions, vested interests are able to tailor their messages, largely unchecked, to individuals and their social networks, creating concerns about “fake news” on all sides.24 Numerous business entities promising technological manipulation of voters in countries across the world have now surfaced, auctioning off their services to the highest bidders.25 The elimination of net neutrality in the United States means further concentration, centralization, and control over the entire Internet by monopolistic service providers.

Elections are increasingly prey to unregulated “dark money” emanating from the coffers of corporations and the billionaire class. Although presenting itself as the world’s leading democracy, the United States, as Paul Baran and Paul Sweezy stated in Monopoly Capital in 1966, “is democratic in form and plutocratic in content.”26 In the Trump administration, following a long-established tradition, 72 percent of those appointed to the cabinet have come from the higher corporate echelons, while others have been drawn from the military.27

War, engineered by the United States and other major powers at the apex of the system, has become perpetual in strategic oil regions such as the Middle East, and threatens to escalate into a global thermonuclear exchange. During the Obama administration, the United States was engaged in wars/bombings in seven different countries—Afghanistan, Iraq, Syria, Libya, Yemen, Somalia, and Pakistan.28 Torture and assassinations have been reinstituted by Washington as acceptable instruments of war against those now innumerable individuals, group networks, and whole societies that are branded as terrorist. A new Cold War and nuclear arms race is in the making between the United States and Russia, while Washington is seeking to place road blocks to the continued rise of China. The Trump administration has created a new space force as a separate branch of the military in an attempt to ensure U.S. dominance in the militarization of space. Sounding the alarm on the increasing dangers of a nuclear war and of climate destabilization, the distinguished Bulletin of Atomic Scientists moved its doomsday clock in 2018 to two minutes to midnight, the closest since 1953, when it marked the advent of thermonuclear weapons.29

Increasingly severe economic sanctions are being imposed by the United States on countries like Venezuela and Nicaragua, despite their democratic elections—or because of them. Trade and currency wars are being actively promoted by core states, while racist barriers against immigration continue to be erected in Europe and the United States as some 60 million refugees and internally displaced peoples flee devastated environments. Migrant populations worldwide have risen to 250 million, with those residing in high-income countries constituting more than 14 percent of the populations of those countries, up from less than 10 percent in 2000. Meanwhile, ruling circles and wealthy countries seek to wall off islands of power and privilege from the mass of humanity, who are to be left to their fate.30

More than three-quarters of a billion people, over 10 percent of the world population, are chronically malnourished.31 Food stress in the United States keeps climbing, leading to the rapid growth of cheap dollar stores selling poor quality and toxic food. Around forty million Americans, representing one out of eight households, including nearly thirteen million children, are food insecure.32 Subsistence farmers are being pushed off their lands by agribusiness, private capital, and sovereign wealth funds in a global depeasantization process that constitutes the greatest movement of people in history.33 Urban overcrowding and poverty across much of the globe is so severe that one can now reasonably refer to a “planet of slums.”34 Meanwhile, the world housing market is estimated to be worth up to $163 trillion (as compared to the value of gold mined over all recorded history, estimated at $7.5 trillion).35

The Anthropocene epoch, first ushered in by the Great Acceleration of the world economy immediately after the Second World War, has generated enormous rifts in planetary boundaries, extending from climate change to ocean acidification, to the sixth extinction, to disruption of the global nitrogen and phosphorus cycles, to the loss of freshwater, to the disappearance of forests, to widespread toxic-chemical and radioactive pollution.36 It is now estimated that 60 percent of the world’s wildlife vertebrate population (including mammals, reptiles, amphibians, birds, and fish) have been wiped out since 1970, while the worldwide abundance of invertebrates has declined by 45 percent in recent decades.37 What climatologist James Hansen calls the “species exterminations” resulting from accelerating climate change and rapidly shifting climate zones are only compounding this general process of biodiversity loss. Biologists expect that half of all species will be facing extinction by the end of the century.38

If present climate-change trends continue, the “global carbon budget” associated with a 2°C increase in average global temperature will be broken in sixteen years (while a 1.5°C increase in global average temperature—staying beneath which is the key to long-term stabilization of the climate—will be reached in a decade). Earth System scientists warn that the world is now perilously close to a Hothouse Earth, in which catastrophic climate change will be locked in and irreversible.39 The ecological, social, and economic costs to humanity of continuing to increase carbon emissions by 2.0 percent a year as in recent decades (rising in 2018 by 2.7 percent—3.4 percent in the United States), and failing to meet the minimal 3.0 percent annual reductions in emissions currently needed to avoid a catastrophic destabilization of the earth’s energy balance, are simply incalculable.40

Nevertheless, major energy corporations continue to lie about climate change, promoting and bankrolling climate denialism—while admitting the truth in their internal documents. These corporations are working to accelerate the extraction and production of fossil fuels, including the dirtiest, most greenhouse gas-generating varieties, reaping enormous profits in the process. The melting of the Arctic ice from global warming is seen by capital as a new El Dorado, opening up massive additional oil and gas reserves to be exploited without regard to the consequences for the earth’s climate. In response to scientific reports on climate change, Exxon Mobil declared that it intends to extract and sell all of the fossil-fuel reserves at its disposal.41 Energy corporations continue to intervene in climate negotiations to ensure that any agreements to limit carbon emissions are defanged. Capitalist countries across the board are putting the accumulation of wealth for a few above combatting climate destabilization, threatening the very future of humanity.

#### The alternative is radical democratic organizing around the collective goal of the abolition of capitalism---that necessitates rejecting neoliberal rhetoric in pedagogical spaces like debate

Giroux ’20 [Henry; McMaster University Professor for Scholarship in the Public Interest and The Paulo Freire Distinguished Scholar in Critical Pedagogy; June 9; “Racist Violence Can’t Be Separated from the Violence of Neoliberal Capitalism,” <https://truthout.org/articles/racist-violence-cant-be-separated-from-the-violence-of-neoliberal-capitalism/>]

As educators, it is crucial for us to examine how we talk, teach, and write about inequality as an object of critique in an age of precarity, uncertainty and the current pandemic crisis. This is especially true at a time when a growing number of authoritarian regimes around the globe substitute replace thoughtful dialogue and critical engagement with the suppression of dissent and a culture of forgetting r. How do we situate our analysis of education as part of a broader discourse and mode of analysis that interrogates the promises, ideals, and claims of a substantive democracy? How do we fight against iniquitous relations of power and wealth that empty power of its emancipatory possibilities, and as Hannah Arendt has argued, “makes most people superfluous as human beings”? How might we understand how neoliberal ideology, with its appropriation of market-based values, regressive notions of freedom and agency, uses language to infiltrate daily life? How does a pandemic pedagogy in the service of neoliberalism produce identities defined by market values, and normalize a notion of responsibility and individuality that convinces people that whatever problem they face they have no one to blame but themselves? Repeated endlessly on right-wing media platforms, the underlying conditions that disproportionately produce chronic illness among poor people of color disappear among a public distracted, if not persuaded, by a pandemic pedagogy that celebrates unchecked self-interest, disdains social responsibility, and turns away from the reality of a society with deep-seated institutional rot and unravelling of social connections and the social contract.

Pandemic pedagogy thrives on inequality and becomes a militarized and heartless normalizing tool to convince the broader public that the lives of the elderly, sick, and vulnerable should be valued according to how much they contribute to the economy. And if they are willing to die in order not to be a drain on the economy, all well and good. Nothing escapes the cruel logic of neoliberalism with its arrogance and hubris on full display as it bathes in the glow of right-wing populism, ultra-nationalism, and neofascism. Its accoutrements of dictatorship are everywhere and can be seen in the swagger of militia that storm state capitals, in police who punch and pepper spray protesters and push elderly men to the ground, and in military forces on the streets without badges reinforcing a climate of fear, repression, and unaccountability. There is more at work here than a lack of humanity on the part of the Trump administration. As the Irish journalist Fintan O’Toole observes, there is also the deepening grip of a culture of cruelty and dehumanization. He writes:

“As a society the American people are being habituated into accepting cruelty on a wide scale. Americans are being taught by Trump and his administration not to see other people as human beings whose lives are as important as their own. Once that line has been crossed – and it is not just Trump and the people around him, but many of Trump’s supporters as well – then we know where that all leads, what the ultimate destination is. There is no mystery about it. We know what happens when a government and its leaders dehumanize large numbers of people.”

Depoliticization and the Authoritarian Turn

Neoliberalism is not only an economic system, it is also an ideological apparatus that relentlessly attempts to structure consciousness, values, desires, and modes of identification in ways that align individuals with its governing structures. Central to this pedagogical project is the attempt to prevent individuals from translating private issues and troubles into broader systemic considerations. By doing this, it becomes difficult for individuals to grasp the historical, social, economic, and political forces at work in shaping a social order as a human activity deeply immersed in specific relations of power. Neoliberalism’s attempt to erase or rewrite historical and social forces makes it difficult for individuals to imagine alternative notions of society, with themselves as collective actors, or view their problems as more than the limitations of faulty character, moral failure, or a problem of personal responsibility. Reducing individuals to isolated, discrete, hermetically-sealed human beings whose lives are shaped only by notions of self-reliance and self-sufficiency is a pedagogical strategy that utterly depoliticizes people, leading them to believe that however a society is shaped, it is part of a natural order. President Trump echoed this “no alternative” narrative when asked about celebrities and rich people having special access to being tested for the coronavirus while few others had access. He replied, “Perhaps that’s been the story of life.”

This individualization of the social with its mounting privatization, gated communities, and social atomization undermines collective action, any viable notion of solidarity, and weakens the notion of global connectivity. The philosopher Byung-Chul Han has rightly argued that contemporary neoliberal society is shaped by a dysfunctional notion of solitude and hermitically-sealed notions of agency, all of which undermine the values and social connections vital to a democracy. He writes:

“Those subject to the neoliberal economy do not constitute a we that is capable of collective action. The mounting egoization and atomization of society is making the space for collective action shrink… The general collapse of the collective and the communal has engulfed it. Solidarity is vanishing. Privatization now reaches into the depths of the soul itself. The erosion of the communal is making all collective efforts more and more unlikely.”

This panoptical nature of hyper-individualism is more aligned with shared fears than shared responsibilities. Under such circumstances, trust and the notion that all life is related become difficult to grasp as the myopic language of private self-interest inures individuals to wider social problems such as extreme inequality. There is no understanding in this discourse of the damage fanatical entrepreneurialism does to our embodied collectivity. Nor is there any value attributed to the important responsibilities, social values, and notion of the common good that exceeds who we are as individuals, or how we have been shaped by diverse social forces in particular ways.

It should be clear that questions of economic and social justice cannot be addressed by a neoliberal pedagogy that enshrines self-interest and privatization while converting every social problem into individualized market solutions or regressive matters of personal responsibility. Under neoliberalism’s disimagination machine, individual responsibility is coupled with an ethos of greed, avarice, and personal gain. One consequence is the tearing up of social solidarities, public values, and an almost pathological disdain for democracy. This radical form of privatization is also a powerful force for the rise of fascist politics because it depoliticizes individuals, immerses them in the logic of social Darwinism, and makes them susceptible to the dehumanization of those considered a threat or disposable.

Just as the spread of the pandemic virus in the United States was not an innocent act of nature, neither is the rise and pervasive grip of inequality. What is clear is that neoliberal support for unbridled individualism has weakened democratic pressures and eroded democracy and equality as governing principles. Moreover, as a mode of public pedagogy, it has undercut social provisions, the social contract, and support for public goods such as education, public health, essential infrastructure, public transportation, and the most basic elements of the welfare state. As a form of pedagogical practice, neoliberalism has morphed into a form of pandemic pedagogy that sacrifices social needs and human life in the name of an economic rationality that values reviving economic growth over human rights. As a lived system of meaning and values, self-reliance and rugged individualism are the only categories available for shaping how individuals view themselves, and their relationship to others and to the planet. The individualization of everyone and the reduction of social problems to private troubles is paralleled by sanctioning a world marked by borders, walls, racism, hate, and a rejection of government intervention in the interest of the common good. Most importantly, neoliberal individualization personalizes power, creating a depoliticized subject whose only obligation as a citizen is defined by consuming and living in a world free from ethical and social responsibilities. In many ways, it does not just empty politics of any substance, it destroys its emancipatory prospects.

The neoliberal strategists use education not only to mask their abuses and the effects of their criminogenic policies, they also – in a time of crisis, when dissatisfaction of the masses might lead to chaos, revolts, and dangerous levels of resistance – move dangerously close to creating the conditions for a fascist politics. The noted theologian Frei Betto is right in stating that under such conditions, “…they cover up the causes of social ills and cover up their effects with ideologies that, by obscuring causes, fuel mood in the face of the effects. That’s why neoliberalism is now showing its authoritarian face – building walls that divide countries and ethnic groups, executive power over legislature and judiciary, disinformation about digital networks, the cult of the homeland, the brazen offensive against human rights.”

Neoliberalism and its regressive notion of individualism and individual responsibility has undermined the belief that human beings both make the world and can change it. The pandemic has ushered in a crisis that undermines that belief and opens the door for rethinking what kind of society and notion of politics will be faithful to the creation of a socialist democracy that speaks to the core values of justice, equality and solidarity. Under such circumstances, private resistance must give way to collective resistance, and personal and political rights must include economic rights. If inequality is to be defeated, the social state must replace the corporate state and social rights must be guaranteed for all. There can be no adequate struggle for economic justice and social equality unless economic inequality on a global level is addressed along with a movement for climate justice, the elimination of systemic racism and a halt to the spiraling militarism that has resulted in endless wars. This can only take place if the anti-democratic ideology of neoliberalism, with its collapse of the public into the private and its institutional structures of domination, are fully addressed and discredited. Étienne Balibar is right in stating that the triumph of neoliberalism has resulted in the “death zones of humanity.” Following Balibar, what must be made clear is that neoliberal capitalism is itself a pandemic and a dangerous harbinger of an updated fascist politics.

Overcoming Pandemic Pedagogy

The kind of societies that will emerge after the pandemic is up for grabs. In some cases, the crisis will give way to authoritarian regimes such as Chile, Hungary and Turkey, all of which have used the urgency of COVID-19 as an excuse to impose more state control and surveillance, squelch dissent, eliminate civil liberties and concentrate power in the hands of an authoritarian political class. As is well documented, history in a time of crisis also has the potential to change dominant ideologies, rethink the meaning of governance, and enlarge the sphere of justice and equality through a vision that fights for a more generous and inclusive politics. It is crucial to rethink the project of politics in order to imagine forms of resistance that are collective, inclusive and global, capable of producing new democratic arrangements for social life, more radical values and a “global economy which will no longer be at the mercy of market mechanisms.” This is a politics that must move beyond siloed identities and fractured political factions in order to build transnational solidarities in the service of an alternative radically democratic society. Making the pedagogical more political means challenging those forms of pandemic pedagogy that turn politics into theater, a favorite tactic of Trump. In this case, the performance works to suspend disbelief, hold power accountable and unravel one’s sense of critical agency. Pandemic pedagogy does more than undermine critical thinking and informed judgments, it dissolves the line between the truth and lies, fantasy and reality, and in doing so, destroys the foundation for understanding, engaging and promoting that social and economic justice. The endgame under the rubric of a pandemic pedagogy is not simply the destruction of the truth, but the elimination of democracy itself.

Central to developing an alternative democratic vision is development of a language that refuses to look away and be commodified. Such a language should be able to break through the continuity and consensus of common sense and appeals to the natural order of things. At stake here is the need to reclaim both critical and redemptive elements of a radical democracy in order to address the full spectrum of violence that structures institutions and everyday life in the United States. This is a language connected to the acquisition of civic literacy, and it demands a different regime of desires and identifications to enable us to move from “shock and stunned silence toward a coherent visceral speech, one as strong as the force that is charging at us.”

Of course, there is more at stake here than a struggle over meaning; there is also the struggle over power, over the need to create a formative culture that will produce informed critical agents who will fight for and contribute to a broad social movement that will translate meaning into a fierce struggle for economic, political and social justice. Agency in this sense must be connected to a notion of possibility and education in the service of radical change. Reimagining the future only becomes meaningful when it is rooted in a fierce struggle against the horrors and totalitarian practices of a pandemic pedagogy that falsely claims that it exists outside of history.

Václav Havel, the late Czech political dissident-turned-politician, once argued that politics follows culture, by which he meant that changing consciousness is the first step toward building mass movements of resistance. What is crucial here in the age of multiple crises is a thorough grasp of the notion that critical and engaged forms of agency are a product of emancipatory education. Moreover, at the heart of any viable notion of politics is the recognition that politics begins with attempts to change the way people think, act and feel with respect to both how they view themselves and their relations to others. There is more to agency than the neoliberal emphasis on the “empire of the self,” with its unchecked belief in the virtues of a form of self-interest that despises the bonds of sociality, solidarity and community.

The U.S. is in the midst of a political and pedagogical crisis. This is a crisis defined not only by a brutalizing racism and massive inequality, but also a constitutional crisis produced by a growing authoritarianism that has been in the making for some time. The recent attacks by the police on journalists, peaceful protesters and even elderly people marching for racial justice echoes the violence of the Brownshirts in the 1930s. Let’s stop the futile debate about whether or not the U.S. is in the midst of a fascist state and shift the register to the more serious question of how to resist it and restore a semblance of real democracy.

Under such circumstances, education should be viewed as central to politics, and it plays a crucial role in producing informed judgments, actions, morality and social responsibility at the forefront not only of agency, but politics itself. In this scenario, truth and politics mutually inform each other to erupt in a pedagogical awakening at the moment when the rules are broken. Taking risks becomes a necessity, self-reflection narrates its capacity for critically engaged agency and thinking the impossible is not an option, but a necessity. Without an informed and educated citizenry, democracy can lead to tyranny, even fascism.

Trump represents the malignant presence of a fascism that never dies and is ready to remerge at different times in different context in sometimes not-so-recognizable forms. The COVID-19 crisis and the pandemic of inequality and racism have revealed elements of a fascist politics that are more than abstractions. The struggle against a fascist politics is now visible in the rebellions taking place across the United States. While there are no political guarantees for a victory, there is a new sense that the future can be changed in the image of a just and sustainable society. There is a new energy for reform taking place in the aftermath of the killing of George Floyd. Massive protests for racial, economic and social justice are emerging all over the globe. As I have argued in The Terror of the Unforeseen, at stake here is the need for these protests to transition from a pedagogical moment and collective outburst of moral anger to a progressive international movement that is well organized and unified. Such a movement must build solidarity among different groups, imagine new forms of social life, make the impossible possible, and produce a revolutionary project in defense of equality, social justice and popular sovereignty. The racial, class, ecological and public health crisis facing the globe can only be understood as part of a comprehensive crisis of the totality. Immediate solutions such as defunding the police and improving community services are important, but they do not deal with the larger issue of eliminating a neoliberal system structured in massive racial and economic inequalities. David Harvey is right in arguing that the “immediate task is nothing more nor less than the self-conscious construction of a new political framework for approaching the question of inequality, through a deep and profound critique of our economic and social system.” This is a crisis in which different threads of oppression must be understood as part of the general crisis of capitalism. The various protests now evolving internationally at the popular level offer the promise of new global anti-fascist and anti-capitalist movements. In the current moment, democracy may be under a severe threat and appear frighteningly vulnerable, but with young people and others rising up across the globe — inspired, energized and marching in the streets — the future of a radical democracy is waiting to breathe again.

### 1NC---OFF

CIL CP

#### The United States federal government should prohibit defense contractor mergers which harm national security by concentrating economic or political power in the relevant market by expanding the scope of its interpretive obligations under customary international law.

#### The CP competes and solves the case – it renders the same conduct equally unlawful, but expands CIL rather than antitrust statute – that signals U.S. adherence to norms of international economic law.

Banks ’12 [Ted; 2012; Scharf President, Compliance & Competition Consultants; Denver Journal of International Law & Policy, “40th Anniversary Edition: The International Law of Antitrust Compliance,” 368]

Introduction

It was not so long ago that the concept of international criminal law was an idea with which lawyers struggled. In 1987, Ved Nanda and M. Cherif Bassiouni put together what may have been the first one-volume compendium of information on antitrust, securities, extradition, tax, and other subjects that made up the developing area of international criminal law. Today, it is well-accepted that there are certain standards of behavior that are the norm in practically all nations, and through national laws and multinational treaties, these principles are entering the realm of customary international law.

Developments in the area of competition law, or antitrust as it is known in some countries, have been particularly dramatic. Countries understand that the encouragement of competition is a key to economic development, and national laws have been enacted where they did not exist before, along with enforcement cooperation agreements among increasing numbers of countries. 1 Enforcement of criminal antitrust laws takes place against both individuals and businesses, 2 and while it is clear that there are situations where business entities must be held responsible for actions of their employees, there are other situations where the intent of the corporation may be contrary to the actions of the employee. Throughout the world, in competition law, as well as in other areas of law, there is a consensus that it is appropriate for companies to adopt compliance and ethics programs to utilize management techniques to foster compliance with law. So, as standards of corporate [\*369] conduct become more universal, they reflect adherence to what is essentially an international law - the international law of competition. At the same time, more national authorities recognize that companies are expected to have compliance programs, and that a bona fide compliance program reflects a corporate intent not to violate the law, and therefore should be a positive factor in how authorities treat such companies, including as a mitigating factor for any penalty that might be imposed based on the ultra vires act by an employee.

It is well accepted that compliance and ethics programs are an expected part of corporate activity, and while no program can always guarantee human behavior, these programs do work to mitigate violations of law. Indeed, it can be said that it is now a standard for companies to have compliance programs or at least some elements of such programs such as codes of conduct. We submit that this growing recognition of the purpose of compliance and ethics programs has reached broad-based acceptance and should now be recognized in the competition law field by the United States and other governments as a standard of international law.

The Concept of Organizational Liability

Under many legal regimes, a corporation cannot be criminally punished for the actions of its employees, and until relatively recently (at least if you consider a century relatively recent), under the common law, a corporation was viewed as a legal fiction, 3 which could not be held liable for the criminal conduct of its employees. In the United States, it was not until 1909, in New York Central & Hudson River Railroad v. United States, 4 that the Supreme Court ruled that because the great majority of business transactions were conducted by corporations, it was time to abandon the "old and exploded doctrine" that a corporation was not indictable. 5 The Court reasoned that, as a matter of public policy, because a corporation could be held civilly liable, criminal liability should also follow. 6

This concept of corporate liability has been extended to the point where the business is often held liable for acts of employees even if the [\*370] company was not aware of the violation, 7 prohibited the conduct that led to the violation, 8 or there was no actual benefit to the corporation through the acts of the employee. 9 So even if none of the three justifications for corporate liability are present, i.e., knowledge, benefit, or authority, corporate liability for the acts of an employee - in addition to the liability of the employee - may still be found. A number of reasons have been given for this approach, but a consistent argument is that this type of liability will have an in terrorem effect on the corporation and force the entity to make certain that employees obey the law. 10 As a practical matter, it also reflects the reality that employees working through a corporation, whether or not their actions are authorized, can cause harm far beyond the abilities of one person. Therefore, according to this line of reasoning, it is appropriate that the entity be punished criminally (and pay civil damages).

The usual rule in the United States and other common law countries is that a corporation is liable for acts of agents and employees acting within the scope of their employment and, in most cases, with the intent to benefit the company. 11 This approach derives from the common law doctrine of respondeat superior, which held that a master is generally liable for the actions of servants, but may escape liability if the servant acts outside the scope of employment (i.e., takes action for [\*371] which there is no actual or apparent authority). 12 The concept of apparent authority, the authority that outsiders would normally assume the agent to possess judging from his or her position in the company and the circumstances surrounding previous instances of conduct, is often the foundation for a finding of corporate liability. 13 Employees are assumed to be acting within the scope of their employment 14 if they are doing acts on the corporation's behalf in the performance of their general line of work. 15 An agent must be "performing acts of the kind which he is authorized to perform, and those acts must be motivated - at least in part - by an intent to benefit the corporation." 16 It is not necessary that the acts actually benefited the corporation, only that they were intended to do so.

The court decisions and statutes that led to these multiple bases for finding enterprise liability grew up in an era where there was recognition of the power of the "faceless" corporation and the need to control its activities. Courts would impute knowledge or intent to the corporation, even where there was no benefit to the enterprise by the wrongful acts of the employee and the activities did not benefit the corporation, although some courts are willing to consider whether the violation was foreseeable. 17 In other situations, liability might be imputed to a corporate officer or director for failure to exert their authority to ensure that the corporation (i.e., acting through employees) did not do wrong. 18

But it is also an inescapable fact of our human existence that people are fallible, and that in some cases people will ignore instructions and do things that they were expressly forbidden to do. By holding a corporation liable for virtually anything that any employee does, a situation of strict liability is created that may, in fact, be outside the scope of many laws that require an intent to violate the law. [\*372] Notwithstanding the desire to control the power of the corporation, there are limits to what it can do. The efforts of the corporation to control the actions of employees are a valid consideration in determining whether the corporation should be held liable for the actions of an employee, as was noted in the instructions to the jury after the trial of Arthur Andersen in connection with the Enron debacle:

If an agent was acting within the scope of his or her employment, the fact that the agent's act was illegal, contrary to the partnership's instructions, or against the partnership's policies does not relieve the partnership of responsibility for the agent's acts. A partnership may be held responsible for the acts its agents performed within the scope of their employment even though the agent's conduct may be contrary to the partnership's actual instructions or contrary to the partnership's stated policies. You may, however, consider the existence of Andersen's policies and instructions, and the diligence of its efforts to enforce any such policies and instructions, in determining whether the firm's agents were acting within the scope of their employment. 19

The key here is "diligence." Was a compliance program something that existed only on paper, 20 or were there indicia of sincerity on the part of the corporation that showed that it legitimately tried to enforce its policy of compliance? The diligence of the corporation in enforcing its policy should be a key factor in determining if it is the kind of program that should entitle the corporation to some measure of mitigation from legal penalties imposed as a result of the actions of an employee that disobeyed the policy. 21

[\*373] Competition law imposes certain standards of behavior that are accepted because of an understanding that society benefits from competition. Therefore, in most cases, cartels are prohibited, as is abuse of market power or dominance. There is a recognition in many areas of law that transparency is beneficial, and thus bribes or secret rebates are prohibited for their disruptive impact on competition, as well as their inherent corruptness.

But how do these standards become accepted? It is not sufficient only to implement national laws and multinational agreements. Enforcement authorities recognize that there must also be private action to enforce policies within corporations and to demonstrate that noncompliance with law will not be tolerated. As will be discussed below, there are benchmarks of what is an "effective" compliance and ethics program that have received broad-based acceptance. Standards of international competition law cannot have their desired impact without international standards and efforts for compliance. Companies need to be able to know that what they do to implement compliance standards does matter so that they will make a diligent effort to prevent cartel behavior from happening. If a company has taken serious action to enforce its standards, such as by discharge of employees who violate the law, 22 this level of corporate compliance, which is expected by enforcement authorities, should be recognized when deciding how to treat corporations, including charging and penalty decisions.

So, there is a combination of factors at work here. Competition law standards are virtually universal in their acceptance. 23 To get those standards to actually be implemented by corporations, there need to be corporate compliance and ethics programs in place. Standards of culpability recognize that factors such as intent, knowledge, and benefit are relevant to findings of corporate liability. A number of countries do specifically encourage compliance and ethics programs, including in the antitrust area. 24 Therefore, this growing, worldwide acceptance, combined with universal necessity, has established an international law not just for antitrust, but for antitrust compliance. The countries that do not formally recognize the value of bona fide compliance programs as relevant to corporate liability, perhaps seduced by the possibility of collecting huge fines from a corporate piggy-bank, are out-of-step with the reality of what is necessary to truly promote the principles of competition law.

#### U.S. commitment prevents the disintegration of international economic law – extinction.

Arcuri ’20 [Alessandra; 2020; Full Professor of Inclusive Global Law and Governance at the Erasmus School of Law, Journal of International Economic Law, “International Economic Law and Disintegration: Beware the Schmittean Moment,” vol. 23]

Introduction

There was a time when national sovereignty was out of fashion. In the nineties, international lawyers were engaged in imaging the global order beyond the nation-state. Theories to make this order possible were proliferating: from Global Administrative Law to global constitutionalism.1 International Economic Law (IEL) played an important role in the journey toward the global order. Our markets could be integrated through an almost brand new organization, the World Trade Organization (WTO). The WTO was created and endowed with a powerful set of new agreements, promoting the harmonization of health and safety law—through the Sanitary and Phytosanitary (SPS) Agreement—and technical regulation—Technical Barriers to Trade (TBT) Agreement—and establishing (relatively uniform) Intellectual Property Rights regimes worldwide (the TRIPS Agreement). The WTO also included a brand new dispute settlement system, considered by many as a manifestation of the rule of law at the international level. Similarly, organizations such as the World Bank and the International Monetary Fund (IMF) were indirectly spreading (de-)regulatory policies throughout the developing world.2 Globalization, nudged by a global technocratic elite, was alive and kicking, back then.

Today we face a crisis of the regime of international economic law and, more broadly, global economic governance. The system appears broken for its incapacity to face some of the most daunting challenges of our time: the widespread and dramatic process of environmental degradation and the unacceptable inequalities between poor and rich. On its face, the phenomenon of far-right populists, partly reflected in Brexit and Trump politics, and spreading across the Atlantic is shaking the system of international economic law, by hailing nationalist policies. The idea that the nation-state may be a desirable source of disintegration of the global (legal) order is gaining traction across the political spectrum. It appears clear that the answer to the legitimacy crisis of the system of international economic law and governance offered by progressives3 resorts also to entrusting the nation state with more political space—a space that allegedly has been unduly constrained by the global economic order.

Not only politicians but also progressive academicians, such as Professor Dani Rodrik, have defended the importance of national sovereignty,4 as one of the necessary paradigms to fix our broken world order. The gist of the reasoning is simple: global institutions went too far in eroding national sovereignty, which is the real basis for democratic liberal regimes. Without the nation-state, environmental, industrial, and redistributive policies cannot be realized. As Rodrik put it: ‘So, I accept that nation-states are a source of disintegration for the global economy.’5

This article critically engages with the idea that the nation-state is a legitimate force of disintegration of the international economic order, with particular attention to trade and investment agreements. There are disparate circumstances, from the realm of food safety regulation to the regulation of capital flows,6 in which it is arguably desirable that domestic institutions (re-)gain more power. Most importantly, the nation-state is today an important site of democracy and, only for that reason, it is worth defending. Yet, in times of raising authoritarianism, it is crucial to reflect on some of the limits of the nation-state and on the necessity to develop alternative paradigms for integrating economies and societies.

This article presents a two-fold critique of the idea that an expansion of national sovereignty is going to achieve a better socio-economic world order per se. The first critique is internal, showing that the nation-state does not possess intrinsic characteristics to facilitate democracy, equality, and sustainability. The second is external and focuses on the necessity to look reflexively at the goals of the system of international economic law, to re-imagine it as capable to address questions of inequality and environmental degradation.

In a more pragmatic fashion, this article posits that more nation-state may be a misleading and possibly dangerous response to today’s daunting challenges. It is misleading in so far as it promises solutions that nation-states alone cannot deliver. It is dangerous in so far as the rhetoric of the nation-state paradoxically facilitates the turn toward an expansion of the ‘rule of exception’ and, eventually, authoritarianism. Above all, in advocating for disintegration through the nation-state, we need to reckon with our haunting past where economic autarchy has been deeply intertwined with the ascent of fascism and Nazism. If today the nation-state may appear as a beacon of democracy, the role of nationalism in generating the nemesis of democracy should not be neglected. In short, and at the risk of oversimplification, ‘America first’ echoes too closely fascist slogans.7

I. A PROGRESSIVE DEFENSE OF THE NATION-STATE AND THE RISK OF A ‘SCHMITTEAN MOMENT’

Let me start by rehashing the two interconnected and equally formidable challenges we are facing today: the question of environmental degradation and the unacceptable level of inequalities whereby a large part of the population in the world lives in poverty (both in developing and developed countries, but still overwhelmingly concentrated in so-called developing countries) vis-à-vis a small elite enjoying incredible wealth. Economic integration that does not deal with these challenges is not only doomed to fail; it is a type of economic integration that we should not aspire to.

It is plausible that Brexit and the disintegrationist economic policy of Trump have been partly enabled by the growing inequalities in the Anglophone nations. It is no brainer that a large fraction of Brexiteers and Trump voters are the ‘left behind.’8 In wealthy countries, the working class often felt left behind by thriving globalization, which has benefited only the elites. The—often labelled—‘populist turn’ rests on the idea that the ‘other’, the ‘foreigner’ has stolen ‘our’ welfare and a more nationalistic policy is needed to protect the losers of the current state of affairs. This is evident from Trump’s slogan ‘Buy American, Hire American.’ It is worrying how this type of nationalism is entrenched in racism and in the othering of the non-American.

However, as mentioned earlier, the case for more nation-state has also been made by ‘progressive’ politicians and intellectuals. Among progressive economists, Dani Rodrik stands out for having defended the nation-state with compelling arguments. Let me quote him at length: ‘When it comes to providing the arrangements that markets rely on, the nation-state remains the only effective actor, the only game in town. Our elites’ and technocrats’ obsession with globalism weakens citizenship where it is most needed—at home—and makes it more difficult to achieve economic prosperity, financial stability, social inclusion, and other desirable objectives.’9 Not only is the nation-state the only game in town, when it comes to issues of redistribution, social security and safety, the nation-state is also desirable because it can deliver institutional diversity which is needed to realize the social contract: ‘Developing nations have different institutional requirements than rich nations. There are, in short, strong arguments against global institutional harmonization.’10 The nation-states can meet different preferences, and ‘[i]nsufficient appreciation of the value of nation-states leads to dead ends.’ Rodrik also concedes that international market liberalization is the offspring of well-functioning nation-states rather than international institutions: ‘Domestic political bargains, more than GATT rules, sustained the openness that came to prevail.’11 Against this background, Rodrik defends ‘economic populism’ in so far as it constitutes a form of resistance to ‘liberal technocrats’ imposing undue restraints on domestic economic policy.12 The rigid focus on price stability in low-inflation environments is a clear example of global or EU-driven policies largely insensitive to the effects on employment and paradoxically even growth.13

Many of Rodrik’s arguments are compelling, such as his critique of the economic profession’s misleading analysis of trade and investment agreements. Some of his reform proposals, such as the strengthening of green industrial policy,14 are arguably desirable. Most crucially, the nation-state may be at present one of the most developed sites of democracy, albeit an imperfect one. When global institutions constrain nation-state policies formed following democratic decision-making, this may legitimately be seen as a threat to democracy. Rodrik’s work has had a wide echo in legal circles, as evidenced by the publication of a book with the goal of reimagining trade and investment law, 15 which is opened by several chapters all commenting—in overwhelmingly positive terms—on Rodrik’s Straight Talks on Trade. The nation-state and, more generally, sovereignty is (re-)gaining traction also among progressive political theorists. In times of economic and existential uncertainties, sovereignty is there to offer protection ‘from unfettered markets and from permanently incumbent austerity’ and it constitutes a ‘refusal of a “liquid society” and of its very solid … inequalities.’16 Some of the most lucid analyses of the current international economic order point at the dramatic consequences of an increase of capitalist power that has incapacitated states to act in defense of its own people.17 The attention on sovereignty is also partly reflected in recently negotiated provisions of new trade and investment agreements, where states are explicitly endowed with a ‘right to regulate.’ Despite the unclear practical implications of such jargon, its symbolic value is unambiguously bearing witness to the shared view that states ought to maintain (or regain) political space. Against this background, Trump’s claims to defend the Ohio steel workers by whatever trade measures it takes may appear more acceptable. Could we then read in this reinvigorated faith in sovereignty a ‘Grotian moment’?18

Without indulging on this question, this article posits that we should beware the ‘risk’ of entering a ‘Schmittean moment’.19 This term is here used to refer to a major shift toward an ideal of unfettered national sovereignty as the chief paradigm to re-orient the international (economic) order. Under such ideal, any international normative benchmark is brushed away by an allegedly more intellectually honest ‘political’ dimension, which can find its realization only in the decisionist state.20 To understand the risk of a ‘Schmittean moment’, it is important to recognize that the move toward more nation-state is partly animated by the legitimate concerns over the existing international legal order; legitimate concerns, which have eloquently been articulated by Schmitt himself.

Carl Schmitt’s work offers a lucid critique of the ‘exclusionary character of liberal universalism.’21 His critique exposes the hypocrisy underpinning many universalisms, most prominently the legal canon of ‘just’ war.22 In fact, it is the very core of the contemporary international legal project that gets questioned: ‘The concept of humanity is an especially useful ideological instrument of imperialist expansion, and in its ethical-humanitarian form, it is a specific vehicle of economic imperialism. Here, one is reminded of a somewhat modified expression of Proudhon’s: whoever invokes humanity wants to cheat.’23 This argument has direct relevance for the domain of international economic law. In an endnote to this claim—discussing the extermination of Indians in North America—Schmitt explains the danger to use certain moral canons as exclusionary devices: ‘As civilization progresses and morality rises, even less harmless things than devouring human flesh could perhaps qualify as deserving to be outlawed in such a manner. Maybe one day, it will be enough if people were unable to pay its debts.’24 This consideration is of extreme actuality in relation to the current international legal order, which seems to have crystallized structures of annihilation of debt states, and their very peoples.25 In decrying how the economical is rescinded by the political, Schmitt unveils the absent ‘presence’ of (mostly American) politics in the economy. In short, Schmitt’s analysis cogently engages with the problem of depoliticization that the international liberal order yields.26 It is at this juncture that the thoughts of Schmitt and Rodrik may intersect. In some sense, Schmitt’s critique resonates with the critique of ‘hyper-globalization’ articulated by Rodrik:27 ‘one type of failure arose from pushing rule making onto supranational domains too far beyond the reach of political debate and control.’28

Before elaborating on this intersection, it is key to rehash some flaws of Schmitt’s analysis. While he has certainly a point in showing how liberal universalism can be used to arbitrarily exert hegemonic power in the name of humanity (and has so been used in such way by the US and other predominantly Western countries), the alternative he implicitly propounds rests on a nostalgia for a mythical past—a golden age based on the jus publicum Europaeum. Regrettably, this age has been golden only for some; the jus publicum Europaeum for all its glory was made of colonial relations, exploitation, and violence. It has also been noted how Schmitt’s historical analysis, which portrays the times of the jus publicum Europaeum as times where war gets domesticated by the modern state eclipses the fact that the ‘development of the modern state apparatus … helped bring about unprecedented capacities for organized state violence, even if such violence was no longer typically unleashed against fellow Europeans.’29 His conception of sovereignty, which finds essential realization only in the ‘unlimited jurisdictional competence’ normalizes the rule of exception. A related trouble with Schmitt’s core normative ideas is the totalizing enemy-friendship antithesis: ‘the distinction of friend and enemy denotes the utmost degree of intensity of a union or separation, of an association or dissociation.’30 This is particular fatal to an ideal of nonviolent international law, as it denies even the aspiration of solidarity beyond borders.31 In other words, Schmitt conceptualization of the international legal order crystallizes nation-state borders in deeper existential structures, leaving no hope for common projects of different communities inhabiting the earth. In exposing the violence of allegedly humanitarian projects, Schmitt is de facto hollowing out the concept humanity, reducing its essence to violence in potentia: ‘the entire life of a human being is a struggle and every human being symbolically a combatant. The friend, enemy, and combat concepts receive their real meaning precisely because they refer to the real possibility of physical killing.’32 In denouncing the hypocrisy of moralism, Schmitt seems to negate the possibility of morality altogether. The Nomos of the earth, starting with the act of appropriation—nehmen (take)—and continuing with dividing the land—nemein (divide)—does not engage with the morality of the first act of appropriation nor with its division. And this is also what Hanna Arendt contests to Schmitt: ‘to remove justice from the content of the law.’33

### 1NC---OFF

Adv CP

#### The United States federal government should:

#### -join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership;

#### -rescind tariffs on Chinese imports;

#### -in concert with allies, develop strategic stockpiles of critical resources; and

#### -improve national logistics infrastructure and supply chain cybersecurity.

#### Multilat, ending tariffs, and enhancing cybersecurity solve supply chain redundancy.

Tang ’1/31 [Christopher and Edward W. Carter; Jan 31, 2022; University Distinguished Professor and chair in business administration at UCLA; managing director of Inline Translation Services; Barrons, “3 Steps Biden Can Take to Shore Up Supply Chains,” https://www.barrons.com/articles/3-steps-biden-can-take-to-shore-up-supply-chains-51643406311]

The Biden administration took comprehensive actions to reduce supply chain snarls to help American consumers get what they wanted for Christmas. However, as U.S. inflation hit 7% at a 40-year high, the public is now worried about higher prices of essential goods such as food and gas.

What can the Biden administration do to reduce price increases and improve supply chain resiliency at the same time?

President Biden has paid close attention to supply chain problems beginning with PPE to Covid-19 vaccine shortages in 2021, and more recently to shortages of Covid-19 at-home test kits and N95 masks. As he pivoted from port congestions to port investments, Biden ordered a review of America’s supply chains in 100 days in 2021, focusing on four sectors: semiconductors, large-capacity batteries, critical minerals, and pharmaceuticals.

These efforts are necessary, but not broad enough to cover other sectors. To ensure supply chain resiliency and security, Biden needs to focus on three global supply chain related issues.

Biden should first repair the frayed trade relationship with China by announcing a clear agenda. Then the U.S. must diversify its supply base that goes beyond China for developing resilient supply chains. Moreover, the Biden administration must ensure supply chain security in the US to reduce supply chain disruptions.

I suggest the following specifications:

First, Biden must end the tariffs for products imported from China that are jacking up consumer prices in the U.S. He should negotiate a new trade deal with China based on measurable milestones and enforceable agreements.

The trade war launched by the Trump administration against China in 2018 has proven futile at best and backfired at worst.

The reality is that the U.S. will continue to rely on products imported from China in the foreseeable future. Case in point: despite higher import tariffs, the U.S. trade deficit with China rose 25% in 2021 over a year earlier to $396.6 billion. To offset the increased tariffs on products imported from China, U.S. companies have raised their prices, hurting American consumers.

The U.S.-China Business Council urged the Biden administration in late 2021 to dial back tariffs, but Biden responded on January 19 by stating that he is not ready to reduce the tariffs on goods imported from China. Because China failed to fulfill its Phase One trade agreement that was signed in January 2020, President Biden should use the increased import tariffs as a bargaining chip to pressure China to step up purchases of U.S. goods and services in the future.

If such an agreement can be reached swiftly, it can reduce tariffs-induced price increase for American consumers quickly.

Second, Biden must create incentives for U.S. firms to diversify their supply base beyond China. Expanding the multi-lateral free trade agreements with various countries can generate the momentum.

Despite Trump’s hasty withdrawal from the original Trans-Pacific Partnership in 2017 and U.S. Secretary of Commerce Gina Raimondo’s rejection of joining the Comprehensive and Progressive Agreement for Trans-Pacific Partnership in late 2021, the U.S. should reconsider joining CPTPP.

Raimondo hinted that the U.S. is planning to launch an Indo-Pacific economic framework, probably involving India in 2022. However, the U.S. needs to form trading partners beyond China and India. In the post-pandemic era, U.S. firms are likely to diversify their supplier base involving existing CPTPP country members such as Japan, Malaysia, and Vietnam in Asia, as well as Canada and Mexico in the Americas.

With the U.S. as a member, the CPTPP could also counterbalance the Regional Comprehensive Economic Partnership that China has joined in November 2019. For instance, if the U.S. can take up the leadership role, it can exert economic and political influence over its member countries.

Ultimately, multilateral trade can enable the U.S. to develop a more diverse supply base with less trade friction, which is essential for developing resilient and cost-efficient global supply chains.

Third, Biden must address some of the supply chain security issues. After ransomware attacks targeting food supply chains in the U.S. in 2021, the U.S. must improve supply chain cybersecurity.

The physical supply chain operations in the U.S. are not secure due to a recent wave of supply chain robberies that has been brought to light recently. For several months, thieves have been raiding Union Pacific cargo containers on rails connected between the busiest ports of Los Angeles and Long Beach and other inland ports. Union Pacific reports that the robberies have led UPS and FedEx to reroute their logistics operations away from the Los Angeles area.

The federal and the state governments must take swift and strong actions against these organized crimes. These crimes create additional supply chain disruptions, put workers and consumers in danger, and create financial burdens on firms.

Just like those increased tariffs, American consumers will be paying for the financial damages caused by these crimes. Improving digital and physical security of supply chains can reduce price increases.

President Biden’s commitments to develop resilient supply chains are laudable. Closing these supply chain gaps can benefit U.S. firms and American consumers.

### 1NC---OFF

FTC DA

#### FTC is ramping up enforcement of dark patterns.

Bryan ’11-2 [Kristin L.; November 2; Attorney at Squire Patton Boggs LLP; Mondaq, “BREAKING: FTC Announces It Will Ramp Up Enforcement Against "Dark Patterns" Directed At Consumers,” https://www.mondaq.com/unitedstates/data-protection/1126702/breaking-ftc-announces-it-will-ramp-up-enforcement-against-dark-patterns-directed-at-consumers]

This month, CPW's Kyle Fath, Kristin Bryan, Christina Lamoureux & Elizabeth Helpling explained how data privacy and cybersecurity were Federal Trade Commission ("FTC") priorities. As they wrote, there were "three key areas of interest to consumer privacy that are now in the FTC's spotlight, as well as their relation to state privacy legislation and their anticipated impact to civil litigation." One area of interest they identified was deceptive and manipulative conduct on the Internet (including so-called "dark patterns"). Today, the FTC announced that it was going to ramp up enforcement against illegal dark patterns that trick consumers into subscriptions. Read on to learn more and what it means going forward.

First, some background. The term "dark patterns" collectively applies manipulative techniques that can impair consumer autonomy and create traps for online shoppers (for instance, think of multi-click unsubscription options). As CPW previously explained, "[e]arlier this year, the FTC hosted a workshop called "Bringing Dark Patterns to Light," and sought comments from experts and the public to evaluate how dark patterns impact customers." The genesis for this workshop was the FTC's concern with harms caused by dark patterns, and how dark patterns may take advantage of certain groups of vulnerable consumers.

Notably, the FTC is not alone in its attention to this issue as California's Attorney General previously announced regulations that banned dark patterns and required disclosure to consumers of the right to opt-out of the sale of personal information collected through online cookies. Dark patterns has also been targeted in civil litigation. This year, the weight-loss app Noom faced a class action alleging deceptive acts through Noom's cancellation policy, automatic renewal schemes, and marketing to consumers.

Building off these prior developments, today, the FTC announced a new enforcement policy statement "warning companies against deploying illegal dark patterns that trick or trap consumers into subscription services." As the FTC cautioned, "[t]he agency is ramping up its enforcement in response to a rising number of complaints about the financial harms caused by deceptive sign up tactics, including unauthorized charges or ongoing billing that is impossible cancel."

As summarized in the FTC's press release announcing this development, businesses going forward must follow three key requirements in this area or run the risk of an enforcement action (including potential civil penalties):

#### The plan trades off.

Nylen ’20 [Leah; December 10; Antitrust journalist; Politico, “FTC suffering a cash crunch as it prepares to battle Facebook,” <https://www.politico.com/news/2020/12/10/ftc-cash-facebook-lawsuit-444468>]

The agency that just launched a landmark antitrust suit to break up Facebook is so strapped for cash that its leaders have discussed shrinking their staff and warned against taking on more cases.

In a series of emails to all Federal Trade Commission staff, obtained by POLITICO, Executive Director David Robbins said the agency would face a period of “belt tightening” to cut costs — and that filing fewer cases and trimming litigation expenses must be on the table.

“[W]e will either need to bring fewer expert intensive cases or significantly decrease our litigation costs (e.g. experts, transcripts, litigation support contractors, etc.),” Robbins said in an Oct. 29 email.

The emails offer an increasingly dire portrait of the money woes facing the FTC, which has launched a record amount of litigation in the past year even as the pandemic has caused a sharp reduction in the corporate merger filing fees that normally supply about half its budget. The crunch also raises the possibility that the FTC may not have the cash it needs to win its case against Facebook, which is gearing up for an expensive fight, or to take on additional companies like Amazon.

#### Dark patterns undermine health informatics.

Capurro and Velloso ’21 [Daniel and Eduardo; 2021; Senior Lecturer in Digital Health, Computing and Information Systems, University of Melbourne AND Senior Lecturer in Human-Computer Interaction and DECRA Fellow at the University of Melbourne; Arxiv, “Dark Patterns, Electronic Medical Records, and the Opioid Epidemic,” <https://arxiv.org/pdf/2105.08870.pdf>]

The amount of information required to make sound clinical decisions is enormous and continuously growing [1, 2]. The combination of patient attributes, laboratory results, imaging—along with patient values and preferences—makes this process very complex [3]. Further, the availability of novel genetic and molecular assays that test for hundreds or thousands of genes or proteins and the emergence of previously unknown diseases make the task impossible without the support of external systems to aid clinicians and patients in sound decision making. The complexity of such decisions is one of the reasons explaining why patients only receive around half of the recommended health interventions [4, 5]—a situation with disastrous consequences for their health and well-being.

Electronic Medical Records (EMRs) have emerged in the past twenty years as comprehensive information systems used to collect and synthesize patient data, and to provide decision support for health professionals. The category of devices and artifacts used to facilitate clinical decision making are collectively known as clinical decision support systems (CDSSs). CDSSs can facilitate the documentation of relevant clinical information, alert clinicians about abnormal laboratory results, suggest relevant clinical pathways, summarize patient variables, and many other forms of decision support. Although CDSSs can be implemented through non-digital methods, such as paper reminders [6], most CDSSs are embedded in Electronic Medical Records. Given the diversity of clinical problems, interventions, and possible outcomes, evidence supporting the use of CDSSs is heterogeneous, but there is a growing number of patient and process outcomes that have been shown to be improved through the use of CDSSs. As an example, a recent overview of systematic reviews on the use of CDSS to improve outcomes in patients with diabetes found that 83% of all included studies showed positive impacts on processes of care and 1/3 of them demonstrated benefits in managing blood pressure, blood glucose, and even a reduction in mortality [7]. The accumulating evidence has made CDSSs an attractive method to influence clinical decision making and to change clinician’s behaviour.

However, at the same time that the digitisation of CDSSs has enhanced the speed, accuracy, and scalability of clinical decision making, it has also increased the risk of making the decision process more opaque and of reducing the agency of clinicians. This risk is amplified by recent advances in artificial intelligence and machine learning, which despite offering promising improvements in decision making performance, might not allow for inspection of how the recommendations were reached. This context, combined with competing interests from pharmaceutical companies and medical device manufacturers, creates fertile grounds for the proliferation of dark interface design patterns in CDSSs. We consider dark patterns to be common interface design solutions leveraging cognitive biases and heuristics to trick users into making decisions that are more aligned to third party interests than to their own. In this paper we discuss a case of dark patterns influencing patient treatment through the modification of a CDSS embedded in a commercial electronic health record.

#### Extinction.

Su ’21 [Zhaohui; 2021; Center on Smart and Connected Health Technologies, Mays Cancer Center, School of Nursing, UT Health San Antonio; The Hong Kong Polytechnic University, “Addressing Biodisaster X Threats with Artificial Intelligence and 6G Technologies: Literature Review and Critical Insights,” <https://arxiv.org/pdf/2105.08870.pdf>]

A disaster can be defined as “a serious disruption of the functioning of a community or society involving widespread human, material, economic, or environmental losses and impacts, which exceeds the ability of the affected community or society to cope using its own resources” [47]. Based on the contributing causes, disasters are usually categorized as natural (eg, earthquakes, infectious disease-inducing epidemics, or pandemics of natural origin) and anthropogenic (eg, armed conflicts, nuclear accidents, or the release of pathogenic genetically modified organisms from laboratory settings). In the context of this study, biodisasters are defined as disasters that occur as a result of infectious pathogens with bioweapon potential, which are unleashed by state or nonstate actors accidentally and intentionally (eg, the Japanese government’s controversial decision to dump Fukushima’s contaminated water into the boundless and borderless ocean shared by all life forms on earth, including humans and sharks [48]). In the context of biodisasters, a state actor often takes the form of a nation that deliberately and systematically designs and develops infectious pathogens with its national interest in mind. In contrast, a nonstate actor is an individual or group acting independently to obtain or manufacture a pathogen either owing to misguidance or malice. Of note, although existing multilateral agreements prohibit the production and use of bioweapons by state actors (termed biowarfare) [49], the presence of signed agreements does not imply that accidental or intentional development and release of pathogens by state actors will not occur.

The concept of “bioterrorism,” defined as the deliberate release of pathogens that could cause illnesses and deaths in society, is not the focus of this study because “bioterrorism” entails both deliberation and malice (eg, to elicit terror to the public) [50]; antecedents may not necessarily apply to Biodisaster X threats. Insights from behavioral science [51-53] and evidence regarding individual-caused mass casualty events (eg, indiscriminate mass shootings) [54-56] suggest that individual actors’ behaviors, potentially leading to the onset of Biodisaster X, may or may not include conscious deliberation to harm. In other words, while it is possible that individual actors’ malicious actions might cause some biodisasters, it is also possible that some individual-caused biodisasters are accidental.

Furthermore, the term bioterrorism is limited, in that “terror” is the main outcome. We believe that for Biodisaster X, which could upend lives, livelihoods, and economies, “disaster” is a more appropriate description that sheds light on the scale and severity of its consequences and is more diverse than “terror.” Drawing insight from real-world examples, similar to the prevalent ransomware hacks, it is possible that state or individual actors could develop and utilize infectious pathogens as “ransomgens” for financial gain rather than merely aiming to generate terror in society. Therefore, under the current research context, we adopted the term “biodisaster” instead of “bioterrorism.” Furthermore, considering that various studies have discussed approaches to address state actor–initiated biodisasters [57-61], this study focuses on biodisasters that are infectious in nature, caused by individual actors, and can result in catastrophic human and economic consequences.

Biodisaster X vs Disease X

The risk of biodisasters, such as Biodisaster X, is increasing in likelihood: advances in technology, particularly the availability and maturity of biotechnology, have grown considerably in recent years. Inadvertently, these advances may resemble those of Oppenheimer [62] in facilitating the release of destructive factors. One example of the misuse of biotechnology is a microbiologist, vaccinologist, and senior biodefense researcher who worked at the United States Army Medical Research Institute of Infectious Diseases, who allegedly engineered the 2001 anthrax attacks [63-65]. While the scale of the 2001 anthrax attacks was minor, it demonstrated how easily biodisasters can occur and how unprepared society was for these events. As seen in the lack of adequate preparation and coherent responses to infectious disease–induced pandemics, including COVID-19 [66-69], Biodisaster X’s effects may be compounded to the same, if not greater, degree by incompetence across international, national, and regional agencies and organizations.

The concept of Biodisaster X can be best understood in contrast with Disease X. In terms of similarities, both Biodisaster X and Disease X are driven by pathogens unknown to humans and have the potential to cause crippling effects on society. Furthermore, based on previous inadequacies in response to emergency events including pandemics [66-74], the world at large may be ill-prepared for both Biodisaster X and Disease X. In terms of unique attributes, compared to Disease X, Biodisaster X is more likely to have the following characteristics: (1) having a pathogen directly affiliated to a laboratory; (2) having distinctive and engineered attributes tailored by the capabilities and intentions of the developer; and (3) the origin, development, and history can be definitively ascertained upon identification of the developer, which is not possible for naturally occurring pathogens (eg, the 1918 influenza pandemic), where there is always uncertainty regarding the origin and evolutionary history of the disaster [75-77].

The Imperative of Preparing for Biodisaster X

Some of the deadliest pandemics—the most recent ones ranging from AIDS, severe acute respiratory syndrome, Middle East respiratory syndrome, Ebola, and COVID-19—all have zoonotic origins [78]. Studies have further shown that for viruses that can transmit from animals to humans, especially those that can infect a diverse range of host species, the transmission speeds are substantially amplified once human-to-human transmission is established, and the diseases can quickly evolve into global pandemics [79]. Consequently, once a pathogen is transmissible within a population, there is a low access threshold: an individual actor can “obtain” these deadly pathogens without the need for advanced laboratory skills or extensive financial resources. However, costs to physical and mental health may reveal a counternarrative.

Based on available evidence, it is difficult to determine whether an individual can be a malicious “patient zero”; an individual who intentionally contracts a novel virus intending to cause infectious disease outbreaks in a society [80]. It is not impossible to purposely study and capture known or unknown deadly pathogens that can trigger infectious diseases; microbial surveys are commonly conducted to identify novel pathogens before they pose a threat to public health [81-84]. In theory, there could be individual actors, with adequate knowledge or experience (similar to the microbiologist allegedly behind the 2011 anthrax attacks [63-65]), who may take the same actions but with different motives, ranging from scientific curiosity to ill-guided intentions. Considering the rich biodiversity of wildlife, along with the large number of “missing viruses” and “missing zoonoses” that remain unidentified [85], close contacts with latent deadly pathogens are nearly impossible to control, which in turn, renders it challenging to locate or identify individual actors who might utilize them. Advances in synthetic biology may further compound the situation, especially considering the scholarly endeavors using pathogens in laboratory settings, which could amount to the level of real-world pandemics (eg, laboratory-cultured viruses such as smallpox [86-88]). The likelihood of Biodisaster X increases in proportion to these factors.

Overall, considering the species diversity of wildlife, the unknown factors related to the scale and severity of viruses in animals, which have the latent potential to infect humans, and the varying degrees of competency of community health centers in detecting infectious disease outbreaks in a bottom-up manner, it could be tremendously difficult for health experts and government officials to monitor potentially emerging Biodisaster X threats. However, not all hope is lost. Technology-based solutions, especially those utilizing AI and 6G technologies, can help address these issues.

The Need for Advanced Technology Solutions for Monitoring and Managing Biodisaster X

The Need for Technology-Based Solutions

Once Biodisaster X becomes a reality, human contact will drive transmission and become the primary fuel for exacerbating infections and deaths caused by the disaster. As seen during the COVID-19 pandemic, owing to virus spread and subsequent public health policies (eg, lockdowns), many critical societal functions could be substantially disrupted. The potential to control and contain human and economic consequences of Biodisaster X, such as the functionality of the health care systems (eg, infected health care professionals) [89-91], may also become critically undermined. In these circumstances, technology-based solutions could be the key to addressing these crises, as they are different from conventional solutions; they are not highly dependent on physical interactions and transportation. Overall, technology-based solutions require limited human resources (eg, with the ability to operate without human input), can be delivered independent of physical human contact (eg, web-based and remote deployment), and are immune to infectious diseases (eg, can function in contaminated environments). Furthermore, technology-based solutions are less vulnerable to issues ranging from physical fatigue to mental health burdens, which are health challenges that frontline workers often face amid emergency events.

The Need for Advanced Technologies

To effectively predict, control, and manage Biodisaster X, which is an event with a low probability (ie, difficult to detect preemptively) and a high impact (ie, difficult to control and contain), advanced technologies are needed. While many emerging technologies can address the dangers and damages associated with Biodisaster X [92,93], 2 families of advanced technology-based solutions show particular promise, namely AI techniques and 6G technologies.

Unique Capabilities of AI

AI is generally considered synonymous with “thinking machines” [94], or techniques that can facilitate “a computer to do things which, when done by people, are said to involve intelligence” [95]. With AI technologies, machines can identify patterns too intricate for humans to identify and process quickly. AI techniques are widely used in areas such as natural language processing, speech recognition, machine vision, targeted marketing, and health care, including efforts to combat COVID-19 [96-99]. While technologies such as virtual reality, smart sensors, drones, and robotics could play a positive role in supporting health care professionals to cope with the pandemic [100-102], AI technologies are arguably most instrumental in addressing some of the most prominent issues health experts and government officials are faced with, ranging from pandemic surveillance to COVID-19 drug and vaccine development [103-106].

AI and machine learning techniques are particularly valuable in their ability to identify trends and patterns across large amounts of data promptly and cost-effectively; for example, in identifying or searching for specific patterns. With natural language processing, for instance, data can be extracted retrospectively from clinical records or prospectively in real time and statistically processed for insights, which, in turn, can supplement existing structured data to enrich actionable information [86]. During the COVID-19 pandemic, natural language processing models have been used to analyze publicly available information such as tweets, tweet timestamps, and geolocation data, to identify and map potential COVID-19 cases cost-effectively, without utilizing testing devices or other medical resources that involve health care professional [107].

Overall, most, if not all, AI techniques are irreplaceable in regard to administering complex tasks such as extracting useful information from large data sets. Moreover, with the continuously increasing speed of its technological advancements and applications, AI technologies are often utilized as core components in other emerging technologies [108]. Smart sensors that perform advanced tasks, such as effectively identifying and recognizing captured motions and images, often need to integrate deep learning technologies (a subgroup of AI) [109-111]. These combined insights suggest that AI techniques have great potential in monitoring and managing Biodisaster X threats.

## Adv---Airbus

### 1NC---AT: Supply Chains

#### Supply chain issues are exaggerated.

Drezner ’22 [Daniel; January; International Politics Professor at Tufts University; Reason, “Where's My Stuff?” https://reason.com/2021/12/05/wheres-my-stuff/]

While demand has been stronger than expected, supply in critical sectors coped better than expected. The predicted pandemic breakdowns in supply chains for food and medical supplies proved to be overstated. Surveys of logistical firms last year revealed that the pandemic had minimal effects on their operational capabilities. Even when it came to medicines and personal protective equipment, there were only minor disruptions after the initial shock in March 2020. Claims that the global supply chain in medical products rendered states vulnerable to weaponized interdependence proved to be wildly exaggerated. The pandemic affected service sectors such as tourism far more severely than any manufacturing sector. Indeed, Slate's Jordan Weissmann pointed out recently that "imports were up 5 percent year-over-year in September, and up 17 percent compared with the same time in 2019." This happened despite the decline in air passenger traffic, which restricted yet another means of shipping goods by air. Supply has increased—it's just that demand has surged even more.

The private sector is responding to market signals by ramping up production and ensuring multiple supply lines. Intel, Samsung, and TSMC are all spending tens of billions of dollars to build new chip foundries in the United States. Skyrocketing shipping prices are incentivizing additional construction of new container ships. The Wall Street Journal reports that in the first five months of 2021, there were nearly twice as many orders for new container ships as there were in all of 2019 and 2020 combined. To ensure holiday inventory, large retailers like Walmart and Home Depot have chartered their own container ships. Container shipping rates have already started to decline from September peaks.

#### Cascading collapse is a hoax.

Moosa ’10 [Imad; October 4; Finance Professor at RMIT in Melbourne, Australia; Journal of Banking Regulation, “The myth of too big to fail,” vol. 11]

There is only one argument for TBTF, the argument of systemic risk and failure. But there is no support in history for the proposition that the failure of one institution could bring about havoc on the financial system and the economy at large. There are numerous cases of financial institutions that were allowed to fail without significant systemic problems. The resulting losses were shared by a large number of investors and creditors, who would have been making good returns in previous years. Then some managers who had been accumulating huge personal fortunes through parasitic activities would lose their jobs and most likely find others. A failed institution would then disappear because of serious errors of judgements, so what? Is not this a feature of capitalism? Is not this the corporate version of the survival of the fittest? Is this not what Adam Smith believed in? Failure is necessary in a free market as it improves economic efficiency. When a company fails, a more successful company can buy its good assets, releasing them from incompetent management. The same applies to the labour force. It is a hoax to believe that catastrophic systemic losses can result from the failure of a badly managed financial institution.

## Adv---Readiness

### 1NC---AT: Heg

#### Hegemony incentivizes rapid escalation---competitive decline creates incentives to wait and de-escalate

Hal Brands 18, the Henry Kissinger Distinguished Professor at Johns Hopkins-SAIS, senior fellow at the Center for Strategic and Budgetary Assessments, 10/24/18, “Danger: Falling Powers,” <https://www.the-american-interest.com/2018/10/24/danger-falling-powers/>

There is, then, no disputing that rising powers can have profoundly disruptive effects. Yet such powers might not actually be the most aggressive or risk-prone type of revisionist state. After all, if a country’s position is steadily improving over time, why risk messing it all up through reckless policies that precipitate a premature showdown? Why not lay low until the geopolitical balance has become still more favorable? Why not wait until one has surpassed the reigning hegemon altogether and other countries defer to one’s wishes without a shot being fired? So while a rising revisionist power may be tempted to assert itself, it should also have good reason to avoid going for broke.

Now imagine an alternative scenario. A revisionist power—perhaps an authoritarian power—has been gaining influence and ratcheting its ambitions upward. Its leaders have cultivated intense nationalism as a pillar of their domestic legitimacy; they have promised the populace that past insults will be avenged and sacrifices will be rewarded with geopolitical greatness and global prestige. Yet then the country’s potential peaks, either because it has reached its natural limit or because of some unforeseen development, and the balance of power starts to shift in unfavorable ways. It becomes clear to the country’s leadership that it may not be able to accomplish the goals it has set and fulfill the promises it has made, and that the situation will only further worsen with time. A roll of the iron dice now seems more attractive: It may be the only chance the nation has to claim geopolitical spoils before it is too late.

In this scenario, it is not rising power that makes the revisionist state so dangerous, but the temptation to act before decline sets in. In this sense, the dynamic bears a resemblance to the famous Davies J-Curve theory of revolution, wherein a populace is held to be more inclined to revolt not when it is maximally oppressed but rather when raised expectations are shown to be in vain.

#### Multipolarity is inevitable---balanced multipolarity is stabilizing, but imbalances trigger conflict

Jennifer Lind 19, Associate Professor of Government at Dartmouth College and an Associate Fellow at Chatham House; and William C. Wohlforth, the Daniel Webster Professor of Government at Dartmouth College, March/April 2019, “The Future of the Liberal Order Is Conservative,” Foreign Affairs, https://www.foreignaffairs.com/articles/2019-02-12/future-liberal-order-conservative

A conservative order would also entail drawing clearer lines between official efforts to promote democracy and those undertaken independently by civil society groups. By example and activism, vibrant civil societies in the United States and other liberal countries can do much to further democracy abroad. When governments get in the game, however, the results tend to backfire. As the political scientists Alexander Downes and Lindsey O’Rourke found in their comprehensive study, foreign-imposed regime change rarely leads to improved relations and frequently has the opposite effect. Liberal states should stand ready to help when a foreign government itself seeks assistance. But when one resists help, it is best to stay out. Meddling will only aggravate that government’s concerns about violations of sovereignty and tar opposition forces with the charge of being foreign pawns.

Far from ceding power to illiberal great powers, a strategy of conservatism would directly address those external threats. Part of the reason those countries contest the order is that it exacerbates their insecurities. Restraining the order’s expansionist impulses would reveal just how much of illiberal states’ current revisionism is defensive in nature and how much is driven by sheer ambition. It could also stymie potential balancing against the order by illiberal states—China, Iran, Russia, and others. Although these revisionists have many divergent geopolitical and economic interests that currently limit their cooperation, the more their rulers worry that their grip on power is under threat from a liberal order, the more they will be inclined to overcome their differences and team up to check liberal powers. Reduce that fear, and there will be more opportunities for the liberal states to divide and rule, or at least divide and deter.

### 1NC---AT: DEWs

#### DEWs aren’t important, and begs the question of normal heg debate

Heather **Venable and** Clarence **Abercrombie 19**, Assistant Professor at Air Command and Staff College, PhD in Military History from Duke, 5-28-2019, "Muting the Hype over Hypersonics: The Offense-Defense Balance in Historical Perspective," War on the Rocks, https://warontherocks.com/2019/05/muting-the-hype-over-hypersonics-the-offense-defense-balance-in-historical-perspective/

The U.S. Defense Intelligence Agency told Congress in its Worldwide Threat Assessment that hypersonics will “revolutionize” warfare by enabling targets to be struck faster, harder, and from farther away. Note, however, that such characteristics are far more evolutionary in nature than revolutionary. It is important to acknowledge the limitations of hypersonics, which do, in fact, permit the development of defensive countermeasures. While hypersonic weapons travel at an extremely fast rate of approximately 2 miles per second, the speed of the Tsirkon hypersonic cruise missile, they still pale in comparison to the speed of directed energy weapons (which travel at the speed of light, 186,282 miles per second). Directed energy weapons such as lasers and high-power microwaves are gaining traction because they address the threat of hypersonics with an unconventional approach. Throughout history, militaries have tried to defeat weapons by creating the next most advanced version of those weapons. If one country created a missile capable of traveling 10 miles, another country would create a missile capable of traveling 20. However, with directed energy weapons, the approach is to defeat the technology that makes these advanced weapons so threatening. Lasers are capable of destroying targets using a focused beam of energy, while high-power microwaves are an invisible wave of electromagnetic energy capable of frying microprocessors. Hypersonic weapons are fast, but they are not instantaneous. Thus, when used against moving targets beyond certain distances, the weapons lose effectiveness as the target’s speed increases and its size decreases. Such limitations require most hypersonic weapons to have some form of onboard guidance, which in turn necessitates electronic circuits to do computations and make guidance adjustments. These circuits are highly susceptible to high-power microwave damage. Additionally, the beam width of high-power microwaves is significantly wider than that of a weaponized laser, which requires less time to be used for targeting. Although lasers are extremely effective, when it comes to countering hypersonic weapons, they are limited by line of sight, limited range, and power requirements. For this reason, when talking about defending against hypersonic weapons, high-power microwaves are the more logical choice. Additionally, because hypersonic weapons are so fast, they struggle with maneuvers in the final seconds against small fast-moving targets. This is due to maneuverability limitations at high speeds. Hypersonic weapons, therefore, are most effective for large and slow-moving or stationary targets, such as an aircraft carrier. Areas outfitted with high-power microwaves could provide area denial capabilities for high-value target areas against hypersonic weapons. Using the equations provided in a University of Maryland study of high-power microwave technology, a source power of 9.5 megawatts could deliver the power density required to damage a hypersonic weapon at a target 25 miles away. This would be about 12.5 seconds prior to the missile reaching the transmission site, assuming the hypersonic weapon is traveling directly toward it. This may not seem like a long time, but the slightest change in trajectory in anything traveling at those speeds would result in a drastically different termination point. For example, an angular change of half a degree would result in a miss distance of 1,150 feet. Additionally, depending on the fusing method, high-power microwaves may also be able to prevent the weapon from fusing and, ultimately, deny detonation. China is one of many countries attempting to develop such directed-energy technology. Richard Fisher, an expert on Chinese and Asian security at the International Assessment and Strategy Center, stated in testimony before the U.S.-China Economic and Security Review Commission: [“]Some Chinese military experts expect that energy weapons will become more prevalent in 10 to 20 years and will dominate the battlefield in 30 years. As such, it is imperative that the United States redouble its focus to achieve technology breakthroughs needed to realize decisive energy weapon capabilities and be ready to cooperate with critical allies to accelerate co-developments. The U.S. should also retain the flexibility to deploy energy weapons from diverse platforms, including space platforms, to meet what could be rapidly emerging new Chinese energy weapon threats.[“] Lockheed Martin is now also discussing integrating the technology into UAVs for the Army, but this integration is at a tactical level while high-power microwave technology has strategic uses. Although Boeing initially led the high-power microwave field in 2012 with its development of the Counter-electronics High-powered Advanced Missile Project, or CHAMP, its use and integration has been limited to the B-52. Other countries are advancing the field. China is developing high-power microwaves not only for the purpose of deployable munitions but also for area denial for high-value targets. More integration is necessary if the United States is to remain effective in an evolving battlespace. High-power microwave technology, however, is not without its own weaknesses. Its effective range is based on the power density present at the target, a number of factors that can affect this figure, such as transmitter power, feeder loss, antenna gain, range, path loss, and the effective isotropic radiated power. These factors really boil down to two design elements: environment and range. These limitations can be used to create a versatile weapon that can defeat hypersonic weapons in most cases. As technology moves forward, someone will inevitably determine how to artificially increase the path loss to a point where the microwave drastically loses effectiveness. It is important to acknowledge each technological leap not as a permanent solution but as part of an ongoing cycle, just as has been the case for other weapons, such as the tanks discussed earlier. Many in the Army believed them to be obsolete in the 1970s until innovators stumbled upon a lightweight protective material that provided them with an important offensive advantage once again. Whether it is hypersonic weapons or high-power microwave technology, no one method or technology can exist for long without a countermeasure. Still, hypersonics and other weapons will continue to entice nations with the promise of easy answers that can reduce the fog and friction of war. For now, U.S, policymakers should invest in directed-energy technology while bearing in mind that it is not a silver bullet. Amid the return to great power conflict, it is understandable that the United States fears the rapidly increasing capabilities of its rising peer competitors. But it is worthwhile to consider whether the U.S. investment in hypersonics needs to be rebalanced more toward developing defensive capabilities. It is also helpful to consider those fears in historical perspective and in light of constant shifts in the technological and military balance. The United States needs offensive and defensive hypersonic capabilities for deterrence. Yet ironically, China and Russia’s acquisition of these capabilities can help to stabilize tensions because it helps them fear the United States less, and vice versa. So keep calm and innovate on.

### 1NC---AT: Nuclear Deterrence

#### Nuclear deterrence undermines crisis stability

David P. Barash 18. Professor emeritus at the University of Washington. 01-14-18. “Nuclear deterrence is a myth. And a lethal one at that.” The Guardian. https://www.theguardian.com/world/2018/jan/14/nuclear-deterrence-myth-lethal-david-barash

First, deterrence via nuclear weapons lacks credibility. A police officer armed with a backpack nuclear weapon would be unlikely to deter a robber: ‘Stop in the name of the law, or I’ll blow us all up!’ Similarly, during the Cold War, NATO generals lamented that towns in West Germany were less than two kilotons apart – which meant that defending Europe with nuclear weapons would destroy it, and so the claim that the Red Army would be deterred by nuclear means was literally incredible. The result was the elaboration of smaller, more accurate tactical weapons that would be more usable and, thus, whose employment in a crisis would be more credible. But deployed weapons that are more usable, and thus more credible as deterrents, are more liable to be used. Second, deterrence requires that each side’s arsenal remains invulnerable to attack, or at least that such an attack would be prevented insofar as a potential victim retained a ‘second-strike’ retaliatory capability, sufficient to prevent such an attack in the first place. Over time, however, nuclear missiles have become increasingly accurate, raising concerns about the vulnerability of these weapons to a ‘counterforce’ strike. In brief, nuclear states are increasingly able to target their adversary’s nuclear weapons for destruction. In the perverse argot of deterrence theory, this is called counterforce vulnerability, with ‘vulnerability’ referring to the target’s nuclear weapons, not its population. The clearest outcome of increasingly accurate nuclear weapons and the ‘counterforce vulnerability’ component of deterrence theory is to increase the likelihood of a first strike, while also increasing the danger that a potential victim, fearing such an event, might be tempted to pre-empt with its own first strike. The resulting situation – in which each side perceives a possible advantage in striking first – is dangerously unstable. Third, deterrence theory assumes optimal rationality on the part of decision-makers. It presumes that those with their fingers on the nuclear triggers are rational actors who will also remain calm and cognitively unimpaired under extremely stressful conditions. It also presumes that leaders will always retain control over their forces and that, moreover, they will always retain control over their emotions as well, making decisions based solely on a cool calculation of strategic costs and benefits. Deterrence theory maintains, in short, that each side will scare the pants off the other with the prospect of the most hideous, unimaginable consequences, and will then conduct itself with the utmost deliberate and precise rationality. Virtually everything known about human psychology suggests that this is absurd.

# 2NC

## CP---Adv

### 2NC---Solvency---OV

#### The CP’s suite of resilience measures solves supply chain disruption.

Iakovou ’20 [Eleftherios; December 3; the Harvey Hubbell Professor of Industrial Distribution at Texas A&M University; Brookings Institute, “How to build more secure, resilient, next-gen U.S. supply chains,” <https://www.brookings.edu/techstream/how-to-build-more-secure-resilient-next-gen-u-s-supply-chains/>]

Supply chain resilience can be strengthened by increasing inventory levels of raw material, work-in-progress, and the final product; adding manufacturing and/or storage capacity to improve manufacturing surge capability; and increasing the number and ensuring the surge capability of suppliers of key materials or work-in-progress to mitigate potential supplier disruption. Such risk-mitigation techniques are expensive; however, competitive advantage will result if a firm’s supply chain resilience and agility is identical to the competition’s but at a lower cost. The level of investment a company makes in coping with risk will depend on the identified risks that the company is concerned about, the awareness that some risks the company might face are unimaginable, and the company’s appetite for risk.

New information and manufacturing technologies provide great potential for improving resiliency and productivity in response to real-time demand analysis. Real-time demand data can be used to determine transshipment decisions of raw materials, work-in-progress, and finished products in order to ensure inventories are kept in balance. Further, real-time decision making can rebalance relocatable production. For example, for distributed multi-facility additive manufacturing systems, 3D-printers can be relocated as demand shifts geographically, in conjunction with delaying product differentiation (postponement) for a more agile supply chain.

The result is supply chain performance that blends the advantages of distributed supply chain systems (having inventory and/or manufacturing capacity close to demand to enable fast fulfillment) and centralized supply chain systems (to enable economies of scale, inventory and risk “pooling,” reduced total safety inventory, and reduced total capital expenditures). This performance is in contrast to lean supply chains that minimize cost but may be unable to effectively respond to and recover from unexpected and disruptive events. A dynamically resilient data-driven supply chain network will quickly detect, respond to, and recover from such changes by adjusting manufacturing capacity as needed. Such a supply chain will be resilient and either lean or agile, depending on need.

The role of government in supply chain resilience

Supply chain resilience has already emerged at the forefront of the United States’ research and development agenda. In identifying R&D priorities for federal agencies for fiscal year 2021, the Office of Science and Technology Policy at the White House has called for the development of resilient advanced military capabilities and improved resilience of critical infrastructure and U.S. advanced manufacturing to natural and man-made disasters, including cyber-attacks and exploitation of supply chain vulnerabilities.

Following the COVID-19 pandemic, policymakers are now calling for supply chains of critical goods, especially medical supplies and high-tech products, to be reshored to the United States. But the complete reshoring of such supply chains cannot be the answer. Domestic suppliers can also be disrupted. And such a move would make U.S. businesses less competitive, putting them at a disadvantage with businesses of other (often adversarial) nations that continue to embrace globalization and support key industries with aggressive industrial policies, including subsidies and currency manipulation. The result may be reduced appeal of U.S. products in foreign markets, increased costs to U.S. consumers, reduced shareholder value for investors, and the erosion of the United States’ global innovation leadership, as complete reshoring would hinder its openness to ideas, people, and sourcing of parts and may not make the U.S. economy more resilient to pandemic-type shocks.

The design and operation of a supply chain is highly dependent on the product. Functional products with long life cycles and relatively small demand variability require cost efficient supply chains that can be offshored. Innovative products with short life cycles and relatively high demand variability require market-responsive supply chains with nearshored or domestic sourcing and production. Products of critical importance to defense, security, health, and national competitiveness require the federal government to take a special interest in their supply chains. Today, such products include rare-earth metals, artificial intelligence, hypersonic weaponry, 5G technology, semiconductors, pharmaceuticals, synthetic biology, and specialized medical equipment.

The competitiveness, resilience, and security of these supply chains, embracing holistically R&D, planning, procurement, manufacturing, distribution, and maintenance along with the cultivation of a national manufacturing ecosystem of small to medium enterprises is key to U.S. national security. Achieving this requires an understanding of a given industry’s “clock speed”, which refers to the speed at which it introduces new products, processes and organizational structures; government and regulatory processes; and manufacturing operations for repair and maintenance, which are often not synchronized across these supply chains. Federal government interventions to cultivate supply chain resilience must work in tandem with a given industry’s clock speed.

As it responds to the pandemic, the United States has made some moves to improve its supply chain resiliency, including provisions in the CARES Act economic relief package to investigate U.S. medical supply chains. President-elect Joe Biden has announced a plan to rebuild U.S. supply chains that aims for broad-based resilience as opposed to pure self-sufficiency. Additionally, there have been multiple Senate hearings to examine the integrity and reliability of critical supply chains following the onset of the pandemic. There are a number of other policy interventions the U.S. government might take to promote more resilient and competitive supply chains. These interventions include:

Mapping supply chains that are critical to U.S. health and economic security in order to identify potential vulnerabilities and threats. Supply chain mapping provides visibility to “the suppliers’ suppliers” and can be laborious and time intensive, as it is often conducted on paper. Following the 2011 tsunami in Japan, for example, a team of 100 executives of a global semiconductor giant needed more than one year to complete this task. Embracing novel digital approaches to illuminate the relevant extended supply networks is imperative to help identify what data are important for the development of well-informed policy interventions and operations.

Investing to improve national logistics infrastructure, including its “hard” (ports, roads, rail networks) and “soft” infrastructure (the service industries that underpin logistics) with a focus on improved customs performance, supply chain reliability and service quality, cybersecurity, environmental sustainability, and skills shortages. These priorities would further raise the United States’s ranking in supply chain performance, global logistics connectivity, and competitiveness. Such long overdue investments unfortunately were not made in the globalization-driven economic boom of the 1980s, when policymakers failed to embrace long-term thinking.

#### Domestic supply isn’t key

Holdren and Lander 17 [John P. Holdren is the Teresa and John Heinz Professor of Environmental Policy at the Kennedy School of Government; Co-Director of the Program on Science, Technology, and Public Policy in the Kennedy School’s Belfer Center for Science and International Affairs; and Professor of Environmental Science and Policy in the Department of Earth and Planetary Sciences at Harvard University; Former presidential Science Advisor and Director of the White House Office of Science and Technology Policy. Eric S. Lander is president and founding director of the Broad Institute of MIT and Harvard (“Ensuring Long-Term U.S.

Leadership in Semiconductors,” Executive Office of the President President’s Council of Advisors on Science and Technology https://www.broadinstitute.org/files/sections/about/PCAST/2017%20pcast\_ensuring\_long-term\_us\_leadership\_in\_semiconductors.pdf]

A strong U.S.-based industry can mitigate some of these security concerns but is not a panacea for them. Risks to the integrity of the semiconductor supply chain, while lower when critical items are designed and produced domestically or on the territories of U.S. allies, cannot be assured through domestic manufacturing and design alone and therefore ultimately need to be mitigated through other means (such as integrity standards and testing and greater system resilience), regardless of where production is located. Moreover, if the United States attempted to ensure security by simply restricting the set of producers that was allowed to sell semiconductors to U.S. firms, it would slow innovation by fragmenting markets and reducing competition. The U.S. government and U.S. consumers would be increasingly unable to procure the cutting-edge chips on which the U.S. economy and national security depend.

## CP---UQ

### 2NC---CP

#### The United States federal government should pass Build Back Better.

## DA---PTX

### 1NR---Link

#### Empirics prove that winners don’t build capital. Congress is a drinker; don’t let him drink too much.

Siewert ’18 [Markus; June 2018; Assistant Professorship of Policy Analysis Hochschule für Politik München an der Technischen Universität München and Former Chair for Policy Analysis at the Bavarian, School for Public Policy; “It’s Never Easy for the President to Get Exactly What He Wants,” https://d-nb.info/1164077325/34]

Third, agenda-setting offers the White House the opportunity to highlight its priorities, how they are distributed across various policy issues, and in which way policies should be packaged (Rudalevige 2005, 437ff; Wayne 2009b, 317ff). Because the resources of any administration to lobby Congress are not infinite and the multiple political arenas are usually heavily crowded with myriad policy items and problems striving to be solved, the White House needs to prioritize its policy agenda. This involves, among other things, to select some issues over others, decide about their sequencing, how to pursue them, and how much political capital it wants or needs to spend on any given item. Therefore, the administration will focus on certain policies with more attention, on others with less, depending on the prioritization by the president but also upon other considerations, such as the overall density of the policy agenda or imminent pressures of the time. The trick is to not overwhelm Congress with the president’s initiatives. As Lyndon B. Johnson famously quipped, “Congress is like a Whiskey drinker. You can put an awful lot of whiskey into a man if you just let him sip it. But if you try to force the whole bottle down his throat at one time, he’ll throw it up.” (cited in Rudalevige 2002, 113). Thus, the failure to prioritize easily leads to overload of Pennsylvania Avenue with Congress at the one end, and to excessive demands and exhaustion for the White House at the other end. The rocky start of the Clinton administration underlines this argument: since the White House did not pursue a ‘rifle-approach’ to define clear policy priorities for its initial months and then execute them, it got lost in numerous legislative battles and mine-fields early on in its first year. Instead it followed a ‘shotgun-approach’ by addressing as many issues as possible at once leading to an overkill and chaos (Rockman 1996; `Sinclair 2000b).

#### Plan isn’t a win---antitrust exacerbates intraparty divisions AND dredges up filibuster conversations---even if its possible for some things

Sagers ’21 [Christopher; February; Law Professor at Cleveland State University; The New US Antitrust Administration, “American Antitrust and the Near Term: Consistency, One Imagines, and Some Reasons Why,” https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en]

15. And so I reach the same conclusion being reached by many other Americans who care about antitrust and think it has been wrecked, and hoping for action that even five years ago I would have said was crazy. The only hope left is legislative reform of statutory antitrust. I think Congress should amend the law to reaffirm its own intention that the law be enforced proactively, aggressively, prophylactically, and for real, without giving every defendant the benefit of every conceivable doubt. Congress should do that in a way that keeps the courts from thwarting its intent through nullifying interpretations, as they have done many times before. Obviously, Senate control is again quite relevant. Under those Senate norms that still remain—in which we retain a filibuster rule for ordinary legislation—a party with fewer than 60 seats can typically do little. The two parties do not apparently work together in hardly any fashion. The party that holds the majority, even if only by one vote, controls the institution and its actions outright, but the minority can typically keep it from taking meaningful substantive action. Where the opposing party holds the White House, Senate minorities have filibustered essentially all legislation, apparently just to deny the opposing President any opportunity for campaign-trail self-congratulation. When the majority party can take effective action, it will only be in extraordinary circumstances or by using a filibuster exception, like the budget reconciliation procedure that was used in connection with the Obamacare legislation in 2010, and in subsequent Republican efforts to repeal it. [304] But antitrust, however important and however much it has returned to popular consciousness, seems unlikely to be so high on the Democratic agenda that it is chosen as one of the extraordinary matters Democrats prioritize in this way, even if they win Senate control.

16. And on top of all of that, it does not help that in this world, in which we dwell on ideas and not institutions—perhaps because institutions seem boring, and do not invite intellectual abstraction or Manichean dreams of good and evil—we see sharp divisions even within our factions. Only liberals and progressives in America favor more antitrust enforcement, but among us we have several hotly disputed disagreements, and some difficulties getting along. It reflects in microcosm the struggle of left and center of the election of 2016. So in 2021 and thereafter, it seems like it will be a fair bit of work to build any effective reform coalition. [305]

17. So, while I think that antitrust law will remain basically the same for the next four years, it is emphatically not because we all agree that it should. I think it is fairly likely that less than a majority of us do. It will be because the only institutions that matter are so radically, heavily stacked against change.

## Adv---Airbus

### 2NC---AT: Supply Chains

#### Squo solves supply chain crisis.

AJOT ’22 [American Journal of Transportation; Jan 19; “Global supply chain activity stabilizing despite Omicron variant spike,” <https://ajot.com/news/global-supply-chain-activity-stabilizing-despite-omicron-variant-spike>

Global transaction volumes remain on par with the previous quarter’s momentum

US supply chains activity is close to normalizing against pre-pandemic forecasts

China’s trade suffers 10 point loss in the wake of strict pandemic protection measures

US supply chain activity finished Q4 within touching distance of pre-pandemic forecasts, as global transaction volumes between buyers and suppliers showed increasing signs of stabilizing, new data from Tradeshift reveals. But signs of a protracted slowdown across Chinese supply chains suggest further disruption could lie ahead.

According to Tradeshift’s Q4 2021 Index of Global Trade Health, the recovery in activity across US supply chains continues to track at a significantly higher level than the rest of the world. Momentum dipped slightly in Q4, falling one point compared to the previous quarter, but an index score of 97 (against a baseline of 100) for the period means the cumulative growth in activity since the pandemic sits just 3 points below the pre-pandemic forecast.

Logjams start to ease

Spiking cases of the Omicron variant tempered the overall momentum across global supply chains, but the impact has been generally far less severe than during previous waves. Total growth in global transaction volumes during Q4 remained level with the previous quarter, finishing the year with an index score of 75.

Global order volumes appeared to stabilize, dropping a modest 0.5 points in Q4 after a series of wild peaks and troughs in activity during previous quarters. A seven point rise in transaction volumes across the transport and logistics sector also suggests that supply chain bottlenecks are starting to ease. Invoice volumes failed to accelerate as expected in Q4 however, suggesting suppliers are still struggling to fulfil the existing backlog of orders.

#### It’s over

Source One ’22 [StrategicSourceror.Com is operated by Source One, online resource for procurement and supply chain professionals; Jan 13; “4 Indications That The Supply Chain Is Getting Better,” <https://www.strategicsourceror.com/2022/01/4-indications-that-supply-chain-is.html>]

The new year is a time to look ahead and to reflect on where we've come from. And when it comes to the supply chain, it's been every which way but linear. The supply chain's challenges are years old as are the attempted solutions. One of the more recent strategies involved making the nation's two largest ports — those of Los Angeles and Long Beach — 24 hours a day, seven days a week operations. This directive came straight from the White House. In doing so, it provided an additional 60 hours of work to free up the backlog.

Nearly three months since this policy was enacted — and more than a year since COVID-19 largely fueled the supply chain issues in the first place, it raises the question: Have conditions improved? While no one denies that snags continue to exist and the remedies aren't working as quickly as everyone would like, things do appear to be getting better. Here are a few indications that the nation's supply chain is gaining strength:

1. 90% on-shelf availability

From grocery stores to delicatessens, products that are true staples of a business have been temporarily unavailable. But according to President Joe Biden, at a year-end meeting of his Supply Chain Disruptions Task Force, "temporary" is the keyword when it comes to merchandise. The current average for products at retailers in 90%. Before the pandemic struck, on-shelf availability was 91%.

Data from the White House suggests the supply chain is showing many signs of improvement.

2. Dwell times cut in half

A core component to improving the flow of goods and uncorking the bottleneck at shipping ports is speeding up the processes that are occurring there. A combination of carrots and sticks from the port authority and the 24/7 policy seems to be paying dividends. John Porcari, who serves as the port envoy for the Supply Chain Disruptions Task Force, told Pres. Biden on Dec. 22 that shipping containers are being unloaded and removed from stations much more swiftly. Dwell times now average approximately four days at the Port of Los Angeles. In October, when the task force was first formed, the average was nine days.

At the Port of Long Beach, the wait is slightly longer (five days) but the reduction in dwell time more significant, being down from 12 days.

3. Dip in backlogs

A major concern among both consumers as well as business owners heading into the holiday season was whether gift items would show up before Christmas, a worry fueled by diminished productivity and heavy demand. Here as well, though, backlogs aren't as deep as they used to be. Indeed, according to the Institute for Supply Management, the backlog of orders index in November reached 61.9. That's a marked recovery from 70.6, a record high in May 2021.

4. Ocean shipping prices down 25%

A major trading partner with the United States is not only China, but much of the Asian continent. Higher shipping rates have been passed on to consumers. Those costs are coming down, though. White House Press Secretary Jen Psaki informed reporters that containers are now 25% less than what they were in September.

Based on these numbers from the government, 2022 is shaping up to be a year of improvement for the supply chain and the world economy as a whole.

#### Supply chain improving

Kalish 1/18 – Ira Kalish, Chief Global Economist, Deloitte, “Weekly global economic update,” 1/18/22, <https://www2.deloitte.com/us/en/insights/economy/global-economic-outlook/weekly-update.html>

Economists and business leaders are eagerly looking and hoping for evidence that the supply chain disruption of the past year is abating. Fortunately, there is such evidence, although we are not yet out of the woods. For example, Taiwan’s government reports that overall exports to the mainland increased dramatically in 2021, largely due to a surge in exports of semiconductors. Specifically, Taiwanese exports were up 24.8% from 2020 to 2021. Exports to the mainland were up 22.9%. Also, Taiwanese exports of electronic components to the mainland were up 23.3%.

This massive growth indicates several things. First, China’s own production of semiconductors has not kept pace with demand, especially due to US sanctions that limited Chinese access to certain technologies. Hence, strong demand for Taiwanese electronics. Second, it indicates strong Chinese manufacturing activity, which depends heavily on semiconductors. Indeed, Chinese exports grew rapidly in 2021. Third, it indicates that production of semiconductors is increasing rapidly, suggesting that the shortage is diminishing. Indeed, Taiwan’s government reported that manufacturing capacity has increased considerably in the past year.

Taiwan remains the world’s most important producer of semiconductors, estimated to account for 64% of global output. Yet, Taiwanese companies are evidently keen on diversifying risk. As such, they continue to invest overseas. However, investment into the mainland declined 14.5% last year (while mainland company investment in Taiwan declined 62.9%). Meanwhile, Taiwanese investment in Southeast Asia, Australia, and New Zealand increased 115.6% last year.

There is other evidence of supply chain improvement. There has been a sizable decline in the cost of shipping commodities and containers, as evidenced by a decline in the well-known Baltic Dry Index as well as the Harper Index. This means that the bottlenecks of the past year are starting to diminish. In addition, there has been a drop in the prices of several mineral and agricultural commodities. This means that shortages of these inputs are starting to abate. And finally, there has been a sizable increase in industrial production and manufactured exports in East Asia. This suggests that manufacturers are increasingly able to meet the strong demand that led to disruption in the first place.

Also, there is reason to expect that global demand for manufactured goods will decelerate in the year ahead. Already, we have seen a decline in real (inflation-adjusted) spending on goods by US consumers over the past half year. Although the level of spending remains well above prepandemic levels, it’s declining from the peak reached in early 2021. This likely reflects an easing of government stimulus, satisfaction of pent-up demand, and possibly a consumer decision to shift back toward spending on services. Going forward, most advanced economies are expected to experience a tightening of monetary and fiscal policy in the coming year, with the likely result being weaker growth of consumer demand. Less consumer demand for goods will mean fewer bottlenecks and less stress on supply chains. It could also mean less inflation.

#### It’s a mismatch between data and rhetoric.

Drezner ’12-7 [Daniel; 2021; International Politics Professor at Tufts University; the Washington Post, “So how is the global supply chain doing?” https://www.washingtonpost.com/outlook/2021/12/07/so-how-is-global-supply-chain-doing/]

The second point, however, is equally important: “[There is] a mismatch between a lot of overheated political rhetoric and an actual understanding of how the global economy works. Many of the past year’s issues are temporary — and when it comes to strained global supply chains, globalization is more often the solution than the problem.” In other words, six months from now many of the issues that people were complaining about in 2021 should have dissipated.

You should read the whole thing at Reason because the hard-working staff here at Spoiler Alerts has no plans to regurgitate the arguments presented at greater length there. However, that essay was put to bed almost six weeks ago. That is always a scary time when writing a feature story — will trends bolster one’s thesis or undercut it? As I was putting the story to bed there were a lot of scary headlines suggesting I was understating the problem. It seems worth assessing whether my story, as written, still checks out.

The answer appears to be yes. Shipping costs were starting to fall even by mid-November. So far in December that fall has continued to the lowest levels in five months.

In more specific sectors of concern, the stresses are also beginning to abate. Late last month Nikkei reported that inventories for computer chips were starting to rise for the first time in several months: “Both chipmakers and their customers say the third quarter of 2021 marked a turning point. Supply shortages of automotive chips are expected to be greatly reduced starting in the July-September quarter.”

This is unalloyed good news! Slightly more alloyed good news is how big retailers such as Amazon, Walmart and Target have coped with the global supply chain issues of the past year. In their third-quarter reports, all three firms reported minimal issues with their own inventories and stated that they were well-prepared for the holiday shopping season. One of the reason for this was that each firm went big in their overseas purchases, contracting entire container ships rather than containers on ships. The same was true of Costco, Ikea, Home Depot and other big box retailers.

### 2NC---AT: Impact

#### Decline doesn’t cause war

Dr. Stephen M. Walt 20, Robert and Renée Belfer Professor of International Relations at Harvard University, PhD in International Relations (with Distinction) from Stanford University, MA in Political Science from the University of California, Berkeley, “Will a Global Depression Trigger Another World War?”, Foreign Policy, 5/13/2020, https://foreignpolicy.com/2020/05/13/coronavirus-pandemic-depression-economy-world-war/

On balance, however, I do not think that even the extraordinary economic conditions we are witnessing today are going to have much impact on the likelihood of war. Why? First of all, if depressions were a powerful cause of war, there would be a lot more of the latter. To take one example, the United States has suffered 40 or more recessions since the country was founded, yet it has fought perhaps 20 interstate wars, most of them unrelated to the state of the economy. To paraphrase the economist Paul Samuelson’s famous quip about the stock market, if recessions were a powerful cause of war, they would have predicted “nine out of the last five (or fewer).”

Second, states do not start wars unless they believe they will win a quick and relatively cheap victory. As John Mearsheimer showed in his classic book Conventional Deterrence, national leaders avoid war when they are convinced it will be long, bloody, costly, and uncertain. To choose war, political leaders have to convince themselves they can either win a quick, cheap, and decisive victory or achieve some limited objective at low cost. Europe went to war in 1914 with each side believing it would win a rapid and easy victory, and Nazi Germany developed the strategy of blitzkrieg in order to subdue its foes as quickly and cheaply as possible. Iraq attacked Iran in 1980 because Saddam believed the Islamic Republic was in disarray and would be easy to defeat, and George W. Bush invaded Iraq in 2003 convinced the war would be short, successful, and pay for itself.

The fact that each of these leaders miscalculated badly does not alter the main point: No matter what a country’s economic condition might be, its leaders will not go to war unless they think they can do so quickly, cheaply, and with a reasonable probability of success.

#### States turn inwards, and if they don’t attacks are on small pushovers---doesn’t escalate

Dominic **Tierney 17**, associate professor of political science at Swarthmore College and contributing editor at The Atlantic, latest book is The Right Way to Lose a War: America in an Age of Unwinnable Conflicts, “The Risks of Foreign Policy as Political Distraction,” The Atlantic, 6/15/2017, https://www.theatlantic.com/international/archive/2017/06/trump-diversionary-foreign-policy/530079/

But what about military force? To be clear, there is little cause to speculate that Trump plans to launch a full-scale war solely to distract attention. For one thing, as president, the worst possible time to start a major military campaign is when you’re deeply unpopular. And the political upside is shaky at best. Recent big wars in Afghanistan and Iraq were politically damaging to George W. Bush. Even victory doesn’t guarantee a pay-off, as George H. W. Bush discovered when he won the 1991 Gulf War and then lost his bid for reelection in 1992. A crisis may arise where there are real national-security rationales for fighting, along with potential domestic gains. Here, the payoff at home would likely enter Trump’s calculus, and even push him over the edge to fight, with the legitimate casus belli providing a shield of plausible deniability. The most tempting use of force may be a seemingly manageable, but still dazzling, kinetic operation, like a missile strike or a raid to kill terrorist leaders. Another option would be to escalate a crisis where an easy win seems available: The key is to find the right enemy, one that’s both widely hated and too weak to fight back. After all, there’s a well-established “rally ‘round the flag” effect, where almost any military crisis temporarily juices the president’s approval ratings. In the wake of Clinton’s airstrikes in 1998, one poll found that 68 percent of Americans approved of his foreign policy. Republican House Speaker Newt Gingrich said, “it was the right thing to do at the right time.”

## Adv---Readiness

### 2NC---OV

#### Comparatively outweighs the benefits of hegemony

Christopher Preble 16, vice president for defense and foreign policy studies at the Cato Institute. PhD in History from Temple University. With William Ruger. 2016. “The Problem With Primacy.” In “Our Foreign Policy Choices, Rethinking America’s Global Role” https://poseidon01.ssrn.com/delivery.php?ID=741072022102024090075118113101083026016056000029024069069123111076082080009064093108016120111006027011049007074022115108007102123042042011081092085100005025006088070001052041101115092080116097001012108114029011071004086091092118120095090091004096029029&EXT=pdf

Another key problem is that primacy inadvertently increases the risk of conflict. Allies are more willing to confront powerful rivals, because they are confident that the United States will rescue them if the confrontation turns ugly, a classic case of moral hazard, or what Barry Posen calls "reckless driving." Restraining our impulse to intervene militarily or diplomatically when Our vital national interests are not threatened would reduce the likelihood that Our friends and allies will engage in such reckless behavior in the first place. Libya and Georgia are only two cases of this problem. Plus, a more restrained U.S. foreign policy would provide a powerful incentive for allies to share the burden of defense. Primacy has not stopped rivals from challenging U.S. power. Russia and China, for example, have resisted the U.S. government's efforts to expand its influence in Europe and Asia. Indeed, by provoking security fears, primacy exacerbates the very sorts of problems that it claims to prevent, including nuclear proliferation. U.S. efforts at regime change and talk of an "axis of evil" that needed to be eliminated certainly provided additional incentives for States to develop nuclear weapons to deter U.S. actions (e.g„ North Korea). Meanwhile, efforts intended to smother security competition or hostile ideologies have destabilized vast regions, undermined Our counter- terrorism efforts, and even harmed those we were ostensibly trying to help. After U S. forces deposed the tyrant Saddam Hussein in 211)3, Iraq descended into chaos and has never recovered. The situation in Libya is not much better; the United States helped Overthrow Muammar el-Qaddafi in 2011, but violence still rages. The Islamic State, which Originated in Iraq, has now established a presence in Libya as well. It is clear that those interventions were counterproductive and have failed to make America safer and more secure.

#### Extinction

Klare 18 – Professor of peace and world security studies at Hampshire College. (Michael T., “The Pentagon Is Planning a Three-Front ‘Long War’ Against China and Russia,” April 4, 2018, <https://fpif.org/the-pentagon-is-planning-a-three-front-long-war-against-china-and-russia/>)//sy

In relatively swift fashion, American military leaders have followed up their claim that the U.S. is in a new long war by sketching the outlines of a containment line that would stretch from the Korean Peninsula around Asia across the Middle East into parts of the former Soviet Union in Eastern Europe and finally to the Scandinavian countries. Under their plan, American military forces — reinforced by the armies of trusted allies — should garrison every segment of this line, a grandiose scheme to block hypothetical advances of Chinese and Russian influence that, in its global reach, should stagger the imagination. Much of future history could be shaped by such an outsized effort. Questions for the future include whether this is either a sound strategic policy or truly sustainable. Attempting to contain China and Russia in such a manner will undoubtedly provoke countermoves, some undoubtedly difficult to resist, including cyber attacks and various kinds of economic warfare. And if you imagined that a war on terror across huge swaths of the planet represented a significant global overreach for a single power, just wait. Maintaining large and heavily-equipped forces on three extended fronts will also prove exceedingly costly and will certainly conflict with domestic spending priorities and possibly provoke a divisive debate over the reinstatement of the draft. However, the real question — unasked in Washington at the moment — is: Why pursue such a policy in the first place? Are there not other ways to manage the rise of China and Russia’s provocative behavior? What appears particularly worrisome about this three-front strategy is its immense capacity for confrontation, miscalculation, escalation, and finally actual war rather than simply grandiose war planning. At multiple points along this globe-spanning line — the Baltic Sea, the Black Sea, Syria, the South China Sea, and the East China Sea, to name just a few — forces from the U.S. and China or Russia are already in significant contact, often jostling for position in a potentially hostile manner. At any moment, one of these encounters could provoke a firefight leading to unintended escalation and, in the end, possibly all-out combat. From there, almost anything could happen, even the use of nuclear weapons. Clearly, officials in Washington should be thinking hard before committing Americans to a strategy that will make this increasingly likely and could turn what is still long-war planning into an actual long war with deadly consequences.

#### Best data goes aff

**Monteiro ’14** (Nuno; 1/1/14; Ph.D. and M.A. in Political Science from the University of Chicago, M.A. in Political Science and Theory from the Catholic University of Portugal, B.A. in IR from University of Minho, Assistant Professor of Political Science at Yale University; Cambridge University Press, “Theory of Unipolar Politics,” p. 181-184) \*Edited for clarity

At the same time, the first two-and-a-half decades of our unipolar system have [has] been **anything but peaceful** in what concerns U.S, involvement in interstate conflict. U.S. forces have been employed in **four interstate wars** – Kuwait (1991), Kosovo (1999), Afghanistan (2001-), and Iraq (2oo3-2011) – in addition to many smaller interventions including Bosnia, Haiti, Somalia, and Sudan.5 As a result, the United States has been at war for **fifteen of the twenty-five years** since the end of the Cold War, In fact, the first two-and-a-half decades of unipolarity — representing around 1o percent of U.S. history account for more than 30 percent of the nation's total wartime.6 For critics of U.S. interventionism, "the central question [of contemporary international politics] is how to contain and moderate the use of military force by the United States."8 Table 5 presents a list of great powers divided into three periods: from 1816 to 1945, multipolarity; from 1946 to 1989, bipolarity; and unipolarity since 1990.9 Table 6 then presents summary data about the incidence of war during each of these periods. Unipolarity is **by far the most conflict prone** of all systems according to two important criteria: the percentage of years that great powers spend at war and the incidence of war involving great powers. In multipolarity, 18 percent of great-power years were spent at war versus 16 percent in bipolarity. In unipolarity, in contrast, a remarkable 64 percent of great-power years have been until now spent at war – **by far the highest percentage** in all systems. Furthermore, during multipolarity and bipolarity the probability that war involving a great power would, break out in any given year was, respectively, 4.2 percent and 3.4 percent. Under unipolarity, it is 16.o percent – or around **four times higher**. It might be argued that the higher number of years that great powers spent at war under unipolarity are merely the result of the long, grinding, and unforeseen occupations of Afghanistan and Iraq by U.S. forces.11 But even if these two wars had gone according to U.S. plans – if the Afghanistan War had ended in the spring of 2002 and the Iraq War in the summer of 2003 – unipolarity would still be particularly **prone to great-power involvement** in war. Even if the United States had not occupied either Afghanistan or Iraq, it would still have spent 16.0 percent of the post-Cold War years at war, which is about the same as the respective percentages for bipolar and multipolar systems. In other words, even if the United States had refrained from any military occupations, the frequency of its use of military force in major operations would still give us **no reason to believe** that unipolarity is any more peaceful than any other past configuration of the international system. As things turned out in both Afghanistan and Iraq, the last two-and-a-half decades saw a sharp increase in both the incidence of conflict and the percentage of great-power years spent at war. This is a particularly puzzling finding given that the current unipole – the United States – is a democracy in a world populated by more democracies than at any time in the past. In light of arguments about how democracies are better able to solve disputes peacefully, choose to engage only in those wars they can win, and tend to fight shorter wars, the United States should have spent fewer years at war than previous nondemocratic great powers.12 As we can see, post-Cold War history can be used in support of both the widespread claim that the overall level of conflict has declined and of the claim that the United States has experienced an **unprecedented level of involvement** in interstate war. Reality seems to be chafing against the view that unipolarity produces no incentives for confilict; at least in what concerns the unipole's involvement in interstate wars, the past two-and-a-half decades seem to point in **the opposite direction**.

#### Turns supply chains---only multipolarity sustains global cooperation and stability

**Pouliot 11** — Professor of Political Science at McGill University (Vincent Pouliot, “Multilateralism as an End in Itself,” International Studies Perspectives (2011) 12, 18–26)//NG

Because it rests on open, nondiscriminatory debate, and the routine exchange of viewpoints, the multilateral procedure introduces three key advantages that are gained, regardless of the specific policies adopted, and tend to diffuse across all participants. Contrary to the standard viewpoint, according to which a rational preference or functional imperative lead to multilateral cooperation, here it is the systematic practice of multilateralism that creates the **drive to cooperate**. At the theoretical level, the premise is that it is not only what people think that explains what they do, but also what they do that determines what they think (Pouliot 2010). Everyday multilateralism is a self-fulfilling practice for at least three reasons. First, the joint practice of multilateralism creates mutually recognizable [and] patterns of action among global actors. This process owes to the fact that practices structure social interaction (Adler and Pouliot forthcoming).2 Because they are meaningful, organized, and repeated, practices generally convey a degree of mutual intelligibility that allows people to develop social relations over time. In the field of international security, for example, the practice of deterrence is premised on a limited number of gestures, signals, and linguistic devices that are meant, as Schelling (1966:113) put it, to ‘‘getting the right signal across.’’ The same goes with the practice of multilateralism, which rests on a set of political and social patterns that establish the boundaries of action in a mutually intelligible fashion. These structuring effects, in turn, allow for the development of **common frameworks** for appraising global events. Multilateral dialog serves not only to find joint solutions; it also makes it possible for various actors to zoom in on the definition of the issue at hand—a particularly important step on the global stage. The point is certainly not that the multilateral procedure leads everybody to agree on everything—that would be as impossible as counterproductive. Theoretically speaking, there is room for skepticism that multilateralism may ever allow communicative rationality at the global level (see Risse 2000; Diez and Steans 2005). With such a diverse and uneven playing field, one can doubt that discursive engagement, in and of itself, can lead to common lifeworlds. Instead, what the practice of multilateralism fosters is the emergence of a shared framework of interaction—for example, a common linguistic repertoire—that allows global actors to make sense of world politics in mutually recognizable ways. Of course, they may not agree on the specific actions to be taken, but at least they can build on an established pattern of political interaction to deal with the problem at hand—sometimes even before it emerges in acute form. In today’s pluralistic world, that would already be a considerable achievement. In that sense, multilateralism may well be a constitutive practice of what Lu (2009) calls ‘‘political friendship among peoples.’’ The axiomatic practice of principled and inclusive dialog is quite apparent in the way she describes this social structure: ‘‘While conflicts, especially over the distribution of goods and burdens, will inevitably arise, under conditions of political friendship among peoples, they will be negotiated within a global background context of norms and institutions based on mutual recognition, equity in the distribution of burdens and benefits of global **cooperation, and power-sharing** in the institutions of global governance rather than domination by any group’’ (2009:54–55). In a world where multilateralism becomes an end in itself, this ideal pattern emerges out of the structuring effects of axiomatic practice: take the case of NATO, for instance, which has recently had to manage, through the multilateral practice, fairly strong internal dissent (Pouliot 2006). While clashing views and interests will never go away in our particularly diverse world, as pessimists are quick to emphasize (for example, Dahl 1999), the management of discord is certainly made easier by shared patterns of dialog based on mutually recognizable frameworks. Second, the multilateral procedure typically ensures a remarkable level of **moderation** in the global policies adopted. In fact, a quick historical tour d’horizon suggests that actors engaged in multilateralism tend to **avoid radical solutions** in their joint decision making. Of course, the very process of uniting disparate voices helps explain why multilateralism tends to produce median consensus. This is not to say that the multilateral practice inevitably leads to lowest common denominators. To repeat, because it entails complex and often painstaking debate before any actions are taken, the multilateral procedure forces involved actors to devise and potentially share **similar analytical lenses** that, in hindsight, make the policies adopted seem inherently, and seemingly ‘‘naturally,’’ moderate. This is because the debate about what a given policy means takes place before its implementation, which makes for a much smoother ride when decisions hit the ground. This joint interpretive work, which constitutes a crucial aspect of multilateralism, creates outcomes that are generally perceived as inherently reasonable. Participation brings inherent benefits to politics, as Bachrach (1975) argued in the context of democratic theory. Going after the conventional liberal view according to which actors enter politics with an already fixed set of preferences, Bachrach observes that most of the time people define their interests in the very process of participation. The argument is not that interests formed in the course of social interaction are in any sense more altruistic. It rather is that the nature and process of political practices, in this case multilateralism, matter a great deal in shaping participants’ preferences (Wendt 1999). In this sense, not only does the multilateral practice have structuring effects on global governance, but it is also constitutive of what actors say, want, and do (Adler and Pouliot forthcoming). Third and related, multilateralism lends **legitimacy** to the policies that it generates by virtue of the debate that the process necessarily entails. There is no need here to explain at length how deliberative processes that are inclusive of all stakeholders tend to produce outcomes that are generally considered more socially and politically acceptable. In the long run, the large ownership also leads to more **efficient implementation**, because actors feel **invested** in the enactment of solutions on the ground. Even episodes of political failure, such as the lack of UN reaction to the Rwandan genocide, can generate useful lessons when re-appropriated multilaterally—think of the Responsibility to Protect, for instance.3 From this outlook, there is no contradiction between efficiency and the axiomatic practice of multilateralism, quite the contrary. The more multilateralism becomes the normal or self-evident practice of global governance, the more benefits it yields for the many stakeholders of global governance. In fact, multilateralism as an end in and of itself could generate even more diffuse reciprocity than Ruggie had originally envisioned. Not only do its distributional consequences tend to even out, multilateralism as a global governance routine also creates **self-reinforcing dynamics** and new focal points for strategic interaction. The axiomatic practice of multilateralism helps define problems in commensurable ways and craft moderate solutions with wide-ranging ownership—three processual benefits that further strengthen the impetus for multilateral dialog. Pg. 21-23

### 2NC---AT: Deterrence Solves

#### Reasons deterrence empirically worked are no longer true---dominance causes crises escalation

Fitzsimmons 17 – (Michael, Visiting Research Professor at the Strategic Studies Institute, U.S. Army War College; 11/6/17; THE FALSE ALLURE OF ESCALATION DOMINANCE; https://warontherocks.com/2017/11/false-allure-escalation-dominance/)

Is escalation dominance still relevant to U.S. strategy today? A debate on this question may soon be revived. In the next few months, the Trump administration will publish the results of its Nuclear Posture Review, the first comprehensive review of U.S. nuclear strategy and capabilities since 2010. Among the topics most worth watching is whether and how the review addresses U.S. strategy for managing escalation. Perhaps even more than the Obama administration’s team in 2010, the current Nuclear Posture Review authors must confront a growing risk of escalation from limited regional conflicts to nuclear war. Tensions with North Korea may pose the most obvious of such risks at the moment, but unfortunately, the problem is broader and more deeply rooted. Two related factors account for this growing risk. First, the erosion of U.S. conventional superiority — especially with the growing sophistication of “anti-access / area denial” capabilities — means adversaries may be increasingly tempted to engage in quick, limited, territorial aggression — a fait accompli — against a U.S. ally. For China, this could be over contested islands in the South or East China Seas or over Taiwan. For Russia, it could be anywhere in its “near abroad,” even against the Baltic NATO allies. On the Korean Peninsula, U.S. conventional superiority remains intact, but major gains in North Korea’s nuclear and missile capabilities could serve as a shield for a number of different limited provocations against South Korea. However, even where U.S. power projection advantages over regional challengers may be strained, they are still sufficiently robust to potentially foil or reverse an attack. So the result of this evolution in conventional military balances is a set of increasingly plausible scenarios in which a nuclear-armed power launches a limited attack on its neighbor, only to find itself on the verge of conventional defeat at the hands of the United States. The second risk driver is the presence, in precisely these limited-war scenarios, of asymmetric interests between the United States and its potential adversaries. In conflicts over, say, Taiwan, South Korea, or Lithuania, U.S. rivals could plausibly calculate that their resolve is decisively superior to that of the United States. While these conditions are not new, their danger is heightened when paired with the conventional balances described above. In such cases, nuclear threats or even limited nuclear use could become an aggressor’s last-ditch war-winning strategy. “Escalate to de-escalate,” as some Russians may (or may not) put it. Or, as Brad Roberts has put it, U.S. rivals have “nuclear theories of victory.” In light of these dynamics, there is a natural temptation for U.S. policymakers to seek solutions in a strategy like escalation dominance. Interest in the concept has waxed and waned over the past 50 years, peaking in the later part of the Cold War. Even then, many considered this level of ambition to be more dangerous than stabilizing in light of the approximate U.S.-Soviet parity in capabilities that prevailed then, and the concept was never codified explicitly in U.S. declaratory policy. But after the Cold War, U.S. planners effectively became, in Elbridge Colby’s words, “accustomed to escalation dominance,” thanks as much to the course of historic events as to deliberate strategy. Analysts often saw American escalation dominance as a key to regional stability. Today the concept continues to generate some interest among think tanks and other analysts focused on nuclear strategy and regional security issues. Escalation dominance may also exert some indirect influence on policymakers’ strategic thinking. Many military and civilian leaders are not steeped in details of nuclear strategy debates, but may find that the concept’s philosophy and intellectual pedigree resonates with their intuition about the need for dominance. Indeed, escalation dominance is superficially appealing. Its deterrent logic is easy to grasp. What could dissuade a regional challenger more effectively than comprehensive superiority? And it comports well with the strategic habits of mind ingrained in a generation of U.S. policy makers by unrivaled post-Cold War military superiority. Nevertheless, the concept has always suffered from serious flaws and is particularly poorly suited to the regional deterrence challenges the United States faces in the 21st century. At least five problems are cause for concern. Asymmetric stakes. As already noted, one of the key sources of escalation risk is the asymmetry of interests between prospective combatants. The most plausible scenarios of escalation involve core, vital interests of the challengers juxtaposed with American extended deterrence commitments to allies and partners. For instance, the United States seeks to deter a Chinese attack on Taiwan. But under extreme circumstances, Chinese leaders may well see the survival of their regime riding on a military victory, while U.S. stakes in protecting Taiwan lie in more abstract goals of maintaining stability, order, and deterrent credibility. Will the United States really engage in nuclear war over Taiwan? Or, in a NATO-Russia conflict, risk trading Virginia Beach for Vilnius? Such potential imbalance of interests is a long-standing problem of extended deterrence. Thomas Schelling famously observed that escalation may take the form of a “competition in risk taking,” and therefore may be governed at least as much by “balance of resolve” as by balance of capabilities. This poses a challenge for any escalation management strategy, but is especially problematic for escalation dominance, which relies heavily on superiority in capabilities. While theoretically plausible, establishing “dominant” resolve as well as dominant capabilities is a difficult standard to meet in a conflict where a capable, nuclear-armed rival has already gambled great stakes. Conventional balance. For escalation dominance to produce the desired deterrent effect, both parties must recognize one side’s superiority at multiple levels of escalation, below and above the nuclear threshold. Superiority itself is of no use if it goes unrecognized or doubted. On this point, escalation dominance faces another formidable obstacle. As alluded to above, the longstanding conventional capability gap between the United States and both China and Russia has shrunk in recent years. The match-ups are becoming too closely balanced to confidently predict that one side will prevail, especially in those fait accompli scenarios in which an adversary seeks a quick victory enabled by local tactical advantages. Even analysts who believe that relative regional shortfalls in U.S. conventional strength have been exaggerated could readily agree that America’s ability to dictate the pace and intensity of a conventional war has diminished. Information and decision-making challenges. Crisis decision-making is subject to a host of extra-rational factors and information limitations, which makes it difficult for actors to precisely evaluate their rivals’ escalation thresholds. In a crisis involving nuclear weapons, factors like time pressures, risk tolerance, incomplete or conflicting intelligence, and psychological stress are a few of the unpredictable elements that complicate fine-tuned chess moves of escalation. This is true regardless of one’s escalation management strategy, but its pathologies may be magnified by a strategy that depends on establishing and communicating superiority at every turn. The party asserting dominance may be more apt to underestimate its adversary’s resolve, while the ostensibly “dominated” party may become more risk-tolerant in the face of a tempting but fleeting opportunity for successful escalation of its own. Similarly, misperception of adversary behavior, intent, and communication is a common feature of international affairs and military history, including in cases of crisis escalation. Even if U.S. decision makers are confident of their own information and analysis, it is not possible to reliably discern adversary values and interpretations of thresholds. In a seminal 2008 study of escalation, RAND Corporation analysts concluded that, relative to the Cold War, “predicting how [U.S. opponents] will perceive U.S. actions is not dramatically easier and, in some cases, can be even more challenging.” Influence of new technologies. Rapidly improving and proliferating capabilities in long-range precision strike, and cyber and space operations have complicated the concept of an escalation “ladder.” Kahn’s original ladder with 44 rungs spanning conventional and nuclear war was already quite complex. Today, the menu of non-nuclear options available to strategic competitors to signal or attack each other has expanded dramatically. Whether the proper metaphor for 21st-century escalation is a ladder or a vortex or something else entirely, there is little doubt that contingency planning for escalation is harder than ever. Where in the hierarchy of escalation does a disabling but reversible Chinese attack on U.S. military satellites belong? Is a Russian cyber attack on the U.S. electrical grid more or less escalatory than missile strikes on European bases? This kind of complexity also compounds the challenges of misperception. If a shared framework among potential adversaries for understanding escalation thresholds was elusive in the Cold War, it is only farther from reach today. Peacetime provocation. Quite apart from the dynamics of crisis decision-making, pursuit of escalation dominance as a declaratory policy is, itself, escalatory. It could exacerbate unreasonable fears of U.S. aggression and prompt otherwise unnecessary arms races. This point is not simply a matter of taking the dovish side of the eternal security dilemma. There are certainly limits to the importance of declaratory policy, and U.S. challengers clearly have many motivations beyond reacting to U.S. provocation. Still, official discussion of managing escalation through dominance or comprehensive superiority supports the prevailing narrative of opponents of American power, and thereby may help empower those factions in the Chinese and Russian governments most dedicated to frustrating U.S. interests. Moreover, U.S. advocacy of escalation dominance may complicate alliance politics, undermine assurance, and impede cohesion within NATO. In combination, these factors make U.S. pursuit of escalation dominance a risky strategy.

### 2NC---AT: Cling

#### Cling to hegemony isn’t inevitable---we have the newest, most comprehensive research

MacDonald and Parent 18 **–** Paul MacDonald is Associate Professor in Political Science at Wellesley College. Joseph M. Parent is associate professor of political science at the University of Notre Dame (Twilight of the Titans: Great Power Decline and Retrenchment, p. 2-3)

In this book, we argue that the conventional wisdom is wrong. Specifically, we make three main arguments. First, relative decline causes prompt, proportionate retrenchment because states seek strategic solvency. The international system is a competitive place, and great powers did not get to the top by being imprudent, irrational, or irresponsible. When their fortunes ebb, states tend to retain the virtues that made them great. In the face of decline, great powers have a good sense of their relative capability and tend not to give away more than they must. Expanding or maintaining grand strategic ambitions during decline incurs unsustainable burdens and incites unwinnable fights, so the faster states fall, the more they retrench. Great powers may choose to retrench in other circumstances as well, but they have an overriding incentive to do so when confronted by relative decline. Second, the depth of relative decline shapes not only how much a state retrenches, but also which policies it adopts. The world is complex and cut- throat; leaders cannot glibly pull a policy off the shelf and expect desired outcomes. Because international politics is a self-help system, great powers prefer policies that rely less on the actions of allies and adversaries. For lack of a better term, we refer to these as domestic policies, which include reducing spending, restructuring forces, and reforming institutions—all to reallocate resources for more efficient uses. But international policies may also help, and they include redeploying forces, defusing flashpoints, and redistributing burdens—all to avoid costly conflicts and reinforce core strong- points. The faster and deeper states fall, the more they are willing to rely on others to cushion their fall. Retrenchment is not a weapon but an arsenal that can be used in different amounts and combinations depending on con- ditions and the enemies faced. Third, after depth, structural conditions are the most important factors shaping how great powers respond to relative decline. Four conditions catalyze the incentives for declining states to retrench. One is the declining state's rank. States in the top rungs of the great power hierarchy have more resources and margin for error than those lower down, so there is less urgency for them to retrench. Another is the availability of allies. Where states can shift burdens to capable regional powers with similar preferences, retrenchment is less risky and difficult. Yet another is the interdependence of commitments. When states perceive commitments in one place as tightly linked to commitments elsewhere, pulling back becomes harder and less likely. The last catalyst is the calculus of conquest. If aggression pays, then retrenchment does not, and great powers will be loath to do it. The world is not just complex and cutthroat, it is also dynamic. No set of conditions is everlasting, and leaders must change with the times. Empirically, this work aims to add value by being the first to study systematically all modern shifts in the great power pecking order. We find sixteen cases of relative decline since 1870, when reliable data for the great powers become available, and compare them to their non-declining counterparts across a variety of measures. To preview the findings, retrenchment is by far the most common response to relative decline, and declining powers behave differently from non-declining powers. States in decline are more likely to cut the size of their military forces and budgets and in extreme cases are more likely to form alliances. This does not, however, make them ripe for exploitation; declining states perform comparatively well in militarized disputes. Our headline finding, however, is that states that retrench recover their prior rank with some regularity, but those that fail to retrench never do. These results challenge theories of grand strategy and war, offer guidance to policymakers, and indicate overlooked paths to peace.

### 2NC---AT: Transition Wars

#### No transition wars---empirics and strategic incentives disprove

MacDonald & Parent ’18 -- Paul MacDonald, associate professor of political science at Wellesley College, Joseph M. Parent, associate professor of political science at the University of Notre Dame. [“Twilight of the Titans: Great Power Decline and Retrenchment,” Cornell University Press, 2018, p. 14-16, <https://muse-jhu-edu.proxy.lib.umich.edu/book/58148>] KS

Preventive war theories lay out a clear cost-benefit analysis, but their accounting is suspect in a number of respects. First, war is incredibly costly and risky. The preferred solution of preventive war theories is one of the most expensive and least predictable actions a state can take. This may be why Thucydides’s prototypical example ended badly. After decisively defeating Athens, Spartan power never recovered, losing to Thebes and Macedon not long after. And modern wars are worse. Even putting nuclear weapons to one side, great power wars have been exorbitantly costly for some time. 23 As Gilpin and Copeland acknowledge, hardline foreign policies bring risks—defeat being the worst—and even victories can be pyrrhic. 24 The use of force may alienate allies, alarm neutrals, and provoke rivals. It can saddle the victor with restive populations and costlier commitments. Shallow declines are not menacing enough to warrant war, while deep declines are hard to reverse with force. Because deep declines tend to be the product of fundamental social and economic deficiencies, foreign policy fixes are seldom silver bullets. Great powers will be most willing to accept the risks of hardline policies at precisely the moments when the benefits are likely to be minimal and unattainable.

Second, and related, preventive war theories underestimate the efficacy of mutual accommodation. The assumption tends to be that war, while rare, is to a large extent inevitable. The alternatives available to declining powers, as Gilpin emphasizes, are “seldom those of waging war versus promoting peace, but rather waging war while the balance is still in that state’s favor or waging war later when the tide may have turned against it.” 25 But there are good reasons why rising challengers would see war as improbable. The capacity of rising powers to sustain their trajectory depends on domestic institutions, which must manage the dislocations associated with rapid growth, and the stresses of great power war are unlikely to help. Premature bids for hegemony can not only encourage the formation of hostile foreign coalitions but also upset the fragile domestic foundations of long-term growth. Windows of vulnerability rarely open as quickly or decisively as theories of preventive action anticipate, and even the most damaged declining power does not become a pushover. Rising powers have strong incentives to bide their time until they are in a decisively dominant position. 26

On their side, declining powers have reasons to avoid confrontational responses as well. The growth of a rising challenger may slow or stall for a variety of reasons. Rising powers may acquire new and costly commitments, which can distract attention and drain resources. Domestic issues may siphon away disposable wealth and divert rising powers from challenging redoubtable great powers. While they may dominate by lesser margins, declining powers can still call upon their large and diverse economies as well as advanced and experienced militaries. They can draw on the support of longstanding allies, appeal to customary diplomatic practices and familiar rules, and concentrate resources on well-established interests. Hostile or unbending actions forfeit these advantages. Provocative actions require declining states to risk scarce resources and use dubious means in uncertain environments for quixotic goals.

Third, preventive war theories obsess over the appearance of credibility, not where it comes from or how much it is worth. For Gilpin, the “fundamental problem with a policy of appeasement or accommodation” is that it leads to “continuing deterioration in a state’s prestige and international position.” 27 But commitments are checks: they only cash when there is something behind them. In world politics, power is the closest equivalent to money, and as a declining state’s power draws down, it has to be more frugal. Great powers cannot be fooled for long; commitments must be backed. Yet declining powers have less capability and must decide whether to keep a stronger, shorter defensive perimeter, or a longer, weaker one. Preventive war theories assert the sanctity of credibility in theory as they recommend overdrawing it in practice. And, while the debate remains lively, credibility in the abstract appears to be worth less than policymakers believe. 28 Great powers are not obligated to defend their interests with equal vigor, and accommodation in one area does not necessarily invite exploitation in others. A reputation for bluffing can be worse than a reputation for weakness.

Most important, credibility is more multifaceted and contextual than preventive war theories assume. Great powers certainly worry about their power and prestige, but their commitments are not of equal weight, and concessions in one area need not be seen as weakening commitments elsewhere. The fact that commitments are complex allows declining powers to shift burdens and concentrate capabilities at key points of challenge. 29 Tactical retreats and strongpoint defenses make deterrence more robust and threats more credible, and may help signal benign intentions. 30 The multifaceted nature of commitments also provides crafty rising challengers with opportunities to challenge the status quo in places that dominant powers are unlikely to vigorously defend. Rising powers that undertake modest challenges to the status quo in less sensitive areas send the important signal that they do not intend to forcibly overturn the existing order. 31 In this way, rising powers can take advantage of their newfound strength without generating incentives for declining powers to clip their wings.

Altogether, these points suggest that shifts in power are concerning but rarely generate strong incentives for war. Declining powers will be drawn to preventive war when uncommon stars align: if war is likely to succeed, if the consequences of war can be managed, if victory will reverse flagging fortunes, and if there are no better options. A declining power must also be confident that rising challengers will continue to ascend rapidly up the ranks, that they will fight to assure their ascendance, and that they are bent on future domination. In the absence of these conditions, pugnacious policies make little sense. Defeat in a preventive war opens the floodgates for exploitation on multiple fronts, and even a successful war can compromise a great power to the point of vulnerability. Typically, states will manage the very real, but often ambiguous, dangers that accompany decline with more caution than aggression.

### 2NC---AT: Revisionism

#### Defensive realism is descriptively accurate---offensive realism can no longer explain a complex system where legitimacy, economic ties, and MAD make offensive approaches counterproductive

Reuben Steph 13 {PhD in Security Studies and a Masters in International Studies. 4-18-2013. “Cooperative Ballistic Missile Defence for America, China, and Russia.” [https://www.tandfonline.com/doi/abs/10.1080/13523260.2013.771035?journalCode=fcsp20}//JM](https://www.tandfonline.com/doi/abs/10.1080/13523260.2013.771035?journalCode=fcsp20%7d//JM)

Defensive Realism and Programmatic Cooperation Shiping Tang’s social evolutionary approach has shown that the international system has transformed from one comprised primarily of offensive realist states to one comprised chiefly of defensive realist states.2 Tang’s analysis suggests that defensive realism is the most sophisticated and operable grand strategic paradigm for the contemporary international system, as a majority of states have been socialized into perceiving the use of military force to settle most disputes as illegitimate. Tang’s thesis is supported by the fact that general deterrence between states, rather than conflict, has become internalized while nuclear weapons and economic interdependencies have reduced the possibility of great power wars breaking out.3 In contrast, offensive realism, which calls for a self-conscious effort to contain rising powers – such as China and Russia – would prove costly and likely create a self-fulfilling prophecy of confrontation.4 As such, ballistic missile defence (BMD) cooperation will be difficult, if not impossible, based upon offensive realist assumptions unless it is a temporary alliance to counter a mutual threat posed by another great power. The emergence of a security community comprising the leading states in the system also represents a direct challenge to offensive realism’s core assumption that competition and conflict are endemic; if the modern system privileged offensive realism, security communities would never emerge. 5 No major alternative accounts for the vicissitudes of missile defence disputes with equal strength. Constructivist approaches can also support BMD cooperation.6 But it could just as easily impede or preclude it by emphasizing ideational differences between America, China, and Russia. Indeed, the worldview of many actors in the George W. Bush administration, especially the neoconservatives, had a constructivist bent as they held that the foreign policy of a state reflected the nature of its domestic regime.7 Thus, only democracies could be trusted.8 This reduced America’s willingness to engage illiberal rogue states, while its goal of democracy expansion appeared to lay the groundwork for future confrontation with Moscow and Beijing along ideological lines.9 Neoclassical realism is even more complementary, especially since it emphasizes the cost to states when socially constructed ideas and interests of domestic actors interfere with appreciation of the external environment and systemic constraint, leading to suboptimal policies and an inability to appreciate their negative effects.10 Although this article touches upon the effect of domestic politics and interests, it stresses the advantages of a defensive realist approach. Defensive realism leads us to consider the question of whether security is made better or worse by independent deployment of missile defence. Recognition that unilateral BMD created new security dilemmas, the core defensive realist concept, is evidence that it did not improve international security. This is the starting point to move towards a new cooperative approach to BMD in which defensive realist states can seek security without intentionally decreasing others’ security.11 In a defensive world, states may still pursue offensive strategies but the system punishes this behaviour.12 Therefore, because expansionism no longer pays, ‘the notion that security via defensive strategies is superior to security via offensive strategies logically becomes the next idea to spread among states’.13 Another significant and reinforcing outgrowth of this defensive realist world has been the emergence of what Patrick M. Morgan calls collective actor deterrence (CAD).14 CAD exists when a group of actors work through an institutionalized entity to uphold the regional or global status quo in the face of a threat to common norms and values. Together, they operate in the interests of system management and their united resources bolster deterrence, making future infringements less likely. There are significant obstacles to cooperation under unipolarity. The power of the unipolar state may be so great that even other great powers in the system may feel insecure as the hegemon threatens their political autonomy.15 Furthermore, even though a state may declare itself benign, it may not be trusted since a greedy state may use reassurance as a ploy to lure another into a false sense of security. Defensive armaments designed to signal one is a security seeker can be perceived as offensive in nature since a shield can facilitate the use of a sword (while fear that the unipolar state will transform into a future predator is increased if memories exist of it as a past predator).16 This applies to America’s Cold War-era relations with China (1949–1971) and Russia (1946–1991). States may also resist or ignore reassurance signals if they are extremely fearful and believe the hegemon may make additional requests of them at a later date, even if they comply with its demands.17

### --2NC---AT: China

#### China is a purely defensive nuclear power. Security desires drove acquisition, force posture continues to be defensive, arsenals lack fundamental warfighting aspects, and there’s no history of nuclear extortion.

Pan 18 (Major General Pan Zhenqiang (retired) is deputy chairman of the China Foundation for International Studies, senior adviser to the China Reform Forum and director of research at the Institute for Strategy and Management of the Central University of Finance and Economics in China. He is also a member of the Executive Committee of the Council of Pugwash Conferences on Science and World Affairs., "A Study of China’s No-First-Use Policy on Nuclear Weapons," *Journal For Peace And Nuclear Disarmament* Volume 1, 2018 - Issue 1, 5-14-2018)

How should one understand China’s no-first-use nuclear policy? In its very first official statement on the no-first-use nuclear policy, the Chinese government purposefully chose powerful expressions, such as “at any time” and “under any circumstances,” to stress that this pledge is absolute, unconditional, and crystal clear. This fact has four implications. First, the unconditional no-first-use policy means that in China’s security calculation, nuclear weapons play only one role: to deter other states from attacking China with nuclear weapons. Simply put, if you do not use or threaten to use nuclear weapons against China, then China’s nuclear arsenal is no threat to you. If you choose to launch nuclear attacks on China, you must anticipate nuclear retaliation, most likely in the form of counterattacks on several large cities that would demonstrate the “unbearable and disastrous consequences” that accompany the use of nuclear weapons. Following this logic, China hopes to achieve its objective of deterring any state from resorting to the nuclear option against China. In short, China’s no-first-use commitment reflects the purely defensive nature of its nuclear policy. In this respect, China’s strategy that is aimed at deterring a nuclear attack differs fundamentally from the deterrence strategy pursued by the Western nuclear community. It aims strictly to prevent a nuclear war, whereas the deterrence strategy long maintained by other nuclear powers, particularly the United States and the USSR (now Russia), is based on preparing to win a nuclear war and is offensive in nature. This offensive strategy caused the US and the USSR to enter into a near-crazy nuclear arms race, escalating to a total of more than 70,000 warheads at the peak of the Cold War, far beyond any rational defensive needs. The US nuclear strategy has another striking feature: it is also applicable to non- nuclear-weapon states. Particularly with respect to those states considered unfriendly or disobedient, the US presents its nuclear weapons as a principal means of military threat and political blackmail, using its nuclear strategy as a powerful pillar to dominate the world. Intent on disassociating itself from Western deterrence theory, the Chinese government has little interest in going along with those Western defense analysts (as well as some nuclear theorists in China itself) who try to observe China’s nuclear strategy through the lens of the Western deterrence concept and who describe China’s nuclear doctrine with such labels as “limited deterrence” or “minimum deterrence” (Xu 1987, 366–369; Chen 1989, 214; Yang 1990, 407–411).3 China believes that these are specious interpretations that blur the clearly self-defensive nature of its nuclear strategy. Second, its unconditional no-first-use policy implies that China has no need to engage in an arms race with other nuclear weapon states. No doubt, China must maintain a survivable nuclear force that can withstand the first wave of nuclear attacks with sufficient counterattack capability. However, China believes it is much more practical and sensible to keep its nuclear weapon development at that level than to pursue a strategy like that of the US and the USSR (Russia), which led inevitably to a nuclear arms race during the Cold War. Throughout those decades of rivalry, the two nuclear superpowers had to stand ready to strike first, thereby plunging themselves into a paranoid mindset. They never knew how much nuclear strike capability was sufficient, and they constantly worried about being overtaken by the other country. Each side, never sure when the other might launch the first bomb, remained constantly at the highest possible “launch on warning” alert; each exaggerating the other’s nuclear capabilities and proceeding with its own nuclear armament and readiness planning based on the worst-case scenario. From China’s perspective, a strategy containing these elements is the root cause of the escalating risk of a nuclear war. China has never been bothered by such over-anxiety or over-action in its nuclear thinking. China believes that to prevent a nuclear war from happening, it is sufficient to target just a few big cities for retaliation; thus it is not necessary to build a huge arsenal or develop massive offensive capabilities. Since acquiring its own nuclear capability in 1964, China has conducted the least number of nuclear tests among the five Nuclear Nonproliferation Treaty (NPT) nuclear weapon states, and it has maintained only a minimum number of warheads throughout that time. Also notably, China sees no need to develop non-strategic nuclear weapons, such as tactical nuclear weapons, which in China’s view are primarily for use on the battlefield; to develop so-called precision- strike nuclear war-fighting capabilities; or to deploy nuclear weapons on the soil of other countries. Furthermore, China considers it unnecessary to keep its nuclear forces at the launch-on-warning alert level, because it is prepared only to mount counter- attacks if attacked. Before any counterattack takes place, China must first determine whether the attack against China is of a nuclear nature and who the attacker is. Such investigation and verification will be time-consuming. In fact, China generally keeps its warheads away from intercontinental ballistic missile (ICBM) launchers, installing them only when launching becomes necessary. This approach not only improves the survivability of its nuclear force but also, more importantly, tells the world that China’s nuclear posture is never offensive. All these are logical effects of the no-first-use policy, which indeed determines China’s nuclear posture, including the mission, size, and structure of its nuclear weapons, as well as the doctrine governing them. For this reason, the common depiction of China’s no-first-use policy as unverifiable rhetoric is demonstrably groundless. Currently, along with its technological and political development, China, like other nuclear weapon states, is also modernizing its array of nuclear armaments, particularly by enhancing the surety, reliability, and effectiveness of its ballistic missiles. This includes, among others, building a nuclear triangle focusing on land- launching ICBMs complemented by bombers and submarines. China is also strengthening its capacity for rapid reaction, effective penetration, conventional precision strikes, damage infliction, and its own protection and survivability. All these actions are geared toward effectively handling future war threats and emergencies. And all these steps, as pointed out by China’s Defense White Paper, have been taken in line with the country’s pledge never to be the first to resort to nuclear weapons (Information Office of the State Council (China) 2013, 12). In short, the no-first-use policy keeps China out of an arms race with other states, and this healthy mindset allows China to proceed with its nuclear modernization programs at a more measured and unruffled pace, in conformity with its national defense needs and within the limits of its overall national strength.

#### Proven by when they had the most military power in the last 20 years and turned to cooperation.

Klaus Heinrich Raditio 19. IR Prof @ University of Sydney. 2019. “Conclusion.” Understanding China’s Behaviour in the South China Sea, Springer Singapore, pp. 185–190. Crossref, doi:10.1007/978-981-13-1283-0\_8.

The main findings of this thesis show strong support for defensive realism theory. During the period of de-escalation (1995 until between 2007 and 2009), China had the most advanced military power compared to other SCS claimants. However, instead of using force, China extended its cooperative behaviour which was successful in de-escalating the SCS tension. China demonstrated its serious commitment to stabilising the region by participating in several multilateral agreements: the 2002 DoC, the ASEAN TAC in 2003, and the JMSU in 2005. This fact is at odds with the offensive realism assumption that suggests China will pursue hegemonic ambition to resolve its dispute with other claimants.1

### --2NC---AT: Russia

#### Russia lacks the will and capacity for broad conquest---they’re defensively responding to threat perceptions

Ted Carpenter 18 [Ted Galen Carpenter, a senior fellow in defense and foreign policy studies at the Cato Institute and a contributing editor at the National Interest, is the author of 10 books, the contributing editor of 10 books, and the author of more than 700 articles on international affairs. 7-28-2018. “Russia Is Not the Soviet Union.” [https://nationalinterest.org/feature/russia-not-soviet-union-27041]//JM](https://nationalinterest.org/feature/russia-not-soviet-union-27041%5d//JM)

The bottom line is that Russia is a conventional, somewhat conservative, power, whereas the Soviet Union was a messianic, totalitarian power. That’s a rather large and significant difference, and U.S. policy needs to reflect that realization.

An equally crucial difference is that the Soviet Union was a global power (and, for a time, arguably a superpower) with global ambitions and capabilities to match. It controlled an empire in Eastern Europe and cultivated allies and clients around the world, including in such far-flung places as Cuba, Vietnam, and Angola. The USSR also intensely contested the United States for influence in all of those areas. Conversely, Russia is merely a regional power with very limited extra-regional reach. The Kremlin’s ambitions are focused heavily on the near abroad, aimed at trying to block the eastward creep of the North Atlantic Treaty Organization (NATO) and the U.S.-led intrusion into Russia’s core security zone. The orientation seems far more defensive than offensive.

It would be difficult for Russia to execute anything more than a very geographically limited expansionist agenda, even if it has one. The Soviet Union was the world’s number two economic power, second only to the United States. Russia has an economy roughly the size of Canada’s and is no longer ranked even in the global top ten. It also has only three-quarters of the Soviet Union’s territory (much of which is nearly-empty Siberia) and barely half the population of the old USSR. If that were not enough, that population is shrinking and is afflicted with an assortment of public health problems (especially rampant alcoholism).

All of these factors should make it evident that Russia is not a credible rival, much less an existential threat, to the United States and its democratic system. Russia's power is a pale shadow of the Soviet Union's. The only undiminished source of clout is the country's sizeable nuclear arsenal. But while nuclear weapons are the ultimate deterrent, they are not very useful for power projection or warfighting, unless the political leadership wants to risk national suicide. And there is no evidence whatsoever that Putin and his oligarch backers are suicidal. Quite the contrary, they seem wedded to accumulating ever greater wealth and perks.

### 2NC---AT: DEWs

#### Infeasible and far off

**Pawlyk 19** [Oriana Pawlyk, Military.com’s air warfare reporter covering everything from the latest personnel trends, aircraft, investigations, defense technology, to Air Force operations all over the world. Pawlyk is also an active member of the Pentagon Press Association.] “Pentagon Halts Work on Directed-Energy Beam to Stop Enemy Missiles” Military.com, 4 September 2019 (<https://www.military.com/daily-news/2019/09/04/pentagon-halts-work-directed-energy-beam-stop-enemy-missiles.html>) – MZhu

The Pentagon is shelving a directed-energy program it was hoping to use in space to destroy enemy intercontinental ballistic missiles in their boost phase. Dr. Mike Griffin, Under Secretary of Defense for Research and Engineering, told audiences at the 2019 Defense News Conference that the Defense Department is "deferring work on neutral particle beams indefinitely." "It's just not near enough term," he said Wednesday at the conference outside Washington, D.C. Instead, the DoD will need to focus on directed-energy and laser programs that can produce more power and be tested and executed faster on space platforms and aircraft, Griffin said, adding that his department is investing more research into high-powered microwaves. "We're focusing on nearer term applications of directed energy, particularly lasers of higher power than we currently have," he said. "We need to be in the hundreds of kilowatts realm, and we are prioritizing that." The Defense Department was hoping to use neutral particle beam (NPB) weapons as space-based anti-missile systems to dismantle ICBMs in their boost phase shortly after takeoff. The Pentagon first tested an NPB concept in 1989 as part of an experiment called Beam Accelerator Aboard a Rocket, or BEAR, according to DefenseOne. Neutral particle beams aren't lasers, but operate in similar ways. They use subatomic particles to achieve effects, or "beams composed of accelerated subatomic particles traveling at near-light speed," DefenseOne reported. Laser photons travel at light speed. Neutral particle beams also travel "in straight lines" and cannot be impaired by electromagnetic fields, according to DefenseOne. The Missile Defense Agency requested $34 million to initiate neutral particle beam development. But in the House's version of the fiscal 2020 National Defense Authorization Act, lawmakers requested an extensive study first. The MDA was hoping to test neutral particle beams in orbit by 2023. As part of a larger Pentagon effort to expedite weapons programs and get them in the field faster, Griffin said directed energy testing needs to accelerate for researchers and developers to understand the minutiae of the systems and how to improve them. "We need to better understand the lethality of such systems, understand things like beam control, and we need to know how to scale them up in practical ways," he said. "There are a lot of practical problems with real-world weapons systems, and we need to dig into those," he added.

#### There’s a structural power/accuracy tradeoff

**Fedasiuk 18** [Ryan Fedasiuk and Kingston Reif on May 14, 2018, “Reasons to doubt laser missile defense,” Arms Control Association, https://www.armscontrol.org/blog/2018-05-14/reasons-doubt-laser-missile-defense]

Power Scaling: At the heart of MDA’s directed energy weapon problem is lowering the ratio of size, weight, and power (SWaP) in a laser system. In his justification for terminating the Airborne Laser program, which mounted six SUV-sized lasers on a Boeing 737, Defense Secretary Robert Gates said the Air Force “would need a laser something like 20 to 30 times more powerful” to be able to hit a missile at a sufficient range. Today the Missile Defense Agency wants to scale up the power for such a system, but field it on a drone. To remedy this technological gap, MDA is pursuing two technologies: the diode-pumped alkali laser system (DPALS), which focuses on building a more powerful singular laser, and Fiber Combining Lasers (FCL), which combine the beam outputs of smaller lasers. Unfortunately, both technologies require approximately 35-40 kilograms of weight per kilowatt of energy emitted. “To have any chance of fielding it on a high altitude platform," said former MDA Director James Syring, "where we need to be is below the 5 kilograms-per-kilowatt window." Neither the agency nor federally funded research and development centers have indicated how they plan to achieve this. However, if the technology proves successful, the agency will run into problems with beam quality. As a laser travels to its target, “it encounters atmospheric effects that distort the beam and cause it to lose its focus.” Particles in the atmosphere such as water vapor, sand, dust, salt, and pollution can all absorb or refract a laser’s energy, and thermal blooming is of particular concern in high-power laser weapons.

### 2NC---AT: Nuclear Deterrence

#### Lieber and Press are wrong, AND admit that China/Russia can’t do it

Jan Ludvik 17, Assistant Professor at the Department of Security Studies and a researcher at the Center for Security Policy, Charles University in Prague, 10/17/17, “ISSF Article Review 88 on “The New Era of Counterforce: Technological Change and the Future of Nuclear Deterrence.” https://networks.h-net.org/node/28443/discussions/526933/issf-article-review-88-%E2%80%9C-new-era-counterforce-technological-change

The second common strategy to protect a nuclear arsenal, mobility and concealment, is undermined by improvements in remote sensing. Traditional sensor platforms like satellites and manned aircraft are improved and supplemented by new systems such as remotely piloted aircraft, underwater drones, autonomous sensors, and cyberspying. State-of-the-art sensors collect “a widening array of signals for analysis using a growing list of techniques” and, in contrast to the Cold-War generation of sensors, the twenty-first century monitoring is persistent and data are transmitted in the real time (33). The aggregate effects of this development put the survivability of systems like submarines and mobile missile launchers in jeopardy. These systems have always been relatively easy to destroy, but historically it had been nearly impossible to locate all of them. Lieber and Press argue that modern sensors make locating and destroying possible.

However persuasive Lieber and Press’s analysis of the effects of the revolution in remote sensing is, it is not without some imperfections. For instance, the heavy secrecy that shrouds the real capabilities of modern nuclear submarines and their opponents’ capabilities in anti-submarine warfare (ASW) precludes Lieber and Press from using current data to assess how vulnerable the submarines are. They must rely on the data about the vulnerability of Soviet Cold-War submarines to the United States’ ASW capabilities to support their general argument about the vulnerability of this weapon’s platform. Consequently, the article can show how vulnerable the submarines were and illustrate how vulnerable the submarines could be, but it remains uncertain how vulnerable they actually are. While logically sound, Lieber and Press’s deductive argument about the vulnerability of modern submarines is inevitably not without some speculation.

It is also possible to argue that a reader can easily get a somewhat exaggerated impression about the degree of vulnerability of mobile missiles launchers to remote detection. Whereas Lieber and Press provide an impressive geospatial analysis of the possible remote-sensing coverage of North Korea’s road network to show how vulnerable North Korea’s mobile missiles are to detection and subsequent destruction, in a footnote they admit that such results cannot be directly applied to much bigger countries like Russia and China (fn. 98). Yet while the degree of vulnerability of submarines and mobile launchers to detection might have been slightly exaggerated, Lieber and Press certainly identify the trends that unequivocally undermine nuclear arsenals’ survivability.

#### Nuclear modernization, specifically for submarines is the crucial internal link to strategic stability and threat perceptions

Kristensen et al. ’17 (Hans Kristensen is an Associate Senior Fellow with the SIPRI Disarmament, Arms Control and Non-proliferation Programme, director of the Nuclear Information Project with the Federation of American Scientists, co-author to the world nuclear forces overview in the SIPRI Yearbook (Oxford University Press) and a frequent adviser to the news media on nuclear weapons policy and operations, "How US nuclear force modernization is undermining strategic stability: The burst-height compensating super-fuze", Bulletin of the Atomic Scientists, https://thebulletin.org/2017/03/how-us-nuclear-force-modernization-is-undermining-strategic-stability-the-burst-height-compensating-super-fuze/)

The US nuclear forces modernization program has been portrayed to the public as an effort to ensure the reliability and safety of warheads in the US nuclear arsenal, rather than to enhance their military capabilities. In reality, however, that program has implemented revolutionary new technologies that will vastly increase the targeting capability of the US ballistic missile arsenal. This increase in capability is astonishing—boosting the overall killing power of existing US ballistic missile forces by a factor of roughly three—and it creates exactly what one would expect to see, if a nuclear-armed state were planning to have the capacity to fight and win a nuclear war by disarming enemies with a surprise first strike. Because of improvements in the killing power of US submarine-launched ballistic missiles, those submarines now patrol with more than three times the number of warheads needed to destroy the entire fleet of Russian land-based missiles in their silos. US submarine-based missiles can carry multiple warheads, so hundreds of others, now in storage, could be added to the submarine-based missile force, making it all the more lethal. The revolutionary increase in the lethality of submarine-borne US nuclear forces comes from a “super-fuze” device that since 2009 has been incorporated into the Navy’s W76-1/Mk4A warhead as part of a decade-long life-extension program. We estimate that all warheads deployed on US ballistic missile submarines now have this fuzing capability. Because the innovations in the super-fuze appear, to the non-technical eye, to be minor, policymakers outside of the US government (and probably inside the government as well) have completely missed its revolutionary impact on military capabilities and its important implications for global security. Before the invention of this new fuzing mechanism, even the most accurate ballistic missile warheads might not detonate close enough to targets hardened against nuclear attack to destroy them. But the new super-fuze is designed to destroy fixed targets by detonating above and around a target in a much more effective way. Warheads that would otherwise overfly a target and land too far away will now, because of the new fuzing system, detonate above the target. FIGURE 1. The deployment of the new MC4700 arming, fuzing, and firing system on the W76-1/Mk4A significantly increases the number of hard target kill-capable warheads on US ballistic missile submarines. The result of this fuzing scheme is a significant increase in the probability that a warhead will explode close enough to destroy the target even though the accuracy of the missile-warhead system has itself not improved. As a consequence, the US submarine force today is much more capable than it was previously against hardened targets such as Russian ICBM silos. A decade ago, only about 20 percent of US submarine warheads had hard-target kill capability; today they all do. (See Figure 1.) This vast increase in US nuclear targeting capability, which has largely been concealed from the general public, has serious implications for strategic stability and perceptions of US nuclear strategy and intentions. Russian planners will almost surely see the advance in fuzing capability as empowering an increasingly feasible US preemptive nuclear strike capability—a capability that would require Russia to undertake countermeasures that would further increase the already dangerously high readiness of Russian nuclear forces. Tense nuclear postures based on worst-case planning assumptions already pose the possibility of a nuclear response to false warning of attack. The new kill capability created by super-fuzing increases the tension and the risk that US or Russian nuclear forces will be used in response to early warning of an attack—even when an attack has not occurred. The increased capability of the US submarine force will likely be seen as even more threatening because Russia does not have a functioning space-based infrared early warning system but relies primarily on ground-based early warning radars to detect a US missile attack. Since these radars cannot see over the horizon, Russia has less than half as much early-warning time as the United States. (The United States has about 30 minutes, Russia 15 minutes or less.) The inability of Russia to globally monitor missile launches from space means that Russian military and political leaders would have no “situational awareness” to help them assess whether an early-warning radar indication of a surprise attack is real or the result of a technical error

#### Nuclear primacy fails and overconfidence is dangerous---even limited nuclear war causes extinction

Starr, ’14 Steven Starr, the Senior Scientist for Physicians for Social Responsibility and Director of the Clinical Laboratory Science Program at the University of Missouri. Starr has published in the Bulletin of the Atomic Scientists and the Strategic Arms Reduction (STAR) website of the Moscow Institute of Physics and Technology, June 11th, 2014, “There Can be No Winners in a Nuclear War”, Truth Out, <https://truthout.org/articles/there-can-be-no-winners-in-a-nuclear-war/>, EO

Nuclear war has no winner. Beginning in 2006, several of the world’s leading climatologists (at Rutgers, UCLA, John Hopkins University, and the University of Colorado-Boulder) published a series of studies that evaluated the long-term environmental consequences of a nuclear war, including baseline scenarios fought with merely 1% of the explosive power in the US and/or Russian launch-ready nuclear arsenals. They concluded that the consequences of even a “small” nuclear war would include catastrophic disruptions of global climate and massive destruction of Earth’s protective ozone layer. These and more recent studies predict that global agriculture would be so negatively affected by such a war, a global famine would result, which would cause up to 2 billion people to starve to death. These peer-reviewed studies – which were analyzed by the best scientists in the world and found to be without error – also predict that a war fought with less than half of US or Russian strategic nuclear weapons would destroy the human race. In other words, a US-Russian nuclear war would create such extreme long-term damage to the global environment that it would leave the Earth uninhabitable for humans and most animal forms of life. A recent article in the Bulletin of the Atomic Scientists, “Self-assured destruction: The climate impacts of nuclear war,” begins by stating: “A nuclear war between Russia and the United States, even after the arsenal reductions planned under New START, could produce a nuclear winter. Hence, an attack by either side could be suicidal, resulting in self-assured destruction.” In 2009, I wrote “Catastrophic Climatic Consequences of Nuclear Conflicts” for the International Commission on Nuclear Non-proliferation and Disarmament. The article summarizes the findings of these studies. It explains that nuclear firestorms would produce millions of tons of smoke, which would rise above cloud level and form a global stratospheric smoke layer that would rapidly encircle the Earth. The smoke layer would remain for at least a decade, and it would act to destroy the protective ozone layer (vastly increasing the UV-B reaching Earth) as well as block warming sunlight, thus creating Ice Age weather conditions that would last 10 years or longer. Following a US-Russian nuclear war, temperatures in the central US and Eurasia would fall below freezing every day for one to three years; the intense cold would completely eliminate growing seasons for a decade or longer. No crops could be grown, leading to a famine that would kill most humans and large animal populations. Electromagnetic pulse from high-altitude nuclear detonations would destroy the integrated circuits in all modern electronic devices, including those in commercial nuclear power plants. Every nuclear reactor would almost instantly meltdown; every nuclear spent fuel pool (which contain many times more radioactivity than found in the reactors) would boil off, releasing vast amounts of long-lived radioactivity. The fallout would make most of the US and Europe uninhabitable. Of course, the survivors of the nuclear war would be starving to death anyway. Once nuclear weapons were introduced into a US-Russian conflict, there would be little chance that a nuclear holocaust could be avoided. Theories of “limited nuclear war” and “nuclear de-escalation” are unrealistic. In 2002 the Bush administration modified US strategic doctrine from a retaliatory role to permit preemptive nuclear attack; in 2010, the Obama administration made only incremental and miniscule changes to this doctrine, leaving it essentially unchanged. Furthermore, Counterforce doctrine – used by both the US and Russian military – emphasizes the need for preemptive strikes once nuclear war begins. Both sides would be under immense pressure to launch a preemptive nuclear first-strike once military hostilities had commenced, especially if nuclear weapons had already been used on the battlefield. Both the US and Russia each have 400 to 500 launch-ready ballistic missiles armed with a total of at least 1800 strategic nuclear warheads, which can be launched with only a few minutes warning. Both the US and Russian Presidents are accompanied 24/7 by military officers carrying a “nuclear briefcase,” which allows them to transmit the permission order to launch in a matter of seconds. Yet top political leaders and policymakers of both the US and Russia seem to be unaware that their launch-ready nuclear weapons represent a self-destruct mechanism for the human race. For example, in 2010, I was able to publicly question the chief negotiators of the New START treaty, Russian Ambassador Anatoly Antonov and (then) US Assistant Secretary of State Rose Gottemoeller, during their joint briefing at the UN (during the Non-Proliferation Treaty Review Conference). I asked them if they were familiar with the recent peer-reviewed studies that predicted the detonation of less than 1% of the explosive power contained in the operational and deployed US and Russian nuclear forces would cause catastrophic changes in the global climate, and that a nuclear war fought with their strategic nuclear weapons would kill most people on Earth. They both answered “no.” More recently, on April 20, 2014, I asked the same question and received the same answer from the US officials sent to brief representatives of the NGOS at the Non-Proliferation Treaty Preparatory Committee meeting at the UN. None of the US officials at the briefing were aware of the studies. Those present included top officials of the National Security Council. It is frightening that President Obama and his administration appear unaware that the world’s leading scientists have for years predicted that a nuclear war fought with the US and/or Russian strategic nuclear arsenal means the end of human history. Do they not know of the existential threat these arsenals pose to the human race . . . or do they choose to remain silent because this fact doesn’t fit into their official narratives? We hear only about terrorist threats that could destroy a city with an atomic bomb, while the threat of human extinction from nuclear war is never mentioned – even when the US and Russia are each running huge nuclear war games in preparation for a US-Russian war. Even more frightening is the fact that the neocons running US foreign policy believe that the US has “nuclear primacy” over Russia; that is, the US could successfully launch a nuclear sneak attack against Russian (and Chinese) nuclear forces and completely destroy them. This theory was articulated in 2006 in “The Rise of U.S. Nuclear Primacy,” which was published in Foreign Affairs by the Council on Foreign Relations. By concluding that the Russians and Chinese would be unable to retaliate, or if some small part of their forces remained, would not risk a second US attack by retaliating, the article invites nuclear war. Colonel Valery Yarynich (who was in charge of security of the Soviet/Russian nuclear command and control systems for 7 years) asked me to help him write a rebuttal, which was titled “Nuclear Primacy is a Fallacy.” Colonel Yarynich, who was on the Soviet General Staff and did war planning for the USSR, concluded that the “Primacy” article used faulty methodology and erroneous assumptions, thus invalidating its conclusions. My contribution lay in my knowledge of the recently published (in 2006) studies, which predicted even a “successful” nuclear first-strike, which destroyed 100% of the opposing side’s nuclear weapons, would cause the citizens of the side that “won” the nuclear war to perish from nuclear famine, just as would the rest of humanity.

#### Externally, nuclear modernization causes rapid Russian first strikes that go nuclear

**Pezard** and Rhoades **20** [Stephanie Pezard is a senior political scientist at the RAND Corporation, Ashley Rhoades is a defense analyst at the RAND Corporation and serves as the special projects coordinator for RAND's Center for Middle East Public Policy (CMEPP), “What Provokes Putin's Russia? Deterring Without Unintended Escalation”, <https://www.rand.org/pubs/perspectives/PE338.html>]

In this context, any changes or perceived changes in U.S. and NATO nuclear forces—such as the recent placement of missile defense systems in Eastern Europe and discussion of increasing nuclear force posture—serve to further jeopardize strategic stability with Russia.88 Putin has expressed a great deal of concern about U.S. nuclear force developments, which he sees as being targeted at Russia despite U.S. assertions that the focus of its nuclear deterrence is on threats from Iran and North Korea.89 Thus far, nuclear deterrence has largely rested on the strategic stability enabled by the relative parity between U.S. and Russian nuclear forces. Any shifts in this balance, coupled with the Russian belief that the United States intends to launch a nuclear attack, may spark Russian fears that it will lose its second-strike capability, increasing its incentive to strike first.90 In a classic security dilemma scenario, U.S. and NATO attempts to strengthen their defensive capabilities, particularly in the nuclear realm, may inadvertently appear to be offensive—and therefore threatening— behavior and trigger the outbreak of conventional or even nuclear war.91 Given Russia’s expressed willingness to use nuclear weapons and Putin’s tendency to interpret any U.S. nuclear force developments as offensive, the United States should be careful to avoid inadvertently provoking a nuclear response from Russia while attempting to deter this exact behavior. Risks of Russian nuclear escalation might also be prompted by major changes in the balance of conventional forces. From this perspective, the ultimate risk associated with enhancing any form of U.S. or NATO military capabilities is that Russia may feel that it has to respond with a nuclear attack if it is unable to match U.S. and NATO combined conventional military strength. Therefore, enhancing and expanding capabilities, even if they are defensive in nature, may create such a strong perception of threat for Russia that it could prompt a preemptive nuclear attack.92

#### Conversely, strategic stability solves escalation

Colby and Denmark 13 (Elbridge A. Colby, Robert M. Gates Senior Fellow at the Center for a New American Security, and Abraham M. Denmark, United States Deputy Assistant Secretary of Defense for East Asia, March 2013, “Nuclear Weapons and U.S.-China Relations: A Way Forward”, https://csis-prod.s3.amazonaws.com/s3fs-public/legacy\_files/files/publication/130307\_Colby\_USChinaNuclear\_Web.pdf)

To gain the benefits of strategic stability, the Working Group believes that nuclear relations between the United States and China should emphasize two complementary approaches: crisis stability and arms race stability. Crisis stability emphasizes the need to minimize pressure on either side to be the first to use nuclear weapons based on perceived advantage or vulnerability. It thus emphasizes the need for a strategic dynamic in which both sides see that launching their nuclear weapons first to avoid being disarmed or to try to disarm one’s opponent is unnecessary and unwise. Arms race stability focuses on the longer term and emphasizes controlling the dynamics of arms competition that can affect the strategic balance, and specifically calculations associated with first-strike stability. The Working Group believes these concepts can even be highly useful in relations between two countries that have asymmetric capabilities such as the United States and China. Such concepts do not demand that two nations have the same or similar numbers or types of forces. Rather, they are adaptable goals that can be fitted to the situation that exists between the United States and China. Based on this concept, stability can emerge between the United States and China if they each field forces that are capable of surviving a first strike and if they are able to credibly demonstrate to the other side that their current and future capabilities are unable to deny the other side a viable strategic deterrent. As a result, fear of preemption and the need to launch weapons early become irrelevant, either as irritants in crisis or as dangers in conflict. In this way, the benefits of deterrence can be retained while minimizing the chances of nuclear escalation. The premise of arms control and stability-oriented measures is that even potential adversaries can achieve the twin goals of both effective nuclear deterrence and mitigation of the possibility of conflict between them. This is because nuclear forces themselves can intensify, if not cause, competition and even conflict—but they need not. Nuclear deterrence is not simply a unilateral action that takes places in a vacuum; rather, it is a relationship shaped by perceptions. Indeed, the ways in which a country procures, postures, and operates its nuclear forces have a major interactive effect on how other countries procure, posture, and operate their forces. Potential adversaries can allay, and possibly even remove, these exacerbating factors through unilateral and cooperative measures that effectively demonstrate that each side’s strategic forces are not capable of conducting a disarming first strike. Such measures do not solve more fundamental political and strategic disputes, but they can help to lessen tensions and mistrust stemming from the essentially ancillary technical features of interstate relations. Both sides could derive value from cooperation on nuclear weapons grounded in the stability concept. The United States worries about the composition of China’s nuclear force, Chinese views on escalation and plans for nuclear use, and the future trajectory of China’s strategic posture. Meanwhile, China worries that the United States may be able or seek to be able to deny it a second-strike capability, and it worries about the scope and sophistication of future U.S. programs, as well as U.S. unwillingness to acknowledge a condition of mutual vulnerability between the two nations. A stability-grounded model could help address these anxieties—on the U.S. side by providing greater insight into China’s current and future force structure and deeper insight into China’s ways of thinking about nuclear strategy, and on the Chinese side by providing similar insight into U.S. developments and a greater degree of assurance about U.S. acknowledgment of the survivability of China’s force. Concurrently, such an approach would have the added benefit of building confidence on both sides. Finally, such a model could provide a satisfactory method through which China could see something approximating its current force size, posture, and doctrine as satisfactory and compatible with stability.

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### Perm: Do Both – 2NC

#### The perm creates statutory support for CIL, deflecting the precedent of independent enforceable obligations.

Kundmueller ‘2 [Michelle; May 1; Attorney specializing in constitutional law, candidate for a J.D. and M.A. in Political Theory from the University of Notre Dame, B.A. from Flagler College; Journal of Legislation, “Note: The Application of Customary International Law in US Courts: Custom, Convention, or Pseudolegislation?” vol. 28]

III. Uses, Abuses, and Implications of Customary International Law in Domestic Law

Debates over the role of customary international law in domestic courts continue to produce differing opinions about the role of customary international law within the U.S. legal structure. While there is general agreement that customary international law plays some role, the extent of this role remains unclear. Three of the most important of the unanswered questions are covered in this section of this Note: (1) whether customary international law has the potential to trump federal legislation, (2) whether customary international law is federal law without empowering legislation from Congress, and (3) which political branch holds ultimate control over the interpretation of customary international law. The resolution of these issues will determine the power of customary international law in U.S. legal systems. In doing this, it may also change the balance of power between the respective federal branches by expanding the judiciary's ability to overrule federal law. In the final analysis, the answers to the preceding questions will determine whether customary international law or Congress controls in domestic legislation. The following section examines some currently viable theories about the power of customary international law in the U.S. legal system.

A. Dominance of Customary International Law over Federal Law

Jordan J. Paust, who has authored a book and several law review articles on the subject of customary international law, asserts that the incorporation [\*366] of this body of law into domestic law is required by the Constitution. He claims that "customary international law has been directly incorporable, at least for civil sanction and jurisdictional purposes, without the need for some other statutory base." 20 According to Paust, "the Founders clearly expected that the customary law of nations was binding, was supreme law, created (among others) private rights and duties, and would be applicable in United States federal courts." 21

Based on his claims of constitutionally mandated incorporation of customary international law, Paust delineates the areas of domestic law that this affects. In some applications, customary international law enhances the power of the "Executive under Article II, section 3 to 'take care that the Laws be faithfully executed.'" 22 In other applications, customary international law restricts the Executive: "Supreme Court and other opinions have also recognized that while exercising Presidential war powers, the Executive is bound by customary international law." 23 In addition to affecting the President and therefore indirectly the Legislative branch, Paust claims that customary international law directly shapes Congressional power because it "can limit the exercise of an otherwise appropriate Congressional power and thus can function partly as an aid for interpreting the extent of constitutional grants of power." 24 The power of customary international law also affects the courts, where it "may be relevant to an adequate interpretation of various sorts of Congressional power in order to functionally enhance such powers." 25 Finally, Paust claims that the "latter process of incorporation might include an enhancement of the power of Congress under Article I, section 3, clause 18 to enact legislation 'necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.'" 26

Because customary international law thus pervades the federal government, alternately limiting and expanding the powers of the respective branches, it becomes a defining body of law in relationship to the federal government. Hence, Paust writes, "in the case of an unavoidable clash between fundamental human rights supported by customary international law and a federal statute, the human rights (which have a constitutional status) [\*367] must prevail." 27 In normal conflicts between codified (treaty) international law and federal statute, the last-in-time rule applies; this rule dictates that whichever law was most recently enacted controls. 28 Paust claims that this rule dictates that, in conflicts between customary international law and federal statutes, customary international law always controls. 29 As Paust theorizes, "customary international law would necessarily be 'last in time,' since custom is either constantly re-enacted through a process of recognition and behavior involving patterns of expectation and practice or it loses its validity and force as law." 30 By this reasoning, custom is always a controlling authority in the face of a directly conflicting federal statute.

The extent to which Paust claims that customary international law influences and controls domestic law leads to the question of who, within the U.S. legal system, decides upon the content, interpretation, and manner of application of international law. While all three branches of the federal government will have some indirect control in forming customary international law, it also limits the scope of each. Hence, whichever branch is empowered to control the application and interpretation of this body of law within the domestic legal structure will be that much stronger, relative to the coordinating branches. In Paust's view, the judicial branch is responsible to "identify, clarify, and apply" this body of law. 31 In response to concerns that this role improperly changes the balance of powers, he asserts that "it is precisely because the federal judiciary has both the power and responsibility to identify and apply customary international law in cases otherwise properly before the courts that there is no violation of the separation of powers when federal courts apply international law while interpreting federal statutes." 32

In an article on human rights law and domestic courts, Richard B. Lillich explores the role and the ramifications of customary international law in United States law. Like Paust, Lillich bases his understanding of the role of customary international law on the finding that "customary international law, while not mentioned in the Constitution, is part of the law of the land to be determined and applied by the courts whenever appropriate in making a decision." 33 Based on this, Lillich states that "the starting point in ascertaining what international human rights norms have been received into customary international law--and therefore are rules of decisions for domestic [\*368] courts--commonly is thought to be the Universal Declaration of Human Rights . . . ." 34 The status of the Universal Declaration of Human Rights as a source of the customary international law rests solely on its position as evidence of existing customary international law. Lillich admits that, while the Universal Declaration of Human Rights resolution was adopted without a dissenting vote by the U.N. in 1948, it is not legally binding as a treaty, as it has never been ratified. 35

Thus, to the extent Lillich is correct that the Universal Declaration of Human Rights reflects--at least in part--customary international law, and to the extent that both Paust and Lillich are correct that customary international law is part of United States law which should be enforced and interpreted by the courts, it should also "be directly enforceable in domestic courts." 36 Most customary international law claims in U.S. courts have been based on a statute which provides for such a claim. The most common example of this is the Alien Tort Statute, which dates back to the Judiciary Act of 1789 and provides for federal jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations of a treaty of the United States." 37 The point of Lillich's suggestion is that, while there is nothing wrong with providing statutorily for the incorporation of customary international law, as has been done in the past, it is unnecessary or redundant.

The implications of Lillich's claim that customary international law may and ought to be directly incorporated into United States law even without statutory support are far reaching. He advocates that judges ought to use human rights law--and implicitly all of customary international law--without statutory support. Not only could claims be brought in federal and state courts without the benefit of enabling statutes, but, under the mirror principle, the United States has an obligation, enforceable domestically, to live up to the provisions of customary international law. 38 Beyond this direct effect, which has the potential to permit the voiding of a federal statute on the grounds that it conflicts with customary international law (as defined and recognized by the judiciary), Lillich predicts that customary international law should have the "greatest impact on domestic law in the future by influencing the courts' approach to constitutional and statutory standards." 39 This means that the Constitution, federal law, and state law should be interpreted in light of customary international law. As Lillich states, "litigants and judges already have invoked the Universal Declaration [of Human Rights] for precisely this purpose." 40 Lillich hails this new world of customary international law's direct and indirect incorporation into United States law as offering "significant as well as virtually limitless possibilities for achieving greater protection of the rights of individuals." 41

#### CIL is codified only when it proves it can override conflicting statute – the perm renders it mere gap-filler.

Wouters ‘2 [Jan and Dries Van Eeckhoutte; June 2002; Professor of International Law and the Law of International Organisations, Leuven University, and Of Counsel at Linklaters De Bandt; Research Assistant, Institute for International Law, Leuven University; Institute for International Law Working Paper, “Giving Effect to Customary International Law Through European Community Law,” No. 25]

1. Introduction

Being part of general international law, customary international law1 is in principle binding on all subjects of international law, including international organisations like the European Union2, the European Community and all of the EU’s Member States.3 The breach of rules of customary international law will entail the international responsibility of the subject(s) involved. However, for private individuals, what matters most is the question of whether and to which extent they are able to rely on a rule of customary international law before the courts in order to see their rights protected. In most domestic legal systems, national courts are under certain conditions willing to accept that a private individual invokes a rule of customary international law to interpret a domestic rule in conformity with customary international law; to derive a right out of a rule of customary international law; or - the strongest and most far-reaching use - to contest the legality of a rule of domestic law. However, this last type of reliance on customary international law is especially severely restricted if not rendered impossible in the case-law of many States.4

Although the case-law of the European Court of Justice (“Court of Justice”) has for many years taken rules of customary international law into account 5, it is only very recently, in the Opel Austria judgment6 of the European Court of First Instance (“Court of First Instance”) and in the Racke judgment7 of the Court of Justice, that the Community courts have explicitly relied on customary international law to test the validity of acts of EU institutions.

These two cases raise a variety of issues which will be analysed in this contribution. First, the question arises as to what the precise position of customary international law is in Community law8 (2). Secondly, Racke and Opel Austria raise the question under which conditions rules of customary international law can be invoked in Community law in order to challenge the validity of acts of EU institutions or rules of national law. This requires a careful analysis of the reasoning followed in the judgments concerned (3). In the third place, it should be examined how the Community courts’ case-law on the invocability of customary international law relates to their case-law on the invocability of treaties to which the EC is a party (4). It would be interesting to see whether there is any incoherence between the two lines of case-law and whether the outcome of a case before the Community courts could differ depending on the formal source of international law involved. Based on the insights acquired in the previous sections, we will end our contribution with some reflections relating to the nature of customary international law (5).

A preliminary remark should be made as to the terminology used in this contribution. The concept of “invocability” is often used interchangeably with that of “direct effect”. In the present contribution, however, we prefer the term “invocability” as it better catches the different manners in which customary international law can be used by private individuals, in particular the review of the legality of domestic (be it national or EC) rules and the interpretation of those rules in conformity with customary international law.9 The use of the term “invocability” also helps to distinguish our analysis, which concerns the relationship between the international legal order and domestic (national or EC) legal orders, from the context in which the notion of “direct effect” is typically used, namely the relationship between rules of Community law and rules of national law.10 When the term “direct effect” is used hereinafter, it will be in reference to the Court of Justice’s wellestablished case-law concerning the rights of private individuals derived from Community acts and/or their right to invoke EC law before a national court in order to assess the compatibility of national law with EC law.

2. The position of customary international law in Community law

Much has been written about the initial reticence of the Court of Justice regarding the relationship between general international law and EC law.11 One can find a specimen of such reticence in the Dyestuffs case (1972), a competition law case in which the Court avoided the problem of the limits which customary international law imposes on the EC’s jurisdiction in cartel cases.12 [FOOTNOTE] 12 Case 48/69, ICI v Commission [1972] ECR 619. As is known, the Court avoided the problem of customary law of jurisdiction by following the Commission’s argument that the parent companies outside the EC, by giving pricing instructions to their EC-based subsidiaries, were acting as a single entity so that the Commission’s decision could be seen as a simple application of the territoriality principle. One may compare this with the thorough examination of customary international law of jurisdiction by Advocate General Mayras in his opinion in this case: [1972] ECR 619, at 692-697. The Court avoided this question again in Joined Cases 6/73 and 7/73, Istituto Chemioterapico Italiano and Commercial Solvents v Commission [1974] ECR 223, points 36-41. [END FOOTNOTE] As Timmermans has rightly stressed, the Court’s initial reticence can largely be explained from its efforts to safeguard the autonomy of Community law vis-à-vis international law.13 However, since then the Court of Justice has made numerous references to customary international law, even though the wording used often blurs the precise formal source of the rule (typically, reference is made to “the general rules of international law”14, “the rules of (public) international law”15, “principles of international law”16 or even simply to “public international law”17 or “international law”18).

This is not to say, though, that through the Community case-law, the precise legal status and place of customary international law within the hierarchy of norms has been clear. Before Opel Austria and Racke the Court of Justice mainly relied on customary international law (i) to demarcate the limits of State or EC/EU jurisdiction and powers, (ii) as providing rules of interpretation and (iii) as a ‘gap-filler’ in the absence of specific EC rules. Although this may have been implicit in earlier case-law (see below), before the aforementioned judgments the Community courts had not explicitly confirmed the possibility that customary international rules could be relied upon to challenge the validity of Community acts (iv).

### Perm: Do CP – 2NC

#### The pronoun refers to the U.S., is possessive, and exclusive.

Brent ’10 [Douglas; June 2; Attorney and Co-Chair at Stoll Keenon Ogden LLP, JD from the University of Kentucky College of Law, BA from the University of Kentucky; Commonwealth of Kentucky Before the Public Service Commission, “Reply Brief on Threshold Issues of Cricket Communications, Inc,” http://psc.ky.gov/PSCSCF/2010%20cases/2010-00131/20100602\_Crickets\_Reply\_Brief\_on\_Threshold\_Issues.PDF]

AT&T also argues that Merger Commitment 7.4 only permits extension of “any given” interconnection agreement for a single three year term. AT&T Brief at 12. Specifically, AT&T asserts that because Cricket adopted the interconnection agreement between Sprint and AT&T, which itself was extended, Cricket is precluded from extending the term of its agreement with AT&T. Id

This argument relies upon an inaccurate assumption: that the agreement (contract) between Sprint and AT&T, and the agreement (contract) between Cricket and AT&T, are one and the same. In other words, to accept AT&T’s argument the Commission must conclude that two separate contracts, i.e. the interconnection between Sprint and AT&T in Kentucky (“Sprint Kentucky Agreement”) and the interconnection between Cricket and AT&T in Kentucky (“Cricket Kentucky Agreement”), are one and the same.

Upon this unstated (and inaccurate) premise AT&T asserts that “the ICA was already extended”; id. at 14, and “the ICA Cricket seeks to extend was extended by Sprint . . . .”; id. at 15, and, finally, “Cricket cannot extend the same ICA a second time . . . .” Id. (emphasis added in all). Note that in the quoted portions of the AT&T brief (and elsewhere) AT&T uses vague and imprecise language when referring to either the Sprint Kentucky Agreement, or the Cricket Kentucky Agreement, in hopes that the Commission will treat the two contracts as one and the same.

But it would be a mistake to do so. The contract governing AT&T’s duties and obligations with Sprint is a legally distinct and separate contract from that which governs AT&T’s duties with Cricket. The Sprint Kentucky Agreement was approved by the Commission in September of 2001 in Case Number 2000-00480. The Cricket Kentucky Agreement was approved by the Commission in September of 2008 in Case Number 2008-033 1.

AT&T ignores the fact that these are two separate and distinct contracts because it knows that the merger commitments apply to each agreement that an individual telecommunications carrier has with AT&T. Notably, Merger Commitment 7.4 states that “AT&T/BellSouth ILECs shall permit a requesting telecommunications carrier to extend its current interconnection agreement . . . . As written, the commitment allows any carrier to extend “its” agreement. Clearly, the use of the pronoun “its” in this context is possessive, such that the term “its” means—that particular carrier’s agreement with AT&T (and not any other carrier’s agreement). Thus, the merger commitment applies to each agreement that an individual carrier may have with AT&T. It necessarily follows then, that Cricket’s right to extend its agreement under Merger Commitment 7.4 is separate and distinct right from another carrier’s right to extend its agreement with AT&T (or whether such agreement has been extended).

#### CIL displaces U.S. law.

Henkin ’87 [Louis; February 1987; University Professor at Columbia University; Harvard Law Review, “The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny,” vol. 100]

The relationship between international and United States law, then, cannot be determined by declaring international law to be common law and therefore inferior to legislation. It has to be determined by reference to some principle that would locate the United States on the monist-dualist spectrum. In fact, one could advance persuasive arguments that customary international law supersedes any United States law and should be given effect even when it conflicts with a subsequent act of Congress. The law of nations, including both treaties and customary international law, is binding on the United States. The framers of the Constitution respected the law of nations, and it is plausible that they expected the political branches as well as the courts to give effect to that law. 100 Other countries have accepted the supremacy of international law: their courts give effect to international law over domestic legislation. 101 Our legal system subordinates treaties to subsequent congressional acts, because the Court has determined that the supremacy clause imposes that hierarchy. But no similar textual basis exists for subordinating customary international law. Customary international law is universal and lasting and has better claim to supremacy than do treaties, which govern only the parties and can be readily terminated or replaced by those parties.

#### That refers exclusively to the Big Three.

Rataj ’21 [Michael; May 12; PC, Law Degree from the Detroit College of Law; Michael Rataj Blog, “Consequences for Breaking Antitrust Laws,” https://www.michaelrataj.com/blog/2021/05/consequences-for-breaking-antitrust-laws/]

The core antitrust laws are…

The three core antitrust laws are the Sherman Act, the Federal Trade Commission Act and the Clayton Act. The Sherman Act primarily prohibits unreasonable restraint of trade and monopolization. Those who are in violation of the Sherman Act may face hefty fines, up to $100 million, and up to 10 years behind bars.

The FTC Act prohibits unfair practices or acts and unfair approaches to harming competition. Only the FTC can file cases under this act. The Clayton Act is a catch-all that covers every practice not covered by the Sherman and FTC Acts. Then consequences for violations of both of these acts are usually civil in nature.

#### Custom is a distinct, internationally derived basis – it’s silent on domestic law.

Hepburn ’18 [Jarrod; 2018; McKenzie Postdoctoral Research Fellow at Melbourne Law School, University of Melbourne, DPhil, MPhil and BCL from Balliol College, University of Oxford; American Journal of International Law, “Domestic Investment Statutes in International Law,” vol. 112]

\* ‘FILs’ = Foreign Investment Laws

The Effect of Domestic Limitations Clauses

Many cases and commentators have held that domestic statutes of limitation do not apply to claims before international tribunals. 300 This principle is perhaps confined to situations where an international tribunal is ruling on an alleged breach of international law. Most of the cases addressing the issue have related to international law breaches: of investment treaties (in Wena v. Egypt, Biedermann v. Kazakhstan, Maffezini v. Spain, Bogdanov v. Moldova, and Energoalians v. Moldova) or custom (in the Gentini and Spader arbitrations). 301 The Wena tribunal even specified that, in its view, domestic time-bars "do not necessarily bind a claim for a violation of an international treaty before an international tribunal." 302 If FIL protections are treated as unilaterally assumed international obligations, as considered in Part III, then FIL claims are equivalent to claims under treaty or custom, and domestic time-bars would not be applied. But the cases just cited arguably say nothing about claims before international tribunals for breaches of domestic law. 303 If, therefore, FIL protections are treated as domestic law obligations, the application of domestic time-bars might be plausible.

#### That refers to the breadth of competition law.

Buccirossi ‘9 [Lear and Eui; September 2009; Researchers for the Directorate General for Economic and Financial Affairs of the European Commission; Competition Policy Indexes, “Measuring the Deterrence Properties of Competition Policy: The Competition Policy Indexes,” https://tinyurl.com/sbpbv553]

Also Hilton and Deng have tried to provide a quantitative summary measure of competition law. Their objective has been to gauge the size of the overall “competition law net” by collecting information on the breadth of the law and on its penalty and defence provisions in 102 countries over the time period January 2001 to December 2004. 47 Their scope index differs from the CPI in that it tries to provide a summary description of the areas covered by competition law rather than an evaluation of its quality. Indeed, the scope index does not attempt to measure how the law is effectively enforced, nor the degree of independence of the CA or the quality of the law. 48

#### ‘Of’ locates the coverage in antitrust laws.

McKeown ’11 [Margaret; 2011; Judge on the US Court of Appeals for the Ninth Circuit; Lexis, “Simonoff v. Expedia, Inc,” 643 F.3d 1202]

Our recent decision in Doe 1 is central to our analysis. There we considered a forum selection clause in AOL's website user agreement that [\*\*5] provided for "exclusive jurisdiction for any claim or dispute . . . in the courts of Virginia." Id. at 1080. We concluded that the choice of the preposition "of" in the phrase "the courts of Virginia" was determinative—"of" is a term "'denoting that from which anything proceeds; indicating origin, source, descent, and the like.'" Id. at 1082 (quoting Black's Law Dictionary 1080 (6th ed. 1990)). Thus, the phrase "the courts of" a state refers to courts that derive their power from the state—i.e., only state courts—and the forum selection clause, which vested exclusive jurisdiction in the courts "of" Virginia, limited jurisdiction to the Virginia state courts. Id. at 1081-82.

#### Custom involves and alters no legislation – any other interpretation shreds precision.

Hameed ’17 [Asif; 2017; Fellow in Law at Selwyn College, University of Cambridge, D.Phil in Law at the University of Oxford; Chinese Journal of International Law, “Some Misunderstandings About Legislation and Law,” vol. 16]

II.D.iii. The third problem

41. In the remaining analysis I will treat the expression "general and abstract" as describing a single property-namely, the generality of the legal norm in question. 52 This, I think, is the gist of Talmon′s understanding of legislation. Even so, his formulation faces a further problem. A formulation of legislation, if it is to be a formulation of legislation (as opposed to anything else), must be discriminating. For our purposes, the formulation must discriminate between legislation and other types of law.

42. Talmon′s formulation of legislation fails to discriminate. It indicates that any legal norm that is "general and abstract" (and I take this to mean "general") is legislative. This would indicate, for example, that many norms of customary international law count as (international) legislation.

43. In international law writing there can sometimes be a lack of clarity about the different types of law-making. Legislating is often treated as a synonym for law-making, rather than as one type of law-making which is to be distinguished from others. 53 This includes some of Talmon′s own writing on the matter. He states that "for a long time, the perceived wisdom was [...] that the states are the legislators of the international legal system". 54 If this is true, what legislation have States been producing (according to received wisdom)? Does customary international law constitute legislation (when made by States)?

44. It would appear so. Talmon goes on to explain how international lawyers have used the expression "international legislation" to "describe the conclusion of lawmaking treaties [...] the making of customary international law", and so on. 55

[FOOTNOTE] 55Ibid. And as noted earlier, a similar approach has been taken by other writers-e.g. Higgins, above n.53. But the approach is not universally shared. See e.g. Skubiszewski, above n.34, 1255 where he states that "[w]riters employ the term [legislation] to describe such divergent phenomena as the making of customary international law (which is a clear perversion of the concept of legislation)". [END FOOTNOTE]

45. But consider customary law again. The problem emerges with particular clarity in relation to national legal systems. When legislation and customary law are recognized as sources of law in national legal systems, a clear distinction is drawn between them precisely because they are different types of law. This is true, for instance, of the various legal systems that recognize indigenous custom as a source of law; and the distinction matters, because a given customary norm may be pre-empted or displaced by legislation. 56 In spite of this, Talmon′s formulation transforms custom into legislation, since many customary norms will be general.

### Perm: Other Issues – 2NC

1. Simultaneously expanding antitrust on both grounds erases the signal.

Lewis ’19 [Dustin, Naz Modirzadeh, and Gabriella Blum; 2019; Research Director of the Harvard Law School Program on International Law and Armed Conflict, LLM from the Utrecht University School of Law, AB from Harvard University; Founding Director of the Harvard Law School Program on International Law and Armed Conflict, JD from Harvard University, Law School, BA from the University of California, Berkeley; Rita E. Hauser Professor of Human Rights and Humanitarian Law at Harvard Law School, LLB from Tel-Aviv University, LLM from Harvard University Law School; Harvard Law School Program on International Law and Armed Conflict, “Quantum of Silence: Inaction and Jus ad Bellum” https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3420959]

2. Estoppel

The doctrine of *estoppel* in international law operates to protect legitimate expectations of a State induced by the conduct of another State.[48] The basic idea is that “international jurisprudence has a place for some recognition of the principle that a State cannot blow hot and cold—allegans contraria non audiendus est” [49] (a person making contradictory statements is not to be heard[50]). In certain respects, the exact parameters of the doctrine of estoppel — and its relationship with related concepts, including preclusion — remain difficult to draw with precision.[51] However, the following position concerning the “principle of preclusion” by Judge Spender of the ICJ, in his dissenting opinion in the *Temple of Preah Vihear* case, might provide useful guidance:[52]

[T]he principle [of preclusion] operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely, and as a result that other State has been prejudiced or the State making it has secured some benefit or advantage for itself.[53]

Under those requirements, it has been said, “[t]he typical effect of the doctrine is that … a representing party is barred—estopped or precluded—from successfully adopting different, subsequent statements on the same issue, without regard to their truth and accuracy.”[54]

#### 2. Specificity – the perm lacks a concrete, definite antitrust issue for CIL application – that nukes spillover.

Moore ‘6 [David; November 2006; Associate Professor, University of Kentucky College of Law; George Washington Law Review, “An Emerging Uniformity for International Law,” vol. 75]

B. Specific Definition and Mutuality

In obvious parallel to self-execution analysis, the first two factors the Court identified were specific definition and mutuality. 202 The Court held that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content [, i.e., specific definition,] and acceptance among civilized nations[, i.e., mutuality,] than the historical paradigms familiar when [the ATS] was enacted." 203 These specificity and mutuality requirements proved fatal to Alvarez's ATS claim. 204 Alvarez, according to the Court, 205 relied on "a general prohibition of 'arbitrary' detention defined as officially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances." 206 Alvarez could only demonstrate, however, acceptance of "a norm against arbitrary detention...at a high level of generality." 207 To the extent the Restatement provided support for a more specific rule - a rule against state-sanctioned "'prolonged arbitrary detention'" - even that rule would not sufficiently specify when a policy of prolonged arbitrary detention [\*39] would render its enforcers "enemies of the human race" and would certainly require something more than Alvarez's "relatively brief detention in excess of positive authority." 208 Thus, "the broad [norm of CIL] Alvarez advanced" was at present "an aspiration" lacking the required specificity. 209 Absent specificity and mutuality, the federal courts could not provide a common-law remedy; as with treaties, specific definition and mutuality considerations served to cabin federal courts' authority to apply CIL as a federal rule of decision.

One might argue that the specific definition and mutuality limitations on the federal application of CIL (a) are born of the historical context in which the ATS was enacted and (b) only apply to ATS claims. 210 There is some basis for the former contention, as the specificity and mutuality limitations certainly emanate from congressional intent with regard to the ATS. The paradigm offenses, according to the Court, were accepted as part of the law of nations at the time the ATS was enacted and were likely the offenses the ATS-drafters had in mind when providing jurisdiction for torts in violation of the law of nations. 211 The First Congress only intended to provide federal jurisdiction to hear these three claims, or at least a narrow set of such claims. 212 Modern Congresses have approved of federal courts' recognition of other causes of action, but that recognition has been subject to limiting standards like those the Sosa Court adopted. 213 Thus, one might conclude that the specificity and mutuality standards that Sosa imposed, as informed by the paradigm offenses, were simply mandated by congressional intent. To the extent that is true, the Court's adoption of these standards is a further manifestation of the principle that congressional intent is the touchstone of CIL incorporation.

However, congressional intent is only part of the story behind the Supreme Court's imposition of the specific definition and mutuality considerations. Indeed, had the Court felt obliged to impose limitations solely to respect the intent of (at least the First) Congress, it presumably would have permitted recognition only of causes of action in situations where a failure to do so would strain U.S. relations with other countries (again with the three specified offenses as paradigms), 214 for it was the national government's inability to respond to international law violations damaging foreign relations that motivated enactment of the ATS. 215 But the specificity and mutuality standards arguably do not derive solely from the ATS. They are part of a broader analysis that applies to the incorporation question generally, as is evidenced by the fact that these standards (a) are inspired by separation of powers concerns independent from the ATS and (b) serve to address those concerns whenever common-law incorporation is at issue.

The specificity and mutuality considerations arose from the Sosa Court's fidelity to the post-Erie distribution of lawmaking authority between Congress and the federal courts. 216 Indeed, the Court decided against Alvarez precisely because "creating a private cause of action to further [the broad norm Alvarez advanced] would go beyond any residual common law discretion [the Court thought] appropriate to exercise." 217 As the Court explained, Erie concerns provide "good reasons" for restraining "the discretion a federal court … exercises in considering a new cause of action" based on CIL. 218 Those concerns, which arise whenever CIL is incorporated as federal common law, are mitigated by the specific definition and mutuality requirements. 219

At a basic level, specific definition and mutuality serve to ensure that federal courts do not incorporate norms that have not yet qualified as CIL. 220 But these requirements do more than that; they also serve to limit the discretion courts may exercise even when the traditional definition of CIL is arguably satisfied. 221 CIL results from the "general and consistent practice of states followed by them from a sense of legal obligation." 222 The inherent difficulty of identifying norms that satisfy this definition leaves room for significant discretion in recognizing claims based on CIL. 223 Requiring widespread acceptance of specifically defined norms reduces the scope of that discretion. 224 Specific definition helps to ensure that the norms courts incorporate provide judicially enforceable standards rather than allow courts to fill abstract principles with their own content.

Similarly, mutuality ensures that courts do not take the lead in enforcing norms that as yet remain underrecognized by other states. Certainly there are times when the United States should endorse as CIL and adopt as domestic law standards that have not yet achieved extensive acceptance internationally. But the decision to bind the United States without mutuality of commitment from other states is a judgment best left to the political branches. 225 As with treaties, it is less controversial for a court to bind the United States to international norms that have been mutually recognized as obligatory by a large number of other states. 226

In short, the specificity and mutuality considerations the Supreme Court adopted are not exclusive to ATS litigation. Although they are critical to ATS litigation and were key to resolving Alvarez's ATS claim, the reason the Court imposed them and their general utility suggest that they are intended to guide incorporation of CIL by federal courts whether pursuant to the ATS or otherwise.

### AT: Hakimi

#### CIL doesn’t have to be a rule to be effective---the CP establishes a prohibition with a contingent U.S. justification, rooted in custom---that will be recognized as law, even if not a ‘rule.’

Hakimi ’20 [Monica; 2020; James V. Campbell Professor of Law at the University of Michigan Law School; Michigan Law Review, “Making Sense of Customary International Law,” https://repository.law.umich.edu/cgi/viewcontent.cgi?article=6084&context=mlr]

The rulebook denies that such positions can be CIL, but it implicitly recognizes their legal significance. If a position must have broad support in the practice and opinio juris to satisfy the two-element test and qualify as CIL, then it must gather quite a bit of steam before then. Before it operates as a rule, it must be treated and accepted as law by some actors and in certain respects but not by or in others. International lawyers sometimes try to capture this reality by sayings things like, “x is emerging as CIL,” or “there is a trend toward x becoming CIL.” These statements themselves reveal the inadequacy of describing CIL as a set of rules. No matter whether x is gaining traction and on the way to becoming a rule, it is at the moment not one. It is fragmentary and might never turn into a rule. And yet, it still might have some force as CIL.

Adherents to the rulebook might say that we should reserve the label “CIL” exclusively for normative positions that have become entrenched like rules. Positions that are more mercurial or contingent might be called something else—if not “emergent CIL,” maybe “soft law.”128 The different labels presumably would be intended to mean something. They would signify that normative positions that do not function like rules are not really CIL and cannot accurately be characterized as such. But why not? If the goal is to describe the normative material that is produced through the CIL process and that global actors in the ordinary course regard and use as they do CIL, then non-rule-like positions must be included. These positions routinely have force as CIL. To call them something else just because they do not operate as rules is weirdly tautological: “Non-rule-like positions cannot be CIL because they are not rules.” It also is misleading. It obscures important parts of the practice of CIL.

Take a question that lies at the heart of international humanitarian law (IHL): Who may be targeted for attack in wartime? The answer in interstate conflicts is relatively straightforward and rests on the fundamental distinction between combatants and civilians. Members of state armed forces generally qualify as combatants, wear uniforms or other identifying insignia, and are targetable unless they are hors de combat. 129 By contrast, civilians are not targetable unless they directly participate in hostilities.130 In many conflicts involving armed nonstate groups, the distinction between combatants and civilians—and the targeting rules that depend on it—is blurred.131 Members of these groups often blend in with the general population, rather than identify themselves as such.132 Moreover, membership itself can be more fluid. Loosely organized armed groups consist of people who participate in different capacities or to varying degrees over time. 133

In 2009, the ICRC released a document—the Interpretive Guidance on the Notion of Direct Participation in Hostilities—that aimed to clarify the targeting norms that apply, mostly as a matter of CIL, in conflicts against nonstate groups. 134 The positions that the ICRC adopted in the Interpretive Guidance were controversial135 and incompatible with the known views of a number of militarily active states.136 Thus, the ICRC did not contend that its positions satisfied the secondary rules of CIL or had the status of primary rules. It said only that they “reflect the ICRC’s institutional position[s] as to how existing IHL should be interpreted

Yet because of the ICRC’s standing in IHL, its institutional positions are legally salient. The positions that it took in the Interpretive Guidance are not always treated as CIL, but they sometimes are, and even when they are not, they are “the main reference point for any discussion of the subject.”138 Of course, the ICRC itself invokes these positions as the best iterations of CIL when it discusses or tries to educate people on IHL.139 Some national prosecutors, militaries, and courts have also treated the positions as CIL.140 For example, prosecutors in Germany have invoked the Interpretive Guidance to justify terminating criminal investigations into attacks on people who, though not at the time participating in hostilities, regularly fought for armed nonstate groups.141 Likewise, the Supreme Court of Israel cited the Interpretive Guidance in 2018 to explain why attacking demonstrators near the security barrier with Gaza could be consistent with IHL.142 In these cases, the positions that the ICRC articulated in the Interpretive Guidance have CIL effect. To insist that they cannot be CIL, just because they do not operate as rules, is to obscure the various ways in which they are actually used and received as CIL in the practice of law.

The precautionary principle is another example. The principle does not function as a CIL rule because global actors take very different positions on what it entails and whether and how it applies in discrete settings.143 But any suggestion that it is not part of CIL—that there is only, as the International Tribunal for the Law of the Sea said in 2011, “a trend towards making [it] part of customary international law”—is misleading.144 For decades, states have used the principle beyond what treaty law indicates to make, justify, or challenge particular governance decisions.145 These states have treated the principle as CIL, if not across the board, as they would a rule, more circumstantially.

International adjudicative institutions have occasionally done the same. These institutions have repeatedly declined to clarify the precautionary principle’s CIL status,146 but they have in discrete settings applied the principle as CIL—in ways that radiate beyond the specific texts in which it appears. 147 For example, in the 1998 Beef Hormones case, the Appellate Body of the World Trade Organization (WTO) determined that it was “unnecessary, and probably imprudent” to opine on the principle’s status in CIL.148 The Appellate Body further noted that the principle was not codified in the WTO agreement at issue.149 However, the Appellate Body then said that the principle “finds reflection” in, and in certain circumstances may inform, what states do under that agreement.150 The Appellate Body effectively used the precautionary principle as CIL. It licensed states to restrict trade consistently with the precautionary principle, even though the text of the WTO agreement did not provide for that result.

The ICJ’s 2010 Pulp Mills judgment is similar. Like the Appellate Body in Beef Hormones, the ICJ in Pulp Mills declined to resolve the CIL status of the precautionary principle.151 Nevertheless, the ICJ noted that “a precautionary approach may be relevant in the interpretation and application of the” bilateral treaty at issue.152 It then determined that the treaty obligation

to protect and preserve [the aquatic environment] . . . has to be interpreted in accordance with [what] . . . may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. 153

Here, the ICJ used the precautionary principle as “general international law” to define the treaty obligation at issue. It gave the principle CIL force.

Where does this leave us? In the everyday practice of international law, CIL looks nothing like the rulebook conception. It does not derive from in telligible and generally applicable secondary rules. It emerges more organically, through an unstructured process in which the participants apply variable criteria to justify their normative positions in CIL. These disjointed interactions define the content of CIL. While they sometimes are sufficiently stable to generate conduct norms that operate like rules, they often are not. Much of CIL’s content is inconstant and contingent, not fixed or generalizable, as rules would be.

B. The Law in Customary International Law

CIL is not the only kind of law that lacks secondary rules and manifests in variable conduct norms. The common law is similarly “untethered.” 154 Digging into the analogy is instructive because it helps explain how CIL can be recognizable as law, without conforming to the rulebook. After all, the common law plainly is law and does not so conform.

#### She explicitly says the arguments their 2AC makes are flawed! The unique process of the CP endows custom with legitimacy, producing acceptance.

Hakimi ’20 [Monica; 2020; James V. Campbell Professor of Law at the University of Michigan Law School; Michigan Law Review, “Making Sense of Customary International Law,” https://repository.law.umich.edu/cgi/viewcontent.cgi?article=6084&context=mlr]

In insisting that CIL has certain secondary rules, the rulebook conception breeds a prominent set of attacks on its legitimacy. According to the rulebook, the secondary rules help keep CIL consensual and therefore legitimate.183 They are supposed to weed out tendentious claims about CIL— claims that are biased in favor of some actors, at the expense of others—so that CIL’s content has enough support to be legitimate as law.

This logic is evident in the ILC Conclusions. The accompanying commentary underscores that the metasecondary rule for CIL—the two-element test—works to separate the wheat from the chaff. “It serves to ensure that the exercise of identifying rules of customary international law results in determining only such rules as actually exist.” 184 Without the two-element test and other secondary rules, the commentary explains, we cannot be sure that a given practice has a sufficient degree of “acceptance among States that it may be considered to be the expression of a legal right or obligation.”185 The secondary rules thus are supposed to save CIL from a serious legitimacy problem. If people do not rigorously apply these rules, if they treat tendentious claims as CIL, then CIL will lack the requisite degree of acceptance to create legitimate law.

The same logic animates the persistent attacks on CIL’s legitimacy.187 Critics of CIL assume that the rulebook’s secondary rules are what keep it consensual and therefore legitimate. They argue, however, that these secondary rules do not work. And in the absence of meaningful secondary rules, the critics claim that CIL cannot be consensual or legitimate; it must just be a foil for some actors—usually, the most powerful actors—to impose their own biases on everyone else.

My account of CIL reveals that this logic is flawed. CIL derives what legitimacy it has not from any secondary rules but from the process through which it is developed and used. Because this process is unstructured, and authority within it is diffusely held, normative positions must be accepted and treated as CIL in order to have the force of CIL. Those who want a position to be CIL must work to earn support for it from other participants in the process. This serves to check (though not eliminate) the effect of biased or tendentious claims in CIL.188 A normative position becomes entrenched enough to operate like a conduct rule only if it actually acquires widespread support. The support that entrenches the rule also evinces some consensus for it.

#### A. NORMATIVE---CIL is an ideal vehicle for reaching convergence on issues of tentative consensus, such as economic law.

Hakimi ’20 [Monica; 2020; James V. Campbell Professor of Law at the University of Michigan Law School; Michigan Law Review, “Making Sense of Customary International Law,” https://repository.law.umich.edu/cgi/viewcontent.cgi?article=6084&context=mlr]

B. Achieving Normative Settlement

Assuming that any number of normative positions are reasonable and legitimate, picking one and settling it in law has value that is independent of [\*1528] its content. Normative settlement can enhance CIL's regulatory effect by allowing people to know the consequences of their decisions and to coordinate their behavior accordingly. Although a better settlement is preferable to a worse one, some settlement might be better than none at all.

The question for CIL is whether its elasticity makes it ill-suited to achieve a settlement. Recall that this question underlies the debate about the efficacy of CIL. Critics contend that, because CIL is so capacious, it has a hard time settling what must be done--or therefore regulating behavior. The participants can too easily argue their way out of their obligations. This critique suggests that CIL works best as a regulatory tool when its conduct norms are sufficiently precise and entrenched to operate like rules and stymie further contest. The critique thus discounts the relevance of the normative material in CIL that is not rule-like. However, this material routinely also contributes to normative settlements and has regulatory purchase.

1. Settlement in Conduct Rules

An important strand of research already emphasizes that arguing in law helps the participants find and settle on common normative positions--and thus establish new conduct rules. A legal contest invites the participants to focus on the issue in dispute, to crystallize their own views, to feel out their competition, and eventually to converge on conduct rules that they all are willing to accept. The contest is not just a distraction from, a waystation for, or an impediment to settlement. It often is essential to achieving a settlement.

CIL is an especially suitable vehicle for having these contests because it is so pliable--not rigid, like rules. Global actors can easily use CIL to advance a diverse range of legal claims and thus catalyze the kinds of interactions that generate new conduct rules. The resultant rules might stay in CIL or might be prescribed in a new treaty. Remember what happened on the continental shelf. As the claims of coastal states gained traction, they were codified as treaty rules and then accepted as rules of CIL. CIL's malleability facilitated the formation of these rules by giving states a relatively easy way [\*1529] to instigate juris-generative interactions. All the United States had to do was issue a proclamation advancing its legal claim. Here, the non-rule-like character of CIL was an ingredient for, not an impediment to, establishing stable conduct rules that regulate behavior.

Of course, CIL's plasticity can then work to undercut the very rules that it helped to produce. Again, this would not necessarily be a problem. Rules that had been desirable might become outmoded. Their downsides might be newly apparent and significant. Or precisely because they function as rules, they might be too crude to regulate certain governance issues. But in any event, CIL rules do not always unravel. Some CIL rules are deeply entrenched and extremely hard to change, even though they are also at times violated. The prohibition of torture is an example. Moreover, where CIL helps generate new conduct rules that are codified in treaty law, as it did on the continental shelf, the settlement can be further insulated from CIL's own vicissitudes.

The key point is that CIL's malleability does not consistently detract from its capacity to establish stable conduct rules. Its malleability is sometimes how it produces such rules. Any effort to evaluate its efficacy along this dimension thus should account not only for the part of CIL that already manifests as rules but also for all of the other stuff that contributes to rule formation, whether in CIL or in treaties that grow out of CIL. The rulebook conception skews the analysis; it leads people to diminish the non-rule-like material in CIL that helps to produce settled rules.

#### B. PROIVSIONAL---narrow invocations for specific contexts create a groundswell for provisional settlements. That’s sufficient, even if total consensus is impossible.

Hakimi ’20 [Monica; 2020; James V. Campbell Professor of Law at the University of Michigan Law School; Michigan Law Review, “Making Sense of Customary International Law,” https://repository.law.umich.edu/cgi/viewcontent.cgi?article=6084&context=mlr]

2. Provisional Settlement

The normative settlements that CIL produces do not come only in the form of rules. They are often only partial or provisional--settlements in the sense that they reflect what the relevant group of actors accepts in a particular setting, at a given moment. Cass Sunstein's concept of "incompletely theorized agreements" nicely captures the idea:

[W]ell-functioning legal systems often tend to adopt a special strategy for producing agreement amidst pluralism. Participants in legal controversies try to produce incompletely theorized agreements on particular outcomes. They agree on the result and on relatively narrow or low-level explanations for it. They need not agree on fundamental principle. They do not offer larger or more abstract explanations than are necessary to decide the case.

Incompletely theorized agreements settle the law for specific contexts, without resolving the larger or deeper issues in dispute. CIL is effective in producing this kind of settlement precisely because it is not rule-like.

[\*1530] Return to the contest on defensive force against nonstate actors. Because this contest is ongoing, it has not produced stable, consistently applied conduct rules. Nevertheless, we can discern the contours of a settlement. It looks something like this: states that use defensive force against nonstate actors usually do not face material or normative repercussions for their operations, especially if they keep their force to a low level. Yet they do not have the full authority of the law behind them, and they risk condemnation for their operations if they seem too trigger happy or if they have to defend themselves before certain institutions, such as the ICJ. This settlement has been in place for at least a few years, but it is unsteady. It can easily shift with a major incident or authoritative decision on defensive force, or a notable change in state behavior. The settlement is not fixed or complete; it is partial and provisional.

Still, it allows the key players to know, more or less, where they stand and establishes the normative backdrop against which they can make concrete decisions. A high-profile incident is illustrative. In 2014, the socalled Islamic State in Iraq and Syria (ISIS) occupied large areas of territory, threatening not only those two states but also many others. Dozens of states responded by participating in or assisting a U.S.-led military campaign to defeat ISIS. The campaign was conducted with the Iraqi government's consent, but the legal basis for using force in Syria was contested. Although states widely supported the Syria part of the campaign, they disagreed about whether or why it was lawful.

Then, in November 2015, states that wanted to bolster the anti-ISIS campaign went to the U.N. Security Council and obtained Resolution 2249. The resolution did not identify a legal basis for using force in Syria. It left on the table, for states to fight over in future cases, the competing normative positions on self-defense. Yet it also called on states "to take all necessary measures, in compliance with international law . . . to eradicate the safe haven [ISIS has] established over significant parts of Iraq and Syria." The practical effect of Resolution 2249 was to confer authority on the anti-ISIS operation; after the Council adopted the resolution, the claim that the operation was unlawful became much harder to sustain. The resolution thus shifted the terms of the above settlement on defensive force for this case, while leaving that settlement largely intact for future cases.

The incident is instructive for four reasons. First, the settlements here--both the default settlement that operated in the background and the more specific settlement that is reflected in Resolution 2249--were partial and provisional because states disagree on what the rule on defensive force should be. Given that they disagree, CIL's malleability made a settlement more, rather than less, likely. States almost certainly would have had a harder time agreeing on Resolution 2249 if they first had to define the generally applicable rule in this area. They indicated that the anti-ISIS campaign was, for all intents and purposes, lawful by leaving open the broader question that it presented.

#### The reason CIL lacks power is because states don’t afford it primacy OR declare adherence---the CP reverses that.

Hakimi ’20 [Monica; 2020; James V. Campbell Professor of Law at the University of Michigan Law School; Michigan Law Review, “Making Sense of Customary International Law,” https://repository.law.umich.edu/cgi/viewcontent.cgi?article=6084&context=mlr]

2. Variable Conduct Norms

The lack of secondary rules in CIL does not mean that "anything goes." It means that what goes is not determined by secondary rules. The status of a given normative position within CIL depends instead on how global actors interact with it over time. To what extent do these actors invoke, regard, and use the position as CIL, rather than ignore or challenge it? Thus, as a practical matter, those who want a position to have traction as CIL must find support for it. They must earn authority for the position from other participants in the CIL process.

Insofar as global actors broadly accept and treat a position as CIL, it becomes entrenched. At some point, it might even garner enough support to operate like a conduct rule. A well-known example involves the continental shelf. In 1945, the United States announced that it had exclusive jurisdiction [\*1511] over the resources in its continental shelf. Other coastal states followed the United States' lead by advancing similar claims. These states then codified their common positions in a 1958 treaty. And in 1969, the ICJ pronounced that the positions reflected "received or at least emergent rules of customary international law."

The rights of coastal states to explore and exploit the continental shelf solidified as rules because they attained such broad support. They will remain entrenched so long as that support continues. Although competing claims on the continental shelf might still be advanced through the CIL process, these claims can easily be dismissed. The reason why has nothing to do with any secondary rules. It is because support for the existing rules is sufficiently robust to prevent the opposition from resonating or gaining legal traction.

Because global actors do not act as a coordinated bloc, the support that they display for different normative positions is not uniform or stable. It varies. Many normative positions that are presented in the CIL process are neither collectively endorsed, like the ones on the continental shelf, nor summarily rejected. They remain in circulation for extended periods with only tepid or contingent support and real competition. These positions have enough support to function as CIL in some settings but not enough support to manifest as rules. Their legal salience is splintered and contingent, rather than consistent or fixed. But in the settings in which they are legally salient, they have the look, feel, and effect of CIL. In these settings, they for all intents and purposes *are* CIL.

#### She says she disagrees with deficits to CIL, invoking custom alone solves, and the ‘rulebook’ critique is wrong. This is the conclusion of her article.

Hakimi ’20 [Monica; 2020; James V. Campbell Professor of Law at the University of Michigan Law School; Michigan Law Review, “Making Sense of Customary International Law,” https://repository.law.umich.edu/cgi/viewcontent.cgi?article=6084&context=mlr]

The implications for reform are straightforward. The best way to enhance the argumentative dimension of CIL is not to clamp down on the part of it that does not manifest as rules. It is to reinvigorate that part—to push global actors to justify or challenge particular exercises of power by invoking CIL, even when their normative positions are splintered and contingent, rather than stable or entrenched. In other words, we should make it harder, not easier, for states to disengage from the argumentative dimension simply by asserting, as the rulebook encourages them to do, that CIL does not exist in the absence of rules.

Let me drill down on two last points for those who still cling to the rulebook conception. First, some might intuit that CIL’s argumentative practice itself requires the rulebook. We know that it doesn’t. Global actors regularly engage in this practice—they invoke, argue about, and justify their decisions in CIL—even though CIL does not operate like a rulebook. But, skeptics might say, perhaps we need to pretend that CIL is like a rulebook in order for them to continue engaging with this practice. Why would that be so? The recognition that CIL does not conform to the rulebook conception would probably reduce the rote invocations of the two-element test (and good riddance!), but global actors have plenty of other moves for arguing about and justifying particular positions in CIL. The ILC Conclusions list a bunch of them.223 Although these moves do not function like rules, they still structure much of the discourse on CIL. They remain available, even if we acknowledge that they are not rules. Indeed, discarding the rulebook conception should make them more, not less, appealing; it would clarify that positions that do not satisfy the supposedly high threshold of the two-element test can still have force as CIL—and thus can be worth pursuing in CIL.

The second point is jurisprudential. Some might accept my earlier argument that CIL need not operate like a rulebook to be law.224 But they might contend that CIL cannot be law, where it only structures an argumentative practice, without authoritatively resolving what ought to be done, whether in generally applicable conduct rules or through more provisional settlements. I disagree. Law does all sorts of things beyond establishing action-guiding prescriptions. The common distinction between law’s regulatory and constitutive functions might be useful here. Recall from the ISIS example that CIL can have regulatory purchase, even when its content is contested. The jus ad bellum shaped the military behavior of some states, both before and after the Security Council adopted Resolution 2249, despite the contest about its content. 225 However, even assuming that CIL has no regulatory effect in a given context, it still might have a constitutive one. It might structure a certain kind of argumentative practice. This practice is quintessentially legal in nature so long as it centers on the authority to make particular governance decisions and places this authority outside the hands of any one player. Again, constituting this kind of argumentative practice is not everything that we want law to do, but it is not nothing. And it happens to be something that CIL does particularly well.

CONCLUSION

The rulebook conception that dominates current thinking on CIL is not only incorrect but insidious. This conception is too dissociated from the everyday practice of CIL to describe, with any degree of accuracy, what CIL is to the many people who come across or interact with it. Nothing about the rulebook conception is jurisprudentially required. It interferes with or is irrelevant to sound legal analysis. And because it defines CIL so stringently, to include only that which manifests as rules, it systematically obscures and devalues much of the good that CIL does, and favors pushing CIL in directions that are at best ill-considered and at worst counterproductive. We should retire the rulebook conception and acknowledge that CIL is a more variable, enigmatic kind of law. Or at least, we should push those who insist on preserving the rulebook conception to explain the reasons why. What exactly do they think they gain by pretending that CIL is something that it is not?

#### Stabilizing international law through direct incorporation is the only way to make law certain and predictable – the unchecked unilateralism of national law is destabilizing.

Noyes ’9 [John E.; 2009; Professor of Law, California Western School of Law, President of the American Branch of the International Law Association; Publicist, “The United States and the Law of the Sea Convention: U.S. Views Concerning the Settlement of International Law Disputes in International Tribunals and U.S. Courts,” https://bjil.typepad.com/publicist/2009/03/publicist01-noyes.html]

Yet refusing to allow direct application of the Convention in U.S. courts would also carry costs. It is consistent with some U.S. traditions to regard international law, even as it applies to individuals, as fully justiciable law, like domestic statutory and case law. In this view, applying the Convention in U.S. cases concerning individuals would be an ordinary exercise of judicial authority. In general, direct application of the Convention in cases involving individuals could have the salutary effect of promoting respect for basic human rights in other countries. There may be other benefits of such application as well. Recognizing the direct applicability of the Convention’s prompt release articles in U.S. court, for example, could defuse conflicts with other states. In addition, the U.S. tradition of promoting international trade and commerce – reflected in the Medellín dissent’s concern that the majority’s decision “threatens to deprive … businesses [and] property owners …. of the workable dispute resolution procedures that many treaties, including commercially oriented treaties, provide”[103] – suggests an historically strong reason not to read the Medellín Court’s non-self-execution holding too broadly. The concern with safeguarding commercial relationships also counsels against writing the non-self-executing provisions of the Advice and Consent Resolution too broadly, or at least counsels in favor of insuring that U.S. legislation fully implements Convention provisions.

If the Convention were self-executing, U.S. courts might help to build state practice and help to reinforce interpretations of the Convention that favor U.S. positions. It is unlikely that U.S. courts would reach decisions construing the Convention in ways that were antithetical to the views of the U.S. Executive Branch. First, U.S. courts could invoke a variety of other prudential abstention doctrines, such as the political question doctrine, to avoid hearing cases that might adversely affect truly sensitive matters of U.S. foreign policy. Both the majority and dissent in Medellín signaled this concern, noting that U.S. courts should not hear such politically sensitive cases. Second, when U.S. courts do apply treaties directly, the courts often accord great weight to the suggestions of the Executive Branch concerning the interpretation of the treaties.[104]

We would do well to remember the original justifications for including the third-party dispute settlement provisions in the Convention. These justifications – which U.S. officials articulated and supported during UNCLOS III – include promoting certainty, predictability, and stability, with respect to rules that greatly benefit the United States.[105] These dispute settlement provisions can help deter illegal behavior, as well as promote the peaceful settlement of disputes. Domestic enforcement of Convention provisions can also serve this end. At the most fundamental level, the Convention furthers the rule of law in the world – the values of using agreed-upon rules and procedures to resist unilateral assertions of jurisdiction or sovereign control, resolving differences even-handedly according to established rules, and providing stable expectations for international actors. Giving full effect to provisions for third-party dispute settlement at the international and national levels would help further these values.

### CIL – CP Key – 2NC

#### The CP legitimizes AND develops CIL – antitrust is unique.

Zwarensteyn ’13 [Hendrik; 2013; Professor of Business Law at Michigan State University; Wroclaw Review of Law, “Some Aspects of the Extraterritorial Reach of the American Antitrust Laws,” ISBN: 9789401744676]

(b) At the Supra-National Level:

An entirely different question which we will have to answer is how the above proposed system would function with regard to the transnational aspects of restraint of trade. Two different situations will have to be considered:

(1) The domestic level.

At the domestic level, the judges can be expected to be conversant with and attuned to the legal and the business problems involved, both from the national and the transnational points of view. It is of course, particularly with respect to the generally accepted and recognized principles of international (antitrust) law that we may insist that the judges apply these principles. This holds true both at the trial level and the appellate levels.

Even then it may happen that an appeal taken to the Court of Antitrust Appeals will be decided in a manner to which a foreign defendant, or his national government, objects on the grounds that the economy, or the sovereignty of the foreign State will be adversely affected, contrary to the rules of international law.

In such a case a review by the United States Supreme Court might seem of little value to the foreign government, particularly if the Supreme Court would only consider the proceedings in the courts below on the basis of the proper application of the law, and not on the basis of the merits of the case. This depends on the wording of the law. If the law contains clearly written rules with regard to transnational aspects of restraint of trade, it would seem highly improbable that the Supreme Court (or even the courts below) would ignore these rules.92

(2) The supra-national level.

The possibility exists that the interpretation of the law by the American domestic courts would lead to an unacceptable result as far as the foreign government is concerned.

To solve problems of this nature provisions need to be made for the review by a supra-national tribunal of cases with trans-national aspects. For convenience sake we shall designate this supra-national tribunal International Antitrust Court. Such a tribunal could conceivably be attached to the International Court of Justice. Another possibility would be to establish an independent Supra-National High Authority for Antitrust Matters, part of which could be a Supra-National Antitrust Court.

A third possibility could be the creation of an International Court of Arbitration for Antitrust Matters. While the organization of the above suggested tribunals may differ slightly in its practical day-to-day work, these differences will not have great impact, since the objectives remain the same.93 We submit that a supra-national tribunal such as suggested by us would not severely jeopardize the sovereignty of the nations affected, because law and economics rather than political considerations would be the major concern of these tribunals.

Furthermore, while these supra-national institutions would review national adjudication on the basis of internationally accepted rules of law and economics, still, they would have to be guided to a certain extent by the ratiocination of the antitrust courts at the national level. To that extent, these courts might even be considered as an extension of the national courts into the trans-national sphere. Conversely, these supra-national tribunals might provide proper guidance to national courts in those cases where trans-national problems of antitrust are submitted to the antitrust courts at the national level. To that extent, a proper interaction would result between the international and the national legal order of the nations of the world. 94

Of course, emotional outbursts can be expected if these supra-national tribunals would find that the national antitrust court had violated the accepted rules of international law. These outbursts will simply have to be countered by the statement that no international cooperation can effectively come about unless even the powerful nations of the world stand ready to have their judicial findings be tested against generally accepted rules or principles. Furthermore, international tribunals have at times reviewed cases which had been decided by national courts, including cases decided by the United States Supreme Court.95 Also, the creation of one more international court in addition to the existing ones does not disturb us; as matters stand today, there are several international tribunals dealing with a variety of rather heterogeneous subject matter. 96

A creation such as here suggested would not only be a vehicle to settle disputes. It would also significantly contribute to the further growth of international law, because it would develop and formulate new principles and rules of international antitrust law; that this is necessary will be shown later in this study.

Furthermore, a tribunal as here alluded to would be of importance with regard to the presently emerging extraterritorial reach of the antitrust law of the European Economic Community, 97 and thus, provide proper guidance with regard to the norms set there. Finally, the tribunal would be an aid to the courts in the emerging and developing nations of the world, in that it could provide guidance with the formulation of principles pertaining to the extraterritorial reach of restrictive trade legislation in those countries. Thus, the principles of international law would increasingly reflect the position that it contains the norms and notions of all nations of the world, rather than the domain of European countries who developed principles to regulate the international relations among themselves.98

There is an added reason for the establishment of an International Antitrust Court. The case for a unilateral application of national law enforcement exclusively by national courts has certainly not been made. On the contrary, this form of adjudication has even provoked the accusation that the (American) national courts were guilty of judicial aggression.99

It just might be possible that a case for antitrust enforcement at the supranational level could be made if the admittedly slower process of adjudication in accordance with the accepted principles of international law were undertaken in a spirit of cooperative effort. 100

We do not underestimate the problems that will confront a Supra-national Antitrust Court, particularly because of the conflicting regulatory policies which prevail in the various countries. 10l It is our conviction however, that the effort is worth the trouble because of the advantages we anticipate to be derived from it.

As early as 1946 the establishment of an international tribunal dealing with antitrust problems was proposed. 102 However, where that suggestion was made for the purpose to determine whether an international cartel would or would not be in conflict with international law, we submit that our proposal would purport to review the decisions of national courts on the basis of the internationally accepted rules of law and economics, against the background of what is necessary to maintain the harmony in the community of nations. Thus, a body of rules of law to which national governments would submit would gradually emerge. 103 in which the special character of the antitrust laws, as a separate area of the law, would find recognition. 104

#### U.S. acceptance causes cascading revision of CIL.

Howard ’20 [David; 2020; Attorney at Baker Botts LLP, J.D. from the University of Texas School of Law; Duke Journal of Constitutional Law and Public Policy, “A Revised Revisionist Position in the Law of Nations Debate,” Lexis]

At the Founding, the Framers viewed the law of nations as arising from positive or natural law, yet this is no longer the case. The law of state-state relations was quite clearly the most important of the three original categories of the law of nations, as it governed the relations between sovereign nations. This law of state-state relations created a system that nations followed to keep the peace and promote economic connections, and is referenced and incorporated in several constitutional provisions, such as the recognition power. However, customary international law has changed drastically since the Founding. Fundamental technological, social, and geopolitical change can accelerate the formation of CIL in what Professor Michael Scharf calls Grotian moments 67, or international constitutional moments.

Footnote 67:

"Grotian Moment" is a term used to describe a "paradigm-shifting development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance." See Michael P. Scharf, Seizing the "Grotian Moment": Accelerated Formation of Customary International Law in Times of Fundamental Change, 43 CORNELL INT'L L.J. 439, 440 (2010).

End of Footnote 67.

These are large turning points in the law of nations. The law of nations is not stagnant, and each state action--to varying degrees--affects that "general and consistent" state practice on which CIL is defined. Because CIL is an unwritten body of law and continues to change, there is tremendous difficulty in determining what it requires. There is even debate over what evidence should be used to define CIL. This is why "determinations of the content of customary international law implicate not only legal considerations but also considerations of U.S. foreign policy."

### ! - IEL - T/L

#### IEL can overcome their warrants

Scharf ’18 [Michael; 2018; Interim Dean and John Deaver Drinko--Baker & Hostetler Professor of Law at the Case Western Reserve University School of Law; Legal Desire, “Importance of International Law: Are They Really Law?” https://legaldesire.com/importance-of-international-law-are-they-really-law/]

As students are first exposed to international legal materials there may be a degree of skepticism about the importance of international law. Some may believe that international law is merely illusionary since governments seem to comply with it only out of convenience and disregard it whenever a contrary interest appears. Others may suspect that international law cannot really be law since there is no effective world legislature, judiciary, or police force to enforce it.

In fact, government compliance with international law is the norm and noncompliance is the very rare exception. There are over 45,000 international treaties, which fill 1,800 thick volumes — usually located in some obscure place in a law school library.1 Fortunately, they are also available electronically via CD-Rom, Lexis, Westlaw, and various sites on the Internet. Treaties govern every aspect of international relations and commerce, including air travel, telephone communications, television broadcasting, mail delivery, weather reporting, private contracts, protection of the environment, human rights, and trade with foreign countries. Breaches are infrequent and not without significant costs as discussed below.

Although there is not a world legislature per se, there is an international legislative process, which takes one of two forms. The first relates to bilateral treaties, which are negotiated and enforced in a manner similar to domestic contracts. The second process relates to multilateral treaties, which are adopted by the United Nations or a Diplomatic Conference of States (in international law, the term “States” means countries). This process can be very similar to the domestic legislative process, with the exception that the laws do not immediately go into effect when the United Nations or Diplomatic Conference approves the text of a treaty. Rather, each State becomes bound to the treaty only when it has been approved through the State’s internally proscribed process.

While there is no single international judiciary, there are numerous international courts established by treaty which clarify and develop law, resolve disputes impartially, and impel nations to observe the law.

The most influential of these are the International Court of Justice, the World Trade Organization, the Law of the Sea Tribunal, and Western Europe’s two regional international courts — the European Court of Human Rights at Strasbourg and the European Court of Justice at Luxembourg. In addition, there are two Security Council-created international war crimes tribunals (for the former Yugoslavia and Rwanda), three hybrid international criminal tribunals (for Sierra Leone, Cambodia, and Lebanon), and a permanent international criminal court established by treaty. International law is also interpreted by numerous international arbitral tribunals, such as the U.S.-Iran Claims Tribunal. But most frequently, international law is litigated in domestic courts.

While there is no international police system whose pervasive presence might deter violation, that does not mean that international law is without effective mechanisms for enforcement. With respect to the most egregious breaches, the U.N. Security Council can impose economic sanctions, freeze assets, and even employ military force to compel compliance. The New York Convention on the Recognition and Enforcement of Arbitral Awards provides a means for enforcing international arbitration awards using the assets of the liable party located in any of the over 100 States Parties to the Convention. As with domestic contracts, the most frequent and effective means of inducing compliance with treaty obligations is by the suspension of reciprocal obligations by the non-breaching party until the breach is remedied. In addition, international law is routinely enforced by individual States through their domestic laws, courts, and police forces. Thus, for example, Article I, Section 8, of the U.S. Constitution empowers Congress to “define and punish … offenses against the Law of Nations.”