# 1nc – harvard 2

## OFF

### PIC – Core

#### The United States federal government should prohibit arbitration agreements that operate as a prospective waiver of a party’s right to statutory remedies.

#### Solves.

Rill 2 – was an Assistant Attorney General for the Antitrust Division in the Department of Justice (James, "The Evolution of Modern Antitrust among Federal Agencies." George Mason Law Review, vol. 11, no. 1, Fall 2002, p. 135-142. HeinOnline)//gcd

Multiple federal enforcement agencies with competition-related authority, broadly defined, have evolved from several different roots. From the outset, these agencies were not uniformly consumer-welfare impelled or oriented, nor have they altogether evolved in that direction. Their focus has been as much on social and political, non-consumer-welfare concerns-a continuing condition more prevalent before the mid-1970s than today. Federal economic concerns with market power brought about the establishment of regulatory agencies prior to enactment of the Sherman Act.' The patriarch, the Interstate Commerce Act of 1887,2 was a congressional response to concerns with the alleged monopoly and political power of the nation's railroads. Over the ensuing years, numerous other non-antitrust agencies were vested with power to regulate competition. Evolving from concerns with "bigness" as a threat to markets and, indeed, to the political system, legislation was enacted to address particular industries. This legislation afforded specialized agencies authority to regulate competition, to some extent in the same vein as that vested in the traditional antitrust agenciese.g., the Packers and Stockyards Act of 19213 and the Public Utility Holding Company Act of 1935.' Specialized agencies were also created to deal with the competitive functioning of industries in markets which were believed to embrace public assets, for example, air space and airlines and, initially, spectrum and broadcast communications. Part of the concern with "bigness" derived from fear of "excessive" competition, leading to statutory and regulatory restrictions on low-level pricing and limitations on market entry. The antitrust statutes were not immune from infection by this concern, as evidenced by enactment of the Robinson-Patman Act in 1936.' While the jurisdiction of sectoral agencies over competition and the relevant industries was often expressed in the governing statues as antitrust concerns, the overarching mandate was, and is, to protect and advance "the public interest." This ambiguous standard continues to provide sectoral agencies with more latitude to address industry competitive and other attributes beyond consumer welfare. The unfortunate ambiguity of this standard is brilliantly illuminated in an address by Judge Henry Friendly in the 1962 Oliver Wendell Holmes lectures at Harvard Law School and in a subsequent article in the Harvard Law Review.

### DA – Politics

#### Budget passes now – Manchin and Sinema support.

Carney 10-28-21

(Jordain, https://thehill.com/homenews/senate/579016-manchin-signals-hes-okay-with-175t-spending-framework-price-tag)

Sen. Joe Manchin (D-W.Va.) signaled on Thursday that he could support the $1.75 trillion price tag for Democrats' social spending plan, even as he hasn't said if he supports the overall framework deal. "We negotiated a good number that we worked off of, and we're all dealing in a good faith," Manchin told reporters. Asked if $1.75 trillion was too high, Manchin replied: "That was negotiated." ADVERTISEMENT Manchin's comments are his first indication that he supports a $1.75 trillion top line — the size of the framework deal that Biden announced. Democrats are proposing paying for their plan, in part, with tax increases focused on high-income households and corporations. The top line is dramatically smaller than the $3.5 trillion spending ceiling that Democrats paved the way for with a budget resolution earlier this year that teed up the spending deal. Progressives had hoped for a $6 trillion bill. But Manchin's preferred price tag has been substantially smaller. Manchin had said for weeks that he was at $1.5 trillion. Biden then threw out a top line of around $2 trillion, and Democrats over the past week said they hoped to get Manchin to come up to between $1.7 trillion and $2 trillion. Manchin's suggestion that he helped negotiate the $1.75 trillion top line for the deal on the spending framework comes as he sidestepped several times on Thursday saying if he supports the framework. “This is all in the hands of the House right now. I’ve worked in good faith and I look forward to continuing to work in good faith and that’s all I’m going to say,” Manchin told reporters earlier Thursday. ADVERTISEMENT Manchin has been at the center of a lobbying storm as Democrats try to lock down his support for different provisions of the spending framework. During a vote on Thursday, Senate Finance Committee Chairman Ron Wyden (D-Ore.), Senate Environment and Public Works Committee Chairman Tom Carper (D-Del.), Senate Democratic Whip Dick Durbin (D-Ill.), Senate Majority Leader Charles Schumer (D-N.Y.) and Sen. Angus King (I-Maine) stopped Manchin to speak with him. Sen. Kirsten Gillibrand (D-N.Y.), who is also trying to get Manchin's support for including a paid family leave plan in the package, was also spotted lobbying him on the Senate floor. Even as Manchin hasn't said whether he supports the framework, some of his Democratic colleagues told reporters on Thursday that they believe it has the backing of all 50 Senate Democrats. Ocasio-Cortez presses Biden on student debt: 'Doesn't need Manchin's... Manchin, Sinema put stamp on party, to progressive chagrin “It's clear that they back this plan," Sen. Chris Coons (D-Del.) told reporters about Manchin and Sen. Kyrsten Sinema (D-Ariz.), adding that he had spoken to both of them. Sen. Tim Kaine (D-Va.) added that he also believed there were 50 votes for the framework deal. "Joe Biden would not have announced this deal and put Sens. [Sinema] and Manchin’s name in the first paragraph of the announcement unless he felt a high degree of confidence," Kaine said.

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

Karaim 21

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

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

#### Budget key to solve climate change.

Dino Grandoni and Brady Dennis 8/11/21. Reporter covering energy and environmental policy. Reporter focusing on environmental policy and public health issues. “Biden aims for sweeping climate action as infrastructure, budget bills advance”. Washington Post. Aug 11 2021. https://www.washingtonpost.com/climate-environment/2021/08/10/biden-climate-congress/

After years of dragging their feet, lawmakers in Washington advanced a pair of major bills this week that include significant provisions for tackling climate change as scientists continue to ring alarm bells about the state of the planet.

The Senate approved on Tuesday a sweeping bipartisan $1.2 trillion infrastructure bill with funding for many public works meant to cut climate-warning emissions. A day later, Democrats in the chamber took a major step to adopt an even bigger, $3.5 trillion budget bill supporting yet more programs for cleaning up power plants and cars.

Each, if passed, would invest billions of dollars in the sort of clean energy transition the United States must make to have any chance of hitting the goal set by President Biden to cut the nation’s emissions by at least 50 percent by the end of this decade.

“This was one of the most significant legislative days we’ve had in a long time here,” Senate Majority Leader Charles E. Schumer (D-N.Y.) told reporters Wednesday.

But both bills face a potentially bumpy road ahead. Democrats still need to draft in committees the details of their massive budget reconciliation package over the coming weeks, with not a single vote to spare in the 50-50 split Senate. The bipartisan public-works bill, meanwhile, still needs approval from the House, where progressive Democrats hold significant sway.

The moves on Capitol Hill come as hundreds of scientists detailed this week the intensifying fires, floods and other catastrophes that will continue to worsen until humans dramatically scale back greenhouse gas emissions.

Scientists assembled by the United Nations made clear in a landmark report Monday that time is running out for the world to make immediate and dramatic cuts to emissions produced by the burning of fossil fuels and other human activities. U.N. Secretary General António Guterres called the sobering, sprawling report from the Intergovernmental Panel on Climate Change a “code red for humanity.”

But it remains unclear whether the new findings alone will be enough to spur new action in a Washington as politically divided as ever.

Climate change remains a distinctly fraught issue in the United States compared with many other countries, with the de facto leader of one of the two major parties — former president Donald Trump — dismissing the scientific consensus about human-caused climate change and downplaying its risks throughout his term.

Even if Congress passes bills with big climate provisions, regulations from the Biden administration are vulnerable to being reined in by federal court judges appointed by Trump and the most conservative Supreme Court in a generation. And the fate of many of the administration’s climate initiatives could depend on the Democratic Party retaining control of Congress — and on how Biden himself fares if he runs again in 2024.

If Biden and his Democratic allies in Congress succeed in shifting the nation rapidly toward a greener future, the math of climate change means that the rest of the world would have to follow suit, and quickly. The United States accounts for only about one-seventh of global emissions. The rest of the world — particularly the world’s largest emitter, China — would need to set more aggressive goals for reducing footprints as well.

Other countries have taken steps to do that. The European Union, for instance, agreed earlier this year to cut carbon emissions as a bloc by at least 55 percent by 2030. But how aggressively China, India, Russia and other nations will move in the years ahead remains an open question.

World leaders already faced mounting pressure to arrive at a major U.N. climate conference scheduled this fall in Scotland with more ambitious, concrete plans to slow greenhouse gas pollution. That pressure grew only more intense after Monday’s IPCC assessment, which found that the world is quickly running out of time to meet the goals of the 2015 Paris agreement.

The report found that humans can only unleash less than 500 additional gigatons of carbon dioxide — the equivalent of about 10 years of current global emissions — to have an even chance of limiting warming to 1.5 degrees Celsius (2.7 Fahrenheit) above preindustrial levels.

The hopes of hitting that target, the most aspirational goal outlined in the Paris accord, will soon slip away without rapid action, the report made clear. After all, the world has already warmed more than 1 degree Celsius (1.8 degrees Fahrenheit), with few signs of slowing unless nations begin to cut emissions at a rate unprecedented in history.

For Biden to live up to his promises to reduce U.S. emissions sharply in coming years, transition to electric vehicles and eliminate the carbon footprint of the power sector by 2035, his administration needs a helping hand from Congress.

The infrastructure package, which the Senate approved in a 69-to-30 vote with the support of 19 Senate Republicans, apportions billions of dollars for building new transmission lines, public transit and electric-car charging stations.

Meanwhile, the separate $3.5 trillion budget reconciliation bill, which Democrats plan to pass on their own, includes more far-reaching provisions for tackling climate change.

That measure would impose new import fees on polluters and give tax breaks for wind turbines, solar panels and electric vehicles. It would also seek to electrify vehicles used by the U.S. Postal Service and other federal agencies and create a new Civilian Climate Corps to enlist young people in planting trees and other conservation work.

Perhaps most crucially, the legislation would put new requirements on electricity providers to use cleaner forms of energy — something President Barack Obama’s administration tried but failed to do.

Dan Lashof, U.S. director of the World Resources Institute, called Tuesday’s bipartisan infrastructure package “a down payment” on the fight against climate change but not nearly enough going forward. He said it is essential for the Senate to also pass the budget-reconciliation package that funds a broader array of climate-focused measures to create jobs and shift the nation’s infrastructure toward one no longer reliant on fossil fuels.

“The forthcoming reconciliation package could be our best opportunity for advancing climate action this decade,” he said. “Kicking the can down the road is no longer an option as extreme weather wreaks havoc across our nation and around the world.”

Passing both bills, along with tighter regulations from the Environmental Protection Agency, “puts us within shooting distance” reducing emissions by 50 percent by 2030, according to Collin O’Mara, president of the National Wildlife Federation.

#### Warming causes extinction – global nuclear conflagration.

Michael Klare 20. The Nation’s defense correspondent, professor emeritus of peace and world-security studies at Hampshire College, senior visiting fellow at the Arms Control Association in Washington, DC. “How Rising Temperatures Increase the Likelihood of Nuclear War”. The Nation. Jan 13 2020. https://www.thenation.com/article/archive/nuclear-defense-climate-change/

President Donald Trump may not accept the scientific reality of climate change, but the nation’s senior military leaders recognize that climate disruption is already underway, and they are planning extraordinary measures to prevent it from spiraling into nuclear war. One particularly worrisome scenario is if extreme drought and abnormal monsoon rains devastate agriculture and unleash social chaos in Pakistan, potentially creating an opening for radical Islamists aligned with elements of the armed forces to seize some of the country’s 150 or so nuclear weapons. To avert such a potentially cataclysmic development, the US Joint Special Operations Command has conducted exercises for infiltrating Pakistan and locating the country’s nuclear munitions. Most of the necessary equipment for such raids is already in position at US bases in the region, according to a 2011 report from the nonprofit Nuclear Threat Initiative. “It’s safe to assume that planning for the worst-case scenario regarding Pakistan’s nukes has already taken place inside the US government,” said Roger Cressey, a former deputy director for counterterrorism in Bill Clinton’s and George W. Bush’s administrations in 2011.

Such an attack by the United States would be an act of war and would entail enormous risks of escalation, especially since the Pakistani military—the country’s most powerful institution—views the nation’s nuclear arsenal as its most prized possession and would fiercely resist any US attempt to disable it. “These are assets which are the pride of Pakistan, assets which are…guarded by a corps of 18,000 soldiers,” former Pakistani president Pervez Musharraf told NBC News in 2011. The Pakistani military “is not an army which doesn’t know how to fight. This is an army that has fought three wars. Please understand that.”

A potential US military incursion in nuclear-armed Pakistan is just one example of a crucial but little-​discussed aspect of international politics in the early 21st century: how the acceleration of climate change and nuclear war planning may make those threats to human survival harder to defuse. At present, the intersections between climate change and nuclear war might not seem obvious. But powerful forces are pushing both threats toward their most destructive outcomes.

In the case of climate change, the unbridled emission of carbon dioxide and other greenhouse gases is raising global temperatures to unmistakably dangerous levels. Despite growing worldwide reliance on wind and solar power for energy generation, the global demand for oil and natural gas continues to rise, and carbon emissions are projected to remain on an upward trajectory for the foreseeable future. It is highly unlikely, then, that the increase in average global temperature can be limited to 1.5 degrees Celsius, the aspirational goal adopted by the world’s governments under the Paris Agreement in 2015, or even to 2°C, the actual goal. After that threshold is crossed, scientists agree, it will prove almost impossible to avert catastrophic outcomes, such as the collapse of the Greenland and Antarctic ice sheets and a resulting sea level rise of 6 feet or more.

Climbing world temperatures and rising sea levels will diminish the supply of food and water in many resource-deprived areas, increasing the risk of widespread starvation, social unrest, and human flight. Global corn production, for example, is projected to fall by as much as 14 percent in a 2°C warmer world, according to research cited in a 2018 special report by the UN’s Intergovernmental Panel on Climate Change (IPCC). Food scarcity and crop failures risk pushing hundreds of millions of people into overcrowded cities, where the likelihood of pandemics, ethnic strife, and severe storm damage is bound to increase. All of this will impose an immense burden on human institutions. Some states may collapse or break up into a collection of warring chiefdoms—all fighting over sources of water and other vital resources.

A similar momentum is now evident in the emerging nuclear arms race, with all three major powers—China, Russia, and the United States—rushing to deploy a host of new munitions. This dangerous process commenced a decade ago, when Russian and Chinese leaders sought improvements to their nuclear arsenals and President Barack Obama, in order to secure Senate approval of the New Strategic Arms Reduction Treaty of 2010, agreed to initial funding for the modernization of all three legs of America’s strategic triad, which encompasses submarines, intercontinental ballistic missiles, and bombers. (New START, which mandated significant reductions in US and Russian arsenals, will expire in February 2021 unless renewed by the two countries.) Although Obama initiated the modernization of the nuclear triad, the Trump administration has sought funds to proceed with their full-scale production, at an estimated initial installment of $500 billion over 10 years.

Even during the initial modernization program of the Obama era, Russian and Chinese leaders were sufficiently alarmed to hasten their own nuclear acquisitions. Both countries were already in the process of modernizing their stockpiles—Russia to replace Cold War–era systems that had become unreliable, China to provide its relatively small arsenal with enhanced capabilities. Trump’s decision to acquire a whole new suite of ICBMs, nuclear-armed submarines, and bombers has added momentum to these efforts. And with all three major powers upgrading their arsenals, the other nuclear-weapon states—led by India, Pakistan, and North Korea—have been expanding their stockpiles as well. Moreover, with Trump’s recent decision to abandon the Intermediate-Range Nuclear Forces (INF) Treaty, all major powers are developing missile delivery systems for a regional nuclear war such as might erupt in Europe, South Asia, or the western Pacific.

All things being equal, rising temperatures will increase the likelihood of nuclear war, largely because climate change will heighten the risk of social stress, the decay of nation-states, and armed violence in general, as I argue in my new book, All Hell Breaking Loose. As food and water supplies dwindle and governments come under ever-increasing pressure to meet the vital needs of their populations, disputes over critical resources are likely to become more heated and violent, whether the parties involved have nuclear arms or not. But this danger is compounded by the possibility that several nuclear-armed powers—notably India, Pakistan, and China—will break apart as a result of climate change and accompanying battles over disputed supplies of water.

Together, these three countries are projected by the UN Population Division to number approximately 3.4 billion people in 2050, or 34 percent of the world’s population. Yet they possess a much smaller share of the world’s freshwater supplies, and climate change is destined to reduce what they have even further. Warmer temperatures are also expected to diminish crop yields in these countries, adding to the desperation of farmers and very likely resulting in widespread ethnic strife and population displacement. Under these circumstances, climate-related internal turmoil would increase the risk of nuclear war in two ways: by enabling the capture of nuclear arms by rogue elements of the military and their possible use against perceived enemies and by inciting wars between these states over vital supplies of water and other critical resources.

The risk to Pakistan from climate change is thought to be particularly acute. A large part of the population is still engaged in agriculture, and much of the best land—along with access to water—is controlled by wealthy landowners (who also dominate national politics). Water scarcity and mismanagement is a perennial challenge, and climate change is bound to make the problem worse. Climate and Social Stress: Implications for Security Analysis, a 2013 report by the National Research Council for the US intelligence community, highlights the danger of chaos and conflict in that country as global warming advances. Pakistan, the report notes, is expected to suffer from inadequate water supplies during the dry season and severe flooding during the monsoon—outcomes that will devastate its agriculture and amplify the poverty and unrest already afflicting much of the country. “The Pakistan case,” the report reads, “illustrates how a highly stressed environmental system on which a tense society depends can be a source of political instability and how that source can intensify when climate events put increased stress on the system.” Thus, as global temperatures rise and agriculture declines, Pakistan could shatter along ethnic, class, and religious lines, precisely the scenario that might trigger the sort of intervention anticipated by the US Joint Special Operations Command.

Assuming that Pakistan remains intact, another great danger arising from increasing world temperatures is a conflict between it and India or between China and India over access to shared river systems. Whatever their differences, Pakistan and western India are forced by geography to share a single river system, the Indus, for much of their water requirements. Likewise, western China and eastern India also share a river, the Brahmaputra, for their vital water needs. The Indus and the Brahmaputra obtain much of their flow from periods of heavy precipitation; they also depend on meltwater from Himalayan glaciers, and these are at risk of melting because of rising temperatures. According to the IPCC, the Himalayan glaciers could lose as much as 29 percent of their total mass by 2035 and 78 percent by 2100. This would produce periodic flooding as the ice melts but would eventually result in long periods of negligible flow, with calamitous consequences for downstream agriculture. The widespread starvation and chaos that could result would prove daunting to all the governments involved and make any water-related disputes between them a potential flash point for escalation.

As in Pakistan, water supply has always played a pivotal role in the social and economic life of China and India, with both countries highly dependent on a few major river systems for civic and agricultural purposes. Excessive rainfall can lead to catastrophic flooding, and prolonged drought has often led to widespread famine and mass starvation. In such a setting, water management has always been a prime responsibility of government—and a failure to fulfill this function effectively has often resulted in civil unrest. Climate change is bound to increase this danger by causing prolonged water shortages interspersed with severe flooding. This has prompted leaders of both countries to build ever more dams on all key rivers.

India, as the upstream power on several tributaries of the Indus, and China, as the upstream power on the Brahmaputra, have considered damming these rivers and diverting their waters for exclusive national use, thereby diminishing the flow to downstream users. Three of the Indus’s principal tributaries, the Jhelum, Chenab, and Ravi rivers, flow through Indian-controlled Kashmir (now in total lockdown, with government forces suppressing all public functions). It’s possible that India seeks full control of Kashmir in order to dam the tributaries there and divert their waters from Pakistan—a move that could easily trigger a war if it occurs at a time of severe food and water stress and one that would very likely invite the use of nuclear weapons, given Pakistan’s attitude toward them.

The situation regarding the Brahmaputra could prove equally precarious. China has already installed one dam on the river, the Zangmu Dam in Tibet, and has announced plans for several more. Some Chinese hydrologists have proposed the construction of canals linking the Brahmaputra to more northerly rivers in China, allowing the diversion of its waters to drought-stricken areas of the heavily populated northeast. These plans have yet to come to fruition, but as global warming increases water scarcity across northern China, Beijing might proceed with the idea. “If China was determined to move forward with such a scheme,” the US National Intelligence Council warned in 2009, “it could become a major element in pushing China and India towards an adversarial rather than simply a competitive relationship.”

Severe water scarcity in northern China could prompt yet another move with nuclear implications: an attempted annexation by China of largely uninhabited but water-rich areas of Russian Siberia. Thousands of Chinese farmers and merchants have already taken up residence in eastern Siberia, and some commentators have spoken of a time when climate change prompts a formal Chinese takeover of those areas—which would almost certainly prompt fierce Russian resistance and the possible use of nuclear weapons.

In the Arctic, global warming is producing a wholly different sort of peril: geopolitical competition and conflict made possible by the melting of the polar ice cap. Before long, the Arctic ice cap is expected to disappear in summertime and to shrink noticeably in the winter, making the region more attractive for resource extraction. According to the US Geological Survey, an estimated 30 percent of the world’s remaining undiscovered natural gas is above the Arctic Circle; vast reserves of iron ore, uranium, and rare earth minerals are also thought to be buried there. These resources, along with the appeal of faster commercial shipping routes linking Europe and Asia, have induced all the major powers, including China, to establish or expand operations in the region. Russia has rehabilitated numerous Arctic bases abandoned after the Cold War and built others; the United States has done likewise, modernizing its radar installation at Thule in Greenland, reoccupying an airfield at Keflavík in Iceland, and establishing bases in northern Norway.

Increased economic and military competition in the Arctic has significant nuclear implications, as numerous weapons are deployed there and geography lends it a key role in many nuclear scenarios. Most of Russia’s missile-carrying submarines are based near Murmansk, on the Barents Sea (an offshoot of the Arctic Ocean), and many of its nuclear-armed bombers are also at bases in the region to take advantage of the short polar route to North America. As a counterweight, the Pentagon has deployed additional subs and antisubmarine aircraft near the Barents Sea and interceptor aircraft in Alaska, followed by further measures by Moscow. “I do not want to stoke any fears here,” Russian President Vladimir Putin declared in June 2017, “but experts are aware that US nuclear submarines remain on duty in northern Norway…. We must protect [Russia’s] shore accordingly.”

On the other side of the equation, an intensifying arms race will block progress against climate change by siphoning resources needed for a global energy transition and by poisoning the relations among the great powers, impeding joint efforts to slow the warming.

With the signing of the Paris Agreement, it appeared that the great powers might unite in a global effort to slash greenhouse gas emissions quickly enough to avoid catastrophe, but those hopes have since receded. At the time, Obama emphasized that limiting global warming would require nations to work together in an environment of trust and peaceful cooperation. Instead of leading the global transition to a postcarbon energy system, however, the major powers are spending massively to enhance their military capabilities and engaging in conflict-provoking behaviors.

Since fiscal year 2016, the annual budget of the US Department of Defense has risen from $580 billion to $738 billion in fiscal year 2020. When the budget increases for each fiscal year since 2016 are combined, the United States will have spent an additional $380 billion on military programs by the end of this fiscal year—more than enough to jump-start the transition to a carbon-​free economy. If the Pentagon budget rises as planned to $747 billion in fiscal year 2024, a total of $989 billion in additional spending will have been devoted to military operations and procurement over this period, leaving precious little money for a Green New Deal or any other scheme for systemic decarbonization.

Meanwhile, policy-makers in Washington, Beijing, and Moscow increasingly regard one another as implacable and dangerous adversaries. “As China and Russia seek to expand their global influence,” then–Director of National Intelligence Dan Coats informed Congress in a January 2019 report, “they are eroding once well-established security norms and increasing the risk of regional conflicts.” Chinese and Russian officials have been making similar statements about the United States. Secondary powers like India, Pakistan, and Turkey are also assuming increasingly militaristic postures, facilitating the potential spread of nuclear weapons and exacerbating regional tensions. In this environment, it is almost impossible to imagine future climate negotiations at which the great powers agree on concrete measures for a rapid transition to a clean energy economy.

In a world constantly poised for nuclear war while facing widespread state decay from climate disruption, these twin threats would intermingle and intensify each other. Climate-​related resource stresses and disputes would increase the level of global discord and the risk of nuclear escalation; the nuclear arms race would poison relations between states and make a global energy transition impossible.

### K – LPE

#### The 1AC’s construct of the firm as the locus of competitive innovation reproduces neoclassical economic orthodoxy. Antitrust is justified as an intervention to correct “market failures.” Market failure relies on the ideal of perfect competition.

Nathan **TANKUS** Research Director Modern Monetary Network **AND** Luke **HERRINE** PhD Candidate @ Yale Law, JD NYU & Former Clerk Second Circuit of Appeals **’21** “Competition Law as Collective Bargaining Law” <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3847377> p. 1-3

­ “[T]oo often discourse about ‘the market’ conveys the sense of something definite—a space or constitution of exchange...when in fact, sometimes unknown to the term’s user, it is being employed as a metaphor of economic process, or an idealisation or abstraction from that process.” – E.P. Thompson2 Introduction To those who study governance of the labor relationship, it is obvious that the relationship between business and labor must be governed, and that stability in this social relation is something valued by labor, business, and society writ large.3 Strangely, the idea that governance is necessary and price stability is good are both obscure interlopers to the study of competition law. To bridge the gap between these two areas of law--and incidentally give labor a greater role and stature in theorizing competition law--we aim to provide a general “market governance” framework for understanding how markets are governed in the context of the legal rules that allow and disallow certain forms of coordination. This framework draws from multiple heterodox traditions in political economy, but is particularly oriented toward building out the emerging framework of Neochartalist microeconomics.4

[Insert Footnote 4 – Turner]

Neochartalism, or Modern Monetary Theory (MMT), began as a macroeconomic framework for understanding how legal institutions produce and reproduce money and monetary value, particularly the acceptance of monetary objects in payments of taxes and court-ordered obligations. In developing over the last twenty-five years, Neochartalism has become an interdisciplinary perspective for understanding and reinterpreting a variety of social phenomena. Some scholarship, particularly the path-breaking work of the late economist Fred Lee (who we rely on in conceptualizing issues in this chapter) builds up a microeconomic framework that is uniquely consistent with--and reliant on--MMT insights. We hope others choose to follow Lee and ourselves in making contributions to Neochartalist Microeconomics and expanding the reach of Neochartalism in a variety of subfields that remain dominated by mainstream microeconomics.

While it is beyond the scope of the current chapter to identify all the ways in which our current perspective accords with unique insights of Neochartalism, our focus on potential financial and market instability, money prices and money income as a focus of analysis rather than relative prices and “real variables'' reflect our Neochartalist lens. Our focus on the legal construction of markets also adds to Neochartalism’s emphasis on the legal construction of a monetary production economy in general. Our focus on inherent and irreducible mediated social interdependence also accords with the scholarly perspective that Neochartalist humanities scholars bring to Neochartalism e.g. SCOTT FERGUSON, DECLARATIONS OF DEPENDENCE: MONEY, AESTHETICS, AND THE POLITICS OF CARE (2018).

[End footnote 4]

Arriving at a theory of market governance requires rejecting economic common sense. Far too much economics scholarship--both among orthodox scholars and their critics--treats “perfect competition” as the analytical (and often normative) baseline for all markets, including labor markets. Under perfect competition, prices (including wages) are arrived at entirely via the uncoordinated matching of bids and asks, assumed to result in settled equilibriums represented by intersecting supply and demand curves. If all markets are perfectly competitive (and certain other conditions obtain), then each input and output has its proper price which sends “signals” throughout the economy and results in a perfectly “efficient” allocation of resources. From this perspective, coordination, especially coordination over prices (again, including wages), appears as an unnatural intervention, a way for those acting collectively to collect “rents” above the “real” value of their contribution to society. If coordination is to be justified, it is usually to correct for some other deviation from perfect competition: workers might bargain collectively to capture some of a monopsonist's rents, for example. And, indeed, many of those trained in economics who advocate for collective bargaining or other worker-empowerment measures appeal to one or more “market failures”.5 In doing so, they reproduce the idea— intentionally or not—that if competition were finally left to do its work it would reveal the prices that reflect the allocation of goods and services that perfectly matches relative scarcity, that markets would work “better” if they were moved “closer” to (or to “resemble” or “approximate”) the “competitive” ideal.6 Collective bargaining is a distortion, but it is the best we can do in our distorted world.

But here's the rub: collective bargaining is not a distortion of a preexisting “labor market”. More generally, coordination between market participants (over price or other matters) is not in itself a distortion of any market. There is not and has never been a market without coordination, including over prices.

#### Neoclassical paradigm will destroy humanity and the biosphere.

Anne **FREMAUX** PhD Political Ecology & Philosophy @ Grenoble ‘**19** *After the Anthropocene: Green Republicanism in a Post-Capitalist World* p. 1-3

If the main starting point of this book is the severe environmental crisis we are facing and the natural planet-wide collapse toward which we are heading, today’s ecological reality is powerfully connected to other issues such as growing socioeconomic inequalities, the erosion of democratic institutions, the organized apathy of citizens, the loss of power of nation-states in favor of corporations, the progressive disappearance of the notion of common good, and the economic colonization of the social, cultural, and political life by economic objectives. The global ecological crisis reveals these interlinked disasters caused by the core components of capitalism that include: an excessive exploitation of nature, the rise of industrialism, the self-destructive over- confidence in human-technical power, the arrogant anthropocentric mind- set, and denial of ecological limits, as well as the narrow rationalism and materialism that develop within a reductionist predominant form of science.

Neoliberalism as a ‘global system’ threatens societies as a whole and more especially the core values of social communities and democracy, such as justice, ‘common decency,’ civic virtue, or citizenship. In neoliberal patterns, economic efficiency, market values, employability, consumer freedom, and instrumental rationality are favored over democratic participation, civic values, personal autonomy, active citizenship, intellectual development (‘enlightenment’1), and moral rationality (reasonability2). Institutions dedicated to the common good are systematically turned into competitive structures to satisfy the interests of markets and greedy elites. Pluralism is disappearing under the assault of a one-dimensional consumer pattern which treats humans and non-humans as commodities under the hegemony of private interests. Civil society, an essential element of the agonistic and critical democracy defended in this book, is losing out to ‘spectator democracy.’ Indeed, citizens are more and more passive and self-centered in part because existing political and democratic structures leave them with few opportunities to participate and make collective decisions. As a consequence, the link between democratic politics and citizens is being critically weakened. Neoliberal individuals end up being overtaken by lassitude and resignation, indifference, and loss of interest for the shared common world. What defines neoliberal society is, indeed, a widespread disaffection for democracy and social bonds entailed by the loss of political agency and self-determination. In such a system, propaganda is necessary to manufacture consent3 and to shape the fundamental values to ensure that individuals see themselves as consumers, workers, or owners of capital, rather than citizens, spiritual or relational individuals, friends, or members of social and ecological communities. In order to be fully operational, such a system must also rely on high doses of cynicism and the value of relativism cultivated by deconstructive postmodern views.

Neoliberal competitive market-state systems have colonized all aspects of life, but mainly, they have subjugated nature and used it as an ‘unlimited’ spring of profit and resources intended to feed the logic of growth. The globalized neoliberal framework behaves as if nature were only a neutral background for profit-seeking and economic development. In order to push back the ecological limits that are more and more visible, neoliberals argue that those limits can be transcended through decoupling and technological innovations (Chapter 5). Indeed, constructivist neoliberal governments act as if the biosphere were a mere component of the socioeconomic sphere. As an anti-ecological ideology, neoliberalism denies the existence of natural limits and promotes unlimited material wants vs. limited resources, a cult of endless consumption (consumerism), and techno-fixes (techno-optimism) as the solution to social and ecological problems. The appropriation and commodification of nature undertaken by this form of economic ideology and the freedom it enshrines—understood mainly as the legitimate exercise of extractive power—entail that the environment is viewed only as an instrumental source of raw material and sinks of fossil fuels rather than as an ethically valuable physical, biological, and chemical context of life. Inevitably, this type of economy has supported an insatiable extraction that is today overwhelming ecosystemic capacities. Neoclassical economics is certainly the instrumental form of rationality ‘that most actively opposes the ethical valuation of the environment’ (Smith, 2001: 26).

The neoliberal capitalist agenda, associated with an arrogant anthropocentrism and the technological optimism of many political leaders, experts, techno-scientists, academics, and citizens, has transformed nature and people into raw materials (‘natural’ and ‘human resources’). It has replaced democratic and republican institutions—defined by their concern for the common good—by structures aiming at facilitating the activities and profits of corporations and markets. It has deprived Western political structures of substantial democratic energy by turning citizens of wealthy liberal nations into demoralized and nihilist homo oeconomicus (‘neoliberal citizens’), that is, passive consumers as opposed to active citizens. More than that, neoliberalism, through mass media, entertainment, information, and educational systems, has incrementally converted all the spheres, activities, and dimen- sions of life into economic ones (‘economization’ or ‘marketization’ of life). Private and public institutions are used as ways to transmit the values of capitalism.4 As an unethical and unsustainable model of commercialization, ultraliberal capitalism supports crass commodification, intensifies ine-ualities and transforms everything in its way—from non-human nature to human beings—into replaceable, dispensable and disposable products. As a global threat, neoliberalism leads to ‘environmental stresses (water shortages, deforestation, soil erosion or climate change), food and energy insecurity, peak oil, rising poverty and inequalities within and between societies, increasing passivity of citizens within democracies and the inexorable rise of corporate power within and over the democratic state’ (Barry, 2008: 3).

The price we, humans, are socially, politically and ecologically paying and will continue to pay in the future for the triumph of the neoliberal ideology is disproportionate with anything humankind has experienced so far (see Fig. 1.2). However, human relatively recent history already shows that the popular passivity and political apathy (mentioned above) fostered by cynical and disempowering systems of ideas have the potential to favour the rise of dictatorial regimes in which a father figure or ‘strong man’ could take upon the conduct of public affairs. At a time when chauvinistic, racist, anti-elitist, and macho-ist parties are dangerously rising in all Western countries, this fear is taking a serious turn, which includes the risk of an authoritarian ecology.

#### We should use the framework of challenge-driven political economy instead of a competitiveness framework. Using the power of the state to make and shape markets is key to direct policy to solve inequality and climate change.

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Twenty-first-century policymaking is increasingly defined by the need to respond to major social, environmental, and economic challenges. Sometimes referred to as ‘grand challenges’, these include threats like climate change, demographic, health, and well-being concerns, as well as the difficulties of generating sustainable and inclusive growth. Against this background, policymakers are increasingly embracing the idea of using industrial and innovation policy to tackle these ‘grand challenges’. Examples of challenge-led policy frameworks include the United Nation’s Sustainable Development Goals (SDGs; Borras,­­ 2019), the European Union’s Horizon Europe research and development programme (Mazzucato, 2018a), and the UK’s 2017 Industrial Strategy White Paper (HM Government, 2018).

Challenge-driven policy frameworks are emerging in parallel to well-established modernization and competitiveness frameworks**.** While 1 2 modernization, and in particular competitiveness frameworks, rely on the idea that government should first and foremost fix market failures,3 a challenge-driven agenda does not have such clearly defined theoretical origins and analytical lenses. As Richard Nelson argued in 1977 in his seminal book The Moon and the Ghetto, getting man to the moon and back is not the same as solving the problem of ghettos in American cities. Put differently, the nature of our knowledge about socio-economic challenges differs from our perception of strictly technical challenges. We can discover answers to technical puzzles; socio-economic issues do not have a single correct discoverable solution. Such issues require continuous discussion, experimentation, and learning.

We believe challenge-led growth requires a new conceptual and analytical framework that has at its core the idea of confronting the direction of growth with growth that is, for example, more inclusive and sustainable. Such a framework should focus on market shaping and market co-creating (Mazzucato, 2016). This is a question of both theory and policy practice. In theory, challenge-driven innovation policy questions both established neoclassical and evolutionary concepts (Schot and Steinmueller, 2018). In policy practice, directed policies require rethinking what is meant by ‘vertical policies’.

Industrial policies have always been composed of both a horizontal and a vertical element. Horizontal policies have historically been focused on skills, infrastructure, and education, while vertical policies have focused on sectors like transport, health, energy, or technologies. These two traditional approaches roughly embody differing schools of economics: neoclassical economics-inspired horizontal policies focusing on supply-side factors and inputs; and evolutionary economics-inspired policies putting emphasis on demand-side factors and systemic interactions (Nelson and Winter, 1974; Hausmann and Rodrik, 2006 for a synthesis). Although certain sectors might be more suited to sectorspecific vertical strategies, the ‘grand challenges’ expressed in SDGs are cross-sectoral by nature and hence we cannot simply apply a vertical approach to them. Both neoclassical and evolutionary approaches to industrial policy have relied on the idea that the best policy outcome is economy-wide development, without specifying its nature. In policy this has led to managing economies according to GDP growth rates, competitiveness indices and rankings, or other macro indicators (e.g. exports, patents) (Drechsler, 2019). Yet, many SDGs are only indirectly related to the economy and hence many of the key issues around SDGs have not been theorized in the context of innovation and industrial policy (see, e.g., Zehavi and Brenzitz, 2017).

In this chapter we argue that through well-defined goals, or more specifically ‘missions’, that are focused on solving important societal challenges, policymakers have the opportunity to determine the direction of growth by making strategic investments, coordinating actions across many different sectors, and nurturing new industrial landscapes that the private sector can develop further (Mazzucato, 2017; Mazzucato and Penna, 2016). The result would be an increase in cross-sectoral learning and macroeconomic stability. This ‘mission-oriented’ approach to industrial policy is not about top-down planning by an overbearing state; it is about providing a direction for growth, increasing business expectations about future growth areas, and catalysing activity—self-discovery by firms (Hausmann and Rodrik, 2003)—that otherwise would not happen (Mazzucato and Perez, 2015). It is not about de-risking and levelling the playing field, nor about supporting more competitive sectors over less (Aghion et al., 2015), since the market does not always know best, but about tilting the playing field in the direction of the desired societal goals, such as the SDGs. However, we argue, to achieve this requires a new analytical framework based on the idea of public value and a policymaking framework aimed at shaping markets in addition to fixing various existing failures. Indeed, we argue that if we want to take grand challenges such as the SDGs seriously as policy goals, market shaping should become the overarching approach followed in various policy fields.

### CP – Sunbursting

#### The United States federal judiciary should decline to prohibit arbitration agreements that operate as a prospective waiver of a party’s right to statutory remedies on the basis that such would undermine judicial deference to reliance interests.

#### The Supreme Court of the United States should announce that existing precedent in this area is no longer reliable and that relevant parties should be on notice that the reliance interests that caused it to be upheld in this case will not apply to future challenges on the issue.

#### Deploying the technique used in Great Northern Railway Company v. Sunburst Oil and Refining Company, the Supreme Court should issue judicial dicta in favor of holding prohibition of arbitration agreements that operate as a prospective waiver of a party’s right to statutory remedies.

#### The United States federal judiciary should not deny certiorari for challenges on the issue.

#### Sunbursting solves---facilitates, not mandates, binding application, applies prospectively, and escapes disturbing caselaw.

Horneman et al ’13 [Hosea, Steven Blickensderfer, and Trevor Jones; 2013; Law clerk for Florida’s Fifth District Court, J.D. from Liberty University; Stetson Law Review, “A Catch-22 Of Cert Review: How Florida's "Clearly Established Law' Requirement Stifles Caselaw Development, And How Sunbursting Can Help The Sunshine State,” Vol. 42; RP]

2. Questions from District Court to Supreme Court A district court may certify a question of great public importance to the Florida Supreme Court. 52 Thus, in either the issue-of-first-impression or Pardo scenario, a district court can attempt to avoid the clearly-established-law problem by denying relief yet certifying the merits issue to the Supreme Court.53 This procedure allows the Supreme Court to decide the merits issue without the constraints of certiorari. It also has the benefit of allowing a decision that is binding throughout the state. Nevertheless, as with county court certified questions, this solution is easier said than done. The district court must first be persuaded that the issue is actually one of great public importance.5 4 Although a district court is more likely to certify a question if it has certain attributes, 5 5 the court's discretion is absolute,5 6 and few questions are actually certified.5 ' Likewise, the Florida Supreme Court has absolute discretion in deciding whether to accept the case.58 Overall, the Court has been accepting comparatively fewer questions over the last couple of decades, 9 and the chance of acceptance is perhaps fifty percent. 60 The Court is unlikely to accept an unusual, nonrecurring legal issue.6 1 And it is not clear that the procedural difficulties created by the clearly-established-law problem are enough to transform a substantively unimportant issue into one of great public importance.62 In summary, each of the existing solutions to the clearly-established-law problem has some benefits but also important drawbacks. Next, we propose a comprehensive solution that resolves the problem without these limitations. V. OUR PROPOSED SOLUTION: "SUNBURSTING" To overcome the caselaw-development hindrances caused by the clearly-established-law requirement, Florida's district courts of appeal should adopt a judicial decision-making approach known as "sunbursting." Under this approach, a reviewing court reaches a holding on the merits in a case without applying that holding to the parties. In effect, the court's decision operates prospectively. Utilizing that technique in the certiorari context, a district court would grant or deny relief based on whether the lower court followed clearly established law, while also ruling on the merits of the issue raised for review. By sunbursting, the district courts could refine and develop caselaw where it is needed, while faithfully adhering to the traditional understanding of the clearly-established-law requirement. In other words, sunbursting would allow courts to escape the clearly-established-law conundrum. In this Part, we first explain more fully what sunbursting is and how it has developed as an alternative decision-making approach. Then, we illustrate how the sunbursting concept has been applied in a closely analogous area of law-federal Section 1983 tort cases. Finally, we explain in more detail how district courts can apply sunbursting to the clearly-established-law problem.

#### It spurs adoption down the road---the plan’s sudden, retroactive change breeds chaos into jurists.

Fairchild ’68 [Thomas; 1968; Attorney, L.L.B. from the University of Wisconsin; Marquette Law Review, “Limitation of New Judge-Made Law to Prospective Effect Only: "Prospective Overruling" or Sunbursting,” <https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2556&context=mulr>; RP]

It is commonplace, in the current period, that the high courts of the states and of the United States make abrupt changes in rules of common law and in constitutional interpretation. The pressure of social needs which induces such changes, sometimes described by saying that the law must be in tune with the times, and must respond to newly emerging conditions of society,' wars with the proposition that stability in the law is important to society, capsuled in the rule of stare decisis. These opposing forces generate uneasiness, yea struggle, in the minds of appellate judges. The subject of this article is a technique, most often called "prospective overruling," which facilitates change by limiting the undermining of stability which a judicially pronounced change would otherwise produce. Prospective overruling is a device whereby a court limits the effect of a new rule to future transactions only, or, more commonly, to future transactions plus the case before the court which presents the opportunity for the announcement of the change. Really, though the device is usually called prospective the distinctive feature of it is the denial or limitation of overruling, retroactive application of a judicial decision. If every judicial departure from precedent were limited to prospective operation, this would fit a philosophy that any judicial decision, at least of a court of last resort, makes law which remains in effect until a later decision conflicts with it. But we do not really follow that philosophy, and we more commonly accept the classical doctrine that a decision which overrules a previous one is accorded retroactive effect, at least until it collides with a statute of limitations, an accord and satisfaction, or res judicata. We employ the technique of prospective overruling as an exceptional expedient when the traditional retroactivity would wreak more havoc in society than society's interest in stability will tolerate. Whatever explanation we may make of prospective overruling in terms of judicial philosophy, clear it is that the use of the technique makes change less disruptive, and thereby makes an appellate court less apprehensive about making a change when it considers a new rule to be more sound than the old. Prospective overruling is sometimes dubbed "sunbursting," a term with a degree of aptness, but which came to apply through sheer coincidence. What practicing lawyer would realize that "sunbursting" refers to a technique in the work of an appellate judge? who has ever imagined himself an eavesdropper on a conference of justices, and hearing one remark to another, "How about it, Joe, shall we sunburst this one?" If one thinks of a judicially pronounced new rule of law as the rosy dawn of a new day, "sunbursting" has an appropriate connotation. The word arrived on the scene, however, as the" name.of a party to litigation which reached the Supreme Court of the United in 1932, Great Northern Railway Company v. Sunburst Oil & Refiting Company.2 Sunburst, a shipper, had sued Great Northern in Montana for refund of excessive charges. Sunburst recovered, relying on a rule of law announced by the Supreme Court of Montana in 1921. When the Sunburst case reached the Montana high court, the court overruled the 1921 decision, but limited the change to cases arising in the future.3 This was prospective overruling in its purest form. New law was announced for cases arising out of future events, but the old rule was applied to the case at hand, arising out of events which had occurred while the old rule was the latest word. 4

### DA – Sua Sponte

#### Ruling sua sponte undermines the judicial process.

Poor & Goldschmidt ’15 [E. King & James E; DRI member and partner in Quarles & Brady LLP’s Chicago office, chair of the firm’s appellate practice, member of the board of directors of the Appellate Lawyers Association, author of two petitions for certiorari granted by the Supreme Court, 25 years of law experience; commercial litigation attorney, associate in Quarles & Brady LLP’s Milwaukee office; October 2015; “Sua Sponte Decisions on Appeal”; <https://www.quarles.com/content/uploads/2015/10/FTD-1510-Poor-Goldschmidt.pdf>; For the Defense, Appellate Advocacy; accessed 4/3/18; TV] \*Edited for reading clarity.

But these permissive exceptions are not consistently applied, and there remain ample examples of courts adhering to the principle of party presentation. See Hartmann v. Prudential Life Ins. Co. of America, 9 F.3d 1207 (7th Cir. 1993) (applying the appellate waiver rule, due to an error by counsel, against orphans whose step- mother killed their father after bribing an insurance agent to defraud the orphans). Commentators agree that such exceptions, together with balancing tests specific to various federal circuits, are susceptible to outcome-oriented application and may just be so many manifestations of the gorilla rule. Miller, supra, at 1279. “No General Rule” This patchwork of rules and exceptions leaves sua sponte decision making without any widely-accepted body of authority that is consistently applied, let alone any controlling authority on this question. As the Supreme Court summed up in Singleton v. Wulff, 428 U.S. 106, 121 (1976), “[t]he matter of what questions may be taken and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule.” If the general rule is really that there is “no general rule,” then where does that leave us? One place to begin is to ask, what happens to our adversary system and the values underlying it when a court resolves a case without hearing from the parties involved? Undermining the Adversarial Process When a court raises an issue on its own and decides it without hearing from the parties involved, it chips away at our adversary system. When a court chooses to treat a case as a vehicle to decide an issue that the court believes is an overlooked, dispositive issue, rather than one addressed by the parties, then the court has ventured away from its role as a neutral decision maker into a subjective realm. In doing so, the court concludes on its own that a particular new question will dispose of the case. It then returns to being a neutral decision maker to decide the very issue which it has selected as dis- positive. A. Milani & M. Smith, Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts, 69 Tenn. L. Rev. 245, 277–78 (2002). But when a court itself selects new issues—without party participation—and then decides those very same issues, the values underlying our adversary system are compromised. The parties are far more likely than the reviewing court to explore the peculiarities and nuances of the case; after all, they have every incentive to do so. On the other hand, considerations of effciency may cause courts to be more likely to reach conclusions on issues that they them- selves have already identified as resolving the case more directly. Id. Moreover, even if identifying new issues does not actually undermine a court’s impartiality, it may still create that impression: “When [the court] a decision maker becomes an active questioner or otherwise participates in a case, she is likely to be perceived as partisan rather than neutral.” Id. at 280. Decisions reached under a court’s own initiative do not “promote respect either for the Court’s adjudicatory process or for the stability of its decisions,” and other commentators have described such decisions as “unseemly,” “not likely to be regarded favorably,” a breach of the parties’ trust, and a sacrifice of the court’s function as an adjudicator. Id. at 280–81 (quoting Justice Harlan’s dissent in Mapp v. Ohio, 367 U.S. 643, 677 (1960)). Such perceptions work against both litigants’ and society’s acceptance of judicial decisions. Id. at 284. As explained elsewhere, “If the grounds for the decision fall completely outside the framework of the argument, making all that was discussed or proved at the hearing irrelevant... the adjudicative process has become a sham, for the parties’ participation in the decision has lost all meaning.” Id. at 285 (quoting L. Fuller, e Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 388 (1978)).

#### That corrodes rule of law via abdicating judicial legitimacy.

Donaldson ’17 [Michael J; Partner at Burnet, Duckworth & Palmer, LLP, Master of Laws from Columbia; 2017; “Justice in Full Is Time Well Spent: Why the Supreme Court Should Ban Sua Sponte Dismissals”; http://www.bdplaw.com/publications/justice-in-full-is-time-well-spent-why-the-supreme-court-should-ban-sua-sponte-dismissals/; Quinnipiac Law Review, Vol 36; accessed 9/15/21; TV]

There is a lot wrong with sua sponte dismissals. They are inconsistent with the adversary system, and change the judge's role from referee to contestant.85 They can undermine respect for the legal system. And they increase the likelihood of errors, leading to unnecessary appeals and a waste of judicial resources." But most importantly, they lack the very due process the courts are supposed to safeguard.

A. Failure to Provide Due Process

Sua sponte decisions are inconsistent with due process.89 Period. There is no other way to look at it. 90 Not only does a plaintiff surprised by a sua sponte dismissal not receive "due" process, she receives no process at all.91 She has no idea her lawsuit is in jeopardy of being dismissed, no idea what the reasons for that dismissal might be, and no opportunity to respond. 92 This is the case whether the court's dismissal decision is right or wrong. 93 As Allan Vestal puts it:

When [issues are] considered sua sponte both parties are taken completely by surprise and the court decides the matter on grounds not urged by either. Neither has had any opportunity to consider the matter, and both are now bound by res judicata grounded on considerations which represent not well reasoned positions for the litigants, but rather only the fortuitous decision of a 94 wayward court.

The reference to res judicata here is important. As Milani and Smith point out, the res judicata doctrine requires a party or its privy to be a participant in the former proceeding before the court can bind him to the consequences of that proceeding because, according to the Supreme Court, "The opportunity to be heard is an essential requisite of due process of law in judicial proceedings."95 If this is the standard applied to former proceedings, how can it not apply to proceedings currently before the court? Lon Fuller once wrote of sua sponte decisionmaking:

[I]f the grounds for the decision fall completely outside the framework of the argument, making all that was discussed or proved at the hearing irrelevant ... the adjudicative process has become a sham, for the parties' participation in the decision has lost all meaning.9 6

The situation is even harder to defend when there is no hearing at all. 9

B. Undermining Respect for the Legal System

The perception that the courts are regularly failing to provide due process cannot do anything but undermine respect for the legal system.9 8 Sir Robert Megarry, in the speech quoted at the beginning of this article,99 underlined the importance of sending the unsuccessful litigant away feeling as though he has had a fair hearing.' Justice Harlan was obviously cognizant of this problem in his dissent in Mapp, when he warned that the Court's sua sponte decision in that case was "not likely to promote respect ... for the court's adjudicatory process."o

This is not a farfetched concern. Offenkrantz and Lichter note that in the Second Circuit's high-profile decision to "[sua sponte remove] Judge Shira Scheindlin from further proceedings in two stop-and-frisk cases," an order which left the Judge "completely blindsided," "newspapers were reporting that appellate courts had carte blanche to raise and decide important issues in a case without ever seeking the input of any of the parties to it."' 0 2

Megarry tells a story of a client of his who had a fatal flaw in his case, but insisted on going ahead anyway.10 3 Instead of seizing on the fatal flaw at the outset, the trial judge heard the case all the way through.1 0 4 The client won on his two collateral points, but, as expected, lost on the key issue. o Megarry tells the story of what happened next:

The course taken by the judge must have prolonged the hearing by an hour or two. But the effect on the defeated tenant was striking. True, he had lost the last point and the case as a whole; but he had been victorious on the other two points. All that nonsense about the agent's lack of authority and the letter not having been received in time had been blown away by the judge. It was a pity about the wording of the letter, of course; but he had seen his case being put in full, and none of his grievances had been left unheard or unresolved.

This is as it should be. Courts must not, as Megarry puts it, give in to "the temptation of brevity."'0 o Their very legitimacy hangs in the balance. A loss of respect for the courts marks the beginning of the unraveling of the rule of law. This is simply too high of a price to pay for efficiency.

#### Extinction.

Davis and Morse ’18 [Christina and Julia; September 19; Professor of Government at Harvard University; Professor of Political Science at the University of California at Santa Barbara; International Studies Quarterly, “Protecting Trade by Legalizing Political Disputes: Why Countries Bring Cases to the International Court of Justice,” vol. 62]

Trade, Conflict, and Adjudication

We argue that countries turn to international adjudication to protect trade flows under conditions of strong economic interdependence. This argument is built on two key assumptions. First, states believe that an international dispute over territory, fishing rights, or another salient issue could harm trade. Second, states view international adjudication as an effective way to end the dispute. Given the risk of harm to economic relations and the potential for courts to contribute to conflict resolution, states with high trade value vested in a relationship will be more willing to undertake costly litigation. This section elaborates on the general conditions of our theory and then explains why the ICJ is a good venue for testing the relationship between economic interdependence and international adjudication. The Adverse Impact of Conflict on Trade The premise that conflict disrupts trade is central to the theory of commercial peace. Russett and Oneal (2001) draw on the work of philosopher Immanuel Kant to argue that interdependence deters conflict by raising its costs. According to this reasoning, war interrupts trade while peace promotes stable commerce, leading states to calculate that the gains of peace are significant compared to the costs of war.4 Other perspectives focus on the informational role of interdependence to lower uncertainty between states (Reed 2003). Gartzke, Li, and Boehmer (2001) contend economic interdependence allows states to signal their resolve through their willingness to bear the economic costs of confrontation.5 A host of empirical studies supports the idea that conflict reduces trade (Keshk, Reuveny, and Pollins 2004; Long 2008). Several potential channels connect trade and conflict, including direct damage to infrastructure and transportation resulting from actual conflict, sanctions policies, and informal discrimination by governments or private actors. Glick and Taylor (2010) find that the effect of war on trade is significant and persistent. At a lower level, political tensions may also suppress trade (Pollins 1989; Fuchs and Klann 2013). Consumer boycotts and financial market reactions in some cases have led to adverse market impact (Fisman, Hamao, and Wang 2014; Heilmann 2016; Pandya 2016). Simmons (2005) finds that territorial disputes have a sizable negative impact on trade even in the absence of militarized action. Others suggest states anticipate the potential adverse impact of conflict on trade, and therefore trade less to begin with if they think that war is likely. In such a scenario, the marginal economic costs of war should be insufficient to change a state's calculation for going to war (Morrow 1999; Barbieri 2002). Gowa and Hicks (2017) contend that trade is largely diverted through third-party channels, which compensate for having less direct trade with the adversary. We assume that leaders and business constituencies on average believe that conflict damages trade relations. Political conflict could lead governments to adopt sanctions against an adversary or to restrict financial flows. Violence likely disrupts trading routes and slows the movement of goods. The potential for adverse financial market reactions and consumer response adds further unpredictability about the risk of spillover from political disagreement into economic harm. Substitution through third parties could alleviate the harm, but this would still increase trade costs. The expected harm to trade motivates states to pursue the resolution of disputes. Adjudication as a Conflict Resolution Mechanism When states want to resolve an interstate dispute, why would they choose adjudication rather than negotiations, economic sanctions, or militarized action? In some cases, the decision follows an episode of military conflict as part of an effort to normalize relations. In other disputes, countries may turn to a legal venue to prevent a problem from ever reaching the stage that could produce serious political tensions or threats of force. The literature offers three broad types of explanations for why states pursue adjudication: legitimacy, informational benefits, and domestic obstacles to settlement. At the systemic level, international norms support peaceful conflict resolution. Some contend that rule of law has come to shape the identities of states, forming norms about appropriate action in both the domestic and international spheres (Finnemore and Sikkink (1998, 902). When international law has been established through fair procedures and offers coherent principles, it forms a legitimate source of authority in international affairs that generates an independent “compliance pull” on state behavior (Franck 1990, 65). International courts combine both legitimacy and authority as they help states solve specific disputes about how to interpret international law; the growing role for international courts in international affairs represents an important trend (Alter 2014; Alter, Helfer, and Madsen 2016). Integration with national courts has reinforced states’ use of the European Court of Justice (ECJ), which stands out for its expansive caseload and impact on state behavior (Alter 1998). The ICJ has achieved a relatively strong record of compliance with rulings (Schulte 2004; Llamzon 2007; Mitchell and Hensel 2007; Johns 2012). Legal settlement can help states coordinate policies through the provision of information. Compared to bilateral negotiations or nonbinding third-party arbitration, adjudication conveys a government's willingness to reach an agreement (Helfer and Slaughter 2005; Gent and Shannon 2010). Having taken the public step to initiate legal action, a government would appear inconsistent and incur a reputational penalty if it also took unilateral measures such as sanctions or military actions before the legal process had reached a conclusion. This shapes the diplomatic context because participants know that the matter will neither escalate into violence nor disappear through neglect. A court ruling offers a focal point amidst uncertainty about how to interpret the terms of an agreement (Ginsburg and McAdams 2004; Huth, Croco, and Appel 2011). As the record-keeper of past actions, courts support systems of tit-for-tat and reputational enforcement (Milgrom, North, and Weingast 1990; Carrubba 2005; Mitchell and Hensel 2007). In these informational theories of courts, states may comply with court rulings in the absence of coercive measures or the threat of sanctions because the reputational costs of noncompliance are too high. Rather than simply interpret law, courts coordinate expectations about enforcement. Johns (2012) models the circumstances whereby mobilization of third-party actions in support of a court ruling generates endogenous enforcement that can affect outcomes. In this way, multilateral enforcement makes an international court different from the pressure available in bilateral negotiations. International courts also offer a way for states to frame settlements to appeal to domestic audiences (Fang 2008). Simmons notes that even when the same deal could be reached in negotiations or through a court decision, a negotiated settlement could be viewed as a sign of weakness while legal resolution would be a positive signal for future cooperation (Simmons 2002, 834). This dynamic occurs because “domestic groups will find it more attractive to make concessions to a disinterested institution than to a political adversary” (Simmons 2002, 834). In research on several prominent ICJ cases, Fischer (1982, 271) emphasizes the court has helped governments to save face. Consequently, those governments unable to reach agreements over domestic opposition may find it easier to do so with the involvement of a third-party ruling. Allee and Huth (2006a) show that governments with higher levels of domestic political constraints are more likely to choose adjudication over negotiation for settling territorial disputes. Domestic political constraints also increase the probability of filing complaints at the WTO (Davis 2012). The mobilization of domestic groups plays a critical role in litigation patterns at the ECJ (Alter and Vargas 2000).

## ADV 1

### Turn – Growth

#### Current antitrust law fosters innovation and competition – the plan crushes growth

Wright 21 – Joshua D. Wright, Executive Director of the Global Antitrust Institute at the Antonin Scalia Law School, former commissioner of the U.S. Federal Trade Commission from 2013 to 2015, “A Time for Choosing: The Conservative Case Against Weaponizing Antitrust,” Summer 2021, https://nationalaffairs.com/time-choosing-conservative-case-against-weaponizing-antitrust

It has long been vogue among liberal advocates to champion expansion of government control over firms, their decisions, and internal workings. Perhaps no better present example can be found than in the area of antitrust, where the policy landscape looks eerily similar to the progressive view articulated 60 years ago, littered with a hodgepodge of proposals to “break up” large firms, prohibit all mergers and acquisitions, assign burdens of proof to the accused, and control the design of products. Today’s progressives offer much of the same medicine for what allegedly ails the modern economy. Senator Warren has proposed, for example, to “break up big tech” platforms such as Amazon, Apple, Facebook, and Google, and to make technology companies criminally liable for misinformation presented on their platforms.[ii] While the large and successful American tech firms—the envy of the global economy—make a convenient target for these proposals, do not be fooled. This wolf comes as a wolf. The modern progressive antitrust agenda is part of a broader, more radical program—self-described as Neo-Brandeisian Antitrust—to turn antitrust law upside down so that it may be weaponized to shape and plan all sectors of the economy.

These proposals, while unfortunate and misguided, draw heavily upon standard liberal orthodoxy that has tended to be largely suspect of markets and the agency of individuals. One can hardly be surprised to see a staunch progressive like Senator Warren or Bernie Sanders advocate greater government control over private life. Perhaps one even grows to expect it.

What is more surprising, however, is the company Senator Warren and the Neo-Brandeisian Antitrust movement have attracted with the siren call of using the antitrust laws to centrally plan the tech sector (among others things), and to achieve greater government control of the interactions between individuals and the technology we use in our daily lives. Stalwart conservatives like Senator Hawley, for example, among others, have offered policy proposals to “deal” with “Big Tech” that eerily mimic those of Senator Warren and the command and control left. Senator Hawley has proposed legislation that would rewrite Section 230 of the Communications Decency Act and usher in a quasi-Conservative Fairness Doctrine for the internet.[iii] Indeed, Hawley’s proposal would place the Federal Trade Commission in the Big Brother position of determining when a social media platform’s moderation decision was “designed to” or “motivated by an intent to” negatively impact a political party. Attorney General Barr has offered a similar refrain, announcing that antitrust is an appropriate tool to police political bias.[iv] And President Trump recently signed an executive order that directs the Federal Trade Commission to explore using its consumer protection authority to sue social media platforms for content moderation decisions.[v]

Without question, the emotional appeal undergirding these actions is understandable. Conservative voices and opinions too often face a stacked deck when dealing with technology companies and social media, in particular. And this bias against conservative voices has taken on new life in the Trump era. But the hallmark of conservative values has been to rightfully eschew government control over economic life and to value principle over expediency. What is at stake, however, with the current proposals to upend modern antitrust to address tech markets is more important than whatever fleeting satisfaction is gained from exacting policy revenge on firms perceived to squelch conservative voices and ideas. At stake are conservative commitments to the rule of law and the role of the judiciary—newly stocked with immense talent by the Trump administration—in preventing government expansion and overreach. And if we resign ourselves to transient political wins, and debase the belief that entrepreneurs rather than bureaucrats should shape technology markets, we risk not only undermining these great causes conservatives have championed for decades but also the enormous economic gains to Americans that arise in our highly competitive tech markets.

Readers less familiar with antitrust law may not understand its critical role in the conservative legal movement. Modern antitrust law—and its consumer welfare standard—is a complex product of powerful ideas, extant economic evidence, and jurists like Bork, Thomas, Scalia, Easterbrook, and Doug Ginsburg taking on the wobbly intellectual foundations of 1960s competition law. That their efforts were so successful in persuading their liberal counterparts on the Supreme Court and lesser federal courts to join in the dismantling of the stale and obsolete antitrust that was then the law of the land is powerful evidence of the force of their ideas. It is difficult to find an area of law where the conservative legal movement enjoyed as much success as quickly and with such resounding results.

No doubt it helped that yesteryear’s antitrust was intellectually bankrupt and an insult to the rule of law. It pursued an unfortunate amalgamation of contradictory doctrines, including undefined notions of populism, protection of individual industries, and reducing firm size, that could be used to justify nearly any result. For instance, antitrust law allowed the market-leading frozen pie manufacturer in Utah to successfully sue its three national-brand competitors for eroding its high market share through a series of price cuts—thereby preventing precisely the type of competition the law was intended to protect. Antitrust law was so unprincipled and incoherent at the time that it led Justice Potter Stewart to observe while reviewing a government suit to block a merger between two grocery stores with a combined market share of 7.5% that, “The sole consistency that I can find is that, in litigation under [the merger laws], the Government always wins.”[vi]

The conservative legal movement, powered by the intersection of economic analysis and law, brought the rule of law to the wild and untamed progressive antitrust vision of the 1960s. Grounding antitrust law in a disciplined and tractable framework not only promotes the rule of law while preventing arbitrary and capricious enforcement, it also creates a stable and predictable environment for private actors and firms to invest and innovate. Of course, no doctrine is perfect and today’s antitrust is not without its own flaws. But it is tethered to robust economic evidence and common-law developments that promote competitive outcomes and, like the common law, has built-in mechanisms to improve and evolve in response to empirical evidence. But the coherent and principled makeup of antitrust should not and cannot be taken for granted.

Proposals today that are attracting conservatives and liberals alike aim to unwind these gains in exchange for granting those who happen to have power in the government a dominant hand in controlling tech firms on the fleeting hope that the power will be deployed for the greater social good. We have experience with this approach to antitrust in the United States. It is what we used to do. And we know better. Shifting power from judges to regulators, and then allowing those regulators to pick winners and losers to achieve political and social goals, is a recipe for abandoning conservative commitment to the rule of law while simultaneously sacrificing economic growth and innovation. The price is too high, with little or nothing to offer those who value individual liberty, the rule of law, and economic growth. While progressive ideology is contiguous with increasing government control over economic and social interactions in technology markets for its own sake, conservative principles are not. The proposed bargain is also remarkably short-sighted. It should go without saying that empowering partisan regulators to enforce a Fairness Doctrine for conservatives is not likely to work out so well when the other side is in control.

Conservatives traditionally have been wary of proposals by liberals and other big government proponents seeking to substitute the judgment of regulators and bureaucrats for those of entrepreneurs and innovators. And rightfully so. Such proposals, even when well intentioned, risk making Americans worse off. Progressives and populists now seek to commandeer antitrust to usher in a new era of central planning in order to achieve social policy objectives that they could not accomplish otherwise. But at what cost? The risks are not trivial. Using antitrust to redesign tech companies and their products will undermine the competitive dynamics that have brought Americans countless modern benefits, including smartphones, fast and easy online shopping, on-demand ride hailing, easy-to-access streaming media, and a bevy of free services including email, maps, and video conferencing. It also will threaten the incredible economic growth and job creation that these companies have brought to America’s shores. And while politicians surely will make promises akin to, “if you like the digital platform you have, you’ll get to keep it,” it is all too clear that when you expand government discretion and limit judicial oversight, those in positions of power will increasingly impose their preferences on the broader society. Ask yourself, do you really want the government designing the iPhone?

The reality is that the U.S. digital economy is highly competitive and serves Americans well. Fueled by investment, innovation, and entrepreneurship, the digital economy has contributed substantially to America’s economic growth. According to the Bureau of Economic Analysis, the digital economy accounted for 6.9 percent of gross domestic product in 2017, growing at an annual rate of 9.9 percent since 1998 as compared to 2.3 percent for the economy overall.[vii] That economic growth has been driven by some of the world’s most successful tech companies, such as Amazon, Apple, Facebook, Intel, Google, and Microsoft, each of which calls the United States home. These firms are investing ever-increasing amounts on research and development to innovate new products and stay competitive. In fact, the United States leads the world in research and development spending, and tech companies lead in the United States—representing the nation’s top five spenders with investments totaling more than $75 billion in 2018.[viii] Tech companies rank second (behind the telecom sector) in U.S. capital expenditures, with Alphabet (Google’s parent company), Amazon, Apple, Facebook, Intel, and Microsoft together spending more than $45 billion in 2017.[ix] And these investment figures are only expected to continue to grow. These are hardly the actions of monopolists resting on their laurels, secure in belief that they are untouchable by competition.

### Econ Impact – 1NC

#### Aff not key to economy – wealth concentration and growing inequality are bigger alt causes.

#### COVID disproves their impact – a year-long recession should have caused war, no brightline for how long is long enough.

#### Countries will exercise restraint.

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Conclusion Political economy theory would lead us to expect rising trade protection during hard times. Yet empirical evidence on this count has been mixed. Some studies find a correlation between poor macroeconomic conditions and protection, but the worst recession since the Great Depression has generated surprisingly moderate levels of protection. We explain this apparent contradiction. Our statistical findings show that under conditions of pervasive economic crisis at the international level, states exercise more restraint than they would when facing crisis alone. These results throw light on behavior not only during the crisis, but throughout the WTO period, from 1995 to the present. One concern may be that the restraint we observe during widespread crises is actually the result of a decrease in aggregate demand and that domestic pressure for import relief is lessened by the decline of world trade. By controlling for product-level imports, we show that the restraint on remedy use is not a byproduct of declining imports. We also take into account the ability of some countries to manipulate their currency and demonstrate that the relationship between crisis and trade protection holds independent of exchange rate policies. Government decisions to impose costs on their trade partners by taking advantage of their legal right to use flexibility measures are driven not only by the domestic situation but also by circumstances abroad. This can give rise to an individual incentive for strategic self-restraint toward trade partners in similar economic trouble. Under conditions of widespread crisis, government leaders fear the repercussions that their own use of trade protection may have on the behavior of trade partners at a time when they cannot afford the economic cost of a trade war. Institutions provide monitoring and a venue for leader interaction that facilitates coordination among states. Here the key function is to reinforce expectations that any move to protect industries will trigger similar moves in other countries. Such coordination often draws on shared historical analogies, such as the Smoot–Hawley lesson, which form a focal point to shape beliefs about appropriate state behavior. Much of the literature has focused on the more visible action of legal enforcement through dispute settlement, but this only captures part of the story. Our research suggests that tools of informal governance such as leader pledges, guidance from the Director General, trade policy reviews, and plenary meetings play a real role within the trade regime. In the absence of sufficiently stringent rules over flexibility measures, compliance alone is insufficient during a global economic crisis. These circumstances trigger informal mechanisms that complement legal rules to support cooperation. During widespread crisis, legal enforcement would be inadequate, and informal governance helps to bolster the system. Informal coordination is by nature difficult to observe, and we are unable to directly measure this process. Instead, we examine the variation in responses across crises of varying severity, within the context of the same formal setting of the WTO. Yet by focusing on discretionary tools of protection—trade remedies and tariff hikes within the bound rate—we can offer conclusions about how systemic crises shape country restraint independent of formal institutional constraints. Insofar as institutions are generating such restraint, we offer that it is by facilitating informal coordination, since all these instruments of trade protection fall within the letter of the law. Future research should explore trade policy at the micro level to identify which pathway is the most important for coordination. Research at a more macro-historical scope could compare how countries respond to crises under fundamentally different institutional contexts. In sum, the determinants of protection include economic downturns not only at home but also abroad. Rather than reinforcing pressure for protection, pervasive crisis in the global economy is shown to generate countervailing pressure for restraint in response to domestic crisis. In some cases, hard times bring more, not less, international cooperation.

### Chem Impact – 1NC

#### Aff doesn’t solve global chemical innovation – ensures impacts like opop, defo, disease occur in other places.

#### No impact to resource tightening.

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As the conflicts in Afghanistan and Iraq drag towards their third decade, and Syria’s civil war ticks towards 400,000 dead, it may seem trite to observe that nobody really “wins” a war. But it nonetheless represents a significant historic change, and one that can help account both for the fact that the number of wars is declining as well as the type and location of wars that remain. War always has been “negative sum,” in that any resource gain to the victor was matched by an equal loss to the loser and both sides paid in lives and arms. But those who prevailed on the battlefield could more than compensate for their military costs through occupation, plunder and enslavement. Anthropologist James Scott discusses the earliest wars in his book “Against the Grain.” He suggests that city-states such as Umma and Lagash in Mesopotamia fought over land and water, but most of all people, and that was still the case when Caesar brought back as many as a million slaves from his invasion of Gaul. People, land and resources remained prizes worth fighting over well into the 20th century. Germany’s demand for Lebensraum (“living space”) and Japan’s obsession with obtaining an independent oil supply helped motivate World War II, for example. But economic change means that land and the stuff on or under it no longer is the key to prosperity and power worldwide. The World Bank calculates a measure of global wealth that divides it into natural capital — land, oil, gold — physical capital, including roads and factories, and “intangible capital.” That last category includes education and the institutions and knowledge from double entry bookkeeping to phonics-based literacy programs that allow economies to produce more value with the same amount of physical inputs. In 2014, natural capital accounted for 9 percent of planetary wealth, according to the World Bank. That compared to 27 percent for physical capital and 64 percent — almost two-thirds — in intangible capital. The fact that wealth is driven by intangible ideas, institutions and relationships, rather than tangible goods and land, means that it can’t be expropriated by an invader. So even winning on the battlefield simply can’t pay off. Take one recent example: The Iraq war has cost the U.S. alone around $2.2 trillion, according to the Watson Institute at Brown University. Oil revenues earn the Iraqi government less than $100 billion a year. Even if President Trump carried out his one-time plan to expropriate the country’s oil, and despite Iraq’s huge share of global reserves, the war would not pay off economically. At the same time, intangible capital is “positive sum” — unlike a barrel of oil, if I use the technology of the internet, you can use it too — indeed, we both benefit from more people using it at the same time. That strengthens the payoff to peaceful cooperation and trade. For all of the continued horror of Syria, Iraq and Afghanistan, the changed basis of wealth and power helps to account for the global decline of war. Since 1975, an average of less than two interstate conflicts have been ongoing in the world each year, and recent years have seen even fewer. No major power war has erupted since 1939 — an 80-year stretch. Most of the wars that remain are in regions where resources still have an outsized share of wealth: The low-income countries most at risk of civil conflict see an average share of natural capital in total capital of just under one-half, for example. Territorial disputes in richer regions of the world have not gone away, from the South China Sea through Ukraine, the West Bank, Gibraltar and The Falklands. And wars often are launched for reasons of domestic politics or ideology disconnected from calculations of power or wealth. But that no developed country could ever “win” a war, in terms of wealth, may help explain why interstate conflict is so much out of fashion. And it also suggests a powerful solution for those who would like to see even greater global peace: Help the poorest countries grow out of resource dependency.

## ADV 2

### Health Impact – 1NC

#### Aff can’t solve rising drug prices or global health inequalities – makes their impact inevitable.

#### Burnout and geographic dispersion check disease.

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For most of human history, natural pandemics have posed the greatest risk of mass global fatalities.37 However, there are some reasons to believe that natural pandemics are very unlikely to cause human extinction. Analysis of the International Union for Conservation of Nature (IUCN) red list database has shown that of the 833 recorded plant and animal species extinctions known to have occurred since 1500, less than 4% (31 species) were ascribed to infectious disease.38 None of the mammals and amphibians on this list were globally dispersed, and other factors aside from infectious disease also contributed to their extinction. It therefore seems that our own species, which is very numerous, globally dispersed, and capable of a rational response to problems, is very unlikely to be killed off by a natural pandemic.

One underlying explanation for this is that highly lethal pathogens can kill their hosts before they have a chance to spread, so there is a selective pressure for pathogens not to be highly lethal. Therefore, pathogens are likely to co-evolve with their hosts rather than kill all possible hosts.39

#### No Bioweapon threat---empirical consensus, technical challenges, and no scenario for extinction.

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The novel coronavirus pandemic has put the threat of bioterrorism back in the spotlight. White supremacist chat rooms are [teeming with talk](https://www.businessinsider.com/coronavirus-white-supremacists-discussed-using-covid-19-as-bioweapon-2020-3?r=DE&IR=T) about “biological warfare.” ISIL even called the virus “[one of Allah’s soldiers](https://www.wsj.com/articles/what-jihadists-are-saying-about-the-coronavirus-11586112043)” because of its devastating effect on Western countries. According to a recent [memo](https://www.independent.co.uk/news/world/americas/coronavirus-terrorist-white-supremacy-fbi-bioterrorism-a9417296.html) by the U.S. Department of Homeland Security, terrorists are “[making] bioterrorism a popular topic among themselves.” Both the United Nations and the Council of Europe have warned of bioterrorist attacks. How serious is the threat? There is a long history of terrorists being fascinated by biological weapons, but it is also one of failures. For the vast majority, the **technical challenges** associated with weaponizing biological agents have **proven insurmountable**. The only reason this could change is if terrorists were to receive support from a state. Rather than panic about terrorists engaging in biological warfare, governments should be vigilant, secure their own facilities, and focus on strengthening international diplomacy. A **History of Failures** Biological warfare, which uses organisms and pathogens to cause disease, is [nearly **as old as war** itself](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1200679/). The first known use of biological agents as a weapon dates back to 600 B.C., when an ancient Greek leader poisoned his enemies’ water supply. Throughout the Middle Ages, especially during the time of the Black Death, it was common to hurl infected corpses into besieged cities. And during the two world wars, all major powers maintained biological weapons programs (although only Japan used them in combat). Among terrorists, however, the use of biological weapons has **been rarer**, although groups from nearly all ideological persuasions [have contemplated it](https://mitpress.mit.edu/books/toxic-terror). Recent examples include a plot to contaminate Chicago’s water supply in the 1970s; food poisoning by a religious cult in Oregon in the 1980s; and the stockpiling of ricin by members of the Minnesota Patriot Council during the 1990s. **No one died** in **any** of these instances. The same is true for the biological warfare programs of al-Qaeda and the Islamic State group. Both groups have sought to [buy, steal, or develop biological agents](https://www.jstor.org/stable/26369585?seq=1#metadata_info_tab_contents). For al-Qaeda, this seems to have been a priority in the 1990s, when its program was overseen by (then) deputy leader Ayman al-Zawahiri, a trained physician. With the Islamic State, evidence dates back to 2014, when Iraqi forces discovered thousands of files related to biological warfare on a detainee’s laptop. Yet **none of these efforts succeeded**. The only al-Qaeda plot in which bioterrorism featured prominently — the so-called “ricin plot” in England in 2002 — was interrupted at such an early stage that [none of the toxin](http://news.bbc.co.uk/2/hi/uk_news/4433499.stm) had actually been produced. The Islamic State’s most serious attempt, in 2017, involved a small amount of ricin, whose [**only fatality** was **the hamster**](https://www.dw.com/en/cologne-ricin-plotters-bought-a-hamster-to-test-biological-weapon/a-44804164) on which it was tested. Of the **tens of thousands** of people that jihadists have murdered, not a **single one** has died from biological agents. It may be no accident that the most lethal bioterrorist attack in recent decades was perpetrated by a scientist and government employee. In late 2001, the offices of several U.S. senators and news organizations received so-called “anthrax letters,” which killed five people and injured 17. Following years of investigation, the FBI identified the sender as [Bruce Ivins,](https://www.npr.org/templates/story/story.php?storyId=93194941&t=1591560313301) a PhD microbiologist and senior researcher at the U.S. Army’s Medical Research Institute of Infectious Diseases. Unlike the others, he was no amateur or hoaxer, but a trained expert with years of experience and full access to the world’s largest repository of lethal biological agents. **Technical Challenges** Ivins’ case helps to explain why so many would-be bioterrorists have failed. At a **technical level**, launching a sophisticated, large-scale bioterrorist attack involves a toxin or a pathogen — generally a bacterium or a virus — which needs to be **isolated** and **disseminated**. But this is more **difficult** than it seems. As well as advanced training in biology or chemistry, isolating the agent **requires significant experience**. It also has to be done in a **safe**, **contained** environment, to stop it from spreading within the terrorist group. Contrary to what [al-Qaeda said in one of its online magazines,](https://www.telegraph.co.uk/news/worldnews/7865978/Al-Qaeda-newspaper-Make-a-bomb-in-the-kitchen-of-your-mom.html) you **can’t** just make a **(biological) weapon** “in the **kitchen** of your mom!” In addition, there is the **challenge of dissemination**. Unless the agent is super-contagious, a powerful biological attack relies on a large number of initial infections in **perfect conditions**. In the case of the bacterium anthrax, for example, only spores of a **particular size** are likely to be effective in certain kinds of **weather**. State-sponsored programs often needed years of testing and experimentation to understand how their weapons could be used. Though not impossible, it is **unlikely** that terrorist groups possess the resources, stable environment, and patience to do likewise. **Doomsday Scenarios** Even if terrorists somehow succeeded, it is **nearly inconceivable** that the resulting “weapon” would be as powerful as the recent coronavirus, SARS-CoV-2. One of its uniquely devastating features has been that people are infectious while experiencing no symptoms. As it spread across the globe, there was no treatment, no vaccine, an incomplete understanding of its pathological modes of action, and no easy, cheap and widely available testing. It was the viral equivalent of a “zero-day exploit” — a cyber-attack that happens before any patch is available. None of the viruses on the U.S. Centers for Disease Control and Prevention’s list of the [**most dangerous biological agents**](https://emergency.cdc.gov/agent/agentlist-category.asp) could be easily “weaponized” or would have the same, **devastating effects** as SARS-CoV-2. Pathogenic viruses such as smallpox, Ebola, Marburg, and Lassa are extremely hard to find, isolate, and spread. Botulinum and ricin are dangerous toxins, but **not contagious**, while [Tularemia](https://www.cdc.gov/tularemia/index.html) cannot be transmitted from human to human. The plague is, of course, capable of causing pandemics, but most countries are nowadays [well prepared for this particular virus,](https://www.who.int/csr/resources/publications/plague/CSR_ISR_2000_1/en/index3.html) and will be able to limit — and cope with — localized outbreaks. This leaves only anthrax, a soil bacterium which is relatively easy to obtain. Even so, isolating a **highly pathogenic strain** is difficult. More importantly, anthrax is **not contagious**, and while its spores are durable and affected areas can be hard to de-contaminate, it is **unable to spread** on its own. Regarding SARS-CoV-2, it is important to distinguish between the possibility that the virus occurred naturally and escaped from a laboratory, and the idea that it was engineered for maximum infectiousness and deliberately released. The first remains a possibility, although other explanations are equally — if not more — plausible, while the second has been debunked by a [comprehensive examination](https://www.nature.com/articles/s41591-020-0820-9) in the journal Nature Medicine, which concluded that SARS-CoV-2 was “not a laboratory construct or a purposefully manipulated virus.” The chances that terrorists would be capable of engineering a virus such as SARS-CoV-2 **without access** to a state’s resources are **virtually zero.** If anything, the possibility of a lab escape — however remote — highlights the importance of [biosafety.](https://warontherocks.com/2020/06/a-guide-to-getting-serious-about-bio-lab-safety/) While governments have paid much attention to laboratories with the highest biosafety level (level 4), work on bat-born coronaviruses is regularly performed at lower levels (level 3, and even level 2), and should instead be subject to similar safety requirements. In sum, small-scale attacks using anthrax or other agents may be possible, but the risk of a highly advanced, weaponized pathogen that spreads among large populations — a **terrorist-initiated biological doomsday** — is **very low.** The only exception, of course, is if terrorists received support from a state, acted as its proxies, or were able to draw on its resources — as in Ivins’ case.

### AI Impact – 2NC

#### Info corruption inevitable – polarization and global spread of digital authoritarianism and misinformation propagated by authoritarian regimes to maintain their governments.

#### No AI impact

Michael Shermer 17. Publisher of Skeptic magazine, a monthly columnist for Scientific American, and a Presidential Fellow at Chapman University. “Why Artificial Intelligence Is Not an Existential Threat” April 2017. Skeptic. Vol. 22, no. 2, pp. 29-35.

Why AI is not an Existential Threat First, most AI doomsday prophecies are grounded in the false analogy between human nature and computer nature, or natural intelligence and artificial intelligence. We are thinking machines, but natural selection also designed into us emotions to shortcut the thinking process because natural intelligences are limited in speed and capacity by the number of neurons that can be crammed into a skull that has to pass through a pelvic opening at birth, whereas artificial intelligence need not be so restricted. We don't need to compute the caloric value of foods, for example, we just feel hungry. We don't need to calculate the waist-to-hip ratio of women or the shoulder-to-waist ratio of men in our quest for genetically healthy potential mates; we just feel attracted to someone and mate with them. We don't need to work out the genetic cost of raising someone else's offspring if our mate is unfaithful; we just feel jealous. We don't need to figure the damage of an unfair or non-reciprocal exchange with someone else; we just feel injustice and desire revenge. Emotions are proxies for getting us to act in ways that lead to an increase in reproductive success, particularly in response to threats faced by our Paleolithic ancestors. Anger leads us to strike out, fight back, and defend ourselves against danger. Fear causes us to pull back, retreat, and escape from risks. Disgust directs us to push out, eject, and expel that which is bad for us. Computing the odds of danger in any given situation takes too long. We need to react instantly. Emotions shortcut the information processing power needed by brains that would otherwise become bogged down with all the computations necessary for survival. Their purpose, in an ultimate causal sense, is to drive behaviors toward goals selected by evolution to enhance survival and reproduction. AIs -- even AGIs and ASIs -- will have no need of such emotions and so there would be no reason to program them in unless, say, terrorists chose to do so for their own evil purposes. But that's a human nature problem, not a computer nature issue. To believe that an ASI would be "evil" in any emotional sense is to assume a computer cognition that includes such psychological traits as acquisitiveness, competitiveness, vengeance, and bellicosity, which seem to be projections coming from the mostly male writers who concoct such dystopias, not features any programmer would bother including, assuming that it could even be done. What would it mean to program an emotion into a computer? When IBM's Deep Blue defeated chess master Garry Kasparov in 1997, did it feel triumphant, vengeful, or bellicose? Of course not. It wasn't even "aware" -- in the human sense of self-conscious knowledge -- that it was playing chess, much less feeling nervous about possibly losing to the reigning world champion (which it did in the first tournament played in 1996). In fact, toward the end of the first game of the second tournament, on the 44th move, Deep Blue made a legal but incomprehensible move of pushing its rook all the way to the last row of the opposition side. It accomplished nothing offensively or defensively, leading Kasparov to puzzle over it out of concern that he was missing something in the computer's strategy. It turned out to be an error in Deep Blue's programming that led to this fail-safe default move. It was a bug that Kasparov mistook as a feature, and as a result some chess experts contend it led him to be less confident in his strategizing and to second-guess his responses in the subsequent games. It even led him to suspect foul play and human intervention behind Deep Blue, and this paranoia ultimately cost him the tournamentt.[ 13] Computers don't get paranoid, the HAL 9000 computer in 2001 notwithstanding. Or consider Watson, the IBM computer built by David Ferrucci and his team of IBM research scientists tasked with designing an AI that could rival human champions at the game of Jeopardy! This was a far more formidable challenge than Deep Blue faced because of the prerequisite to understand language and the often multiple meanings of words, not to mention needing an encyclopedic knowledge of trivia (Watson had access to Wikipedia for this). After beating the all-time greatest Jeopardy! champions Ken Jennings and Brad Rutter in 2011, did Watson feel flushed with pride after its victory? Did Watson even know that it won Jeopardy!? I put the question to none other than Ferrucci himself at a dinner party in New York in conjunction with the 2011 Singularity Summit. His answer surprised me: "Yes, Watson knows it won Jeopardy!" I was skeptical. How could that be, since such self-awareness is not yet possible in computers? "Because I told it that it won," he replied with a wry smile. Sure, and you could even program Watson or Deep Blue to vocalize a Howard Dean-like victory scream when it wins, but that is still a far cry from a computer feeling triumphant. This brings to mind the "hard problem" of consciousness -- if we don't understand how this happens in humans, how could we program it into computers? As Steven Pinker elucidated in his answer to the 2015 Edge Question on what to think about machines that think, "AI dystopias project a parochial alpha-male psychology onto the concept of intelligence. They assume that superhumanly intelligent robots would develop goals like deposing their masters or taking over the world." It is equally possible, Pinker suggests, that "artificial intelligence will naturally develop along female lines: fully capable of solving problems, but with no desire to annihilate innocents or dominate the civilization."[ 14] So the fear that computers will become emotionally evil are unfounded, because without the suite of these evolved emotions it will never occur to AIs to take such actions against us. What about an ASI inadvertently causing our extinction by turning us into paperclips, or tiling the entire Earth's surface with solar panels? Such scenarios imply yet another emotion -- the feeling of valuing or wanting something. As the science writer Michael Chorost adroitly notes, when humans resist an AI from undertaking any form of global tiling, it "will have to be able to imagine counteractions and want to carry them out." Yet, "until an AI has feelings, it's going to be unable to want to do anything at all, let alone act counter to humanity's interests and fight off human resistance." Further, Chorost notes, "the minute an A.I. wants anything, it will live in a universe with rewards and punishments -- including punishments from us for behaving badly. In order to survive in a world dominated by humans, a nascent A.I. will have to develop a humanlike moral sense that certain things are right and others are wrong. By the time it's in a position to imagine tiling the Earth with solar panels, it'll know that it would be morally wrong to do so."[ 15] From here Chorost builds on an argument made by Peter Singer in The Expanding Circle (and Steven Pinker in The Better Angels of Our Nature[ 16] that I also developed in The Moral Arc[ 17] and Robert Wright explored in Nonzero[ 18]), and that is the propensity for natural intelligence to evolve moral emotions that include reciprocity, cooperativeness, and even altruism. Natural intelligences such as ours also includes the capacity to reason, and once you are on Singer's metaphor of the "escalator of reason" it can carry you upward to genuine morality and concerns about harming others. "Reasoning is inherently expansionist. It seeks universal application," Singer notes.[ 19] Chorost draws the implication: "AIs will have to step on the escalator of reason just like humans have, because they will need to bargain for goods in a human-dominated economy and they will face human resistance to bad behavior."[ 20] Finally, for an AI to get around this problem it would need to evolve emotions on its own, but the only way for this to happen in a world dominated by the natural intelligence called humans would be for us to allow it to happen, which we wouldn't because there's time enough to see it coming. Bostrom's "treacherous turn" will come with road signs ahead warning us that there's a sharp bend in the highway with enough time for us to grab the wheel. Incremental progress is what we see in most technologies, including and especially AI, which will continue to serve us in the manner we desire and need. Instead of Great Leap Forward or Giant Fall Backward, think Small Steps Upward. As I proposed in The Moral Arc, instead of Utopia or dystopia, think protopia, a term coined by the futurist Kevin Kelly, who described it in an Edge conversation this way: "I call myself a protopian, not a Utopian. I believe in progress in an incremental way where every year it's better than the year before but not by very much -- just a micro amount."[ 21] Almost all progress in science and technology, including computers and AI, is of a protopian nature. Rarely, if ever, do technologies lead to either Utopian or dystopian societies. Pinker agrees that there is plenty of time to plan for all conceivable contingencies and build safeguards into our AI systems. "They would not need any ponderous 'rules of robotics' or some newfangled moral philosophy to do this, just the same common sense that went into the design of food processors, table saws, space heaters, and automobiles." Sure, an ASI would be many orders of magnitude smarter than these machines, but Pinker reminds us of the AI hyperbole we've been fed for decades: "The worry that an AI system would be so clever at attaining one of the goals programmed into it (like commandeering energy) that it would run roughshod over the others (like human safety) assumes that AI will descend upon us faster than we can design fail-safe precautions. The reality is that progress in AI is hype-defyingly slow, and there will be plenty of time for feedback from incremental implementations, with humans wielding the screwdriver at every stage."[ 22] Former Google CEO Eric Schmidt agrees, responding to the fears expressed by Hawking and Musk this way: "Don't you think the humans would notice this, and start turning off the computers?" He also noted the irony in the fact that Musk has invested $1 billion into a company called OpenAI that is "promoting precisely AI of the kind we are describing."[ 23] Google's own DeepMind has developed the concept of an AI off-switch, playfully described as a "big red button" to be pushed in the event of an attempted AI takeover. "We have proposed a framework to allow a human operator to repeatedly safely interrupt a reinforcement learning agent while making sure the agent will not learn to prevent or induce these interruptions," write the authors Laurent Orseau from DeepMind and Stuart Armstrong from the Future of Humanity Institute, in a paper titled "Safely Interruptible Agents." They even suggest a precautionary scheduled shutdown every night at 2 AM for an hour so that both humans and AI are accustomed to the idea. "Safe interruptibility can be useful to take control of a robot that is misbehaving and may lead to irreversible consequences, or to take it out of a delicate situation, or even to temporarily use it to achieve a task it did not learn to perform or would not normally receive rewards for this."[ 24] As well, it is good to keep in mind that artificial intelligence is not the same as artificial consciousness. Thinking machines may not be sentient machines. Finally, Andrew Ng of Baidu responded to Elon Musk's ASI concerns by noting (in a jab at the entrepreneur's ambitions for colonizing the red planet) it would be "like worrying about overpopulation on Mars when we have not even set foot on the planet yet."[ 25] Both Utopian and dystopian visions of AI are based on a projection of the future quite unlike anything history has given us. Yet, even Ray Kurzweil's "law of accelerating returns," as remarkable as it has been has nevertheless advanced at a pace that has allowed for considerable ethical deliberation with appropriate checks and balances applied to various technologies along the way. With time, even if an unforeseen motive somehow began to emerge in an AI we would have the time to reprogram it before it got out of control. That is also the judgment of Alan Winfield, an engineering professor and co-author of the Principles of Robotics, a list of rules for regulating robots in the real world that goes far beyond Isaac Asimov's famous three laws of robotics (which were, in any case, designed to fail as plot devices for science fictional narratives).26 Winfield points out that all of these doomsday scenarios depend on a long sequence of big ifs to unroll sequentially: "If we succeed in building human equivalent AI and if that AI acquires a full understanding of how it works, and if it then succeeds in improving itself to produce super-intelligent AI, and if that super-AI, accidentally or maliciously, starts to consume resources, and if we fail to pull the plug, then, yes, we may well have a problem. The risk, while not impossible, is improbable."[ 27]

#### No U.S.-Russia miscalc.

Jim Townsend 19. Townsend is an adjunct senior fellow in the CNAS Transatlantic Security Program. “The Tale of Turkey and the Patriots.” War on the Rocks, https://warontherocks.com/2019/07/the-tale-of-turkey-and-the-patriots/

In November 2015, the region seemed moments from an explosion when Turkey shot down a Russian aircraft which had reportedly entered Turkish airspace for a few moments. Had Russia retaliated militarily against NATO ally Turkey, the rest of NATO could have been dragged into war with Russia. The potential of facing NATO forces under Article 5 likely deterred Russia from a direct, violent response, although Russian-backed Syrian forces did exchange blows with Turkish-backed forces. Rather than spoil his efforts to split the Turks off from the West and to avoid war, Putin — who had been wooing his fellow autocrat Erdogan for years — limited the Russian reaction to economic sanctions against Turkey.

# 2NC

## 2NC

### 2NC – FW

#### These debates are the core of antitrust. The economic concepts and worldviews embedded in antitrust advocacy should be evaluated upstream of specific cost-benefit comparison of implementation.

Sabel **RAHMAN** Law @ Brooklyn **’20** “Structuralist Regulation” Prepared for NYU Law School Public Law Colloquium, September 2020

Second, this concept of structuralist regulation helps provide a policy framework for understanding and engaging some of the structuralist claims made by grassroots reform movements especially in this moment. We are in a unique moment of resurgent grassroots activism, and as scholars of social movements have argued, many of these movements are advancing structural, transformative visions of public policy and legal-institutional change.20 But these claims are often seen as outside the scope of more traditional modes of policy debate and analysis. Building a conceptual framework of what we mean by ‘structural’ reform can help bridge the reform ideas being generated by grassroots movements on the one hand, and those arising from policymakers and academics on the other. More broadly, we might even say we are on the cusp of a revival of interest in structuralist policy solutions in response to the deeper problems of economic inequality,21 racial subordination,22 power in public law,23 and political economy approaches to law and public policy.24 A clearer understanding of structuralist policy design will be important to inform the kind of inclusionary policy agenda needed to remedy these inequities.

The rest of the paper proceeds as follows. Part I provides a conceptualization of ‘structuralist’ policymaking, identifying the underlying assumptions that animate structuralism as a regulatory strategy. This Part also notes that this concept of regulatory strategy (or what I call “regulatory logic”, as defined below) should be understood as a distinct way of unpacking and analyzing the patterns of policymaking judgment distinct from other modes of analysis like cost-benefit analysis or the rules-versus-standards debate. Part II then looks at examples of structuralist policy proposals in recent economic policy debates: the debate over tech platforms, the debate over too-big-to-fail financial firms and systemic risk, and the renewed interest in anti-trust and anti-monopoly law. These examples help illustrate structuralist regulatory logics in action, and their distinctive assumptions and potential benefits over more conventional regulatory approaches. The purpose of this Part is not to offer a full-throated defense of structuralist policies in each of these sectors (although I am perhaps unsurprisingly sympathetic to the arguments on the merits); rather the purpose here is simply to illustrate structuralism as a distinct mode of thinking about policymaking. Part III articulates some broader implications for how to implement and institutionalize structuralist policies. Part IV concludes with some closing thoughts on how structuralism as a way of thinking about regulation connects to this broader moment of intense political and scholarly interest in inequality and racial (in)justice.

I. Structure as regulatory subject and strategy

Regulatory logics

The task of creating an effective and responsive regulatory system is often thought of in terms of questions of institutional design the balance of responsibilities between legislatures, agencies, and judges; how agencies should be structured; how agency heads should be appointed; how agencies can generate sufficient expertise to regulate effectively without falling prey to industry capture. But part of the challenge in ensuring effective and responsive regulation lies within the ways in which regulators and policymakers more broadly think about their task—the concepts and worldviews that operate within the ‘black box’ of policy decisionmaking and judgment.

However stringently we might read the external legal constraints on regulatory action— whether through judicial review or command—the fact of regulator discretion and judgment is inescapable.25 So how then should we think about the analytical methods or frameworks employed by regulators themselves? Regulators and legislators are not merely technical automatons executing the public will or legislative command. Nor are they simply political ideologues. Rather, policymakers are necessarily making decisions that involve degrees of subjective, normative, and policy judgments. The ways in which that judgment is exercised has an impact on the dynamics of regulatory policy.

Embedded in these judgments are a range of assumptions, values, and concerns. How are policymakers understanding the purposes of regulation in a given domain? Do they see their enterprise as complementary to existing private parties and practices? Or as fundamentally critical and oppositional? How do regulators view their own capacities and institutional competency—particularly relative to other private or governmental actors? Do they see themselves as outgunned and undermanned? Or well-informed and capable? What is their analysis of the systems and causes that drive the problems they are trying to solve—and which of those causes are, in their view, most amenable to the tools they have on hand? These are the kinds of underlying questions that operate upstream from a discrete policy issue or costbenefit analysis inquiry.

These questions often aggregate into distinctive patterns of judgment, consistent regulatory strategies, or what I call in this paper “regulatory logics”. Regulatory logics live squarely in the midst of the black box of regulatory judgment; they are more reasoned and grounded in understandings of the empirical nature of the world than pure political ideology, but at the same time they also share some degree of normative, subjective judgment beyond merely technical calculations of risk, costs, and benefits. We can think of “regulatory logics” as analogous to canons and methods of statutory interpretation in the judiciary. Just as canons offer a conceptual framework and method of reasoning forjudges seeking to fill in the gaps between statutory text and a new fact situation, regulatory logics can be thought of as a bundle of presumptions about the social goals of regulation, about the relative institutional competency of regulators in comparison to private actors, and about the appropriate methods of analysis required in formulating rules responding to new circumstances. And, like modes of interpretive reasoning, regulatory logics do not predetermine a specific outcome—though they may shade in some directions making some policy determinations and outcomes more likely than others. Nor are the same logics necessarily appropriate in all circumstances; different conditions may demand different regulatory logics.

### 2NC – AT: Case O/W

#### . Reject the individualistic framework of utility. Greatest good for the greatest number is based in the same rational-utility maximizing assumptions that reduce ethics to preference satisfaction. We have an ethical responsibility to foreground ecological impacts.

Julie **NELSON** Senior Research Fellow at the Global Development and Environment Institute, Tufts Universit and Economics @ UMass (Boston) **’13** “Ethics and the Economist: What Climate Change Demands of Us” GLOBAL DEVELOPMENT AND ENVIRONMENT INSTITUTE WORKING PAPER NO . 11 – 02 p. 13-17

A motivating emotion of particular importance to the case of climate change, may be, as suggested by noted environmental ethicist Hans Jonas in his 1984 book The Imperative of Responsibility , that of fear. While much of Jonas' argument is phrased in the traditional styles of philosophical argument, h e also points out that our development of technological powers with potentially profound and irreversible effects on the environment has created a world in which past and present experiences (Jonas 1984, 27) and the traditional ethics of rights and duties (Jonas 1984, 38) no longer serve as adequate guides. Linked to the point (to be argued at more length below) that what we need now is more attention to the avoidance of catastrophes than the achievement of best outcomes, he finds in fear a useful emotion for promoting action. Notions of moral imagination and narrative are also central to the questions of ethical motivation. As Jonas put it, our "first duty" is to "visualize" the effects of our harmful environmental practices (27). "[T]he creatively imagined malum ," he wrote, "has to take over the role of the experienced malum , and this imagination does not arise on its own but must be intentionally induced" (27). The by now proforma introduction of articles on climate change with extensive reviews of specific, concrete dangers (e.g., sea level rise, methane clathrate releases, disruption of the thermohaline circulation, floods, droughts, storms, and so on — all expressed with vivid geographic specificity) can thus be seen as an essential and vitally important part of a responsible ethical practice. So, also, are narratives which (while they may seem wildly overoptimistic given current political conditions) encourage people to have some hopefulness and a "can - do" attitude about addressing climate change. As long as there is life, there is hope. Our actions are often also based on simple heuristics (Gigerenzer 2007) and good narratives (Lakoff 2004, Chapter 6; Taleb 2010) , more than the logical weighing of alternatives. This suggests that, for inspiring action on climate change, detailed, rational, technocratic arguments — e.g., debates on the parameterization of climate and CBA models — may be less useful than economists generally prefer to think. While there is an important, defensive role to be played by economists who critique existing models that prescribe inaction (e.g., Ackerman and Fi nlayson 2006; Stanton 2010; Ackerman and Munitz 2011) , it would be a profound mistake to think that creating models prescribing action would do much, by itself, to avert catastrophe. Models — unlike emotions, moral imagination, and the stories that generate them — simply do not motivate. What gives "go slow" economic models their current power in directing (in)action is not the elegance of their equations (though this does create a barrier - to - entry effect, putting them seemingly beyond the critique of non - econ omists and non - mathematicians). Rather, they are but one small part of a general narrative of "costs," "price increases," and "job losses" — said to arise if mitigation efforts interfere with the engine (note the mechanical metaphor) of GDP growth. This narrative is being widely hyped throughout our culture by powerful coal, oil, and other interests with something to lose. Can the powers of fear and story - telling be abused? Absolutely. We have seen this to the n th degree in the United States, in fear - inspiring narratives of "weapons of mass destruction" and color - coded terrorism alerts. Do we need to continue to think rationally about outcomes and weigh risks, in cases where this can be productively accomplished? Absolutely. Nothing in the above should be taken as supporting an abandonment of reason in favor of "anything goes" emotionalism and con - artist storytelling. But what is the alternative to using emotional energy and effective storytelling to get societies moving on climate change? Letting things proceed with "business - as - usual" is profoundly unsafe. Attempting to create motivation through strictly cool, rational processes is profoundly ineffective. There is no rational, clockwork, safe world to which we can retreat from this dilemma, brushing messy de cisions off our hands. The question is not whether to tap emotions and narratives or not, but how to come up with good and useful ones that foster the sorts of changes that are needed. Perhaps, it might be argued, that while all this is necessary, it is not the role of economists to work on narratives. Such a view, however, ignores the fact that contemporary mainstream economics is a narrative (McCloskey 1985) , and an extremely culturally powerfully on e at that. While we are accustomed to hiding the story under layers of physics - emulating math, the story we tell is about a fictional world of mechanism and control, where a focus on small (marginal) changes is appropriate. When we use such a story in our research or teaching we should, given the contemporary state of the world, be required to attach a large red health - warning label. And in particular, we should flag the part of the story that glamorizes individual self - interested choice. 4. We Must Work T ogether In response to Republican rhetoric on health care, climate change, and nearly every other issue that has recently come before the United States Congress, the parody on - line magazine The Onion recently suggested a scenario: A massive asteroid is hu rtling towards earth, threatening massive conflagrations and extinctions. The "article" quotes fictional Republican congresspersons arguing that government spending on trying to change the asteroid's course would involve "big government" and "lost jobs." "We believe" they state, "that the decisions of how to deal with the massive asteroid are best left to the individual" (The Onion 2011) . While the fundamental unit of both Neoclassical economics and analytical philosophy is the human individual , and a fundamental ethical value is that of individual freedom, mitigation of climate change requires action on a vastly broader scale. Not only must people cooperate within communities and nations, but across national boundaries. We need to work together . Our abilities to think about how we might do this, however, are hampered by Enlightenment Beta habits of narrowing focusing on the single value of individual freedom, to the exclusion of other values. In particular, the long - running central narrative of economics has contributed greatly for the current U.S. sentiments in favor of permissive indulgence of economic self - interest and the radical weakening of regulation or any form of centralized government power. Although Adam Smith would no doubt be greatly alarmed to see the exaggeration and distortion this particular idea of his has suffered over the centuries, the story about the "invisible hand" of decentralized markets making individual self - interest serve the social good has become not only an economic but also a political and cultural mantra. Markets, it is now believed, vacate the necessity for ethics or shame. Much as we, as economists, may try to nuance this story of radical self - interested individualism by pointing to insights about externalitie s and public goods, those are usually part of Lesson 2 (or, more likely, in Chapter 14), and only picked up on by our better students. Lesson 1, from the way we currently teach economics — and blared incessantly from right - wing blogs and institutes — is that social cooperation is not necessary, and even becomes detrimental (i.e., freedom - reducing) in a competitive - market - based, GDP - growth aspiring, economy. For keeping this as Lesson 1, our discipline carries a good deal of responsibility for the cultural shift towards radical individualism that underlies the current failure of climate policy. 6 We have actively helped to create a climate of, as Amartya Sen and Jean Drèze expressed it (in the context of global hunger), "complacent irresponsibility" (1989, 276) .

### 2NC – AT: Perm

#### Combining new norms for antitrust with the baseline of competition co-opts transformation.

Sanjukta **PAUL** Law @ Wayne State **’19** “Antitrust as Allocator of Coordination Rights” https://www.gwern.net/docs/economics/2019-paul.pdf p. 3-4

The reigning antitrust paradigm authorizes large, powerful firms as the primary mechanisms of economic and market coordination, while largely undermining all others: from workers’ organizations to small business cooperation to democratic regulation of markets. This paper argues that rather than promoting competition, as conventionally understood, antitrust’s basic function is to allocate coordination rights. While deploying the notion of competition to undermine its disfavored forms of economic coordination, antitrust law also relies upon conceptually unrelated “efficiencies” to quietly underwrite a major exception to its principles of competition: the business firm itself. By surfacing what I call antitrust’s firm exemption, I reveal the contingency of the law’s choices about permissible economic coordination—and bring the possibility of making different choices closer.

Proposals to reform antitrust have generally stopped short of questioning the basic understanding that its primary function is to promote competition. To be sure, many posit that antitrust performs this stated function badly.1 And some have begun the critical work of re-introducing other, older normative benchmarks to antitrust analysis,2 whose memory a minor strain of earlier scholars had kept alive.3 To varying degrees, this work still regards antitrust primarily in terms of promoting competition. Meanwhile, more mainstream antitrust scholarship’s official consensus position is that the ideal competitive market is the only appropriate normative benchmark for decision-making.4 At least officially, if increasingly uneasily, competition is still king.

#### 3. Even ambitious reforms relying on the normative framework of competition as the baseline for economic coordination should be rejected.

Sanjukta **PAUL** Law @ Wayne State **’19** “Fissuring and the Firm Exemption” *Law and Contemporary Problems* 82:65 p. 85-87

Instead, we might consider allocating coordination rights on the basis of power and social benefit. Importantly, to guide the application of these concepts, we must first discard the ideal-state competitive order as the default normative framework for antitrust and for economic regulation more generally. This is not to say that competition as a social process, referring to healthy business rivalry, is not important to antitrust law: it is, and ought to be balanced with appropriate and socially beneficial coordination. However, once we realize that the idealstate concept of competition that is currently presumed to form the basis for antitrust law is contributing very little—except as a smokescreen for other normative choices—then we need no longer view economic coordination as a special exception to the order of things. Thus, we need not look for conditions of deprivation, or powerlessness, as constituting the sole basis—aside from the firm exemption—for the appropriate exercise of coordination rights because they are an exception to an otherwise perfect order. That is what our current framework does, and it is also the assumption on which even the most ambitious reform proposals proceed.77

### Link

#### Their framework treats competition as an abstract end in itself. Democratic control over the economy requires discarding the neoclassical model of perfect competition as our baseline.

Sanjukta **PAUL** Law @ Wayne St. **’21** “Charting the Reform Path” *Michigan Law Review* Forthcoming <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3931868> p. 11-16

David Seligman’s helpful chapter on the fissured workplace points out that lead firms’ current ability to control pricing and many other decisions by less-powerful firms in their orbits, while disavowing responsibility for these decisions and weaponizing anti-coordination legal norms against countervailing coordination by those less-powerful firms or actors, is a form of ‘having one’s cake and eating it too.’58 But it is not clear that this intuitive tension actually registers within the framework of imperfect competition defined by welfare economic theory, as the volume often seems to suggest, instead of on a prior and broader conceptual ground upon which legal principles are worked out.59 The definition of firms and their legal boundaries, and indeed of the forms of coordination beyond firm boundaries that are permitted, prohibited, favored or disfavored, is among the fundamental decisions about coordination rights that, I would argue, constitute particular markets. These definitions create and distribute economic power. We can certainly revise them because we decide that the distributions and relationships of economic power they create are not ones that are fair, good, or socially beneficial. It is not at all clear, however, that when we revise them, what we are doing is restoring “competitive markets” abstracted from such moral and political judgments (or the wage rates and other outcomes prescribed by a competitive market, abstracted from these judgments).

The analytical framework that is foregrounded in Inequality and the Labor Market seems to assume that the legal allocation of economic coordination rights is something that follows the diagnosis of market power, as a means of correcting it, rather than always existing as a primary and foundational element of constituting markets.60 This conceptualization of workers’ coordination— potentially non-employee workers, but also unions themselves—entails that such coordination is a “second best” (where the first best would presumably be individual workers competing with each other for jobs at firms under conditions of perfect competition).61 Aside from the hesitation that many may feel about characterizing democratic worker organization as a “second best” to theoretical perfect competition, it is not even clear that this framework is analytically coherent62 or provides a superior guide for assessing policy. In fact, most actual economic studies comparing actual rates of pay to the rates that would obtain in a hypothetical, preferred market do make assumptions about the legal allocation of coordination rights. For instance, in a powerful forthcoming analysis demonstrating the interracial transfer of wealth from college football and basketball athletes to coaches, administrators, and others under current market conditions organized by the NCAA, Hal Singer and Ted Tatos use a unionized hypothetical market as the normative benchmark for comparison.63 I would argue that this choice of a benchmark, ultimately shaped by contingent value judgments about fairness and democratic voice, is entirely appropriate—but it is shaped by these value judgments, from which the intellectual groundwork of neoclassical imperfect competition does not provide an escape.

Finally, on this view, even if labor markets are always monopsonized (a proposition that numerous economists will object to, and whose objections are likely to be persuasive to many judges and policy-makers), there are nevertheless presumably degrees of monopsony or market power. From this, it is plausible to argue that the degree of workers’ organizing rights ought to be keyed to the degree of employers’ market power in that instance.64 This is probably not the view of most of the worker advocates who contributed to this book. Yet it is really not obvious how one is to forestall such inferences and the resulting debates. It is worth noting in this respect that these debates are not entirely new. While the editors point out that perfectly competitive labor markets have long been the assumption of standard economic policy thinking, this was not always the case. Economist Harold Botwinick has described the debates between advocates of imperfect competition models (in labor markets and beyond) that enjoyed wide currency in the post-war period and advocates of perfect competition who successfully pushed back on these approaches,often by pointing out their logical lacunae.65

I have not focused primarily here upon the the many fine, specific policy prescriptions contained in this volume, and that is largely because I read the major purpose for the volume as framing the “intellectual groundwork” for these various worker-protective prescriptions as restoring outcomes that would obtain under “naturally competitive” conditions.66 A primary purpose of this Review is therefore to urge caution about about embracing neoclassical imperfect competition as the intellectual groundwork not only for antitrust’s application to labor markets but for work law more generally. At a minimum, there ought to be a pause in which we acknowledge that this is not an inevitable path prescribed by a univocal, external social science, but instead relies on a particular set of views within social science, which cannot ultimately be extricated from contested assumptions of law.

III. FIRST STEPS ON AN ALTERNATE PATH

This Review is not the place to set out and defend an alternative approach to thinking about competition, economic dominance, and labor markets, but it is important to at least note that there are alternatives. A growing literature highlights contingent decisions about market coordination, and the essential role of law in making or mediating those choices, as partially determinative of key outcomes including prices.67 A ‘moral economy’ approach to market regulation would then center the moral and normative choices that are unavoidably implicated by making these choices.68 As an initial matter, note that there are concerns about dominant firms’ impact on workers and labor markets that are not straightforwardly cognizable in an imperfect competition framework, but maybe captured through an alternative path.

First, predatory pricing or below-cost pricing is a traditional antitrust concern that directly implicates wages and the organization of labor markets. But we hear little or nothing about it in Inequality and the Labor Market nor in other influential accounts of antitrust and labor markets that emphasize neoclassical imperfect comeptition. Below-cost pricing was one of the primary concerns of Louis D. Brandeis, one of the major antimonopoly figures of the Progressive era and one of the inspirations in its revival today.69 Predatory pricing was a central tactic of the original trusts70 and it continues to be a major threat to independent and small producers and merchants.71 More generally, below-cost pricing tends to drive down wages and is ultimately unsustainable for any business that is not either being subsidized by another division or product line, or by an external financing source. A dramatic example of this dynamic has been the competition between global, venture capital-backed tech firms and local working-class entrepreneurs in taxi or ride-share markets.72 It is not that predatory pricing cannot be cognized within a welfarist framework at all,73 but that the lack of focus on internal pricing decisions in the neoclassical framework tends to shift attention away from cost- based pricing. On the other hand, in a framework in which external competitive forces are part of the picture but not the whole of it, cost-based pricing becomes highly salient both as a descriptive matter—in terms of how businesses, embedded in broader networks and institutions, seek to reproduce themselves—and as a normative matter, in determining what types of competition one wishes to encourage.

Another long-running antitrust concern that is not obviously squared with the imperfect competition framework is the outsized political influence of large, powerful firms. Examples of such political influence harming workers are common: one prominent recent example is Uber’s sponsorship, spending, and media management leading up to ballot Proposition 22.74 This concern, in fact, correlates less with market concentration, and more with absolute measures of a firm’s economic power outside particular product or labor markets—for instance, its absolute size or wealth as measured by its total assets or by its annual revenue.75 A focus upon absolute firm size or assets is more easily cognizable in a broader legal-institutionalist view of markets than in a focus upon imperfect competition.

From a moral economy perspective, these concerns are straightforwardly cognizable as, variously, destabilizing; undermining fair prices and wages; and promoting economic and political domination. These concerns present directly, instead of being first funneled through the theoretical intermediary of deviations from perfect competition. This same principle would then apply to assessing other rules, policies, or institutional changes. For example, corporate mergers and acquisitions’ effects on workers might be evaluated directly through business plans, testimony, and perhaps binding promises, rather than through speculation about whether they will reduce competition in a given labor market. Unions would not second-best alternatives to a fictive “free market” (that can never be specified in the absence of legal determinations of coordination rights) but rather, one possible market coordination mechanism among others. Indeed, a union itself can serve as an agent of market stabilization that benefits the small firms in a decentralized market while also managing wages and working conditions.76

From this perspective, real-world economic competition, channeled in socially beneficial ways, is a crucial element of a healthy economy that, at its best, spurs innovation and technological efficiency, and encourages us all to do our best. It ensures that both consumers and workers have reasonable outside options, creating a check on bureaucratic power. The existence of competition, in the sense of numerosity of decision-makers, also ensures some level of power distribution in the economy—though it is not sufficient to do so on its own. Block and Harris’ volume affirms these important values by encouraging a focus on market concentration, on oppressive contractual terms of various sorts, and on non-compete agreements and collusion among employers to suppress wages or limit worker mobility.

But while competition is an important element *of* a healthy economy, it can never be the primary organizing principle for an economy. Instead, those organizing principles are supplied by us, collectively, in good part through our representative law-makers. We can make different choices about the organizing principles, but we cannot choose to abdicate decision-making about how to structure markets altogether. The key is that law as a whole, and antitrust law itself, already makes decisions about what forms of economic coordination it will permit, prohibit, discourage, or encourage.77 It also makes decisions about the terms on which competition will proceed:78 will firms compete by aspiring to quality, technical efficiency, and being good to their customers and workers? Or will they compete by gobbling up other firms, by dominating counter-parties and subjecting them to extractive contracts, and by imposing sweatshop wages and working conditions? There is no escaping these choices. Status quo antitrust law encourages economic coordination through powerful firms that are largely unaccountable to the public and are minimally constrained in their ability to impose terms on others. If we are going to replace that status quo with something else, we have to replace it with alternate, more democratic forms of economic coordination, and with fair competition—not just with competition in the abstract, and not just with limited or conditional democratic coordination as a “second best” to perfect competition.

CONCLUSION

The conversation about competition, labor markets, and antitrust law is a rapidly evolving one, and Block and Harris’ volume is a valuable contribution to it. It is important to note that the analytical frameworks I have described in this Review are sometimes messy and overlapping; moreover, much of this overlap and common ground is likely to persist even in case of the methodological shifts I have tried to motivate here. Even now, there are some who theorize labor markets in terms of imperfect competition who also espouse or at least have sympathy for a legal- institutionalist or moral economy view of markets,79 while others may not. Constructing a new sort of law and economics is not an overnight project. Both tributaries of this interdisciplinary project are essential to it: one tending to emphasize the legal rules and institutional structures that form markets, the other tending to emphasize identifiable, emergent patterns of market dynamics that may arise across types of markets. The suggestion I make here is simply to caution against prematurely taking the precepts of neoclassical economic theory as primary, and as a stable and independent basis from which to derive the rules of law. Instead, I suggest that we re-center law within “law and economics.”

The abstract ideal of competitive markets will not organize a market or an economy on its own. It will always invite tacit, ad hoc policy preferences—whether those preferences tend egalitarian and democratic, or inegalitarian and hierarchical—that cannot really be derived from its abstractions. Building an egalitarian and democratic policy program on top of this ideal is tempting because of its generality, its apparent neutrality, and its current epistemic prestige. But logically speaking, there is ultimately no avoiding institutional specificity and direct engagement with moral values, even if doing so requires bucking an intellectual paradigm that can seem inescapable. We may as well get to the task sooner than later.

### AT: Perfect Competition True

#### Perfect competition has no empirical basis so mainstream models of supply are incoherent.

Steve **KEEN** Head of the School of Economics, History and Politics @ Kingston University (London) **’11** *Debunking Economics: Revised and Expanded Edition* p.101-102

The main consequence of this critique for neoclassical economics is that it removes one of the two essential pillars of their approach to modeling the economy. Unless perfect competition rules, there is no supply curve.

This fact goes a long way to explaining why neoclassical economists cling to using a notion that is so unrealistic, and so unlike any industry in the real world: because without it, their preferred method of modeling becomes impossible.

Economics has championed the notion that the best guarantee of social welfare is competition, and perfect competition has always been its ideal. The critiques in this chapter show that economic theory has no grounds whatsoever for preferring perfect competition over monopoly. Both fail the economist’s test of welfare, that marginal cost should be equated to price.

Worse, the goal of setting marginal cost equal to price is as elusive and unattainable as the Holy Grail. For this to apply at the market level, part of the output of firms must be produced at a loss. The social welfare ideal thus requires individual irrationality. This would not be a problem for some schools of economics, but it is for the neoclassical school, which has always argued that the pursuit of individual self­interest would lead to the best, most rational outcome for all of society.

Economics can therefore no longer wave its preferred totem, but must instead only derive supply as a point determined by intersection of the marginal cost and marginal revenue curves.

Worse still, once we integrate this result with the fact that the demand curve can have any shape at all, the entire ‘Totem of the Micro’ has to be discarded. Instead of two simple intersecting lines, we have at least two squiggly lines for the demand side – marginal revenue and price, both of which will be curves – an aggregate marginal cost curve, and lots of lines joining the many intersections of the marginal revenue curve with the marginal cost curve to the price curve. The real Totem of the Micro is not the one shown at the beginning of this chapter, but a couple of strands of noodles wrapped around a chopstick, with lots of toothpicks thrown on top.17

# 1NR

## ptx

## PIC – core

### condo – 1nr

## CP – sunbursting

### overview – 1nr

### AT: PDB – 1nr

### AT: PDCP – 1nr

#### 2---functionally: it’s dicta---both uncertain and un-immediate.

Kay ’14 [Richard; 2014; Professor of Law at the University of Connecticut; The American Journal of Comparative Law, “Retroactivity and Prospectivity of Judgments in American Law,” <https://opencommons.uconn.edu/cgi/viewcontent.cgi?article=1286&context=law_papers>]

The simple approach of starting the rule running, at the moment of decision, has, for reasons which will become apparent, been labeled "pure prospectivity." Neither the litigant in the case announcing the new rule, nor any other person whose claim is based on prior events, will be subject to that rule. 29 Since the new rule plays no role in determining the outcome of the litigation, it is technically dicta and, as such, communicates only a prediction of what the law will be.30 A court might even postpone the moment that the rule becomes applicable to some date further in the future. This variation has been called "prospective-prospective overruling." A court may reason that parties affected by the new rule need additional time to adjust their behavior. So, when the Wisconsin Supreme Court abrogated the doctrine of governmental immunity from tort liability on June 5, 1962, it held the "effective date of the abolition of the rule" would be July 15, 1962 in order “[t]o enable the various public bodies to make financial arrangements to meet the new liability."3 1 When later, the same year, the Minnesota Supreme Court reached a similar conclusion, it expressed its "intention to overrule the doctrine ... with respect to tort claims . . . arising after the next Minnesota Legislature adjourns, subject to any statutes which now or hereafter limit or regulate the prosecution of such claims." This both allowed institutions to buy liability insurance and gave the legislature a chance to craft a different liability regime that would accommodate the special interests of the public entities. 32

#### That distinction alone establishes competition.

Horneman et al ’13 [Hosea, Steven Blickensderfer, and Trevor Jones; 2013; Law clerk for Florida’s Fifth District Court, J.D. from Liberty University; Stetson Law Review, “A Catch-22 Of Cert Review: How Florida's "Clearly Established Law' Requirement Stifles Caselaw Development, And How Sunbursting Can Help The Sunshine State,” Vol. 42]

A. Obiter Dicta In sunbursting, a district court will reach a holding on the merits but not apply that holding to the parties because of the clearly-established-law requirement.15 An obvious argument is that any language or legal ruling in the court's opinion not dispositive of the case is mere obiter dictum.96 "Obiter dictum" (or dicta when plural)" is defined as a "judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)."" Whereas, a "holding" is "[a] court's determination of a matter of law pivotal to its decision."9 9 In our proposed solution the reviewing court will have "held" that the lower court either did or did not violate clearly established law and granted or denied the petition. In its most simplistic form, any further comments by the court on the merits could be considered mere dicta and nonbinding.100

#### 1---resolved.

OED ’89 [Oxford English Dictionary; 1989; OED, “Resolved,” Vol. 13, p. 725]

Of the mind, etc.: Freed from doubt or uncertainty, fixed, settled. Obs.

#### 2---should.

Summers ’94 [Summers; 1994; Justice on the Supreme Court of Oklahoma; Oklahoma State Courts Network, “Kelsey v. Dollarsaver Food Warehouse of Durant,” <http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker3fn13>]

4 The legal question to be resolved by the court is whether the word "should" 13 in the May 18 order connotes futurity or may be deemed a ruling in praesenti.14 The answer to this query is not to be divined from rules of grammar;15 it must be governed by the age-old practice culture of legal professionals and its immemorial language usage. To determine if the omission (from the critical May 18 entry) of the turgid phrase, "and the same hereby is", (1) makes it an in futuro ruling - i.e., an expression of what the judge will or would do at a later stage - or (2) constitutes an in in praesenti resolution of a disputed law issue, the trial judge's intent must be garnered from the four corners of the entire record.16 [CONTINUES – TO FOOTNOTE] 13 "Should" not only is used as a "present indicative" synonymous with ought but also is the past tense of "shall" with various shades of meaning not always easy to analyze. See 57 C.J. Shall § 9, Judgments § 121 (1932). O. JESPERSEN, GROWTH AND STRUCTURE OF THE ENGLISH LANGUAGE (1984); St. Louis & S.F.R. Co. v. Brown, 45 Okl. 143, 144 P. 1075, 1080-81 (1914). For a more detailed explanation, see the Partridge quotation infra note 15. Certain contexts mandate a construction of the term "should" as more than merely indicating preference or desirability. Brown, supra at 1080-81 (jury instructions stating that jurors "should" reduce the amount of damages in proportion to the amount of contributory negligence of the plaintiff was held to imply an obligation and to be more than advisory); Carrigan v. California Horse Racing Board, 60 Wash. App. 79, 802 P.2d 813 (1990) (one of the Rules of Appellate Procedure requiring that a party "should devote a section of the brief to the request for the fee or expenses" was interpreted to mean that a party is under an obligation to include the requested segment); State v. Rack, 318 S.W.2d 211, 215 (Mo. 1958) ("should" would mean the same as "shall" or "must" when used in an instruction to the jury which tells the triers they "should disregard false testimony"). 14 In praesenti means literally "at the present time." BLACK'S LAW DICTIONARY 792 (6th Ed. 1990). In legal parlance the phrase denotes that which in law is presently or immediately effective, as opposed to something that will or would become effective in the future [in futurol]. See Van Wyck v. Knevals, 106 U.S. 360, 365, 1 S.Ct. 336, 337, 27 L.Ed. 201 (1882).

### AT: theory – 1nr

### AT: L2NB – 1nr

### AT: uncertainty – 1nr

### AT: conservative court – 1nr

### AT: delay – 1nr

## DA – sua sponte

### overview – 1nr

### AT: inev and fake – 1nr

#### The court avoids unpredictable rulings by strictly addressing issues presented by litigants.

Baird ‘9 (Vanessa, Associate Professor of Political Science – UC-Boulder and Tonja, Professor of Law – Northwestern University, “How the Dissent Becomes the Majority: Using Federalism to Transform Coalitions in the U.S. Supreme Court”, Duke Law Journal, November, 59 Duke L.J. 183, Lexis)

But why do Justices need to signal for cases in the future? If the Justices did not need new case facts, they could simply transform the issue in the initial case into one involving federalism, without needing new litigation. There are instances when Justices can manipulate the issues without waiting for litigants to frame new cases appropriately. Professors Epstein and Shvetsova note examples of this, showing that the Chief Justice can have some impact on which issues are taken into consideration on the merits. [87](http://www.lexis.com/research/retrieve?_m=e2be8268ea5ab912f8de4cce2742a8eb&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzb-zSkAA&_md5=45df09c4d44394ec2b1545244b9dee01#n87) Moreover, Professors Ulmer 88 and  [\*207]  McGuire and Palmer [89](http://www.lexis.com/research/retrieve?_m=e2be8268ea5ab912f8de4cce2742a8eb&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzb-zSkAA&_md5=45df09c4d44394ec2b1545244b9dee01#n89) provide evidence that Justices, because they prefer some issues over others, create issues that were not presented before them - a phenomenon called "issue fluidity," whereby Justices address legal questions in their opinions that were not presented in the legal briefs. 90 The response to this counterargument is that Justices may not always be as willing or able to address issues that the litigants did not present. Professors Epstein, Segal, and Johnson argue that some Justices consider issue fluidity inappropriate; it violates a norm they consider important. [91](http://www.lexis.com/research/retrieve?_m=e2be8268ea5ab912f8de4cce2742a8eb&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzb-zSkAA&_md5=45df09c4d44394ec2b1545244b9dee01#n91) By the time a case reaches the Supreme Court, it has a well-developed record that is often difficult to ignore. In fact, even before a sympathetic judge, an outcome may depend not simply on the fact that a litigant makes a federalism argument, but may require a particular form of that argument. Because litigants need to choose carefully the arguments they make before the Court - due to opportunity costs created by time constraints and judicial impatience with litigants who throw every possible argument into a brief - effective signaling will often require new litigation, and will not be amenable to fact or issue manipulation. Holding all else equal, Justices are likely to prefer cases with facts amenable to particular legal arguments, rather than cases in which they have to create the issue themselves. And if the initial case facts do not lend themselves to being framed on the basis of federal-state power, the Justices will require new case facts to generate different legal arguments. In this situation, litigants have an incentive to find (or create) new case facts and bring new litigation that allows dissenting Justices to persuade their previously unsympathetic colleagues to join them in their opinion..

#### Roberts court is minimalist – doesn’t deviate from retrospective precedent.

Sunstein 16(Cass R., Harvard Law Professor“Don't Expect the Supreme Court to Change Much”, https://www.bloomberg.com/view/articles/2016-11-09/don-t-expect-the-supreme-court-to-change-much)

The Donald Trump presidency, coupled with the new Congress, is likely to produce major changes in federal law. But for the Supreme Court, expect a surprising amount of continuity -- far more than conservatives hope and progressives fear.

If, as expected, Trump is able to replace Justice Antonin Scalia, the court will look a lot like it did until Scalia died in February: four relative liberals (Ruth Bader Ginsburg, Stephen Breyer, Elena Kagan, and Sonia Sotomayor); two moderate conservatives (John Roberts and Anthony Kennedy); and three relative conservatives (Clarence Thomas, Samuel Alito, and the new justice).

That means it would reflect the same ideological makeup as the court that upheld Obamacare and required states to recognize same-sex marriages. It would contain the same five justices -- a majority -- who recently voted to uphold affirmative action programs and to invalidate restrictions on the abortion right.

A court like that won't license a Republican-led executive branch to do whatever it wants. It will assert the rule of law. It will rarely veer off in novel directions.

To be sure, things will be different if Trump is able to replace one of the liberal justices. Neither Ginsburg (who is 83) nor Breyer (78) is a spring chicken. But they both appear to be in good health; don't be surprised if they continue to serve for the next four years.

Suppose, though, that one of them does resign. At that point, significant changes would be possible. But probably not many. One reason involves the idea of respect for precedent. The justices are usually reluctant to disturb the court's previous rulings, even if they disagree strongly with them. In this light, would a new majority really want to announce in, say, 2018, that states can ban same-sex marriage, after years of saying otherwise? That’s unlikely: Such an abrupt reversal of course, defeating widespread expectations, would make the law seem both unstable and awkwardly political.

Would a Trump court want to overrule Roe v. Wade, which has been the law since 1973, and thus allow states to ban abortion? Considering the intensity of conservative opposition to abortion, that is somewhat more probable. But judges are not politicians, and again to avoid the appearance of destabilizing constitutional law, any majority would hesitate before doing something so dramatic.

Would a court composed of Alito, Roberts, Kennedy, Thomas, and one or two Trump appointees be willing to grant broad new powers to the president? No chance. The current conservatives have expressed a great deal of skepticism about executive authority. They aren’t going to turn on a dime merely because the president is a Republican.

There is a more general point. Many judges (and Roberts in particular) are drawn to “judicial minimalism”; they prefer to focus on the facts of particular cases. Quite apart from respecting prior rulings, they like small steps and abhor bold movements or big theories.

An instructive example: In the 1970s, many progressives were terrified when President Richard Nixon found himself a position to transform a left-of-center court, led by Earl Warren, and to appoint no fewer than four “strict constructionists.” And to be sure, the Nixon court, as it was sometimes called, repeatedly disappointed the left. It halted the movement toward recognition of welfare rights, declined to expand the rights of criminal defendants and refused to recognize a constitutional right to education. But the whole period is aptly described as “the counter-revolution that wasn’t.” The Nixon court maintained a lot of continuity with its predecessor. Believing that the commitment to the rule of law entails humility and respect for the past, it preserved most of its precedents, even as it refused to build on them.

It’s true that with further changes in the court’s membership, we should expect to see some incremental movements in the law, including expansions in gun rights, increased protection of commercial advertising and new constraints on the power of regulatory agencies. But there’s an excellent chance that in four years, constitutional law will look pretty much the same as it does now.

### AT: test case – 1nr

#### 2 – Lack of precision matters – the exact wording of the aff must be present for a viable test case; test case isn’t in the plan.

Krimbel ‘89 (Rosemary, JD – Chicago-Kent College of Law, “Rehearsing Sua Sponte in the U.S. Supreme Court: A Procedure for Judicial Policymaking, Chicago-Kent Law Review, 65 Chi.-Kent L. Rev. 919, Lexis)  
Indeed, the Court hears only a small proportion of the thousands of cases that request Supreme Court review. 159 Which cases the Court chooses to decide indicates its policies and priorities as well as the extent of its influence upon the political discourse both in our government and among citizens. Despite this considerable discretion, the Court is still limited to the cases and issues which the litigants choose to present. This limitation assures that an activist Court may not reach out and decide just any issue of its choice. In other words, even an activist Court must bide its time waiting for the "perfect" case. This control of the issues by the litigants is central to our adversarial system of law. The Constitution embodies the adversarial system in section two of Article III which extends the judicial power to all "Cases" or "Controversies." 160 It does not extend the power to all "issues of interest to the Justices." In addition to this constitutional constraint on the Court's jurisdiction, the Court has created rules of self-restraint, including the doctrine of advisory opinions, ripeness, standing, and mootness. 161 Both the constitutional limitation of case or controversy and the [\*942] judicially created doctrines comport with the Court's duty to avoid constitutional questions unless necessary.

#### 3 – Fiating a test case is theo

#### A) “Should” denotes immediacy.

Summers ‘94 (Justice – Oklahoma Supreme Court, “Kelsey v. Dollarsaver Food Warehouse of Durant”, 1994 OK 123, 11-8, http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker3fn13)

¶4 The legal question to be resolved by the court is whether the word "should"[13](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker3fn13) in the May 18 order connotes futurity or may be deemed a ruling in praesenti.14 The answer to this query is not to be divined from rules of grammar;[15](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker3fn15) it must be governed by the age-old practice culture of legal professionals and its immemorial language usage. To determine if the omission (from the critical May 18 entry) of the turgid phrase, "and the same hereby is", (1) makes it an in futuro ruling - i.e., an expression of what the judge will or would do at a later stage - or (2) constitutes an in in praesenti resolution of a disputed law issue, the trial judge's intent must be garnered from the four corners of the entire record.16 [CONTINUES – TO FOOTNOTE] [13](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker2fn13) "*Should*" not only is used as a "present indicative" synonymous with *ought* but also is the past tense of "shall" with various shades of meaning not always easy to analyze. See 57 C.J. Shall § 9, Judgments § 121 (1932). O. JESPERSEN, GROWTH AND STRUCTURE OF THE ENGLISH LANGUAGE (1984); St. Louis & S.F.R. Co. v. Brown, 45 Okl. 143, 144 P. 1075, 1080-81 (1914). For a more detailed explanation, see the Partridge quotation infra note 15. Certain contexts mandate a construction of the term "should" as more than merely indicating preference or desirability. Brown, supra at 1080-81 (jury instructions stating that jurors "should" reduce the amount of damages in proportion to the amount of contributory negligence of the plaintiff was held to imply an *obligation* *and to be more than advisory*); Carrigan v. California Horse Racing Board, 60 Wash. App. 79, 802 P.2d 813 (1990) (one of the Rules of Appellate Procedure requiring that a party "should devote a section of the brief to the request for the fee or expenses" was interpreted to mean that a party is under an *obligation* to include the requested segment); State v. Rack, 318 S.W.2d 211, 215 (Mo. 1958) ("should" would mean the same as "shall" or "must" when used in an instruction to the jury which tells the triers they "should disregard false testimony"). [14](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker2fn14) *In* praesenti means literally "at the present time." BLACK'S LAW DICTIONARY 792 (6th Ed. 1990). In legal parlance the phrase denotes that which in law is *presently* or immediately effective, as opposed to something that will or would become effective in the future *[in futurol*]. See Van Wyck v. Knevals, 106 U.S. 360, 365, 1 S.Ct. 336, 337, 27 L.Ed. 201 (1882).

#### B) “Substantial” necessitates immediate announcement.

Words and Phrases ‘64 (40 W&P 759)

The words “outward, open, actual, visible, substantial, and exclusive,” in connection with a change of possession, mean substantially the same thing. They mean not concealed; not hidden; exposed to view; free from concealment, dissimulation, reserve, or disguise; in full existence; denoting that which not merely can be, but is opposed to potential, apparent, constructive, and imaginary; veritable; genuine; **certain**; absolute; real at present time, as a matter of fact, not merely nominal; opposed to form; actually existing; true; not including admitting, or pertaining to any others; undivided; sole; opposed to inclusive.

### AT: impact d – 1nr

#### Empirics prove – past sua sponte decisions created legal and media controversy and forced the Court to back down.

Epstein ‘96 (Lee, Professor of Political Science and Professor of Law – Washington University, et al., “The Claim of Issue Creation on the U.S. Supreme Court”, American Political Science Review, 90(4), December, Jstor)

While we are sympathetic to this claim, two factors dampen our enthusiasm. For one thing, if the Court did not respect the norm disfavoring the creation of issues, then it merely would have reconsidered Runyon without asking for rearguments; in other words, if the Court could discover issues, it could surely reexamine past cases sua sponte. Seen in this way, the Patterson order may lend further support for the existence of the norm of sua sponte, rather than ammunition to refute it. Second, the request for reargument in Patterson elicited, not unlike the Goldberg memo, a highly negative response: Four justices dissented, asserting that "neither the parties nor the Solicitor General [as an amicus curiae] have argued that Runyon should be reconsid- ered" (Patterson 1988, 617); newspapers and magazines took aim at the Court's majority (see, e.g., Jacoby and McDaniel 1988); legal scholars deemed the order an example of brute activism (see, e.g., Krimbel 1989); and, at the end of the day, the Court did not overrule Runyon. Of course, we do not claim that the decision to retain Runyon was causally connected to the overwhelmingly negative reaction to the reargument order; yet, because of the "fuss" following the request in Patterson, legal scholars have speculated that "it may be a long time before the Court requests rehearing sua sponte" (Krimbel 1989, 933).

### AT: rol thumped – 1nr