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#### 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.

#### We need a paradigmatic shift from perfect competition to political-economic governance. Antitrust allocates rights to coordinate economic activity. The aff uses the baseline of perfect competition to match antitrust laws to micro-economic assumptions of rationally acting firms.

Luke **HERRINE** PhD Candidate @ Yale Law & Managing Editor LPE Bog **’21** https://lpeproject.org/blog/markets-collective-bargaining-all-the-way-down/

Coase, of course, laid the foundation for the transaction cost approach to conceptualizing the coordinating mechanisms of firms vs. markets. In “The Nature of the Firm”, he asked why there should be firms at all if production can be efficiently coordinated via unplanned markets in the neoclassical utopia. Coase answered that markets have their own costs–transaction costs–that can be reduced by bringing exchanges “into” the firm (i.e. converting them from trades to commands). The idea of transaction costs formed the foundation for the “New Institutional Economics” that provided the groundwork for Oliver Williamson’s work on firm structure and antitrust (which was hugely influential on Robert Bork, among others), for Jean Tirole’s theory of platforms as two-sided markets, for Douglass North’s groundbreaking work on economic history, for the “New New” Institutionalism of Acemoglu and Robinson, and for much else besides. It is out of “transaction costs” that neoclassical economists build their theories of institutions, because it is only possible to have enduring institutions (rather than a constantly shifting terrain of self-liquidating contractual relationships) if there is some “cost” preventing spot exchanges from regulating every contingency.

In her article “Antitrust as Allocator of Coordination Rights“, Paul flips this script. As the title indicates, Paul is also concerned with theorizing coordination. But she rejects Coase’s way of framing the question. Who cares how coordination would work in a neoclassical utopia? A “market”, as neoclassicals use the term, can never serve as a coordinating mechanism. To use the non-coordination coordination of that utopia as a descriptive or normative baseline for reality is to confuse our analysis. In the real world, some form of active coordination is always needed in both markets and firms. Antitrust law works together with corporate law, property law, contract law, et al. to determine which forms of coordination within the production and distribution system will be tolerated, which will be favored, and which will be prohibited. To determine how coordination works and how it might work, we must inductively examine how different patterns of coordination rights facilitate different production and distribution processes.

Paul’s article is the inverse of Coase’s in more ways than one. Coase started in the domain of social theory while ignoring law altogether. But it turned out that his social theoretic concepts provided a convenient way to make sense of the awkward mismatch between neoclassical models and instituted reality. Paul starts from the law, though with a critical eye to the way that neoclassical theory has been translated into legal doctrine.

It remains to build a social theory off of her legal groundwork.

Ulysse Lojkine recently suggested one way forward: to combine Paul’s framework with the work of Janos Kornai in a rejiggering of Marxian theories of surplus value and exploitation.

In a forthcoming contribution to an edited volume, Nathan Tankus and I articulate another. We incorporate Paul’s concept of coordination rights into market governance theories found in Postkeynesian economics, institutiontalist economics, and economic sociology in an effort to build out a Neochartalist micoreconomics. Nathan has a summary of one of the central arguments of the article over at his blog (to which readers of this blog should subscribe!). In the remainder of this post, I want to focus more generally on the concept of market governance and how it contributes to an alternative to the Coasian toy models that are so familiar to those of us who live in the world law-and-economics has created.

One way to get at the concept of market governance is to conceptualize the coordination of production and distribution as taking place within a “social field“. A social field exists when a group of individuals understand themselves as participants in a common social space–whether as collaborators, rivals, or some combination. For social fields to endure as stable spaces of action, participants must actively (though not necessarily consciously) reproduce the terms on which they exist: the rules and norms that govern social action, the rituals and social scripts that organize time, the discourses and knowledge practices that facilitate mutual understanding all only exist to the extent that they are continue to be followed, taught, enforced, etc. The terms on which action in a social field proceeds is the subject of a settlement that benefits incumbents, with insurgents benefiting from the stability produced by a settlement but chafing under its terms. This settlement can be challenged and destabilized, whether by insurgents, participants in neighboring fields, or others, whose efforts may be spurred or aided by a technological or organizational change that makes the previous settlement more difficult to sustain, by a collapse of an institution or field on which that field depended (e.g. a shift in a regulatory regime or a failure of some link in a supply chain), or some other deep shift of context with which the field must cope. But open contestation over the terms of the settlement cannot be constant, lest a field lack the stability necessary for coherent social action. Rather, most of the time contestation takes place in a more muted and gradual way, leaving most of the terms of the settlement in place, with more dramatic destabilization leading either to a field’s collapse or reorganization according to a new settlement.

If we understand production and distribution as taking place within overlapping social fields, we can conceptualize coordination and competition as always going on–always coexisting–at multiple levels. What neoclassical economics thinks of as “perfect” competition appears not as a plausible way of organizing a social space but as unmanageable chaos. It exists only times of social instability, when fields are in crisis. Most of the time, competition proceeds according to a social settlement that preserves the stability necessary for coherent social action (while preserving the advantage of incumbents). The pattern of coordination rights at any given time are part of this settlement.

To this general sociological account of economic action we can add heterodox economic accounts of modern production and distribution processes as money-mediated, with businesses operating as “going concerns”. As Jamee Moudud put it in a post on this blog,

Pricing policy is central to the going concern: setting an appropriate price over unit costs in an attempt to obtain a target rate of return has to generate adequate cash flow for the firm to grow. Crucially, the time gap between current debt obligations and future revenues always compels the firm to have an adequate stock of liquidity, or cash on hand to pay debts. This money-centered view of the firm is not consistent with the barter-based framework undergirding neoclassical economics which separates money from the “real” (production-based) economy.

In order to manage the inward and outward flows of money, participants in a production and distribution process must create a stable set of pricing practices–they must administer prices, to use a term from Gardiner Means. This can be done within a firm, but it can also be done across entities via horizontal coordination (in a cartel, via fair trade laws, or through other means). Thus, the practice of pricing (among other practices) can be understood as the subject of a settlement that stabilizes the social field in which money-mediated institutions operate.

With this lens, we can avoid comparing the real world to a single model of an ideal market and instead explore different ways that prices have been and might be stabilized. And we can then explore the good and bad of each form of price stabilization. Nathan and I begin this project in our article, surveying multiple contemporary forms of price stabilization (chartered exchanges vs. oligopolistic corporations, e.g.) and analyzing several historical forms (fairs, formal markets, early chartered exchanges). In doing so, we hope to illustrate a fundamentally different way of thinking about how coordination works, one that treats “microfoundations” as a project of attention to institutional detail rather than rational choice reconstruction

We think a paradigm shift along these lines will be crucial in connecting different LPE projects–for instance, the reconsiderations of money, banking, and financial regulation with the reconsiderations of antitrust, of public utility, and of corporate governance with the revisiting of the financial and organizational architecture of slave plantations. If we want to build on a different foundation than neoclassical economics, the anti-Coasian foundations of Paul’s groundbreaking work seems like a good place to start.

#### 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.

Mariana **MAZZUCATO** Inst. for Innovation & Public Purpose @ University College (London) **AND** Rainer **KATTEL** Inst. for Innovation & Public Purpose @ University College (London) **’20** “Grand Challenges, Industrial Policy, and Public Value” Non-paginated

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.

#### Rejecting the paradigm of market-failure reinvigorates our collective choices about the purpose of economic activity.

Michael **JACOBS** Visiting Prf. School of Public Policy & Poli Sci @ University College (London) **AND** Mariana **MAZZUCATO** RM Phillips Professor in the Economics of Innovation at SPRU at the University of Sussex ‘**16** in *Rethinking Capitalism: Economics and Policy for Sustainable and Inclusive Growth* eds. Michael Jacbos & Mariana Mazzucato p. Non-paginated

Beyond market failure: towards a new approach

Each chapter of the book approaches its subject in a different way. In commissioning them we wanted to reflect a variety of perspectives, both on the nature of the problems of modern capitalism and in the economics required to address them. The authors are responsible only for their own chapters: we did not seek, and do not claim, that they all agree with one another.

Nevertheless, their critiques have many elements in common. Each challenges an important aspect of orthodox economic theory and policy prescription. By ‘orthodox’ we mean the view that dominates public debate about economic policy. Within the academic discipline of economics there are lively arguments about many aspects of theory and policy. But mainstream economic discourse rests to a powerful extent on a very simple underlying conception of how capitalism works. This is that capitalism is an economic system characterised by competitive markets.

In these markets privately owned companies, seeking to make profits for their shareholders, compete with one another to supply goods and services to other businesses and freely choosing consumers. In individual markets, neoclassical theory (on which the orthodox view is based) holds that such competition drives economic efficiency, which in turn maximises welfare. Markets are assumed to tend towards equilibrium, while businesses are assumed to be fundamentally alike, analysed as ‘representative agents’ constrained to act in the same ways by the external pressures of the market. At the level of the economy as a whole, it is competition between firms which is believed to generate innovation, and therefore leads to long-run economic growth.

The orthodox model understands that markets do not always work well. It therefore uses the concept of ‘market failure’ to explain why suboptimal outcomes occur and how they can be improved. Markets fail under various circumstances: when firms have monopolistic power which restricts competition; when there are information asymmetries between producers and consumers; when there are ‘externalities’ or impacts on third parties which are not properly reflected in market prices; and where public and common goods exist whose benefits cannot be captured by individual producers or consumers.36 The propensity of real-world markets to fail in these various ways means that ‘free’ markets do not maximise welfare. So the theory of market failure provides a rationale for government intervention. Public policy should seek to ‘correct’ market failures—for example by promoting competition; by requiring information about goods and services to be more widely available; by forcing economic actors to pay for externalities through means such as pollution taxes; and by providing or subsidising public goods.

At the same time, the orthodox view emphasises that it is not only markets which fail; governments do too. Even well-meaning ones can intervene badly, creating outcomes worse than if they had left markets alone—not least because private actors often adjust their behaviour to compensate. And public institutions are never disinterested —they develop goals and incentives of their own which may not reflect the general welfare of society as a whole. So public policy interventions always have to balance the goal of correcting market failures with the risk of generating government failures which outweigh them.37

Broadly speaking, it is this general model of capitalism which underpins most public economic commentary and policymaking today. And it leads to some familiar policy conclusions. Chief among these is that markets generally produce positive outcomes which increase welfare, and should therefore be allowed to operate without much interference wherever possible. A basic regulatory framework of employment, consumer and environmental protection is required to correct for clear externalities and information asymmetries; but governments should not seek to direct markets or shape the businesses which operate in them. The ‘invisible hand’ of the market knows best, generating the highest welfare-producing activities where firms seek to maximise value for their shareholders. Even where the market might seem to get it wrong, governments cannot presume to know better. So governments should be extremely wary of seeking to ‘pick winners’ through industrial and innovation policy; of seeking to push banks and other financial institutions to make specific forms of investments; or of investing in the private economy themselves.

Public investment—particularly if funded by borrowing— will simply ‘crowd out’ private investment. Governments should seek to use competitive private enterprise to deliver public utilities and services wherever possible. Getting the public finances into balance should be the overwhelming priority of fiscal policy. Taxation is necessary; but because it tends to disincentivise wealth creation and work, it should be kept as low as possible. Within each of these propositions lurks many a disagreement among academic economists, often informed by subtly complex theory and detailed empirical evidence. But it is not hard to find these views expressed in public debate; and they have dominated the practice of policy-making over recent years.

The orthodox model provides an attractively simple framework for thinking about economics and policy. It combines the mathematical elegance of neoclassical microeconomics with plausible claims about the macroeconomy. The fact that many of the policy prescriptions which follow from it favour those in positions of incumbent economic power has given it a powerful grip on public discourse. But it’s not an adequate model for understanding how capitalism works. For markets are not simple structures which behave in the ways set out in economics textbooks; and ‘market failure’ is not a helpful concept for analysing capitalism’s major problems or how to address them. These idealised theories assume away many of capitalism’s key features, or treat them as ‘imperfections’ rather than structural, systemic characteristics. They ignore much of the evidence on how different economies actually function, and when and why they have performed well or badly. None of the key problems which Western capitalism has experienced over recent decades—weak growth and financial instability, declining investment and financialisation, the stagnation of living standards and rising inequality, dangerous environmental risk—are explained by them.

Capitalist economies are not theoretical abstractions but complex and dynamic systems, embedded in specific societies, as well as in natural environments governed by biophysical laws. They are formed of multiple relationships between real and heterogeneous economic actors whose behaviour is not that of idealised ‘representative agents’, but arises from their particular characteristics and choices in different circumstances. These relationships give rise not to equilibrium, but to dynamic patterns of growth and change. The macroeconomic outcomes they generate are more than simply the sum of their microeconomic parts. Their problems are not failures of markets which ‘normally’ succeed, but arise from fundamental characteristics and structures. So to understand how they work, and to explain how policy can help them work better, we need a much richer approach.

Fortunately, there are plenty of resources within economics with which to do this. For these characteristics of capitalist economies are hardly revelatory. They have been analysed in theory and documented in practice for more than a hundred years of economic scholarship. They underlie the work of some of the greatest economists of the past century—such as Karl Polanyi, Joseph Schumpeter and John Maynard Keynes— and of the more recent schools of evolutionary, institutional and post-Keynesian economics. As the separate chapters in this book show, analysis based on these foundations can generate searching critiques of current policy, and powerful alternative perspectives.

Three key insights underpin a rethinking of capitalism in these ways.

First, we need a richer characterisation of markets and the businesses within them. It is not helpful to think of markets as pre-existing, abstract institutions which economic actors (firms, investors and households) ‘enter’ to do business, and which require them, once there, to behave in particular ways. Markets are better understood as the outcomes of interactions between economic actors and institutions, both private and public. These outcomes will depend on the nature of the actors (for example, the different corporate governance structures of firms), their endowments and motivations, the body of law and regulation and cultural contexts which constrain them and the specific nature of the transactions which take place. Markets are ‘embedded’ in these wider institutional structures and social, legal and cultural conditions.38 In the modern world, as Polanyi pointed out, the concept of a ‘free’ market is a construct of economic theory, not an empirical observation.39 Indeed, he observed that the national capitalist market was effectively forced into existence through public policy—there was nothing ‘natural’ or universal about it.40

The orthodox notion of competition between firms is equally misleading. Many of the most important markets in modern capitalism are oligopolistic in form, characterised by economies of scale and ‘network effects’ that lead to concentration and benefit incumbents. But even where there is greater competition, capitalist businesses are not all the same, forced to behave in similar ways by the external forces of ‘the market’. On the contrary, as Lazonick shows, what we actually observe is persistent heterogeneity, both in businesses’ internal characteristics and in their reactions to different market circumstances. Given that they must compete through innovation, this is hardly surprising. As evolutionary economics has emphasised, this heterogeneity is not a short-run transition towards a world of similar actors, but a long-run feature of the system.41 Different norms and routines combine to generate different behaviours and outcomes.

In fact, the evidence shows the particular importance of ownership and governance structures. Over the past thirty years the orthodox view that the maximisation of shareholder value would lead to the strongest economic performance has come to dominate business theory and practice, in the US and UK in particular.42 But for most of capitalism’s history, and in many other countries, firms have not been organised primarily as vehicles for the short-term profit maximisation of footloose shareholders and the remuneration of their senior executives. Companies in Germany, Scandinavia and Japan, for example, are structured both in company law and corporate culture as institutions accountable to a wider set of stakeholders, including their employees, with long-term production and profitability their primary mission. They are equally capitalist, but their behaviour is different. Firms with this kind of model typically invest more in innovation than their counterparts focused on short-term shareholder value maximisation; their executives are paid smaller multiples of their average employees’ salaries; they tend to retain for investment a greater share of earnings relative to the payment of dividends; and their shares are held on average for longer by their owners. And the evidence suggests that while their short-term profitability may (in some cases) be lower, over the long term they tend to generate stronger growth.43 For public policy, this makes attention to corporate ownership, governance and managerial incentive structures a crucial field for the improvement of economic performance.

In short, markets are not idealised abstractions, but concrete and differentiated outcomes arising from different circumstances. Contrary to the claims of orthodox economists that ‘the laws of economics are like the laws of engineering: one set of laws works everywhere’,44 there are in fact many different kinds of market behaviour, and several varieties of capitalism.45

The second key insight is that it is investments in technological and organisational innovation, both public and private, which are the driving force behind economic growth and development. The diffusion of such innovations across the economy affects not just patterns of production, but of distribution and consumption. It has been the primary source of improvements in productivity, and consequent rises in living standards, for the past 200 years.46 Thus a theory of how capitalist economies work must include at its centre the dynamics of innovation, understanding both the specific nature of the investments needed and the turbulent, non-equilibrium outcomes that result. But this requires a much more dynamic and accurate understanding of how innovation occurs than is provided by the orthodox economic theories of imperfect competition. Drawing on Schumpeter’s original analysis of the processes of ‘creative destruction’,47 modern evolutionary economics has done much to explain how firms operate with bounded rationality in circumstances of uncertainty, where markets tend towards disequilibrium and change is path-dependent. Growth results from the coevolution of technologies, firms and industry structures and the social and public institutions which support them, connected by complex feedback processes.48

Promoting innovation therefore requires attention to be paid to each of these elements. The economy needs firms with risk taking management cultures and incentives which reward long-run perspectives, rather than those, as Haldane notes, focused largely on short-term financial returns. Innovation requires very specific forms of finance: patient, long-term and committed. As Griffith-Jones and Cozzi argue, this creates a particular role for public banks, able to steer finance towards long-run projects, leverage private capital and stimulate multiplier effects.

Taxation policies need to incentivise long-term investment. Critically, as Mazzucato shows, innovation also needs well-funded public research and development institutions and strong industrial policies. These need to be directed across the entire innovation chain, not only in the classic ‘public good’ area of basic science. A crucial recognition is that innovation has not only a rate, but also a direction.49 Historically, that direction has often been determined by ‘mission-oriented’ public policies, which have steered both public and private investments into new fields. During the mass production era, as Perez notes, it was policies around suburbanisation that allowed the new technologies of mass production to be fully diffused and deployed.

Mazzucato observes that public funding drove both the IT revolution and other fields such as bio- and nanotechnologies and today’s green technologies.50 Each of these has involved both supply-side and demandside policies, in which new markets as well as new products have been created and public investment has ‘crowded in’ private.

By setting societal missions, and using their own resources to co-invest with long-term capital, governments can do far more than ‘level the playing field**’**, as the orthodox view would allow. They can help tilt the playing field towards the achievement of publicly chosen goals. Just as the creation of the welfare state in the postwar period, and the information technology revolution in the decades around the turn of the century, unleashed new waves of economic growth and widened prosperity, so new missions today have the potential to catalyse new innovation and investment. Foremost among them must be the transformative challenge of reducing and eventually eliminating greenhouse gas emissions to limit dangerous climate change, and of constraining the economy’s wider environmental impacts within biophysical boundaries. As Perez argues, there is particular potential for such a ‘green’ direction, allied to the continuing development of information and communications technologies, to drive a new wave of structural transformation and growth.

Recognition of the role of the public sector in the innovation process informs the third key insight. This is that the creation of economic value is a collective process. Businesses do not create wealth on their own. No business today can operate without the fundamental services provided by the state: schools and higher education institutions, health and social care services, housing provision, social security, policing and defence, the core infrastructures of transport, energy, water and waste systems.

These services, the level of resources allocated to them and the type of investments made in them, are crucial to the productivity of private enterprises. The private sector does not ‘create wealth’ while taxpayer-funded public services ‘consume’ it. The state does not simply ‘regulate’ private economic activity. Rather, economic output is co-produced by the interaction of public and private actors—and both are shaped by, and in turn help to shape, wider social and environmental conditions.

### 1NC – DA

#### Federal courts are barely recovering from COVID now.

Morris ’21 [Angela; ALM Media's Texas litigation reporter, internally citing several Texas district court judges; 6/11/21; “'Backlogs Keep Me Up at Night': A look at Cases Clogging Texas Dockets Amid Pandemic”; <https://www.law.com/texaslawyer/2021/06/11/backlogs-keep-me-up-at-night-a-look-at-cases-clogging-texas-dockets-amid-pandemic/?slreturn=20210805152423>; Texas Lawyer; accessed 9/5/21; TV]

Texas Lawyer analyzed case data from the administrative office and found that between 2019 and March of this year, the active criminal docket in district courts swelled by 34% to land at nearly 255,800 cases. The number of active family cases grew by 13% since 2019, ending at just over 370,600 this March. In contrast, there was only 2% growth in the number of active civil cases in the time period. The number of juvenile cases actually shrank by 5%. “Any backlog is always concerning to me, because I know backlogs represent unresolved cases,” said 379th Criminal District Judge Ron Rangel of San Antonio. “Backlogs do keep me up at night.” Criminal docket The pandemic was the hardest on criminal cases. Although district courts had a 94% clearance rate for criminal cases in 2019, it dropped to 70% in 2020. It’s recovered somewhat so far this year at 80%. Case clearance rates represent a comparison between the number of old cases that courts dispose of, and the new cases added to their dockets. The gold standard is a 100% clearance rate, and means courts are getting rid of the same number of old cases as the new cases coming in. If courts have a rate less than 100%, that will lead to a growing case backlog. If a court’s clearance rate is more than 100%, it means the court is shrinking its docket. The result of criminal clearance rates dropping so much during the pandemic was a case backlog that skyrocketed from about 7,600 cases in 2019 to over 55,200 backlogged cases in 2020. The backlog number represents the difference in case numbers at the end of the year compared to the beginning. The backlog would remain the same if a court had disposed of the same number of cases as were filed that year. But if a court was not keeping up, the backlog would grow. Backlogs sometimes shrink if courts are clearing cases faster than they are coming in. Overall, the number of active pending criminal cases on district courts’ dockets grew by 29% between 2019 and 2020, to land at nearly 247,000 cases. The docket’s growth continued at a slower rate of 4% so far in 2021, and as of March 31, there were nearly 255,800 active criminal cases in the district courts. Rangel, who serves as the local administrative judge in Bexar County, said criminal case backlogs grew more during 2020 than other case types because virtual jury trials were not available for criminal matters. The U.S. Constitution gives criminal-defendants the right to confront their accusers, and the Texas Supreme Court did not allow a court to compel a virtual trial in criminal cases, he explained. When the pandemic started, judges across Texas granted large numbers of personal recognizance bonds to get defendants with low-level, non-violent offenses out of jails, where conditions were ripe for infections, added Rangel. Once a defendant gets released from jail, it lowers the motivation to resolve a case, he said. “The lack of a jury trial removes significant incentives for defendants to work their cases out,” said Rangel. The issue will get better as courts resume in-person jury trials. Rangel noted that Bexar County started sending out jury summonses in May and setting cases in preparation for restarting in-person jury trials in June. “Cases started moving a lot faster. In district court, we reduced the backlog by 200 cases since May 17,” Rangel said during a June 7 interview. “I have always recognized that having the loss of an in-person trial available makes it very tough to move cases, because the parties recognize nobody can force anything on them.” Judge Robert Schaffer of Harris County’s 152nd Civil District Court said that courts have already been able to cut into coronavirus case backlogs for one simple reason—they’re starting to seat juries for trials. But those trials won’t happen in great numbers for quite some time. “We can try a maximum in Harris County we can take a maximum of four juries a day,” said Schaffer, who is local administrative judge in his county. “Until there is access to jury trials in larger numbers, I don’t know what you can do to fix the backlog.” He said that criminal-defense attorneys might have advised their clients not to go to trial during the pandemic. “Lawyers today say, ‘This is a horrible situation that we are in right now. You should not be trying your case now, because of the makeup of the juries, because of the COVID mask restrictions—you can’t see people’s faces,’” said Schaffer. “If I were a lawyer, I wouldn’t want to try a case in this environment, especially if I had a substantial case.” Family dockets The same reticence to use virtual proceedings may have contributed to the backlog in family law cases. Slayton, the Texas court administrator, said that he has talked with judges and attorneys who felt that it wasn’t a good time to resolve cases during the upheaval of the pandemic. “Judges and attorneys felt it was best dealt with in-person, in a courtroom, than over Zoom. I think there was more resistance to doing that remotely,” Slayton said. District courts in 2019 had a 100% clearance rate for family cases, which dropped to 80% in 2020, leading to a backlog that mushroomed to just over 46,500 cases. The active pending family docket grew by 14% between 2019 and 2020—when it was more than 374,000 cases. There was a slight 1% dip in the first quarter of 2021, but the district courts still had more than 370,600 family cases on their dockets. Civil dockets Civil case dockets were not as badly impacted by the pandemic–perhaps because judges and lawyers embraced remote court. District courts’ civil case clearance rates stayed the same–90%–in 2019, 2020 and so far in 2021. The number of cases considered to be a backlog actually shrank by just under 700 cases between 2019 and 2020. As a result, the civil active pending case docket only grew by 5% during the pandemic year, going from nearly 382,900 in 2019 to nearly 401,700 in 2020. This number has already dropped by 2% in the first quarter of 2021. Judge Amy Clark Meachum of Travis County’s 201st District Court wrote in an email that judges rose to the challenges of the pandemic by using virtual platforms. Travis County judges ran their usual non-jury dockets and met their normal daily demands, she said.

#### Antitrust litigation consumes vast judicial resources – causes backlogs.

Fitch et al. ’21 [Lynn Fitch, Krissy C. Nobile, Justin L. Matheny; Attorney General of Mississippi; Deputy Solicitor General for Mississippi; Assistant Solicitor General; 3/1/21; “BRIEF FOR THE STATES OF MISSISSIPPI, ALABAMA, ARIZONA, ARKANSAS, CONNECTICUT, FLORIDA, GEORGIA, IDAHO, INDIANA, IOWA, KENTUCKY, LOUISIANA, MAINE, MICHIGAN, MINNESOTA, MONTANA, NEW JERSEY, OREGON, SOUTH CAROLINA, TEXAS, UTAH, VIRGINIA, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER”; <https://www.supremecourt.gov/DocketPDF/20/20-1018/170601/20210301174920932_pdf>; Louisiana Real Estate Appraisers Board v. United States Federal Trade Commission; accessed 9/6/21; TV]

The financial costs and burdens of defending antitrust litigation are also extraordinarily high. To mitigate those costs and burdens, which ultimately are borne by state taxpayers and citizens, States and their political subdivisions have a significant interest in dismissal of antitrust claims at the earliest stage possible whenever dismissal is legally appropriate. “Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government.” Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009).

Immediate appellate review of a denial of a claim of state-action immunity is also efficient. Antitrust litigation is costly for litigants and the judicial system. Antitrust cases are complex and can easily consume judicial time and resources. Fully resolving state-action immunity on the front-end of litigation focuses on a narrow, outcome-determinative issue and can prevent the waste of judicial resources expended in a trial that, at the end, proves to be unwarranted. Courts therefore have a vested interest in early-stage dismissal of antitrust claims that cannot lead to redress.

An appeal from a final judgment cannot adequately safeguard these important state and judicial interests or adequately protect against financial burdens needlessly imposed by forcing a state entity entitled to state-action immunity to litigate antitrust cases to a final judgment. See Commuter Transp. Sys., 801 F.2d at 1289 (“The purpose of the state action doctrine is to avoid needless waste of public time and money.”). Allowing an immediate appeal to avoid an unnecessary trial when a State or state entity is in fact immune will protect significant public interests; obviate, or at least diminish, unnecessary financial expenditure; foster efficiency; and conserve judicial resources.

B. It is widely recognized that antitrust litigation is particularly costly. Indeed, this Court’s decision in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) is predicated in good measure on the fact that antitrust litigation is notoriously expensive. The complex and protracted discovery inherent in the early stages of antitrust litigation accounts for much of that expense. Id. at 558. In fact, that is why Twombly admonished courts not “to forget that proceeding to antitrust discovery can be expensive.” Id. at 558-59 (citing, inter alia, Note, Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation, 78 N.Y.U. L. REV. 1887, 1898-99 (2003) (discussing the unusually high cost of discovery in antitrust cases); Manual for Complex Litigation, Fourth, § 30, p. 519 (2004) (describing extensive scope of discovery in antitrust cases); and Memorandum from Hon. Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000) (reporting that discovery accounts for as much as 90 percent of litigation costs when discovery is actively employed)).

Twombly stands for the general proposition that, when allegations in a complaint, however true, fail to state a claim for relief, the claim should be dealt with “at the point of minimum expenditure of time and money by the parties and the court.” Twombly, 550 U.S. at 558 (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, at 233-234 (3d ed. 2004)). The point of minimum expenditure in an antitrust case, in particular, comes before the case proceeds to discovery. Twombly, 550 U.S. at 568 (citing Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984) (“[T]he costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint.”)).

If a state entity defendant in an antitrust case is entitled to state-action immunity—whether that immunity is deemed immunity from suit or from liability— there is no reasonable likelihood that a plaintiff can raise a claim of entitlement to relief or recovery. There is thus every reason to allow the state-action immunity issue to be appealed before the parties and the court are faced with the costs of discovery and trial—i.e., to deal with the issue “at the point of minimum expenditure of time and money by the parties and the court.”

Antitrust litigation is legally and factually complex, inevitably requires massive discovery, cannot be conducted without a battery of expert witnesses, and is of protracted duration. See, e.g., Corr Wireless Commc’ns v. AT&T, Inc., 893 F. Supp. 2d 789, 809-10 (N.D. Miss. 2012); Nepresso USA, Inc. v. Ethical Coffee Co. SA, 263 F. Supp. 3d 498, 508 (D. Del. 2017) (highlighting “the financial burden of the discovery process in general, but particularly in antitrust cases”). Those concerns counsel in favor of application of the collateral-order doctrine to allow interlocutory appeals of the denial of claims of state-action immunity in antitrust cases.

#### Judicial backlogs collapse democratic rule of law.

Marks ’21 [Lawrence K; Chief Administrative Judge, New York State Unified Court System; 4/30/21; “The Rule of Law and the Courts”; <https://www.law.com/newyorklawjournal/2021/04/30/the-rule-of-law-and-the-courts/>; New York Law Journal; accessed 9/7/21; TV]

As Thomas Paine famously said, “In America, the law is king.” This year’s Law Day theme—the rule of law—embodies the concept that no individual is above the law; that everyone is subject to and accountable under the law, including lawmakers, law enforcement officials, and judges. This principle was recognized by the ancient philosophers. Democracy focuses on how societies select those who will hold political power; the rule of law concerns how that power is exercised. The rule of law is the foundation of our rights and liberties in the United States.

The courts, of course, perform a critical role in ensuring the rule of law. Without an independent, fair and efficient court system, the rule of law would be little more than a lofty, but hollow, gesture. Crime would go unpunished, negligent acts would not be redressed, business contracts would lack enforcement, property rights would be ignored, family legal disputes would be left unresolved. In short, civilized society, as we know it and which we often take for granted, would cease to exist.

This is precisely why we worked so hard in New York to keep courts open—to ensure access to justice—even throughout the darkest days of the pandemic. Although during the early weeks of the pandemic the magnitude of the public health crisis necessitated that court operations be limited to emergency and essential matters, in very short time technology was deployed to permit access to justice for a rapidly expanded range of proceedings that did not meet the emergency and essential criteria. Indeed, as of the writing of this article, typically each week over 20,000 virtual court conferences and related proceedings are being conducted, roughly 5,000 cases are being settled or otherwise disposed of virtually, over 1,000 remote bench trials and other evidentiary hearings are being held, and over 2,000 written decisions are being issued.

So the miracle of technology, the ingenuity of judges and court staff, and the cooperation and determination of the bar have enabled the rule of law to endure over the past year.  ave been serious challenges. Proceedings that do not easily lend themselves to the virtual format—in particular, jury trials—have suffered. And although virtual proceedings are here to stay and will continue to be an important part of how the New York courts conduct business, there are many examples of where virtual is not always as effective as in-person, especially when self-represented litigants are involved.

As a result, backlogs have grown in some, although not all, case courts and case types. This is of vital concern, because the viability of the rule of law requires an efficient court system that can consistently resolve legal disputes in a timely fashion. The rule of law would be an empty gesture if the rights of the accused and the interests of crime victims are not speedily addressed, injury victims are subject to lengthy delays in securing redress, contract rights are not expeditiously interpreted and enforced, and critically sensitive family disputes are allowed to fester.

So as we approach the final stage of the pandemic, and as we begin the return to eventual full complements of jury trials and other in-person proceedings, our focus is being re-directed to the expanded backlogs of cases we see in many of our courts. The good news is that we have broad experience to draw upon in confronting this challenge. Chief Judge Janet DiFiore’s Excellence Initiative, which up until the pandemic had been so successful in attacking case delays and promoting efficiencies in case processing, provides a blueprint for meeting the challenges we now face. This involves, first and foremost, extensive collection of caseload data for courts throughout the state, and the widespread sharing of that data with Administrative Judges, Supervising Judges, and, importantly, individual judges so they can review and fully understand their case inventories and pinpoint where the problems lie. This intensive focus on addressing aging cases includes, particularly in high-volume jurisdictions, designation of judges to concentrate on resolving the oldest cases and, if they cannot be resolved, readying them for trial. Also critically important is a careful evaluation of how court resources, judges and court staff alike, are allocated and, where necessary, reassigning those resources to allow for maximum efficiency.

Finally, any meaningful effort to attack case backlogs must include a major emphasis on alternative dispute resolution (ADR). This includes traditional forms of ADR such as mediation and neutral evaluation, to be conducted by court-established rosters of neutrals and community dispute resolution centers, but it also includes concerted efforts by judges and court legal staff to presume all civil matters are appropriate for settlement, and to endeavor to do so at the earliest stages of the case. A statewide program to dramatically expand presumptive, early ADR had begun in the months preceding the pandemic, and that effort will be renewed in the months ahead as a critical element of the courts’ plans to attack case backlogs and delays.

The past year has offered unprecedented challenges for society as a whole, and that includes the courts. But we can take great assurance in the fact that, despite the challenges, the rule of law has endured. Our courts have continued to provide an independent and fair forum for the resolution of legal disputes. The courts’ timely and efficient resolution of legal disputes, however, is an important component of the rule of law. New Yorkers can be assured that this goal will be of the highest priority for our courts as we navigate the challenges that lie ahead.

#### Rule of law stops great power wars.

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).

### 1NC – States CP

#### The fifty states and relevant subnational entities should establish and apply contract laws to regulate restrictive contracts governing post-sale use restrictions on products embodying patented components.

#### States solve.

Arteaga & Ludwig ’21 [Juan; 1/28/21; Partner @ Crowell & Moring LLP, JD @ Columbia; and Jordan; Partner @ Crowell & Moring LLP, JD @ Loyola Law School, Los Angeles; “The Role of US State Antitrust Enforcement,” *Global Competition Review*; https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement; AS]

During the 1980s, for example, state attorneys general once again emerged as vigorous antitrust enforcers, especially with respect to the prosecution of resale price maintenance practices and other vertical restraints. The rise in the level and prominence of state antitrust enforcement during this period was largely due to a perceived enforcement void at the federal level, where the DOJ and FTC had mostly limited their focus to ‘prohibiting cartels and large horizontal mergers’. No longer content with ceding antitrust enforcement to federal enforcers, state attorneys general expanded their antitrust dockets from prosecuting purely ‘local matters, such as bid-rigging on state contracts’, to actively investigating and litigating matters with multistate and national implications. To help ensure that they had a larger seat at the antitrust enforcement table, state attorneys general also increased the coordination of their enforcement efforts and competition advocacy through organisations such as the National Association of Attorneys General (NAAG), which created a Multistate Antitrust Task Force and issued state Vertical Restraints and Horizontal Merger Guidelines during this period.

Since the reawakening of state antitrust enforcement nearly 30 years ago, state attorneys general have continued to play an important role in the enforcement of both state and federal antitrust laws. During periods of lax federal antitrust enforcement, state attorneys general have often ramped up their enforcement activity in order to protect consumers from anticompetitive transactions and business practices. During periods of vigorous federal antitrust enforcement, they have often served as strong partners for the DOJ and FTC by, among other things, offering valuable insights about competitive dynamics in local markets, assisting with obtaining information from key market participants (including state governmental entities that are direct purchasers of goods and services), and helping develop and implement litigation strategies for cases being tried before federal judges presiding in their states.

Since January 2017, state attorneys general have increasingly played a leading and independent antitrust enforcement role. State antitrust enforcers have significantly increased their enforcement activity and willingness to act separately from their federal counterparts because many of them believe that there has been ‘under-enforcement’ by the DOJ and FTC. State antitrust enforcers have also been able to enhance their influence over key competition policy issues and the antitrust enforcement agenda within the United States because there appears to have been a significant decline in the coordination and relationship between the DOJ and FTC.

### 1NC – PTO CP

#### The United States Patent and Trademark Office should substantially increase prohibitions on anticompetitive business practices by the private sector to regulate self-replicating seed technologies.

#### The PTO has rulemaking and adjudicatory authority over patent law – has the power to incorporate economic policy and promote innovation

Wasserman 12, Melissa F. Charles Tilford McCormick Professor of Law at the University of Texas, JD from NYU and PhD from Princeton. ("The changing guard of patent law: Chevron deference for the PTO." Wm. & Mary L. Rev. 54 (2012): 1959. <https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/wmlr54&section=52>) //S.He

Yet, as criticism toward the patent system has grown, so too have the challenges to this unusual power dynamic.6 An increasing number of commentators believe this lopsided institutional structure is the root cause of the patent system’s systemic failures.7 An even larger contingency of scholars support reforms that would shift greater power to the PTO.8 The cries for institutional reform culminated in 2011 when Congress enacted the historic Leahy-Smith America Invents Act (AIA).9 The AIA provided the first major overhaul to the patent system in sixty years and undeniably increased the stature of the PTO by granting the Agency a host of new responsibilities, such as fee-setting authority10 and the ability to conduct new adjudicatory proceedings in which patent rights may be obtained or challenged.11

This Article contends, however, that commentators have generally failed to recognize the extent to which the AIA alters the fundamental power dynamic between the Federal Circuit and the PTO. Although scholars acknowledge that the AIA bestows a glut of new powers upon the Agency,12 they have nearly uniformly concluded that “Congress stopped short of allowing the PTO to interpret the core provisions of the Patent Act—those that affect the scope of what is patentable.”13 Though Stuart Benjamin and Arti Rai have observed that certain congressional bestowals of adjudicatory authority may entitle the PTO’s legal interpretations of the Patent Act to strong judicial deference,14 this Article provides the first in-depth exploration of whether the actual powers granted by the AIA would result in the PTO becoming the primary interpreter of the core patentability requirements. This Article concludes that the AIA rejects over two hundred years of court dominance in patent policy by anointing the PTO as the chief expositor of substantive patent law standards.

In general, the patent system has historically suffered from a lack of serious engagement with administrative law,15 even though Supreme Court intervention in 1999 made clear that standard administrative law norms—including the Administrative Procedure Act—apply to the PTO.16 Applying administrative law principles to the AIA provides that the PTO’s legal interpretations of the Patent Act, as announced by its new adjudicatory proceedings, are entitled to the highly deferential standard of review articulated in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. 17 As this Article argues, this deference is a normatively desirable outcome.18 Making the PTO the primary interpreter of the core patentability standards ushers the patent system into the modern administrative era, which has long recognized the deficiencies associated with judge-driven policy.19 This provides the institutional foundation for infusing economic policy into the patent system, enabling the tailoring of patentability standards to advance the system’s constitutionally mandated goal: the promotion of innovation.

### 1NC – Sua Sponte DA

#### 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).

## Ag

### 1NC – AT: Ag

#### Eliminating IP rights would destroy incentives for innovation

Bacchus 20 – member of the Herbert A. Stiefel Center for Trade Policy Studies, the Distinguished University Professor of Global Affairs and director of the Center for Global Economic and Environmental Opportunity at the University of Central Florida. He was a founding judge and was twice the chairman—the chief judge—of the highest court of world trade, the Appellate Body of the World Trade Organization in Geneva, Switzerland. (James, "An Unnecessary Proposal: A WTO Waiver of Intellectual Property Rights for COVID-19 Vaccines," Cato Institute, 12-16-2020, <https://www.cato.org/free-trade-bulletin/unnecessary-proposal-wto-waiver-intellectual-property-rights-covid-19-vaccines>) //S.He

The primary justification for granting and protecting IP rights is that they are incentives for innovation, which is the main source for long‐​term economic growth and enhancements in the quality of human life. IP rights spark innovation by “enabling innovators to capture enough of the benefits of their own innovative activity to justify taking considerable risks.”[18](https://www.cato.org/free-trade-bulletin/unnecessary-proposal-wto-waiver-intellectual-property-rights-covid-19-vaccines#_ednref18) The knowledge from innovations inspired by IP rights spills over to inspire other innovations. The protection of IP rights promotes the diffusion, domestically and internationally, of innovative technologies and new know‐​how. Historically, the principal factors of production have been land, labor, and capital. In the new pandemic world, perhaps an even more vital factor is the creation of knowledge, which adds enormously to “the wealth of nations.” Digital and other economic growth in the 21st century is increasingly ideas‐​based and knowledge intensive. Without IP rights as incentives, there would be less new knowledge and thus less innovation.

In the short term, undermining private IP rights may accelerate distribution of goods and services—where the novel knowledge that went into making them already exists. But in the long term, undermining private IP rights would eliminate the incentives that inspire innovation, thus preventing the discovery and development of knowledge for new goods and services that the world needs. This widespread dismissal of the link between private IP rights and innovation is perhaps best reflected in the fact that although the United Nations Sustainable Development Goals for 2030 aspire to “foster innovation,” they make no mention of IP rights.[19](https://www.cato.org/free-trade-bulletin/unnecessary-proposal-wto-waiver-intellectual-property-rights-covid-19-vaccines#_ednref19)

#### Stringent applications of antitrust law to IP stifle innovation by artificially lowering royalties and upending market processes – benefits individual firms at the expense of competition

Renaud 18 – intellectual property litigator and patent strategist at Mintz Law. (Michael, "DOJ sensibly returns to antitrust fundamentals on patent licensing," TheHill, 11-22-2018, <https://thehill.com/opinion/finance/417833-doj-sensibly-returns-to-antitrust-fundamentals?rl=1>) //S.He

Our tech-focused world depends on our innovation economy bringing standards like Wi-Fi and LTE to market. Some c[ommentators have suggested that recent Department of Justice statements on intellectual property rights, coined the “New Madison Approach,” threaten to upend this ecosystem](https://thehill.com/opinion/finance/410958-doj-giving-cover-to-monopolizing-firms-breaching-antitrust-rules).

To the contrary, the New Madison Approach marks a return to the core principles on which the patent laws are predicated.

A viable standard has three primary characteristics: compelling technology, industry consensus and straightforward implementation. These characteristics compel firms with different business goals to collaborate on a standard.

One firm may wish to commercialize a new technology; another may wish to monetize an established technology; and yet another may wish to gain access to a range of technologies for implementation. A smart standardization process attracts all interested firms, including those seeking royalties and those likely to pay most of those royalties.

For over 50 years, standard-setting organizations (SSOs) have maintained this balance by requiring participants to contractually agree to offer to license contributed technology on terms that are “fair, reasonable, and non-discriminatory” (“FRAND”).

SSOs, however, do not articulate what FRAND means. In fact, the meaning can’t be spelled out, given the divergent interests involved. Historically, FRAND is a term of art understood by SSO participants to impose mechanical, not financial, requirements.

The FRAND obligation does not dictate how to calculate royalty rates, it merely requires an SSO participant to bargain in good faith with an implementer (even a competitor) toward a fair license to essential technology.

It has become fashionable to interpret FRAND as including obligations beyond those that the term has traditionally encompassed, in the process upending time-tested licensing practices.

Last year, a California court, concerned that firms would leverage their technology’s inclusion in the standard to extract higher royalties (sometimes referred to as “hold-up”), engaged in rate-setting for a license from Ericsson to manufacturer TCL for LTE technology.

The court’s methodology required thousands of hours of expert review, raising enforcement costs beyond most patent owners’ means.

It also ignored the approach that Ericsson, a foundational contributor to global wireless telecommunications standards, had used for years to determine royalty rates for the LTE technology it licensed to most of the world. To the court, concerns over hold-up justified scrapping and replacing the established market process.

Critics of New Madison overlook how the new interpretations that courts and commenters have ascribed to FRAND threaten the balance that has worked for generations.

The goal of any SSO is to balance the interests of advancing a technology with easing that technology’s implementation, but ease of implementation does not mean making the technology artificially cheap by devaluing standard-essential patents (SEPs).

When the IEEE (a SSO) added contractual obligations to its FRAND encumbrance, Qualcomm — among the most innovative American firms — ended its years-long participation in IEEE. Efforts to devalue essential technology will likewise drive innovators away from standardization.

Assistant Attorney General Makan Delrahim, in speeches setting forth the New Madison Approach, wisely minimizes the role of hold-up in FRAND analysis. As the Department of Justice now recognizes, there is no evidence that hold-up is an actual problem requiring a regulatory solution.

Rather, fears about hold-up are just another iteration of the age-old attempt to use the antitrust laws to protect individual competitors — who benefit from artificially low royalty rates — at the expense of competition, which maximizes consumer welfare when market participants are motivated to innovate in order to maximize royalties.

The realization that courts have fallen for this topsy-turvy application of antitrust principles has resulted in historical levels of free-riding, with implementers emboldened to force SEP holders to incur the delay, cost and risk of enforcement.

New Madison simply argues that we shouldn’t impose obligations on licensors beyond those to which they agreed when joining an SSO. FRAND has worked for decades on basic contract law principles.

The en vogue FRAND theory that the antitrust laws should now be deployed as a patent royalty rate-setting regime perverts the process of invention innovation that forms the very basis of our patent laws.

It encourages free-riding, discourages innovation and increases enforcement costs. The New Madison approach merely recognizes that these outcomes are antithetical to the goals of the antitrust laws.

#### No food wars.

Vestby ’18 [Vestby, Ida Rudolfsen, and Halvard Buhaug; 5-18-18; Doctoral Researcher at the Peace Research Institute Oslo; doctoral researcher at the Department of Peace and Conflict Research at Uppsala University and PRIO; Research Professor at the Peace Research Institute Oslo (PRIO); Professor of Political Science at the Norwegian University of Science and Technology (NTNU); and Associate Editor of the Journal of Peace Research and Political Geography; “Does hunger cause conflict?” Prio, https://blogs.prio.org/ClimateAndConflict/2018/05/does-hunger-cause-conflict/]

It is perhaps surprising, then, that there is little scholarly merit in the notion that a short-term reduction in access to food increases the probability that conflict will break out. This is because to start or participate in violent conflict requires people to have both the means and the will. Most people on the brink of starvation are not in the position to resort to violence, whether against the government or other social groups. In fact, the urban middle classes tend to be the most likely to protest against rises in food prices, since they often have the best opportunities, the most energy, and the best skills to coordinate and participate in protests.

Accordingly, there is a widespread misapprehension that social unrest in periods of high food prices relates primarily to food shortages. In reality, the sources of discontent are considerably more complex – linked to political structures, land ownership, corruption, the desire for democratic reforms and general economic problems – where the price of food is seen in the context of general increases in the cost of living. Research has shown that while the international media have a tendency to seek simple resource-related explanations – such as drought or famine – for conflicts in the Global South, debates in the local media are permeated by more complex political relationships.

#### Alt cause – Development accelerates soil impacts.

Wang ’18 (Li-Yan Wang, Research Center for Eco-Environmental Sciences, Chinese Academy of Sciences, College of Resource and Environment, University of Chinese Academy of Sciences, Yi Xiao, Research Center for Eco-Environmental Sciences, Chinese Academy of Sciences, En-Ming Rao, College of Geography Resource Sciences, Sichuan Normal University, Ling Jiang, Zhongshan Research Institute of Environmental Protection Science Co., Yang Xiao, Research Center for Eco-Environmental Sciences, Chinese Academy of Sciences, Zhi-Yun Ouyang, Research Center for Eco-Environmental Sciences, Chinese Academy of Sciences, “An Assessment of the Impact of Urbanization on Soil Erosion in Inner Mongolia,” 3/19/18, <http://www.mdpi.com/1660-4601/15/3/550>)

From the perspective of demand, the economy’s development has placed enormous pressures on the scarce natural resources of Inner Mongolia, and this extensive economic development has led to greater demands for energy and resources, which is characterized by high energy consumption, large amounts of waste, and serious levels of pollution. From 2000 to 2010, about 2469.73 km2 area of other land was converted to urban land, the GDP-2 rate had improved by 29.66% and the GDP-1 rate had fallen by 64.87%; together, this indicates that the economic structure has been transformed, shifting in emphasis from agriculture to industry. The production of energy and the mining of mineral resources have been accompanied by the destruction of vegetation and the accumulation of waste materials [60]. Large areas of grassland, approximately 1754.03 km2 had been converted to urban land via transportation and excavation that have markedly disturbed local natural ecosystems. The soil erosion generated in just one year due to this activity would be the equivalent of the amount of natural, and even agricultural, erosion occurring over dozens of years [61]. The results of this study suggested that increasing the GDP-2 proportion of total GDP could worsen soil erosion. A study of the WuLanMuLun River, in the Shenfu mining area, indicated that sediment discharge had doubled after mining commenced, the erosion modulus of the mining area had increased by 15,000 t/km2 ·a, with a 14.965-million ton increase in the annual soil erosion loss [62]. In addition, heavy industry, mining, and construction not only directly influence the land surface through excavation and waste accumulation, but they indirectly further aggravate soil erosion through road transport and the consumption of resources and energy [63].

#### No soil impact.

Simon, Econ PhD, 97 Julian L. Simon teaches business at the University of Maryland and is a senior fellow at the Cato Institute. "Digging Deeper Into the Soil Erosion Scam," June 3, CATO, https://www.google.com/search?sugexp=chrome,mod=13&sourceid=chrome&ie=UTF-8&q=Digging+Deeper+Into+the+Soil+Erosion+Scam

This program is part-and-parcel of the most conclusive discredited environmental-political fraud of recent times, the National Agricultural Lands Study (NALS) set up in 1980 by the Agriculture Department. This organization created a huge media scare about farmland being ruined by two supposedly related forces, urbanization of farmland and the erosion of fields. Both scares were quickly disproven. The amazing part is that the assertions were eventually acknowledged to be false by the U.S. Department of Agriculture. That is, even the original purveyors of the false facts about the "vanishing farmland crisis" ended up agreeing that the widely reported scare was without foundation. But the scares did not die, and are back with us again. Here is the saga: Headlines like these began to appear in the newspapers about 1980: "The peril of vanishing farmlands" (the New York Times). "Farmland losses could end U.S. food exports" (Chicago Tribune). "Vanishing farmlands: selling out the soil" (Saturday Review), and "As world needs food, U.S. keeps losing soil to land developers" (Wall Street Journal). The stories claimed that the urbanization-of-farmland rate had jumped from the 1960s to the 1970s from less than 1 million acres per year to 3 million acres per year. This assertion was wholly untrue as we shall see. Then in a Jan. 11, 1983, speech President Reagan said, "I think we are all aware of the need to do something about soil erosion." The headline on a June 4, 1984, Newsweek "My Turn" article typified how the issue was presented: "A step away from the Dust Bowl." More recently, we have such statements as that of Vice President Al Gore about how "8 acres' worth of prime topsoil floats past Memphis every hour," and that Iowa "used to have an average of 16 inches of the best topsoil in the world. Now it is down to 8 inches " These are the scam-busting facts: The long-run trend in the decades up to 1970 was about 1 million acres of total land urbanized per year. The Soil Conservation Service in conjunction with NALS asserted that the rate then jumped to 3 million acres yearly from 1967 to 1975 or 1977. Scholars at several universities and think tanks found that the 3 million-acres-a-year rate was most implausible in light of data from other sources. And we found that the survey on which the NALS based its claim employed a faulty polling technique and had amazing huge errors in arithmetic. The soil erosion claims were **equally** ridiculous. According to the USDA, only a tiny proportion of cropland--3 percent--is so erosive that no management practices can help much. Seventy-seven percent of cropland erodes at rates below 5 tons per acre each year, the equilibrium rate at which new soil is formed below the surface; that is, most cropland erodes less than the "no net loss rate." Just 15 percent of U.S. cropland "is moderately erosive and eroding about a 5-ton tolerance. Erosion on the land could be reduced with improved management practices," though this does not necessarily mean the land is in danger or is being managed uneconomically. In short, the aggregate data on the condition of farm and the rate of erosion do not support the concern about soil erosion. What's more, the data suggest that the condition of cropland has been improving rather than worsening. Theodore W. Schultz, the only agricultural economist to win a Nobel Prize, and Leo V. Mayer of the USDA, both wrote very forcefully that the danger warnings were false. Mr. Schultz cited not only research but also his own lifetime recollections starting as a farm boy in the Dakotas in the 1930s. But even a Nobel laureate's efforts could not slow the public-relations juggernaut that successfully co-opted the news media, won the minds of the American public, and were used to justify the USDA giveaways. So far, the story is unremarkable--another environmental scare disproven. But in this case there was a remarkable development: In 1984, the USDA's own Soil Conservation Service issued a paper by Susan Lee that completely reversed the earlier scare figures and confirmed the estimates by the independent scholars. And the accompanying press release made it clear that the former estimates were now being retracted. "[T]he acreage classified as urban and built-up land was 46.6 million acres in 1982, compared to 64.7 million acres reported in 1977." Please read that again. It means that whereas in 1977 the SCS had declared that 64.7 million acres had been "lost" to built-up land, just five years later SCS admitted that the actual total was 46.6 million acres. That is, the 1977 estimate was admitted to be fully 50 percent too high, a truly amazing error for something so easy to check toughly as the urbanized acreage of the U.S. With unusual candor, the USDA press release added, "The 1977 estimate thus appears to have been markedly overstated." The USDA press release of April 10,1984, contained a second bombshell: "The average annual rate of soil erosion on cultivated cropland dropped from 5.1 tons per acre to 4.8 tons per acre." That is, erosion was lessening rather than getting worse, exactly the opposite of what NALS claimed. And this finding undercuts the new USDA program being proposed now.

#### Alt causes to bio-d – habitat destruction, overutilization, chemical pollution, climate change.

EJ ’21 [EarthJustice; non-profit public interest organization based in the United States dedicated to litigating environmental issues. “What is the Biodiversity Crisis?”. 3/31/21. https://earthjustice.org/features/biodiversity-crisis]

What are the main drivers causing species die-off?

Habitat destruction, overutilization, chemical pollution — and climate change

A lot of things that humans do.

1. The biggest driver is habitat destruction: humans transforming habitats for their own purposes. Resource-extractive industry practices, like clear-cutting trees, drilling for oil and gas, and mining, destroy habitats. Real-estate development in places that have been off limits before is also causing populations to drop.

2. The second driver is what scientists call overutilization: humans exploiting natural resources for mass consumption, faster than the earth can replenish them. That includes overharvesting plants for industrial agriculture, and overfishing. For example, humans sustainably caught fish for millennia without exceeding the ocean’s seafood supply; but with the advent of industrial fishing, humans started extracting more fish than the sea could provide, causing fish populations to crash.

3. The third driver is chemical pollution. This in particular is causing insect populations to collapse, which are critical for most of the ecosystem services on which we depend.

In the midst of all this, climate change is an ascending factor that is worsening the effects of all these drivers. As the planet warms, habitats become inhospitable — too hot, too dry. A species either needs to move habitat, which it may not be able to do (because the ground between their current home and the next livable place is being developed by humans), or it dies out.

## Patents

### 1NC – AT: Patents

#### New antitrust is circumvented and watered down – durable fiat doesn’t solve judicial disregard and congressional inaction

Crane 21 – Frederick Paul Furth Sr. Professor of Law at UMich (Daniel, Antitrust Antitextualism, 96 Notre Dame L. Rev. 1205 (2021). Available at: <https://scholarship.law.nd.edu/ndlr/vol96/iss3/7>

As first the antitrust agencies through their merger guidelines and then the courts through endorsement of the agencies’ approach systematically shifted merger policy away from the incipiency standard and began requiring formal market definition and probability of adverse price effects, Congress acquiesced through inaction. Whatever else it said in 1950, Congress has thus far shown itself willing to let the courts and antitrust agencies reshape merger law in a form far more favorable to business consolidation. \* \* \* In sum, from the courts’ earliest forays into interpreting the Sherman Act up through contemporary antitrust jurisprudence, the courts have manifested a systematic tendency to interpret the substantive antitrust statutes contrary to their texts, legislative histories, and often their spirit.236 Sometimes, as with the rule of reason and labor exemption, the judicial disregard of text and purpose has occurred fairly immediately. In other cases, as with the Robinson-Patman and Celler-Kefauver Acts, an initial period of statutory fidelity has slipped gradually into a period of statutory infidelity. In some cases, as with respect to section 5 of the FTC Act and section 3 of the Clayton ct, the courts continue to proclaim their fidelity after they functionally move to infidelity. In many cases, the courts stop pretending after a while and admit quite candidly that they are taking liberties with the statute. If this antitrust antitextualism is merely the product of common-law methodology, one would expect to see movement away from the statute’s text in both permissive and restrictive directions, or, to put it more crassly, both in favor of big capital and against it. But the movement has all been in one direction: loosening a congressional check on big capital. Thus, the rule of reason allowed courts to bless large combinations of capital that the courts deemed reasonable; narrowing the labor exemption frustrated labor’s ability to countervail capital’s power; restricting the private right of action for treble damages significantly curtailed the private-litigation check on business; judicial narrowing of the Clayton Act’s exclusive dealing and tying restrictions allowed (mostly big) firms to exploit market power; reading “unfair” out of the FTC Act eliminated section 5 as a check on business morality; eviscerating the Robinson-Patman Act protections for small and independent businesses favored large and powerful businesses; and requiring proof of likely price increases and technical relevant market definition in merger cases immunized many large-scale mergers from legal challenge. Throughout the history of American antitrust law, the courts have shown a systematic tendency to read down the antitrust statutes in favor of big capital. But the story of antitrust antitextualism is not simply one of conservative/progressive ideological struggle between Congress and the courts. Much of the action away from statutory text and purpose was accomplished by, or with the support of, judges of the political left. Unlike in other fields, Congress has not responded with statutory overrides. And far from buttressing its atextual statutory readings of the antitrust laws through veiled constitutional warnings about congressional overreaching, the Court has repeatedly pulled in the opposite direction, asserting quasi-constitutional reverence for antitrust law.237 Despite ample opportunity to do so, the Court has not removed antitrust law from the reach of congressional reconsideration by constitutionalizing its atextual readings. Antitrust antitextualism does not follow a conventional left/right ideological pattern. Its actual pattern is more subtle III. THE IDEALISTIC CONGRESS, PRAGMATIC COURTS THESIS AND ITS IMPLICATIONS Thus far, this Article has made an empirical observation—that, from the beginning of antitrust history, the courts have atextually read down the antitrust statutes in favor of big business and considered and rejected a potential explanation: that this phenomenon primarily represents an ideological tugof-war between a progressive Congress and more conservative courts. This final Part searches for an alternative understanding, one that is perhaps less obvious but more fitting, and then considers its systemic implications for the antitrust enterprise. A. The Idealistic/Pragmatic Thesis Congress writes expansive statutes reining in business power, the courts (either immediately or over time) disregard the plain text of the statutes and trim them down in favor of capital, and Congress acquiesces through inaction. Why? The best-fitting explanation is this: the antitrust laws reside in perennial tension between two fundamental impulses of the American political psyche—the romantic and idealistic attachment to smallness over bigness, and the pragmatic and often grudging realization that large-scale organization may be necessary to achieve material advantages. The romanticism and idealism of the anti-bigness impulse pushes it to the fore in the popular political arena. Congress legislates on the popular aspiration for an egalitarian economy organized around small proprietors and independent local businesses and freedom from economic dominance. When the statutes come to the courts or antitrust agencies, judges and antitrust enforcers play the pragmatic role of balancing those popular aspirations against the contending impulse for efficiency and material benefit. This balancing act induces them to give less effect to the statutes than the broad statutory texts suggest. So long as the judicial decisions achieve results that strike a politically acceptable outcome between the aspirational and pragmatic impulses, Congress is content to leave the judicial and enforcement decisions alone.

#### New rule of reason constraints are egregiously misinterpreted and result in corporate victory

Hanley 4-6 – policy analyst at Open Markets Institute (Daniel, "How Antitrust Lost Its Bite," Slate Magazine, <https://slate.com/technology/2021/04/antitrust-hearings-congress-legislation-bright-line-rules.html> APRIL 06, 2021)//gcd

In the late 1970s, however, judges began to adopt a malevolent antitrust framework, which they claimed was beneficial to consumers, while actually relishing, [praising](https://www.law.cornell.edu/supct/html/02-682.ZS.html), and [incentivizing](https://en.wikipedia.org/wiki/Brooke_Group_Ltd._v._Brown_%26_Williamson_Tobacco_Corp.) the concentration of corporate power. This new consumer welfare standard emerged in large part because of the “rule of reason.” The rule of reason was initially created by the Supreme Court [in 1911](https://en.wikipedia.org/wiki/Standard_Oil_Co._of_New_Jersey_v._United_States) to help the judiciary navigate the vast range of variance in antitrust harms. The rule of reason allows judges to determine whether ostensibly predatory or exclusionary corporate conduct is legal based on the reasonableness of the suspected violator’s behavior. Exclusionary antitrust conduct analyzed under a rule of reason analysis generally functions by allowing each side of a lawsuit to argue the predatory effects and the justifications for the conduct. Although the rule of reason is perceptually fair by giving each side of the litigation an opportunity to argue about the conduct at issue, in practice it is anything but. Judges began using the ambiguity of the rule of reason to push a standard focused on consumer welfare, one that [favors corporate concentration](https://www.yalelawjournal.org/note/amazons-antitrust-paradox) and turns away from strict antitrust rules. Courts initially only applied the rule of reason selectively. After adopting the consumer welfare framework, the Supreme Court now applies the rule of reason to most antitrust violations. Antitrust is about determining and [allocating the rights](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3337861), privileges, and duties of all economic actors. When Congress originally enacted the Sherman Act, the law was intended to [protect consumers, workers, and democracy](https://digitalcommons.law.umaryland.edu/mlr/vol78/iss4/4/) from excessive concentrations of corporate power. Because of this reality, it is an inherently political area of law. The shift toward rooting it in economics, and making its application substantially more obscure than a bright-line rule, is effectively a means by the judiciary to strip the historical foundations of antitrust from the record and instead substitute its own judgment on what the priorities are for the economy and how it should be structured. When combined with the rule of reason, the judiciary’s consumer welfare framework effectively erases Congress’ intent for the antitrust laws to operate as a “[comprehensive charter of economic liberty](https://supreme.justia.com/cases/federal/us/356/1/)” that “[does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers](https://supreme.justia.com/cases/federal/us/334/219/).” Such values are best determined by members of the elected legislature rather than unelected judges, a point ironically acknowledged by the [Supreme Court in 1972](https://supreme.justia.com/cases/federal/us/405/596/). Lower federal courts today continue to push the consumer welfare standard even further by, in violation of [controlling Supreme](https://supreme.justia.com/cases/federal/us/405/596/) [Court precedent](https://supreme.justia.com/cases/federal/us/374/321/), weighing the competitive harms of a dominant firm’s conduct against one group to the benefits provided to another group. In [ongoing litigation against the NCAA](https://www.scotusblog.com/case-files/cases/national-collegiate-athletic-association-v-alston/) that was heard by the Supreme Court last week, the district court judge ruled that the NCAA’s compact with universities to set a ceiling on the amount of compensation that student-athletes can receive is legal because of the reputed benefit consumers derive from watching athletes knowing there is a cap on their compensation. The court employed the rule of reason to arrive at this result. In an alternative enforcement regime, the NCAA would be a per se illegal employer cartel that is suppressing workers’ wages. Comprehensive empirical analysis has revealed that the rule of reason has been a rubber stamp for even the most egregious antitrust conduct. A [2009 analysis](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1480440) revealed that 97 percent of cases analyzed under the rule of reason result in victories for defendants. That means corporations are effectively shielded from most antitrust violations. Part of the reason for such a skewed result in favor of antitrust defendants is that dominant firms have access to high-salaried economists that are able to manipulate analyses to mask the corporation’s conduct to look like it is operationally efficient instead of engaging in predatory practices. Such a situation also deters antitrust litigation because a plaintiff will also have to incur the cost of an economist—which can cost several thousand dollars and, [in some cases](https://www.propublica.org/article/these-professors-make-more-than-thousand-bucks-hour-peddling-mega-mergers), [several hundred thousand dollars](https://www.law.cornell.edu/supremecourt/text/12-133). Thus, the battle over the legality of a business tactic under a consumer welfare framework and rule of reason legal analysis depends on access to immense financial capital and judicial appeasement of policies that favor corporate integration rather than common notions of fairness, equity, and deconcentrated markets—which was the original purpose of the antitrust laws. Despite [controlling](https://supreme.justia.com/cases/federal/us/370/294/) Supreme Court [precedent](https://supreme.justia.com/cases/federal/us/374/321/) prohibiting the use of economics in certain antitrust violations, courts now routinely use it to justify corporate consolidation. For example, in the context of merger analysis, the economization of antitrust has led courts to believe and depend on theoretical assumptions on how mergers are beneficial for society and consumers. In the case of AT&T and its pursuit of acquiring Time Warner in 2018, the corporation [stated](https://www.courtlistener.com/recap/gov.uscourts.dcd.191339/gov.uscourts.dcd.191339.121.0_1.pdf) its merger would produce efficiencies and save customers money. District Court Judge Richard Leon was persuaded by AT&T’s statements [holding that](https://casetext.com/case/united-states-v-at-t-inc-2) vertical integration is able to shrink its costs and will “lead to lower prices for consumers.” But such assumptions have been categorically repudiated by researchers. In one example, the economist John Kwoka [found that](https://mitpress.mit.edu/books/mergers-merger-control-and-remedies) 80 percent of studied mergers led to high prices and even reduced output. [Other studies](https://www.antitrustinstitute.org/wp-content/uploads/2019/04/Carstensen-Lande-Final.pdf) have found equivalent results. In the context of AT&T, subsequent evidence showed that AT&T did [raise prices](https://arstechnica.com/information-technology/2018/07/att-promised-lower-prices-after-time-warner-merger-its-raising-them-instead/) on consumers.

#### Courts will use rule of reason analysis to water down new and past precedent

Sipe 18 – JD Yale Law, 2017-2018 Supreme Court Fellow, Current Professor of Law at the University of Baltimore (Matthew, "The Sherman Act and Avoiding Void-for-Vagueness." Florida State University Law Review, vol. 45, no. 3, Spring 2018, p. 709-762. HeinOnline)//gcd

Consider the case law governing boycotts. In Klor's, Inc. v. Broadway-Hale Stores, Inc., the Court examined a group of appliance manufacturers and distributors boycotting a particular retail store.8 2 The Court unambiguously stated that such boycotts were per se Sherman Act violations: Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances . . . . Even when they operated to lower prices or temporarily to stimulate competition they were banned.... It clearly has, by its "nature" and "character," a "monopolistic tendency."83 Without explicitly overruling this seemingly bright-line and straightforward per se rule, the Court has blurred its boundaries significantly. 84 For example, in Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., the Court reversed the Ninth Circuit's application of the per se rule against boycotts to a purchasing cooperative's boycott of a certain retailer.8 5 Although reaffirming that "group boycotts are so likely to restrict competition . . . that they should be condemned as per se violations of § 1 of the Sherman Act," the Court warned that "[e]xactly what types of activity fall within the forbidden category is, however, far from certain."8 6 The Court's analysis provided a number of threshold factors to be considered prior to application of the per se rule, which the Ninth Circuit later summarized as whether: "(1) the boycott cuts off access to a supply, facility, or market necessary to enable the victim firm to compete; (2) the boycotting firm possesses a dominant market position; and (3) the practices are not justified by plausible arguments that they enhanced overall efficiency or competition." But these threshold inquiries-market structure, efficiency, and market power-are classic components of the more flexible and amorphous rule of reason. In other words, the case law dictates that ''courts must apply the rule of reason in order to determine whether the per se rule applies" in the first place.88 To the extent that the ambiguities inherent in the rule of reason are effectively imported into per se analyses as a step-zero inquiry, the latter category is no less vaguely defined.

#### Downturn won’t cause war – prefer post-COVID evidence.

Walt ’20 [Stephen; Robert and Renée Belfer professor of international relations @ Harvard University; 5/13/20; "Will a Global Depression Trigger Another World War?"; Foreign Policy; https://foreignpolicy.com/2020/05/13/coronavirus-pandemic-depression-economy-world-war/]

One familiar argument is the so-called diversionary (or “scapegoat”) theory of war. It suggests that leaders who are worried about their popularity at home will try to divert attention from their failures by provoking a crisis with a foreign power and maybe even using force against it. Drawing on this logic, some Americans now worry that President Donald Trump will decide to attack a country like Iran or Venezuela in the run-up to the presidential election and especially if he thinks he’s likely to lose. This outcome strikes me as unlikely, even if one ignores the logical and empirical flaws in the theory itself. War is always a gamble, and should things go badly—even a little bit—it would hammer the last nail in the coffin of Trump’s declining fortunes. Moreover, none of the countries Trump might consider going after pose an imminent threat to U.S. security, and even his staunchest supporters may wonder why he is wasting time and money going after Iran or Venezuela at a moment when thousands of Americans are dying preventable deaths at home. Even a successful military action won’t put Americans back to work, create the sort of testing-and-tracing regime that competent governments around the world have been able to implement already, or hasten the development of a vaccine. The same logic is likely to guide the decisions of other world leaders too. Another familiar folk theory is “military Keynesianism.” War generates a lot of economic demand, and it can sometimes lift depressed economies out of the doldrums and back toward prosperity and full employment. The obvious case in point here is World War II, which did help the U.S economy finally escape the quicksand of the Great Depression. Those who are convinced that great powers go to war primarily to keep Big Business (or the arms industry) happy are naturally drawn to this sort of argument, and they might worry that governments looking at bleak economic forecasts will try to restart their economies through some sort of military adventure. I doubt it. It takes a really big war to generate a significant stimulus, and it is hard to imagine any country launching a large-scale war—with all its attendant risks—at a moment when debt levels are already soaring. More importantly, there are lots of easier and more direct ways to stimulate the economy—infrastructure spending, unemployment insurance, even “helicopter payments”—and launching a war has to be one of the least efficient methods available. The threat of war usually spooks investors too, which any politician with their eye on the stock market would be loath to do. Economic downturns can encourage war in some special circumstances, especially when a war would enable a country facing severe hardships to capture something of immediate and significant value. Saddam Hussein’s decision to seize Kuwait in 1990 fits this model perfectly: The Iraqi economy was in terrible shape after its long war with Iran; unemployment was threatening Saddam’s domestic position; Kuwait’s vast oil riches were a considerable prize; and seizing the lightly armed emirate was exceedingly easy to do. Iraq also owed Kuwait a lot of money, and a hostile takeover by Baghdad would wipe those debts off the books overnight. In this case, Iraq’s parlous economic condition clearly made war more likely. Yet I cannot think of any country in similar circumstances today. Now is hardly the time for Russia to try to grab more of Ukraine—if it even wanted to—or for China to make a play for Taiwan, because the costs of doing so would clearly outweigh the economic benefits. Even conquering an oil-rich country—the sort of greedy acquisitiveness that Trump occasionally hints at—doesn’t look attractive when there’s a vast glut on the market. I might be worried if some weak and defenseless country somehow came to possess the entire global stock of a successful coronavirus vaccine, but that scenario is not even remotely possible. If one takes a longer-term perspective, however, a sustained economic depression could make war more likely by strengthening fascist or xenophobic political movements, fueling protectionism and hypernationalism, and making it more difficult for countries to reach mutually acceptable bargains with each other. The history of the 1930s shows where such trends can lead, although the economic effects of the Depression are hardly the only reason world politics took such a deadly turn in the 1930s. Nationalism, xenophobia, and authoritarian rule were making a comeback well before COVID-19 struck, but the economic misery now occurring in every corner of the world could intensify these trends and leave us in a more war-prone condition when fear of the virus has diminished. On balance, however, I do not think that even the extraordinary economic conditions we are witnessing today are going to have much impact on the likelihood of war. Why? First of all, if depressions were a powerful cause of war, there would be a lot more of the latter. To take one example, the United States has suffered 40 or more recessions since the country was founded, yet it has fought perhaps 20 interstate wars

, most of them unrelated to the state of the economy. To paraphrase the economist Paul Samuelson’s famous quip about the stock market, if recessions were a powerful cause of war, they would have predicted “nine out of the last five (or fewer).” Second, states do not start wars unless they believe they will win a quick and relatively cheap victory. As John Mearsheimer showed in his classic book Conventional Deterrence, national leaders avoid war when they are convinced it will be long, bloody, costly, and uncertain. To choose war, political leaders have to convince themselves they can either win a quick, cheap, and decisive victory or achieve some limited objective at low cost. Europe went to war in 1914 with each side believing it would win a rapid and easy victory, and Nazi Germany developed the strategy of blitzkrieg in order to subdue its foes as quickly and cheaply as possible. Iraq attacked Iran in 1980 because Saddam believed the Islamic Republic was in disarray and would be easy to defeat, and George W. Bush invaded Iraq in 2003 convinced the war would be short, successful, and pay for itself.The fact that each of these leaders miscalculated badly does not alter the main point: No matter what a country’s economic condition might be, its leaders will not go to war unless they think they can do so quickly, cheaply, and with a reasonable probability of success. Third, and most important, the primary motivation for most wars is the desire for security, not economic gain. For this reason, the odds of war increase when states believe the long-term balance of power may be shifting against them, when they are convinced that adversaries are unalterably hostile and cannot be accommodated, and when they are confident they can reverse the unfavorable trends and establish a secure position if they act now. The historian A.J.P. Taylor once observed that “every war between Great Powers [between 1848 and 1918] … started as a preventive war, not as a war of conquest,” and that remains true of most wars fought since then. The bottom line: Economic conditions (i.e., a depression) may affect the broader political environment in which decisions for war or peace are made, but they are only one factor among many and rarely the most significant. Even if the COVID-19 pandemic has large, lasting, and negative effects on the world economy—as seems quite likely—it is not likely to affect the probability of war very much, especially in the short term. To be sure, I can’t rule out another powerful cause of war—stupidity—especially when it is so much in evidence in some quarters these days. So there is no guarantee that we won’t see misguided leaders stumbling into another foolish bloodletting. But given that it’s hard to find any rays of sunshine at this particular moment in history, I’m going to hope I’m right about this one.

#### Slow growth is irrelevant.

Sharma, CFA, 17 - Chief Global Strategist and Head of Emerging Markets at Morgan Stanley Investment Management (Ruchir, “The Boom Was a Blip: Getting Used to Slow Growth”, 96 Foreign Aff. 104 2017, Hein Online)

The global recovery from the Great Recession of 2009 has just entered its eighth year and shows few signs of fading. That should be cause for celebration. But this recovery has been an underwhelming one. Throughout this period, the global economy has grown at an average annual pace of just 2.5 percent-a record low when compared with economic rebounds that took place in the decades after World War II. Rather than rejoicing, then, many experts are now anxiously searching for a way to push the world economy out of its low-growth trap. Some economists and investors have placed their hopes on populists such as U.S. President Donald Trump, figuring that if they can make their countries' economies grow quickly again, the rest of the world might follow along. Given how long the global economy has been in the doldrums, however, it's worth asking whether the forces slowing growth are merely temporary. Although economists and business leaders complain that a 2.5 percent global growth rate is painfully slow, prior to the 1800s, the world's economy never grew that fast for long; in fact, it never topped one percent for a sustained period. Even after the Industrial Revolution began in the late eighteenth century, the average global growth rate rarely exceeded 2.5 percent. It was only with the massive baby boom following World War II that the global economy grew at an average pace close to four percent for several decades. That period was an anomaly, however-and should be recognized as such. The causes of the current slowdown can be summed up as the Three Ds: depopulation, deleveraging, and deglobalization. Between the end of World War II and the financial crisis of 2008, the global economy was supercharged by explosive population growth, a debt boom that fueled investment and boosted productivity, and an astonishing increase in cross-border flows of goods, money, and people. Today, all three trends have begun to sharply decelerate: families are having fewer children than they did in the early postwar years, banks are not expanding their lending as they did before the global financial crisis, and countries are engaging in less cross-border trade. In an ideal world, political leaders would recognize this new reality and dial back their ambitions accordingly. Instead, many governments are still trying to push their economies to reach unrealistic growth targets. Their desperation is understandable, for few voters have accepted the new reality either. Indeed, many recent elections have punished establishment politicians for failing to do more, and some have brought to the fore populists who promise to bring back the good times. This growing disconnect between the political mood and the economic reality could prove dangerous. Anxious to please angry publics, a number of governments have launched radical policy experiments designed to revive economic growth and increase wages, or to at least spread the wealth more equitably-even though such plans are likely to fail, since they often rely on heavy spending that is liable to drive up deficits and spark inflation, leading to boom-and-bust swings. Even worse, some leaders are trying to use nationalism-by scapegoating foreigners or launching military adventures-to divert the public's attention from the economy altogether. Depopulation, deleveraging, and deglobalization need not hurt everyone; in fact, they will benefit certain classes of countries, companies, and people. To respond properly to these trends, governments need to plan for them and to manage public expectations. So far, however, few leaders have shown the ability-or even the inclination-to recognize the new economic reality. MORE OR LESS The emergence of the Three Ds represents an epochal reversal in the story of global development, which for decades prior to the Great Recession was a tale of more: more people, more borrowing, and more goods crossing borders. To understand why the plot took such an unexpected turn, it's helpful to consider the roots of each trend. Depopulation was already under way prior to the economic meltdown. During the postwar baby boom, the annual rate of growth in the global population of working-age people nearly doubled, from one percent in the mid-1950s to over two percent by 1980. This directly boosted economic growth, which is a simple function of how many people are joining the work force and how rapidly their productivity is increasing. By the 1980s, however, signs that the boom would fade had begun to appear, as women in many countries began to bear fewer children, in part because of the spread of contraception. As a result, the annual growth rate of the global working-age population started to fall in stages, with a sharp drop after 2005. By 2016, it had dropped all the way back to just one percent. In the United States, growth in the working-age population declined from 1.2 percent in the early years of this century to just 0.3 percent in 2016-the lowest rate since the UN began recording this statistic in 1951. The UN now predicts that worldwide, population growth rates will continue to decline through 2025 and beyond. Such long-term forecasts, which are based on a relatively simple combination of birth and death rates, have an excellent track record. And the economic implications of that trend are clear: every percentage point decline in working age population growth shaves an equally large chunk off the GDP growth rate. In the 1950s and 1960s, the baby boom provided a massive boost to the global economy, as did increases in productivity rooted in large measure in technological advances. As productivity growth slowed in the subsequent decades, however, easy money started to take its place as an economic spur. Beginning in the early 1980s, central banks began to win the war on inflation, which allowed them to lower interest rates dramatically. Until that point, borrowing and economic growth had moved in tandem, as is the norm in a capitalist system; for decades, global debt had grown in line with global GDP. But as falling interest rates lowered the cost of borrowing to near zero, debt surged from 100 percent of global GDP in the late 1980s to 300 percent by 2008. Although some of this borrowed money was wasted on speculation, much of it went to fuel business activity and economic growth. Then came the global financial crisis. Regulations issued in its wake limited the risks that U.S. and European banks could take both in their domestic markets and overseas. In 2008, global capital flows which are dominated by bank loans stood at 16 percent of global GDP. Today, those flows hover at around two percent of global GDP-back to where they were in the early 1980s. Meanwhile, many private borrowers and lenders have been paralyzed by "debt phobia," which has prevented new lending despite the fact that interest rates are at record lows. The only country where borrowing has continued to grow rapidly is China, which did not develop a fear of debt because it remained insulated from the financial crisis in 2008. But globally, since interest rates can hardly drop any further, a new debt boom is extremely unlikely. Globalization is not likely to revive quickly, either. The last time that cross-border flows of money and people slowed down was in 1914, at the onset of World War I. It took three decades for that decline to hit bottom, and then another three decades for flows to recover their prewar peaks. Then, in the early 1980s, many countries began to open their borders, and for the next three decades, the volume of cross border trade doubled, from the equivalent of 30 percent of global GDP in 1980 to 60 percent in 2008. For many countries, export industries were by far the fastest-growing sector, lifting the overall growth rate of the economy. In the wake of the recession, however, consumers have cut back on spending, and governments have started erecting barriers to goods and services from overseas. Since 2008, according to the Centre for Economic Policy Research's Global Trade Alert, the world's major economies have imposed more than 6,000 barriers to protect themselves from foreign competition, including "stealth" measures designed to dodge trade agreements. Partly as a result of such policies, international trade has fallen back to the equivalent of 55 percent of global GDP. This trend is likely to continue as populists opposed to globalization move to further restrict the movement of goods and people. Witness, for example, one of Trump's first moves in office: killing the Trans-Pacific Partnership (TPP), a 12-nation deal that was designed by Trump's predecessor to assure that American-style free-market rules would govern trade in Asia. WELCOME TO THE DESERT OF THE REAL Depopulation, deleveraging, and deglobalization have become potent obstacles to growth and should prompt policymakers in countries at all levels of development to redefine economic success, lowering the threshold for what counts as strong annual GDP growth by a full percentage point or two. Poorer countries tend to grow faster, because they start from a lower base. In countries with average annual incomes of less than $5,000, such as Indonesia, a GDP growth rate of more than seven percent has historically been considered strong, but that number should come down to five percent. For countries with average annual incomes of between $5,000 and $15,000, such as China, four percent GDP growth should be considered relatively robust. For developed nations such as the United States, with average annual incomes above $25,000, anything over 1.5 percent should be seen as healthy. This is the new reality of economic success. Yet few, if any, leaders understand or accept it. Given the constraints imposed by the Three Ds, the economies of China, India, Peru, the Philippines, Poland, and the United States are all growing at what should be considered healthy rates. Yet few citizens or policymakers in those countries seem satisfied with the status quo. In India, where the economy is now growing at a pace between five and six percent, according to independent estimates, elites still fantasize about hitting eight or nine percent and becoming the next China. The actual China, meanwhile, is still taking on ever more debt in an effort to keep its growth rate above six percent. And in the United States, Trump has talked of somehow getting the already fully developed U.S. economy to grow at four, five, or even six percent a year. Such rhetoric is creating an expectations gap. No region of the world is growing as fast as it was before 2008, and none should expect to. In 2007, at the peak of the pre-crisis boom, the economies of 65 countries including a number of large ones, such as Argentina, China, India, Nigeria, Russia, and Vietnam-grew at annual rates of seven percent or more. Today, just six economies are growing at that rate, and most of those are in small countries such as Cote d'Ivoire and Laos. Yet the leaders of many emerging-market countries still see seven percent annual GDP growth as the benchmark for success. THE POPULIST MOMENT "What's wrong with ambition?" some might object. The answer is that pushing an economy to sustain speeds beyond its potential is like persistently gunning a car's engine: it may sound cool, but eventually the motor will burn out. And if buyers are promised a muscle car but find themselves stuck in a broken-down family sedan, they will turn on the dealer. In the last year, numerous leaders once considered rising stars, such as Mexico's Enrique Pefia Nieto and Italy's Matteo Renzi, have seen their approval ratings tumble and, in Renzi's case, have been forced out of office after their reform plans failed to deliver as promised. Normally, incumbent politicians enjoy an advantage on election day, but not during antiestablishment revolts, such as the one occurring now. In 2009, in the 50 most populous democracies, the governing party won 90 percent of elections at the national level. Since then, the success rate of ruling parties has fallen steadily, to just 40 percent last year. The beneficiaries of this shift have often been populist and nationalist leaders who have cast doubt on the central tenets of the liberal postwar order. Figures such as Trump, Prime Minister Theresa May in the United Kingdom, and the right-wing leader Marine Le Pen in France have encouraged people to question the so-called Washington consensus-that is, the belief that there is an intrinsic link between global free markets and rising prosperity-which was an article of faith in the United States and other Western countries for decades. Many of these same politicians promise more muscular leadership in the name of promoting their countries' interests, and publics have shown themselves to be increasingly open to such appeals. The World Values Survey polled citizens of 30 large countries in the late 1990s and then again in the first five years of the current decade, asking, among other things, whether "having a strong leader who does not have to bother with parliament and elections" would be good for their country. In 25 of the surveyed countries, the share of people who said they would prefer authoritarian rule to democracy rose. The figure increased by 11 percentage points in the United States, 24 percentage points in Russia, and 26 points in India, where the number now stands at a stunning 70 percent. Even more striking, the decline in support for democracy was sharper among young people than among the old. Many leaders are responding to this shift by embracing protectionist policies and by intervening more aggressively in markets. One of the main reasons for British voters' surprising 2016 decision to leave the EU was a popular desire, whipped up by populists, to "retake control" of national borders and trade policy. Now the Washington consensus is under attack even in Washington. In the name enemies within is a trick as of his "America first" agenda, Trump begun publicly demanding that companies build with U.S.- sourced materials and threatening to change the tax code to explicitly favor exports over imports. This willingness to scrap postwar economic orthodoxy has extended into emerging markets as well. Although Indian Prime Minister Narendra Modi was once a darling of the free-market crowd, he has recently begun to defy its preferences, most recently by deciding to withdraw 86 percent of the paper currency in circulation in India, virtually overnight, as a way to punish wealthy tax dodgers. Such policies stand little chance of accomplishing the larger goal: bringing back a period of broad prosperity. Indeed, populist experiments will likely do more harm than good, in part by threatening the victory in the war on inflation that governments won in the 1980s and have sustained ever since, as tighter central bank policies have combined with intensifying international competition to put a lid on prices. If countries pursue insular, protectionist policies, decreased foreign competition will likely remove that lid. Populist proposals to boost growth by increasing government spending could also push prices up, especially if the economy is already running close to full capacity, as it is in the United States right now. That is why expectations for U.S. inflation have risen markedly since Trump took office. Populist spending might indeed drive up growth for a year or so, but it would come at the expense of higher deficits and rising inflation. That would force central banks to raise interest rates faster than expected, triggering a downturn. Trumps call for significant new spending on roads and bridges has proved broadly popular, but the timing is all wrong. The U.S. economy is already in the eighth year of a recovery, which means the need for stimulus spending has passed. And the Trump plan would push the U.S. budget deficit, which is already at unprecedented levels, even higher. At this stage, Washington should be building a surplus-money it will need when the next recession inevitably hits. But the idea of saving for a rainy day seems quaint at a time when disgruntled voters are demanding an economic revival. The U.S. economy is already growing in line with its potential rate of 1.5 to two percent, yet most politicians seem to share the public's disappointment and eagerness for more. WINNERS AND LOSERS The slowdown in global flows of goods, money, and people has affected more than just national politics and policymaking: it has also rearranged the international balance of economic power. Before 2008, emerging economies sought to export their way to prosperity. But that model has become less effective as the competitive edge once enjoyed by major exporters, such as South Korea and Taiwan, has begun to shift to countries that can grow by selling to their own large domestic markets, such as Indonesia or Poland. At the same time, countries that got ahead by specializing in outsourced labor will probably see their advantage dwindle. India has seen cities such as Bangalore emerge as incubators of the country's rising middle class, spurred by opportunities at global outsourcing firms. The same goes for the Philippines, where call centers did not exist at the turn of the millennium but have exploded into a $22 billion industry employing more than one million people. As globalization retreats, however, outsourcing is likely to decline, and Trump's tax plans, designed to bring companies and jobs back to the United States, will accelerate this shift. Economic advantages are also moving away from big multinationals and toward smaller, domestically focused companies that rely less on exporting goods and importing or outsourcing labor. As borders tighten and it becomes harder to fill positions with foreign employees, workers in developed economies such as the United States will gain more bargaining power. For much of the postwar era, the share of U.S. national income that went to workers declined, in large part because many companies cut labor costs by shifting jobs abroad. Meanwhile, the share of national income going to corporate profits rose steadily, to a peak of ten percent in 2012. Since then, however, the corporate share has started to drop and the workers' share has begun inching up. Border restrictions and aggressive government intervention in markets are nonetheless likely to slow the global economy. Reduced competition tends to undermine productivity, one of the key drivers of growth. As leaders attempt to grab a greater share of the global pie for their countries, their combined efforts will wind up shrinking the pie itself.

#### Alt Cause – inflation.

Bartash ’21 [Jeffry. Jeffry Bartash is a reporter for MarketWatch in Washington. “The U.S. economy is ready to surge again. So is inflation.”. 3/7/21. https://www.marketwatch.com/story/the-u-s-economy-is-ready-to-surge-again-so-is-inflation-11614978098]

The U.S. added a robust 379,000 jobs in February, and the economy is primed to take off, but improved growth prospects might come with a cost in the short run.

In a word: inflation.

Make no mistake. Inflation is still very low right now, and it has been for the past decade. The coronavirus pandemic squelched inflation early last year, and, even now, prices are rising less than 2% a year.

The loss of so many jobs during the pandemic — nearly 10 million are still missing — and resulting drop in demand is also helping to keep a lid on inflation.

“It is difficult, if not impossible, to generate sustained inflation and higher inflation expectations when the economy is still so far away from full employment,” said chief economist Scott Anderson of Bank of the West.

That could change in the coming months.

How come? Rising oil prices. Shortages of raw materials and other key supplies such as lumber and semiconductors. And another round of massive government financial aid to Americans.

After falling near zero last May, the yearly increase in the consumer-price index rose to 1.4 % in January — and it’s expected to keep going up. The CPI is the government’s main tool for tracking the cost of living and determining how much to increase Social Security benefits every year, among other things.

Economists predict the CPI will increase 0.3% in February, nudging the yearly rate up to as high as 1.7%. The report, which comes out Wednesday, is the highlight of the week on a light economic calendar.

By summer, many economists estimate the cost of living will be up 2% on a yearly basis and likely push past the Federal Reserve’s 2% target.

The evidence of rising prices is mounting. A pair of purchasing-managers reports last week, for example, showed that companies are paying sharply higher prices for a wide array of supplies they need to produce goods and services.

One price barometer for business supplies soared to a 10-year peak, leading a wholesale executive to fret about “an ongoing influx of price increases due to raw-material shortages, labor shortages and transportation delays.”

Then there are oil prices. The cost of petroleum has jumped 25% since early January after Saudi Arabia and other providers outside the U.S. slashed production. That’s also feeding into higher prices.

Throwing fuel on the fire is nearly $2 trillion in new financial aid from Washington just as the economy appears to be speeding up. The House is expected to again pass the bill, with the Senate’s adjustments, in a matter of days, with President Joe Biden signing the legislation quickly.

The upshot is that inflation is all but sure to rise in the months ahead. The big question: Will it be a temporary phenomenon tied to a full reopening of the economy? Or something worse that will persevere?

Fed Chairman Jerome Powell and most senior central-bank officials are betting the price increases won’t last. Powell has repeatedly predicted the expected burst of inflation will peter out and not pose a threat to the economy.

The danger, some economists warn, is that a spike in inflation will create more uncertainty among investors, drive interest rates higher and potentially sap the economic recovery.

Home sales, automobile sales, and many other consumer and business activities have benefited greatly from rock-bottom interest rates. And that’s not to mention record stock-market gains that some Fed critics tie to the central bank’s easy-money strategy.

Even if Powell is right, the rise in inflation is likely to complicate the path of a U.S. economic recovery if investors continue to harbor doubts.

“Powell is prepared to let inflation take off and is unlikely to take action in the face of that, unless it gets out of control,” said economists James Knightley and Padhraic Garvey of ING in a note to clients. “The problem is we won’t know whether it is in or out of control until we let it rip a bit.”

# 2NC vs Wichita State

## K

### 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** **for judges** 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

#### 3. 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) .

#### 4. Human existential risk pales in comparison to the global ethical failure of the Sixth mass extinction.

Stefanie **FISHEL** Political and Int’l Theory in Dept of Gender and Race Studies @ Alabama **ET AL ‘18** (Additional authors: Anthony Burke Politics @ New South Wales, Audra Mitchell Canada Research Chair in Global Political Ecology @ Wilfrid Laurier, Simon Dalby CIGI Chair in the Political Economy of Climate Change at the Balsillie School of International Affairs, Daniel Levine Poli Sci @ Alabama) “Planet Politics: A Manifesto from the End of IR” *Millennium* 44 (3) p p. 516-518

8. Global ethics must respond to mass extinction. In late 2014, the Worldwide Fund for Nature reported a startling statistic: according to their global study, 52% of species had gone extinct between 1970 and 2010.60 This is not news: for three decades, conservation biologists have been warning of a ‘sixth mass extinction’, which, by definition, could eliminate more than three quarters of currently existing life forms in just a few centuries.61 In other words, it could threaten the practical possibility of the survival of earthly life. Mass extinction is not simply extinction (or death) writ large: it is a qualitatively different phenomena that demands its own ethical categories. It cannot be grasped by aggregating species extinctions, let alone the deaths of individual organisms. Not only does it erase diverse, irreplaceable life forms, their unique histories and open-ended possibilities, but it threatens the ontological conditions of Earthly life.

IR is one of few disciplines that is explicitly devoted to the pursuit of survival, yet it has almost **nothing to say** in the face of a **possible mass extinction event**.62 It utterly lacks the conceptual and ethical frameworks necessary to foster diverse, meaningful responses to this phenomenon. As mentioned above, Cold-War era concepts such as ‘nuclear winter’ and ‘omnicide’ gesture towards harms massive in their scale and moral horror. However, they are asymptotic: they imagine nightmares of a severely denuded planet, yet they do not contemplate the **comprehensive negation** that a **mass extinction event entails**. In contemporary IR discourses, where it appears at all, extinction is treated as a problem of **scientific management** and **biopolitical control** aimed at **securing existing human lifestyles**.63 Once again, this approach fails to recognise the reality of extinction, which is a **matter of being and nonbeing**, not one of life and death processes.

Confronting the enormity of a possible mass extinction event requires a total overhaul of human perceptions of what is at stake in the disruption of the conditions of Earthly life. The question of what is ‘lost’ in extinction has, since the inception of the concept of ‘conservation’, been addressed in terms of financial cost and economic liabilities.64 Beyond reducing life to forms to capital, currencies, and financial instruments, the dominant neoliberal political economy of conservation imposes a homogenising, Western secular worldview on a planetary phenomenon. Yet the enormity, complexity, and scale of mass extinction is so huge that humans need to draw on every possible resource in order to find ways of responding. This means that they need to mobilise multiple worldviews and lifeways – including those emerging from indigenous and marginalised cosmologies.

Above all, it is crucial and urgent to realise that extinction is a matter of global ethics. It is not simply an issue of management or security, or even of particular visions of the good life. Instead, it is about staking a claim as to the goodness of life itself. If it does not fit within the existing parameters of global ethics, then it is these boundaries that need to change.

### 2NC – AT: Cap Good

#### 2. Impact turns based on the core assumptions that we’ve criticized should be disregarded. The neoclassical models give us zero basis for robust economic assessment.

Michael **BERNSTEIN** John Christie Barr Prf. of History and Economics @ Tulane **’18** “Reconstructing a public economics: markets, states and societies” *Real-World Economics Review* 84 p. 2-3

Liberating contemporary economic analysis from the straitjacket of mainstream neoclassical theory is the animating theme of the essays assembled in this special number of the Real-World Economics Review (RWER). The authors of the works assembled here are all committed to the idea that what is regarded by traditional economic theory as a set of exogenous forces framed and deployed from outside the market mechanisms that are the focus of the discipline – namely, the public sector – is in fact an integral agent that directly affects the very issues and phenomena neoclassical theory claims to explain. Indeed, it is the very failure of traditional economic thinking to account for the “public economy” in any systematic and meaningful fashion that prevents it from explaining how societies actually produce goods and services and, in compensation, constructs inapt and futile framings, such as “market failures,” to explain why governments exist.

In contradistinction to prevailing doctrine, the following articles strive to reconstruct a public economics by embedding the public sector intrinsically within economic models. Rather than separate the “public sector” from economics, understanding collective action as something distinct from the economy, a public economics views the entire economic system – the “macroeconomy” as a whole – as comprised of multiple economic systems: of markets, of public activities, and of domestic interactions. As Neva Goodwin explains (“There is More Than One Economy”), human economies may be understand as a construction of the market or “private business economy,” a “public purpose economy,” and a “core economy.” The market is the focus of virtually all of mainstream economic thinking today. Public purpose economy is defined by Goodwin as government, non-profit, and non-governmental entities that focus on a broader array of goals not simply defined by profit-maximization. In the core economy, one finds the domestic activities of consumption, distribution, and resource management that are focused on the survival, nurturing, and welfare of its constituents.

Simply understood as venues within which rational agents pursue optimization goals, markets cannot account for public purpose articulated and projected within collective-action dynamics, domestic and intimate goals framed by affective and cultural behaviors, and ecological and environmental contexts imposed by the physical and biological realms within which all human activities occur. That being the case, an economics that only accounts for the workings of “perfect” markets, understood to exist separately from domestic, public, and ecological frameworks, is not even remotely useful in explaining how economies actually function, let alone how they might be improved. If, for example, government is understood simply as a remedial instrument to rectify **“market failure**,” its essential role in the economic mechanisms of consumption, production, and distribution is obscured. Similarly, if both the domestic sphere (of family and human relationships) and the environment are grasped as dimensions external to, and non-constitutive of the economy, it becomes **impossible** to **analyze** and **predict** **economic** **behaviors and outcomes in reliable ways**.

Reframing how economic theory accounts for the public and domestic realms of social life is uniquely tied to the manner by which we understand government action. As June Sekera demonstrates (“The Public Economy: Understanding Government as a Producer”), by viewing governments as essentially economic “operating systems,” that function according to a non-market economic logic and within the constraints of biophysical realities, we gain a far more effective understanding and appreciation of society, markets, and the environmental impacts of economic activity. This not only allows for more accurate analyses of proposed policies; it also animates a deeper and more genuine understanding of the ways in which public goals and purposes may in fact be effectively conceptualized and achieved. There is no better historical demonstration of this fact than in the twentieth century experience in the United States.

#### 3. Private markets are not more efficient than public provisioning. Comprehensive studies prove.

Michael **BERNSTEIN** John Christie Barr Prf. of History and Economics @ Tulane **’18** “Reconstructing a public economics: markets, states and societies” *Real-World Economics Review* 84 p. 14

In thralldom to the dominant catechism of neoclassical economic theory, the vast majority of investigators assume that private markets, if “perfectly” structured and operationalized, will always generate more efficient outcomes than public provision. Yet empirical evidence, drawn from an array of national and regional examples, proves otherwise. David Hall (“The Relative Efficiency of Public Provision of Public Services”) is able to demonstrate this fact with remarkable clarity – and with large stores of data drawn from both highly developed and currently emergent economies. His are a particularly striking set of findings insofar as they strike at the heart of the unsubstantiated pronouncements of orthodox theory regarding the alleged virtues of unfettered markets – in both “private” and “public” settings.

### 2NC – AT: Perm

#### 2. 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

### 2NC – Alt

#### Capitalism is inherently unsustainable and will inevitably collapse — it’s only a question if we choose to keep it afloat — the contradictions of global neoliberalism will push humanity to total extinction

Foster, PhD, ‘19 [John, Professor of Sociology @University of Oregon, PhD @York University, "Capitalism Has Failed—What Next?" 2/1/2019, *Monthly Review*, https://monthlyreview.org/2019/02/01/capitalism-has-failed-what-next/, DFU | JKS]

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

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

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

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

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

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

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

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

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

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

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

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

Increasingly severe economic sanctions are being imposed by the United States on countries like Venezuela and Nicaragua, despite their democratic elections—or because of them. Trade and currency wars are being actively promoted by core states, while racist barriers against immigration continue to be erected in Europe and the United States as some 60 million refugees and internally displaced peoples flee devastated environments. Migrant populations worldwide have risen to 250 million

, with those residing in high-income countries constituting more than 14 percent of the populations of those countries, up from less than 10 percent in 2000. Meanwhile, ruling circles and wealthy countries seek to wall off islands of power and privilege from the mass of humanity, who are to be left to their fate.30

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

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

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

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

Capitalism is best understood as a competitive class-based mode of production and exchange geared to the accumulation of capital through the exploitation of workers’ labor power and the private appropriation of surplus value (value generated beyond the costs of the workers’ own reproduction). The mode of economic accounting intrinsic to capitalism designates as a value-generating good or service anything that passes through the market and therefore produces income. It follows that the greater part of the social and environmental costs of production outside the market are excluded in this form of valuation and are treated as mere negative “externalities,” unrelated to the capitalist economy itself—whether in terms of the shortening and degradation of human life or the destruction of the natural environment. As environmental economist K. William Kapp stated, “capitalism must be regarded as an economy of unpaid costs.”42

We have now reached a point in the twenty-first century in which the externalities of this irrational system, such as the costs of war, the depletion of natural resources, the waste of human lives, and the disruption of the planetary environment, now far exceed any future economic benefits that capitalism offers to society as a whole. The accumulation of capital and the amassing of wealth are increasingly occurring at the expense of an irrevocable rift in the social and environmental conditions governing human life on earth.43

Some would argue that China stands as an exception to much of the above, characterized as it is by a seemingly unstoppable rate of economic advance (though carrying with it deep social and ecological contradictions). Yet Chinese development has its roots in the 1949 Chinese Revolution, carried out by the Chinese Communist Party headed by Mao Zedong, whereby it liberated itself from the imperialist system. This allowed it to develop for decades under a planned economy largely free of constraints from outside forces, establishing a strong agricultural and industrial economic base. This was followed by a shift in the post-Maoist reform period to a hybrid system of more limited state planning along with a much greater reliance on market relations (and a vast expansion of debt and speculation) under conditions—the globalization of the world market—that were particularly fortuitous to its “catching up.” Through trade wars and other pressures aimed at destabilizing China’s position in the world market, the United States is already seeking to challenge the bases of China’s growth in world trade. China, therefore, stands not so much for the successes of late capitalism but rather for its inherent limitations. The current Chinese model, moreover, carries within it many of the destructive tendencies of the system of capital accumulation. Ultimately, China’s future too depends on a return to the process of revolutionary transition, spurred by its own population.44

How did these disastrous conditions characterizing capitalism worldwide develop? An understanding of the failure of capitalism, beginning in the twentieth century, requires a historical examination of the rise of neoliberalism, and how this has only served to increase the destructiveness of the system. Only then can we address the future of humanity in the twenty-first century.

## Ag

### XT 3 – AT: Food

#### Non-resource factors and costs of war.

Baryamov ’18 [Agha; PhD candidate and lecturer in the department of International Relations and International Organization @ University of Groningen; “Review: Dubious nexus between natural resources and conflict,” *Journal of Eurasian Studies* 9(1): 72-81]

First, function of natural resources in conflict is narrowly explained. Less research has been devoted to non-resource factors of conflicts and their connection with resources. Conflict is composed of multiple dimensions (political, economic, historical, cultural, ethnic and geographical etc.) rather than single factor. It is not clear how non-resource dimensions o1f conflict interact with natural resources, namely poor performance of state institutions or scarcity of state capacity One may understand how natural resources influence non-resource dimensions but one may not find how and whether non-resource dimensions affect scarcity or abundancy of natural resources. In this regard, it is not sufficient to simply propose scarcity or abundancy of natural resources as the fundamental reason for conflicts. Second, less research has scrutinized political and economic costs of resources wars, namely occupation cost, international cost and investment costs (e.g. Meierding, 2016). The existing works give a misleading impression that resource incomes can cover easily invasion, investment and international costs of wars.

#### Resource states aren’t equal, and non-state actors aren’t considered.

Baryamov ’18 [Agha; PhD candidate and lecturer in the department of International Relations and International Organization @ University of Groningen; “Review: Dubious nexus between natural resources and conflict,” *Journal of Eurasian Studies* 9(1): 72-81]

Third, the existing works consider approximately most resource states to be more or less equal entities. Although such states may have equal rights from juridical perspective, they share too many diverse features to be considered equal entities in other empirical terms. For example, while Azerbaijan and Saudi Arabia have rich natural resources, they are dissimilar in a number of other important ways. However, both qualitative and quantitative analyses neglect this factor while explaining the resource-conflict nexus. Therefore, it is unwise to lump different case studies together in the same category without considering the particular characteristics of the region or country in question. Moreover, wide part of the existing works adopts a national-level approach by portraying abundancy, scarcity and conflict at the unitary state-level. Nevertheless, natural resources are distributed inconsistently over a nation's territory. In other words, only particular places, namely cities or urban areas are affected by the abundancy or scarcity of resources. Hence, conflict more likely develops in areas which are excluded from resource wealth and development. However, the present works neglect the distinctive characteristics between resource rich cities and non-resource cities by putting them into country level analysis. Inadequate explanation of actors and players in resource governance is another weak point. The majority of the literature has surveyed the resource-conflict relationship through the lens of sovereign states or the great powers. The rest of the actors (companies, financial institutions, NGOs, and etc.) are superficially recognized because these actors represent states' national interests. Therefore, little research has focused on other players, such as the role of regional and international organizations (e.g. Hendrix & Noland, 2014;Price-Smith, 2015, Schrijver, 2010). Despite their key importance, states are not the sole actors in the sustainable management and use of natural resources. There are several actors that are involved actively in resource management and disputed areas. Although these actors are not the panaceas for global issues, resource state cannot simply ignore their interests. Meanwhile, to protect their own interests, these actors to some extent affect the security and stability of resource rich regions. Considering, the role of multiple actors is thus crucial, in order to pursue a multi-level analysis and view the complex interdependency of these actors from different perspectives.

#### Their research is flawed – structural factors check.

Baryamov ’18 [Agha; PhD candidate and lecturer in the department of International Relations and International Organization @ University of Groningen; “Review: Dubious nexus between natural resources and conflict,” *Journal of Eurasian Studies* 9(1): 72-81]

The arguments of scarcity adherents have been challenged by a number of scholars in terms of qualitative and quantitative findings. According to Stern (2016) the assumptions underpinning the scarcity notion are illogical due to the exaggeration of threats arising from oil ownership from misperceptions of market information. Furthermore, Koubi et al. (2013) explain that despite their strong empirical explanations, scarcity scholars have weak quantitative research results ones that fail to prove the link between resource scarcity and intrastate or interstate conflict. The reason for this is that some large-N findings contradict early results, which illustrate that the scarcity-conflict nexus is more complicated than scarcity scholars would have us believe. Dinar (2011), meanwhile, argues that natural resource scarcity may in fact be an important force for cooperation between states. However, scholars of natural resource scarcity have hitherto ignored the ways in which scarcity can spur cooperation (Deudney, 1999).

Considering these findings, three conclusions can be drawn from this section. First, scarcity is a complex term and it should not be equated with only natural resources. As it is explained by Kester (2016) some countries may suffer from scarcity of technical, knowledge and human capacity rather than natural resources. In light of this, without a proper capacity it is also possible to have scarcity within abundancy of resources. While supporting the scarcity argument, Andrews-Speed (2015) offer an alternative explanation that natural resources are not physically scarce but there are indeed economic, political, environmental and equity barriers that can lead to a scarcity of natural resources. Due to the strong rule of law, decent neighbourly relations and existence of strong norms for compromise and of multilateral institutions, the North Atlantic countries are highly unlikely to utilize force against or declare war to each other. However, these dimensions and buffers are currently lacking in the Middle East, Africa and Asia. As such, the U.S and Europe should work closely with these regions to prevent any resource disputes erupting (Andrews-Speed 15). Similarly, Gleditsch (1998) explains that some highly developed countries have population density, clean water, and land degradation problems but they still do not suffer from environmental violence. Thus the main issue might be that poor economic development, rather than environmental scarcity, leads to conflict. Kester (2016) names this situation as “second-order-scarcity” which refers to a lack of technology, economic capacity, and knowledge to stop resource scarcity. In this regard, it may be scarcity, itself, rather than natural resources that leads to conflict.

Second, conflict can be defined differently based on different dimensions. However, the common consensus is that conflict consists of multiple dimensions (political, economic, environmental, historical, cultural, and geographical etc.) rather than single factor. In this regard, scarcity of natural resources is not strong enough, by itself, to induce either interstate or intrastate conflict. It needs in fact to interact with other variables. Finally, related to the previous reasons, scarcity of natural resources might be a contributing or marginal reason for rather than the root cause of a given conflict. In other words, it needs to interact with non-resource factors in order to cause violence.

### XT 4 and 5 – No Soil Impact

#### Minimal and local impact to soil erosion

Ruttan, Econ PhD, 99 [Vernon, Prof. Emeritus Econ. And Applied Econ. @ U. Minnesota, Proceedings of the National Academy of Sciences, “The transition to agricultural sustainability”, 96:5960-5967, May, http://www.pnas.org/content/96/11/5960.full.pdf?ck=nck, CMR]

The fact that the data is so limited should not be taken to suggest that soil erosion is not a serious problem. But it should induce some caution in accepting some of the more dramatic pronouncements about the inability of to sustain agricultural production (32). The impact of human-induced soil degradation and loss is not evenly distributed across agroclimatic regions, either in developed or developing countries. What I do feel comfortable in concluding is that the impacts on the resource base and on regional economies from soil erosion and degradation are local rather than global. It is unlikely that soil degradation and erosion will emerge as important threats to the world food supply in the foreseeable future. Where soil erosion does represent a significant threat to the resource and the economic base of an area, the gains from implementation of the technical and institutional changes necessary to reclaim degraded soil resources, or at least to prevent further degradation, can be quite substantial.

### XT 6 – No Biod

#### UN goals not being met.

AP ’20 [Associated Press. American non-profit news agency headquartered in New York City. “World not meeting biodiversity goals, UN report finds”. 9/15/20. https://www.tampabay.com/news/environment/2020/09/15/world-not-meeting-biodiversity-goals-un-report-finds/]

A decade-long global effort to save Earth’s disappearing species and declining ecosystems has mostly stumbled, with fragile habitats like coral reefs and tropical forests in more trouble than ever, researchers said in a report Sept. 15.

In 2010, more than 150 countries agreed to goals to protect nature, but the new United Nations scorecard found that the world has largely failed to meet 20 different targets to safeguard species and ecosystems.

Six of those 20 goals were “partially achieved,” and the rest were not.

If this were a school and these were tests, the world has flunked, said Elizabeth Maruma Mrema, executive secretary of the U.N. Convention on Biological Diversity, which released the report.

Inger Andersen, who leads the U.N. environment program, called it a global failure.

“From COVID-19 to massive wildfires, floods, melting glaciers and unprecedented heat, our failure to meet the Aichi (biodiversity) targets — protect our our home — has very real consequences,” Andersen said. “We can no longer afford to cast nature to the side.”

In a Sept. 15 interview with the Associated Press, former U.N. Secretary-General Ban Ki-Moon connected the problems to “a lack of global partnership and political leadership.” He said multilateralism has been under attack, citing the United States' withdrawal from the Paris climate change agreement as an example.

The U.N. team and report authors said the study is not meant to stoke despair, but to galvanize governments to take stronger actions over the next decade to protect the diversity of life.

“Some progress has been made, but inadequate progress. A lot still needs to be done,” Mrema said. “The key is to get the political will and the commitment.”

Duke University ecologist Stuart Pimm, who was not involved in the new report, said it’s good that countries are getting together to examine their biodiversity goals but some of the targets are nebulous. Reducing “everything on the planet to single scores” obscures the fact that the picture may look different in different places, he said.

For years, conservation activists have used the polar bear as a poster child for species in trouble — especially those threatened by climate change, which the report connects to biodiversity loss. But Mrema and lead author David Cooper said the world should think about a different poster animal: humans.

“A lot of things civilizations depend on are certainly threatened,” he said.

The report was originally slated to be released at a U.N. conference to set biodiversity targets for the next decade, but the event in Kunming, China, was postponed until next year due to the pandemic.

Last week, the World Wide Fund for Nature released new research detailing how monitored populations of mammals, birds, amphibians, reptiles and fish have declined, on average, 68 percent, between 1970 and 2016.

“With pandemic deaths surging and wildfires raging across the entire West Coast, never have the consequences of our misuse and abuse of the natural world been more clear,” said Julia Baum, a biologist at Canada’s University of Victoria who wasn’t part of the report.

As countries prepare to restart their economies after combating the coronavirus, there’s an opportunity to do better — or much worse — for the planet, Cooper said.

“Some countries are relaxing environmental regulations, but others are investing in a green recovery,” he said.

One of the challenges in meeting global biodiversity targets is a mismatch between countries with abundant natural assets — such as large tracts of intact tropical forests — and those with money to enforce protections.

“The biodiversity hotspots tend to be in poorer countries,” and wealthy countries need to be willing to provide financial or practical support to help other nations, Cooper said.

# 1NR

## Patents

### XT 1-3 – Circumvention

#### The plan and any purported spilover to antitrust broadly gets circumvented and watered down to favor the interests of big corporations:

#### 1. Courts – antitrust is governed by common law – the aff establishes a regime for one type of antitrust as applied to the first sale doctrine, but the subsequent itnerpretations of that statutory change are subject to modifications by the courts – our ev says they blatantly defy statutes, which durable fiat can’t solve because they can only fiat the mandate of the plan, which is mere expansion of scope not enforcement – that’s Crane.

#### 2. Rule of reason – the anttirust standards are egregiously vague and mean nothing, enables litigants powered by big companies like monsato to win future cases easily – that’s Hanley.

#### The courts will disregard clear statutes

Crane 21 – Frederick Paul Furth Sr. Professor of Law at UMich (Daniel, Antitrust Antitextualism, 96 Notre Dame L. Rev. 1205 (2021). Available at: <https://scholarship.law.nd.edu/ndlr/vol96/iss3/7>

Limitations of Writing Clear Statutes This Article has shown that, historically, the judiciary has treated the antitrust statutes as broad delegations to the courts to create a pragmatic common law of competition, even when the statutes plainly said something more specifically prohibitory. What, then, are the strategies available to a reformist Congress seeking to rein in business power through remedial antitrust legislation? The one strategy that does not seem especially promising is simply writing clearer statutes. The antitrust statutes that the courts wrote down in favor of big business did not suffer from a lack of clarity or, if they did, not in the textual implications the courts chose to ignore. Strikingly, the courts continue to insist that the antitrust statutes are indeterminate delegations of common-law power, even while admitting in candor that they have simply chosen to ignore the statutes’ plain meaning in favor of a common method of deciding antitrust cases. For instance, in Professional Engineers, Justice Stevens remarked for the Court that “the language of § 1 of the Sherman Act . . . cannot mean what it says” and therefore that Congress must not have intended “the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations,” thus justifying the courts in shaping the “statute’s broad mandate by drawing on common-law tradition.”255 Given over a century’s tradition of interpreting antitrust statutes as invitations to continue a common-law process whatever else is suggested by the statute’s text, it is difficult to see how simply accumulating stern new language in new texts would lead to a different result.

#### Rule of reason violates vagueness

Sokol 19 – full-time law professor at the USC Gould School of Law with a secondary appointment at the USC Marshall School of Business (Daniel, Reinvigorating Criminal Antitrust?, 60 Wm. & Mary L. Rev. 1545 (2019))//gcd

Antitrust potentially may fall into a void for vagueness problem.245 This is not to suggest that all of antitrust is void for vagueness,246 or that all per se criminal antitrust is unconstitutional.247 Rather, there is a case to be made, given that for antitrust restraints are based on a rule of reason approach, that any attempt to criminalize such behavior again might also lead to a challenge based on a void for vagueness argument. 248 On its face, the Sherman Act appears vague. One can begin with the words of the Sherman Act itself. 249 Section 1 of the Sherman Act explains that “[e]very contract, combination ... or conspiracy, in restraint of trade or commerce ... is declared to be illegal.” 250 Section 2 of the Sherman Act states that “[e]very person who shall monopolize, or attemptto monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce ... shall be deemed guilty.” 251 However, case law has filled in the gaps as to what sort of limits exist for the Sherman Act and similar state antitrust laws.252 One might argue that if a current court had the inclination, it could sustain a broad variety of criminal antitrust prosecutions by citing United States v.Lanier, where the criminal civil rights statute was upheld regarding sexual assault cases.253 In Lanier, the U.S. Supreme Court offered guidance as to the “three related manifestations of the fair warning requirement” that are required whether or not a criminal statute may be unconstitutionally vague.254 These include: (1) the vagueness doctrine, (2) the rule of lenity, and (3) retroactive application of a new construction of the statute.255 The purpose ofthe fair warning requirements is to ensure that the “statute, either standing alone or as construed, ma[k]e it reasonably clear at the relevant time that the defendant’s conduct was criminal.” 256 The vagueness manifestation may be at play in the antitrust context.

### XT 4 – No Econ Impact

#### Downturns don’t cause conflict:

#### Recessions inhibit the resources required to wage war. States use other methods to stimulate the economy. Empirics are on our side – the US has undergone 40 recessions, and none have been related to the wars it’s fought. Security, not economic gain, motivates war – that’s Walt

#### Downturns don’t cause wars.

Liao ’19 [Jianan Liao, Shenzhen Nanshan Foreign Language School, China. Business Cycle and War: A Literature Review and Evaluation. Advances in Economics, Business and Management Research, volume 68. Copyright 2019]

First, war can occur at any stage of expansion, crisis, recession, recovery, so it is unrealistic to assume that wars occur at any particular stage of the business cycle. On the one hand, although the domestic economic problems in the crisis/recession/depression period break out and become prominent in a short time, in fact, such challenge exists at all stages of the business cycle. When countries cannot manage to solve these problems through conventional approaches, including fiscal and monetary policies, they may resort to military expansion to achieve their goals, a theory known as Lateral Pressure. [13] Under such circumstances, even countries in the period of economic expansion are facing downward pressure on the economy and may try to solve the problem through expansion. On the other hand, although the resources required for foreign wars are huge for countries in economic depression, the decision to wage wars depends largely on the consideration of the gain and loss of wars. Even during depression, governments can raise funding for war by issuing bonds. Argentina, for example, was mired in economic stagflation before the war on the Malvinas islands (also known as the Falkland islands in the UK). In fact, many governments would dramatically increase their expenditure to stimulate the economy during the recession, and economically war is the same as these policies, so the claim that a depressed economy cannot support a war is unfounded. In addition, during the crisis period of the business cycle, which is the early stage of the economic downturn, despite the economic crisis and potential depression, the country still retains the ability to start wars based on its economic and military power. Based on the above understanding, war has the conditions and reasons for its outbreak in all stages of the business cycle.

Second, the economic origin for the outbreak of war is downward pressure on the economy rather than optimism or competition for monopoly capital, which may exist during economic recession or economic prosperity. This is due to a fact that during economic prosperity, people are also worried about a potential economic recession. Blainey pointed out that wars often occur in the economic upturn, which is caused by the optimism in people's mind [14], that is, the confidence to prevail. This interpretation linking optimism and war ignores the strength contrast between the warring parties. Not all wars are equally comprehensive, and there have always been wars of unequal strength. In such a war, one of the parties tends to have an absolute advantage, so the expectation of the outcome of the war is not directly related to the economic situation of the country. Optimism is not a major factor leading to war, but may somewhat serve as stimulation. In addition, Lenin attributed the war to competition between monopoly capital. This theory may seem plausible, but its scope of application is obviously too narrow. Lenin's theory of imperialism is only applicable to developed capitalist countries in the late stage of the development capitalism, but in reality, many wars take place among developing countries whose economies are still at their beginning stages. Therefore, the theory centered on competition among monopoly capital cannot explain most foreign wars. Moreover, even wars that occur during periods of economic expansion are likely to result from the potential expectation of economic recession, the "limits of growth" [15] faced during prosperity — a potential deficiency of market demand. So the downward pressure on the economy is the cause of war.

#### No impact to decline – it’s resilient and economic factors don’t indicate collapse of the liberal order.

Drezner ’19 [Daniel; Professor of International Politics in The Fletcher School of Law and Diplomacy @ Tufts University, BA in Political Economy @ Williams College, Econ MA and Political Science PhD @ Stanford; “Counter-Hegemonic Strategies in the Global Economy,” *Security Studies* 28.3, p. 505-531; AS]

The neoliberal economic order, as defined by the Washington Consensus, has endured for decades. Global governance structures successfully contained the damage created by the 2008 financial crisis. Nonetheless, concerns have been raised about the resiliency of the current hegemonic order and whether a rising great power could mount a revisionist challenge to the system. Debates about the AIIB and BRI have been distracting, however. Instead, it is better to sketch out an optimal path for actors to challenge the hegemonic order and then see how the candidate great powers are behaving in those areas. The evidence suggests that Russia has genuinely revisionist aims but is pursuing them in a radically inefficient manner. China, on the other hand, seems far less interested in revisionist strategies than many feared in 2009.

This paper concludes that state-led efforts to create a counter-hegemonic system to challenge the US-created hegemonic order have been either ineffective or inefficient. At the same time, it offers two warnings about the future of the liberal economic order. The first is that US scholars, in assessing the future stability of the liberal international order, may also be focusing on the wrong signals. Too much attention is being paid to the financial dimensions of the order. The findings presented here suggest that finance is a laggard and not a leading indicator of threats to the system. Indeed, this would not be the first time that observers focused on the wrong structural pillar of the hegemonic order. In The Great Transformation, Karl Polanyi noted, “The true nature of the international system under which we were living was not realized until it failed. Hardly anyone understood the political function of the international monetary system; the awful suddenness of the transformation thus took the world completely by surprise … . when it broke, the effect was bound to be instantaneous.” 100 Focusing exclusively on the gold standard would have caused analysts in the early half of the twentieth century to have missed the decay and revisionism present in the security and information pillars. This paper concludes that the finance pillar should be the last to fall in any breakdown of a hegemonic economic order. The same problem afflicts analysts who focus on the dollar’s standing as the world’s reserve currency as a possible canary in the coal mine for any erosion of the hegemonic order. Their attention would be better directed at the ideational challenges to the open global economy. That is the true canary in the coal mine, and it is already starting to sing rather loudly.

#### Decline incentivizes trade agreements---2008 proves leaders turn to more, not less trade

Edward D. Mansfield 18, Ph.D. in Political Science from the University of Pennsylvania, Professor of Political Science at the University of Pennsylvania, Helen V. Milner, Ph.D. in Government from Harvard University, Professor of Politics and International Affairs at Princeton University, July 2018, “The Domestic Politics of Preferential Trade Agreements in Hard Times,” World Trade Review, Volume 17, Issue 3, p. 1-2

The received wisdom is that economic downturns prompt countries to raise trade barriers (Conybeare, 1983; Cassing et al., 1986; Bohara and Kaempfer, 1991; Bagwell and Staiger, 2003; Davis and Pelc, 2017). Recently, various studies have challenged this claim by pointing out that the financial crisis and recession of 2008–2009 generated little protectionism. Crucial to averting protectionism during this episode was that the G20 leaders pledged to resist the temptation to raise trade barriers (Organisation for Co-operation and Development, 2010; Vandenbussche and Viegelahn, 2011; Kee et al., 2013; Gawande et al., 2015).1 Not only did G20 countries forestall a rise in protectionism, but the bulk of these states formed international trade agreements during this period.2

The latter development reflects a tendency for leaders of democratic countries to establish trade agreements during hard economic times. We argue that some democratic leaders enter trade agreements because they yield political as well as economic benefits. Such agreements can help heads of state in countries with competitive political systems retain office during economic downturns. In democracies, leaders are concerned that the public will hold them responsible for the downturn and vote them out of office. Policies designed to liberalize and promote the flow of trade can signal to voters that the downturn was not the product of rent-seeking or incompetence, but instead was due to circumstances beyond the leader’s control. Since trade agreements bind the hands of political leaders, they have a harder time acquiescing to protectionist pressures. Such agreements create credible commitments by the leader to avoid rent-seeking behavior.

#### Assumes their internal link, the worse the crisis the harder justifying protectionism becomes

Cameron Ballard-Rosa 18, Ph.D. in Political Science from Yale University, Assistant Professor of Political Science at the University of North Carolina, et al., July 2018, “Economic Crisis and Trade Policy Competition,” British Journal of Political Science, Vol. 48, Issue 3, p. 736-738

Existing research on the effects of crises on trade policy offers conflicting accounts, arguing at the same time that shocks make autarky more likely, that economic distress leads to less protectionism and that there is no systematic relationship linking crises to policy reform. Our novel theoretical account reconciles these diverging perspectives by distinguishing between the intensity and duration of economic shocks, and by explicating the differential effects of crises on industries’ lobbying resources and strategies. We demonstrate that as crises increase in severity, industries clamor for more protection, but when crises become dire, industries can no longer afford to secure protection because they must compete in the policy domain with other players seeking lower tariffs. Similarly, following the onset of a crisis, affected industries demand protection, but as the crisis persists over time, lobbying resources run dry and counter lobbies mobilize to demand greater liberalization. We investigate our theory’s claims using formal modeling, illustrative examples, and both sub-national and cross-national empirical evidence, finding strong support for our argument.

Our results have several policy implications. For example, we find that when the cost of organizing a counter-lobby – a key parameter in our model – is lower, it is easier for firms to engage in counter-lobbying activities. These expenditures have a significant offsetting effect on the demand for trade protection, lowering tariff levels as shocks increase in size. To the extent that lower tariffs are desirable, then, reducing the organizational costs of counter-lobbying can result in more socially beneficial policy outcomes. More broadly, institutional designs that promote the broader representation of interest groups can achieve greater policy-making stability during crisis periods, as lobbying for policy adjustments can spark counter-lobbying that drives policy back toward the status quo. While our article does not speak directly to these implications, it raises a constructive set of research questions about the role of policy competition, institutional design and representation in shaping distributional politics.

#### It causes preferential agreements that sustain global trade

Edward D. Mansfield 18, Ph.D. in Political Science from the University of Pennsylvania, Professor of Political Science at the University of Pennsylvania, Helen V. Milner, Ph.D. in Government from Harvard University, Professor of Politics and International Affairs at Princeton University, July 2018, “The Domestic Politics of Preferential Trade Agreements in Hard Times,” World Trade Review, Volume 17, Issue 3, p. 28-29

**PTAs = Preferential Trade Agreements**

The received wisdom is that economic downturns promote protectionism. It is therefore surprising that economic hard times sometimes lead political leaders to negotiate agreements that reduce trade barriers and resist protectionism among members. We have argued that domestic political incentives exist for democratic leaders to establish trade agreements during hard times. Of course, domestic politics is not the sole factor shaping PTAs; we have found that a wide variety of economic and international political variables also exert a strong influence of the establishment of these agreements. But the domestic political logic of PTAs and its relationship to the state of the economy has been understudied and underappreciated to date, a gap that we helped to fill in this study.

PTAs signal to the public that a country’s leader may not be captured by protectionist special interests. Hence, when economic troubles arise, some voters and protrade interest groups may be less likely to blame the leader. Establishing agreements that liberalize overseas commerce indicates to the public that its leader is less likely to be exploitative or incompetent and that hard times should be attributed to sources beyond his or her control. Public opinion data from around the world show that a strong majority in many countries like trade and think it is good for their country. Under these circumstances, leaders appear to have a better chance of retaining office during economic downturns when they make agreements. Leaders realize political gains as a result and the general public also benefit from freer trade. We find that, since World War II, various leaders have chosen this strategy and have been rewarded for it.

Where leaders face greater political competition, these considerations are particularly important. In more democratic settings, leaders are more concerned with how the public react to hard economic times and thus leaders are more likely to enact policies that reassure the public. Trade agreements help to provide such reassurance when the public support trade; the international visibility and monitoring mechanisms in trade agreements create more credible commitment by leaders. We therefore expect that on average leaders in more democratic political environments will be more likely to negotiate PTAs in bad times than otherwise.

Autocrats are often less susceptible to the political consequences of economic downturns (Bueno de Mesquita et al., 2003). Hence, they have less reason to pursue trade agreements in general and during bad times. Indeed, during dips in the business cycle, they may avoid making agreements because the distributional effects of doing so may harm their supporters. Autocrats often depend on the support of the major sectors of the economy and may, in turn, protect these sectors to generate political support. Reducing trade barriers during downturns may undermine this support and thus jeopardize their hold on power. Consistent with this observation, we find that the business cycle has relative little bearing on whether non-democracies enter trade agreements.

Our research suggests some good news. PTAs do less to promote welfare than unilateral or multilateral trade liberalization; but with the WTO struggling to advance multilateral liberalization and the difficulties that many countries face unilaterally liberalizing foreign commerce, PTAs may be the best and only politically viable way to keep the global trading system open. In the recent past when public support for trade has been strong, such trade agreements seem to be associated with longer duration in office for leaders, especially those who sign them in bad times. Political incentives may thus animate PTAs. Moreover, democratic leaders may have some political reasons to resist protectionism in the face of downturns. The past 20 years have been marked by extreme economic turbulence and yet the global trading system has not collapsed. Many political leaders confronting dips in the business cycle have not turned to protectionism, but have rather sought out strategies like PTAs that enable a more calibrated response to hard times. With resistance to trade developing in some advanced industrial countries, although majorities remain favorable to trade in surveys, this strategy may face less acceptance in the future.

#### Economic decline causes cooperation, not protectionism.

Christina L. Davis & Krzysztof J. Pelc 17. \*Professor of Politics and International Affairs at Princeton. \*\*Associate Professor of Political Science at McGill University. “Cooperation in Hard Times: Self-restraint of Trade Protection.” *Journal of Conflict Resolution* 61(2): 398-429.

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.

#### Collapse doesn’t cause war.

Clary ’15 [Christopher; 4/25/15; Ph.D. in political science from the Massachusetts Institute of Technology, M.A. in National Security Affairs, Postdoctoral fellow, Watson Institute for International Studies, Brown University; MIT Political Science Department Research Paper, “Economic Stress and International Cooperation: Evidence from International Rivalries,” https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2597712]

Do economic downturns generate pressure for diversionary conflict? Or might downturns encourage austerity and economizing behavior in foreign policy? This paper provides new evidence that economic stress is associated with conciliatory policies between strategic rivals. For states that view each other as military threats, the biggest step possible toward bilateral cooperation is to terminate the rivalry by taking political steps to manage the competition. Drawing on data from 109 distinct rival dyads since 1950, 67 of which terminated, the evidence suggests rivalries were approximately twice as likely to terminate during economic downturns than they were during periods of economic normalcy. This is true controlling for all of the main alternative explanations for peaceful relations between foes (democratic status, nuclear weapons possession, capability imbalance, common enemies, and international systemic changes), as well as many other possible confounding variables. This research questions existing theories claiming that economic downturns are associated with diversionary war, and instead argues that in certain circumstances peace mayresult from economic troubles. I define a rivalry as the perception by national elites of two states that the other state possesses conflicting interests and presents a military threat of sufficient severity that future military conflict is likely. Rivalry termination is the transition from a state of rivalry to one where conflicts of interest are not viewed as being so severe as to provoke interstate conflict and/or where a mutual recognition of the imbalance in military capabilities makes conflict-causing bargaining failures unlikely. In other words, rivalries terminate when the elites assess that the risks of military conflict between rivals has been reduced dramatically. This definition draws on a growingquantitative literature most closely associated with the research programs of William Thompson, J. Joseph Hewitt, and James P. Klein, Gary Goertz, and Paul F. Diehl.1 My definition conforms to that of William Thompson. In work with Karen Rasler, they define rivalries as situations in which “[b]oth actors view each other as a significant politicalmilitary threat and, therefore, an enemy.”2 In other work, Thompson writing with Michael Colaresi, explains further: The presumption is that decisionmakers explicitly identify who they think are their foreign enemies. They orient their military preparations and foreign policies toward meeting their threats. They assure their constituents that they will not let their adversaries take advantage. Usually, these activities are done in public. Hence, we should be able to follow the explicit cues in decisionmaker utterances and writings, as well as in the descriptive political histories written about the foreign policies of specific countries.3 Drawing from available records and histories, Thompson and David Dreyer have generated a universe of strategic rivalries from 1494 to 2010 that serves as the basis for this project’s empirical analysis.4 This project measures rivalry termination as occurring on the last year that Thompson and Dreyer record the existence of a rivalry. Economic crises lead to conciliatory behavior through five primary channels. (1) Economic crises lead to austerity pressures, which in turn incent leaders to search for ways to cut defense expenditures. (2) Economic crises also encourage strategic reassessment, so that leaders can argue to their peers and their publics that defense spending can be arrested without endangering the state. This can lead to threat deflation, where elites attempt to downplay the seriousnessof the threat posed by a former rival. (3) If a state faces multiple threats, economic crises provoke elites to consider threat prioritization, a process that is postponed during periods of economic normalcy. (4) Economic crises increase the political and economic benefit from international economic cooperation. Leaders seek foreign aid, enhanced trade, and increased investment from abroad during periods of economic trouble. This search is made easier if tensions are reduced with historic rivals. (5) Finally, during crises, elites are more prone to select leaders who are perceived as capable of resolving economic difficulties, permitting the emergence of leaders who hold heterodox foreign policy views. Collectively, these mechanisms make it much more likely that a leader will prefer conciliatory policies compared to during periods of economic normalcy. This section reviews this causal logic in greater detail, while also providing historical examples that these mechanisms recur in practice. Economic Crisis Leads toAusterity Economic crises generate pressure for austerity. Government revenues are a function of national economic production, so that when production diminishes through recession, revenues available for expenditure also diminish. Planning almost invariably assumes growth rather than contraction, so the deviation in available revenues compared to the planned expenditure can be sizable. When growth slowdowns are prolonged, the cumulative departure from planning targets can grow even further, even if no single quarter meets the technical definition of recession. Pressures for austerity are felt most acutely in governments that face difficulty borrowing to finance deficit expenditures. This is especially the case when this borrowing relies on international sources of credit. Even for states that can borrow, however, intellectual attachment to balanced budgets as a means to restore confidence—a belief in what is sometimes called “expansionary austerity”—generates incentives to curtail expenditure. These incentives to cut occur precisely when populations are experiencing economic hardship, making reductions especially painful that target poverty alleviation, welfare programs, or economic subsidies. As a result, mass and elite constituents strongly resist such cuts. Welfare programs and other forms of public spending may be especially susceptible to a policy “ratchet effect,” where people are very reluctant to forego benefits once they have become accustomed to their availability.6 As Paul Pierson has argued, “The politics [of welfare state] retrenchment is typically treacherous, because it imposes tangible losses on concentrated groups of voters in return for diffuse and uncertain gains.”7

## Sua Sponte

### 2NC – O/V

#### Turns advantage 1 –Weakening the court prevents sustainable development

Stein 5—Former Judge of the New South Wales Court of Appeal and the New South Wales Land and Environment Court [Justice Paul Stein (International Union for Conservation of Nature (IUCN) Specialist Group on the Judiciary), “Why judges are essential to the rule of law and environmental protection,” Judges and the Rule of Law: Creating the Links: Environment, Human Rights and Poverty, IUCN Environmental Policy and Law Paper No. 60, Edited by Thomas Greiber, 2006]

The Johannesburg Principles state:

“We emphasize that the fragile state of the global environment requires the judiciary, as the guardian of the Rule of Law, to boldly and fearlessly implement and enforce applicable international and national laws, which in the field of environment and sustainable development will assist in alleviating poverty and sustaining an enduring civilization, and ensuring that the present generation will enjoy and improve the quality of life of all peoples, while also ensuring that the inherent rights and interests of succeeding generations are not compromised.”

There can be no argument that environmental law, and sustainable development law in particular, are vibrant and dynamic areas, both internationally and domestically. Judge Weeramantry (of the ICJ) has reminded us that we judges, as custodians of the law, have a major obligation to contribute to its development. Much of sustainable development law is presently making the journey from soft law into hard law. This is happening internationally but also it is occurring in many national legislatures and courts.

Fundamental environmental laws relating to water, air, our soils and energy are critical to narrowing the widening gap between the rich and poor of the world. Development may be seen as the bridge to narrow that gap but it is one that is riddled with dangers and contradictions. We cannot bridge the gap with materials stolen from future generations. Truly sustainable development can only take place in harmony with the environment. Importantly we must not allow sustainable development to be duchessed and bastardized.

A role for judges?

It is in striking the balance between development and the environment that the courts have a role. Of course, this role imposes on judges a significant trust. The balancing of the rights and needs of citizens, present and future, with development, is a delicate one. It is a balance often between powerful interests (private and public) and the voiceless poor. In a way judges are the meat in the sandwich but, difficult as it is, we must not shirk our duty. Pg. 53-54

#### Turns solvency because the ruling is perceived as illegitimate.

Luke Ryan, Summer 2017 [J.D., 2017, Fordham University School of Law “How The Party Presentation Rule Limits Judicial Discretion” St. Thomas journal of Complex Litigation <https://www.stu.edu/Portals/law/docs/academics/student-orgs/jcl/volumes/Volume%204/RyanLuke-EssayThePartyPresentationRule.pdf> //DMcD]

The party presentation rule—also known as the “norm against judicial issue creation” or “norm against sua sponte decision-making”—flows out of a judge’s neutral role in the adversarial system as one “who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties.” 15 While outside factual research is highly controversial and strongly discouraged because it raises evidentiary and due process concerns and infects the trial record that is vital on an appeal,16 outside legal research is not per se discouraged because of the judge’s unique responsibility to know the law and apply it to the facts correctly.17 Outside legal research and sua sponte decision-making becomes controversial, however, when judges disregard party autonomy and raise new legal arguments that were intentionally or accidentally omitted by the litigants.18 Such unilateral actions have the effect of helping one party at the expense of another and feed into the damaging narrative that “courts are more likely to raise an issue sua sponte if they think a case is really important or if the judges really want to reach a particular result.” 19 While most judges and legal scholars agree that sua sponte decision-making is not justified when used to help one side in an adversarial proceeding or to promote a judge’s personal agenda, many judges (and some legal scholars) believe the party presentation rule does not prohibit judicial creation of new legal arguments that support a litigant’s existing claims.20 Federal judges (and the federal courts21) have two important roles. First, in their “dispute resolution” capacity, judges are required to resolve concrete conflicts, between individual parties, involving particularized facts.22 Second, in their “law pronouncement” or “public values” role, judges are required “to make accurate statements about the meaning of the law that govern beyond the parameters of the parties and their dispute.” 23 Courts are usually able to perform each function without conflict, but tensions arise when an individual dispute that is poorly or insufficiently litigated has the potential to have an impact on precedent. In such circumstances, legal scholars, judges, and litigants will sometimes disagree about which role is supreme.24 The dispute resolution capacity provides the strongest justifications for an absolute party presentation rule. When viewing a judge’s responsibilities from this vantage, the rule preserves the essential and unique roles adversarial litigants and neutral judges play in the American legal system.25 “[J]udges are more likely to reach the ‘right’ legal answer when two parties, each with a stake in the matter, compete to present the most persuasive case to the court.” 26 Absolute preservation of the adversarial roles also creates buy-in by the parties and results in greater acceptance of a final judgment because the parties believe that they received a fair opportunity before the court.27 A second justification rests on principles of due process by ensuring that the parties have notice and an opportunity to respond to all issues and arguments considered by the judge.28 Here again, an absolute rule helps avoid the one-sided inconsistency that occurs when courts refuse to consider a party’s arguments that were not raised at the first opportunity, but remain free to entertain their own post-briefing ideas.29 Finally, the rule has beneficial practical effects to dispute resolution by conserving scarce judicial resources, preventing judicial activism and agenda setting, and ensuring efficient resolution of cases by identifying all relevant matters early in the litigation.30

#### Judicial weakness destroys soft power.

Sidhu ’11 (Dawinder S; J.D. from George Washington University, M.A. from Johns Hopkins University, B.A. from the University of Pennsylvania, attorney at Shook, Hardy & Bacon, Professor of Law at the University of New Mexico, Visiting Professor at the University of Baltimore, former fellow at the Supreme Court of the United States, former law clerk to U.S. District Judge David G. Campbell, former Special Assistant to the Chair of the U.S. Sentencing Commission; 2011; “Judicial Review as Soft Power: How the Courts Can Help Us Win the Post-9/11 Conflict”; <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1003&context=nslb>; American University National Security Law Brief, Vol. 1, Issue 1, Article 4; accessed 4/4/18; TV)

There can be little doubt that military victory overseas, at present, stands beyond the grasp of American’s long and powerful arm.22 Perhaps even more sobering is the fact that even if the United States was faring better on the military front, such success would be insufficient to prevail in the war. As the 9/11 Commission noted, al Qaeda “represents an ideological movement, not a finite group of people,” akin to a “decentralized force.”23 The American strategy, however, appears to be one based on warfare. Judge Richard A. Posner observed that “we have no strategy for defeating them, only fighting them.”24 President Obama’s foreign policy objectives in the war have been considered to be “exclusively military” and, on that score, the war “is not going well.”25 Put differently, the American efforts appear to be limited in scope and disappointing in that narrow subset of possible action against transnational terrorism. These facts are beyond dispute—in committing the terrorist atrocities on 9/11, al Qaeda provoked the United States into a war in Afghanistan that was expanded to Iraq. These conflicts are being waged primarily on the military arena, and the achievement of American goals in both arenas has been frustrated despite years of effort, billions of dollars, and the lives of many American soldiers. What can we do differently? What other instruments are available to the United States such that defeating—not just capably fighting—the terrorists may be a closer prospect? Specifically, how can American law be an advantage to our national security? This Article seeks to answer these questions. In this Article, I will argue that the American response to Islamic terrorist factions must move outside the military sphere in which battles are fought between arms and men to a more conceptual contest for hearts and minds, where the ammunition in this abstract war will be fundamental American principles, particularly a constitutional commitment to the rule of law, and where advancements in the war will be based on incrementally increased attraction to America. This approach will speak to one’s will and conscience in an effort to secure a more lasting respite from the ongoing struggles that have no foreseeable end in sight, have been attended by suffering and sorrow, and have claimed a growing number of victims on all sides.26 Part I will distinguish between “hard power,” which generally constitutes the ability to attain favorable foreign policy outcomes by way of military force or economic coercion, and “soft power,” defined as the ability to achieve those outcomes by way of attraction.27 Though soft power generally is thought to include a nation’s values, social norms, and culture, academic studies have not fully demonstrated that a nation’s legal dimensions—specifically its legal institutions and adherence to the rule of law—are also a form of soft power.28 This part will attempt to make this showing, citing to aspects of the American constitutional design that may be attractive to people of other communities, including Muslims.29 The legal principles established by the Framers and enshrined in the Constitution are a source of attraction only if we have meaningfully adhered to them in practice. Part II will posit that the Supreme Court’s robust evaluation of cases in the wartime context suggests that the nation has been faithful to the rule of law even in times of national stress. As support, this part will provide examples of cases involving challenges to the American response to wars both before and after 9/11, the discussion of which will exhibit American respect for the rule of law. While the substantive results of some of these cases may be particularly pleasing to Muslims, for instance the extension of habeas protections to detainees in Guantánamo,30 this part will make clear that it is the legal process—not substantive victories for one side or against the government—which is the true source of American legal soft power. If it is the case that the law may be an element of soft power conceptually and that the use of the legal process has reflected this principle in practice, the conclusion argues that it would benefit American national security for others in the world to be made aware of the American constitutional framework and the judiciary’s activities related to the war. Such information would make it more likely that other nations and peoples, especially moderate Muslims, will be attracted to American interests. This Article thus reaches a conclusion that may seem counterintuitive—that the judicial branch, in the performance of its constitutional duty of judicial review, furthers American national security and foreign policy objectives even when it may happen to strike down executive or legislative arguments for expanded war powers to prosecute the current war on terror and even though the executive and legislature constitute the foreign policy branches of the federal government. In other words, a “loss” for the executive or legislature, may be considered, in truth, a reaffirmation of our constitutional system and therefore a victory for the entire nation in the neglected but necessary post-9/11 war of ideas.31 As such, it is the central contention of this Article that the judicial branch is a repository of American soft power and thus a useful tool in the post-9/11 conflict.

#### Causes extinction – China, terrorism, warming, pandemics, and cyber.

Nye ’17 (Joseph S; University Distinguished Service Professor and former Dean of the Kennedy School of Government at Harvard University, Ph.D. in Political Science from Harvard, B.A. from Princeton, Rhodes Scholarship from Oxford, ranked as the most influential scholar on American foreign policy by a survey of 2700 IR scholars, named one of the top 100 Global Thinkers by Foreign Policy, fellow of the American Academy of Arts and Sciences, the British Academy, and the American Academy of Diplomacy, recipient of Princeton University’s Woodrow Wilson Award and the Charles Merriam Award from the American Political Science Association, former deputy Undersecretary of State, chair of the National Intelligence Council, Assistant Secretary of Defense for International Security Affairs; Jan/Feb 2017; “Will the Liberal Order Survive?”; <https://www.foreignaffairs.com/articles/2016-12-12/will-liberal-order-survive>; Foreign Affairs; DOA: 2/8/17)

POWER CHALLENGED AND DIFFUSED Public goods are benefits that apply to everyone and are denied to no one. At the national level, governments provide many of these to their citizens: safety for people and property, economic infrastructure, a clean environment. In the absence of international government, global public goods--a clean climate or financial stability or freedom of the seas--have sometimes been provided by coalitions led by the largest power, which benefits the most from these goods and can afford to pay for them. When the strongest powers fail to appreciate this dynamic, global public goods are under-produced and everybody suffers. Some observers see the main threat to the current liberal order coming from the rapid rise of a China that does not always appear to appreciate that great power carries with it great responsibilities. They worry that China is about to pass the United States in power and that when it does, it will not uphold the current order because it views it as an external imposition reflecting others' interests more than its own. This concern is misguided, however, for two reasons: because China is unlikely to surpass the United States in power anytime soon and because it understands and appreciates the order more than is commonly realized. Contrary to the current conventional wisdom, China is not about to replace the United States as the world's dominant country. Power involves the ability to get what you want from others, and it can involve payment, coercion, or attraction. China's economy has grown dramatically in recent decades, but it is still only 61 percent of the size of the U.S. economy, and its rate of growth is slowing. And even if China does surpass the United States in total economic size some decades from now, economic might is just part of the geopolitical equation. According to the International Institute for Strategic Studies, the United States spends four times as much on its military as does China, and although Chinese capabilities have been increasing in recent years, serious observers think that China will not be able to exclude the United States from the western Pacific, much less exercise global military hegemony. And **as for soft power**, the ability to attract others, a recent index published by Portland, a London consultancy, ranks the United States first and China 28th. And as China tries to catch up, the United States will not be standing still. It has favorable demographics, increasingly cheap energy, and the world's leading universities and technology companies. Moreover, China benefits from and appreciates the existing international order more than it sometimes acknowledges. It is one of only five countries with a veto in the UN Security Council and has gained from liberal economic institutions, such as the World Trade Organization (where it accepts dispute-settlement judgments that go against it) and the International Monetary Fund (where its voting rights have increased and it fills an important deputy director position). China is now the second-largest funder of UN peacekeeping forces and has participated in UN programs related to Ebola and climate change. In 2015, Beijing joined with Washington in developing new norms for dealing with climate change and conflicts in cyberspace. On balance, China has tried not to overthrow the current order but rather to increase its influence within it. The order will inevitably look somewhat different as the twenty-first century progresses. China, India, and other economies will continue to grow, and the U.S. share of the world economy will drop. But no other country, including China, is poised to displace the United States from its dominant position. Even so, the order may still be threatened by a general diffusion of power away from governments toward nonstate actors. The information revolution is putting a number of transnational issues, such as financial stability, climate change, terrorism, pandemics, and cybersecurity, on the global agenda at the same time as it is weakening the ability of all governments to respond. Complexity is growing, and world politics will soon not be the sole province of governments. Individuals and private organizations--from corporations and nongovernmental organizations to terrorists and social movements--are being empowered, and informal networks will undercut the monopoly on power of traditional bureaucracies. Governments will continue to possess power and resources, but the stage on which they play will become ever more crowded, and they will have less ability to direct the action. Even if the United States remains the largest power, accordingly, it will not be able to achieve many of its international goals acting alone. For example, international financial stability is vital to the prosperity of Americans, but the United States needs the cooperation of others to ensure it. Global climate change and rising sea levels will affect the quality of life, but Americans cannot manage these problems by themselves. And in a world where borders are becoming more porous, letting in everything from drugs to infectious diseases to terrorism, nations must use soft power to develop networks and build institutions to address shared threats and challenges. Washington can provide some important global public goods largely by itself. The U.S. Navy is crucial when it comes to policing the law of the seas and defending freedom of navigation, and the U.S. Federal Reserve undergirds international financial stability by serving as a lender of last resort. On the new transnational issues, however, success will require the cooperation of others--and thus empowering others can help the United States accomplish its own goals. In this sense, power becomes a positive-sum game: one needs to think of not just the United States' power over others but also the power to solve problems that the United States can acquire by working with others. In such a world, the ability to connect with others becomes a major source of power, and here, too, the United States leads the pack. The United States comes first in the Lowy Institute's ranking of nations by number of embassies, consulates, and missions. It has some 60 treaty allies, and The Economist estimates that nearly 100 of the 150 largest countries lean toward it, while only 21 lean against it. Increasingly, however, the openness that enables the United States to build networks, maintain institutions, and sustain alliances is itself under siege. This is why the most important challenge to the provision of world order in the twenty-first century comes not from without but from within. POPULISM VS. GLOBALIZATION Even if the United States continues to possess more military, economic, and **soft-power resources** than any other country, it may choose not to use those resources to provide public goods for the international system at large. It did so during the interwar years, after all, and in the wake of the conflicts in Afghanistan and Iraq, a 2013 poll found that 52 percent of Americans believed that "the U.S. should mind its own business internationally and let other countries get along the best they can on their own."

### 2NC – AT: Case T/DA – 2AC 2

#### Consistent, legitimate court rulings and due process are the bedrocks of legitimacy.

Redish and Heins ’16 [Martin and Matthew; 2016; Professor of Law and Public Policy at the University of Northwestern; J.D. from the University of Northwestern, B.A. from the University of Southern California; William & Mary Law Review, “Premodern Constitutionalism,” vol. 57; RP]

The argument Kramer and others advance is not only normatively unpersuasive, it is also logically untenable in light of the structural Constitution and the basic premises of American constitutionalism. As we explained in Part I, the traditionalist view understands the value of counter-majoritarian checking as a political mechanism for enshrining skeptical optimism, which can be readily deduced from the Constitution’s structural design. Our constitutionalism is thus principally concerned with facilitating democracy while promoting rule of law values and protecting minorities.296 The reality is that any argument that temporary majorities or the governmental bodies that are directly accountable to those majorities are either more capable or more suitable arbiters of constitutional meaning ignores the careful framework for promoting these values that was etched into our supreme law at the constitutional convention. Our proclaimed unflagging commitment to due process of law, the existence of a supreme document ratified by super-majoritarian movement and subject to formal alteration only through a super-majoritarian process, and our provision of a politically insulated judiciary are all brightly flashing signals that our system understands the importance of speed bumps to slow majorities down. Popular constitutionalism seems to forget – or intentionally ignore – all of this. 297 Mark Tushnet’s case against judicial supremacy directly takes on Larry Alexander’s and Frederick Schauer’s defense of judicial review.298 Alexander and Schauer assert that without judicial supremacy we would have a system of interpretive anarchy on our hands.299 The role of the Supreme Court, say Alexander and Schauer, is to provide a single authoritative interpreter to which others must defer, to serve the settlement function of the law. 300 Tushnet responds that when it declares that Congress has overstepped its bounds, the Court justifies its behavior using the self-interestedness of the Congress: Congress is self-interested when it defines the scope of its own power. Members of Congress have an interest in maximizing their own power by expanding their sphere of power and responsibilities. Any decision [Congress] make[s], no matter how fully deliberated, will be shaped, and perhaps distorted, by this self-interest. 301 But this is an objection equally available to those who would question the Court’s version of judicial supremacy, because the judiciary is just as apt to act self-interestedly and expand its own power.302 This position runs directly contrary to the basic principles underlying the structural Constitution. Tushnet’s argument essentially ignores the fact that the judiciary was built to be (1) limited in active power, and (2) counter-majoritarian, staffed by insulated judges with salary and tenure protections. With the exception of issues surrounding its own powers, the judiciary is uniquely positioned to serve as the neutral adjudicator that can settle disputes as to the boundaries between executive and legislative, as well as federal and state branches. More importantly, if the judiciary were not tasked with settling the boundaries of majoritarian power, there would be no counter-majoritarian check at all, and the Constitution would essentially be meaningless. And even as to its own power, the Court’s authority – unlike that of Congress or the President – is confined to a passive role, awaiting cases to adjudicate.303 It therefore makes sense to give the Court final say as to its own constitutional power in order to protect its counter-majoritarian role.304 Under a regime of judicial supremacy, the judiciary is no more capable of aggrandizement than is Congress. Professor Tushnet looks to City of Boerne v. Flores to show how the Court gives deference to Congress and assumes laws are constitutional because Congress has a duty to support the Constitution, but the Court does not give deference to congressional redefinitions of its own power because Congress is self-interested.305 But, he argues, the Court is no less self-interested because every institution with both power and the ability to aggrandize it will seek to expand or enhance that power.306 Both of Professor Tushnet’s proof points are flawed. The Court is no more empowered to engage in self-aggrandizement than is Congress, considering that Congress is arguably capable of simply stripping the federal courts of jurisdiction (within constitutional limits) whenever it chooses.307 Why would it be, under Tushnet’s theory, that the Framers would devise a constitutional system in which the Congress could be trusted to determine the scope of its own power, disregarding judicial pronouncements of the limits of that power, and then could strip the courts of jurisdiction to hear any challenges to such self-aggrandizement? Tushnet has effectively written Article III out of the Constitution. And although he focuses his attention on the fact that the Court is no more a single authoritative interpreter than is Congress or maybe even less singular, because each individual voice is so much more meaningful on the Court 308Tushnet forgets that Congress represents hundreds of millions of people and is, at some level, subject to their momentary preferences. What makes the Court uniquely capable of serving as the final voice of constitutional interpretation – the single authoritative interpreter that Alexander and Schauer describe and that the Framers envisioned – is that it is insulated from such political pressure.309 Arguing that judicial supremacy distorts legislation, Professor Tushnet suggests that without it, Congress would act more responsibly in interpreting and abiding by the Constitution.310 For example, in the context of flag burning, he contends that judicial supremacy problematically prevented Congress from doing what its members and the people wanted – namely, passing an effective law against the burning of the American flag.311 But that is exactly the point. Presumably by the exact same reasoning, it could have been argued that during the McCarthy era, the judiciary should not have been allowed to prevent the majority from doing what it wanted to do namely, suppress left-wing dissenters. The entire purpose of our structural Constitution is to embed Founding-era American skeptical optimism and force the majority, if it wishes to circumvent those fundamental truths, to garner enough super-majoritarian support to change them. If the American people are so concerned with flag burning, it is a good thing to require them to amend the Constitution formally, by means of the prescribed super-majoritarian process 312 to render constitutional those state or federal laws that ban it. If burning the flag is a method of expression, and laws forbidding it are contrary to the First Amendment because of their communicative impact, the people may amend the Constitution to declare that flag-burning laws are an exception to the Amendment’s general coverage.313 Tushnet believes that lawmakers may apply their own conception of the Constitution if they are conscientious and if their interpretation is reasonable, 314 but this begs the question: Who is to decide whether a lawmaker has conscientiously considered and reasonably interpreted the Constitution? The lawmaker himself? Our constitutional democracy cannot survive such constant, momentary, self-interested reinterpretation. Tushnet says it is wrong to assume that members of Congress are inherently incapable of interpreting the Constitution.315 But the traditionalist view of American constitutionalism in no way stands for the position that Congress is incapable of properly exercising interpretive authority. To the contrary, we both hope and assume that Congress is doing just that in deciding whether to enact legislation. The Constitution does not in any way prohibit the majoritarian branches from ever exercising interpretive authority; in fact, as Professor Paulsen discusses with great alacrity, each and every politically accountable member of the federal government takes an oath to support the Constitution.316 Congress might be undereducated about the Constitution, and it might be that Congress would improve without the judiciary as a backstop, especially if given the same kind of institutional support that the executive receives in its endeavors of constitutional interpretation, such as the Solicitor General’s Office and the Department of Justice’s Office of Legal Counsel. 317 But this misses the point entirely. The problem is not that Congress is bad at constitutional interpretation – it is that because of its inherently majoritarian nature, Congress is structurally incapable of effectively policing majoritarian threats to the values and dictates embodied in the counter-majoritarian Constitution. This is especially true when Congress itself creates those threats. Thus, our structural Constitution does not envision Congress as the final interpreter, and for good reason. The people’s elected representatives exist to advance the current and future interests of their constituents; the courts exist to ensure that those current and future legislative and policy choices adhere to foundational principles embodied in the nation’s counter-majoritarian supreme law.

#### A sua sponte decision would permanently erode judicial legitimacy.

Hills ’20 [Blake R; Prosecuting Attorney in Utah, former appellate clerk for the Tennessee Court of Criminal Appeals; 2020; “Sua Sponte Dismissals: Is Efficiency More Important than Procedural Fairness?”; <https://heinonline.org/HOL/Page?handle=hein.journals/umkc89&div=14&g_sent=1&casa_token=>; UMKC Law Review; accessed 9/15/21; TV]

In addition to violating due process, sua sponte dismissals reduce respect for judicial decisions. This is because "[a]ppearances matter tremendously in court. The legal system shouldn't just be fair, it should also appear to be fair."77 As stated by Lord Chief Justice Heward in the Sussex Justice case, "justice should not only be done, but should manifestly and undoubtedly be seen to be done."1 78

The principle that the legal system must be fair and must be seen to be fair is known as "procedural justice."1 79 This principle is important because research has shown that "the manner in which disputes are handled by the courts has an important influence upon people's evaluations of their experience in the court system."180 Indeed, "[t]hey accept 'losing' more willingly if the court procedures used to handle their case are fair."' 8 ' A fair proceeding is one in which all litigants have the opportunity to present their argument and have it considered by the court. 8 2 Under this principle, sua sponte dismissals do not have the appearance of fairness because the litigants do not have the opportunity to respond to dispositive issues and have their arguments considered by the court.

The adversary system is built on the premise that allowing litigants to address the court on dispositive issues both increases the accuracy of the decision and "increases the parties' sense that the court's process and result are fair.". 3 As stated by the Supreme Court, "[f]airness can rarely be obtained by secret, onesided determination of facts decisive of rights.... No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." 84

Sua sponte dismissals reduce "societal acceptance of courts' decisions because the losing party will feel that he has not been given a fair opportunity to present his case when he had neither notice of, nor the chance to present, arguments on the issue that the court found determinative. " As one commentator has noted: "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." 186 This is a real problem:

Indeed, one study revealed that even lawyers who won a case based on an issue decided sua sponte did not like the practice: "[T]hey said the cases should have been decided on issues they had argued. Perhaps they felt it did not reflect well on their advocacy." A lawyer who lost a case on a sua sponte decision was more blunt: "The case became somewhat personal to me. I felt, one, [the client] got screwed. Two, I got screwed. He got screwed, that's pretty bad. Me getting screwed, that's an imposition up with which I shall not put."187

The bottom line is that courts should recognize that there are negative consequences that result from sua sponte dismissals. Whatever the situation may have been in the past, courts currently operate "in an environment in which people have generally lower levels of trust and confidence in all forms of governmental authority."188 Modern courts should "care about the public appearance of their actions because abstract truth is not the criterion of legitimacy for legal obligations; legal obligations must be justified as authentic."1 89 There is an easy way to do this:

[Courts] can provide evidence that they are listening to people and considering their arguments by giving people a reasonable chance to state their case, by paying attention when people are making that presentation, and by acknowledging and taking account of people's needs and concerns when explaining their decisions. This is true even if the [courts] cannot accept those arguments and give people what they feel they deserve.190

In sum, courts must recognize that they cannot dismiss cases sua sponte without causing the public to lose respect for those decisions.

#### 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).

#### Deciding sua sponte violates the case or controversy requirements of the Constitution – it’s an issue of how the decision is perceived – the aff politicizes the Court and utterly destroys its legitimacy.

**Krimbel, 89** – JD at Chicago-Kent College of Law (Rosemary, 65 Chi.-Kent L. Rev. 919, “REHEARING SUA SPONTE IN THE U.S. SUPREME COURT: A PROCEDURE FOR JUDICIAL POLICYMAKING,” lexis)

By rehearing sua sponte, the Court can accelerate the "sooner or later" timing of an issue's arrival and, thereby, evade the Constitution's jurisdictional constraints. Thus, the Court can address either issues that have not been decided by a politically accountable body or, worse, issues that have been decided by political representatives. The latter set of issues gives the Court the opportunity to invalidate legislative enactments without anyone requesting that they do so. Both actions raise the countermajoritarian difficulty and possibly violate the Constitution's case or controversy limitation.

The greater problem with unrestricted sua sponte rehearing is the possibility that the procedure will be used by an activist Court or Justice to further a personal agenda. n165 Justice Kennedy's statement in Patterson  [\*943]  that "some Members of this Court believe that Runyon was decided incorrectly" n166 could support the argument that the Rehnquist Court has such an agenda regarding civil rights. Such argument, however, is mere speculation. The real problem with unregulated sua sponte rehearing is that the Court is perceived as having a personal agenda whether it does in fact have one or not.

When the parties choose the issues, there is little opportunity for judges to pursue their own agendas and, as a consequence, the proceedings are not only fairer, but are perceived as fairer. n167 As Justice Blackmun said in his dissent to the Patterson memorandum decision that requested rehearing sua sponte:

I am at a loss to understand the motivation of five Members of this Court to reconsider an interpretation of a civil rights statute that so clearly reflects our society's earnest commitment to ending racial discrimination, and in which Congress so evidently has acquiesced. I can find no justification for the bare majority's apparent eagerness to consider rewriting well-established law. n168  
Such commentary, especially from a member of the Court, raises questions as to the impartiality of the Court's actions, and such speculation tarnishes the Court's legitimacy. Litigant control of the issues is important to satisfy not only the parties, but society as well. As stated by the Supreme Court: "[J]ustice must satisfy the appearance of justice." n169 When the Court solicits issues that the litigants have not presented, the Court erodes its credibility and trespasses on the soul of the adversarial system.

Because the Court decides constitutional issues, which affect us all, society's confidence in the Court's ability to render impartial and reasoned decisions is as important as the decisions themselves. As a result of the tremendous power with which Congress has imbued the Court, it it vital that decisions of the Court be perceived as legitimate. Damage to the legal system may be caused by "frequent or sudden reversals of direction that may appear to have been occasioned by nothing more significant than a change in the identity of this Court's personnel." n17

### 2NC – AT: Other Cases 2AC 6

#### The Texas decision put legitimacy on the brink. Future overruling of precedent will confirm it’s dead.

Hull ‘9/1 [Gordon; Associate Professor of Philosophy and Public Policy at UNC Charlotte; 9/1/21; “When does the Supreme Court lose its legitimacy?”; <https://www.newappsblog.com/2021/09/when-does-the-supreme-court-lose-its-legitimacy.html>; New Apps; accessed 9/15/21; TV]

And what does that mean? Now is a good time to ask. The Court has let stand a 5th Circuit decision upholding a Texas law that is plainly unconstitutional under current SCOTUS jurisprudence (it bans abortion at 6 weeks) and involves an enforcement mechanism that comes straight from Stalin’s playbook (it allows individuals to sue people they suspect of assisting a woman of obtaining an abortion). This piece on Vox runs through how deeply perverse the Texas law in question in, how thoroughly Trump has corrupted the 5th Circuit, and how alarming SCOTUS inaction is.

In Planned Parenthood v. Casey – which, along with Roe is apparently being overruled in Texas without a hearing and without a reasoned opinion – the Court favorably cites earlier opinion to the effect that the Court is supposed to give reasons when it overturns its precedent:

"A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve"

Justice O’Connor adds:

“The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court. As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands. The underlying substance of this legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court's opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all. But even when justification is furnished by apposite legal principle, something more is required. Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute. The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation” (emphasis added)

O’Connor adds that if “the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in Roe” that “only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance.”

The Court’s so-called “shadow docket” – consequential decisions rendered in orders for cases not heard, as for example prioritizing religious claims over public health – has been on the rise over the last couple of years, and commentators have worried about the damage this does to the rule of law as an institution. In the case of abortion, the Court has a case on the docket that would give it the opportunity to overturn Roe; it could have waited until then (and avoided the need to validate Texas’ enforcement mechanism). You could argue that the Court didn’t “decide” anything last night, but it was faced with a clearly erroneous 5th Circuit decision that it let stand. I don’t see how last night’s failure to enjoin the Texas law doesn’t utterly gut its legitimacy in the sense articulated in Casey. Texas just banned abortion, and SCOTUS offered no justification at all in letting the law stand.

Again, Casey: “to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.” Court legitimacy is important:

“It is true that diminished legitimacy may be restored, but only slowly. Unlike the political branches, a Court thus weakened could not seek to regain its position with a new mandate from the voters, and even if the Court could somehow go to the polls, the loss of its principled character could not be retrieved by the casting of so many votes. Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible.”

#### There’s a distinction between raising an issue and deciding a case sua sponte – courts actively avoid issuing sua sponte rulings.

Hills ’20 [Blake R; Prosecuting Attorney in Utah, former appellate clerk for the Tennessee Court of Criminal Appeals; 2020; “Sua Sponte Dismissals: Is Efficiency More Important than Procedural Fairness?”; <https://heinonline.org/HOL/Page?handle=hein.journals/umkc89&div=14&g_sent=1&casa_token=>; UMKC Law Review; accessed 9/15/21; TV]

There is a tremendous difference between a court raising an issue sua sponte and a court deciding an issue sua sponte. In the first instance, the court raises an issue it considers to be important and gives the parties an opportunity to respond before a ruling is made. In the second, the court raises an issue itself and rules on the issue without providing notice and an opportunity to respond. The first procedure is sometimes appropriate, the second is not-especially when it comes to dismissals.

Jurisdiction is the primary issue for a court to raise sua sponte.156 Indeed, the Supreme Court has stated, "federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press." 5 7 Likewise, courts should also raise the issues of ripeness 58 and standing'5 9 sua sponte.

Although jurisdiction is arguably the most important issue for a court to raise sua sponte, there are several others. For example, courts can raise the issue of sovereign immunity sua sponte.160 It may also be appropriate to raise an issue sua sponte to protect a litigant who is proceeding pro se. 161 A court may raise an issue sua sponte in order to prevent a miscarriage of justice.16 2 It may also be appropriate for courts to raise issues sua sponte when necessary to fulfill the courts' duties to define the law and to avoid exceeding the scope of the judicial role, to preserve judicial independence, to enforce constitutional restrictions on other branches of the government, and to effectuate constitutional exercises of legislative power.163 Essentially, courts should feel free to raise issues sua sponte when necessary to protect the integrity of the judicial system or to promote the ends of justice. As stated by Justice Stevens:

Trial judges are kept busy responding to motions, objections, and requests by the litigants. It is quite wrong, however, to assume that a judge is nothing more than a referee whose authority is limited to granting or denying motions advanced by the parties. As Learned Hand tersely noted, a "judge, at least in a federal court, is more than a moderator; he is affirmatively charged with securing a fair trial, and he must intervene sua sponte to that end, when necessary." That duty encompasses not only the avoidance of error before it occurs, but the correction of error that may have occurred earlier in a proceeding. 164

Justice Stevens is correct. A court is not simply a moderator who waits silently like a potted plant. But neither are the parties, and they should have an opportunity to respond to any issue raised by the court, especially an issue that could result in dismissal. A court can certainly raise issues sua sponte, but for the reasons discussed below, it should not decide issues sua sponte.

#### 3. There’s a distinction between past cases and the aff – justices have injected proceedings with legal issues separate from those brought up by litigants. But, the judicial system requires that there be adversaries before that happens – ruling without any litigation is completely unprecedented.

Frost ‘9 (Amanda; Professor of Law at the American University Washington College of Law, former clerk for Judge A. Raymond Randolph on the U.S. Court of Appeals for the D.C. Circuit, affiliated researcher at Oxford University’s Border Criminologies, Academic Fellow at the Pound Civil Justice Institute, member of the National Constitution Center’s Coalition of Freedom Advisory Board, J.D. from Harvard Law School; December 2009; “The Limits of Advocacy”; <http://www.jstor.org/stable/20684812>; Duke Law Journal, Vol. 59, No. 3; accessed 4/3/18; TV)

B. Issue Creation and the Goals of the Adversarial System Judicial issue creation is consistent with the rationales cited in support of the adversarial system, discussed in detail in Part I.185 Issue creation can enhance truth seeking without sacrificing a judge's impartiality or undermining litigant autonomy. Indeed, permitting a judge to introduce legal issues might answer, at least in small part, the most persistent criticism of adversarial procedure—that it fails when the parties' skills and resources are not evenly matched. The pages that follow seek to justify issue creation on adversary theory's own terms by demonstrating that the adversarial nature of dispute resolution can be maintained, along with the benefits that are claimed to arise from it, even when judges play a role in developing legal arguments. 1. Enhancing Truth Seeking. The adversarial system has been touted as the best method of determining the truth of the matter in dispute, and thus of reaching the right result in each case.186 The basic characteristics of adversary procedure—such as notice, a hearing, and an opportunity to present evidence and test an opponent's evidence— are lauded as essential to reaching the correct outcome.187 As the Supreme Court declared: "[0]ur legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error."188 And yet to achieve this goal, there must be at least a rough equality in the resources and presentation skills of the advocates for either party—what Professor Frank Michelman, among others, refers to as "equipage equality"—that all too often does not exist. As one legal scholar observed, [o]ur adversary system is premised upon the idea that the most accurate and acceptable outcomes are produced by a real battle between equally-armed contestants; thus the adversary system requires, if it is to achieve these goals, some measure of equality in the litigants' capacities to produce their proofs and arguments.189 Without equipage equality, "the stronger case might not necessarily be the better case."190 When the resources and abilities of opposing parties are lopsided, the adversarial system will fail to produce accurate results. The wealthier, sophisticated, repeat-player litigants will usually win; the poorer, outgunned, one-shot litigants will lose, regardless of the merit of their cases.191 Indeed, critics cite this problem as one of the adversarial system's major flaws, and note that the other claimed benefits of adversarial presentation—the dignity and participation values, for example—are small compensation for the inevitable losses suffered by the weaker party.192 As one prominent critic of the adversarial system commented: "The simple truth is that very little in our adversary system is designed to match combatants of comparable prowess, even though adversarial prowess is a main factor affecting the outcome of litigation."193 By raising overlooked issues and legal authority, a judge can ameliorate the imbalances that undermine the adversarial system. For that very reason, judges have a tradition of assisting pro se litigants with case presentation. The same rationale that permits judges to depart from the party presentation rule in pro se cases should apply in cases in which one lawyer is clearly outgunned. This exception to the principle of party presentation should be viewed not as a deviation from adversary theory, but rather as a means of promoting adversarialism by ensuring that it works as best it can. The judge can make the adversary system more efficient at reaching just and accurate outcomes by helping to right the imbalance in opposing lawyers' skills and resources. Allowing judges to raise issues is not equivalent to transforming the judge into an advocate for one side or the other. An advocate finds facts and legal precedents that help only the one party he has been charged to represent, and then uses them to make arguments on that party's behalf. But judges need not go so far to correct an imbalance in the system. If a judge realizes that there is an important legal argument that has been overlooked, or valuable precedent that has gone uncited, the judge does not act as advocate if she points out the missing information and provides both parties with an opportunity to address the issues she has identified. If neither party chooses to do so, the court can obtain guidance from an amicus assigned to make the relevant arguments. In short, the line between judge and advocate can be firmly maintained even when a judge takes on a more active role in framing the case.

#### 4. The Court hasn’t ruled without litigation – prefer a consensus of empirical evidence.

Thomas ’10 (Jerry D; J.D. from the Chicago-Kent College of Law, Ph.D. in Political Science from the University of Kentucky, former Professor of Government at Eastern Kentucky University, Professor of Political Science at the University of Wisconsin Oshkosh; 2010; “Chapter 2: Law and Ideology in Judicial Decisionmaking”; Law and Ideology in the U.S. Courts of Appeals: Judicial Review of Federal Agency Decisions; pp. 19; accessed 4/3/18; TV)

Since the federal court system in the U.S. is an adversarial one, courts are limited to reviewing the real controversies that litigants bring before the courts. Courts are unable to review agency actions unless citizens or agencies themselves make an appeal to an appropriate reviewing court. While there are few real constraints on a federal court‘s ability to do so, there is little evidence that the Supreme Court strikes down agency actions sua sponte (of their own volition) without review being requested by litigants (Howard and Segal 2004).

#### 5. Comprehensive data proves – the Court doesn’t rule sua sponte.

Howard & Segal ‘4 (Robert M. & Jeffrey A; Professor of Political Science at Georgia State University, PhD in American Politics and Public Law from the State University of New York, Executive Director of the Southern Political Science Association; Professor of Political Science at Stony Brook University, Ph.D. from Michigan State; March 2004; “A Preference for Deference? The Supreme Court and Judicial Review”; <http://www.jstor.org/stable/3219840>; Political Research Quarterly, Vol. 57, No. 1; accessed 4/3/18; TV)

Reliability To test the reliability of the data we double coded one hundred cases. We achieved 98 percent agreement on whether the petitioner requested that the Court strike federal law (Kappa = .85; p < .001), 99 percent agreement on whether the respondent requested that the Court strike federal law (Kappa = .90; p < .001), 94 percent agreement on whether the petitioner requested that the Court strike state or municipal law (Kappa = .60; p < .001), and 95 percent agreement on whether the respondent requested that the Court strike a state or municipal law (Kappa = .52; p < .001). As a second check on our data, we determined whether all cases that showed up in Spaeth's dataset as a declaration up in our dataset as requests for judicial review. In 52 of 53 cases in Spaeth's dataset, our coders found a request to strike a law as unconstitutional. In only one instance, Lee v. International Society for Krishna Consciousness (1992), did we fail to match the dataset. Our review of this one case showed our coders to be incorrect, and we rectified this error. As we stated in our introduction, one question we wanted to examine was whether the Court will strike down legislation without a party to the case requesting the court to do so. To do otherwise is in itself an example of judicial activism. However, an examination of these cases in the Spaeth dataset confirms that, at least in this respect, the Court practices restraint. In no case in our dataset did the Court overturn a law sua sponte. All cases involved a request to overturn by one of the parties. Needless to say, many cases show up on our list that do not show up on Spaeth's. The most obvious reason for this is that the Spaeth dataset only notes when the Opinion of the Court actually strikes state or federal laws. The dataset does not note those instances when the Court is asked to overturn a state or federal law but does not do so.6

#### 6. Cases granted cert prove that sua sponte remains strong.

Livermore et al. ’16 (Michael A. Livermore, Allen B. Riddell, Daniel Rockmore; Associate Professor at the University of Virginia School of Law, founding executive director of the Institute for Policy Integrity at New York University School of Law, J.D. from NYU Law; Assistant Professor in the School of Informatics, Computing, and Engineering at Indiana University, Ph.D. in Program in Literature at Duke University, Neukom Fellow at the Neukom Institute for Computational Sciences and the Leslie Center for the Humanities at Dartmouth College; Professor of Computational Science, Mathematics, and Computer Science at Dartmouth; 2/29/16; “AGENDA FORMATION AND THE U.S. SUPREME COURT: A TOPIC MODEL APPROACH”; <http://neukom.dartmouth.edu/docs/16_agenda_formation_livermore_riddell_rockmore.pdf>; accessed 4/3/18; TV)

Scholars have also studied how the Court decides how to allocate its attention within the potential subjects presented by a case selected for review. Petitioners to the Court often raise a large number of objections to the lower court opinion that is being appealed, and the Court frequently only certifies a limited number of them for review, effectively refusing certiorari with respect to the remaining questions. The Court, however, is not bound by that decision, and sometime issues are resuscitated during oral argument (Sorenson and Johnson 2014). McGuire and Palmer (1995) examine the Court’s 1998 term to determine the frequency of “issue fluidity” in which some issues present in the grant of certiorari are suppressed while others that were not present are discovered. They find that fluidity of some form is common. Epstein et al. (1996) critique the data and methods used by McGuire and Palmer (1995), ultimately concluding that norms against raising issues sua sponte remain strong on the Court. McGuire and Palmer (1996) and Palmer (1999) respond to the critiques raised in Epstein et al. (1996) and expand their analysis, again concluding that the issues covered in the final decision do not exactly track those that are raised in the cases granted certiorari.