# 1AC

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### Avoidance---1AC

#### Contention one is Avoidance.

#### Antitrust’s political avoidance crushes statutory and constitutional construction---limiting is key to prevent avoidance creep and clarify the First Amendment.

Tim Wu 20. Isidor and Seville Sulzbacher Professor of Law at Columbia Law School. “Antitrust and Corruption: Overruling Noerr”. https://knightcolumbia.org/content/antitrust-and-corruption-overruling-noerr

We live in a time when concerns about influence over the American political process by powerful private interests have reached an apogee, both on the left and on the right. Among the laws originally intended to fight excessive private influence over republican institutions were the antitrust laws of the 1890–1914 period, whose sponsors were concerned with monopoly, particularly its influence over legislatures and politicians. While no one would claim that the antitrust laws were meant to be comprehensive anticorruption laws, there can be little question that they were passed with concerns about the political influence of powerful firms and industry cartels.

Since the 1960s, however, the scrutiny of corrupt and deceptive political practices inherent to antitrust law has been sharply limited by the Noerr-Pennington doctrine,1 which provides immunity to antitrust liability for conduct that can be characterized as political or legal advocacy.2

The Noerr case was strained when it was decided, and it has not aged well. As an interpretation of the antitrust laws, it ignored congressional concern with political mischief undertaken by conspiracy or monopoly. Its legitimacy has always rested on avoidance of the First Amendment, and while Noerr itself may have legitimately reflected such avoidance, the subsequent growth of a Noerr immunity has blown past any First Amendment–driven defense of its existence. For that reason, some have suggested a reformulation of the doctrine.3 The better answer is that, lacking constitutional or statutory foundation, Noerr should be overruled.

The First Amendment guarantees freedom of speech, assembly, and “to petition the government for a redress of grievances.”4 It therefore protects efforts to influence political debate as well as legitimate petitioning in legislative, judicial, or administrative processes.5 The First Amendment does not, however, create a right to bribe government officials, deceive agencies, file false statements, or abuse government process through repeated filings designed only to injure a competitor. Nonetheless, each of these activities has, in some courts at least, been granted immunity under the overgrown Noerr immunity.6 For these reasons, it is an extraconstitutional outlier ripe for reexamination.

The case for overruling Noerr is buttressed by the fact that, since its decision, Noerr’s theoretical foundations have become “wobbly” and “moth-eaten.”7 Written before the dawn of public choice theory or contemporary understanding of interest group influence, Noerr relies on an exceptionally stylized model of politics that understates the potential for corruption and the denial of majority will.8

After several decades, moreover, the judge-made immunity has begun to creep far beyond its original justifications—a well-known problem for doctrines anchored in avoidance (so-called “avoidance creep”).9 Constitutional avoidance, as Charlotte Garden argues, yields decisions that deliberately interpret the statute in a manner at odds with congressional intent. Subsequent decisions building on that interpretation can easily leave behind both congressional intent and the original justifications for the avoidance.10 The result is a free-floating doctrine, as with Noerr, that becomes untethered to both statutory goals and constitutional principle.

Overruling Noerr would not make political petitioning illegal. It would, instead, require defendants to rely on the First Amendment itself (and not Noerr) when seeking to defend what would otherwise be conduct that is illegal under the antitrust laws. Doctrinally, this is to force courts to address whether conduct in question is actually an antitrust violation and, if so, whether it is protected by the First Amendment or not, drawing on an established jurisprudence for some of the problems presented in the Noerr context. For example, while the First Amendment protects false statements in some contexts,11 it has never protected perjury or the making of false statements to government agencies.12 It should take no great leap of insight to conclude that the First Amendment might be the superior vehicle for adjudging a defendant’s First Amendment interests. 13

---FOOTNOTE 13 STARTS, PARAGRAPH ENDED---

13. Another, perhaps minor, advantage of overruling Noerr would be the better development of a petitioning jurisprudence. Whether various putative forms of petitioning government are actually protected by the First Amendment is unclear; the existence of a Noerr immunity has served to further obscure this concept. See Maggie McKinley, Lobbying and the Petition Clause, 68 Stan. L. Rev. 1131 (2016).

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Noerr could be overruled by the Supreme Court in an appropriate case. It could also be overruled by Congress. The legislature, of course, is not in a position to overrule the aspects of Noerr immunity that are anchored in the First Amendment.14 But Congress could do what this article calls for: namely, return the immunities granted political speech and petitioning to their constitutional limits while reaffirming the purposes of the antitrust laws.

#### Spills over---antitrust sets a framework---precedent can’t be distinguished.

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Second, because the Noerr-Pennington doctrine is now commonly framed in First Amendment terms, its application has spread beyond antitrust claims—and in more than one dimension.27

---FOOTNOTE 27 STARTS, MIDPARAGRAPH---

27 See Sosa v. DIRECTV, Inc., 437 F.3d 923, 931 (9th Cir. 2006) (“[W]e conclude that the Noerr-Pennington doctrine stands for a generic rule of statutory construction, applicable to any statutory interpretation that could implicate the rights protected by the Petition Clause.”); Baltimore Scrap Corp. v. David J. Joseph Co., 237 F.3d. 394, 399 (2001) (holding that NoerrPennington immunity applies to adjudicatory processes through the First Amendment because “the rights of petition and association trump any anticompetitive effects that might occur from asking the government for redress . . . and that [a]ny other rule would allow the specter of satellite litigation to restrict the primary right of citizens to seek justice from the judicial system”) (citing California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510-11, (1972)); White v. Lee, 227 F.3d 1214, 1231 (9th Cir. 2000) (holding that because NoerrPennington “is based on and implements the First Amendment right to petition,” it is not limited to the antitrust context; rather, it “applies equally in all contexts”).

---FOOTNOTE 27 ENDS, PARAGRAPH CONTINUES---

But the United States Supreme Court has not squarely held this to be the case, although, as we will see, it has inferentially done so, at least to the satisfaction of the lower courts. In BE & K Const. Co. v. N.L.R.B., the Court faced the by-then familiar “issue of when litigation may be found to violate federal law, but this time with respect to the NLRA rather than the Sherman Act.”28 Ultimately, the Court did not need to decide whether fully to extend Noerr to a non-antitrust statute, but—as Justice Scalia stated in a concurring opinion—the majority opinion sufficiently cleared that road:

Although the Court scrupulously avoids deciding the question (which is not presented in this case), I agree with Justice BREYER, that the implication of our decision today is that, in a future appropriate case, we will construe the National Labor Relations Act (NLRA) in the same way we have already construed the Sherman Act: to prohibit only lawsuits that are both objectively baseless and subjectively intended to abuse process.29

The underlying reasoning of the majority opinion was that—consistent with the general notion that the freedoms of speech and press entail that they must be given “breathing space”—it would be anathema to First Amendment values to declare unlawful an “entire class of reasonably based but unsuccessful lawsuits.”30

This expansive reading of Noerr is consistent with what many courts both before and after BE & K have held. As one Texas court put it, “[t]he courts that have addressed whether the doctrine applies in cases other than those based on anti-trust violations recognize that while the doctrine originally arose in connection with anti-trust cases, it is fundamentally based on First Amendment principles . . . . Thus, the doctrine is a principle of constitutional law that bars litigation arising from injuries received as a consequence of First Amendment petitioning activity, regardless of the underlying cause of action asserted by the plaintiff.” 31

---FOOTNOTE 31 STARTS, MIDPARAGRAPH---

31 RRR Farms, Ltd. v. Am. Horse Prot. Assoc., 957 S.W.2d 121, 129 (Tex. App.— Houston [14th Dist.] 1991) (holding that Noerr-Pennington immunity applies to a claim of tortious interference with prospective business advantage brought by breeders of Tennessee Walking Horses based on the a horse association’s lobbying and litigation designed to do away with certain procedures and devices used in the training and showing of Tennessee Walking Horses).

---FOOTNOTE 31 ENDS, PARAGRAPH CONTINUES---

Not surprisingly, then, Noerr now applies to (1) non-antitrust federal statutory claims32

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32 Gen-Probe, Inc. v. Amoco Corp., 926 F. Supp. 948, 956 (S.D. Cal. 1996) (the doctrine bars “any claim, federal or state, common law or statutory, that has as its gravamen constitutionally protected petitioning activity”).

---FOOTNOTE 31 ENDS, PARAGRAPH CONTINUES---

(2) state as well as federal claims,33

---FOOTNOTE 33 STARTS, MIDPARAGRAPH---

33 South Dakota v. Kan. City S. Indus., Inc., 880 F.2d 40, 50-53 (8th Cir. 1989) (recognizing that Noerr-Pennington doctrine may be invoked to immunize petitioning activity from civil liability outside the antitrust context); Video Int’l Prod., Inc. v. Warner Amex Cable Commc’n., 858 F.2d 1075, 1077-78, 1084 (5th Cir. 1988) (applying Noerr-Pennington to claims for tortious interference and violation of 42 U.S.C. § 1983 and opining that “[t]here is simply no reason that a common-law tort doctrine can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust”); Stern v. U.S. Gypsum, Inc., 547 F.2d 1329, 1342-46 (7th Cir. 1977) (applying Noerr-Pennington to 42 U.S.C. § 1985(1)); In re Circuit Breaker Litig., 984 F. Supp. 1267, 1282-83 (C.D. Cal. 1997) (“[T]o the extent that Defendants’ claims for intentional interference are based on conduct protected by the Noerr-Pennington doctrine, such claims fail because the conduct cannot be found wrongful under a state tort law.”); Computer Assocs. Int’l, Inc. v. Am. Fundware, Inc., 831 F. Supp. 1516, 1522 (D. Colo. 1993) (recognizing Noerr-Pennington doctrine applies in suits other than those based on antitrust violations); National Indus. Sand Ass’n v. Gibson, 897 S.W.2d 769, 774 (Tex. 1995) (recognizing applicability of Noerr-Pennington doctrine to conspiracy claim); RRR Farms, 957 S.W.2d at 129 (finding Noerr-Pennington doctrine applicable to claims for malicious prosecution, tortious interference, abuse of process, and prima facie tort); Diaz v. Sw. Wheel, Inc., 736 S.W.2d 770, 774 (Tex.App.—Corpus Christi 1987, writ denied) (finding summary judgment for trade association proper where association allegedly attempted to influence government agency not to recall or ban product; further finding that the act was not illegal and therefore could not give rise to conspiracy claim).

---FOOTNOTE 33 ENDS, PARAGRAPH CONTINUES---

(3) pre-litigation activities,34 (4) reports to law enforcement,35 (5) some settlement agreements,36

---FOOTNOTE 36 STARTS, MIDPARAGRAPH---

36 A.D. Bedell Wholesale Co. v. Philip Morris, Inc., 263 F.3d 239 (3d Cir. 2001), cert. denied, 534 U.S. 1081 (2002) (in extending Noerr to settlement agreement, court stated that “[W]e see no reason to distinguish between settlement agreements and other aspects of litigation between private actors and the government which give rise to an antitrust immunity”).

---FOOTNOTE 36 ENDS, PARAGRAPH CONTINUES---

and (6) refusals to settle.37

#### Avoidance creep collapses court legitimacy.

Charlotte Garden 20. Co-Associate Dean for Research & Faculty Development and Associate Professor of Law, Seattle University School of Law. “Avoidance Creep”. University of Pennsylvania Law Review. Vol. 168: 331/ https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9686&context=penn\_law\_review

Conversely, there are at least two additional reasons that militate against the Court’s use of constitutional avoidance in these cases. The first is that the use of constitutional avoidance—and especially the use of aggressive forms of avoidance, where the Court applies a clear statement rule or resolves an insubstantial constitutional question—can appear strategic or results-oriented. Scholars, including Richard Hasen, have criticized the Court’s selective use or nonuse of avoidance in other cases on precisely this ground.277 This Article’s account of avoidance creep highlights this risk: even a principled use of avoidance could be indirectly subject to this criticism if it is used by later courts in unexpected or illegitimate ways. For example, a reader inclined towards cynicism might observe that although avoidance creep in the dues/fees context looks different than avoidance creep in the union picketing context, they do have one thing in common: both versions ultimately work to unions’ disadvantage. Perhaps this is because “judges don’t like labor unions.”278 But even if that isn’t the reason, courts risk at least the appearance of partiality.

#### That 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

#### Extinction of all complex life.

Barry 13—Political ecologist with expert proficiencies in old forest protection, climate change, and environmental sustainability policy [Dr. Glen Barry (Ph.D. in "Land Resources" and Masters of Science in "Conservation Biology and Sustainable Development” from the University of Wisconsin-Madison), “ECOLOGY SCIENCE: Terrestrial Ecosystem Loss and Biosphere Collapse,” Forests.org, February 4, 2013, pg. http://forests.org/blog/2013/02/ecology-science-terrestrial-ec.asp

Blunt, Biocentric Discussion on Avoiding Global Ecosystem Collapse and Achieving Global Ecological Sustainability Science needs to do a better job of considering worst-case scenarios regarding continental- and global-scale ecological collapse. The loss of biodiversity, ecosystems, and landscape connectivity reviewed here shows clearly that ecological collapse is occurring at spatially extensive scales. The collapse of the biosphere and complex life, or eventually even all life, is a possibility that needs to be better understood and mitigated against. A tentative case has been presented here that terrestrial ecosystem loss is at or near a planetary boundary. It is suggested that a 66% of Earth's land mass must be maintained in terrestrial ecosystems, to maintain critical connectivity necessary for ecosystem services across scales to continue, including the biosphere. Yet various indicators show that around 50% of Earth's terrestrial ecosystems have been lost and their services usurped by humans. Humanity may have already destroyed more terrestrial ecosystems than the biosphere can bear. There exists a major need for further research into how much land must be maintained in a natural and agroecological state to meet landscape and bioregional sustainable development goals while maintaining an operable biosphere. It is proposed that a critical element in determining the threshold where terrestrial ecosystem loss becomes problematic is where landscape connectivity of intact terrestrial ecosystems erodes to the point where habitat patches exist only in a human context. Based upon an understanding of how landscapes percolate across scale, it is recommended that 66% of Earth's surface be maintained as ecosystems; 44% as natural intact ecosystems (2/3 of 2/3) and 22% as agroecological buffer zones. Thus nearly half of Earth must remain as large, connected, intact, and naturally evolving ecosystems, including old-growth forests, to provide the context and top-down ecological regulation of both human agroecological, and reduced impact and appropriately scaled industrial activities. Given the stakes, it is proper for political ecologists and other Earth scientists to willingly speak bluntly if we are to have any chance of averting global ecosystem collapse. A case has been presented that Earth is already well beyond carrying capacity in terms of amount of natural ecosystem habitat that can be lost before the continued existence of healthy regional ecosystems and the global biosphere itself may not be possible. Cautious and justifiably conservative science must still be able to rise to the occasion of global ecological emergencies that may threaten our very survival as a species and planet. Those knowledgeable about planetary boundaries—and abrupt climate change and terrestrial ecosystem loss in particular—must be more bold and insistent in conveying the range and possible severity of threats of global ecosystem collapse, while proposing sufficient solutions. It is not possible to do controlled experiments on the Earth system; all we have is observation based upon science and trained intuition to diagnose the state of Earth's biosphere and suggest sufficient ecological science–based remedies. If Gaia is alive, she can die. Given the strength of life-reducing trends across biological systems and scales, there is a need for a rigorous research agenda to understand at what point the biosphere may perish and Earth die, and to learn what configuration of ecosystems and other boundary conditions may prevent her from doing so. We see death of cells, organisms, plant communities, wildlife populations, and whole ecosystems all the time in nature—extreme cases being desertification and ocean dead zones. There is no reason to dismiss out of hand that the Earth System could die if critical thresholds are crossed. We need as Earth scientists to better understand how this may occur and bring knowledge to bear to avoid global ecosystem and biosphere collapse or more extreme outcomes such as biological homogenization and the loss of most or even all life. To what extent can a homogenized Earth of dandelions, rats, and extremophiles be said to be alive, can it ever recover, and how long can it last? The risks of global ecosystem collapse and the need for strong response to achieve global ecological sustainability have been understated for decades. If indeed there is some possibility that our shared biosphere could be collapsing, there needs to be further investigation of what sorts of sociopolitical responses are valid in such a situation. Dry, unemotional scientific inquiry into such matters is necessary—yet more proactive and evocative political ecological language may be justified as well. We must remember we are speaking of the potential for a period of great dying in species, ecosystems, humans, and perhaps all being. It is not clear whether this global ecological emergency is avoidable or recoverable. It may not be. But we must follow and seek truth wherever it leads us. Planetary boundaries have been quite anthropocentric, focusing upon human safety and giving relatively little attention to other species and the biosphere's needs other than serving humans. Planetary boundaries need to be set that, while including human needs, go beyond them to meet the needs of ecosystems and all their constituent species and their aggregation into a living biosphere. Planetary boundary thinking needs to be more biocentric. I concur with Williams (2000) that what is needed is an Earth System–based conservation ethic—based upon an "Earth narrative" of natural and human history—which seeks as its objective the "complete preservation of the Earth's biotic inheritance." Humans are in no position to be indicating which species and ecosystems can be lost without harm to their own intrinsic right to exist, as well as the needs of the biosphere. For us to survive as a species, logic and reason must prevail (Williams 2000). Those who deny limits to growth are unaware of biological realities (Vitousek 1986). There are strong indications humanity may undergo societal collapse and pull down the biosphere with it. The longer dramatic reductions in fossil fuel emissions and a halt to old-growth logging are put off, the worse the risk of abrupt and irreversible climate change becomes, and the less likely we are to survive and thrive as a species. Human survival—entirely dependent upon the natural world—depends critically upon both keeping carbon emissions below 350 ppm and maintaining at least 66% of the landscape as natural ecological core areas and agroecological transitions and buffers. Much of the world has already fallen below this proportion, and in sum the biosphere's terrestrial ecosystem loss almost certainly has been surpassed, yet it must be the goal for habitat transition in remaining relatively wild lands undergoing development such as the Amazon, and for habitat restoration and protection in severely fragmented natural habitat areas such as the Western Ghats. The human family faces an unprecedented global ecological emergency as reckless growth destroys the ecosystems and the biosphere on which all life depends. Where is the sense of urgency, and what are proper scientific responses if in fact Earth is dying? Not speaking of worst-case scenarios—the collapse of the biosphere and loss of a living Earth, and mass ecosystem collapse and death in places like Kerala—is intellectually dishonest. We must consider the real possibility that we are pulling the biosphere down with us, setting back or eliminating complex life.

#### Avoidance removes all congressional checks on the executive---now is key.

Aneil Kovvali 17. Associate at Wachtell, Lipton, Rosen & Katz. “Constitutional Avoidance and Presidential Power”. https://www.yalejreg.com/bulletin/constitutional-avoidance-and-presidential-power/

Introduction

Recent developments have brought renewed attention to statutes designed to constrain and discipline the President. The federal anti-nepotism statute, the federal conflict of interest statute, and the Federal Advisory Committee Act all appear set to endure unusual stress in the coming years. Troublingly, these statutes have already been given limited constructions that weaken their power to restrain the President. Under the constitutional avoidance canon, courts construe statutes so as to avoid constitutional questions. Citing the avoidance canon and the President’s (sometimes merely arguable) constitutional prerogatives, courts have limited the scope of statutes meant to discipline the presidency. The application of constitutional avoidance in this context is uniquely troubling. The President is an active participant in the legislative process, and can use his veto power to protect his prerogatives for himself. As a result, judicial avoidance can greatly extend presidential power in a way that is difficult for Congress to reverse. The President’s unique powers also make the application of constitutional avoidance particularly problematic in this context.

Recent developments have brought renewed attention to statutes designed to constrain and discipline the President. The federal anti-nepotism statute, the federal conflict of interest statute, and the Federal Advisory Committee Act all appear set to endure unusual stress in the coming years. Troublingly, these statutes have already been given limited constructions that weaken their power to restrain the President. Under the constitutional avoidance canon, courts construe statutes so as to avoid constitutional questions. Citing the avoidance canon and the President’s (sometimes merely arguable) constitutional prerogatives, courts have limited the scope of statutes meant to discipline the presidency. The application of constitutional avoidance in this context is uniquely troubling. The President is an active participant in the legislative process, and can use his veto power to protect his prerogatives for himself. As a result, judicial avoidance can greatly extend presidential power in a way that is difficult for Congress to reverse. The President’s unique powers also make the application of constitutional avoidance particularly problematic in this context.

I. Constitutional Avoidance

News reports have suggested that various norms will be under unusual strain in the coming years. For example, while the text of the federal anti-nepotism statute,1 seems to prevent the President from appointing close relatives to any civilian role, the President’s son in law and daughter were recently appointed to White House positions.2

But even when statutory text cuts against such arrangements, courts seem willing to distort such texts to expand presidential discretion. For example, in Public Citizen v. U.S. Department of Justice3 the Supreme Court gave a limited interpretation to the Federal Advisory Committee Act (“FACA”). The FACA was enacted by Congress to bring order to the patchwork of committees, boards, and commissions created to advise executive branch officials.4 Where it applies, it imposes strict procedural requirements, including various disclosures.5 In Public Citizen, the Court considered whether FACA applied to executive consultations with the American Bar Association regarding judicial nominations.

The Supreme Court adopted a narrow reading of FACA that excluded the American Bar Association’s advice. While various considerations supported the decision, the Court was ultimately persuaded by the constitutional avoidance canon: “When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”6 Acknowledging the lower court’s concern that the statute “infringed unduly on the President’s Article II power to nominate federal judges and violated the doctrine of separation of powers,”7 the Supreme Court adopted a narrow FACA interpretation that avoided the constitutional question by excluding the consultations.8

Similarly, in Ass’n of American Physicians and Surgeons v. Clinton, the District of Columbia Circuit held that the FACA did not apply to a presidential task force on health care, a group chaired by then-First Lady Hillary Rodham Clinton.9 The court was moved by constitutional concerns, stating that “Article II not only gives the President the ability to consult with his advisers confidentially, but also, as a corollary, it gives him the flexibility to organize his advisers and seek advice from them as he wishes.”10 Instead of deciding whether this principle would make it unconstitutional for Congress to regulate the task force, the Court adopted a limited reading of the statute that excluded the task force.11

II. Presidential Involvement in the Legislative Process

The constitutional avoidance canon is well entrenched, though it has been heavily criticized.12 But the canon is particularly problematic in this context, given the President’s involvement in the legislative process. The President’s veto power over legislation allows him to defend his constitutional prerogatives for himself, and means that the constitutional avoidance canon can have an unusually distortive effect in this context.13

To illustrate, imagine that the extent of the President’s power is mapped on a single line.14 The point “P” refers to the President’s preferred level of power. The closer one gets to “P,” the more satisfied the President will be; the further away, the less satisfied he will be. Similarly, “C” refers to Congress’s preferred level of presidential power, and “Cv” captures the preferences of the member of Congress whose vote will decide whether a presidential veto is sustained or overridden.15 Suppose that Congress passes a statute designed to change the situation from the status quo (“S”) to Congress’s preferred outcome (“C”):

[IMAGE 1 OMITTED]

The statute would be vulnerable to a veto. If the president vetoed the bill, the member of Congress whose vote will decide whether the veto is sustained will support the president—“S” is closer to “Cv” than “C” is, so the member would prefer the status quo to the bill.

Acting strategically, Congress might adopt a less aggressive measure, designed to bring about an intended outcome (“I”):16

[IMAGE 2 OMITTED]

If the President attempted to veto this legislation, his veto would be overridden: “I” is closer to “Cv” than “S,” meaning that the member of Congress whose vote will decide whether the presidential veto is sustained would prefer that the legislation remain intact.

This example demonstrates that, in the context of presidential power, the veto serves functions normally filled by the constitutional avoidance canon. It serves to resist intrusions on the relevant constitutional value, forcing Congress to back away from its preferred outcome “C” to a more moderate outcome “I,” and it demands an unusual degree of agreement within Congress before a more intrusive measure can be adopted.17 And this conclusion flows from the President’s formal powers alone. The President also has informal tools for shaping legislation, which amplify the effect.18

The avoidance canon amplifies the effect even further. Suppose that a court, uncomfortable with the constitutional questions raised by the statute, adopts a judicial interpretation more favorable to the President (“J”):

[IMAGE 3 OMITTED]

Congress might seek to undo the interpretation with a new statute:

[IMAGE 4 OMITTED]

But this new statute would be vulnerable to a presidential veto.19 Since “J” is closer to “Cv” than “I,” the member of Congress whose vote will decide whether the presidential veto is sustained would back the President.

In sum, the judicial interpretation has the effect of making it impossible for Congress to achieve its desired outcome of “I.”20 Importantly, if the courts insist on this outcome because of “constitutional avoidance” instead of an actual violation of the Constitution, it is entirely possible that “I” — the outcome that the courts have prevented Congress from achieving — is a constitutional outcome that is within Congress’s legitimate power.

III. Unique Concerns with Presidential Power

Using the avoidance canon to give the President flexibility poses other problems. First, it emboldens the executive branch in potentially dangerous ways. The executive often interprets statutes, without any opportunity for judicial review.21 In these contexts, the executive can adopt a self-serving understanding of potential constitutional issues, and use that understanding to reshape statutes as it pleases without judicial discipline.22 Recent history suggests that this is not a purely theoretical concern.23 In an age when serious scholars remark that “the legally constrained executive is now a historical curiosity,”24 there is little need to further embolden the executive.

Second, the avoidance canon muddies the issues. The limits of presidential power cannot be identified in isolation — they emerge from the relationship between the President and Congress. Per the tripartite scheme articulated in Justice Jackson’s concurring opinion in Youngstown Sheet & Tube Co. v. Sawyer, the strength of the President’s authority depends on Congress’s position: “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum,” when he “acts in the absence of either a congressional grant or denial of authority” his authority is in a “zone of twilight,” and when he “takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.”25 Avoidance blurs the categories: it treats presidential acts incompatible with statutory text as if they were consistent with a statute reinterpreted to avoid conflict.

Third, the canon distorts the balance of power between the branches. Institutionally, Congress must speak in generalities through universally applicable laws, while the President is able to make targeted decisions.26 That is particularly true in the context of statutes like FACA, which is intended to address extemporaneous groups instead of agencies established by statute. Congress cannot anticipate every group that the executive may be inspired to convene at some later time. By requiring Congress to speak with particularity, the constitutional avoidance canon places the burden of prediction on Congress, when it is often more reasonable to insist that the President anticipate problems and request an accommodation from Congress. Congress has proven willing to entertain such requests.27

Finally, presidential power often conflicts with other constitutional values, which Congress seeks to enforce through statutory law. When Congress adopted statutes prohibiting torture and limiting surveillance, it was defending values that find support in the First, Third, Fourth, Fifth, and Eight Amendments to the Constitution.28 Similarly, ethics statutes defend anti-corruption values that find support in the Emoluments Clauses.29 When avoidance is used to narrow these statutes, their underlying constitutional values are diminished in favor of the somewhat unclear30 constitutional provision vesting the “executive power” in the President.31

IV. Conclusion

The constitutional avoidance canon creates special problems when it is used to defend presidential prerogatives. In that context, its role is already filled by the presidential veto, and the presidential veto amplifies its distortive effect. The doctrine also interacts dangerously with the unique powers of the presidency. As statutes constraining the President are placed under stress, both courts and executive actors should hesitate to weaken them by deploying the canon of constitutional avoidance.

#### Extinction---unchecked presidential powers cause global preemption.

Robert Sloane 08. Associate Professor of Law, Boston University School of Law, 2008, Boston University Law Review, April, 88 B.U.L. Rev. 341, Lexis.

There is a great deal more constitutional history that arguably bears on the scope of the executive power in the twenty-first century. But it is vital to appreciate that the scope of the executive power, particularly in the twenty-first century, is not only a constitutional or historical issue. As an international lawyer rather than a constitutionalist, I want to stress briefly that these debates and their concrete manifestations in U.S. law and policy potentially **exert a profound effect** on the shape of international law. Justice Sutherland's sweeping dicta in United States v. Curtiss-Wright Export Corp., that the President enjoys a "very delicate, plenary and exclusive power ... as the sole organ of the federal government in the field of international relations - a power which does not require as a basis for its exercise an act of Congress," n52 has been (correctly, in my view) criticized on a host of grounds. n53 But in practice, in part for institutional and structural reasons, n54 it accurately reflects the general preeminence of the President in the realm of U.S. foreign affairs. Because of the nature of the international legal and political system, what U.S. Presidents do and say often **establish precedents** that **strongly influence what other states do and say** - with potentially dramatic consequences for the shape of customary international law. The paradigmatic example is the establishment of customary international law on the continental shelf following the Truman Proclamation of September 28, 1945, n55 which produced an echo of similar claims and counterclaims, culminating in a whole new corpus of the international law of the sea for what had previously been understood only as a geological term of art. n56 **Many states** took note, for example, when in the 2002 National Security Strategy of the United States ("NSS"), President Bush asserted that the United States had the right under international law to engage in preventive wars of [\*350] self-defense. n57 While, contrary to popular belief, the United States never in fact formally relied on that doctrine in practice, many would argue that President Bush de facto exercised this purported right when he initiated an armed conflict with Iraq based on claims, which have since proved unfounded, about its incipient programs to develop catastrophic weapons. The 2006 NSS notably retreats from the 2002 NSS's robust claims of a right to engage in preventive wars of self-defense. n58 Yet even within this brief, four-year period, an astonishing number of other states have asserted a comparable right to engage in preventive self-defense. These include not only states that the United States has described as "rogue states," such as **North Korea** and **Iran**, but Australia, **Japan**, the United Kingdom, **China**, **India**, **Iran**, **Israel**, **Russia**, and (though technically not a state) **Taiwan**. n59 I doubt we will welcome the consequences of this pattern for the evolving jus ad bellum of the twenty-first century. Equally, after President Bush's decision to declare a global war on terror or terrorism - rather than, for example, the Taliban, al-Qaeda, and their immediate allies - virtually every insurgency or disaffected minority around the world, including peoples suffering under repressive regimes and seeking to assert legitimate rights to liberty and self-determination, has been recharacterized by opportunistic state elites as part of the enemy in this global war. n60 The techniques employed and justified by the **U**nited **S**tates, including the resurrection of rationalized torture as an "enhanced interrogation technique," n61 likewise have emerged - and will continue to emerge - in the [\*351] practice of other states. Because of **c**ustomary **i**nternational **l**aw**'s** acute sensitivity to authoritative assertions of power, the widespread repetition of claims and practices initiated by the U.S. executive may well **shape international law** in ways the United States ultimately finds disagreeable in the future. So as we debate the scope of the executive power in the twenty-first century, the stakes, as several panelists point out, could not be higher. They include more than national issues such as the potential for executive branch officials to be prosecuted or impeached for exceeding the legal scope of their authority or violating valid statutes. n62 They also include international issues like the potential **use of catastrophic weapons by a rogue regime** asserting a right to engage in preventive war; the **deterioration of international human rights norms** against practices like torture, norms which took years to establish; and the **atrophy of genuine U.S. power** in the international arena, which, as diplomats, statesmen, and international relations theorists of all political persuasions appreciate, demands far more than the largest and most technologically advanced military arsenal. In short, what Presidents do, internationally as well as domestically - the precedents they establish - may affect not only the technical scope of the executive power, as a matter of constitutional law, but the practical ability of future Presidents to exercise that power both at home and abroad. We should candidly debate whether terrorism or other perceived crises require an expanded scope of executive power in the twenty-first century. But it is dangerous to cloak the true stakes of that debate with the expedient of a new - and, in the view of most, indefensible - "monarchical executive" theory, which claims to be coextensive with the defensible, if controversial, original Unitary Executive theory. n63 We should also weigh the costs and benefits of an expanded scope of executive power. But it is vital to appreciate that there are costs. They include not only short-term, acute consequences but long-term, systemic consequences that may not become fully apparent for years. In fact, the exorbitant exercise of broad, supposedly inherent, executive powers may well - as in the aftermath of the Nixon administration - culminate in precisely the sort of reactive statutory constraints and de facto **diplomatic obstacles** that proponents of a robust executive regard as misguided and a threat to U.S. national security in the twenty-first century.

#### Global hotspots go nuclear.

Olumide Obayemi 06. East Bay law school professor, “Article: Legal Standards Governing Pre-Emptive Strikes and Forcible Measures of Anticipatory Self-Defense Under the U.N. Charter and General International Law”, 12 Ann. Surv. Int'l & Comp. L. 19, lexis.

The United States must abide by the rigorous standards set out above that are meant to govern the use of preemptive strikes, because today's international system is characterized by a relative infrequency of interstate war. It has been noted that developing doctrines that lower the threshold for preemptive action could put that accomplishment at risk, and exacerbate regional crises already on the brink of open conflict. n100 This is important as O'Hanlon, Rice, and Steinberg have rightly noted: ...countries already on the brink of war, and leaning strongly towards war, might use the doctrine to justify an action they already wished to take, and the effect of the U.S. posture may make it harder for the international community in general, and the U.S. in particular, **to counsel delay and diplomacy**. Potential **examples abound**, ranging from Ethiopia and Eritrea, to China and Taiwan, to the Middle East. But perhaps the clearest case is the India-Pakistan crisis. n101 The world must be a safe place to live in. We cannot be ruled by bandits and rogue states. There must be law and order not only in the books but in enforcement as well. No nation is better suited to enforce international law than the United States. The Bush Doctrine will stand the test [\*42] of time and survive. Again, we submit that nothing more would protect the world and its citizens from nuclear weapons, terrorists and rogue states than an able and willing nation like the United States, acting as a policeman of the world within all legal boundaries. This is the essence of the preamble to the United Nations Charter.

#### Sole executive control AND secrecy build in groupthink.

Matthew Fleischman 10. J.D. Candidate, 2010, New York University School of Law; B.A., 2007, Washington University in St. Louis. “A FUNCTIONAL DISTRIBUTION OF WAR POWERS.” <http://www.nyujlpp.org/wp-content/uploads/2012/11/Matthew-Fleischman-A-Functional-Distribution-of-War-Powers.pdf>

While Nzelibe and Yoo's model is clearly plausible, it misses certain critical institutional constructs. Their analysis attempts to determine which branch is the more effective agent in this principal-agent problem; however, they fail to realize that the institutional design is not an either-or choice. n96 The whole notion of separation of powers or checks and balances is rooted in the idea of having one agent checking the other agent. n97 The system's design "promotes deliberation among multiple agents, which encourages them to reveal private information that might otherwise remain hidden." n98 While there is little empirical evidence on the value of deliberation, Professor James Fishkin has found evidence that "significant shifts in opinion" take place after participating in public policy deliberations. n99 Studies [\*152] such as this one show that there is value to deliberating. Thus, there must be something unique and different about war powers that justifies abandoning the traditional and effective means of coming to a decision. The first argument offered by Nzelibe and Yoo reasons that presidents tend to be held more democratically accountable for foreign policy than Congress and should therefore be given significant power in this area, and asserts that ex post congressional action is sufficient to mitigate the effects of poor decisions. n100 First of all, while the President may be seen as the key decision maker in the war powers arena, that does not mean that congressional actors are immune from being held democratically accountable for the decision to engage in significant armed conflict. n101 Beyond overestimating the negative accountability effects of going to war, Nzelibe and Yoo fail to account for the numerous benefits from going to war. Professors Cecil Crabb and Pat Holt observed that "once a president has made a foreign affairs decision that becomes known to the public, he automatically receives the support of at least 50 percent of the American people, irrespective of the nature of the decision." n102 This is commonly known as the "rally around the flag" effect. n103 This surge of patriotic sentiment is temporary, n104 but very real. When this sentiment evaporates, the President can react in a multitude of ways. While accountability can breed prudence, it can also lead to "gambling for resurrection." n105 This is an [\*153] agency problem in which leaders prolong unsuccessful wars in the hope that the tides of war will eventually turn, saving the leader's legacy. n106 Ultimately, unilateral Executive action does garner increased accountability, but can lead to short-term political gain and an unwillingness to concede defeat. Furthermore, ex post congressional constraints on presidential actions are insufficient. The fact is, "ex post congressional involvement can only terminate some presidential mistakes and can never recover the sunk costs of bad presidential decisions." n107 Not only are there sunk costs, but "even some opponents of the initial decision to go to war recognize that overly hasty withdrawal could be a poor policy at later stages." n108 Ex post decisions are made in response to a new status quo, one in which use of the power of the purse can be viewed as endangering troops n109 or giving America a weaker image abroad. n110 The second way in which Nzelibe and Yoo justify expansive executive powers is by arguing that the President has superior information to Congress. n111 Yet, allowing for a second opinion on the same information will reduce the likelihood of poor decision making, while not positively or negatively impacting the quality of the information in and of itself. n112 Therefore, Type I errors n113 are less likely when Congress is consulted. Nzelibe and Yoo cite the Iraq War as proof that intelligence failures can occur with or without congressional involvement. n114 However, it could instead be argued that the failure was caused by "executive manipulation of information to exaggerate a threat." n115 The problem was not the informational asymmetry, but rather the use of that information. One logical solution to this problem would be to increase the information gathering and interpreting capabilities of Congress. Nzelibe and Yoo mistakenly take the Executive's informational advantage as a given when it is entirely alterable. [\*154] Therefore, the information advantage can be lessened, which would greatly diminish the odds of Type I errors. Any shift in an independent variable should lead to a corresponding shift in the causal variable. In this case, to the extent that the frequency of Type I errors is correlated with informational disparities, correcting the disparities should negate the odds of Type I errors occurring. The third functional argument presented by Nzelibe and Yoo concerns the relative value of signaling to different regime types. n116 Given that they advocate for a President-First approach, but concede that congressional authorization has value in disputes between democratic states, n117 there is no real disagreement about the value of congressional authorization in these disputes. That leaves conflicts between democratic nations and rogue states or terrorist organizations as the lone area where the two sides disagree on this issue. Even before one can question this distinction, the definition of a rogue nation must be determined. Nzelibe and Yoo leave this task to the President. Nzelibe and Yoo believe that the leaders of rogue states are insulated from domestic political pressure, n118 but this is simply not true, as "all leaders are answerable to some coalition of domestic political forces on which their power and political survival rests. Failure in conflict and war helps shorten the tenure of such leaders." n119 All leaders pursue a rational strategy to maintain power. n120 Wars occur when political leaders attempt to rally the masses behind a national cause via aggressive rhetoric and policies. Thus, all leaders, whether of rogue nations or of first world countries, are subject to popular pressure and suffer consequences at home for losing wars. Nonetheless, elected presidents are more concerned with national support and are therefore more likely to engage in such rhetoric and promote war, since it has been shown to increase the approval rating of presidents. n121 [\*155] On the other hand, the Legislature has more localized interests and would be resistant to using such rhetoric. Localized interests are not rallied by promoting a national identity or a national battle but by catering to a smaller community's needs and interests. Because of the political advantages gained by a president going to war and the Legislature's inclination to shirk the issue, n122 unilateral presidential action is likely to lead to an overly aggressive position on military engagements. Therefore, congressional involvement should decrease the likelihood of Type I errors with respect to all regimes. The totality of the analysis suggests that deliberation decreases the likelihood of Type I errors. This type of deliberation cannot occur within the Executive branch alone. While the president consults with staffers and cabinet secretaries, they are likely to "succumb to groupthink, as it has been called - the overt and subtle pressures driving group cohesiveness that can distort the decision-making process." n123 When a group decides upon a view, dissent becomes difficult and there is pressure to reject alternatives. n124 Furthermore, even before coalescing around a particular opinion, executive staffers are likely to possess policy preferences. Type II errors (not entering "good" wars) would only be more likely under the Congress-First approach if Congress were more likely than the Executive to be opposed to good wars. However, since research shows that Congress is likely to approve most wars independent of circumstances n125 that is highly unlikely to be the case. But there is no reason to believe that Congress has any aversion to good wars. n126 Ultimately, a Congress-First system would decrease Type I errors and have little impact on Type II errors when dealing with traditional warfare, and it is the institutional design that would better accommodate functionalists' concerns and desires.

#### Groupthink causes war with Russia over Ukraine.

Robert Parry 15. Investigative journalist @ Consortium. 2-2-15. “Group Think Is Putting the US on the Precipice of Dangerous Conflict with Russia,”http://www.alternet.org/world/group-think-putting-us-precipice-dangerous-conflict-russia

If you wonder how the lethal “group think” on Iraq took shape in 2002, you might want to study what’s happening today with Ukraine. A misguided consensus has grabbed hold of Official Washington and has pulled in everyone who “matters” and tossed out almost anyone who disagrees. Part of the problem, in both cases, has been that neocon propagandists understand that in the modern American media the personal is the political, that is, you don’t deal with the larger context of a dispute, you make it about some easily demonized figure. So, instead of understanding the complexities of Iraq, you focus on the unsavory Saddam Hussein. This approach has been part of the neocon playbook at least since the 1980s when many of today’s leading neocons – such as Elliott Abrams and Robert Kagan – were entering government and cut their teeth as propagandists for the Reagan administration. Back then, the game was to put, say, Nicaragua’s President Daniel Ortega into the demon suit, with accusations about him wearing “designer glasses.” Later, it was Panamanian dictator Manuel Noriega and then, of course, Saddam Hussein. Instead of Americans coming to grips with the painful history of Central America, where the U.S. government has caused much of the violence and dysfunction, or in Iraq, where Western nations don’t have clean hands either, the story was made personal – about the demonized leader – and anyone who provided a fuller context was denounced as an “Ortega apologist” or a “Noriega apologist” or a “Saddam apologist.” So, American skeptics were silenced and the U.S. government got to do what it wanted without serious debate. In Iraq, for instance, the American people would have benefited from a thorough airing of the complexities of Iraqi society – such as the sectarian divide between Sunni and Shiite – and the potential risks of invading under the dubious rationale of WMD. But there was no thorough debate about anything: not about international law that held “aggressive war” to be “the supreme international crime”; not about the difficulty of putting a shattered Iraq back together after an invasion; not even about the doubts within the U.S. intelligence community about whether Iraq possessed usable WMD and whether Hussein had any ties to al-Qaeda. All the American people heard was that Saddam Hussein was “a bad guy” and it was America’s right and duty to get rid of “bad guys” who supposedly had dangerous WMDs that they might share with other “bad guys.” To say that this simplistic argument was an insult to a modern democracy would be an understatement, but the propaganda worked because almost no one in the mainstream press or in academia or in politics dared speak out. Those who could have made a difference feared for their careers – and they were “right” to have those fears, at least in the sense that it was much safer, career-wise, to run with the herd than to stand in the way. Even after the Iraq War had turned into an unmitigated disaster with horrific repercussions reaching to the present, the U.S. political/media e stablishment undertook no serious effort to impose accountability. Almost no one who joined in the Iraq “group think” was punished. It turns out that there truly is safety in numbers. Many of those exact same people are still around holding down the same powerful jobs as if nothing horrible had happened in Iraq. Their pontifications still are featured on the most influential opinion pages in American journalism, with the New York Times’ Thomas L. Friedman a perfect example. Though Friedman has been wrong again and again, he is still regarded as perhaps the preeminent foreign policy pundit in the U.S. media. Which brings us to the issue of Ukraine and Russia. A New Cold War From the start of the Ukraine crisis in fall 2013, the New York Times, the Washington Post and virtually every mainstream U.S. news outlet have behaved as dishonestly as they did during the run-up to war with Iraq. Objectivity and other principles of journalism have been thrown out the window. The larger context of both Ukrainian politics and Russia’s role has been ignored. Again, it’s all been about demonized “bad guys” – in this case, Ukraine’s elected President Viktor Yanukovych and Russia’s elected President Vladimir Putin – versus the “pro-Western good guys” who are deemed model democrats even as they collaborated with neo-Nazis to overthrow a constitutional order. Again, the political is made personal: Yanukovych had a pricy sauna in his mansion; Putin rides a horse shirtless and doesn’t favor gay rights. So, if you raise questions about U.S. support for last year’s coup in Ukraine, you somehow must favor pricy saunas, riding shirtless and holding bigoted opinions about gays. Anyone who dares protest the unrelentingly one-sided coverage is deemed a “Putin apologist” or a “stooge of Moscow.” So, most Americans – in a position to influence public knowledge but who want to stay employable – stay silent, just as they did during the Iraq War stampede. One of the ugly but sadly typical cases relates to Russia scholar Stephen F. Cohen, who has been denounced by some of the usual neocon suspects for deviating from the “group think” that blames the entire Ukraine crisis on Putin. The New Republic, which has gotten pretty much every major issue wrong during my 37 years in Washington, smeared Cohen as “Putin’s American toady.” And, if you think that Cohen’s fellow scholars are more tolerant of a well-argued dissent, the Association for Slavic, East European and Eurasian Studies further proved that deviation from the “group think” on Ukraine is not to be tolerated. The academic group spurned a fellowship program, which it had solicited from Cohen’s wife, Katrina vanden Heuvel, because the program’s title included Cohen’s name. “It’s no secret that there were swirling controversies surrounding Professor Cohen,” Stephen Hanson, the group’s president, told the New York Times. In a protest letter to the group, Cohen called this action “a political decision that creates serious doubts about the organization’s commitment to First Amendment rights and academic freedom.” He also noted that young scholars in the field have expressed fear for their professional futures if they break from the herd. He mentioned the story of one young woman scholar who dropped off a panel to avoid risking her career in case she said something that could be deemed sympathetic to Russia. Cohen noted, too, that even established foreign policy figures, ex-National Security Advisor Zbigniew Brzezinski and former Secretary of State Henry Kissinger, have been accused in the Washington Post of “advocating that the West appease Russia,” with the notion of “appeasement” meant “to be disqualifying, chilling, censorious.” (Kissinger had objected to the comparison of Putin to Hitler as unfounded.) In other words, as the United States rushes into a new Cold War with Russia, we are seeing the makings of a new McCarthyism, challenging the patriotism of anyone who doesn’t get into line. But this conformity of thought presents a serious threat to U.S. national security and even the future of the planet.

#### Reinvigorated Congressional war powers solve nuclear war.

Matthew Waxman 14. Law Prof @ Colombia. “The Power to Threaten War,” Yale Law Journal, 123(6): 1626-2133

Blechman and Kaplan’s work, including their large data set and collected case studies, was important for showing the many ways that threatened force could support U.S. security policy. Besides deterrence and compellence, threats of force were used to reassure allies (thereby, for example, avoiding their own drive toward militarization of policies or crises) and to induce third parties to behave certain ways (such as contributing to diplomatic resolution of crises). The record of success in relying on threatened force has been quite mixed, they showed. Blechman and Kaplan’s work, and that of others who built upon it through the end of the Cold War and the period that has followed,105 helped explain the factors that correlated with successful threats or demonstrations of force without resort or escalation to war, especially the importance of credible signals.106 After the Cold War, U.S. grand strategy continued to rely on coercive force—threatened force to deter or compel behavior by other actors. During the 1990s, the United States wielded coercive power with varied results against rogue actors in many cases that, without the overlay of superpower enmities, were considered secondary or peripheral, not vital, interests: Iraq, Somalia, Haiti, Bosnia, and elsewhere. For analysts of U.S. national security policy, a major puzzle was reconciling the fact that the United States possessed overwhelming military superiority in raw terms over any rivals with its difficult time during this era in compelling changes in their behavior.107 One important factor that seemed to undermine the effectiveness of U.S. coercive threats during this period was that many adversaries perceived the United States as still afflicted with “Vietnam syndrome,” unwilling to make good on its military threats and see military operations through.108 Since the turn of the twenty-first century, major U.S. security challenges have included **non-state terrorist threats**, the **prolif**eration of nuclear and other weapons of mass destruction (WMD), and rapidly changing power balances in East Asia, and the United States has accordingly been reorienting but retaining its strategic reliance on threatened force. The Bush Administration’s “preemption doctrine” was premised on the idea that some dangerous actors—including terrorist organizations and some states seeking WMD arsenals—are undeterrable, so the United States might have to strike them first rather than waiting to be struck.109 On one hand, this was a move away from reliance on threatened force: “The inability to deter a potential attacker, the immediacy of today’s threats, and the magnitude of potential harm that could be caused by our adversaries’ choice of weapons, do not permit” a reactive posture.110 Yet the very enunciation of such a policy—that “[t]o forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively”111—was intended to persuade those adversaries and their supporters to alter their policies that the United States regarded as destabilizing and threatening. Although the Obama Administration pulled back from this rhetoric and placed greater emphasis on international institutions, it has continued to rely on threatened force as a key pillar of its strategy with regard to deterring adversaries (such as aggressive **Iran**ian moves), intervening in humanitarian crises (as in Libya), and reassuring allies.112 With regard to East Asia, for example, the credible threat of U.S. military force is a significant element of U.S. strategy for deterring Chinese and North Korean aggression as well as reassuring other Asian powers of U.S. protection, to avert a destabilizing arms race.113 In justifying possible military force against Syria in response to its government’s use of chemical weapons, President Obama emphasized the credible threat of U.S. military action as necessary to dissuade states and terrorist organizations from acquiring or using WMD.114 D. The Disconnect Between Constitutional Discourse and Strategy There is a major disconnect between the decades of work by strategists and political scientists on American security policy since the Second World War and legal analysis and scholarship of constitutional war powers during that period. Lawyers and strategists have been relying on not only distinct languages but distinct logics of military force. When it comes to using U.S. military power, students of law think in terms of “going to war” while students of strategy focus on potential war and processes leading to it. These framings manifest in differing theoretical starting points for considering how exercises of U.S. military might affect war and peace, and they skew empirical insights and resulting normative prescriptions about presidential power. 1. Lawyers’ Misframing Lawyers’ focus on actual uses of force—especially engagements with enemy military forces—as constitutionally salient, rather than including threats of force in their understanding of modern presidential powers, tilts analysis toward a one-dimensional strategic logic. It misses a more complex, multi-dimensional and dynamic logic in which the credible will to use force is as important as the capacity to do so. As discussed above, early American constitutional thinkers and practitioners generally wanted to slow down decisions to go to war with institutional checks because they thought that would make war less likely. “To invoke a more contemporary image,” wrote John Hart Ely of their vision, “it takes more than one key to launch a missile: It should take quite a number to start a war.”115 They also viewed the exercise of military power as generally a ratchet of hostilities, whereby as the intensity of authorized or deployed force increased, so generally did the state of hostilities between the United States and other parties move along a continuum from peace to war.116 Echoes of this logic still reverberate in modern congressionalist legal scholarship: the more flexibly the President can use military force, the more likely it is that the United States will find itself in wars; better, therefore, to clog decisions to make war with legislative checks.117 Modern presidentialist legal scholars usually respond that rapid action is a virtue, not a vice, in exercising military force.118 Now that the United States is a superpower with global interests and global security concerns, vesting discretion in the President to take rapid military action—endowed as he is with what Alexander Hamilton called “[d]ecision, activity, secrecy, and dispatch”119—best protects American interests. In either case the emphasis tends to be overwhelmingly placed on actual military engagements with adversaries. Strategists and many political scientists, by contrast, view some of the most significant use of military power as starting well before armed forces clash—and including important cases in which they never actually do. Coercive diplomacy and strategies of threatened force, they recognize, often involve a set of moves and counter-moves by opposing sides and third parties before or even without the violent engagement of opposing forces. It is often the parties’ perceptions of anticipated actions and costs, not the actual carrying through of violence, that have the greatest impact on the course of events and resolution or escalation of crises. Instead of being a ratchet of escalating hostilities, the flexing of military muscle can decrease as well as increase actual hostilities, stabilize as well as inflame relations with rivals or enemies. Moreover, those effects are determined not just by U.S. moves and countermoves but by anticipation and responses of other parties to them.120 Indeed, as Schelling observed, strategies of brinksmanship operate by “the deliberate creation of a recognizable risk of war, a risk that one does not completely control.”121 This insight—that effective strategies of threatened force involve not only great uncertainty about the adversary’s responses but also sometimes involve intentionally creating risk of inadvertent escalation122—poses a difficult challenge for any effort to cabin legally the President’s power to threaten force in terms of likelihood of war or some standard of due care.123 2. Lawyers’ Selection Problems Methodologically, a lawyerly focus on actual uses of force—a list of which would then commonly be used to consider which ones were or were not authorized by Congress—vastly undercounts the instances in which Presidents wield U.S. military might. Some legal scholars already recognize that studying actual uses of force risks ignoring instances in which the President contemplated force but refrained from using it, whether because of political, congressional, or other constraints.124 The point here is a different one: that some of the most significant (and, in many instances, successful) presidential decisions to threaten force do not show up in legal studies of presidential war powers that consider actual deployment or engagement of U.S. military forces as the relevant data set. Moreover, some actual uses of force, whether authorized by Congress or not, were preceded by threats of force; in some cases these threats may have failed on their own to resolve the crisis, and in other cases they may have precipitated escalation. To the extent that lawyers are interested in understanding from historical practice what war powers the political branches thought they possessed and how well that understanding worked, they are excluding important cases. Consider, as an illustration of this difference in methodological starting point, that for the period of 1946-1975 (during which the exercise of unilateral presidential war powers had its most rapid expansion), the Congressional Research Service compilation of instances in which the United States has conducted military operations abroad to protect U.S. citizens or promote U.S. interests—often relied upon by legal scholars studying war powers—lists only twenty-three incidents.125 For the same time period, the Blechman and Kaplan study of political uses of force (usually threats accompanied by some movement of military forces)—often relied upon by political scientists studying U.S. security strategy—includes dozens more data-points, because its authors divide up many military crises into several discrete policy decisions, because many crises were resolved with threat-backed diplomacy, and because many uses of force were preceded by overt or implicit threats of force.126 Among the most significant incidents studied by Blechman and Kaplan but not included in the Congressional Research Service compilation are the 1958-1959 and 1961 crises over Berlin and the 1973 Middle East War, during which U.S. Presidents signaled threats of superpower war, and in the latter case signaled particularly a willingness to resort to nuclear weapons.127 Because the Presidents did not in the end carry out these threats, these cases lack the sort of authoritative legal justifications or reactions that accompany actual uses of force. It is therefore difficult to assess definitively how the executive branch and Congress understood the scope of the President’s war powers in these cases. Historical inquiry, however, would probably show the executive branch’s interpretation to be very broad, even to include full-scale war and even where the main U.S. interest at stake was the very credibility of U.S. defense commitments undergirding its grand strategy, not simply the interests specific to divided Germany and the Middle East region. One might argue that because the threatened military actions were never carried out in these cases, it is impossible to know for sure if the President would have sought congressional authorization or how Congress would have reacted to the use of force. Nonetheless, it is easy to see that in crises like these a threat by the President to use force, having put U.S. credibility on the line in addition to whatever other foreign policy stakes were at issue, would have put Congress in a bind. By focusing so narrowly on actual hostile engagements pitting U.S. and enemy forces against each other—such as the Korean and Vietnam Wars—legal scholars systematically exclude from their functional analysis of war powers significant examples in which the President probably wielded broad unilateral authority in successfully defusing crises. Including them still leaves room to debate whether that unilateral authority was wielded in ways that precipitated the crises in the first place, or whether a stronger role for congressional consultation or authorization would have contributed to or detracted from the likelihood of peaceful resolution—with powerful normative implications—but it provides a much richer and more complete data set. 3. Lawyers’ Mis-Assessment Empirically, analysis of and insights gleaned from any particular incident—which might then be used to evaluate the functional merits of presidential powers—look very different if one focuses predominantly on the actual use of force instead of considering also the role of threatened force. Take, for example, the Cuban Missile Crisis—perhaps the Cold War’s most dangerous event. To the rare extent that they consider domestic legal issues of this crisis at all, lawyers interested in the constitutionality of President Kennedy’s actions generally ask only whether he was empowered to initiate the naval quarantine of Cuba, because that is the concrete military action Kennedy took that was readily observable and that resulted in actual engagement with Soviet forces or vessels—as it happens, very minimal engagement.128 To strategists who study the crisis, however, the naval quarantine is not in itself the key presidential action. After all, as Kennedy and his advisers realized, a quarantine alone could not remove the missiles that were already in Cuba. The most consequential presidential actions were threats of military or even nuclear escalation, signaled through various means including putting U.S. strategic bombers on highest alert.129 The quarantine itself was significant not for its direct military effects but because of its communicative impact in showing U.S. resolve. If one focuses, as lawyers often do, on presidential military action that actually engaged the enemy in combat (or nearly did), it is easy to dismiss this case as not very constitutionally significant. But if one focuses instead on nuclear brinksmanship, as strategists and political scientists often do,130 the Cuban Missile Crisis is arguably the most significant historical exercise of presidential powers to affect war and peace. Considering again the 1991 Iraq War, most legal scholars would view this instance as constitutionally a pretty uncontroversial military conflict: the President claimed unilateral authority to use force, but he eventually sought and obtained congressional authorization for what was ultimately—at least in the short run—a quite successful war.131 For the most part, this case is therefore neither celebrated nor decried much by either side of legal war powers debates,132 though some congressionalist scholars highlight the correlation of congressional authorization for this war and a successful outcome.133 Political scientists look at the case differently, though. They often study this event not as a successful war but as failed coercive diplomacy, in that the United States first threatened war through a set of dramatically escalating steps that ultimately failed to persuade Saddam Hussein to withdraw from Kuwait.134 Some political scientists even see U.S. legal debate about military actions as an important part of this story, asserting that adversaries pay attention to congressional arguments and moves in evaluating U.S. resolve (an issue taken up in greater detail below) and that congressional opposition to Bush’s initial unilateralism in this case undermined the credibility of U.S. threats.135 Whether one sees the Gulf War as a case of successful war, as lawyers usually do, or unsuccessful threatened war, as political scientists usually do, colors how one evaluates the outcome and the credit one attaches to factors such as vocal congressional opposition to initially unilateral presidential moves. Notice also that legal analysis of presidential authority to use force is sometimes thought to turn partly on the U.S. security interests at stake, as though those interests are purely contextual and exogenous to U.S. decision-making and grand strategy. In justifying President Obama’s 2011 use of force against the Libyan government, for example, the Justice Department’s Office of Legal Counsel concluded that the President had such legal authority “because he could reasonably determine that such use of force was in the national interest,” and it then went on to detail the U.S. security and foreign policy interests.136 The interests at stake in crises like these, however, are altered dramatically if the President threatens force. Doing so puts the credibility of U.S. threats at stake, which is important not only with respect to resolving the crisis at hand but with respect to other potential adversaries watching U.S. moves.137 The President’s power to threaten force means that he may unilaterally alter the costs and benefits of actually using force through his prior actions.138 Consider, for example, that once President George H.W. Bush placed hundreds of thousands of U.S. troops in the Persian Gulf region and issued an ultimatum to Saddam Hussein in 1990, the credibility of U.S. threats and assurances to regional partners were put on the line;139 or that in threatening force against Serbian President Slobodan Milosevic over the 1999 Kosovo crisis, President Clinton and allied leaders altered the strategic stakes by putting perceptions (among both allies and adversaries) of collective NATO resolve on the line.140 In other words, the U.S. security interests in carrying through on threats are partly endogenous to the strategy embarked upon to address crises. Moreover, interests at stake in any one crisis cannot simply be disaggregated from broader U.S. grand strategy: If the United States generally relies heavily on threats of force to shape the behavior of other actors, then its demonstrated willingness or unwillingness to carry out a threat and the outcomes of that action may affect its credibility in the eyes of other adversaries and allies, too.141 It is remarkable, though in the end not surprising, that the executive branch does not generally cite these credibility interests in justifying its unilateral uses of force. It does cite when relevant the U.S. interest in sustaining the credibility of its formal alliance commitments or U.N. Security Council resolutions, as reasons supporting the President’s constitutional authority to use force.142 The executive branch generally refrains from citing the similar interests in sustaining the credibility of the President’s own threats of force, however, probably in part because doing so would so nakedly expose the degree to which the President’s prior unilateral strategic decisions would tie Congress’s hands on the matter. \*\*\* In sum, lawyers’ focus on actual uses of force—usually in terms of armed clashes with an enemy or the placement of troops into hostile environments—does not account for much vaster ways that Presidents wield U.S. military power, and it skews the claims legal scholars make about the allocation of war powers between the political branches. A more complete account of constitutional war powers should incorporate the significant role of threatened force in American foreign policy. II. DEMOCRATIC CHECKS ON THREATENED FORCE Thus far, this Article has shown that, especially since the end of World War II, the United States has relied heavily on strategies of threatened force—for which credible signals are a critical element—in wielding its military might, and that the President is not constrained legally in any significant, formal sense in threatening war. Drawing on recent political science scholarship, this Part takes some of the major questions often asked by students of constitutional war powers with respect to the actual use of force and reframes them in terms of threatened force. First, as a descriptive matter, in the absence of formal legal checks on the President’s power to threaten war, is the President nevertheless informally but substantially constrained by democratic institutions and processes, and what role does Congress play in that constraint? Second, as a normative matter, what are the merits and drawbacks of this arrangement of democratic institutions and constraints with regard to strategies of threatened force? Third, as a prescriptive matter, since it is not really plausible that Congress or courts would ever erect direct legal barriers to the President’s power to threaten war, how might legal reform proposals to more strongly and formally constrain the President’s power to use force indirectly impact his power to threaten it effectively? For reasons discussed below, I do not consider whether Congress could legislatively restrict the President’s power to threaten force or war; in short, I set that issue aside because even if doing so were constitutionally permissible, ardent congressionalists have exhibited no interest in doing so, and instead have focused on legally controlling the actual use of force. Political science insights that bear on these questions emerge from several directions. One is from studies of Congress’s influence on decisions to use force, which usually assume that Congress’s formal legislative powers play only a limited role in this area, and the effects of this influence on presidential decision-making about threatened force. Another is international relations literature on bargaining,143 as well as literature on the theory of democratic peace, the notion that democracies rarely go to war with one another.144 In attempting to explain the near-absence of military conflicts between democracies, political scientists have examined how particular features of democratic governance—electoral accountability, the institutionalized mobilization of political opponents, and the diffusion of decision-making authority regarding the use of force among executive and legislative branches—affect decision-making about war.145 These and other studies, in turn, have led some political scientists (especially those with a rational choice theory orientation) to focus on how those features affect the credibility of signals about force that governments send to adversaries in crises.146 My purpose in addressing these questions is to begin painting a more complete and detailed picture of the way war powers operate, or could operate, than one sees when looking only at actual wars and use of force. This is not intended to be a comprehensive account, but is instead an effort to synthesize some strands of scholarship from other fields regarding threatened force in order to inform legal discourse about how war powers function in practice and the strategic implications of reform. The answers to these questions also bear on debates raging among legal scholars on the nature of American executive power and its constraint by law. Initially, they seem to support the views of those legal scholars who have long believed that, in practice, law no longer seriously binds the President with respect to war-making.147 That view has been taken even further recently by Eric Posner and Adrian Vermeule, who argue that “[l]aw does little to constrain the modern executive” at all, but also observe that “politics and public opinion” operate effectively to cabin executive powers.148 The arguments offered here, however, support the position of those legal scholars who describe a more complex relationship between law and politics, including that law is constitutive of the processes of political struggle.149 That law helps constitute the processes of political struggles is true of any area of public policy, though, and what is special here is the added importance of foreign audiences—including adversaries and allies alike—observing and reacting to those politics, too. A. Democratic Constraints on the Power to Threaten Force At first blush, including the power to threaten war or force in our understanding of how the President wields military might seems to suggest a conception of presidential war powers even more expansive in scope and less checked by other branches than often supposed, especially since the President can by threatening force put the United States on a path to war that Congress will have difficulty resisting. That is partially true. But recent political science scholarship reveals that democratic politics significantly constrain the President’s decisions to threaten force. It also shows that Congress plays an important role in shaping those politics even in the absence of binding legislative action. Whereas most lawyers usually begin their analysis of the President’s and Congress’s war powers by focusing on their formal legal authorities, political scientists usually take for granted these days that the President is—in practice—the dominant actor with respect to military crises and that Congress wields its formal legislative powers in this area rarely or in only very limited ways. A major school of thought, however, holds that members of Congress nevertheless wield significant influence over decisions about force, and that this influence extends to threatened force, so that Presidents generally refrain from threats that would provoke strong congressional opposition. Even without any serious prospect for legislatively blocking the President’s intended threats, Congress under certain conditions can loom large enough to force Presidents to adjust their policies; even when it cannot, members of Congress can oblige the President to expend much political capital. As Jon Pevehouse and William Howell explain: When members of Congress vocally oppose a use of force, they undermine the president’s ability to convince foreign states that he will see a fight through to the end. Sensing hesitation on the part of the United States, allies may be reluctant to contribute to a military campaign, and adversaries are likely to fight harder and longer when conflict erupts—thereby raising the costs of the military campaign, decreasing the president’s ability to negotiate a satisfactory resolution, and increasing the probability that American lives are lost along the way. Facing a limited band of allies willing to participate in a military venture and an enemy emboldened by domestic critics, presidents may choose to curtail, and even abandon, those military operations that do not involve vital strategic interests.150 This statement also highlights the important point, alluded to earlier, that force and threatened force are not neatly separable categories. Limited uses of force are often intended as signals of resolve to escalate, and most conflicts involve bargaining in which the threat of future violence—rather than what Schelling calls “brute force”151—is used to try to extract concessions. The formal participation of political opponents in legislative bodies provides them with a forum for registering dissent to presidential policies of force through such mechanisms as floor statements, committee oversight hearings, resolution votes, and funding decisions.152 These official actions prevent the executive branch, even if it can be considered a unitary body, “from monopolizing the nation’s political discourse” on decisions regarding military actions and can thereby make it difficult for the President to depart too far from congressional preferences when weighing strategic choices about threats.153 Members of the political opposition in Congress also have access to resources for gathering policy-relevant information from the government that informs their policy preferences. Their active participation in specialized legislative committees similarly gives opponent party members access to fact-finding resources and forums for registering informed dissent from decisions within the committee’s purview.154 As a result, legislative institutions within democracies can enable political opponents to have a **more immediate** and **informed impact** on the executive’s decisions regarding **force** than can opponents among the general public. Furthermore, studies suggest that Congress can actively shape media coverage and public support for a president’s foreign policy engagements.155 Under this logic, Presidents, **anticipating dissent**, will be **more selective** in issuing threats in the first place, making only those commitments that would not incite widespread political opposition should the threat be carried through.156 Moreover, with regard to the signaling so critical to effective threats, “Congress matters, and matters **greatly**[,] to a nation’s ability to credibly **convey resolve** to **enemies and allies alike**.”157 Political opponents within a legislature have few electoral incentives to collude in an executive’s bluff, and they are capable of expressing opposition to a threatened use of force in ways that could expose the bluff to a threatened adversary.158 This again narrows the President’s range of viable policy options for brandishing military force. Having called for tougher action in Bosnia during the 1992 presidential campaign, for instance, President Clinton delayed coercive military threats against Serb forces once in office, due in part to congressional opposition and infighting.159 Counterintuitively, given the President’s seemingly unlimited and unchallenged constitutional power to threaten war, it may in some cases be easier for members of Congress to influence presidential decisions to threaten military action than presidential war decisions once U.S. forces are already engaged in hostilities. It is widely believed that once U.S. armed forces are fighting, congressmembers’ hands are often tied: policy opposition at that stage risks being portrayed as undermining our troops in the field.160 Perhaps the President takes this phenomenon into account and discounts political opposition to threatened force, assuming that such opposition will dissipate if he carries it through or announces his firm intention to do so. It is also likely that actual use of force generally attracts much more interest in Congress than threats of force, so members of Congress may be much less inclined to exercise their influence when actual military action seems remote. These factors may help explain how President Obama seemingly misjudged congressional reluctance toward armed intervention in Syria when he called on Congress to authorize strikes in August 2013.161 Nonetheless, well before a final decision-point to use force occurs, members of Congress may communicate messages domestically and convey signals abroad that the President will find difficult to counter.162 In some cases, Congress may communicate greater willingness than the president to use force, such as through non-binding resolutions. For example, in May 2013, the Senate, invoking constitutional war powers as its basis, passed a resolution 99-0 calling for the United States to support Israel against Iran if it were to take military action against Iran’s nuclear weapons program.163 A generation earlier, many members of Congress publicly opposed President Jimmy Carter’s termination of the Mutual Defense Treaty with Taiwan directed at Communist China.164 Congress passed, despite the President’s objections, the Taiwan Relations Act, which was in part intended to signal a strong commitment to defend Taiwan.165 Such efforts, in addition to showing that the President and his agents do not completely control communication of threats, put pressure on the President to act while also conveying to foreign audiences a sturdy political foundation for threats the President may make along those lines. The upshot is that a body of recent political science, while confirming the President’s dominant position in setting policy in this area, also reveals that policy-making with respect to threats of force is significantly shaped by domestic politics and that Congress is institutionally positioned to play a powerful role in influencing those politics, even without exercising its formal legislative powers. The President’s exercise of war powers—including powers to threaten war—is not as unfettered as many assume. B. Democratic Institutions and the Credibility of Threats A central question among constitutional war powers scholars is whether robust checks—especially congressional ones—on presidential use of force lead to “sound” policy decision-making. Congressionalists typically argue that legislative control over war decisions promotes more thorough and valuable deliberation, including more accurate weighing of consequences and gauging of political support for military action.166 Presidentialists usually counter that the executive branch has better information and therefore better ability to discern the dangers of action or inaction, and that quick and decisive military moves are often required to deal with security crises.167 If we are interested in these sorts of functional arguments—and we should be—then reframing the inquiry to include threatened force prompts critical questions as to whether such checks also contribute to or detract from effective deterrence and coercive diplomacy and therefore positively or negatively affect the likelihood of achieving aims without resort to war. Here, recent political science provides some reason for optimism, though the scholarship in this area is neither well-developed nor conclusive. To be sure, “soundness” of policy with respect to force is heavily laden with normative assumptions about war and the appropriate role for the United States in the broader international security system, so it is difficult to assess the merits and disadvantages of constitutional allocations in the abstract. That said, whatever their specific assumptions about appropriate uses of force, constitutional war powers scholars usually evaluate the policy advantages and dangers of decision-making allocations too narrowly in terms of the costs and outcomes of actual military engagements with adversaries. The importance of credibility to strategies of threatened force adds important new dimensions to this debate. On the one hand, one might intuitively expect that robust democratic checks would generally be ill-suited for coercive threats and negotiations—that institutional centralization and secrecy of decision-making might better equip non-democracies to wield threats of force in support of foreign policy ambitions. As Quincy Wright speculated in 1942, autocracies “can use war efficiently and threats of war even more efficiently” than democracies,168 especially the American democracy in which vocal public and congressional opposition may undermine threats.169 Moreover, proponents of democratic checks on war powers usually assume that careful deliberation is a virtue in preventing unnecessary wars, but strategists of deterrence and coercion observe that perceived irrationality is sometimes important in conveying threats: “Don’t test me, because I might just be crazy enough to do it!”170 On the other hand, some political scientists have recently called this view into question. They have concluded that the institutionalization of political contestation and some diffusion of decision-making power in democracies of the kind described in the previous Section make threats especially credible and effective in resolving international crises without actual resort to armed conflict. Recent arguments in effect turn some old claims about the strategic disabilities of democracies on their heads: whereas it used to be generally thought that democracies are ineffective in wielding threats because they are poor at keeping secrets and their decision-making is constrained by internal political pressures, a new wave of political science accepts this basic description but argues that these democratic features are really strategic virtues.171 Rationalist models of crisis bargaining between states assume that because war is risky and costly, states will be better off if they can resolve their disputes through bargaining rather than by enduring the costs and uncertainties of armed conflict.172 Effective bargaining during such disputes—that which resolves the crisis without a resort to force—depends largely on states’ perceptions of their adversary’s capacity to wage an effective military campaign and its willingness to resort to force to obtain a favorable outcome. A state targeted with a threat of force, for example, will be less willing to resist the adversary’s demands if it believes that the adversary intends to wage and is capable of waging an effective military campaign to achieve its ends. If a state perceives that the threat from the adversary is credible, that state has less incentive to resist such demands if doing so will escalate into armed conflict. The accuracy of such perceptions, however, is often compromised by informational asymmetries that arise from private information about an adversary’s relative military capabilities and resolve that prevents states from correctly assessing each other’s intentions, as well as by the incentives states have to misrepresent their willingness to fight—that is, to bluff.173 Informational asymmetries increase the potential for misperception and thereby make war more likely; war, consequentially, can be thought of in these cases as a “bargaining failure.”174 Some political scientists have argued in recent decades—contrary to previously common wisdom—that features and constraints of democracies make them better suited than non-democracies to **credibly signal their resolve** when they threaten force. To bolster their bargaining position, states will seek to generate credible signals by making “hand-tying” commitments from which leaders **cannot back down** without suffering considerable domestic political costs.175 These domestic audience costs, according to some political scientists, are especially high for leaders in democratic states, where they may bear them at the polls.176 Given the potentially high domestic political and electoral repercussions democratic leaders face from backing down from a public threat, they have significant incentives to refrain from bluffing. An adversary that understands these political vulnerabilities is thereby more likely to perceive a threat that a democratic leader does issue as highly credible, in turn making it more likely that the adversary will yield.177 Other scholars have recently pointed to the special role of legislative bodies in signaling and threatening force. This is especially interesting from the perspective of constitutional powers debates, because it posits a distinct role for Congress—and, again, one that does not necessarily rely on Congress’s ability to pass binding legislation that formally confines the President. Kenneth Schultz, for instance, argues that the open nature of competition within democratic societies ensures that the interplay of opposing parties in legislative bodies over the use of force is observable not just to their domestic publics but to foreign actors; this inherent transparency within democracies—magnified by legislative processes—provides more information to adversaries regarding the unity of domestic opponents around a government’s military and foreign policy decisions.178 Political opposition parties can undermine the credibility of some threats by the President to use force if they publicly voice their opposition in committee hearings, public statements, or through other institutional mechanisms. Furthermore, legislative processes—such as debates and hearings—make it difficult to conceal or misrepresent preferences about war and peace. Faced with such institutional constraints, Presidents will incline to be more selective about making such threats and avoid being undermined in that way.179 This restraining effect on the ability of governments to issue threats in turn makes those threats that the government does issue **more credible** because observers will likely assume that the President would not issue it if he anticipated strong political opposition. Especially when legislative members of the opposition party publicly support an executive’s threat to use force during a crisis, their visible support lends additional credibility to the government’s threat by confirming that domestic political conditions favor the use of force should it be necessary.180 The credibility-enhancing effects of legislative constraints on threats are disputed. Some studies question the assumptions underpinning theories of audience costs—specifically the idea that democratic leaders suffer domestic political costs to failing to make good on their threats, and therefore that their threats are especially credible181—and others question whether the empirical data support claims that democracies have credibility advantages in making threats.182 Other scholars dispute the likelihood that leaders will really be punished politically for backing down, especially if the threat was not explicit and unambiguous or if they have good policy reasons for doing so.183 Additionally, even if transparency in democratic institutions allows domestic dissent from threats of force to be visible to foreign audiences, it is not clear that adversaries interpret these mechanisms as political scientists expect in their models of strategic interaction, in light of various common problems of misperception in international relations.184 These disputes are not just between competing theoretical models but also over the links between any of the models and real-world political behavior by states. At this point there remains a dearth of good historical evidence as to how foreign leaders interpret political maneuvers within Congress regarding threatened force. Nevertheless, at the very least, strands of recent political science scholarship cast **significant doubt** on the intuition that democratic checks are inherently disadvantageous to strategies of threatened force. Quite the contrary, they suggest that the types of legislative political checks discussed in the previous Section—including the signaling functions that Congress is institutionally situated to play with respect to foreign audiences interpreting U.S. government moves—can be harnessed in some circumstances to support such strategies. C. Legal Reform and Strategies of Threatened Force Among legal scholars of war powers, the ultimate prescriptive question is whether the President should be constrained more formally and strongly than he currently is by legislative checks, especially a more robust and effective mandatory legal requirement of congressional authorization to use force. Calls for reform usually involve narrowing the circumstances in which congressional authorization is not constitutionally required, tightening enforcement of these purported requirements (by all three branches of government), or revising and enforcing the War Powers Resolution or other framework legislation requiring express congressional authorization for military actions.185 Under these sorts of proposals, the President would often lack authority to unilaterally make good on threats except in narrow circumstances (such as stopping imminent attacks on the United States). Whereas legal scholars are consumed with the internal effects of war powers law, such as whether and when it constrains U.S. government decision-making, the analysis contained in the previous Section shifts attention externally to whether and when U.S. law might influence decision-making by adversaries, allies, and other international actors. In prescriptive terms, if the President’s power to use force is linked to his ability to threaten it effectively, then any consideration of war powers reform on policy outcomes and long-term interests should include the important secondary effects on deterrent and coercive strategies—and how U.S. legal doctrine is perceived and understood abroad.186 Would stronger legal requirements for congressional authorization to use force reduce a president’s opportunities for bluffing? If so, would such requirements improve U.S. coercive diplomacy by making ensuing threats more credible? Or would they undermine diplomacy by taking some threats legally off the table as viable policy options? And would stronger formal legislative powers with respect to force have significant marginal effects on the signaling effects of dissent within Congress, beyond those already resulting from open political discourse? These are difficult questions, but the analysis and evidence above help generate some initial hypotheses and avenues for further research and analysis. One might ask at this point why, having exposed as a hole in war powers legal discourse the tendency to overlook threatened force, this Article does not take up whether Congress should assert some direct legislative control of threats—perhaps statutorily limiting the President’s authority to make them or establishing procedural conditions like presidential reporting requirements to Congress. This Article puts such a notion aside for two reasons. First, for reasons alluded to above, such limits would be constitutionally suspect and difficult to enforce.187 Second, even the most ardent congressionalists do not contemplate such direct limits on the President’s power to threaten. Direct limits are therefore not a realistic option for reform. Instead, this Article focuses on the more plausible—and much more discussed—possibility of strengthening Congress’s power over the ultimate decision whether to use force, but augments the usual reform debate with appreciation for the importance of credible threats. A claim previously advanced from a presidentialist perspective is that stronger legislative checks on war powers could be harmful to coercive and deterrent strategies, because they establish easily visible impediments to the President’s authority to follow through on threats: legal constraints trade off with credibility. This was a common policy argument during the War Powers Resolution debates in the early 1970s. Eugene Rostow, an advocate inside and outside the government for executive primacy, remarked during consideration of legislative drafts that any serious restrictions on presidential use of force would mean in practice that “no President could make a credible threat to use force as an instrument of deterrent diplomacy, even to head off explosive confrontations.”188 He continued: In the tense and cautious diplomacy of our present relations with the Soviet Union, as they have developed over the last twenty-five years, the authority of the President to set clear and silent limits in advance is perhaps the most important of all the powers in our constitutional armory to prevent confrontations that could carry nuclear implications. . . . . . . . . . . [I]t is the diplomatic power the President needs most under the circumstance of modern life—the power to make a credible threat to use force in order to prevent a confrontation which might escalate.189 In his veto statement on the War Powers Resolution, President Nixon echoed these concerns, arguing that the law would undermine the credibility of U.S. deterrent and coercive threats in the eyes of both adversaries and allies—they would know that presidential authority to use force would expire after sixty days, so absent strong congressional support they could assume U.S. withdrawal at that point.190 In short, those who oppose tying the president’s hands with mandatory congressional authorization requirements to use force sometimes argue that doing so incidentally and dangerously ties his hands in threatening it. Their position assumes that presidential flexibility to act militarily, preserved in legal doctrine, enhances the credibility of presidential threats to escalate. A second argument, this one advanced by some congressionalists, is that stronger legislative checks on presidential uses of force would improve deterrent and coercive strategies by making them more selective and credible. The most credible U.S. threats, this argument holds, are those that carry formal approval by Congress, which reflects strong public support and willingness to bear the costs of war.191 A frequently cited case for this claim is President Eisenhower’s request (soon granted) for standing congressional authorization to use force in the Taiwan Strait Crises of the mid- and late-1950s—an authorization he claimed at the time was important to bolstering the credibility of U.S. threats to protect Formosa from Chinese aggression.192 “It was [Eisenhower’s] seasoned judgment . . . that a commitment by the United States would have much greater impact on allies and enemies alike because it would represent the collective judgment of the President and Congress,” concludes Louis Fisher. “Single-handed actions taken by a President, without the support of Congress and the people, can threaten national prestige and undermine the presidency. Eisenhower’s position was sound then. It is sound now.”193 An important assumption here is that legal requirements of congressional participation in decisions to use force filter out unpopular uses of force, the threats of which are unlikely to be credible and which, if unsuccessful, undermine the credibility of future U.S. threats. A third view is that legal clarity is important to U.S. coercive and deterrent strategies; that ambiguity as to the President’s powers to use force undermines the credibility of threats. Michael Reisman observed in 1989, for example, that **ambiguity “in the allocation of competence and the uncertain congressional role will sow uncertainty among those who depend on U.S. effectiveness for security and the maintenance of world order.** Some reduction in U.S. credibility and diplomatic effectiveness may result.”194 Such stress on legal clarity is common among lawyers, who usually regard it as important to planning, whereas strategists tend to see possible value in “constructive ambiguity,” or deliberate fudging of drawn lines as a negotiating tactic or for domestic political purposes.195 A critical assumption here is that clarity of constitutional or statutory design with respect to decisions about force exerts significant effects on foreign perceptions of U.S. resolve to make good on threats, if not by affecting the substance of U.S. policy commitments with regard to force, then by pointing foreign actors to the appropriate institution or process for reading them. Political scientists almost never directly engage these questions of constitutional design and reform (it is difficult, in fact, to find even passing references to questions of legal doctrine or reform in political science scholarship on threats of force). Partly this may reflect a general scholarly disposition favoring descriptive over normative or prescriptive analysis—the opposite of most American legal scholarship. Partly, though, it also reflects a difference in emphasis between legal scholars and political scientists with respect to democratic institutions. Whereas legal scholars tend to focus on formal legal powers and checks—such as binding legislative control and judicial review—political scientists focus on the political interactions that these institutional arrangements facilitate.196 Political scientists tend to concentrate on the legal allocation of powers between branches of government only to the extent that such arrangements reinforce or provide a forum for political contestation and competition among domestic political opponents. As a result, they rarely examine how the sorts of constitutional and legislative reforms so often put forward by legal thinkers would affect the credibility of threats. That said, political science contributions in this area suggest that all three of the views common among legal theorists probably contain some truth in some cases, but also that all three are exaggerated. They are exaggerated to the extent that they fail to account for the political checks imposed by Congress that Presidents already internalize and that foreign actors already perceive; they tend to consider formal legal checks in absolute terms rather than their marginal effects relative to baseline politics, which operate quite robustly as constraints. Furthermore, any reading of signals by foreign audiences would have to take account of the possibility that a President might act outside the law, especially in a grave national security crisis. On balance and in general, though, the political science scholarship surveyed above suggests that a result of stronger formal congressional checks on force would likely be restricted reliance on threatened force, but at least some of the ensuing threats would probably in turn be more credible. Even if Congress already wields informal political influence over threatened force, more potent and formal requirements of legislative force authorization or stricter enforcement of existing ones would probably push U.S. policy toward a narrower set of commitments and more reserved use of threats—a more selective coercive and deterrent strategy—in several ways. For a President, knowing that he requires legal authorization from Congress to follow through on threats raises the expected political costs of making them (even very popular ones would require spending some political capital to obtain formal legislative backing). A more formal and substantial role for Congress in authorizing the carrying out of threats would also probably **amplify** some of the **informational effects** of executive-legislative dialogue and congressional debate described in the previous Section: these processes—which could become more prominent if they have greater legal significance—make it difficult to conceal or misrepresent preferences about war and peace, **and therefore reduce opportunities for bluffing**. If stronger legislative checks on war and force likely mean a more narrowly selective policy of threatened force, then the previous Sections’ analysis also suggests—contrary to the common wisdom among presidentialists that tying the executive’s hands necessarily undermines the effectiveness of threats—that the credibility of those select threats may in some cases **be enhanced**. Returning to the Iran example with which this Article began, although a presidency that is more legally constrained in using force would have less flexibility to dictate U.S. actions, a President’s decision to draw a red-line threat could send an even more potent signal of resolve if legislation were ultimately required to carry it out, because it might more clearly communicate projected inter-branch unity behind the threat. As the next Part will explain, whether more narrowly selective—but perhaps more credible—threats would result in an **overall improvement** from a policy standpoint depends on shifting geopolitical context and other balances in U.S. strategy. The general point here is that the ultimate effects of any legal reform on war and peace will depend not just on the internal effects on U.S. government decision-making but the external perceptions of actors reading U.S. signals. III. CONSTITUTIONAL WAR POWERS AND AMERICAN GRAND STRATEGY One broad implication of this analysis is that the true allocation of constitutional war powers is—in anything but a formalistic sense—geopolitically and strategically contingent. It is often believed that the power to go to war is one of the most important constitutional powers because wars put American blood and treasure at risk.197 But even assuming as a normative matter that this means that our constitutional law should be structured to be war-averse,198 this principle does not provide as much guidance about legal doctrine as often supposed unless integrated with ideas about how the United States can and should pursue that agenda in relation to other actors pursuing theirs and amid a changing international context. A. Threats of War and Presidential Powers in Historical and Strategic Context Thinking generally about the “powers of war and peace,” the power to decide to go to war was a much more significant one relative to the power to threaten war—as well as other foreign relations powers—when the United States was a small, militarily weak power, and when our strategy was avowedly to stay out of foreign disputes, or when coercive diplomacy and deterrence that extended to protecting distant allies abroad was not a serious strategic option.199 If a major component of grand strategy is hiding behind geographical barriers and avoiding conflict by not taking sides in disputes among other powers—as it was during the infancy of the Republic and as it was again in the interwar years—then the power to threaten war is not often very consequential and an allocation of powers that makes it difficult to engage in military conflicts or even threaten to do so is consistent with that strategic vision.200 Note, too, that the lack of a very potent standing military force during these periods limited options for coercive and deterrent strategies anyway and made the President heavily dependent on Congress to furnish the means to initiate them.201 Because the importance for the United States of threatened force—to coerce or deter adversaries and to reassure allies—in affecting war and peace grew so substantially after World War II, the constitutional decision-making about using force has been relegated in large degree to a mechanism for implementing grand strategy rather than setting it.202 For a superpower that plays **a major role** in **sustaining global security,** threatening war is in some respects a much more **policy-significant constitutional power than the power to actually make war.**

#### Oversight’s key to program effectiveness.

Heidi **Kitrosser 07**. University of Minnesota - Twin Cities - School of Law. 06/19/2007. Congressional Oversight of National Security Activities: Improving Information Funnels. SSRN Scholarly Paper, ID 995014, Social Science Research Network. papers.ssrn.com, https://papers.ssrn.com/abstract=995014.

There are persuasive arguments not only that national security based secrecy needs are dramatically overstated, but that excessive secrecy hurts national security by encouraging poorly informed and under-vetted decision-making and diminishing the United States' domestic and international credibility. As I have noted elsewhere: [C]ountless scholars, journalists, legislators and executive branch officials have noted secrecy's judgment-clouding and securityhindering effects in relation to historic and current events. For examples of such criticism, one needs to look no further than commentary on the 2003 invasion of Iraq. It has been argued repeatedly that the reticence of the press and of Congress to ask difficult questions prior to the invasion of Iraq combined with the Bush administration's penchant for secrecy created an insular White House environment in which debate was stifled, "groupthink" flourished, and questionable data on weapons of mass destruction were embraced while predictions of a peaceful, post-invasion Iraq similarly went unquestioned. Similar concerns have been raised about the negative impact of secrecy on homeland security, both prior to, and in the wake of, 9- 11. Similar analyses about more distant historical events [including the Vietnam War and the Cold War] abound. [There also is a risk] that secrecy not only will be misused by wellmeaning yet overzealous officials, but that it will intentionally be misused by those set on manipulating public debate toward their own ends. Indeed, McCarthy's exploitation of government secrecy calls to mind Vice President Cheney's recent attempts to perpetuate the theory of a link between Al Qaeda and Saddam Hussein through vague public allusions to evidence in the administration's possession of which others, including the 9-11 Commission, supposedly were not aware. Similarly, concerns long have been raised about executive branch "spinning of information" through selective declassification or leakage of otherwise classified information.10 2 Such points are manifest in responses to the administration's arguments for keeping the NSA surveillance program largely secret. For one thing, critics charge that no convincing explanation has been offered as to why it would have endangered national security to reveal the program's bare existence to the public, let alone to the congressional intelligence committees. 10 3 And while public details of the program remain too scarce as of mid-2007 to evaluate its effectiveness, efficacy concerns intrinsically are raised by the insular nature of the decisionmaking process that generated the program. 0 4 These efficacy concerns are exacerbated by post-revelation disclosures that raise questions about the program's reach, the adequacy of its oversight and mistakes that might have occurred in administering it. 105

#### Congress solves adventurism---it escalates---action now is key.

Stephen Pomper and Tess Bridgeman 19. Stephen Pomper is senior director for policy at the International Crisis Group. During the Obama administration, he served on the staff of the National Security Council as special assistant to the president and senior director for multilateral affairs and human rights. Prior to joining the staff of the National Security Council, he was the assistant legal adviser for political-military affairs at the Department of State. Tess Bridgeman is senior editor at Just Security and senior fellow and visiting scholar at New York University Law School’s Reiss Center on Law and Security. She served as special assistant to President Barack Obama, associate counsel to the president, and deputy legal adviser to the National Security Council. She previously served at the Department of State’s Office of the Legal Adviser where she was special assistant to the legal adviser and, prior to that role, an attorney adviser in the Office of Political-Military Affairs. 1. "Introduction: The War Powers Resolution," by Tess Bridgeman and Stephen Pomper. Policy Roundtable: The War Powers Resolution. https://tnsr.org/roundtable/policy-roundtable-the-war-powers-resolution/

Hathaway sees things differently, arguing that the current system both betrays constitutional design and inappropriately shields U.S. military operations from democratic accountability. To these concerns we would add one further: It coarsens U.S. sensibilities when it comes to the consequences of military action. While Congress has generally authorized major ground wars, the presence of U.S. “boots on the ground” is not the only metric by which the seriousness of U.S. engagement in conflict should be assessed.

We submit that “seriousness” should take into account not just the risk of an operation to U.S. forces (although that is certainly critically important), but also the geopolitical consequences, the risk of escalation, and the risk to civilian populations. An operation that does not imperil U.S. lives could, after all, still spark a humanitarian disaster, result in the deaths of thousands of civilians, implicate the United States in wartime atrocities, create power vacuums filled by armed groups, or generate enormous ill will among locals. Yemen is a case in point for most if not all of those concerns. Waxman’s piece calls our attention to this set of issues, noting that so-called “minor” conflicts can, in fact, have major consequences, though he does not recommend war powers reform as the right way to get Congress to pay more attention.

This brings us to our final point, which is to question whether there is in fact a better way. It may well be that the ultimate key to better policy on matters of war and peace is an improved politics — one in which well-informed citizens elect members of Congress who play the policing role that we would wish for them. But under the current framework, neither Congress nor American voters necessarily have a full picture of how the United States is operating militarily around the world or what the associated costs are. That makes the more enlightened politics that are a prerequisite for a more responsible Congress difficult to generate.

We believe war powers reform can help with this. By forcing members of Congress to take responsibility — including taking more votes — on a broader range of conflicts, a reformed War Powers Resolution would create more reasons for members to seek information about the conflicts in question, more opportunities for civil society to engage the political process, and more openings for journalists to share that information with the public. In this sense, war powers reform may not be sufficient to produce a more thoughtful U.S. approach to engagement in armed conflict, but it could well be necessary.

Whether or not it is achievable is a separate question, but we would not write off the possibility. For one thing, the politics of the moment — the growing frustration with endless war Hathaway notes coupled with nervousness about Trump that Waxman describes — has created openings that might have been difficult to imagine even a few years ago.

In order for reform to happen, reformers will need to plant the flag on a set of concrete goals and begin the hard and patient work of trying to make them realizable. There is, of course, no guarantee of success. But in a world that has been too much shaped and bruised by U.S. missteps in Yemen, Libya, and the so-called forever war, can America really afford not to try?

### Bribery---1AC

#### Contention two is Bribery.

#### Antitrust’s political avoidance protects anticompetitive bribery---First Amendment restraints solve.

Tim Wu 20. Isidor and Seville Sulzbacher Professor of Law at Columbia Law School. “Antitrust and Corruption: Overruling Noerr”. https://knightcolumbia.org/content/antitrust-and-corruption-overruling-noerr

As we run through these increasingly dirty advocacy campaigns, the First Amendment interests become progressively weaker to the point of being nonexistent. Laws that ban bribery, defamation, deception of government, and sabotage have all survived First Amendment challenges, either based on the strength of the government interest or the idea that there really is no protected speech at issue, but merely conduct.

On the antitrust side of the ledger, the strength of the government’s interests would similarly seem to depend on deception through outright corruption. Despite occasional academic suggestions that the antitrust laws should be indifferent to anticompetitive intent or malicious conduct, the nature of the conduct matters, as evidenced by case law condemning intentional monopolization, deception, and other tortious conduct like fraud or sabotage.

What is needed, is something that courts do regularly, namely, balance the respective interests protected by the First Amendment and antitrust laws, respectively.

And that is what is completely lacking in Noerr: any consideration of the relative strengths of the First Amendment and antitrust interests. And as we shall see, it has led the courts—especially district courts—to extend Noerr immunity beyond any defensible boundary.

II. Leaving the Constitution behind

If it might originally have been defended as an exercise in constitutional avoidance, the Noerr doctrine has over the decades grown into its own creature, too unconnected and insensitive to the competing concerns of antitrust policy and the First Amendment. At its worst, it has provided immunities to classes of conduct, like bribery, abuse of government process, and lying to government, that the antitrust laws were obviously meant to punish and for which there are no constitutional protections.

The 1991 decision City of Columbia v. Omni Outdoor Advertising, Inc. did the most to make the doctrine insensitive to the competing concerns in this area. The jury had found a corrupt conspiracy between the city of Columbia, South Carolina, and a local billboard company. Even though the First Amendment does not generally protect conspiracies, Justice Scalia’s majority nonetheless held the conduct to be protected by Noerr. The key doctrinal move in Omni was to limit Noerr’s sham exception—which as we have seen can be understood as a proxy for the First Amendment’s limits. The Court limited it to one category of sham: bad-faith abuse of the political process, and declined to find any other possible exceptions, such as the “conspiracy” exception found by the court of appeals. Given that the sham exception can be understood as standing in for the limits of the First Amendment, Omni gave courts an open door to use Noerr to protect conduct that would not be protected by the First Amendment.

Since that time, Noerr has, in lower courts, come to protect a range of conduct unprotected by the Constitution, including not just conspiracy but also bribery, false statements to government, deceit, and even abuse of process—so long as some political objective can be claimed. Overbroad Noerr immunity and an under-inclusive sham exception made courts reluctant to recognize areas of clearly anticompetitive action that should not enjoy any constitutional protection.

Consider the following example of how Noerr is invoked to immunize bribery. In 2001, a district court in Louisiana heard allegations that a riverboat company was bribing government officials so as to prevent competitors from obtaining a license to operate. The court rejected the idea that “bribery, extortion and corruption” would “abrogate antitrust immunity.” It did so based on the premise that even corrupt and criminal activity is immune from antitrust scrutiny under Omni so long as the ultimate object is a favorable political outcome.

In another departure from First Amendment principle, some courts have also interpreted Noerr to protect the making of false statements to government. For example, in a 2013 dispute between two asphalt firms, one alleged that the other had lied to municipal governments about the relevant regulations so as to trick the governments into excluding rivals. When targeted in an antitrust suit, the court upheld immunity, despite the analogy to obtaining a fraudulent patent condemned in Walker Process, as well as evidence of effects on competition, and the fact that the First Amendment, with rare exceptions, does not protect false statements made to government.

#### It undermines the democratic process.

Karen Roche 12. J.D. Candidate, May 2013, Loyola Law School Los Angeles; B.A., May 2010, University of San Diego. Deference or Destruction? Reining in the Noerr-Pennington and State Action Doctrines, 45 Loy. L.A. L. Rev. 1295 (2012). Available at: https://digitalcommons.lmu.edu/llr/vol45/iss4/6

2. The Lack of a Misrepresentation Exception Undermines the Democratic Process

Because the Court has left open the question of whether a fraud or misrepresentation exception exists, lower courts have been highly inconsistent in recognizing and applying the exception.218 The courts that do recognize the exception have done so on a limited basis, such as by recognizing the exception only in an adjudicative proceeding and then requiring that the misrepresentation be both intentional and material.219 Additionally, the Supreme Court has said that if such an exception exists, it applies only to adjudicatory petitions, not to administrative or legislative petitions.220

Because the Court has excluded petitioning activity from the reach of antitrust law rather than creating an exception for petitions due to First Amendment concerns, the courts can and have immunized petitions based on intentional misrepresentations, even though that petitioning activity would not be protected under the First Amendment.221 This has resulted in a doctrine under which citizens are allowed to ask the government to suppress competition even if the information they give the government in support of that petition is knowingly false.222 For example, in Mercatus Group, LLC v. Lake Forest Hospital, the court gave Noerr immunity to the defendant’s petitions even though the petitions were based on false information because it found that the board considering the petitions was acting in a legislative rather than an adjudicative capacity and that the misrepresentation exception therefore did not apply.223 Immunizing petitions that are based on false and fraudulent information fosters an abuse of the governmental process.224 The democratic process relies on accurate information to make informed decisions. Petitions based on false information impede the ability of the democratic system to work the way it is meant to work.225 Based on the foregoing, there does not appear to be any justification to protect this type of unethical and harmful petition.

#### Bribery enables American collusion with kleptocracy.

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The defining document of our era is the Supreme Court’s Citizens United decision in 2010. The ruling didn’t just legalize anonymous expenditures on political campaigns. It redefined our very idea of what constitutes corruption, limiting it to its most blatant forms: the bribe and the explicit quid pro quo. Justice Anthony Kennedy’s majority opinion crystallized an ever more prevalent ethos of indifference—the collective shrug in response to tax avoidance by the rich and by large corporations, the yawn that **now greets the millions in dark money spent by invisible billionaires** to influence elections. In other words, the United States has **legitimized a political economy of shadows**, and it has done so right in step with a global boom in people hoping to escape into the shadows. **American collusion with kleptocracy** comes at a **terrible cost** for the rest of the world. All of the stolen money, all of those evaded tax dollars sunk into Central Park penthouses and Nevada shell companies, might otherwise fund health care and infrastructure. (A report from the anti-poverty group One has argued that 3.6 million deaths each year can be attributed to this sort of resource siphoning.) Thievery tramples the possibilities of workable markets and credible democracy. It **fuels suspicions** that the whole idea of liberal capitalism is a **hypocritical sham**: While the world is plundered, self-righteous Americans **get rich off their complicity** with the crooks.

#### The US has a unique opportunity to stop the spread of kleptocratic autocracies---domestic regulation is a pre-requisite.

Igor Logvinenko and Casey Michel 20. \*\*Igor Logvinenko is an Associate Professor of Diplomacy and World Affairs and an affiliate of the John Parke Young Initiative on the Global Political Economy at Occidental College. \*\*Casey Michel is a writer, analyst, and investigative journalist based in New York, covering foreign interference and kleptocracy-related developments. “Global Kleptocracy as an American Problem” Just Security. 12-04-20. https://www.justsecurity.org/73599/global-kleptocracy-as-an-american-problem/

Putting an end to the **spread of corruption from kleptocratic autocracies** into the United States will be one of the most significant **challenges** for the incoming presidential administration. Still, we believe President-elect Joe Biden will have a chance to reshape how U.S.-based jurisdictions approach doing business with economic actors based in kleptocracies. To succeed, the White House will need to connect this foreign policy priority with a **domestic agenda of financial regulation.** Fortunately, this issue may have enough **bipartisan goodwill** for these efforts to produce a major legislative win for the incoming administration. While Americans have been gripped by the psychodrama of the Trump years, governments of China, Russia, Saudi Arabia, and Turkey have become more autocratic while also expanding their influence thanks to the global power vacuum left by Washington. The United States still possesses an **immense source of leverage against these powers**, because even as they entirely abandoned democratic aspirations, they have become even more dependent on the global financial system centered on the American economy and its legal-regulatory apparatus. Corrupt officials, oligarchs and state-owned firms from around the world flock **into Western democracies** with longstanding rule-of-law traditions and deep financial markets in search of legitimization, tax “optimization,” and property rights protections. In particular, U.S. banking, accounting, and law firms are still without rivals in helping these actors accomplish their goals. Wall Street banks have had a long history of legitimizing the inflow of questionable capital into the global pool of money. Just look at the recent $3 billion settlement between the Justice Department and Goldman Sachs over misconduct at Malaysia’s sovereign wealth fund, which highlighted one of the most egregious, but entirely commonplace, examples of U.S. banks facilitating this process. The Trump years also made it clear that the interconnectedness between the West and autocratic kleptocracies presents a security challenge for the United States. The Trump experience showed that top officials in the U.S. government can be corrupted by wealthy elites from foreign nations. Not only did we see such dynamics play out during the lead-up to President Donald Trump’s impeachment, but immediately after Trump’s failed re-election, the son-in-law of Turkey’s president resigned his post as finance minister, in part because his friendship with his U.S. counterpart, Trump’s son-in-law Jared Kushner lost its utility to Mr. Erdoğan. Biden and Michael Carpenter, former deputy assistant secretary of defense for Russia, Ukraine, Eurasia, concluded their 2018 essay on this subject by saying that “as matters of national security, these are issues that should be of interest to both Democrats and Republicans who want to reduce our vulnerability to foreign corrupt influence.” We agree enthusiastically. The Biden administration has an opportunity to **deal a real blow to global kleptocracy**, but it must adopt a comprehensive plan that would **deploy domestic** financial **regulation** as a vehicle to combat corruption at home and abroad. To that end, here are several recommendations for immediately confronting the problem of global kleptocracy, while also unwinding the United States’ ongoing role as one of the centers of offshoring and financial secrecy.

#### Extinction---kleptocratic governance causes terrorism, nuclear rogue states, and escalates hotspots---American democratic leadership is key.

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American leadership is needed more than ever to restore not only faith in our democratic institutions and the rule of law, but to also address the impacts of COVID-19, our economic recovery, climate change, and an array of other transnational threats that endanger our collective security.

Repression of Democracy and Subversion of the Rule of Law

As we have witnessed in the United States in recent weeks, democracy cannot be taken for granted, and is constantly tested as corrupt leaders who abuse their power, subvert the will of their people, and other coercive forces of chaos destabilize our collective welfare, prosperity, and security.

In Mexico, cartels and organized criminals have co-opted the government at the federal, state, and local levels, and have diversified into other sectors such as agriculture, mining, and transportation. They also control strategic and critical infrastructure such as the country’s major ports.

In recent years, for example, the Jalisco New Generation Cartel has killed judges, police officers, politicians, and thousands of civilians. The cartel controls significant trafficking routes into the United States, and is expanding operations into Europe and Asia. The significant infiltration and penetration of these criminal groups have destabilized the Mexican economy, rule of law, and regional stability.

Across the Sahel, authoritarian kleptocrats, ungoverned spaces, lawlessness, and conflicts have created the perfect storm for criminals and terrorist groups to exploit and expand their illicit trafficking and smuggling operations. The lucrative business of illicit trade has been militarized. These bad actors have bribed complicit government officials to shield their illicit enterprises from scrutiny and coerced soldiers to protect their illicit markets.

In other parts of the world, ruthless leaders are similarly engaging in criminality and coercive actions, repressing democracy, arresting dissidents and those who expose corruption, profiting from illegal activities, undermining global security, co-opting the state, and creating illicit economies.

Make no mistake: Illicit wealth and malign influence remain the lifeblood of today’s corrupt bad actors, criminal organizations, and terrorist groups. Through dirty money derived from criminality and kleptocracy, these malefactors finance corruption, chaos, insecurity, and violence.

Fighting the Twin Devils of Kleptocracy and Illicit Trade

In the middle of the deadly pandemic and dark days of subversive criminality and aggressive actions across borders, in early 2021, we are now at a critical moment in time where leadership is sorely needed.

To provide more secure and stable economies, we need to develop better policies and strategies to fight against today’s corruptive and criminal influences subverting the rule of law, penetrating markets, and harming our communities.

Corruption corrodes the underpinnings of democracy, good governance, clean markets and supply chain security, and economic development efforts. It also impedes progress on human rights and implementation of national sustainability strategies.

Illicit trade, which includes a convergence of numerous trafficking, smuggling, financial, cyber, and fraud crimes, fuels a multi-trillion-dollar illegal economy globally every year. It is a fact that illicit trade is booming, fueling transnational crime and corruption. It corrodes the rule of law and undermines social stability and the welfare of our people.

Illicit trade further hampers economic development by preventing the equitable distribution of resources that provide for sustainable futures. It enables kleptocrats to pillage their countries, violent trafficking organizations to expand their operations, terrorist groups to finance their attacks against our communities, and rogue regimes to underwrite their nuclear programs.

The reality is that both corruption and illicit trade are threat multipliers that ripple across borders and imperil democratic freedoms and institutions and systems of open, free, and just societies.

While COVID-19 has brought economic malaise to most sectors, the illicit economy continues to thrive. This is especially true across e-commerce marketplaces that are generating tremendous prosperity for scammers, fraudsters, and other bad actors and threat networks.

Other profitable criminal activities include the trafficking of narcotics, opioids, arms, and people, fake medicines, counterfeit and pirated goods; illegal tobacco and alcohol products; illegally harvested timber, wildlife, and fish; pillaged oil, diamonds, gold, natural resources and precious minerals; stolen antiquities; and other contraband or commodities.

These are all sold on our main streets, on social media, online marketplaces, and the dark web every hour of every day.

Illicit networks not only distort the legal economy and corrupt public officials, but they also divert revenue from legitimate market drivers such as businesses and governments.

According to the OECD and the EU’s Intellectual Property Office (EUIPO) the value of counterfeit and pirated goods amounts to 3.3% of world trade ($509 billion). WEF estimates that over 3% of global GDP (US$2.2 trillion) will be lost due to illicit trade leakages in 2020. The International Monetary Fund (IMF) has estimated that money laundering comprises approximately 2 to 5 percent of the world’s gross domestic product (GDP) each year, or approximately $1.74 trillion to $4.35 trillion in 2019.

But this goes beyond just economic harm.

Kleptocracy and criminalized markets incur a significant negative social cost, and in some cases, help to foment economic instability, enslave our human capital, desecrate our environment, and endanger national efforts to implement sustainable development goals (SDGs).

Kleptocracy and the embezzlement of national revenue and natural resources (e.g., extraction of oil and minerals) impair the ability of communities to make the investments necessary to stimulate economic growth especially during these hard economic times.

Revenue that could be used to build roads to facilitate commerce, hospitals to fight pandemic outbreaks and diseases, homes to raise and protect families, or schools to educate children and future leaders is instead siphoned away for private gain, stashed in financial secrecy jurisdictions.

Illicit commerce, fueled by anonymous shell companies, puts the safety and health of communities in danger when criminals put counterfeit medicines, electronics, tainted food, fake automotive and airplane parts, toxic toys, pirated film and other illegal goods into our distribution networks and supply chain.

The dumping of toxic waste contaminates our food and water supplies. Illegal mining, logging and deforestation or poaching harm vital ecosystems and habitats, exacerbate climate change, and undermine policies to advance inclusive, green, sustainable development. Poaching and trafficking of endangered wildlife robs economies of their natural assets and their future.

The corruption that allows counterfeit medicines or ineffective pharmaceuticals, personal protective equipment (PPE), and fast-moving consumer goods (FMCG) to enter our communities endangers public health, denying the sick effective treatment and permitting deadly viruses and disease to infect our communities. We must be vigilant against such predatory criminality as countries begin the distribution of COVID-19 vaccines, securing our global supply chains and shutting down illicit websites selling possible fakes.

The OECD Task Force on Countering Illicit Trade has highlighted how COVID-19 policies and governance gaps have contributed to increasing organized crime in some vulnerable sectors. Countries like South Africa, Malaysia, Philippines, and Mexico, which banned alcohol, tobacco, and food products during the pandemic, have seen more problems than benefits. Such bans have resulted in boom for the illicit trade in alcohol, cigarettes and food that was falsely labelled as medicinal cures providing more opportunities for organized criminals to exploit. While demand has generally remained the same, the supply has only changed hands from legal routes to illegal ones.

The corruption that allows traffickers to move contraband and illegal goods across borders and global supply chains and exploit them with impunity further fuels instability in armed conflict zones and stymies law enforcement efforts including in Central America, North Africa, the Middle East, and other hot spots of violence.

Bi-Partisan Congressional Support is Vital

In securing the peace and democracy, President Biden and his Administration should make the global fight against kleptocracy and illicit trade a higher priority including working with the US Congress to pass new legislation that helps our law enforcement and intelligence communities confront today's transnational threats.

#### Terrorism causes extinction---retaliation.

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The escalating threats between North Korea and the United States make it easy to forget the “nuclear nightmare,” as former US Secretary of Defense William J. Perry put it, that could result even from the use of just a single terrorist nuclear bomb in the heart of a major city. At the risk of repeating the vast literature on the tragedies of Hiroshima and Nagasaki—and the substantial literature surrounding nuclear tests and simulations since then—we attempt to spell out here the likely consequences of the explosion of a single terrorist nuclear bomb on a major city, and its subsequent ripple effects on the rest of the planet. Depending on where and when it was detonated, the blast, fire, initial radiation, and long-term radioactive fallout from such a bomb could leave the heart of a major city a smoldering radioactive ruin, killing tens or hundreds of thousands of people and wounding hundreds of thousands more. Vast areas would have to be evacuated and might be uninhabitable for years. Economic, political, and social aftershocks would ripple throughout the world. A single terrorist nuclear bomb would change history. The country attacked—and the world—would never be the same. The idea of terrorists accomplishing such a thing is, unfortunately, not out of the question; it is far easier to make a crude, unsafe, unreliable nuclear explosive that might fit in the back of a truck than it is to make a safe, reliable weapon of known yield that can be delivered by missile or combat aircraft. Numerous government studies have concluded that it is plausible that a sophisticated terrorist group could make a crude bomb if they got the needed nuclear material. And in the last quarter century, there have been some 20 seizures of stolen, weapons-usable nuclear material, and at least two terrorist groups have made significant efforts to acquire nuclear bombs. Terrorist use of an actual nuclear bomb is a low-probability event—but the immensity of the consequences means that even a small chance is enough to justify an intensive effort to reduce the risk. Fortunately, since the early 1990s, countries around the world have significantly reduced the danger—but it remains very real, and there is more to do to ensure this nightmare never becomes reality. Brighter than a thousand suns. Imagine a crude terrorist nuclear bomb—containing a chunk of highly enriched uranium just under the size of a regulation bowling ball, or a much smaller chunk of plutonium—suddenly detonating inside a delivery van parked in the heart of a major city. Such a terrorist bomb would release as much as 10 kilotons of explosive energy, or the equivalent of 10,000 tons of conventional explosives, a volume of explosives large enough to fill all the cars of a mile-long train. In a millionth of a second, all of that energy would be released inside that small ball of nuclear material, creating temperatures and pressures as high as those at the center of the sun. That furious energy would explode outward, releasing its energy in three main ways: a powerful blast wave; intense heat; and deadly radiation. The ball would expand almost instantly into a fireball the width of four football fields, incinerating essentially everything and everyone within. The heated fireball would rise, sucking in air from below and expanding above, creating the mushroom cloud that has become the symbol of the terror of the nuclear age. The ionized plasma in the fireball would create a localized electromagnetic pulse more powerful than lightning, shorting out communications and electronics nearby—though most would be destroyed by the bomb’s other effects in any case. (Estimates of heat, blast, and radiation effects in this article are drawn primarily from Alex Wellerstein’s “Nukemap,” which itself comes from declassified US government data, such as the 660-page government textbook The Effects of Nuclear Weapons.) At the instant of its detonation, the bomb would also release an intense burst of gamma and neutron radiation which would be lethal for nearly everyone directly exposed within about two-thirds of a mile from the center of the blast. (Those who happened to be shielded by being inside, or having buildings between them and the bomb, would be partly protected—in some cases, reducing their doses by ten times or more.) The nuclear flash from the heat of the fireball would radiate in both visible light and the infrared; it would be “brighter than a thousand suns,” in the words of the title of a book describing the development of nuclear weapons—adapting a phrase from the Hindu epic the Bhagavad-Gita. Anyone who looked directly at the blast would be blinded. The heat from the fireball would ignite fires and horribly burn everyone exposed outside at distances of nearly a mile away. (In the Nagasaki Atomic Bomb Museum, visitors gaze in horror at the bones of a human hand embedded in glass melted by the bomb.) No one has burned a city on that scale in the decades since World War II, so it is difficult to predict the full extent of the fire damage that would occur from the explosion of a nuclear bomb in one of today’s cities. Modern glass, steel, and concrete buildings would presumably be less flammable than the wood-and-rice-paper housing of Hiroshima or Nagasaki in the 1940s—but many questions remain, including exactly how thousands of broken gas lines might contribute to fire damage (as they did in Dresden during World War II). On 9/11, the buildings of the World Trade Center proved to be much more vulnerable to fire damage than had been expected. Ultimately, even a crude terrorist nuclear bomb would carry the possibility that the countless fires touched off by the explosion would coalesce into a devastating firestorm, as occurred at Hiroshima. In a firestorm, the rising column of hot air from the massive fire sucks in the air from all around, creating hurricane-force winds; everything flammable and everything alive within the firestorm would be consumed. The fires and the dust from the blast would make it extremely difficult for either rescuers or survivors to see. The explosion would create a powerful blast wave rushing out in every direction. For more than a quarter-mile all around the blast, the pulse of pressure would be over 20 pounds per square inch above atmospheric pressure (known as “overpressure”), destroying or severely damaging even sturdy buildings. The combination of blast, heat, and radiation would kill virtually everyone in this zone. The blast would be accompanied by winds of many hundreds of miles per hour. The damage from the explosion would extend far beyond this inner zone of almost total death. Out to more than half a mile, the blast would be strong enough to collapse most residential buildings and create a serious danger that office buildings would topple over, killing those inside and those in the path of the rubble. (On the other hand, the office towers of a modern city would tend to block the blast wave in some areas, providing partial protection from the blast, as well as from the heat and radiation.) In that zone, almost anything made of wood would be destroyed: Roofs would cave in, windows would shatter, gas lines would rupture. Telephone poles, street lamps, and utility lines would be severely damaged. Many roads would be blocked by mountains of wreckage. In this zone, many people would be killed or injured in building collapses, or trapped under the rubble; many more would be burned, blinded, or injured by flying debris. In many cases, their charred skin would become ragged and fall off in sheets. The effects of the detonation would act in deadly synergy. The smashed materials of buildings broken by the blast would be far easier for the fires to ignite than intact structures. The effects of radiation would make it far more difficult for burned and injured people to recover. The combination of burns, radiation, and physical injuries would cause far more death and suffering than any one of them would alone. The silent killer. The bomb’s immediate effects would be followed by a slow, lingering killer: radioactive fallout. A bomb detonated at ground level would dig a huge crater, hurling tons of earth and debris thousands of feet into the sky. Sucked into the rising fireball, these particles would mix with the radioactive remainders of the bomb, and over the next few hours or days, the debris would rain down for miles downwind. Depending on weather and wind patterns, the fallout could actually be deadlier and make a far larger area unusable than the blast itself. Acute radiation sickness from the initial radiation pulse and the fallout would likely affect tens of thousands of people. Depending on the dose, they might suffer from vomiting, watery diarrhea, fever, sores, loss of hair, and bone marrow depletion. Some would survive; some would die within days; some would take months to die. Cancer rates among the survivors would rise. Women would be more vulnerable than men—children and infants especially so. Much of the radiation from a nuclear blast is short-lived; radiation levels even a few days after the blast would be far below those in the first hours. For those not killed or terribly wounded by the initial explosion, the best advice would be to take shelter in a basement for at least several days. But many would be too terrified to stay. Thousands of panic-stricken people might receive deadly doses of radiation as they fled from their homes. Some of the radiation will be longer-lived; areas most severely affected would have to be abandoned for many years after the attack. The combination of radioactive fallout and the devastation of nearly all life-sustaining infrastructure over a vast area would mean that hundreds of thousands of people would have to evacuate. Ambulances to nowhere. The explosion would also destroy much of the city’s ability to respond. Hospitals would be leveled, doctors and nurses killed and wounded, ambulances destroyed. (In Hiroshima, 42 of 45 hospitals were destroyed or severely damaged, and 270 of 300 doctors were killed.) Resources that survived outside the zone of destruction would be utterly overwhelmed. Hospitals have no ability to cope with tens or hundreds of thousands of terribly burned and injured people all at once; the United States, for example, has 1,760 burn beds in hospitals nationwide, of which a third are available on any given day. And the problem would not be limited to hospitals; firefighters, for example, would have little ability to cope with thousands of fires raging out of control at once. Fire stations and equipment would be destroyed in the affected area, and firemen killed, along with police and other emergency responders. Some of the first responders may become casualties themselves, from radioactive fallout, fire, and collapsing buildings. Over much of the affected area, communications would be destroyed, by both the physical effects and the electromagnetic pulse from the explosion. Better preparation for such a disaster could save thousands of lives—but ultimately, there is no way any city can genuinely be prepared for a catastrophe on such a historic scale, occurring in a flash, with zero warning. Rescue and recovery attempts would be impeded by the destruction of most of the needed personnel and equipment, and by fire, debris, radiation, fear, lack of communications, and the immense scale of the disaster. The US military and the national guard could provide critically important capabilities—but federal plans assume that “no significant federal response” would be available for 24-to-72 hours. Many of those burned and injured would wait in vain for help, food, or water, perhaps for days. The scale of death and suffering. How many would die in such an event, and how many would be terribly wounded, would depend on where and when the bomb was detonated, what the weather conditions were at the time, how successful the response was in helping the wounded survivors, and more. Many estimates of casualties are based on census data, which reflect where people sleep at night; if the attack occurred in the middle of a workday, the numbers of people crowded into the office towers at the heart of many modern cities would be far higher. The daytime population of Manhattan, for example, is roughly twice its nighttime population; in Midtown on a typical workday, there are an estimated 980,000 people per square mile. A 10-kiloton weapon detonated there might well kill half a million people—not counting those who might die of radiation sickness from the fallout. (These effects were analyzed in great detail in the Rand Corporation’s Considering the Effects of a Catastrophic Terrorist Attack and the British Medical Journal’s “Nuclear terrorism.”) On a typical day, the wind would blow the fallout north, seriously contaminating virtually all of Manhattan above Gramercy Park; people living as far away as Stamford, Connecticut would likely have to evacuate. Seriously injured survivors would greatly outnumber the dead, their suffering magnified by the complete inadequacy of available help. The psychological and social effects—overwhelming sadness, depression, post-traumatic stress disorder, myriad forms of anxiety—would be profound and long-lasting. The scenario we have been describing is a groundburst. An airburst—such as might occur, for example, if terrorists put their bomb in a small aircraft they had purchased or rented—would extend the blast and fire effects over a wider area, killing and injuring even larger numbers of people immediately. But an airburst would not have the same lingering effects from fallout as a groundburst, because the rock and dirt would not be sucked up into the fireball and contaminated. The 10-kiloton blast we have been discussing is likely toward the high end of what terrorists could plausibly achieve with a crude, improvised bomb, but even a 1-kiloton blast would be a catastrophic event, having a deadly radius between one-third and one-half that of a 10-kiloton blast. These hundreds of thousands of people would not be mere statistics, but countless individual stories of loss—parents, children, entire families; all religions; rich and poor alike—killed or horribly mutilated. Human suffering and tragedy on this scale does not have to be imagined; it can be remembered through the stories of the survivors of the US atomic bombings of Hiroshima and Nagasaki, the only times in history when nuclear weapons have been used intentionally against human beings. The pain and suffering caused by those bombings are almost beyond human comprehension; the eloquent testimony of the Hibakusha—the survivors who passed through the atomic fire—should stand as an eternal reminder of the need to prevent nuclear weapons from ever being used in anger again. Global economic disaster. The economic impact of such an attack would be enormous. The effects would reverberate for so far and so long that they are difficult to estimate in all their complexity. Hundreds of thousands of people would be too injured or sick to work for weeks or months. Hundreds of thousands more would evacuate to locations far from their jobs. Many places of employment would have to be abandoned because of the radioactive fallout. Insurance companies would reel under the losses; but at the same time, many insurance policies exclude the effects of nuclear attacks—an item insurers considered beyond their ability to cover—so the owners of thousands of buildings would not have the insurance payments needed to cover the cost of fixing them, thousands of companies would go bankrupt, and banks would be left holding an immense number of mortgages that would never be repaid. Consumer and investor confidence would likely be dramatically affected, as worried people slowed their spending. Enormous new homeland security and military investments would be very likely. If the bomb had come in a shipping container, the targeted country—and possibly others—might stop all containers from entering until it could devise a system for ensuring they could never again be used for such a purpose, throwing a wrench into the gears of global trade for an extended period. (And this might well occur even if a shipping container had not been the means of delivery.) Even the far smaller 9/11 attacks are estimated to have caused economic aftershocks costing almost $1 trillion even excluding the multi-trillion-dollar costs of the wars that ensued. The cost of a terrorist nuclear attack in a major city would likely be many times higher. The most severe effects would be local, but the effects of trade disruptions, reduced economic activity, and more would reverberate around the world. Consequently, while some countries may feel that nuclear terrorism is only a concern for the countries most likely to be targeted—such as the United States—in reality it is a threat to everyone, everywhere. In 2005, then-UN Secretary-General Kofi Annan warned that these global effects would push “tens of millions of people into dire poverty,” creating “a second death toll throughout the developing world.” One recent estimate suggested that a nuclear attack in an urban area would cause a global recession, cutting global Gross Domestic Product by some two percent, and pushing an additional 30 million people in the developing world into extreme poverty. Desperate dilemmas. In short, an act of nuclear terrorism could rip the heart out of a major city, and cause ripple effects throughout the world. The government of the country attacked would face desperate decisions: How to help the city attacked? How to prevent further attacks? How to respond or retaliate? Terrorists—either those who committed the attack or others—would probably claim they had more bombs already hidden in other cities (whether they did or not), and threaten to detonate them unless their demands were met. The fear that this might be true could lead people to flee major cities in a large-scale, uncontrolled evacuation. There is very little ability to support the population of major cities in the surrounding countryside. The potential for widespread havoc and economic chaos is very real. If the detonation took place in the capital of the nation attacked, much of the government might be destroyed. A bomb in Washington, D.C., for example, might kill the President, the Vice President, and many of the members of Congress and the Supreme Court. (Having some plausible national leader survive is a key reason why one cabinet member is always elsewhere on the night of the State of the Union address.) Elaborate, classified plans for “continuity of government” have already been drawn up in a number of countries, but the potential for chaos and confusion—if almost all of a country’s top leaders were killed—would still be enormous. Who, for example, could address the public on what the government would do, and what the public should do, to respond? Could anyone honestly assure the public there would be no further attacks? If they did, who would believe them? In the United States, given the practical impossibility of passing major legislation with Congress in ruins and most of its members dead or seriously injured, some have argued for passing legislation in advance giving the government emergency powers to act—and creating procedures, for example, for legitimately replacing most of the House of Representatives. But to date, no such legislative preparations have been made. In what would inevitably be a desperate effort to prevent further attacks, traditional standards of civil liberties might be jettisoned, at least for a time—particularly when people realized that the fuel for the bomb that had done such damage would easily have fit in a suitcase. Old rules limiting search and surveillance could be among the first to go. The government might well impose martial law as it sought to control the situation, hunt for the perpetrators, and find any additional weapons or nuclear materials they might have. Even the far smaller attacks of 9/11 saw the US government authorizing torture of prisoners and mass electronic surveillance. And what standards of international order and law would still hold sway? The country attacked might well lash out militarily at whatever countries it thought might bear a portion of responsibility. (A terrifying description of the kinds of discussions that might occur appeared in Brian Jenkins’ book, Will Terrorists Go Nuclear?) With the nuclear threshold already crossed in this scenario—at least by terrorists—it is conceivable that some of the resulting conflicts might escalate to nuclear use. International politics could become more brutish and violent, with powerful states taking unilateral action, by force if necessary, in an effort to ensure their security. After 9/11, the United States led the invasions of two sovereign nations, in wars that have since cost hundreds of thousands of lives and trillions of dollars, while plunging a region into chaos. Would the reaction after a far more devastating nuclear attack be any less?

### Solvency---1AC

#### The United States federal government should substantially increase its antitrust prohibitions on anticompetitive petitioning not protected by the Constitution.

#### The plan solves---it prohibition under antitrust requires the exact determination of the First Amendment. Reinstates congressional intent, ends free-floating judicial doctrine, and creates court consistency. FTC has called for the plan.

Tim Wu 20. Isidor and Seville Sulzbacher Professor of Law at Columbia Law School. “Antitrust and Corruption: Overruling Noerr”. https://knightcolumbia.org/content/antitrust-and-corruption-overruling-noerr

III. Reasons to overrule Noerr

The problem of Noerr’s expansion is hardly unrecognized by commentators. Even Robert Bork’s Antitrust Paradox, not generally understood as a manual for vigorous antitrust enforcement, suggested that Noerr had gone too far in its licensing of anticompetitive conduct. There have, over the years, been several prominent calls for courts to adjust or narrow the Noerr doctrine, including a study by the FTC in 2006, but the calls for substantive reform have had influence only at the margins.

If it can be accepted that Noerr has gone beyond any defensible basis in the First Amendment, there are three good reasons to overrule it. The first and most obvious is the duty of the courts to apply the Sherman Act and similar laws as Congress intended. The text of the statute does not contain exceptions for seeking monopolization or restraint of trade through governmental means. And as suggested earlier, the legislative history of the antitrust laws does not suggest a Congress that wanted to exempt bribery, deception, or other abuses from antitrust scrutiny. Noerr has therefore prevented government from confronting some of the problems that the antitrust laws were meant to solve.

The second reason to overrule Noerr is to ensure greater consistency in the courts. As it stands, some courts consider First Amendment limits when deciding Noerr cases, but others feel free to treat Noerr as a free-floating doctrine that can be extended regardless of its basis in the First Amendment. The current approach is a recipe for inconsistency and circuit splits.

When facing a case involving alleged political activity, a court would break the analysis into its constituent parts, so that it becomes obvious whether any given ruling is statutory or constitutional. One would first ask whether the conduct in question represents an activity that Congress meant to prohibit in Section 1 or 2 of the Sherman Act, Section 3 or 7 of the Clayton Act, or Section 5 of the FTC Act. Once that is done, the court can then consider whether the conduct is nonetheless protected by the First Amendment, relying on established First Amendment doctrine. Doing this would not allow courts to mix the issues and consequently avoid analysis of either.

The third reason is related: maintaining the coherence of the respective constitutional and statutory doctrines. Because Noerr does not clearly call for either, it creates a pronounced danger of doctrinal creep. To the extent that protected speech or petitioning under the First Amendment is implicated, the First Amendment’s own jurisprudence is best suited to provide an answer. To the degree that hard statutory questions are presented—just when is anticompetitive bribery a violation of the FTC Act?—such questions should be answered, as opposed to brushed away with a citation to Noerr.

An alternative to overruling Noerr is to demand that courts consider the First Amendment in the course of applying Noerr immunity. This is better than the current state of affairs but has the problem of being too convoluted. Take the bribery case described earlier. It would require the court, in the midst of an antitrust analysis, to consider the scope of any constitutional right to bribery, potentially to create a bribery exception (or to expand the sham exception) and then return to the antitrust point. It is simpler, as is the normal style, to assess whether the conduct in question violates the law and, if so, whether it is nonetheless protected by the First Amendment and then, if so, whether the government’s interests outweigh the speech interests.

#### Noerr is what enables judge-made free-floating immunity.

Tim Wu 20. Isidor and Seville Sulzbacher Professor of Law at Columbia Law School. “Antitrust and Corruption: Overruling Noerr”. https://knightcolumbia.org/content/antitrust-and-corruption-overruling-noerr

If superficially appealing, this logic evaporates on further inspection. To pursue monopoly is not the same thing as to pursue it corruptly, but the view just described brushes over the difference. As already discussed, the framers of the Sherman Act considered the activity of corruptly seeking state-granted monopolies to be within the concerns of the law, especially through bribery, threats, or deception. Even if government can override the antitrust laws, it does not necessarily follow that the courts need immunize efforts to obtain state action, especially if they should go beyond the normal protections for advocacy provided by the First Amendment.

This conclusion is reinforced by examining immunities outside of the antitrust context where there is no such blanket “corollary” to be found. The government, unlike a private citizen, has special immunities when it puts people to death or seizes property. Yet those seeking to convince government to use those powers enjoy no special immunity to bribery laws, lobbying laws, or other criminal prohibitions. They have, instead, only the protections for political advocacy that come from the First Amendment. The existence of a government power has, outside of antitrust, never been read as a license to pursue it using independently illegal means. It all returns to the question of what the First Amendment protects, which returns us to the case for overruling Noerr.

These are conclusions that are further buttressed by the Court’s recognition of a sham exception in Noerr.36 Were Noerr meant to be the perfect mirror image of Parker, it might be thought that any purported effort to influence government, no matter how distasteful, might be thought to be immunized. But the sham exception better suggests First Amendment avoidance, because it tracks the well-known position that the First Amendment has limits and does not protect everything that might plausibly be described as speech or petitioning. The sham exception looks very much like a placeholder for the limits of the First Amendment. Just as conduct falsely claiming to be speech is not protected by the First Amendment, anticompetitive activity falsely claiming to be political petitioning is not afforded undue protection.37

Additional cases finding fraud on the government to be actionable under the antitrust laws support the idea that Noerr relied on constitutional avoidance. In Walker Process, a party was alleged to have intentionally lied to the patent office about the state of the “prior art” so as to obtain a patent.38 The Court declined to create any special immunity for such conduct, instead stating that “the enforcement of a patent procured by fraud on the Patent Office may be violative of § 2 of the Sherman Act provided the other elements necessary to a §2 case are present.”39 That result impeaches any idea that the Sherman Act was not meant to reach efforts to defraud government for anticompetitive purposes.

All this suggests that while constitutional avoidance may be appropriate in some cases, it was mistaken in Noerr, because Noerr was hardly a one-off. It gave birth to a judge-made immunity and in the process left a critical matter undetermined: whether a court, invoking Noerr, need rely on constitutional avoidance to do so, and thereby conduct a First Amendment analysis, or whether it was free to just invoke Noerr as a free-floating immunity. The latter would, in time, allow the immunity to expand far beyond any constitutional or statutory mandate.

A different way of stating the critique is this: Noerr does not give the courts the tools or mandate to address the competing values of the First Amendment and the antitrust laws in the cases it addresses. Unlike, say, the overlap between patent and antitrust, where the conflict is made explicit, it was instead buried by constitutional avoidance. That burial would lead the courts to expand the immunity in directions entirely unrelated to First Amendment values, a matter to which we now turn.

# 2AC

## SOP Advantage

#### Congress is key---groupthink outweighs any benefits of exec flex.

David Gray Adler 8, Professor of Political Science at Idaho State University, “The Judiciary and Presidential Power in Foreign Affairs: A Critique”, 6-1, http://www.freerangethought.com/index.php?option=com\_content&task=blogsection&id=6&Itemid=41

{11} The structure of shared powers in foreign relations serves to deter abuse of power, misguided policies, irrational action, and unaccountable behavior.[[31]](http://www.urich.edu/%7Eperspec/adler.htm#31) As a fundamental matter, emphasis on joint policymaking permits the airing of sundry political, social, and economic values and concerns. Such a structure wisely ensures that the ultimate policies will not merely reflect the private preferences or the short-term political interests of the President.[[32]](http://www.urich.edu/%7Eperspec/adler.htm#32) {12} Of course, this arrangement has come under fire in the postwar period on a number of policy grounds. Some have argued, for example, that fundamental political and technological changes in the character of international relations and the position of the United States in the world have rendered obsolete an eighteenth century document designed for a peripheral, small state in the European system of diplomatic relations. Moreover, it has been asserted that quick action and a single, authoritative voice are necessary to deal with an increasingly complex, interdependent, and technologically linked world capable of almost instantaneous massive destruction. Extollers of presidential dominance also have contended that only the President has the qualitative information, the expertise, and the capacity to act with the necessary dispatch to conduct U.S. foreign policy.[[33]](http://www.urich.edu/%7Eperspec/adler.htm#33) {13} These policy arguments have been reviewed, and discredited, elsewhere; space limitations here permit only a brief commentary.[[34]](http://www.urich.edu/%7Eperspec/adler.htm#34NAME=) Above all else, the implications of U.S. power and action in the twentieth century have brought about an even greater need for institutional accountability and collective judgment than existed two hundred years ago. The devastating, incomprehensible destruction of nuclear war and the possible extermination of the human race demonstrate the need for joint participation in any decision to initiate war. Moreover, most of the disputes at stake between the executive and legislative branches in foreign affairs have virtually nothing to do with the need for rapid response to crisis. Rather, they are concerned only with routine policy formulation and execution, a classic example of the authority exercised under the separation of powers doctrine.[[35]](http://www.urich.edu/%7Eperspec/adler.htm#35) {14} Nevertheless, these joint functions have been fused by the executive branch and have become increasingly unilateral, secretive, insulated from public debate, and hence unaccountable.[[36]](http://www.urich.edu/%7Eperspec/adler.htm#36) In the wake of Vietnam, Watergate, and the Iran-contra scandal, unilateral executive behavior has become ever more difficult to defend. Scholarly appraisals have destroyed arguments about intrinsic executive expertise and wisdom in foreign affairs and the alleged superiority of information available to the President.[[37]](http://www.urich.edu/%7Eperspec/adler.htm#37) Moreover, the inattentiveness of presidents to important details and the effects of "groupthink" that have dramatized and exacerbated the relative inexperience of various presidents in international relations have also devalued the extollers' arguments. Finally, foreign policies, like domestic policies, are reflections of values. Against the strength of democratic principles, recent occupants of the White House have failed to demonstrate the superiority of their values in comparison to those of the American people and their representatives in Congress. {15} The assumption of foreign affairs powers by recent presidents represents a fundamental alteration of the Constitution that is both imprudent and dangerous. We turn now to an examination of the judiciary's contribution to executive hegemony in foreign affairs.

#### Congress solves adventurism---it escalates---action now is key.

Stephen Pomper and Tess Bridgeman 19. Stephen Pomper is senior director for policy at the International Crisis Group. During the Obama administration, he served on the staff of the National Security Council as special assistant to the president and senior director for multilateral affairs and human rights. Prior to joining the staff of the National Security Council, he was the assistant legal adviser for political-military affairs at the Department of State. Tess Bridgeman is senior editor at Just Security and senior fellow and visiting scholar at New York University Law School’s Reiss Center on Law and Security. She served as special assistant to President Barack Obama, associate counsel to the president, and deputy legal adviser to the National Security Council. She previously served at the Department of State’s Office of the Legal Adviser where she was special assistant to the legal adviser and, prior to that role, an attorney adviser in the Office of Political-Military Affairs. 1. "Introduction: The War Powers Resolution," by Tess Bridgeman and Stephen Pomper. Policy Roundtable: The War Powers Resolution. https://tnsr.org/roundtable/policy-roundtable-the-war-powers-resolution/

Hathaway sees things differently, arguing that the current system both betrays constitutional design and inappropriately shields U.S. military operations from democratic accountability. To these concerns we would add one further: It coarsens U.S. sensibilities when it comes to the consequences of military action. While Congress has generally authorized major ground wars, the presence of U.S. “boots on the ground” is not the only metric by which the seriousness of U.S. engagement in conflict should be assessed.

We submit that “seriousness” should take into account not just the risk of an operation to U.S. forces (although that is certainly critically important), but also the geopolitical consequences, the risk of escalation, and the risk to civilian populations. An operation that does not imperil U.S. lives could, after all, still spark a humanitarian disaster, result in the deaths of thousands of civilians, implicate the United States in wartime atrocities, create power vacuums filled by armed groups, or generate enormous ill will among locals. Yemen is a case in point for most if not all of those concerns. Waxman’s piece calls our attention to this set of issues, noting that so-called “minor” conflicts can, in fact, have major consequences, though he does not recommend war powers reform as the right way to get Congress to pay more attention.

This brings us to our final point, which is to question whether there is in fact a better way. It may well be that the ultimate key to better policy on matters of war and peace is an improved politics — one in which well-informed citizens elect members of Congress who play the policing role that we would wish for them. But under the current framework, neither Congress nor American voters necessarily have a full picture of how the United States is operating militarily around the world or what the associated costs are. That makes the more enlightened politics that are a prerequisite for a more responsible Congress difficult to generate.

We believe war powers reform can help with this. By forcing members of Congress to take responsibility — including taking more votes — on a broader range of conflicts, a reformed War Powers Resolution would create more reasons for members to seek information about the conflicts in question, more opportunities for civil society to engage the political process, and more openings for journalists to share that information with the public. In this sense, war powers reform may not be sufficient to produce a more thoughtful U.S. approach to engagement in armed conflict, but it could well be necessary.

Whether or not it is achievable is a separate question, but we would not write off the possibility. For one thing, the politics of the moment — the growing frustration with endless war Hathaway notes coupled with nervousness about Trump that Waxman describes — has created openings that might have been difficult to imagine even a few years ago.

In order for reform to happen, reformers will need to plant the flag on a set of concrete goals and begin the hard and patient work of trying to make them realizable. There is, of course, no guarantee of success. But in a world that has been too much shaped and bruised by U.S. missteps in Yemen, Libya, and the so-called forever war, can America really afford not to try?

## Bribery Advantage

## T Prohibit

#### Prohibit can mean ‘severely hinder’---doesn’t necessitate a ban.

Washington Court of Appeals 19 (KORSMO-judge. Opinion in State v. Kimball, No. 35441-5-III (Wash. Ct. App. Apr. 2, 2019). Google scholar caselaw. Date accessed 7/13/21).

His argument runs counter to the meaning of the word "prohibit." It means "1. To forbid by law. 2. To prevent, preclude, or severely hinder." BLACK'S LAW DICTIONARY 1405 (10th ed. 2014). As "severely hinder" suggests, a "prohibition" need not be an all or nothing proposition.

#### Prohibition includes per se and rule of reason.

Anu Bradford and Adam S. Chilton 18. Anu Bradford Henry L. Moses Professor of Law and International Organization, Columbia Law School. Adam S. Chilton. Assistant Professor of Law and Walter Mander Research Scholar.

Before discussing our data and the coding of the CLI, it is important to recognize that there are limitations to any index that attempts to quantify competition regulation. This is because it is difficult to produce a single metric that tells the comprehensive story of country’s competition regime. For example, if a specific type of conduct is prohibited, is it prohibited always (per se) or sometimes (rule of reason)? This seems like a relevant distinction to code, but it turns out to be difficult to capture systematically in many jurisdictions. For instance, Article 101(3) of the Treaty on the Functioning of the European Union (TFEU) seems to regulate anticompetitive agreements under the rule of reason standard in the European Union, but, in practice, cartels are per se prohibited. This highlights the challenge of coding even just the law in books, let alone accounting for all the nuances of a country’s competition policies.20

#### 4. Grammar---“by” means expanding antitrust is the way in which we prohibit---making it illegal under antitrust should be sufficient.

Crown Academy of English 18, (Andrew, Fully qualified English teacher with TESOL (Teaching English to Speakers of Other Languages) qualification. “Preposition BY – Meaning and use”, https://www.crownacademyenglish.com/preposition-by-meaning-use/)

by + ING form of verb

This describes how to do something. It describes the method for achieving a a particular result.

## Multilat CP/Trade DA

#### The counterplan is impossible---perm is better.

Anu Bradford 11. Henry L. Moses Professor of Law and International Organization and director of the European Legal Studies Center at Columbia Law School, Senior Scholar at Columbia Business School’s Jerome A. Chazen Institute for Global Business, a nonresident scholar at Carnegie Endowment for International Peace, heads the Comparative Competition Law Project, was an Assistant Professor at the The University of Chicago Law School, practiced EU and antitrust law in Brussels, served as an adviser on economic policy in the Parliament of Finland, and served as an expert assistant at the European Parliament. “International Antitrust Cooperation and the Preference for Nonbinding Regimes”. COOPERATION, COMITY, AND COMPETITION POLICY, ANDREW T. GUZMAN, ED., OXFORD UNIVERSITY PRESS (2011). https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=2966&context=faculty\_scholarship

This article has argued that the pursuit of nonbinding international antitrust cooperation represents an optimal choice for states. It is not merely an opportunity to capture limited gains from cooperation while proceeding towards a binding international agreement, as is commonly perceived. States’ conflicting preferences over the optimal content of international antitrust cooperation is the primary impediment for negotiating binding antitrust rules in the WTO. States have sought to accommodate their divergent preferences by removing controversial issues from the negotiation agenda. However, this has led to proposals for watered-down rules that would confer trivial benefits to WTO member states. Because states expect low net benefits from a prospective WTO antitrust agreement, states have abandoned the negotiations to seek case-by-case cooperation and voluntary international guidelines instead. Nonbinding cooperation has successfully fostered international antitrust convergence. A growing number of states enforce increasingly consistent antitrust rules today without any binding international agreement requiring them to do so. Eventually, successful voluntary convergence could pave the way for binding cooperation. However, this article has argued that nonbinding agreements are likely to persist for three primary reasons. First, as cooperation under nonbinding agreements is largely self-enforcing, the added value of a binding agreement with provisions for monitoring, enforcement, and sanctions is trivial. Second, in the absence of coordinated domestic interest group support for international antitrust cooperation, a binding agreement would not provide states with any domestic political economy rents and therefore will remain a low national priority. Finally, the emerging voluntary convergence will slowly eradicate negative externalities stemming from decentralized antitrust regimes, making the case for a binding international agreement less compelling. By arguing that nonbinding agreements are preferable to binding agreements, even in situations where binding agreements are feasible, this article disputes the view that nonbinding agreements are second-best instruments for fostering international antitrust convergence. States have not chosen nonbinding agreements because their first-best regime choice has been unavailable. Instead, states have viewed binding agreements as unnecessary and undesirable. An optimal institutional design must be consistent with state interests to be effective. By acknowledging both the difficulties involved in the pursuit of binding international antitrust cooperation and the ability of nonbinding agreements to mitigate those difficulties, this article raises two critical questions. First, given the obstacles to international antitrust cooperation, how could a binding agreement emerge? And second, assuming that a binding agreement could emerge, what would it add to the existing nonbinding international antitrust regime? Until the proponents of a binding international antitrust agreement can answer those questions, nonbinding cooperation is, and will likely remain, the preferred solution.

#### No link---antitrust laws rarely apply extraterritorially AND when they do its cooperative!

OECD 17. OECD Directorate For Financial And Enterprise Affairs Competition Committee. “Roundtable on the Extraterritorial Reach of Competition Remedies - Note by the United States”. FTC. 4-5 December 2017. https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/et\_remedies\_united\_states.pdf

4. The U.S. Agencies require relief sufficient to eliminate identified anticompetitive harm that has the requisite connection to U.S. commerce and consumers, even if this means reaching assets or conduct in a foreign jurisdiction.7 For example, in the merger context, a company may be required to divest a manufacturing plant outside of the U.S. in order to help preserve competition in the U.S. At the same time, Section 5.1.5 of the International Guidelines sets out a balanced standard for the Agencies’ reliance on extraterritorial remedies that “limits overly broad extraterritorial reach, while recognizing and allowing for effective enforcement.” 8 To this end, the International Guidelines provide that: The Agencies seek remedies that effectively address harm or threatened harm to U.S. commerce and consumers, while attempting to avoid conflicts with remedies contemplated by their foreign counterparts. An Agency will seek a remedy that includes conduct or assets outside the United States only to the extent that including them is needed to effectively redress harm or threatened harm to U.S. commerce and consumers and is consistent with the Agency’s international comity analysis.9 5. This statement sets out a number of important guiding principles. First, the Agencies always look first to resolve anticompetitive concerns through domestic remedies. 6. Second, the Agencies will seek an extraterritorial remedy only when: (1) the extraterritorial remedy is needed to address harm or threatened harm to U.S. commerce and consumers, and (2) such a remedy is consistent with the Agency’s comity analysis. Thus, the Agencies’ general practice is to seek an effective remedy that is restricted to the United States, which the Agencies believe is the best approach. Only when a domestic remedy cannot effectively redress the harm or threatened harm to U.S. commerce or consumers will the Agencies consider broader remedies that have extraterritorial effect. 7. The International Guidelines explain that comity can be a consideration in the Agencies’ remedy determinations. Comity “reflects the broad concept of respect among co-equal sovereign nations and plays a role in determining ‘the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation.’”10 The U.S. Supreme Court has held that no conflict exists for purposes of international comity analysis if a person subject to regulation by two nations can comply with the laws of both.11 In addition, even where there is no direct conflict, “the Agencies will assess the articulated interests and policies of a foreign sovereign beyond whether there is a conflict with foreign law.” 12 Comity has not been a significant factor in the Agencies’ remedy determinations involving more than one sovereign because of

the high degree of international convergence in competition law and policy. Convergence has reduced the number of direct conflicts, including on remedies. 8. Third, the Agencies seek to avoid conflicts with remedies contemplated by their foreign counterparts, notably through cooperation. The International Guidelines specifically provide that the Agencies “may cooperate with other authorities, to the extent permitted under U.S. law, to facilitate obtaining effective and non-conflicting remedies.”13 Cooperation “can improve substantive analyses and ensure that investigations and remedies are as consistent and predictable as possible, which improves outcomes, and reduces uncertainty and expense to firms doing business across borders.”14 Divergent remedies have the potential to impair firms’ abilities to compete globally and can undermine competition enforcement efforts. In many cases, particularly those involving extraterritorial remedies, cooperation and coordination are important to an effective outcome and improve understanding of each of the cooperating authorities’ needs and proposed decisions. 15 Information exchange among enforcers investigating the same conduct enables the Agencies to understand each other’s decisions in a case and any impact on U.S. commerce. 16 Cooperation has also facilitated informal and practical approaches to limiting duplication, including by one authority’s closing of its investigation without remedies after taking another authority’s remedy into account. 17 9. Consequently, if an extraterritorial remedy is contemplated in a particular case, these principles, as provided in the International Guidelines, allow the Agencies to ensure that the remedy is appropriately tailored to address the identified competitive harm to U.S. commerce and consumers without unnecessarily conflicting with the laws, policies, or remedies of foreign jurisdictions. 10. Specific examples of Agency cooperation on remedies are discussed at Part VI.

#### Decades of unilateral application thump.

Virginia del Aguila 05. “Establishing Global Competition Standards: Achievable Mission or Utopia?” Centro de Estudios Economicos de Regulacion. Universidad Argentina de la Empresa. Working Paper N 20. April 2005. <https://www.uade.edu.ar/DocsDownload/Publicaciones/4_228_1634_WPS020_2005.pdf>

The competition authorities in the US have had **little compunction** about enforcing their antitrust laws against overseas companies. In this sense, they have in some occasions demanded that commercial documents located abroad should be handed over, and the **Courts have even issued final orders** requiring that foreign companies should **change their commercial practices or restructure their industry**41. Nonetheless, it should be noted that the 1994 International Antitrust Enforcement Assistance Act (IAEAA)42 is intended to improve the ability of the US enforcement agencies to obtain evidence located abroad by providing for reciprocal agreements to be entered between the US and other countries to facilitate the exchange of information, including confidential information. Notwithstanding, due to the fact that certain antitrust offences are criminal under US law and, thus, it is possible for individuals to be sentenced to terms of imprisonment, for the moment only an agreement between the US and Australia was concluded under the IAEAA.

#### There’s no extraterritorial conflict.

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In the past 15 years, the level of hostility has **reduced considerably** due to a number of factors.[325] First, a growing number of **states now recognise that anti-competitive activities** — most notably hard core cartels, which until recently made up most of the international cases — **are bad for their own economies**.[326] This growing recognition has produced a rush of **new competition regimes**. It has also **fostered a spirit of cooperation**, resulting in a number of collaborative initiatives, including positive comity.[327] Second, a number of states have indicated that they are prepared to **apply their competition laws extraterritorially**; this has tended to **mute complaints by those states against US extraterritorialism.** Third, US antitrust authorities and, more recently but to a lesser degree, US courts, have become more sensitive to the legitimate concerns of other states.[328] The consequence is that competition law extraterritorialism is no longer necessarily just a matter of aggressive unilateralism. **It can, and often does, operate in a cooperative environment; it is no longer just a US phenomenon.**

#### No trade impact.

Joel **Einstein 17**. Australian National University. 01-17-17. “Economic Interdependence and Conflict – The Case of the US and China.” E-International Relations. <http://www.e-ir.info/2017/01/17/economic-interdependence-and-conflict-the-case-of-the-us-and-china/>

In 1913, Norman Angell declared that the use of military force was now economically futile as international finance and trade had become so interconnected that harming the enemy’s property would equate to harming your own.[1] A year later Europe’s economically interconnected states were embroiled in what would later become known as the First World War. Almost a century later Steven Pinker made a similar claim. Pinker argues, “Though the relationship between America and China is far from warm, we are unlikely to declare war on them or vice versa. Morality aside, they make too much of our stuff and we owe them too much money.”[2] His argument rests upon the liberal assumption that high levels of trade and investment between two states, in this case the US and China, will make war unlikely, if not impossible. It is this assumption that this essay seeks to evaluate. This essay is divided into three sections. The first briefly outlines the theory that economic interdependence results in a reduced likelihood of conflict, breaking the theory down into smaller components that can be examined. In the second section, this essay suggests that the premise ‘more trade equals less conflict’ is simplistic. It does not take into account many of the variables that can influence the strength of economic interdependence’s conflict reducing attributes. Within this section, the essay considers: the extent to which conflict cuts off trade, theories arguing that how and what a state trades matters, Copeland’s theory of trade expectations and the differences between status quo and revisionist states. The final section deals with the realist perspective, concentrating on arguments pertaining to the primacy of strategic interests and arguments that economic interdependence will increase the likelihood of conflict owing to a reduction of deterrence credibility. Each section will be related back to the US-China relationship with a view to assessing Pinker’s claim. The essay will conclude that economic interdependence does reduce the likelihood of conflict but is insufficient on its own to completely prevent it. To calculate the likelihood of conflict correctly one would need to factor in the nature of the economic interdependence alongside the strength of the strategic interests at stake. Economic Interdependence and Conflict The theory that increased economic interdependence reduces conflict rests on three observations: trade benefits states in a manner that decision-makers value; conflict will reduce or completely cut-off trade; and that decision-makers will take the previous two observations into account before choosing to go to war. Based on these observations, one should expect that the higher the benefit of trade, the higher the cost of a potential conflict. After a certain point, the value of trade may become so high that the state in question has become economically dependent on another. Proponents of this theory argue that if two states have reached this point of mutual dependence (interdependence), their decision-makers will value the continuation of trade relations higher than any potential gains to be made through war.[3] It is on this argument that Pinker rests his statement that the economic relationship between the US and China precludes war. One can see evidence of this when analysing US views on China as trade rises. A 2014 Chicago Council on Global Affairs survey indicates that only a minority of Americans see China as a critical threat, compared to a majority in the mid-1990s. This number is even higher when analysing Americans who directly benefit from trade with China.[4] As compelling as this argument may be, high levels of economic interdependence have not always resulted in peace. The decades preceding WW1 saw an unprecedented growth in international trade, communication, and interconnectivity but needless to say, war broke out.[5] This instance alone is not enough to disprove Pinker’s logic. War may become very unlikely but began nonetheless.[6] Let us take two hypothetical scenarios, one in which the chances of war is 80% and the other in which trade has reduced the likelihood of war to 10%. Just knowing that war did indeed take place does not tell us which scenario was in play. Similarly, the fact that WW1 took place gives us no information about whether economic interdependence made war unlikely or not. In fact, evidence even exists to suggest that economic linkages prevented a war from breaking out during the sequence of crises that led up to WW1.[7] However, the fact that a war as detrimental as WW1 could break out despite a supposed reduction of the likelihood of conflict gives us an impetus to examine whether this reduction does take place. Additionally, if this is the case, what variables can weaken this pacifying effect? Does Conflict Cut off Trade? Economic interdependence theory makes the assumption that conflict will reduce or cut-off trade. This assumption appears to be logical, as one would expect that the moment two states are officially adversaries, fear of relative gains would ensure that policy makers want to completely cut-off trade. However, there are many historical examples of trade between warring states carrying on during wartime, including strategic goods that directly affect the ability of the enemy to carry out the war.[8] For example, in the Anglo-Dutch Wars, British insurance companies continued to insure enemy ships and paid to replace ships that were being destroyed by their own army.[9] Even during WW2, there are numerous examples of American firms continuing to trade strategic goods with Nazi Germany.[10] Barbieri and Levy argue that these examples and their own statistical analysis suggest that the outbreak of war does not radically reduce trade between enemies, and when it does, it often quickly returns to pre-war levels after the war has concluded.[11] In response to this result, Anderton and Carter conducted an interrupted time-series study on the effect war has on trade in which they analysed 14 major power wars and 13 non-major power wars. Seven of the non-major power wars negatively impacted trade (although only four of these reductions were significant), but in the major war category, all results bar one showed a reduction of trade during wartime and a quick return to pre-war levels at its conclusion.[12] Accompanying this contradictory finding one must take into account that even if war does not radically reduce trade, if a state believes that it does then potential opportunity cost would still figure in their calculations. Variables that Impact the Pacifying Effect of Economic Interdependence The purpose of this section is to demonstrate that the pacifying effect of economic interdependence is not constant. It achieves this via a discussion of the effect of changes in a number of variables pertaining to how and what a state trades. Once it is established that changes in such variables may alter the effect of economic interdependence on the likelihood of conflict, Pinker’s statement (that the level of trade between the US and China makes conflict unlikely) can be considered to be an over-simplification. One variable is the relative levels of economic dependence. Some argue that asymmetry of trade can increase the chances of conflict if the trade is more important to one state than it is to the other; their resolve would not be reduced by the same degree. The less dependent state would be far more willing than its adversary to initiate a conflict.[13] An example is the possibility of the prevalent idea in China that ‘Japan needs China more than China needs Japan’ leading to China becoming more assertive in Senkaku/Diaoyu islands dispute.[14] It is important to recognize that all trade is asymmetric in one fashion or another. It is radical asymmetry that one has to fear, which at the moment does not appear to be the case in the China-Japan or US-China case. Another variable is the specifics of what is being traded. A study by Dorussen suggests that the pacifying effect of trade is less evident if the trade consists of raw materials and agriculture but stronger if the trade consists of manufactured goods. Even within the category of manufactured goods there are differences in effect. Mass consumer goods yield the strongest pacifying results whilst high-technology sectors such as electronics and highly capital-intensive sectors such as transport and metal industries tend to have a relatively weak effect.[15] If it is a sector with alternative trade avenues then embargos and boycotts as a result of conflict will have far less effect.[16] The rule is that the more inelastic the import demand, the higher the opportunity cost and the smaller the probability of conflict.[17] According to these studies, trade still generally reduces the likelihood of conflict however it is by no means homogeneous in its effects. Additionally, the opportunity costs are not the same for importers and exporters. Dorussen’s study suggests that increased trade in oil tends to make the exporters more hostile and the importers friendlier in relations to their foreign policy.[18] Taking this framework into account, in 2014 China’s top five exports to the US (computers, broadcasting equipment, telephones and office machine parts) all fell under the category of electronics,[19] whilst the US’s top five exports to China (air and/or spacecraft, soybeans, cars, integrated circuits and scrap copper) were all either high-capital intensive sectors or raw materials and agriculture.[20] According to Dorussen’s study, these exports should not yield the strongest possible conflict reducing results, which could impact the validity of Pinker’s statement. Copeland presents another variable, namely expectations of trade. Copeland argues that if a highly dependent state expects future trade to be high, decision makers will behave as many liberals predict and treat war as a less appealing option. However if there are low expectations of future trade, then a highly dependent state will attach a low or even negative value to continued peaceful relations and war would become more likely.[21] As an example, he points out that despite high levels of trade in 1914 German leaders believed that rival great powers would attempt to undermine this trade in the future, so a war to secure control over raw materials was in the interests of German long-term security.[22] Via this framework, if the US began to believe that in future years they would be less dependent on China’s economy, or if it became apparent that a US-China trade war was about to take place, there would be a sharp rise in the probability of conflict. The final variable this essay will discuss relates to the differences between status quo and revisionist states. Most empirical analyses of economic interdependence tend to group together states as different as the United States, Pakistan, Australia, Germany and China and assume that variations in their behaviour would be the same.[23] Papayoanou on the other hand, argues that when analysing the effects of economic interdependence it is useful to differentiate the effects on great power states and states with revisionist aspirations.[24] If a status quo power has strong economic ties with revisionist state there will be interest groups who advocate engagement and who believe that confrontational stances will threaten the political foundation of economic links. This will constrain the response of the status quo state.[25] One can see evidence of such an interest group in the US, a group Friedberg describes as the Shanghai coalition, who he argues advocate engagement with China at the expense of balancing.[26] A study by Fordham and Kleinberg backs up this argument as they find that US business elites who benefit from trade with China tend to see little benefit in limiting the growth of Chinese power.[27] A 21st Century revisionist power is far less likely to be a democracy, and therefore, interest groups will influence the leadership far less. This means an authoritarian revisionist power will be working under fewer constraints and will be able to take a more aggressive stance.[28] This appears to be the case in China where rather than having domestic constraints on taking an aggressive stance against Japan, one of their biggest trading partners, grassroots nationalism has made explicit cooperation a domestically risky option.[29] There are many indicators to suggest that China is a revisionist power willing to wage war. Lemke and Werner argue that an extraordinary growth of military expenditures’ reveals when a state is dissatisfied with the status quo.[30] Data provided by the Stockholm International Peace Research Institute certainly indicates that China qualifies as its military expenditure has nominally increased by 1270% between 1995 and 2015.[31] Additionally, the military modernization appears to be aimed at capabilities to contest US primacy in East Asia.[32] Much like German strategists recognized that Britain was operating under significant domestic constraints, China could realize the same of the US.[33] This is not to say that Chinese decision-makers would be cavalier about making a decision that would be to the detriment its economy. A crash in the Chinese economy due to the loss of exports to the US could potentially undermine the legitimacy of the Chinese Communist party and endanger the regime. However, the view that China is a revisionist power indicates that good trade relations alone will not result in a low probability of conflict. Realist Arguments Pertaining to Dominance of Strategic Interests Having established that if the pacifying effect of trade does exist, it can rise or fall depending on changes in a series of variables this essay proceeds to deal with realist theories arguing that trade has a negligible or even negative effect on the likelihood of conflict. Buzan argues that noneconomic factors contribute far more to major phenomena than liberal theorists usually cite to support their theory.[34] There is evidence of the primacy of strategic interests in Masterson’s 2012 study on the relationship between China’s economic interdependence and political relations with its neighbours. The study concluded that as economic interdependence with neighbouring states increased the likelihood of conflict did indeed decrease, but that the impact was minimal when compared to the impact of relative power capabilities. In other words, political and military issues dominated interstate relations. Growth in power disparities were associated with decreases in dyadic political relations that were greater than the increase caused by economic interdependence.[35] If the pacifying effect of trade can rise and fall so can the provocative effect of strategic interests. It is important to distinguish between the existence of a strategic interest and a situation of unbearable strategic vulnerability. China and the US have many opposing strategic interests, but neither is in a strategically vulnerable position. For example, China shares many borders, but none present the same threat of invasion that Tsarist Russia did to Imperial Germany as none of the current maritime tensions between China, Japan, and the US equate to a matter of national survival.[36] This is crucial as some believe that for a crisis to escalate to a major war an actor who is isolated and believes that history is conspiring against them is needed. Only this actor would take an existential risk to try and offset their strategic vulnerability.[37] Imperial Germany fit this description, but neither China nor the US does. This is largely due to the geography of the region. The tension between the US, China and Japan are over maritime regions. Maritime issues still relate to national interests but, as Krause points out, “Land armies are still the only forces that can conquer and hold territory.”[38] Taking this into account one can argue that the benefits of US-China trade are, for each state, currently greater than the benefits of pursing strategic benefits via force, but this situation will only remain as long as the situation does not become one of unbearable strategic vulnerability. Realist Arguments Pertaining to the Undermining of Deterrence Having established that scenarios exist where strategic interests and vulnerabilities have a greater effect on the likelihood of war than economic interdependence, this essay will now evaluate arguments that economic interdependence can increase the likelihood of conflict through the undermining of deterrence. The argument proceeds as follows: if economic interdependence constrains the ability or willingness of a state to use its military, security is lowered as the state now has a weakened ability to engage in deterrence and defensive alliances. Deterrence relies on the ability of a state to make credible threats and defensive alliances rely on credible promises to protect one’s allies.[39] Credibility is defined as the product of the operational capability to follow through with a threat and the communication of resolve to use force.[40] What is at risk here is that if economic interconnectivity interferes with the communication of resolve to use force then states may end up with a way that neither side expected or wanted. Some argue that it was such a failure to communicate resolve that resulted in the beginning of WW1. Indeed, Jolly claims that: “The Austrians had believed that vigorous actions against Serbia and a promise of German support would deter Russia: the Russians had believed that a show of strength against Austria would both check the Austrians and deter Germany. In both cases, the bluff had been called and the three countries were faced with the military consequences of their actions.”[41] The risk in the US-China case would be that the interest groups described earlier would prevent the US from effectively communicating its resolve to use force if China were to cross a redline. The flaw in this argument lies in the fact that whilst interest groups might push back against public statements outlining redlines; the US has many less overt options available to it to communicate resolve. Modern technology and the forms of interconnectivity have resulted in many more lines of communication between China and the US than adversaries had access to in 1914. Private meetings, electronic communication and numerous other methods of communication have the capability to be candid without being visible to interest groups. It is for this reason that this essay discounts the theory that Sino-American economic interdependence results in a reduction of deterrence and therefore increases the likelihood of conflict. Conclusion This essay has shown that the strength of the pacifying effect of economic interdependence is subject to change depending on a series of dynamic variables. It has also demonstrated that the strength of the conflict provoking effects of strategic interests can change depending on whether the strategic interest amounts to a situation of unbearable strategic vulnerability. It has discounted the theory that interdependence leads to a higher chance of conflict through an erosion of credibility. To sum up, trade does seem to reduce the likelihood of conflict but should not be seen as a deterministic factor as strategic interests, and vulnerabilities also have a large effect. There is no hard rule as to what will be the driving factor as the nature of economic interdependence and of strategic factors impact their relative values. Accordingly, Pinker’s statement that the trade between the US and China makes war exceptionally unlikely is simplistic and misleading because it fails to account for a wide array of variables that can radically change the likelihood of a Sino-American war. An intellectually honest thesis would insist upon a comprehensive approach in which the level of economic activity is simply one of many variables that is required.

## Advantage CP

#### Noerr spills-over to other causes.

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THE **NOERR-PENNINGTON** DOCTRINE **provides immunity from antitrust laws** to those who petition the government through lobbying,1 the initiation of a lawsuit, or the submission of forms required for the approval of governmental action.2 **The doctrine has also been expanded to other causes of action.** Courts within the Ninth Circuit, for example, have held that the Noerr-Pennington doctrine is not limited to antitrust and **applies to all civil causes of action**.3 California state courts have also taken an expansive view of Noerr-Pennington and have routinely applied it to areas outside antitrust.4 Some have pushed for even **greater expansion of Noerr-Pennington immunity** and have recently attempted to persuade judges that the doctrine is not only a rule of liability but also a rule of evidence that can **shield statements that concern petitioning** from even being considered by a jury. However, the recent case of AMCORD v. Hernandez suggests that even courts that take an expansive view of Noerr-Pennington may be willing to push the doctrine only so far and no farther.5

#### If it limits Noerr it links to the net benefit, if not it gets struck down.

Michael Pemstein 14**.** Attorney, Quinn Emanuel Urquhart & Sullivan, LLP. “The Basis For Noerr-Pennington Immunity: An Argument That Federal Antitrust Law, Not The First Amendment, Defines The Boundaries Of Noerr-Pennington” <https://heinonline.org/HOL/LandingPage?handle=hein.journals/thurlr40&div=9&id=&page=>

The second type of error that may occur is not an error in result, but an error in reasoning. If the "proper" level of protection for petitioning activity in a non-antitrust cause of action happens to be the same level that would be required by the Noerr-Pennington doctrine, then while courts may reach the correct outcome by transposing the Noerr-Pennington doctrine outside the context of antitrust law, these courts will base this result on an improper analysis. Even though this is a mistake in reasoning and not in result, there still may be consequences. For example, courts which make this mistake may be avoiding constitutional questions concerning the proper scope and application of the First Amendment right to petition when they should be addressing them. This can occur because the Noerr-Pennington doctrine is primarily based on an interpretation of federal antitrust statutes and therefore it is imbued with statutory interpretation principles. These principles require courts to take a cautious approach and to be hesitant to attribute an intent to infringe or chill constitutionally protected freedoms to the legislature. For example, in Noerr, the Court avoided "difficult constitutional questions" by refusing to interpret the Sherman Act as imposing antitrust liability for political activities, noting that Congress had traditionally been hesitant to regulate such activities. 62 These statutory interpretation principles, however, are not applicable in petitioning immunity cases based on common law causes of action. The common law is the sole province of the judicial branch. By imputing these statutory interpretation principles into the realm of common law, courts, like the one in Theme Promotions,are shirking their institutional responsibility to address the "difficult constitutional questions" posed by petitioning immunity suits that are based on common law causes of action.163 As a result, the right to petition, an already underdeveloped area of law, will continue to be neglected, potentially compounding these problems in future petitioning immunity cases. Another consequence to this error in reasoning is that it attributes constitutional status to levels of protection which were primarily based on non-constitutional considerations**. As a result it entirely precludes Congress from changing the levels of protection afforded to petitioning activity in areas of law governed by statute**. **Any changes to those levels of protection would have to come by way of constitutional amendment or court decision.**

## Cap K

#### Growth is sustainable and solves a laundry list of threats.

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Discourse on food ethics often advocates the anti-capitalist idea that we need less capitalism, less growth, and less globalization if we want to make the world a better and more equitable place, with arguments focused on applications to food, globalization, and a just society. For example, arguments for this anti-capitalist view are at the core of some chapters in nearly every handbook and edited volume in the rapidly expanding subdiscipline of food ethics. None of these volumes (or any article published in this subdiscipline broadly construed) focuses on a defense of globalized capitalism.1

More generally, discourse on global ethics, environment, and political theory in much of academia—and in society—increasingly features this anti-capitalist idea as well.2 The idea is especially prominent in discourse surrounding the environment, climate, and global poverty, where we face a nexus of problems of which capitalism is a key driver, including climate change, air and water pollution, the challenge of feeding the world, ensuring sustainable development for the world's poorest, and other interrelated challenges.

It is therefore important to ask whether this anti-capitalist idea is justified by reason and evidence that is as strong as the degree of confidence placed in it by activists and many commentators on food ethics, global ethics, and political theory, more generally.

In fact, many experts argue that this anti-capitalist idea is not supported by reason and argument and is actually wrong. The main contribution of this essay is to explain the structure of the leading arguments against the anti-capitalist idea, and in favor of the opposite conclusion. I begin by focusing on the general argument in favor of well-regulated globalized capitalism as the key to a just, flourishing, and environmentally healthy world. This is the most important of all of the arguments in terms of its consequences for health, wellbeing, and justice, and it is endorsed by experts in the empirically minded disciplines best placed to analyze the issue, including experts in long-run global development, human health, wellbeing, economics, law, public policy, and other related disciplines. On the basis of the arguments outlined below, well-regulated capitalism has been endorsed by recent Democratic presidents of the United States such as Barack Obama, and by progressive Nobel laureates who have devoted their lives to human development and more equitable societies, as well as by a wide range of experts in government and leading nongovernmental organizations.

The goal of this essay is to make the structure and importance of these arguments clear, and thereby highlight that discourse on global ethics and political theory should engage carefully with them. The goal is not to endorse them as necessarily sound and correct. The essay will begin by examining general arguments for and against capitalism, and then turn to implications for food, the environment, climate change, and beyond.

Arguments for and against Forms of Capitalism

The Argument against Capitalism

Capitalism is often argued to be a key driver of many of society's ills: inequalities, pollution, land use changes, and incentives that cause people to live differently than in their ideal dreams. Capitalism can sometimes deepen injustices. These negative consequences are easy to see—resting, as they do, at the center of many of society's greatest challenges.3

And at the same time, it is often difficult to see the positive consequences of capitalism.4 What are the positive consequences of allowing private interests to clear-cut forests and plant crops, especially if those private interests are rich multinational corporations and the forests are in poor, developing countries whose citizens do not receive the profits from deforestation? Why give private companies the right to exploit resources at all, since exploitation almost always has some negative consequences such as those listed above? These are the right questions to ask, and they highlight genuine challenges to capitalism. And in light of these challenges, it is reasonable to consider the possibility that perhaps a different economic system altogether would be more equitable and beneficial to the global population.

The Argument for Well-Regulated Capitalism

However, things are more complicated than the arguments above would suggest, and the benefits of capitalism, especially for the world's poorest and most vulnerable people, are in fact myriad and significant. In addition, as we will see in this section, many experts argue that capitalism is not the fundamental cause of the previously described problems but rather an essential component of the best solutions to them and of the best methods for promoting our goals of health, well-being, and justice.

To see where the defenders of capitalism are coming from, consider an analogy involving a response to a pandemic: if a country administered a rushed and untested vaccine to its population that ended up killing people, we would not say that vaccines were the problem. Instead, the problem would be the flawed and sloppy policies of vaccine implementation. Vaccines might easily remain absolutely essential to the correct response to such a pandemic and could also be essential to promoting health and flourishing, more generally.

The argument is similar with capitalism according to the leading mainstream arguments in favor of it: Capitalism is an essential part of the best society we could have, just like vaccines are an essential part of the best response to a pandemic such as COVID-19. But of course both capitalism and vaccines can be implemented poorly, and can even do harm, especially when combined with other incorrect policy decisions. But that does not mean that we should turn against them—quite the opposite. Instead, we should embrace them as essential to the best and most just outcomes for society, and educate ourselves and others on their importance and on how they must be properly designed and implemented with other policies in order to best help us all. In fact, the argument in favor of capitalism is even more dramatic because it claims that much more is at stake than even what is at stake in response to a global pandemic—what is at stake with capitalism is nothing less than whether the world's poorest and most vulnerable billion people will remain in conditions of poverty and oppression, or if they will instead finally gain access to what is minimally necessary for basic health and wellbeing and become increasingly affluent and empowered. The argument in favor of capitalism proceeds as follows:

Premise 1. Development and the past. Over the course of recorded human history, the majority of historical increases in health, wellbeing, and justice have occurred in the last two centuries, largely as a result of societies adopting or moving toward capitalism. Capitalism is a relevant cause of these improvements, in the sense that they could not have happened to such a degree if it were not for capitalism and would not have happened to the same degree under any alternative noncapitalist approach to structuring society. The argument in support of this premise relies on observed relationships across societies and centuries between indicators of degree of capitalism, wealth, investments in public goods, and outcomes for health, wellbeing, and justice, together with econometric analysis in support of the conclusion that the best explanation of these correlations and the underlying mechanism is that large increases in health, wellbeing, and justice are largely driven by increasing investments in public goods. The scale of increased wealth necessary to maximize these investments requires capitalism. Thus, as capitalist societies have become dramatically wealthier over the past hundred years (and wealthier than societies with alternative systems), this has allowed larger investments in public goods, which simply has not been possible in a sustained way in societies without the greater wealth that capitalism makes possible. Important investments in public goods include investments in basic medical knowledge, in health and nutrition programs, and in the institutional capacity and know-how to regulate society and capitalism itself. As a result, capitalism is a primary driver of positive outcomes in health and wellbeing (such as increased life expectancy, lowered child and maternal mortality, adequate calories per day, minimized infectious disease rates, a lower percentage and number of people in poverty, and more reported happiness);5 and in justice (such as reduced deaths from war and homicide; higher rankings in human rights indices; the reduced prevalence of racist, sexist, homophobic opinions in surveys; and higher literacy rates).6 These quantifiable positive consequences of global capitalism dramatically outweigh the negative consequences (such as deaths from pollution in the course of development), with the result that the net benefits from capitalism in terms of health, wellbeing, and justice have been greater than they would have been under any known noncapitalist approach to structuring society.7

Premise 2. Economics, ethics, and policy. Although capitalism has often been ill-regulated and therefore failed to maximize net benefits for health, wellbeing, and justice, it can become well-regulated so that it maximizes these societal goals, by including mechanisms identified by economists and other policy experts that do the following:

* optimally8 regulate negative effects such as pollution and monopoly power, and invest in public goods such as education, basic healthcare, and fundamental research including biomedical knowledge (more generally, policies that correct the failures of free markets that economists have long recognized will arise from “externalities” in the absence of regulation);9
* ensure equity and distributive justice (for example, via wealth redistribution);10
* ensure basic rights, justice, and the rule of law independent of the market (for example, by an independent judiciary, bill of rights, property rights, and redistribution and other legislation to correct historical injustices due to colonialism, racism, and correct current and historical distortions that have prevented markets from being fair);11 and
* ensure that there is no alternative way of structuring society that is more efficient or better promotes the equity, justice, and fairness goals outlined above (by allowing free exchange given the regulations mentioned).12

To summarize the implication of the first two premises, well-regulated capitalism is essential to best achieving our ethical goals—which is true even though capitalism has certainly not always been well regulated historically. Society can still do much better and remove the large deficits in terms of health, wellbeing, and justice that exist under the current inferior and imperfect versions of capitalism.

Premise 3. Development and the future. If the global spread of capitalism is allowed to continue, desperate poverty can be essentially eliminated in our lifetimes. Furthermore, this can be accomplished faster and in a more just way via well-regulated global capitalism than by any alternatives. If we instead opt for less capitalism, less growth, and less globalization, then desperate poverty will continue to exist for a significant portion of the world's population into the further future, and the world will be a worse and less equitable place than it would have been with more capitalism. For example, in a world with less capitalism, there would be more overpopulation, food insecurity, air pollution, ill health, injustice, and other problems. In part, this is because of the factors identified by premise 1, which connect a turn away from capitalism with a turn away from continuing improvements in health, wellbeing, and justice, especially for the developing world. In addition, fertility declines are also a consequence of increased wealth, and the size of the population is a primary determinant of food demand and other environmental stressors.13 Finally, as discussed at length in the next section of the essay, capitalism can be naturally combined with optimal environmental regulations.14 Even bracketing anything like optimal regulation, it remains true that sufficiently wealthy nations reduce environmental degradation as they become wealthier, whereas developing nations that are nearing peak degradation will remain stuck at the worst levels of degradation if we stall growth, rather than allowing them to transition to less and less degradation in the future via capitalism and economic growth.15 In contrast, well-regulated capitalism is a key part of the best way of coping with these problems, as well as a key part of dealing with climate change, global food production, and other specific challenges, as argued at length in the next section. Here it is important to stress that we should favor well-regulated capitalism that includes correct investments in public goods over other capitalist systems such as the neoliberalism of the recent past that promoted inadequately regulated capitalism with inadequate concern for externalities, equity, and background distortions and injustices.16

Conclusion. Therefore, we should be in favor of capitalism over noncapitalism, and we should especially favor well-regulated capitalism, which is the ethically optimal economic system and is essential to any just basic structure for society.

This argument is impressive because, as stated earlier in the essay, it is based on evidence that is so striking that it leads a bipartisan range of open-minded thinkers and activists to endorse well-regulated capitalism, including many of those who were not initially attracted to the view because of a reasonable concern for the societal ills with which we began. To better understand why such a range of thinkers could agree that well-regulated capitalism is best, it may help to clarify some things that are not assumed or implied by the argument for it, which could be invoked by other bad arguments for capitalism.

One thing the argument above does not assume is that health, wellbeing, or justice are the same thing as wealth, because, in fact, they are not. Instead, the argument above relies on well-accepted, measurable indicators of health and wellbeing, such as increased lifespan; decreased early childhood mortality; adequate nutrition; and other empirically measurable leading indicators of health, wellbeing, and justice.17 Similarly, the argument that capitalism promotes justice, peace, freedom, human rights, and tolerance relies on empirical metrics for each of these.18

Furthermore, the argument does not assume that because these indicators of health, wellbeing, and justice are highly correlated with high degrees of capitalism, that therefore capitalism is the direct cause of these good outcomes. Rather, the analyses suggest instead that something other than capitalism is the direct cause of societal improvements (such as improvements in knowledge and technology, public infrastructure, and good governance), and that capitalism is simply a necessary condition for these improvements to happen.19 In other words, the richer a society is, the more it is able to invest in all of these and other things that are the direct causes of health, wellbeing, and justice. But, to maximize investment in these things societies need well-regulated capitalism.

As part of these analyses, it is often stressed that current forms of capitalism around the world are highly defective and must be reformed in the direction of well-regulated capitalism because they lack investments in public goods, such as basic knowledge, healthcare, nutrition, other safety nets, and good governance.20 In this way, an argument for a particular kind of progressive reformism is an essential part of the analyses that lead many to endorse the more general argument for well-regulated capitalism.

Although these analyses are nuanced, and appropriately so, it remains the case that the things that directly lead to health, wellbeing, and justice require resources, and the best path toward generating those resources is well-regulated capitalism. And on the flip side, according to the analyses behind premise 1 described above, an anti-capitalist system would not produce the resources that are needed, and would thus be a disaster, especially for the poorest billion people who are most desperately in need of the resources that capitalism can create and direct, to escape from extreme poverty.21

#### Past the tipping point and the alt is dictatorship and genocide---only tech can solve.

Eric Levitz 5/17/21. Senior Writer at New York Magazine. MA Johns Hopkins. "We’ll Innovate Our Way Out of the Climate Crisis or Die Trying". Intelligencer. 5-17-2021. https://nymag.com/intelligencer/2021/05/climate-biden-green-tech-innovation.html

Today’s best-case ecological scenario was a horror story just three decades ago. In 1993, Bill Clinton declared that global warming presented such a profound threat to civilization that the U.S. would have to bring its “emissions of greenhouse gases to their 1990 levels by the year 2000.” Instead, we waited until 2020 to do so; in the interim, humanity burned more carbon than it had since the advent of agriculture. Now, it will take a historically unprecedented, worldwide economic transformation to freeze warming at “only” 2 degrees — a level of temperature rise that will turn “once in a century” storms into annual events, drown entire island nations, and render major cities in the Middle East uninhabitable in summertime (at least for those whose lifestyles involve “walking outdoors without dying of heatstroke”). This is what passes for a utopian vision in 2021. If we confine ourselves to mere optimism — and assume that every Paris Agreement signatory meets its current pledged target for decarbonization — then warming will hit 2.4 degrees by century’s end.

The reality of our ecological predicament invites denial of our political one. Put simply, it is hard to reconcile the scale of the climate crisis with the limits of contemporary American politics. Delusions rush in to fill the gap. Among these is the fantasy of national autonomy; the notion that the United States can save the planet or destroy it, depending on the precise timeline of its domestic decarbonization. A rapid energy transition in the U.S. is a vital cause, not least for its potential to expedite similar transformations abroad. But the battle for a sustainable planet will be won or lost in the developing world. Although American consumption played a central role in the history of the climate crisis, it is peripheral to the planet’s future: Over the coming century, U.S. emissions are expected to account for only 5 percent of the global total.

There is also the delusion of “de-growth’s” viability. The fact that there is no plausible path for global economic expansion that won’t entail climate-induced death and displacement has led some environmentalists to insist on global stagnation. Yet there is neither a mass constituency for this project, nor any reason to believe that there will be any time soon. Freeze the status-quo economy in amber, and you’ll condemn nearly half of humanity to permanent poverty. Divide existing GDP into perfectly even slices, and every person on the planet will live on about $5,500 a year. American voters may express a generalized concern about the climate in surveys, but they don’t seem willing to accept even a modest rise in gas prices — let alone a total collapse in living standards — to address the issue. Meanwhile, any Chinese or Indian leader who attempted to stymy income growth in the name of sustainability would be ousted in short order. It’s conceivable that one could radically reorder advanced economies in a manner that enabled living standards to rise even as GDP fell; Americans might well find themselves happier and more secure in an ultra-low-carbon communal economy in which individual car ownership is heavily restricted, and housing, healthcare, and myriad low-carbon leisure activities are social rights. But nothing short of an absolute dictatorship could affect such a transformation at the necessary speed. And the specter of eco-Bolshevism does not haunt the Global North. Humanity is going to find a way to get rich sustainably, or die trying.

Thus, the chasm between the ecologically necessary and the politically possible can only be bridged by technological advance. And on that front, the U.S. actually has the resources to make a decisive contribution to global decarbonization — and some political will to leverage those resources. Unfortunately, due to some combination of fiscal superstitions and misplaced priorities, the Biden administration’s proposed investments in green innovation remain paltry. An American Jobs Plan with much higher funding for green R&D is both imminently winnable and environmentally imperative. U.S. climate hawks should make securing such legislation a top priority.

The choice before us is techno-optimism or barbarism.

If governments are forced to choose between increasing income growth in the present, and mitigating temperature rise in the future, they are going to pick the former. We’ll get cheap, lab-grown Kobe beef before we get a U.S. Senate willing to tax meat, and steel plants powered by “green hydrogen” before we get anarcho-primitivism with Chinese characteristics.

The question is whether we’ll get such breakthroughs before it’s too late.

Techno-optimism has its hazards, but the progress we’ve made toward decarbonization has come largely through technological innovation. When India canceled plans to construct 14 gigawatts of new coal-fired power stations in 2019, it did not do so in deference to international pressure or domestic environmental movements, but rather to the cost-competitiveness of solar energy. The same story holds across Asia’s developing countries: Thanks to a ninefold reduction in the cost of solar energy over the past decade, the number of new coal plants slated for construction in the region has fallen by 80 percent. Meanwhile, the road to an electric-car revolution was cleared by a collapse in the cost of lithium batteries, the challenge of powering cities with solar energy on cloudy days was eased by a 70 percent drop in the price of utility-scale batteries, and wind power grew 40 percent cheaper. Our species remains lackluster at solidarity and self-government, but we’ve got a real knack for building cool shit.

The technological progress of the past decade was not sufficient to compensate for tepid climate policy. But real techno-utopianism has never been tried: As of 2019, global spending on clean energy R&D totaled $22 billion a year, or 3 percent of the Pentagon’s annual budget. Increasing spending on such research — while expediting cost-reductions in existing technologies by deploying them en masse — should be twin priorities of American climate policy.

The preconditions for green industrialization can be made in America.

The United States has more fiscal capacity and better-financed research universities than any nation on the planet. And, for all the pathologies of our politics, public investment in green tech inspires far weaker opposition than many less-indispensable climate policies. In fact, late last year, with Republicans controlling the Senate and Donald Trump in the White House, the U.S. increased funding for zero-emission technology R&D by $35 billion. America does not have sovereignty over enough humans to save the planet by slashing our domestic emissions. But we just might have the resources and political economy necessary to help the developing world save us all.

Although progress on renewables has exceeded optimistic expectations, the technical obstacles to global decarbonization remain immense. In the most optimistic scenario, scaling up existing, cost-competitive technologies can get us about 16 percent of the emissions reductions necessary for achieving net-zero by 2050, according to the International Energy Agency. Driving down the price of tech we already have will get us another 39 percent. The rest must come from technologies that have yet to be fully developed. We need electrified cement, hydrogen-powered steel plants, and evaporative cooling. We need utility-scale energy storage, electric airplanes, and ultra-high voltage transmission lines. And we’d be remiss to not toss a bit of our collective wealth at game-changing hail marys like nuclear fusion.

## Court Politics DA

#### Roberts has no capital with the Court’s conservatives---Texas abortion ruling proves.

Bravin 9/2/21 (Jess – JD from University of California at Berkeley & Brent Kendall – legal affairs reporter, “Texas Ruling Raises Doubts About Chief Justice’s Hold on the Roberts Court,” https://www.wsj.com/articles/texas-ruling-raises-doubts-about-chief-justices-hold-on-the-roberts-court-11630624331)

WASHINGTON -- The Supreme Court's 5-4 midnight order letting Texas ban most abortions raised new uncertainty about reproductive rights, but one point was clear: It is another sign that Chief Justice John Roberts is struggling to steer the Roberts Court at a time when an even bigger abortion case is looming. A conservative chief justice who prizes consensus and calibration in jurisprudence once again found himself out of step with five colleagues further to his right. Instead, Chief Justice Roberts landed in an increasingly familiar place on the court he leads: dissenting alongside three liberals who, often for different reasons, share his disagreement with the newly expanded conservative majority. According to a compilation by University of Texas professor Steve Vladeck, Wednesday's case was the fourth time this term that Chief Justice Roberts joined liberals to dissent from emergency orders issued by the court. In his dissent, joined by two liberals, the chief justice warned of "the consequences of approving the state action, both in this particular case and as a model for action in other areas." The unsigned majority opinion expressed no such concerns, saying that procedural factors made it impossible for the court to block the law from going into effect. "If I were the chief justice, I'd be worried not only about how people perceive my power on the court today, but also my ability to forge a consensus over the long term with the other justices on a broad range of issues," said William & Mary law professor Neal Devins. The Texas ruling didn't directly address abortion rights, and the conservative majority made clear that was intentional in its one-paragraph opinion. "This order is not based on any conclusion about the constitutionality of Texas's law," the court said. Instead, it said that procedural complexities prevented them from intervening, given that Texas state officials can't themselves enforce the law, and because it isn't clear if, or when, a private party might attempt to invoke the law to sue an abortion provider. The majority also noted that there are other avenues for challenging the Texas ban, especially in state court. Even before the Texas case rose quickly and unexpectedly to the Supreme Court this week, the future of abortion rights was in the spotlight, with a case from Mississippi slated for argument in the coming months.

#### Multiple politically divisive cases on the docket including guns and affirmative action.

Robinson 9/3/21 (Kimberly Strawbridge – JD from Columbia University School of Law, “After Texas Abortion Ruling, Progressives Brace for SCOTUS Term,” https://news.bloomberglaw.com/us-law-week/after-texas-abortion-ruling-progressives-brace-for-scotus-term?context=search&index=9)

Also on the docket is the Second Amendment case, New York State Rifle & Pistol Association Inc. v. Bruen, a potential blockbuster that seeks to extend protections for gun owners outside of the home. And the justices also have signaled a willingness to readdress the availability of affirmative action programs in Students for Fair Admissions Inc. v. President & Fellows of Harvard College. That case challenges Harvard’s us of race as one factor in admissions. Among the less heralded issues before the court starting Oct. 4 are state funding for religious schools, an equal protection challenge to the exclusion of Puerto Ricans for Social Security benefits, and a pair of cases on the federal government’s ability to withhold information under the state-secrets privilege. The court also is set to consider criminal cases that may prove divisive. For example, the justices will hear argument on Nov. 1 in Shinn v. Ramirez, a procedural dispute that could bar defendants with ineffective lawyers from getting relief, including a potentially innocent man facing execution. On Oct. 13, the court will hear argument in the case of Boston Marathon Bomber Dzhokhar Tsarnaev, as the Justice Department seeks to reinstate his death sentences. Northwestern law professor Tonja Jacobi says it is important for progressives to pay attention to these under-the-radar cases as well as the big-ticket issues. She pointed to Houston Community College System v. Wilson , a First Amendment case that could cut back on legislative power, and American Hospital Association v. Becerra, an administrative law case that could undo the way court’s review agency actions. While the public tends to focus on the higher-profile cases, “in terms of the average person and how their life is affected, they are affected 100 times a day by government decisions,” Jacobi said, ranging from where you can park your car to how safe it is to eat at a particular restaurant to licensing requirements.

#### The conservative majority will likely overturn *Roe* in *Dobbs*---even a “narrow” ruling upholding the Mississippi law practically dooms the rights right to abortion.

Millhiser 9/28/21 (Ian – JD from Duke University, “9 high-stakes issues the Supreme Court will take up this coming term,” https://www.vox.com/22675986/supreme-court-term-roe-wade-gun-rights-anti-discrimination-laws-october-2021)

The parties in Dobbs v. Jackson Women’s Health Organization, which the Court will hear in early December, agree on just one thing: The case is an existential threat to Roe v. Wade. Dobbs involves a Mississippi law that bans abortions after 15 weeks of pregnancy. (Notably, this 15-week clock starts on “the first day of the last menstrual period of the pregnant woman” — meaning that, in practice, the law functions as something much closer to a 13-week abortion ban.) Technically, the justices say they took up this case to answer a slightly narrower question than whether the constitutional right to an abortion should be eliminated in its entirety. But Mississippi spends the lion’s share of its brief arguing that Roe should be overruled and the constitutional right to an abortion eliminated. Meanwhile, the abortion providers challenging the law argue that there is no practical difference between a decision repealing Roe and a superficially narrower decision permitting states to ban abortions prior to viability. According to their brief, “Any abandonment of viability would be no different than overruling Casey and Roe entirely.” The 15th week of pregnancy is well before viability. According to a paper published in the journal Pediatrics in 2019, “Infants born at 22 weeks’ gestation can achieve survival rates of 25% to 50%.” I could spend some time summarizing the legal arguments in the two sides’ briefs, but really, what’s the point? For most justices, the question of whether the Constitution protects a right to abortion ceased to have anything to do with legal doctrines and Latin maxims such as stare decisis — the doctrine that courts should generally be bound by their prior decisions — long ago. The bottom line is that Republican elected officials generally oppose abortion, Democrats typically support the right to have one, and six of the nine justices were appointed by Republican presidents. Five of those justices already allowed a Texas law that effectively bans abortions after six weeks to take effect. Barring extraordinary events, the right to an abortion is probably doomed.

## FTC Tradeoff DA

#### The FTC is going after Noerr conduct now.

C&M 18. “New Full Slate of FTC Commissioners Will Face Unique Challenges and Opportunities” Crowell & Moring. 04-30-18. https://www.crowell.com/NewsEvents/AlertsNewsletters/Antitrust-Law-Alert/New-Full-Slate-of-FTC-Commissioners-Will-Face-Unique-Challenges-and-Opportunities

State Action and Regulations Affecting Competition. The FTC’s suits (ending in success at the Supreme Court) in NC Dental and Phoebe Putney challenged state-sanctioned limitations on competition. Additionally, outgoing Acting Chair Ohlhausen made “Economic Liberty” and combating state occupational licensing requirements a key feature of her tenure. The FTC is likely to continue to pursue policy advocacy and antitrust enforcement in cases where state regulations significantly restrain competition. State Certificate of Public Advance (COPA) laws have recently stymied FTC efforts to stop allegedly anticompetitive hospitals mergers, so look for the FTC to devote resources to studying the effects of these laws and trying to prevent more states from passing such laws and from approving hospital mergers under them. We also expect to see even greater interest in examining anticompetitive conduct by nominally “state” boards made up of private industry participants, and perhaps **stepped-up efforts to erode the Noerr-Pennington (First Amendment) protections for anticompetitive petitioning** activity directed at courts and governments that impede markets.

#### The FTC is already overwhelmed with antitrust cases.

PYMNTS 7/28/21. “FTC Sees Most Merger Filings In 2 Decades, Chair Says.” https://www.pymnts.com/antitrust/2021/ftc-sees-most-merger-filings-2-decades/

The Federal Trade Commission (FTC) is dealing with a rise in mergers that has amounted to the highest number of filings in 20 years, Bloomberg reported.

“Although the FTC is working to review many of these deals, the sheer volume of transactions is significantly straining commission resources,” FTC Chair Lina Khan said, per Bloomberg. “I am deeply concerned that the current merger boom will further exacerbate deep asymmetries of power across our economy, further enabling abuses.”

Companies have thus far announced $2.8 trillion in deals in the first seven months of this year, Bloomberg reported, which amounts to 2021 likely being the most active ever.

The reason for the influx is the high level of corporate confidence and the free spending of private equity firms, which has been happening over several industries, including technology, media, healthcare, transportation and others, according to Bloomberg.

Over the first three quarters of the current fiscal year, antitrust agencies have processed more than 2,400 merger filings Khan said, per Bloomberg.

But she said the wave of mergers hasn’t been the only issue. There are two other big problems facing the FTC, including a recent Supreme Court decision making it harder to recover money for victims of scams or deceptive practices, and the general boost in fraud during the pandemic, which has been made even worse by digital platforms, Bloomberg reported.

Khan, nominated by President Joe Biden for her role at the FTC, was officially approved June 15 in a 69-28 Senate vote.

“The overwhelming support in the Senate for Lina Khan’s nomination to serve on the Federal Trade Commission is a big win for fair competition in our country,” FTC Commissioner Rohit Chopra said in a statement at the time. “There is a growing consensus that the FTC must turn the page on the failed policies spanning multiple administrations.”

Khan has been known for being a critic of the tech industry and has worked on anti-competition issues before. She wrote a paper when she was a student that looked into how antitrust legislation didn’t negatively affect Amazon.

#### Zero link uniqueness---aggressive antitrust enforcement is back.

E. Steele Clayton, IV, 8/10/21 – Bass, Berry & Sims PLC, “Be Prepared: Aggressive Antitrust Enforcement Is Back.” https://www.jdsupra.com/legalnews/be-prepared-aggressive-antitrust-8939761/

This summer has seen a flurry of bold antitrust announcements from the Biden administration. By issuing a sweeping executive order calling for numerous changes to antitrust enforcement and by naming progressive favorites and prominent Big Tech critics to head the Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice (DOJ), President Biden has signaled that federal antitrust policy is entering a new era.

The FTC has already begun carrying out its mandate to reshape antitrust policy. Under the leadership of new Chairwoman Lina Khan, the FTC has moved quickly to eliminate checks on its antitrust enforcement powers. A majority of the FTC’s commissioners have expressly disavowed the agency’s longstanding approaches to policing antitrust violations and have given the new chair unprecedented authority over investigations and rulemakings.

Collectively, the Biden administration and the FTC have sent a clear message to the business community: aggressive antitrust enforcement is back. Companies should expect to see an increase in antitrust investigations, stiffer penalties for violations, more burdensome merger reviews, and new rules targeting a range of industry practices. In this environment, effective antitrust counseling and compliance programs are more important than ever.

#### Authorities already juggle competing goals.

Michelle Meagher 21. A competition lawyer and Senior Policy Fellow at the University College London Centre for Law, Economics and Society. This paper has been prepared for the ABA Spring Meeting 2021 session on the consumer welfare standard. “Adaptive Antitrust.” 03-24-21. https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3816662

(7) How will authorities juggle competing goals? – The application of an “excessive power” legal standard is not a question purely of “juggling” or “balancing”. Instead, authorities must **synthesise the evidence from a range of sources, as they already do.** And courts will be required to do the same, **as they already must.**

#### FTC overstretch inevitable BUT the plan fiats they legislative backing and court victory---key to legitimacy and funding.

Marianela Lopez-Galdos 7-28-21. Global Competition Counsel at the Computer& Communications Industry Association, previously served as Director of Competition & Regulatory Policy, and is a professor at George Washington University Competition Law Center and at the University of Melbourne Law School. “Policy Decisions of Antitrust Institutions Series: The Future of the FTC and Its Perils”. Disruptive Competition Project. https://www.project-disco.org/competition/072821-policy-decisions-of-antitrust-institutions-series-the-future-of-the-ftc-and-its-perils/

But the current FTC leadership seems to have overlooked the agency’s history. As such, it has already promised to produce different policy outcomes and noted that the Section 5 Policy Guidelines were shortsighted. As a result, the current FTC has decided, with the support of the other two Democratic Commissioners, to rescind the Policy Guidelines.

It is unknown whether the current FTC will try to adopt different guidelines or whether it will start opening more cases under Section 5 of the FTC Act. Furthermore, it is less clear whether the new FTC leadership currently counts with the sufficient and aligned Neo-Brandeisian human talent to bring solid cases that are not based on the consumer welfare standard or to litigate before judges that support the Neo-Brandeisian vision of antitrust.

What seems clear is that the new agency’s leader might find it hard to bring all Commissioners to an agreement with respect to what the agency can do with Section 5 of the FTC Act, and this situation, in and of itself, puts the agency in peril.

The FTC’s Rulemaking Authority

Another important policy change that may be detrimental to the FTC is its expressed willingness to expand the agency’s rulemaking authority under, e.g., Section 18 of the FTC Act. It is well known that in addition to its authority to investigate law violations by individuals and businesses, the FTC also has federal rulemaking authority to issue industry-wide regulations.

However, the agency’s rulemaking authority has been self-limited since the 80s in an effort to ensure the institution doesn’t overuse its capacity to adopt industry-wide regulations and raise concerns with those policy makers that are against the legislature deferring its core mandate to an independent agency that doesn’t represent the people.

Traditionally the legislature has the constitutional mandate to create laws affecting different sectors of the economy. Whereas it is legally accepted to design independent agencies with constrained mandates to adopt regulations, such powers are not necessarily understood to construe independent agencies as substitutes for the legislature’s powers. It is a basic tenet of administrative law, that agencies are constrained by the enabling statute that gives them authority to promulgate regulations in the first place.

Against this background, it seems risky for the new leadership to engage in broad rulemaking endeavors that might raise concerns from an institution legitimacy perspective. In the long term, it is predictable that many policymakers might not be supportive of an agency that implements its rulemaking authority in its broadest sense. As a result, some degree of political backlash against the agency might not help the agency’s lifecycle, especially if the agency is not granted with specific legislative guidance in the form of new legislation.

The Future of the FTC

One of the most challenging matters to tackle when it comes to leadership of antitrust authorities, or administrative agency for that matter, is legacy and the impact for the future of the agency. To put it simply, while antitrust leaders leave agencies, the side effects of leadership’s successes and failures condition the future of the agencies. Their leadership has consequences and sets precedent which will bind the agency well into the future.

Under the current political context, it would not be surprising if the current Neo-Brandeisian FTC enjoyed political support and success with its decision to bring big cases, especially against leading tech companies. In the short term, if the FTC makes headlines for opening cases against “Big Tech”, policymakers pushing for antitrust reforms will surely applaud the new changes as they would reflect a commitment to enhanced enforcement outcomes notwithstanding the strength of the cases.

However, in the mid-and long-term, if the FTC loses the big cases, the commitment to policy outcomes won’t be met. And then, it is unlikely that the question would be whether the antitrust norms are fit for today’s economy, but rather if the agency is capable of executing its mandate effectively. The recent decision in the FTC v. Facebook case is a good example of this paradigm, where the Judge expressed that the FTC had not carried out a sufficiently robust analysis supported by evidence, and therefore dismissed the case.

Eventually, the agency’s short-term reputational gains could quickly turn into a debacle for the institution itself with the caveat that by then, most probably, Neo-Brandeisian leadership will be long gone. Unfortunately then, the U.S. antitrust system — which is the only one to keep two federal antitrust agencies, bringing about positive outcomes for consumers — might be at risk. Political support to merge these two institutions could gain even more support, as has happened in the past, to the detriment of consumers.

#### Uniqueness overwhelms right to repair.

Michael Potuck 7/21/2021/ "FTC unanimously adopts Right to Repair policy to reduce restrictions from manufacturers like Apple," 9to5Mac, <https://9to5mac.com/2021/07/21/ftc-adopts-right-to-repair-policy-statement/>

Back in May, the Federal Trade Commission (FTC) published a report about “anti-competitive repair restrictions” in the US [including concerns about Apple](https://9to5mac.com/2021/05/07/ftc-anti-competitive-repair-restrictions/). Then, President Biden [signed an executive order](https://9to5mac.com/2021/07/09/president-biden-executive-order-competition/) for the FTC to create new Right to Repair rules. Now that process has started with the FTC unanimously voting to approve a new policy statement that’s looking to restore “Right to Repair for small businesses, workers, consumers, and government entities.”

The FTC [shared the update on its website](https://www.ftc.gov/news-events/press-releases/2021/07/ftc-ramp-law-enforcement-against-illegal-repair-restrictions) today with the new policy set to [ramp up law enforcement](https://www.ftc.gov/public-statements/2021/07/policy-statement-federal-trade-commission-repair-restrictions-imposed) against repair restrictions.

The Federal Trade Commission today unanimously [voted to ramp up law enforcement against repair restrictions](https://www.ftc.gov/public-statements/2021/07/policy-statement-federal-trade-commission-repair-restrictions-imposed) that prevent small businesses, workers, consumers, and even government entities from fixing their own products. The policy statement adopted today is aimed at manufacturers’ practices that make it extremely difficult for purchasers to repair their products or shop around for other service providers to do it for them. By enforcing against restrictions that violate antitrust or consumer protection laws, the Commission is taking important steps to restore the right to repair.

The FTC also reiterated its findings from its earlier report on how manufacturers preventing or limiting the right to repair hurt consumers and small businesses.

#### It causes their impacts and thumpers.

Marcy Gordon, 7-26-2021, "Manufacturers Balk at 'Right to Repair' Initiative by Biden Administration," Insurance Journal, https://www.insurancejournal.com/news/national/2021/07/26/624233.htm

Manufacturers, on the other hand, maintain that repair restrictions are needed to safeguard

intellectual property, protect consumers from injuries that could result from fixing a product or using one that was improperly repaired, and guard against cybersecurity risks. Manufacturers say they could face liability or harm to their reputation if independent repair shops make faulty equipment repairs.

New right-to-repair laws and regulations “would create innumerable harms and unintended consequences for consumers and manufacturers alike, including by limiting consumer choice, impeding innovation, threatening consumers’ safety and wellbeing, (and) opening the door to counterfeits,” the National Association of Manufacturers said in a prepared statement.

Legislation to ease repair restrictions is active in about 25 states, and the European Community also is considering new right-to-repair regulations.

The repair directive was included in President Joe Biden’s sweeping executive order issued earlier this month targeting what he labeled anti-competitive practices in tech, healthcare, banking and other key parts of the economy. The order has 72 actions and recommendations that Biden said would lower prices for families, increase wages for workers and promote innovation and faster economic growth. New regulations that agencies may write to translate his policy into rules could trigger epic legal battles, however.

“Let me be clear: Capitalism without competition isn’t capitalism. It’s exploitation,” Biden said at a White House signing ceremony.

The order includes calls for banning or limiting so-called noncompete agreements to help boost wages, allowing rule changes to pave the way for hearing aids to be sold over the counter at drugstores, and banning excessive early-termination fees by internet companies. It calls on the Transportation Department to consider requiring airlines to refund fees when baggage is delayed or in-flight services aren’t provided as advertised.

# 1AR

## SOP

#### Congress is key---empirics.

Joseph V. Gallagher 11, Joint Staff, Pakistan/Afghanistan Coordination Cell, former security assistance staffer for the US European Command, former F/A-18C Pilot, Air Officer, and F/A-18C/D Flight Instructor in the US Marine Corps, “Unconstitutional War: Strategic Risk in the Age of Congressional Abdication,” Parameters, Summer 2011, https://ssi.armywarcollege.edu/pubs/parameters/articles/2011summer/Gallagher.pdf

One of Clausewitz’ greatest contributions to the study of war is his emphasis on the conceptual link between politics and war. “War is never a separate phenomenon,” Clausewitz wrote, “but the continuation of politics by other means.”54 Behind this proposition is a deeply textured argument about the intrinsic political purpose of war. This political purpose encompasses the components comprising war: societal disposition, economic capability, and strategy. Clausewitz advised leaders to thoroughly consider any use of violence. So the link between war and politics “should never be overlooked.”55 Even in the 21st century, war retains this political dimension despite the recent emergence of nonstate actors and transnational groups.56

In other words, success at the tactical level of war first requires careful preparations at the political and strategic levels. The enabling institutions for success in war—Congress, the president, the cabinet, and other advisors—all need to be fully engaged in the development of feasible, suitable, and acceptable strategy.57 And this carefully crafted strategy needs to include legitimate justification for violence, rigorous calculation and valuation of political objectives, and commitment of resources sufficient to achieve strategic objectives.58

Since 1945, the United States has built the world’s most capable war-fighting machine. So why, then, have most of the nation’s large military interventions since World War II ended in defeat or, at best, stalemate? Political leaders should attend more to what Clausewitz calls the political dimensions of war—national unity and the political value of the objective—as inseparable from national and military strategy.

War theorists have long emphasized the importance of national unity and the political value of the war objective. Thousands of years ago, Sun Tzu identified the necessary pre-condition of national unity for successful war strategy.59 National unity enables political leaders to muster resources needed to win wars and to amass the human capital that makes an army. Clausewitz advised, “to discover how much of our resources must be mobilized for war, we must first examine our own political aim.”60

National unity underwrites the commitment the nation needs to successfully prosecute war, provided the war has political value commensurate to the effort expended.61 The founders directed this nation to use a collaborative process to assess the political value of a war. So the Constitution requires Congress to deliberate on the decision to go to war and, when it so decides, to declare war. Therefore, the Constitution serves as the guarantor of ensuring national unity and a legitimate valuation of the war’s political objective—provided through the mechanism of the war declaration. Consider the language of the 1941 war declaration against Japan. It captures the national unity, the political value of the objective, and the will and support of Congress to support the war.62

#### Their warrant is speed---that’s wrong AND creates counterproductive groupthink

Stuart Streichler 8. Adjunct Faculty at Seattle University School of Law. Ph.D. at Johns Hopkins University; J.D. at the University of Michigan Law School; B.S. at Bowling Green State University. Winter 2008. “Mad about Yoo, or Why Worry about the Next Unconstitutional War”, The Journal of Law & Politics. 24 J. L. & Politics 93. Lexis.

When Yoo discusses the need for flexibility in the process for warmaking, he creates a false dilemma. He suggests that the president has discretionary power to start wars or that the president must secure prior authorization from Congress through a "fixed, legalistic process." n230 For Yoo, the latter would inevitably hamper the government's ability to respond to terrorist threats. n231 Yet even if Congress has the power to decide whether to go to war, the president retains substantial powers to respond quickly to defend the country. No lawmaker would insist on Congress deliberating while terrorists set off weapons of mass destruction in the United States. Americans who lived with the risk of nuclear attack during the Cold War accepted the president's authority to respond to the Soviet Union without waiting for the results of legislative debate. Additionally, Congress has demonstrated that it can move quickly to authorize the use of military force. Three days after September 11, the Senate voted 98-0 to authorize the president to use force in response to the attacks, n232 and the House approved the measure a few hours later (420-1). n233 Another four days passed before the president signed it. n234 The last time Congress declared war in response to an attack on the United States, it did not take lawmakers long to do so. The Senate (82-0) and the House (388-1) issued a declaration of war thirty-three minutes after President Franklin D. Roosevelt's "Day of Infamy" speech. n235 Furthermore, whatever their capacity for dynamic response, presidents do not always react to security threats with speed and energy. While Yoo cleverly aligns his position with flexibility, there is more to constructing an adaptive foreign policy than letting the president initiate military hostilities. Executive decisions on war that appear, in the short term, to reflect a flexible approach may limit policy options over the long run, constraining foreign policymakers and military planners. Yoo expresses no doubt that the president's capacity to make decisions in foreign affairs and defense - to "consider policy choices" and to "evaluate threats" - is "far superior" to Congress's. n236 That overstates the case. Despite the imperfections of the legislative process, it is hard to [\*124] reach such an unqualified conclusion. Seemingly for every example where executive decision-making works well, another can be cited exposing its deficiencies. President John F. Kennedy's management of the Cuban missile crisis, though not without its critics, is often cited as a classic model of decision-making in crisis. The same president's handling of the Bay of Pigs invasion has been roundly criticized. n237 As Yoo presents his argument on executive decision-making, it does not matter who occupies the office of the president. In fact, that can make a good deal of difference. With the presidency structured around one individual, the decision-making process is shaped by the chief executive's native abilities, judgment, and experience. n238 A whole range of personal qualities may affect the president's decision on whether to take the nation to war: how the president assesses risk (especially with the uncertain conditions that prevail in foreign affairs); whether he or she engages in wishful thinking; whether he or she is practical, flexible, and open-minded. n239 While every president consults with advisers, small group dynamics add another layer of difficulties in the executive decision-making process. Even talented White House staffers and independent-minded cabinet secretaries succumb to groupthink, as it has been called - the overt and subtle pressures driving group cohesiveness that can distort the decision-making process. n240 This effect can be pronounced in foreign policy, with stressful crises that often involve morally difficult choices. n241 Members of the president's team, not fully aware they are doing so, may overrate their own power or moral position, cut off the flow of information, downplay contrary views of outside experts, limit consideration of long-term consequences, underestimate the risks of a particular policy, or fail to develop contingency plans. n242 Once the group coalesces around a particular view, it becomes increasingly difficult for individual members to [\*125] press the group to reassess rejected alternatives. n243 The unique circumstances of working for the president can make matters worse. Members of the administration generally share the president's outlook, ideology, and policy preferences. Internal decision-making may get skewed because executive officials give advice based on what they think the president wants to hear. Even if the president's subordinates differ with the chief executive on particular questions, they can only go so far to challenge the president. n244 In short, there are more questions surrounding presidential decision-making on war than Yoo is willing to admit. Congress, with the president still involved, may be able to offset the structural disadvantages of a decision-making process taking place behind closed doors in the White House. While the executive branch tends to concentrate command authority in one person, power is dispersed on Capitol Hill. Not all members of Congress are equal, but no person has influence comparable to the president's power within the executive branch. In comparison with the select handful of advisers who have the most influence with the president, the number of elected legislators and their diverse ideologies, constituencies, and perspectives make them less susceptible to groupthink. Contrary to the president's decision-making process, insulated by executive privilege, the legislative process involves on-the-record votes and speeches by elected representatives and thus provides a forum for public deliberation. n245 To be sure, Congress is not an idealized debating society. Lawmakers have parochial concerns. They often bargain in private. Their public debates can be grounded in emotional appeals as much as reason. n246 Yet in his eagerness to rate the president far above Congress in deciding to go to war, Yoo overlooks the value in having a decision-making process conducted in relatively open view and the possibilities for lawmakers to engage in serious deliberations on vital questions of national security. n247

## Kritik

#### Cap’s sustainable---solves resource scarcity and climate change.

Rainer Zitelmann 21. German historian and author of “The Rich in Public Opinion.” "Consumption Presumption: Are Human Beings Destroying the World?" National Interest. 2-12-2021. https://nationalinterest.org/feature/consumption-presumption-are-human-beings-destroying-world-178114

Some people claim that we need to cut our consumption or there will be no hope for the planet. Such claims are based on the thesis that continued growth increases the rate at which the earth’s finite resources are consumed and, moreover, leads to irreversible climate change. And such warnings are by no means new. In 1970, for instance, the Club of Rome attracted a great deal of attention with the publication of The Limits to Growth. A Report for the Club of Rome’s Project on the Predicament of Mankind, which has to date sold more than thirty million copies in thirty languages. The book warned people to change their ways and had a clear message: the world’s raw materials, and in particular, oil would soon be used up. In twenty years, the scientists predicted, we would have used the very last drop of oil. Of course, the Club of Rome’s models for the depletion of oil—and almost all other major raw materials—were wrong. According to the scenarios presented in The Limits to Growth, we should now be living on a planet that has been devoid of natural gas, copper, lead, aluminum and tungsten for decades. And we were supposed to have run out of silver in 1985. Despite the bleak forecasts, as of January 2020, the United States Geological Survey estimated silver reserves worldwide at 560,000 tons.

More from Less

Employing an extensive array of data, the American scientist Andrew McAfee proves in his book More from Less that economic growth is no longer coupled to the consumption of raw materials. Data for the United States, for example, show that of seventy-two resources, from aluminum to zinc, only six are not yet post-peak. Nevertheless, despite the fact that the U.S. economy has grown strongly in recent years, consumption of many commodities is actually decreasing.

Back in 2015, the American environmental scientist Jesse Ausubel wrote an essay, “The Return of Nature: How Technology Liberates the Environment,” showing that Americans are consuming fewer and fewer raw materials per capita. Total consumption of steel, copper, fertilizer, wood and paper, which had previously always risen in line with economic growth, had plateaued and was now in constant decline.

Such across-the-board reductions in natural resource consumption are only possible because of much-maligned capitalism: companies are constantly developing more efficient production methods and reducing the amount of raw materials they consume. Of course, they are not doing this primarily to protect the environment but to cut costs.

What's more, a constant stream of innovations has promoted the trend of miniaturization or dematerialization. Just think of your smartphone. How many devices has your smartphone replaced and how many raw materials did they use to consume?

Calculator

Telephone

Video camera

Alarm clock

Voice recorder

Navigation system

Camera

CD-player/radio

Compass

Nowadays, many people no longer have a fax machine or street atlas because they have everything they need on their smartphone. Some even use their phones instead of a wristwatch. You used to need four separate microphones in your telephone, cassette recorder, Dictaphone and video camera, today you just need one—in your smartphone.

Fighting climate change with nuclear energy

The finite nature of the world’s natural resources is one argument against growth, climate change is another. Let’s take China as an example: China currently emits more CO2 than any other country in the world and is building a number of new nuclear power plants in order to achieve carbon neutrality by 2060. With the new build program well underway, China’s first new-generation nuclear power plant recently went into operation.

In the very near future, China intends to start exporting power plants. The latest generation of nuclear power plants is much safer than earlier models—and can play a pivotal role in the fight against climate change. In the United States, Joe Biden is already evaluating the advantages of small modular reactor (SMR) nuclear power plants. As the name suggests, SMRs are smaller than traditional nuclear fission reactors and offer a maximum capacity of three hundred megawatts. In the United Kingdom, for example, a consortium led by Rolls-Royce has announced plans to build up to sixteen SMR power plants.

So far, two reactors of this type are in operation, both onboard the floating nuclear power plant  “\Akademik Lomonosov, which supplies heat and electricity to the Siberian city of Pevec and its one hundred thousand inhabitants.

Anticapitalists blame capitalism for resource consumption and climate change. But political decisions—such as Germany’s decision to phase out nuclear energy—frequently have a negative impact on climate change.

Telling people to cut their consumption must seem like pure mockery to the hundreds of millions of people around the world who are still living in extreme poverty. What they need is more capitalism and economic growth. Just like in China, where the number of people living in extreme poverty has fallen from 88 percent in 1981 to less than 1 percent today. Andrew McAfee’s book has an optimistic message about how we don't have to turn back the clocks and cut our consumption: capitalism and technological progress are allowing us to steward the world’s resources, rather than stripping them bare.

#### It can’t produce innovation.

Philippe Aghion, Céline Antonin, & Simon Bunel 21. Professor at the Collège de France, INSEAD, and the London School of Economics and Political Science and was previously Professor of Economics at Harvard. Senior Researcher at OFCE, the French Economic Observatory at Sciences Po in Paris, and Research Associate in the Innovation Lab at the Collège de France. Senior Economist at INSEE, the French National Institute of Statistics and Economic Studies, and at the Bank of France. “The Power of Creative Destruction: Economic Upheaval and the Wealth of Nations.” Harvard University Press.

Nonetheless, the abolition of capitalism is not the solution. The last century witnessed a large-scale experiment with an alternative system—a system of central planning in the Soviet Union and other communist countries of Central and Eastern Europe. This system failed to offer individuals the freedom and economic incentives necessary for frontier innovation, and so these nations were unable to get beyond an intermediate level of development. Henri Weber, a well-known figure of the French movement of May 1968, was a former Trotskyist leader in the 1960s and 1970s but later became a leader of the French Socialist Party and Socialist member of the European Parliament. He explained his personal conversion to the free market economy and social democracy, looking to the Scandinavian experience: “Having witnessed from a front-row seat the disaster of collectivization of agriculture and firms in the Soviet Union, the Scandinavian Socialists were the first to break with the dogma of socializing means of production and managing the economy by a central planning committee. To control and humanize the economy, it is altogether unnecessary to expropriate management, to nationalize firms, or to eradicate the market . . . altogether unnecessary to deprive society of the creativity, knowhow, and dynamism of entrepreneurs. Under certain conditions, entrepreneurial talent can be mobilized to serve the common good.” A market economy, because it induces creative destruction, is inherently disruptive. But historically it has proved to be a formidable engine of prosperity, hoisting our societies to levels of development unimaginable two centuries ago. Must we therefore resign ourselves to the serious pitfalls and defects of capitalism as the necessary price to pay to generate prosperity and overcome poverty?

In this book, we have sought to better understand how growth through creative destruction interacts with competition, inequality, the environment, finance, unemployment, health, happiness, and industrialization, and how poor countries catch up to rich ones. We have analyzed to what degree the state, with appropriate control of the executive, can stimulate the creation of wealth while at the same time tackling the problems mentioned above. We have seen how, by moving from laissez-faire capitalism, with market forces given free rein, to a form of capitalism in which the state and civil society play their full role, it is possible to stimulate social mobility and reduce inequality without discouraging innovation. We have also seen how appropriate competition policies can curb the decline of growth and how we can redirect innovation toward green technologies to combat global warming. We have seen that, without forgoing globalization, a country can improve its competitiveness through innovative investments and put in place effective safety nets to protect individuals who lose their jobs. Lastly, we have seen how, with the indispensable support of civil society, it is possible to prevent yesterday’s innovators, in collusion with public officials, from pulling up the ladder behind themselves to block the path of tomorrow’s innovators.

#### 1. Their political project has no support.

Buch-Hansen 18 — Hubert Buch-Hansen (Department of Business and Politics, Copenhagen Business School), “The Prerequisites for a Degrowth Paradigm Shift: Insights from Critical Political Economy,” Ecological Economics Volume 146, April 2018, Pages 157-163, dml)

Political projects do not become hegemonic just because they embody good ideas. For a project to become hegemonic, (organic) intellectuals first need to develop the project and a constellation of social forces with sufficient power and resources to implement it then needs to find it appealing and struggle for it. In this context, it is worth noting that degrowth, as a social movement, has been gaining momentum for some time, not least in Southern Europe. Countless grassroots' initiatives (e.g., D'Alisa et al., 2013) are the most visible manifestations that degrowth is on the rise. Intellectuals – including founders of ecological economics such as Nicholas Georgescu-Roegen and Herman Daly, and more recently degrowth scholars such as Serge Latouche and Giorgos Kallis – have played a major role in developing and disseminating the ideas underpinning the project. A growing interest in degrowth in academia, as well as well-attended biennial international degrowth conferences, also indicate that an increasing number of people embrace such ideas. Still, the degrowth project is nowhere near enjoying the degree and type of support it needs if its policies are to be implemented through democratic processes. The number of political parties, labour unions, business associations and international organisations that have so far embraced degrowth is modest to say the least. Economic and political elites, including social democratic parties and most of the trade union movement, are united in the belief that economic growth is necessary and desirable. This consensus finds support in the prevailing type of economic theory and underpins the main contenders in the neoliberal project, such as centre-left and nationalist projects. In spite of the world's multidimensional crisis, a pro-growth discourse in other words continues to be hegemonic: it is widely considered a matter of common sense that continued economic growth is required. It is also noteworthy that economic and political elites, to a large extent, continue to support the neoliberal project, even in the face of its evident shortcomings. Indeed, the 2008 financial crisis did not result in the weakening of transnational financial capital that could have paved the way for a paradigm shift. Instead of coming to an end, neoliberal capitalism has arguably entered a more authoritarian phase (Bruff, 2014). The main reason the power of the pre-crisis coalition remains intact is that governments stepped in and saved the dominant fraction by means of massive bailouts. It is a foregone conclusion that this fraction and the wider coalition behind the neoliberal paradigm (transnational industrial capital, the middle classes and segments of organized labour) will consider the degrowth paradigm unattractive and that such social forces will vehemently oppose the implementation of degrowth policies (see also Rees, 2014: 97). While degrowth advocates envision a future in which market forces play a less prominent role than they do today, degrowth is not an anti-market project. As such, it can attract support from certain types of market actors. In particular, it is worth noting that social enterprises, such as cooperatives (Restakis, 2010), play a major role in the degrowth vision. Such enterprises are defined by being ‘organisations involved at least to some extent in the market, with a clear social, cultural and/or environmental purpose, rooted in and serving primarily the local community and ideally having a local and/or democratic ownership structure’ (Johanisova et al., 2013: 11). Social enterprises currently exist at the margins of a system, in which the dominant type of business entity is profit-oriented, shareholder-owned corporations. The further dissemination of social enterprises, which is crucial to the transitions to degrowth societies, is – in many cases – blocked or delayed as a result of the centrifugal forces of global competition (Wigger and Buch-Hansen, 2013). Overall, social enterprises thus (still) constitute a social force with modest power. Ougaard (2016: 467) notes that one of the major dividing lines in the contemporary transnational capitalist class is between capitalists who have a material interest in the carbon-based economy and capitalists who have a material interest in decarbonisation. The latter group, for instance, includes manufacturers of equipment for the production of renewable energy (ibid.: 467). As mentioned above, degrowth advocates have singled out renewable energy as one of the sectors that needs to grow in the future. As such, it seems likely that the owners of national and transnational companies operating in this sector would be more positively inclined towards the degrowth project than would capitalists with a stake in the carbon-based economy. Still, the prospect of the “green sector” emerging as a driving force behind degrowth currently appears meagre. Being under the control of transnational capital (Harris, 2010), such companies generally embrace the “green growth” discourse, which ‘is deeply embedded in neoliberal capitalism’ and indeed serves to adjust this form of capitalism ‘to crises arising from contradictions within itself’ (Wanner, 2015: 23). In addition to support from the social forces engendered by the production process, a political project ‘also needs the political ability to mobilize majorities in parliamentary democracies, and a sufficient measure of at least passive consent’ (van Apeldoorn and Overbeek, 2012: 5–6) if it is to become hegemonic. As mentioned, degrowth enjoys little support in parliaments, and certainly the pro-growth discourse is hegemonic among parties in government.5 With capital accumulation being the most important driving force in capitalist societies, political decision-makers are generally eager to create conditions conducive to production and the accumulation of capital (Lindblom, 1977: 172). Capitalist states and international organisations are thus “programmed” to facilitate capital accumulation, and do as such constitute a strategically selective terrain that works to the disadvantage of the degrowth project. The main advocates of the degrowth project are grassroots, small fractions of left-wing parties and labour unions as well as academics and other citizens who are concerned about social injustice and the environmentally unsustainable nature of societies in the rich parts of the world. The project is thus ideationally driven in the sense that support for it is not so much rooted in the material circumstances or short-term self-interests of specific groups or classes as it is rooted in the conviction that degrowth is necessary if current and future generations across the globe are to be able to lead a good life. While there is no shortage of enthusiasts and creative ideas in the degrowth movement, it has only modest resources compared to other political projects. To put it bluntly, the advocates of degrowth do not possess instruments that enable them to force political decision-makers to listen to – let alone comply with – their views. As such, they are in a weaker position than the labour union movement was in its heyday, and they are in a far weaker position than the owners and managers of large corporations are today (on the structural power of transnational corporations, see Gill and Law, 1989).

6. Consent

It is also safe to say that degrowth enjoys no “passive consent” from the majority of the population. For the time being, degrowth remains unknown to most people. Yet, if it were to become generally known, most people would probably not find the vision of a smaller economic system appealing. This is not just a matter of degrowth being ‘a missile word that backfires’ because it triggers negative feelings in people when they first hear it (Drews and Antal, 2016). It is also a matter of the actual content of the degrowth project. Two issues in particular should be mentioned in this context. First, for many, the anti-capitalist sentiments embodied in the degrowth project will inevitably be a difficult pill to swallow. Today, the vast majority of people find it almost impossible to conceive of a world without capitalism. There is a ‘widespread sense that not only is capitalism the only viable political and economic system, but also that it is now impossible to even imagine a coherent alternative to it’ (Fisher, 2009: 2). As Jameson (2003) famously observed, it is, in a sense, easier to imagine the end of the world than it is to imagine the end of capitalism. However, not only is degrowth – like other anti-capitalist projects – up against the challenge that most people consider capitalism the only system that can function; it is also up against the additional challenge that it speaks against economic growth in a world where the desirability of growth is considered common sense. Second, degrowth is incompatible with the lifestyles to which many of us who live in rich countries have become accustomed. Economic growth in the Western world is, to no small extent, premised on the existence of consumer societies and an associated consumer culture most of us find it difficult to completely escape. In this culture, social status, happiness, well-being and identity are linked to consumption (Jackson, 2009). Indeed, it is widely considered a natural right to lead an environmentally unsustainable lifestyle – a lifestyle that includes car ownership, air travel, spacious accommodations, fashionable clothing, an omnivorous diet and all sorts of electronic gadgets. This Western norm of consumption has increasingly been exported to other parts of the world, the result being that never before have so many people taken part in consumption patterns that used to be reserved for elites (Koch, 2012). If degrowth were to be institutionalised, many citizens in the rich countries would have to adapt to a materially lower standard of living. That is, while the basic needs of the global population can be met in a non-growing economy, not all wants and preferences can be fulfilled (Koch et al., 2017). Undoubtedly, many people in the rich countries would experience various limitations on their consumption opportunities as a violent encroachment on their personal freedom. Indeed, whereas many recognize that contemporary consumer societies are environmentally unsustainable, fewer are prepared to actually change their own lifestyles to reverse/address this. At present, then, the degrowth project is in its “deconstructive phase”, i.e., the phase in which its advocates are able to present a powerful critique of the prevailing neoliberal project and point to alternative solutions to crisis. At this stage, not enough support has been mobilised behind the degrowth project for it to be elevated to the phases of “construction” and “consolidation”. It is conceivable that at some point, enough people will become sufficiently discontent with the existing economic system and push for something radically different. Reasons for doing so could be the failure of the system to satisfy human needs and/or its inability to resolve the multidimensional crisis confronting humanity. Yet, various material and ideational path-dependencies currently stand in the way of such a development, particularly in countries with large middle-classes. Even if it were to happen that the majority wanted a break with the current system, it is far from given that a system based on the ideas of degrowth is what they would demand.

## Trade DA

#### 2. Biden is just as protectionist as Trump.

Steve Chapman 21. A former columnist and editorial writer for the Chicago Tribune. “Column: The damaging protectionism of Trump — and Biden” Chicago Tribune. 05-28-21. https://www.chicagotribune.com/columns/steve-chapman/ct-column-biden-trade-trump-tariffs-chapman-20210528-qqq5giqswvc6rocjrw7bg5ie5e-story.html

When he became president, Joe Biden summarily reversed his predecessor’s policies on a range of issues, including climate change, immigration, taxes, social welfare and police reform. But on international trade, it’s **almost like Donald Trump never left.** Trump had a primitive view of this issue. Good, in his view, were exports, trade surpluses, tariffs and trade wars. Bad were imports, trade deficits and multilateral trade agreements. He saw global commerce as a zero-sum game, in which anything that benefited another country must come at our expense, and vice versa. He was unable to grasp that exchanges of goods and services across national borders could — and do — make people in every nation better off. So Trump **slapped tariffs on steel, aluminum**, solar panels and washing machines. He put tariffs on some $360 billion worth of Chinese apparel, appliances, machinery, shoes and more. He threatened to impose import taxes on cars made abroad. He **pulled out of the Trans-Pacific Partnership**, a free-trade accord with 11 other countries. He ended talks on the Transatlantic Trade and Investment Partnership, a major effort to lower trade barriers between the U.S. and the European Union. He **nullified the World Trade Organization, which resolves trade disputes**, by blocking the appointment of new members to the body that hears those cases. But his efforts accomplished nothing worthwhile. They raised prices for American consumers while punishing American companies that use steel and aluminum. What the Tax Foundation described as “one of the largest tax increases in decades” now costs the typical American family more than $1,200 a year. His tariffs failed to create jobs in the steel industry, which shrank even before the pandemic, and produced only a tiny boost in aluminum jobs. But a study by economists at the consulting firm The Trade Partnership estimated they would eliminate some 145,000 jobs in other sectors. Our trading partners **retaliated against U.S. companies** with tariffs of their own. American farmers were hit so hard that Trump had to come up with $23 billion to cushion the blow. Nor did his strategy reduce our trade deficits. The overall U.S. trade deficit last year was the biggest since 2008. China has not given up the practices Trump was trying to stop. In March, Gallup found that 63% of Americans — including 79% of Democrats — have a positive view of trade, with only 32% disagreeing. Biden was part of the Obama administration, which negotiated the Pacific trade deal and pressed hard to reach an agreement with the EU. But the Democratic Party has somehow **fallen under the sway of protectionists**, and he’s shown little interest in resisting. **He’s left most of Trump’s tariffs in place**, and his trade representative, Katherine Tai, said removing them would be a bad idea. She vowed a **“worker-centric” trade policy** focused on raising wages, omitting such goals as expanding commerce and fostering competition. Her stance fits the prevailing progressive superstition that **commerce with the world makes us poorer.**

#### No internal link.

Allison Murray 19, JD from the Loyola Law School, Los Angeles Law School, BS in Business Administration from the University of Redlands, Judicial Law Clerk at the U.S. Bankruptcy Courts, Former Corporate Paralegal at Boeing, Degree in Economics and Management from the University of Oxford, “Given Today's New Wave of Protectionism, Is Antitrust Law the Last Hope for Preserving a Free Global Economy or Another Nail in Free Trade's Coffin?”, Loyola of Los Angeles International and Comparative Law Review, Volume 42, Number 1, 42 Loy. L.A. Int'l & Comp. L. Rev. 117, Winter 2019, p. 117-119

Trump is not the only high-profile leader flirting with staunch protectionism. Western leaders in the E.U. appear to be growing more comfortable than their predecessors with considering similar policies. However, Western lawmakers themselves do not seem as persuaded by the statements of their leadership. The general sentiment among international policymakers is that there has been too much political wherewithal spent on loosening international trade barriers to take actions [\*119] that could counteract that progress. 6Presidential actions taken because of dissatisfaction with current global trade relations aside, a complete overhaul of trade agreements may be too daunting and difficult a task, especially absent ample political support in legislative bodies.

#### It’s DOJ policy to not apply them extraterritorially and to cooperate.

OECD 17. OECD Directorate For Financial And Enterprise Affairs Competition Committee. “Roundtable on the Extraterritorial Reach of Competition Remedies - Note by the United States”. FTC. 4-5 December 2017. https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/et\_remedies\_united\_states.pdf

12. The Department’s Merger Remedies Guide (“DOJ Merger Remedies Guide”) addresses merger remedies that may reach assets or conduct outside the United States. Similar to Section 5.1.5 of the International Guidelines, the DOJ Merger Remedies Guide also explains that the Department strives, “to the extent possible,” to ensure that its “remedies do not conflict unnecessarily with the remedies of other jurisdictions.”19 The Guide states, “In many cases, the [Department] may be able to work collaboratively with other antitrust agencies to craft remedies that are effective across jurisdictions.”20

#### Cooperation is the norm, but rarely applied extraterritorially either way.

OECD 17. OECD Directorate For Financial And Enterprise Affairs Competition Committee. “Roundtable on the Extraterritorial Reach of Competition Remedies - Note by the United States”. FTC. 4-5 December 2017. https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/et\_remedies\_united\_states.pdf

5. The Agencies’ Cooperation with Foreign Jurisdictions on Remedies 18. Achieving effective remedies often entails cooperation with foreign jurisdictions. Such cooperation may allow the U.S. agencies to secure relief that sufficiently protects U.S. competition and consumers without applying the remedy to conduct or assets outside the United States. When an extraterritorial remedy is necessary to address harm or threatened harm to U.S. commerce and consumers, cooperation helps to minimize the risk of conflict with obligations of foreign laws or foreign remedial orders.35 Cooperation and coordination on remedies can be efficient for enforcers and the parties under investigation, especially given that over 130 jurisdictions have antitrust laws and over 80 require pre-merger notification. Cooperation may result in a remedies package that addresses competition concerns in multiple jurisdictions.36 The Agencies work closely with competition enforcers in other jurisdictions on cases under common review, including to help foster convergence and consistent remedy determinations.37 6. U.S. Case Examples 19. To the extent that the Agencies rely on extraterritorial remedies, they do so in both merger and conduct cases, although they arise most frequently in the merger context. In all cases, the Agencies seek remedies that are appropriately tailored and that do not apply extraterritorially unless necessary to address the harm or threatened harm to U.S. commerce or consumers. 6.1. Merger Cases 20. In most mergers, the Agencies can obtain an effective remedy for U.S. competition and consumers without extraterritorial divestitures or other relief. This is the case even when an Agency coordinates with other jurisdictions in investigating a transaction that raises concerns in both domestic markets and markets outside the U.S. Even in these instances, however, coordination between jurisdictions can be helpful. For example, the FTC benefited from coordinating with antitrust authorities in Canada, the EU, and Mexico during the investigation of Emerson Electric Co.’s acquisition of Pentair plc, even though the potential harm to U.S. markets was resolved exclusively through the divestiture of a U.S. switchbox facility.38 Similarly, in the General Electric-Alstom SA merger, effective relief for U.S. markets required divestiture of only U.S. based assets; however, coordination between the Department and the EC in connection with the Department’s investigation “facilitated [the Department’s] investigation and helped formulate remedies that [preserved] competition in the United States and internationally.”39 A coordinated remedy resulted in the Department and the EC announcing separate settlements that eliminated harm to consumers in their respective jurisdictions. 40 There are many more cases in which the Agencies have coordinated with their foreign counterparts on mergers that affect multiple jurisdictions.41 21. Although a merger may affect competition in several jurisdictions, the Agencies focus on preserving competition in the domestic markets that may be harmed by the proposed acquisition. On some occasions, relief secured by foreign jurisdictions means that no remedy, domestic or extraterritorial, is necessary to protect domestic competition. Though our experience in deferring to another authority’s remedy is limited, we have relied on informal deference and remain interested in doing so, under the right conditions. A notable example was in connection with Cisco’s acquisition of Tandberg in 2010. The Department declined to challenge the merger in part due to certain commitments that Cisco made to the European Commission (EC) to facilitate interoperability in products related to a type of videoconferencing called telepresence. Waivers of confidentiality by the parties and industry participants allowed the Department and the EC to cooperate closely in their parallel reviews of the transaction, resulting in an efficient outcome for the enforcers and the merging parties.42 22. Nevertheless, certain merger investigations resolved by consent decree have required the divestiture of assets located outside the United States to preserve competition within the United States. For example, the FTC consent decree resolving concerns regarding the merger of cement manufacturers Holcim Ltd. and Lafarge SA required, in part, divestiture of a Canadian cement plant and related U.S. terminals along with two Canadian terminals related to a U.S. cement plant. The FTC explained that the divested assets “remedy competitive concerns in northern U.S. markets [and are] part of a larger group of Holcim assets located in Canada that Holcim and Lafarge have agreed to divest to address competitive concerns raised by the [Canadian Competition Bureau (“CCB”)]. Commission staff worked closely with staff from the CCB to reach outcomes that benefit consumers in the United States.” 43 An extraterritorial remedy was also required to resolve Department’s investigation of the Anheuser-Busch InBev SA/NV & Grupo Modelo S.A.B. merger. The consent decree in that matter similarly required divestiture of a facility outside of the United States, the Grupo Modelo brewery in Mexico, and a perpetual and exclusive U.S. trademark license to the seven brands of beer that Modelo then offered in the United States, as well as three brands not yet offered in the United States, but currently sold by Modelo in Mexico. This remedy allowed the acquirer “to meet current and future demand for Modelo Brand Beer in the United States,” which resolved concerns that the merger would harm competition in twenty-six local U.S. markets. 44 6.2. Civil Non-Merger 23. Extraterritorial remedies are less common when the underlying antitrust violation involves non-merger conduct. Indeed, none of the Department’s recent civil-non merger remedies has applied outside the United States.45 The FTC consent order with Invibio Inc. and its parent Victrix plc represents one example of a conduct remedy with a carefully tailored extraterritorial component. The FTC’s complaint related to Invibio’s worldwide sales of high performance polymer (PEEK) that was used to manufacture medical devices manufactured or sold in the U.S.46 The FTC consent imposed obligations applicable to certain extraterritorial sales, but explicitly excluded sales of PEEK used solely in products not manufactured or sold in the U.S.47 24. In the limited number of civil non-merger cases in which the Agencies find that the licensing of intellectual property is necessary to remedy allegedly anticompetitive conduct, the Agencies generally rely on a domestic-only licensing remedy because the license can be tailored to permit use of the intellectual property only in the domestic markets affected by the conduct. However, in rare cases, when a broader license may be necessary to provide effective relief, the Antitrust Agencies seek a remedy that is no broader than necessary.48 To the extent that multiple enforcers are reviewing similar conduct that may implicate remedies involving intellectual property, comity considerations and cooperation may come into play. 7. Conclusion 25. In their mission to protect competition in the United States, the U.S. Antitrust Agencies aim to tailor antitrust remedies to the identified competitive harm to U.S. commerce and consumers. Although agency remedies may reach conduct or assets outside the United States in order to preserve competition from a merger or to remedy anticompetitive conduct that affects U.S. commerce and consumers, the Agencies seek to avoid remedies with extraterritorial effect where possible. The Agencies’ International Guidelines set out a well-balanced standard for doing so, allowing for effective enforcement while limiting overly broad extraterritorial reach. Carefully tailoring remedies pursuant to the principles set forth in the International Guidelines helps the Agencies to avoid potential duplication and conflicting remedies. The Agencies believe that this approach is worthy of consideration by other authorities addressing these issues.

#### Trade doesn’t solve war---commerce just re-routes.

Joanne Gowa & Raymond Hicks 17. \*\*William P. Boswell Professor of World Politics of Peace and War, Princeton. \*\*Statistical Programmer, Niehaus Center for Globalization and Governance; PhD in political science, Emory. “Commerce and Conflict: New Data about the Great War.” *British Journal of Political Science* 47(3): 653-74. Emory Libraries.

The findings we report show that the Great War led to a **rerouting**, rather than a wholesale breakdown, of trade. This did not come as a surprise to states: the historical record shows that states anticipated wartime shifts in their trade channels. Most belligerents nonetheless incurred efficiency losses as a consequence of the shifts, but the losses pale in light of the aggregate costs the war imposed on them. These findings suggest that neglecting wartime trade channels can **overstate** the deterrent power of ex ante trade. It is reasonable to question the extent to which wartime trade can, in general, substitute for its ex ante counterpart. This depends, as we noted above, on the composition of trade. The dominance of homogenous products in trade at the time of World War I made substitution a feasible option. For the same reason, other wars that occurred during the first half of the twentieth century seem likely to have precipitated the same trade dynamics as did the Great War. Preliminary empirical analyses are consistent with this argument. 95 After World War II, however, intra-industry trade – that is, trade in differentiated products between countries with similar factor endowments – came to account for a much larger share of commerce. Krugman notes, for example, that intra-industry rose from about 22 per cent of trade between the industrialized countries in 1962 to about 50 per cent in 2006. 96 This trade tends to involve ‘highly specialized imported varieties for which domestic imports are hard to find’, 97 raising the estimated gains from trade that accrue to countries shifting from autarky to free trade. Trade in these products can magnify wartime trade costs to the extent that trade across enemy lines engages imports that cannot easily be obtained from other trading partners. Production networks also spread more widely across countries over time. This implies that conflicts in the more recent past might indeed have wreaked havoc on trade, raising the deterrent power of ex ante trade. But the composition of conflicts also shifted over time. After 1945, no war would ever again split the major trading states. As we noted above, the advent of the Cold War transformed them into each other’s sturdiest allies. Because the advanced industrialized countries account for a large share of **intra-industry trade**, post-World War II conflicts **did not endanger** the exchange of differentiated products. The same is true of foreign direct investment: for most of the twentieth century, it was largely the major developed country trading partners that were both its home and host countries. 98 The **changing composition of warring dyads** after World War II may help explain the findings in the empirical literature on this period that conflict and ex ante trade are inversely related. The effects of conflicts on wartime commerce in this period have yet to be examined, however. Conclusion That the First World War unleashed tremendous destruction is indisputable. It marked the inception of what has been described as the long European civil war. It resulted in sixteen million deaths and twenty million wounded and destroyed large amounts of physical capital. 99 In its wake, the great powers never established anything remotely similar to the Concert of Europe that succeeded the Napoleonic Wars. Their best efforts produced a League of Nations that was unable to resolve the conflicts of interest that stymied co-operation among them. They could agree neither on the enforcement of the Versailles Treaty nor on a collective response to the Great Depression, which set the stage for the outbreak of the Second World War. The Great War also reputedly destroyed the large trade flows that existed during the first golden age of globalization. For this reason, it has become central to debates about the liberal peace. Its outbreak seemed to destroy any hope that leaders had internalized the idea that war had become a ‘great illusion’, more likely to impose costs than benefits because of the concomitant destruction of the trade that had become integral to the growth of national power. 100 Because its belligerents had been each other’s major trading partners ex ante, the Great War seemed to destroy hopes that economic linkages would secure peace. Yet, the evidence we present here suggests that one of the largest wars in history did not induce a breakdown of trade. Instead, large shifts occurred in interstate commerce, privileging trade between allies, penalizing commerce between adversaries and increasing trade with neutrals. The composition of early twentieth-century trade helped to mitigate the welfare losses these shifts imposed, as it enabled states to switch trading partners and transit routes more easily than might seem possible later in the twentieth century. Because ex ante commerce between belligerents is not necessarily a good indicator of their ex post trade, estimates of the deterrent power of trade need to take both into account.