# 2AC

## Prices Adv

No cards

## Innovation

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## T Scope

#### We meet – plan expands antitrust to conduct not currently prohibited

Marmaro 21 – JD, Columbia

Morgan Marmaro, Editor-in-Chief, Colum. J.L. & Soc. Probs, Law Clerk, Freshfields Bruckhaus & Deringer LLP, JD-Columbia, 54 Colum. J.L. & Soc. Probs 169, <http://blogs2.law.columbia.edu/jlsp/wp-content/uploads/sites/8/2021/02/Volume-54-Marmaro.pdf>

A class action, In re Humira (Adalimumab) Antitrust Litiga-tion,46 alleges that AbbVie’s multiple agreements are actually mar-ket allocating agreements and settlements qualifying as reverse payments. As of this writing, the In re Humira litigation is under-going appeal after a district court ruled in favor of AbbVie, noting that while the behaviors seem unsavory, they were legal “exploited advantages” derived from the current regulatory system.47 The court went further astray, finding that the agreements were not anticompetitive, and in contradiction with Actavis’s rejection of the scope of the patent doctrine, did so by relying upon the alleged strength of AbbVie’s Humira patents.48 But neither the parties nor the Court in In re Humira questioned the basic application of Ac-tavis to the agreements in this case. Though the In re Humira district court dismissed the case in favor of defendants,49 this Note argues that the In re Humira district court was correct to engage in an Actavis analysis but did so incorrectly.

[FN 47]

47. Id. at 819 (“The legal and regulatory backdrop for patented biologic drugs, together with a well-resourced litigation strategy, gave AbbVie the ability to maintain control over Humira. Plaintiffs say that AbbVie’s plan to extend its power over Humira amounts to a scheme to violate federal and state antitrust laws. But what plaintiffs describe is not an antitrust violation. AbbVie has exploited advantages conferred on it through lawful practices and to the extent this has kept prices high for Humira, existing antitrust doctrine does not prohibit it.”).

[End FN]

#### CI—scope of the antitrust laws is defined by the stringency of doctrinal tests—we meet bc we presume pay for delay is illegal

Bauer, Professor of Law, Notre Dame Law School; Visiting Professor, Emory

University School of Law, ‘04

(Joseph P., “Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?” 16 Loy. Consumer L. Rev. 303 2003-2004)

Lately, much attention has been given to the scope of the antitrust laws. This discussion has two overlapping components: (1) consideration of the substantive doctrines specifying the behavioral or structural changes that are or are not unlawful and the appropriate methodology; and (2) analysis for making those determinations with attention given to the appropriate vehicles for enforcing the antitrust laws. Some argue that the antitrust laws proscribe activities that are either pro-competitive or at worst benign.' Further, they assert that the multiplicity of antitrust enforcers and enforcement devices has resulted in undue burdens, including excessive cost, time delay, and forestalling of legitimate, procompetitive behavior.

#### *Actavis* limited the scope in this area, we do the opposite

Kades 21 – Director of Markets and Competition Policy, Washington Center for Equitable Growth

Michael Kades, A Canary in the Coal Mine for the Failure of U.S. Competition Law: Competition Problems in Prescription Drug Market, Prescription for Change: Cracking Down on Anticompetitive Conduct in Prescription Drug Markets, Subcommittee on Competition Policy, Antitrust, and Consumer Rights, July 13, 2021, https://equitablegrowth.org/a-canary-in-the-coal-mine-for-the-failure-of-u-s-competition-law-competition-problems-in-prescription-drug-market/

These rulings had a devastating impact on generic competition. The number of potential pay-for-delay deals with significant payments increased from zero in fiscal year 2004 to a high of 33 in fiscal year 2012.26 The deals increased prescription drug costs by $63 billion.27

In 2013, in the Androgel case (FTC v. Actavis), the Supreme Court rejected the lenient view that patent holders could simply pay potential infringers to stay off the market. According to the Supreme Court, an agreement in which the branded and generic companies eliminate potential competition and share the resulting monopoly profits likely violates the antitrust laws, absent some justification.28 The Supreme Court’s decision has limited pay-for-delay deals. In fiscal year 2017, the most recent year of reported data, the number of potential pay-for-delay deals with significant payments fell to three.29

That success has been incomplete, and it overlooks the cost of enforcement. The Supreme Court approach requires a case-by-case analysis of a practice that virtually always is anticompetitive. That allows companies to find new ways to hide compensation or offer a plethora of alternative justifications for their conduct. Based on the past mistakes and some open hostility to the Supreme Court’s decision, courts could accept one of these defenses and create a costly loophole.

Further, the approach is resource intensive. Indeed, the FTC resolved the Androgel case itself almost 6 years after the Supreme Court decision allowing the case to go forward and more than a decade after the case was filed. The FTC continues to litigate multiple cases against the same parties over the same product.30

Failure of antitrust law

Anticompetitive conduct in prescription drug markets has been occurring for decades and has flourished despite the Federal Trade Commission having devoted substantial resources to trying to stop the conduct. It regularly litigates to judgment to stop egregious anticompetitive conduct with only limited success. The obstacles to successful enforcement are likely to increase because the Supreme Court has taken away the FTC’s ability to seek monetary remedies.

We are in this situation because “antitrust enforcement faces a serious deterrence problem, if not a crisis.”31 Judicial decisions have contributed to this problem. They “have thrown up inappropriate hurdles that limit the practical scope of the antitrust laws’ application to anticompetitive exclusionary conduct, including monopolization, and to anticompetitive mergers.”32 These developments make it less, not more, likely that antitrust law will condemn harmful conduct.

#### “Increase” requires pre-existence.

Ortega 07 – Judge, Oregon Appeals Court, Oregon Supreme Court

Darleen Ortega, Papas v. Or. Liquor Control Comm'n, 213 Ore. App. 369, Court of Appeals of Oregon, June 2007, LexisNexis

We begin with whether OLCC's interpretation of the rule, as developed and applied in this case, is consistent with the rule's text. Certainly, OLCC's understanding that the rule applies to "competitions" is consistent with the rule's use of the term "contest." See Webster's Third New Int'l Dictionary 492 (unabridged ed 2002) (defining the noun "contest" as a "competition"). However, by its terms, the rule refers and applies to specific types of drinking contests: as pertinent here, ones that involve "increase[d] consumption \* \* \* in increased quantities" of alcoholic beverages. OLCC's interpretation and application in this case fail to account for that qualification or to yield any pertinent point of reference in that regard; that is, nothing in OLCC's interpretation or application of the rule here identifies the consumption or quantities against which the required "increase" is to be, or was, measured. See Webster's at 1145 (defining the transitive verb "increase" as "to make greater in some respect (as in bulk, quantity, extent, value, or amount) : add to : enhance" and defining the adjective "increased" as "made or become greater"). Thus, OLCC's proposed interpretation--that mere competition between participants constitutes conduct violating the rule--is inconsistent with the latter, qualifying aspects of the rule.

## States CP

#### State courts cannot consider cases pertaining to federal patent law---federal courts have exclusive jurisdiction.

Paul D. Clement 21. Counsel of Record. WARSAW ORTHOPEDIC, INC., MEDTRONIC, INC., MEDTRONIC SOFAMOR DANEK, INC., Petitioners v. RICK C. SASSO, M.D., Respondent. On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit. 03-12-21. https://www.supremecourt.gov/DocketPDF/20/20-1284/171750/20210312113145882\_2021-03-12%20Medtronic%20Petition%20Final.pdf

Pursuant to 28 U.S.C. §1338(a), federal courts have exclusive jurisdiction over all cases arising under federal patent law; that jurisdiction is exclusive of state courts, which are explicitly prohibited from adjudicating such cases. Petitioners brought this suit in federal court seeking a declaration that its products were not covered by valid patent claims and thus they did not owe respondent damages. The district court assumed it had exclusive jurisdiction to hear petitioners’ claims, but “abstain[ed]” from resolving them—deferring instead to a “mirror image” Indiana state-court proceeding respondent had brought against petitioners, in which the state trial court essentially held a patent infringement trial, addressing, inter alia, issues of claim construction and PTO cancellation of the same patent claims. On appeal, the Federal Circuit went even further than the district court: It explicitly held in a precedential opinion that the district court had exclusive jurisdiction, such that the Federal Circuit (and not the Seventh Circuit) had exclusive appellate jurisdiction. But despite holding that the federal courts had exclusive jurisdiction over this federal patent-law dispute, the Federal Circuit held the district court could properly “abstain” from resolving the parties’ federal patent-law dispute in deference to the ongoing state-court proceedings.

#### State action on P4D is preempted – it conflicts with the balance established by federal courts in Actavis

Samp 15 – Chief Counsel, Washington Legal Foundation

Richard Samp, *The Role of State Antitrust Law in the Aftermath of Actavis*, The Minnesota Journal of Law, Science & Technology, Vol 15, Issue 1, Article 14

This paper concludes that state antitrust liability can be imposed on parties to patent settlements so long as the state action “parallels” federal antitrust law. On the other hand, state law is preempted to the extent that it seeks to impose antitrust liability for conduct not deemed actionable under federal law; under such circumstances, state-law liability would be impliedly preempted because it would stand as an obstacle to accomplishing the purposes of federal patent law. The scope of preemption likely would include any effort by states to apply a stricter standard of review to reverse payment patent settlements—either a “quick look” review accompanied by a presumption of illegality, or a declaration that such settlements are “per se” illegal. Part I of this paper summarizes federal preemption law as it has been applied to state antitrust actions. It explains that the U.S. Supreme Court has never interpreted federal antitrust law as imposing a limit on states’ authority to regulate business practices deemed by states to have anticompetitive effects. Nonetheless, federal courts have not hesitated to rule that state antitrust law is preempted by federal law when they determine that state law comes into conflict with some other federal statute. In this instance, the relevant “other federal statute” is federal patent law. Part II examines the Supreme Court’s Actavis decision and explains that Actavis attempted to balance the conflicting demands of federal antitrust law and patent law. The decision was based on what the Court deemed the appropriate balance between those conflicting demands, and the paper concludes that states may not adopt policies that would conflict with the balance arrived at by the Court. Parts III and IV examine the extent to which Activis and other Supreme Court decisions should be deemed to preempt state antitrust law challenges to reverse payment patent settlements. They conclude that state antitrust law should be deemed preempted to the extent that it attempts to impose liability under state law in circumstances under which federal law would not permit imposition of antitrust liability. The paper recognizes, however, that state antitrust claims of this sort are likely to become increasingly common and that defendants may not always prevail in their efforts to convince state courts to rule that expansive state law claims are preempted. Moreover, even when state courts are purporting to do no more than enforce state antitrust law that merely “parallels” federal antitrust law, defendants may nonetheless encounter greater difficulty (in comparison to federal court proceedings) in convincing a state-court fact-finder that settlement of their patent dispute had pro-competitive effects.

#### Specifically, state laws that attempt to regulate biosimilars are pre-empted

Fresco & Fischer 17 – Associate & Partner @ Patterson Belknap, Biologics Blog

Michael Fresco & Aron Fischer, “Federal Circuit: BPCIA Preempts State Law In Biosimilar Litigation,” December 15, 2017, https://www.biologicsblog.com/federal-circuit-bpcia-preempts-state-law-in-biosimilar-litigation

The Federal Circuit on Thursday issued an opinion in Amgen v. Sandoz holding that that the Biologics Price Competition and Innovation Act (BPCIA) preempts state-law claims that are based on a biosimilar applicant’s failure to participate in the BPCIA’s patent dispute resolution procedures, a/k/a the “patent dance.” In light of the Supreme Court’s earlier ruling that the BPCIA provides no federal remedy for this failure, the Federal Circuit’s decision confirms that biosimilar applicants may opt out of the patent dance without facing legal liability.

The dispute between Amgen and Sandoz was the first under the BPCIA, and it involved the first biosimilar product approved in the United States, Sandoz’s Zarxio. Zarxio is a biosimilar of Amgen’s Neupogen (filgrastim), a cancer treatment drug. Before Zarxio’s approval, Amgen filed a lawsuit asserting, among other things, that Sandoz had refused to initiate the patent dance by giving Amgen pre-suit information about its biosimilar. Amgen claimed that this failure was an unlawful act that was actionable under California’s unfair competition law. In 2015, The Federal Circuit, in its first decision interpreting the BPCIA, rejected Amgen’s unfair competition claim, holding that there was no unlawful act because under the BPCIA a biosimilar applicant can opt out of the patent dance so long as it is willing to accept the statutory consequences for doing so. The Supreme Court granted the parties’ cross-petitions for certiorari and, in a decision issued earlier this year, agreed with the Federal Circuit’s interpretation of the BPCIA on this issue. The Court, however, declined to decide whether failing to follow the patent dance can subject a biosimilar applicant to state-law liability. Instead, the Supreme Court remanded the case to the Federal Circuit with instructions to determine whether California would treat non-compliance with the BPCIA as unlawful and, if so, whether BPCIA preempts any additional remedy under state law. The Court noted, however, that the Federal Circuit could instead assume the existence of state-law liability and address preemption first.

That is what the Federal Circuit did. On remand, the Federal Circuit took up the preemption question first and, after finding that Sandoz had not waived the argument, held that the BPCIA preempts state-law claims premised on an applicant’s failure to participate in the patent dance. The Court found both “field” and “conflict” preemption applicable. As to field preemption, the Court pointed to the BPCIA’s complexity and its “carefully calibrated scheme for preparing to adjudicate, and then adjudicating” biosimilar patent infringement claims as indications that “the federal government has fully occupied this field,” leaving no room for state-law claims to exist in this area. As to conflict preemption, the Court found that Amgen sought to impose through state law penalties for non-compliance with the BPCIA that Congress intended to omit from the statute. The Court was particularly concerned that casting the BPCIA’s “detailed regulatory regime in the shadow of 50 States’ tort regimes” would “dramatically increase the burdens on biosimilar applicants beyond those contemplated by Congress in enacting the BPCIA.” The Court, accordingly, ruled that Amgen’s state law claims could not proceed.

## Statute-Independent Common Law CP

#### The court being in charge of things is bad – causes warming, they read the impact for us

Michael Klarman 18, Kirkland & Ellis Professor at Harvard Law School, “Why Democrats Should Pack the Supreme Court,” Take Care blog, October 15, 2018, <https://takecareblog.com/blog/why-democrats-should-pack-the-supreme-court>

Despite Democrats’ having won the popular vote in six of the last seven presidential elections, the Supreme Court has not had a liberal majority since 1969. Because Senate Majority Leader Mitch McConnell straight-out stole the seat vacated by the death of Justice Antonin Scalia early in 2016, a seat that should have been filled by President Barack Obama’s nominee (Merrick Garland), liberals are unlikely to control the Court for at least another couple of decades. As has been frequently noted, recently appointed Justices Neil Gorsuch and Brett Kavanaugh were nominated to the Court by a president who lost the popular vote by nearly three million votes, and were then confirmed by a majority of senators who represented minorities of the American population.

Even before the appointment of Justice Kavanaugh, the Supreme Court—which has always been a political institution—had become an adjunct of the Republican Party. Today’s conservative majority on the Court busts labor unions (which remain the backbone of the Democratic Party) and undermines class-action litigation (which the Republican justices apparently regard as a gravy train for plaintiffs’ lawyers, who contribute disproportionately to Democratic coffers). That same majority legitimizes voter suppression (which purports to be addressed toward a form of voter fraud that exists only in the fevered imagination of Fox News viewers), with the effect of diminishing turnout among constituencies that disproportionately support the Democratic Party—racial minorities, poor people, and young adults. Conservative justices have refused to intervene against political gerrymandering, which in recent years has vastly inflated Republican power at the state and national levels. These same Justices have also used dubious interpretations of the First Amendment in campaign-finance rulings to unleash money in politics. Of course, that largely redounds to the benefit of the Republican Party, which derives a disproportionate share of its resources from wealthy donors who generally regard the political arena as a forum in which to purchase policies that benefit them, such as tax cuts that disproportionately favor the rich and the evisceration of the Environmental Protection Agency. The Court’s Republican majority ferrets out non-existent animus against conservative Christians in a Colorado civil rights commission, while turning a blind eye to transparent animus against Muslims within the Trump administration. And, lest we forget, Republican justices in 2000 shut down a recount that jeopardized the prospects of their party’s presidential candidate, eventually enabling President George W. Bush to put two more Republican Justices on the Court.

When progressives win back political power at the national level, which will happen one day, we will be confronted with the most conservative Supreme Court in nearly a century. It is easy to imagine that Court concocting constitutional arguments against virtually every measure a progressive administration might pursue—for example, universal health care, a ban on assault weapons, a new federal law to protect voting rights, or environmental rules to mitigate the effects of human-caused global climate change. (Remember, this is the same Court that came within an inch of invalidating the most important piece of domestic legislation in the last fifty years, the Affordable Care Act, on a constitutional basis so absurd that it didn’t even occur to nearly any of the Republican politicians who had opposed the bill’s passage in Congress.)

## Neolib K

#### Perm do both – plan lowers drug prices and stops ppl from dying bc they can’t afford medicine – key to actualize the alt’s politics

Feldman 8/27 – Distinguished Professor of Law Chair & Director of the Center for Innovation, UC Hastings Law

Robin Feldman, Arthur J. Goldberg Distinguished Professor of Law, Albert Abramson ’54 Distinguished Professor of Law Chair, and Director of the Center for Innovation, The Price Tag of 'Pay-for-Delay', UC Hastings Research Paper Forthcoming, 27 Aug 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3846484

The skyrocketing price of prescription medication continues to plague the pharmaceutical industry. For example, an analysis of one million Medicare patients between 2010 and 2017 found that the average dosage-unit price of brand-name drugs increased by 313 percent even after accounting for rebates.2 [FN 2] 2 Robin Feldman, The Devil in the Tiers, J.L. & BIOSCI. 1, 19 (2021). The RAND Corporation found in 2021 that the price of brand-name prescription drugs in the U.S. is 256 percent of the prices in thirty-two OECD countries combined, ranging from 170 percent of prices in Mexico to 779 percent of prices in Turkey (ANDREW W. MULCAHY ET AL., RAND CORP., INTERNATIONAL PRESCRIPTION DRUG PRICE COMPARISONS: CURRENT EMPIRICAL ESTIMATES AND COMPARISONS WITH PREVIOUS STUDIES 26 (2021), <https://www.rand.org/content/dam/rand/pubs/research_reports/RR2900/RR2956/RAND_RR2956.pdf>). [End FN] Similarly, one in four Americans have difficulty affording their medications, and three in ten say costs have prohibited them from taking their medications as prescribed.3 With rising out-of-pocket costs and patients dangerously rationing medication, these prices are causing real pain for American patients. Diabetic patients, for example, paid nearly $6000 a year out of pocket for insulin in 2016, and patients with arthritis saw the price of Humira rise to $1552 a month in 2019.4 As difficult as the burdens are for any patient, the burden of paying high prices lands particularly hard on lower-income groups, threatening access to life-saving treatments and creating further gaps in equity across society.

#### Plan’s nuanced use of competition policy is good – thinking that using competition policy to incentivize drug development is the equivalent of mass deregulation is totalizing – both state planning and complete decentralization are disasters

Coniglio, antitrust attorney in the Washington, DC office of Sidley Austin LLP, ‘20

(Joseph V., “Economizing the Totalitarian Temptation: A Risk-Averse Liberal Realism for Political Economy and Competition Policy in a Post-Neoliberal Society,” 59 Santa Clara L. Rev. 703)

The implication of the foregoing is that the most pressing task for competition policymakers may not involve a rethinking of first principles. The principles of neoliberal competition policy may have ultimately been proven justified by an unprecedented period of economic growth, technological progress and reductions in poverty, and should presumably remain operative as long as they remain the best framework for bringing about these ends. Neither, as we have suggested, must the capitalist entrepreneur be lost in the process. The totalitarian temptation to submit to general state control of the economy-whether it be in the form of communism from below or fascism from above should be resisted so as to preserve and build upon the great prosperity Western Civilization has managed to achieve.

This statement will no doubt be highly unsatisfactory to many critics of neoliberalism who seek more fundamental and revolutionary changes. Surely, they suggest, there must be some principled basis for critiquing the neoliberal status quo with which so many are frustrated. Indeed, there very well may be, and none of the arguments in this article should be understood to the contrary. The goal of this article has been limited to a tailored defense of neoliberal principles only as they relate to competition policy, broadly understood. It does not suggest that neoliberal monetary, trade, and fiscal policies are also sound-let alone a neoliberal social order, where all the core institutions within society are organized according to the neoliberal principles of wealthmaximization, empiricism, and the rest.129 This is to say that even if neoliberalism is a sound theory as applied to the area of competition policy, neoliberal monetary policy, for example, may be problematic and a just target for contemporary critics. Similarly, claiming that competition policy should be enforced using a consumer welfare standard does not mean that all the organs of law and civil society should be oriented to maximize wealth or consumer welfare, even if this economic inquiry is nonetheless informative. 30 It is well known that several prominent neoliberals have expanded the neoliberal policy apparatus beyond the regulation of market capitalism with which antitrust is concerned to domains typically understood to be beyond a purely utilitarian purview.' 3 ' However, whatever the merits of these broader neoliberal policy programs, the competition policy baby, so to speak, should not be thrown out with the bathwater.

Consider the charge that neoliberal policies have increased wealth inequality in the United States. Some commentators attempt to link this increased inequality with a decline in competition'3 2 and, by implication, consumer welfare competition policy. Notwithstanding the interest such theories appeared to have garnered from highly distinguished economists and policymakers, such as Nobel Laureate Joe Stiglitz,133 one might alternatively consider whether increasing wealth inequality and the resultant social strife are far more a result of policies in other areas, such as monetary policy. 134 At the same time as Chicago School antitrust policy took root, the American economy began to undergo sustained expansions in the money supply and reductions in interest rates that, at least in theory, disproportionately reward the owners of financial assets, who are more likely to be wealthy. 135

#### Only market incentives produce truly innovative technology – state planning can give you a lab but it cannot fiat the formula for new biologics

Janeway, board of directors of the U.S. Social Science Research Council and co-founder of the Institute for New Economic Thinking, ‘12

(William, Doing Capitalism in the Innovation Economy, pg. 273-277)

All of the stages of development are dependent to some degree on speculative forays into the unknown. None lends itself to optimal management in accord with a strict accounting of expected returns relative to costs incurred, whether conducted by a central planner or an established, profit-making enterprise. When scientific advance was funded by the profits of the great corporations through the first half of the twentieth century, the costs of the central research labs could no more be rationalized by the calculus of prospective financial returns than could the costs of the National Science Foundation (NSF) or the Defense Advanced Research Projects Agency (DARPA) or the National Institutes of Health (NIH) – which is why they were all required to shift resources toward explicitly applied research and development when profits came under pressure. Thus, the prime and critical constituent elements of the Innovation Economy are sources of funding decoupled from concern for economic return. This is clearly so with respect to the unfettered pursuit of scientific curiosity, but support for such research may be fully available from the state only during transient moments of national self-confidence when economic competition seems least threatening. Perversely, investment in scientific research is likely to be challenged as the nation’s competitive position weakens. So the Haldane principle, invoked in Britain to defend the autonomy of scientific research from political pressures, dates back to the First World War, when the sun still did not set on the British Empire. It was radically revised by the Rothschild Report in post-Empire 1971 to draw a bright line between pure and applied research and to subject the latter to the test of a customer–contractor relationship.3 In the United States, Vannevar Bush’s vision of public investment in science transcended near-term considerations of return, economic or political. Two generations later, the NIH and NSF are collaborating under the tortuous acronym STAR METRICS – “Science and Technology for America’s Reinvestment: Measuring the Effects of Research on Innovation, Competitiveness and Science” – in response to “increasing pressure to document the results of … research investments in a scientific manner and to quantify how much of the work is linked to innovation.”4 The attempt to manage scientific research in narrow pursuit of “value for money” can be expected to reduce its potential for creative exploration of the unknown. As I learned from my engagement with computing, the state has directly and indirectly accelerated construction of technology platforms to support the speculative exploits of entrepreneurs and the capitalists who finance them. Financial bubbles, in which returns are decoupled from the economic fundamentals, are the complementary engine of Schumpeterian waste. There are some examples of efficient deployment of new technological infrastructure: the construction of the French railroad system under state direction *was a model* of engineering efficiency and proceeded pari passu with the railroad systems in Britain and the United States, but without their duplicative waste. But, regardless of how potentially revolutionary networks have been planned, their financing has exploited the essential and inevitable herding behavior of investors. And, for the final phase of the Innovation Economy, there is no substitute for the speculative wastefulness of financial markets and the proliferation of hosts of hopeful commercial monsters funded thereby to explore the new economic space. When the great technology corporations were still funding basic research in their central labs, their monopoly positions in the markets they served inhibited their ability to exploit the technologies derived therefrom. Three times I directly observed signal examples of such failure. During the 1980s, I witnessed repeated instances of “fumbling the future” at Xerox when none of the innovations delivered by PARC could measure up to the profits of the entrenched, patent-protected copier business.5 Like all investors in the birth of client–server computing, I was an indirect beneficiary of AT&T’s failure to capitalize on the extraordinary information technologies created within its Unix Systems Laboratory. And at BEA, I was both the direct beneficiary of AT&T’s invention of Tuxedo and, in equal measure, of IBM’s inability to sacrifice the profits from its proprietary products to compete directly in the new world of open and distributed computing. Joseph Schumpeter expressed the view that large firms have an inherent advantage in innovation relative to smaller enterprises.6 But, as Josh Lerner summarizes the experience of the biotech and internet revolutions: “The enabling technologies were developed with government funds at academic institutions and research laboratories. It was the small entrants … who first seized upon the commercial opportunities.”7 In defiance of Schumpeter’s expectation, economic innovation has not been effectively bureaucratized by the great corporations. Rather, it tends to be delivered by new companies. But funding those new companies depends on access to financiers who have access to financial markets prone to speculative excess. This is the lesson both of my professional life as a practitioner and of my research into the sources of venture capital returns. And it is a lesson drawn not only from the most recent iteration of the Innovation Economy or from the long-term development of the British and American economies. Even in the bank-based industrial economies of Germany and Japan, the stock exchange played a critical role in funding aggressive investment in frontier technologies during their initial high-growth decades of the late nineteenth and early twentieth centuries.8 The vast expansion of the German and Japanese banking systems took place to finance post-Second World War recovery, precisely when innovation was a distraction from the defined task of literally reconstructing the physical assets of the economy. The most recent new economy – the digital economy in whose development I have passed my professional career – was built through the combined forces of state funding of research and speculative financing of the companies created to transform the fruits of research into commercial goods and services. But the discrediting of LBJ’s Great Society in the context of Vietnam, followed by the stagflation of the 1970s, opened the door to the return of market fundamentalism as a constraint on state initiatives.

#### The “imminent collapse unless alt” narrative is wrong—enough time to address existential risk without discarding capitalism

Wade, Professor of Global Political Economy at the Department of International Development, London School of Economics, ‘21

(Robert H., “What is the Harm in Forecasting Catastrophe due to Man-Made Global Warming?” July 22, <https://www.globalpolicyjournal.com/blog/22/07/2021/what-harm-forecasting-catastrophe-due-man-made-global-warming>)

When parts of western Germany, Belgium and Netherlands have just experienced catastrophic floods and the Pacific northwest has recently broken heat records, it is counter-intuitive to challenge the prevailing pessimism about global warming – captured for example by the Financial Times columnist Martin Wolf who says, “Given this signal failure [to vaccinate against Covid in line with the global interest], it is impossible to imagine we will do much more than fiddle while the planet burns.”

The danger of this mindset is that it encourages inflation of the threat-language far beyond the credible science, so that the future cannot be discussed except in terms of a choice between “disaster”, “catastrophe”, “planetary extinction” on the one hand or impossibly fast reforms to how humanity lives, works and governs, on the other.

Every sensible person agrees that (1) global warming has been happening over most of the second half of the twentieth century and on into the twenty first, and (2) most of it to date is due to greenhouse gas emissions. What could be called the “mainstream view” of climate change goes much further, onto uncertain epistemological ground: (3) man-made global warming is the main cause of all kinds of disagreeable events – including extreme weather, rising seas, and much more; (4) humanity faces impending catastrophe unless we undertake far-reaching changes to how we live, work and govern in order to cut CO2 emissions and dematerialize economies (“net zero by 2050”).

This essay identifies some of the weaknesses in the evidence presented in support of the mainstream view, including weaknesses in the claim that 97% of climate scientists believe in anthropogenic global warming, in the claim that global temperatures will rise much faster than they have been rising, and in the (implicit) claim that the horrifying worst-case scenario presented by the Intergovernmental Panel on Climate Change represents the likely scenario to 2100 in the absence of radical actions starting now. It identifies the incentive mechanisms that produce the exaggerations and sustain wide credence in them. At the end it considers the question: does highlighting the doomsday exaggerations serve to reduce the political and public pressures for necessary ameliorative action, in a world where powerful fossil lobbies seek to block or delay such action for reasons independent of “evidence”? To what extent must mass publics be “panicked” in order to induce enough collective political, business and family action to substantially slow the growth of greenhouse gas emissions?

Policy Recommendations

Every sensible person agrees that (1) global warming has been happening over most of the second half of the twentieth century and on into the twenty first, and (2) most of it to date is due to greenhouse gas emissions.

But too much policy discussion about global warming is polarized and locked into a “syndrome of exaggeration”. The mainstream view talks of coming disaster, catastrophe, even extinction, short of urgent and massive action on a global scale. But it is easy to question the empirical basis of this forecast – not least the long history of repeated wild exaggerations of disaster relative to what later transpired. In response an active but small “sceptical” community exaggerates its scepticism. The two sides make a syndrome in that the behaviour of each confirms the negative expectations of the other.

What is now strangely urgent is to calm down the present climate hysteria so that safety-first resource allocation and consumption decisions can be made without “climate” being the touchstone of the very future of humanity, the current idol of the ancient human longing for Salvation in anxious times, the pathway for all the ingredients of a better world.

The essay suggests changes in the budget and mandate of the Intergovernmental Panel on Climate Change; more action by learned societies in calling to account the wild exaggerators; beefing up the Loss and Damage pillar of the Paris Agreement; boosting investment in “clean coal” technologies as well as renewables, and linking coal-power retirement to the coming on stream of attractive alternatives; creating central planning capacity at national and international levels (eg in multilateral development banks) to integrate investment decisions in energy, transport, buildings, industry and agriculture; and last but not least, respecting the principle of free speech while maintaining the standards of civil discourse.

Every sensible person agrees that (1) global warming has been happening over most of the second half of the twentieth century and on into the twenty first, and (2) most of it to date is due to greenhouse gas emissions. Many go on to say that (3) global warming is the cause of all kinds of disagreeable events – including extreme weather, rising seas, and much more; and that (4) humanity faces impending catastrophe short of far-reaching changes to how we live, work and govern in order to cut CO2 emissions and dematerialize economies. This could now be described – with only a little exaggeration – as the mainstream view.

The Impending Catastrophe

Here are examples of people and organizations claiming that catastrophe for humanity and the biosphere lies ahead if the people of developed and developing countries alike do not make radical changes soon.

The New York Times reported after the G7 Summit in June 2021 that “Mr Biden was once again part of a unanimous consensus that the world needs to take drastic action to prevent a climate disaster”. The report explains that “… the world needs to urgently cut emissions if it has any chance of keeping average global temperatures from rising above 1.5C compared with preindustrial levels. That’s the threshold beyond which experts say the planet will experience catastrophic, irreversible damage.”

US climate envoy John Kerry delivered a dire warning on 12 May 2021 on “the mounting costs … of global warming and of a more volatile climate”. 2020’s tally of “22 hurricanes, floods, droughts and wildfires shattered the previous annual record of 16 such events, and that was set only 4 years ago…. You don’t have to be a scientist to begin to feel that we’re looking at a trend line.”

Christiana Figueres, former executive secretary of the UN Framework Convention on Climate Change and pivotal figure in the Paris Agreement, declared in 2020, “It is only over the next 10 years from here to 2030 that we can influence what is going to happen. The scary thing is that after 2030 it basically doesn’t really matter what humans do. We will be in danger of those tipping points having a domino effect on each other and we will lose total control.” (1)

Some more examples:

Kevin Drun, 2019: “[The Green New Deal] would only change the dates for planetary suicide by a decade or so. It’s nowhere near enough even if we do it ”.

Professor Frank Fenner, microbiologist, ANU, 2010: “We’re going to become extinct. Whatever we do now is too late”

John Davies, geophysicist, senior researcher at the Cold Climate Housing Research Center, 2014: “With business as usual life on earth is largely doomed”.

James Hansen, former Director, NASA Goddard Institute for Space Studies, testifying at a Congressional hearing on global warming in 2008: “We’re toast if we don’t get on to a very different path. This is the last chance” to avoid mass extinctions, ecosystem collapse and dramatic sea level rises. “We [scientists] see a tipping point occurring right before our eyes. The Arctic is the first tipping point and it’s occurring exactly the way we said it would.” In five to 10 years [by 2013-2018], the Arctic will be free of ice in the summer.

James Hansen, testimony at Congressional hearing, 1988: “world's leading climate expert [Hansen] predicts lower Manhattan underwater by 2018”

Dr Michael Mann, Penn State: “We’re talking about literally giving up on our coastal cities of the world and moving inland”

United Nations Environment Programme, 2005: “Fifty million climate refugees by 2010.” (2)

United Nations Environment Programme, 2011: “60 million environmental refugees by 2020”

The Guardian carried a front-page story in 2004 headlined, “Now the Pentagon tells Bush: climate change will destroy us”. The by-line reads: “Secret report warns of rioting and nuclear war. Britain will be ‘Siberian’ in less than 20 years. Threat to the world is greater than terrorism”. The text continues, “A secret report, suppressed by US defence chiefs…, warns that major European cities will be sunk beneath rising seas as Britain is plunged into a ‘Siberian’ climate by 2020. Nuclear conflict, mega-droughts, famine and widespread rioting will erupt across the world.” (Emphases added).

Remember that in the 1960s and 1970s many experts forecast an immanent Ice Age. For example, 1970: “Ice age by 2000”. 1971: “New Ice Age coming by 2020 or 2030.” 1976: “Scientific consensus planet cooling famines imminent”. 1978: “No end in sight to 30 year cooling trend”.

The Climate Change Consensus

The diagnoses and prescriptions in the above statements express an underlying consensus.

Human actions (mainly burning fossil fuels and changing land use) are causing rising concentration of atmospheric CO2 (and other greenhouse gases, GHG),

Rises in man-made GHG are causing rising global temperatures in atmosphere and seas, and

This temperature rise poses not just a serious threat to humanity and the whole biosphere, but an existential threat.

In other words, the existence of humans and many other species is at stake if we do not succeed in drastically cutting CO2 emissions as the way to reduce the atmospheric concentration of GHG and thereby slow or reverse the rise in global temperature. In the oft used phrase, humanity faces an “existential crisis” induced by climate change caused by human actions. Implied but not normally stated, there are no benefits from higher concentrations of CO2 or higher temperature to be weighed against costs. Also implied but not normally stated, we must act to stop climate change regardless of cost, because the costs might include deep disruption of human civilization or even extinction.

We have to think of avoiding climate change as the global equivalent of avoiding explosions at nuclear power plants (Chernobyl, Fukushima). We invest heavily in safety-first measures in order to reduce the probability of a nuclear explosion to a very low level because the costs of a nuclear explosion are so huge. The same logic applies at the level of climate, in terms of the costs of average temperature rising by more than ~ 1.5 C from “pre-industrial”.

This is the Anthropogenic Global Warming Consensus, or Climate Change Consensus (CCC) for short. I use “consensus” in the same sense as “the Washington Consensus” about best policy for developing countries, the phrase coined by John Williamson in 1990.

The CCC is now well anchored into international agreements (such as the Paris Declaration), national policy, and increasingly corporate strategy too. The periodic Assessment Reports of the Intergovernmental Panel on Climate Change (IPCC) reaffirm it, particularly in the Summary for Policymakers. Financial Times journalist Pilita Clark observed, “The world has rarely seen any environmental idea take off like the push to cut greenhouse gas emissions to net zero. A fringe concept six years ago, it has gone mainstream so quickly that more than 60 percent of countries now have some sort of net zero goal, along with investors managing nearly $37tn and at least 20 percent of the 2,000 largest publicly listed companies. The International Energy Agency [IEA] warns in a striking net zero report today that all new oil, gas and coal projects and exploration must stop if global warming is to stay below 1.5C.”

Scientific support comes from the fact that 97% of climate scientists agree that man-made greenhouse gases have been responsible for “most” of the warming of the Earth’s average temperature over the second half of the twentieth century. The 3% who are sceptical are not highly regarded scientists and some are in the pay of fossil fuel interests.

In the face of this scientific, interstate, and corporate agreement about the necessity of a global Big Push to cut CO2 emissions fast, developing countries and China carry a heavy responsibility, because they are the major source of global CO2 emissions, mainly from their consumption of fossil fuels. They must quickly follow the developed countries in investing on a massive scale in sources of renewable energy, whose prices are falling fast. Developed countries will offer large-scale financing and technical assistance for them to make the switch – in the developed countries’ self-interest.

It is true that developed countries put up most of the stock of greenhouse gases now in the atmosphere as they used fossil fuels to power their ascent to the top of the global hierarchy of income and wealth over the past two centuries. But that gives developing countries, even though they remain well down the income hierarchy, no justification for saying that they therefore have the right to carbon space for powering their economic development – because continuing to use relatively accessible, cheap and reliable fossil-fuel energy to power their growth pushes all humanity and the biosphere towards ruin.

Do Virtually all Climate Scientists Agree with the CCC?

It is widely cited that “97% of climate scientists agree warming is man-made”; or more exactly, “97% of science papers taking a position on climate change say it is man-made”. The conclusion is frequently amped up to “a 97% consensus that ‘humans are causing a global warming crisis’”.

Note that this last statement – with “crisis” – is not the same as the previous two, but all three statements tend to be conflated, so that people agreeing with “most recent warming is man-made” tend to be scored as agreeing that global warming is a crisis, which commonly gets inflated into agreeing that it is an existential crisis or the existential crisis.

Note that these statements of “consensus” do not specify the time period.

Note also that “high consensus” in science is only a weak criterion of “truth” in science – but the 97% figure is often deployed as evidence of the “truth” that warming is man-made. Of course, it is worth knowing to what extent there are “widely accepted truths” in any field. But problems come when the “fact” of consensus is established in a clearly tendentious way.

A standard source of the claim that 97% of climate scientists agree that global warming is man-made is the study by John Cook et al. (2013). The study rated about 12,000 abstracts of peer-reviewed papers published between 1991 and 2011. The rating was done by 12 volunteers, each abstract was rated by two people, making 24,000 ratings. The ratings were in three categories: (1) implicit or explicit endorsement of human-caused global warming; (2) no opinion; (3) implicit or explicit rejection or minimization of the human influence. About 4,000 abstracts took a position on the cause of global warming, 97.1% of which endorsed human-caused global warming.

Notice that this should not be, but commonly is translated as “97% of climate scientists endorse …”. Notice too that the abstracts were not rated as to whether they stressed greenhouse gases or man-made changes in land use and land cover; the implicit assumption is, man-made greenhouse gases are the cause of warming. Finally, notice that the abstracts were not rated as to whether they endorsed the idea of a global warming crisis or catastrophe; only as to whether they endorsed the idea of human causes of global warming.

A Wikipedia essay describes the study as “a landmark climate research paper [which] found that 97.1% of climate scientists supported the hypothesis of anthropogenic global warming (AGW). As of March 2021, the paper has received at least 1,270,076 downloads.”

There is an obvious question. Does “endorsement of human-caused global warming” mean warming caused 100% by human actions, or 75%, or 50%, or 25%? Any of these may be consistent with “climate change is man-made”. By leaving the degree of causation by humans open, thumbs can be put on the scales to yield the conclusion that virtually all well-qualified scientists believe that global warming of the past several decades is caused almost entirely by human action (would not be occurring in the absence of that action).

Professor Mike Hulme, professor of Human Geography at the University of Cambridge, concludes: “The ‘97% consensus’ article is poorly conceived, poorly designed and poorly executed.” Analysis by David Legates et al (2015) found that only 0.3% of the sampled papers “endorsed the standard definition of consensus: that most warming since 1950 is anthropogenic”. Research physicist Nicola Scafetta: “Cook et al (2013) is based on a straw man argument because it does not correctly define the IPCC AGW [anthropogenic global warming ] theory, which is NOT that human emissions have contributed 50%+ of the global warming since 1900 but that almost 90-100% of the observed global warming was induced by human emission”. (3)

It is testimony to the apocalyptic emotion behind people’s response to “climate change” and “global warming” that the Cook et al. paper, and others with similar methods, have commanded such credence in the face of evident flaws – notably (1) in fudging the distinction between agreeing that human actions have some role in global warming and agreeing that human actions explain most global warming; (2) in not asking whether – extent to which -- the scientists’ papers identified global warming as a problem, a crisis, an existential crisis, over what time period. (4)

By keeping it vague what the “consensus” agrees on, authors and users of the studies have given the impression that endorsement of “humans are causing global warming” means endorsement that “humans’ enhancement of the greenhouse effect will be dangerous enough to be ‘catastrophic’”, and therefore also means endorsement of the imperative for urgent, radical action on a global scale by governments, firms and families.

It is testimony to the pervasive anxiety of the zeitgeist that such surveys are routinely cited as demonstrating a near-unanimous scientific consensus in favor of radical, far-reaching climate policy (including for energy, food and materials), when the surveys do not even ask the question as to whether the respondent considers that (a) the anthropogenic component of recent warming is dangerous, and (b) dangerous enough to require a global climate policy. The surveys are almost valueless scientifically, but valuable politically.

Upward Bias in Temperature Forecasting Models

The prospect of a coming catastrophe for humanity and the biosphere rests heavily on outputs of climate forecasting models. But as David Legates and co-authors argue, these models “exhibit a strong exaggeration in their results even when narrowly adopting atmospheric carbon dioxide as the sole driver of climate responses…. [General circulation models, such as those of the IPCC, the Intergovernmental Panel on Climate Change] have consistently overestimated the climate sensitivity to rising atmospheric carbon dioxide.”

Ross McKitrick (2020) begins his assessment, “Two new peer-reviewed papers from independent teams confirm that climate models overstate atmospheric warming, and the problem [of overstatement] has gotten worse over time, not better”. One of the papers (by McKitrick and John Christy) examined 38 models, the other, 48 models, used by the Intergovernmental Panel on Climate Change (IPCC), the various US “National Assessments”, the EPA’s “Endangerment Finding”, and more.

McKitrick continues, “Both papers looked at ‘hindcasts’, which are reconstructions of recent historical temperatures in response to observed greenhouse gas emissions and other changes (eg aerosols and solar forcing). Across the two papers it emerges that the models overshoot historical warming from the near-surface through the upper troposphere, in the tropics and globally.” The study based on 48 models for 1998 to 2014 found that they warm on average 4 to 5 times faster than the observations.

McKitrick concludes, “modelling the climate is incredibly difficult, and no one faults the scientific community for finding it a tough problem to solve. But we are all living with the consequences of climate modelers stubbornly using generation after generation of models that exhibit too much surface and tropospheric warming, in addition to running grossly exaggerated forcing scenarios (eg RCP8.5).

“[W]hen the models get the tropical troposphere wrong, it drives potential errors in many other features of the model atmosphere. Even if the original problem was confined to excess warming in the tropical mid-troposphere, it has now expanded into a more pervasive warm bias throughout the global troposphere.

“If the discrepancies in the troposphere were evenly split across models between excess warming and cooling we could chalk it up to noise and uncertainty. But that is not the case: it’s all excess warming…. That’s bias, not uncertainty, and until the modelling community finds a way to fix it, the economics and policy making community are justified in assuming future warming projects are overstated, potentially by a great deal….”

The strong upward bias in temperature forecasts relative to observations compromise the models’ forecasting impacts on ecosystems, including agriculture, by exaggerating the probability of catastrophic effects.

The IPCC makes projections of future global temperatures to the end of century based on various models. They range from a low of 1.4 C to a high of 5.6 C over pre-industrial temperature (roughly 1900). The wide range makes them almost meaningless. The IPCC explains that the wide range results from uncertainty about the magnitude of the feedback between warming and increased rates of evaporation – and David Seckler adds, also about the effects of evaporation on clouds and precipitation. (5)

It is astonishing to learn that the climate models miss a critical component of the climate system -- the hydrological cycle, and specifically clouds, which the IPCC calls the “wild card” in the climate system.

The IPCC’s Worst Case Scenario is commonly used as the Business as Usual without a Radical Policy Action’ Scenario

The IPCC’s Assessment Report 5 (AR5), published in 2014, presented a range of forecasts of global climate out to 2050 and 2100, based on different assumptions about radiative forcing (a measure of how much of the sun’s energy the atmosphere traps). The most extreme – the worst case – was called Representative Concentration Pathway (RCP) 8.5. It assumes ominous reversals in several basic, long-standing trends, all heading in the extremely wrong direction to 2100:

high population growth to reach more than 12 billion people

slow technology development

coal consumption increases by 500 % between 2005 and 2100 (no account taken of supply constraints)

slow GDP growth

fast rise in world poverty

high energy use

high GHG emissions.

temperature forecast: 5 C rise between 2005 and 2100.

RCP 8.5’s vision is horrifying, as worst-case scenarios should be.

A whole wave of literature, in peer-reviewed journals as well as in media, even by IPCC authors, has since presented this worst-case as either “the most likely case” or “the baseline case – business as usual without policy action”. This misleading assumption provoked a recent paper in Nature subtitled: “Stop using the worst-case scenario for climate warming as the most likely outcome” (see also, Chrobak, 2020).

The Politics: How has the CCC become so Dominant

How can we understand the present dominance of the CCC in public and political opinion around the world, despite repeated evidence -- over decades -- of wildly exaggerated forecasts of doom when compared against measured outcomes, and despite the real uncertainties (“known unknowns”) in knowledge about basic mechanisms?

We can identify several mutually reinforcing reasons.

1. The public demand for negatively-inflected news, especially on climate

News that fits the CCC plays into a more general logic of “If it bleeds, it leads”, meaning that the media tend to deliver negativity – about climate, health, almost anything – because readers and viewers want negatively-inflected stories. Recent research finds that across all types of articles the most popular stories have high negative content. Surprisingly, politics matters little: there is no difference between conservative and liberal outlets in propensity to deliver negativity. Rather, the difference is between media outlets by size and influence: the bigger and more influential the media brand, the stronger the bias towards the negative – showing how good they are at delivering what people want. According to Matthew Yglesias, several recent research studies find that “the kind of stories people like to consume are compulsive rather than satisfying …. You’re clicking and sharing stories about terrible things and raising alarms and listening to the alarms that are being raised by others, and it all feels very compelling precisely because it’s gloomy and alarming …. People like to get mad, then share the content so that peers can share their outrage.”

Climate lends itself well to this negativity bias. Richard Betts, then the head of climate impacts at the Met Office, explained the demand for negative climate stories (BBC News Channel, 11 January 2010, emphasis added ):

“The focus on climate change is now so huge that everybody seems to need to have some link to climate change if they are to attract attention and funding. Hence the increasing tendency to link everything to climate change – whether scientifically proven or not …. I have quite literally had journalists phone me up during an unusually warm spell of weather and ask ‘is this a result of global warming?’ When I say ‘no, not really, it is just weather’, they’ve thanked me very much and then phoned somebody else, and kept trying until they got someone to say yes it was. Talking up of the problem then gives easy ammunition to those who wish to discredit the science.”

Holman Jenkins, in The Wall St Journal (2018), describes the other side of the exaggeration incentive: “Over the past 15 or 20 years the climate beat has been handed over to reporter-activists who’ve decided that climate science is impenetrable but at least nobody ever got fired for exaggerating the risks of climate change.”

Climate scientist Judith Curry identifies a similar logic in the frequent conflation of extreme weather events and “global warming”. “In 2005 [following Hurricane Katrina] the public found it very hard to care about 1 degree or even 4 degrees of warming – heck, the temperatures varied by that much on a day-to-day basis.… However, arguments that a relatively small amount of global warming (order 1 C) could result in more intense hurricanes, well that got their attention…. The activists now had a new weapon in their arsenal – attributing extreme weather events to manmade climate change. The ‘will to act’ seemed tied to alarmism about extreme weather events. Which provides a key political role for unsupported ‘storylines’ about extreme weather events.” The “heat dome” over the Pacific northwest of the US and Canada in June 2021 was generally treated as yet more evidence of “climate change. You would not know it from the coverage, but in Washington and Oregon, the number of days per decade with temperature above 99 F shows no upward trend from 1911-20 to 2011-20. For example, the number of days above 99 F in 1971-80 was more than in 2011-20. Across the US the 1930s was arguably the hottest decade on record; the time of the deadly “Dust Bowl”, summer 1936, was the hottest summer on record between 1895 and 2020.

An attempt to push the distinction between “weather” and “climate” is unwelcome in this context, because it weakens the motivating, mobilising force of “climate” as the boundless enemy that could destroy humanity, like the Biblical Flood. The Climate Apocalypse is imminent, is the motivational message (also see Adler, 2019).

This is the deeper story behind the wild exaggerations of the forecasts and the continued high credibility of those who make them. The exaggerations express the apocalyptic thinking about climate now sweeping the world, including the financial and corporate world. They express a story of humans damaging Nature, and Nature destroying humans in return. These stories themselves express ancient de-creation stories of humans misbehaving in the eyes of God, and God punishing them. The Biblical flood occurred because God decided the people had become wicked, had stopped respecting God and Nature, so He resolved to wipe life off the face of the earth, saving only a breeding pair of each species in order to recreate the world in His image. Much the same story appeared in Sumerian culture long before the Bible, and later in the Quran, expressing a desperate human wish for Salvation.

In our more secular age, apocalyptic theology can rely on Nature in place of God -- Nature invested with God-like powers of punishment and reward.

2. The “political” science of the IPCC

The IPCC was established to provide a properly scientific center of gravity for discussions about climate, and issue regular balanced assessments of the state of scientific climate knowledge. But there are at least two basic problems with the IPCC process. One is that the mandate of the IPCC says that it is “to assess … the scientific, technical and socio-economic information relevant to understanding the scientific basis of risk of human-induced climate change, its potential impacts and options for adaptation and mitigation” (emphasis added). (6) The mandate does not mention to assess the interaction between human and natural causes. It is as though natural causes do not exist. The IPCC’s whole body of work consequently is slanted towards exaggerating human causes of given climate changes, marginalizing the role of natural causes interacting with human causes. Which among other effects leads it to give undue weight to “mitigating” climate change (by changing human actions) relative to “adapting” to climate changes partly induced by natural forces.

The common justification given by IPCC defenders is: natural causes operate only very slowly; the climate is changing fast; therefore the climate changes must be driven by humans, and humans can change their behaviour fast – when forced and sufficiently motivated to do so ( using all the techniques of Machiavelli). This justification underplays the point that some natural causes – eg the Atlantic Multidecadal Oscillation – do change fairly quickly, over decades, with far reaching effects (eg Atlantic Multidecadal Oscillation and its impacts on the Greenland ice sheet).

The second IPCC problem is that this bias to doomsday forecasts – therefore to urgent and far-reaching action -- is intensified in the process of translating from the technical reports to the summaries for policy makers. The translation – done mostly by non-scientists -- tends to downplay uncertainties and up-play certainties in an alarming, even catastrophizing direction. Hence the tendency to treat worst-case scenarios as likely scenarios. Recall the subtitle to the Nature paper, “Stop using the worst-case scenario for climate warming as the most likely outcome” (2020).

3. Logic of decision-making and logic of mobilization

The tendency to treat worst-case scenarios as likely scenarios “in the absence of radical changes to how we live, work and govern” can be understood in terms of the distinction between the logic of decision-making and the logic of mobilization or action. To make the best decision about what to do, one needs to explore a range of possible alternative courses of action, weigh up the pros and cons of each, then decide which is best. But having exposed many people to a range of options, there may be action-sapping disagreement as to which is best. To get a great mass of people to move all in one direction one needs to present them with only two alternatives, one of which is crazy, and pretend to be entirely confident of the two outcomes. (7) If they can be convinced that there are only two alternatives and one is crazy, they will follow.

The Climate Change Consensus expresses the logic of mobilization. It presents two alternatives. “Do nothing (or little)”, which leads to catastrophe, extinction, the planet becomes ungovernable, coastal cities must be abandoned, lower Manhattan will be underwater by 2018. Or else, quickly decarbonize the world economy and push towards a broader dematerialization of lifeways. No prizes for guessing which wins. This is how you mobilize people on a vast scale to do what you think must be done. Or as a US senator from the West once put it, “Managing politicians is like herding wild horses. To get them running in the same direction you have to stampede them.” (8)

4. Left and right politics

While the demand for negatively-inflected news cuts across the political spectrum, political ideology certainly shapes people’s beliefs about climate. Climate change “scepticism” is almost a talisman of the center-right and right, and is strongly promoted by fossil fuel interests. Climate “alarmism” is more pronounced on the center-left and left of the ideological spectrum. It is promoted as a sacred unifying mission by a great global phalanx of left-green civic action organizations (Extinction Rebellion is prominent).

A Guardian article describes the right-wing “sceptical” tactic. “Vested interests have long realized [that people-at-large trust climate scientists on the subject of global warming] and have engaged in a campaign to misinform the public about the scientific consensus. For example, a memo from communications strategist Frank Luntz leaked in 2002 advised Republicans, ‘Should the public come to believe that the scientific issues are settled, their views about global warming will change accordingly. Therefore, you need to continue to make the lack of scientific certainty a primary issue in the debate’. This campaign has been successful… The media has assisted in this public misconception, with most climate stories ‘balanced’ with a ‘sceptic’ perspective. However, this results in making the 2-3% seem like 50%... As a result, people believe scientists are still split about what’s causing global warming, and therefore there is not nearly enough public support or motivation to solve the problem.”

Both sides accuse the other of abusing “the science”. Both sides generate expansive pressures to describe more and more trends, issue more and more prescriptions, without ambiguity and shading, and judge more and more of the other’s claims pre-emptively. Individual issues (eg extreme weather) are not discussed in terms of their own evidence but are packaged together in ideological visions, the better to establish clear moral battle lines, disagreement being moral heresy.

This is the playing out of a larger process of polarization common when scientific disagreements become public. As described by sociologist of science Robert K. Merton, each group then responds to stereotyped versions of the other. “They see in the other’s work primarily what the hostile stereotype has alerted them to see, and then promptly mistake the part for the whole. In this process, each group … becomes less and less motivated to study the work of the other, since there is manifestly little point in doing so. They scan the out-group’s writings just enough to find ammunition for new fusillades.” (9)

The result is a “syndrome of exaggeration”: each side exaggerates evidence in its favour and downplays evidence against, which justifies the other in exaggerating evidence in its favour and downplaying evidence against; and back again. It is a syndrome in that the behaviour of each side confirms the negative expectations of the other. They often go at each other ad hominem, like adolescent school boys, including people who regard themselves as serious scientists. In the digital era members of both sides are able to quickly find one another and the enemy. (10)

Yet to talk of “two sides” is misleading, because the side championing the CCC is by far the dominant. Recall the Financial Times journalist Pilita Clark: “The world has rarely seen any environmental idea take off like the push to cut greenhouse gas emissions to net zero.” For political leaders and increasingly business leaders, being seen to give high value to protecting the public against all the ills attributed to “climate change” – including by pledging big changes to be made long after they leave office -- is a way to show foresight, statesmanship, leading on the front foot. Many right-wing politicians and business leaders now wish to present themselves as fighters against climate change, even as they continue to support fossil-fuel industries.

5. Finance and business interests

There are now powerful industrial interest groups promoting climate alarmism for profit-seeking reasons, including those invested in the switch from fossil fuels to renewables and those invested in the switch from combustion to electrical engines. The CEO of the electric vehicle car company Lucid (a former Tesla engineer) said recently that the transition to an EV world will happen faster than anyone expects, driven by the environmental imperative. He said, “The environment is in crisis. The world needs millions of electric cars tomorrow”. He did not suggest where all the electricity will come from.

Many big players in finance see opportunities for speculative profits by playing up climate dangers. Goldman-Sachs in 2005 authored the firm’s environmental policy, which said “voluntary action alone cannot solve the climate change problem”, from a firm that has consistently opposed government regulation. It and other financial firms supported what Matt Taibbi called “a new commodities bubble disguised as an ‘environmental plan’” – a carbon credit market in the form of cap-and-trade. Coal plants, utilities, natural gas distributors and some other industries are assigned carbon emission limits. To exceed the limits they must buy credits from those who emit less than their limit. As of 2010, the volume of the market in the US was estimated as $1 trillion annually. Goldman and the others were making themselves central actors in the market. The best thing about it is that the emission limits keep being lowered, implying that the price is guaranteed to keep rising, to the benefit of the intermediaries.

On top of all this, the whole “sustainable investing” movement provides opportunities for big profits at the intersection of the already thick alphabet soup of sustainability disclosure regulations (TCFD, SASB, GRI, CDSB among others, in the case of the EU) and the lack of meaningful, reliable data. “At the moment, the risk is that it is ‘garbage in, garbage out’”, says the head of sustainable finance at S&P Global Ratings.

So the fact that the financial sector is “worried” about climate change could be taken to be part of the problem, underlining the need for public authorities to take charge and frame parameters within which private operations produce public benefits. (11)

Conclusion

I have argued that the “plausible” risks of climate change are commonly exaggerated within the climate community. Recall for example, Christiana Figueres, 2020, “The scary thing is that after 2030 it basically doesn’t really matter what humans do”; Kevin Drum, 2019, “[The Green New Deal] would only change the dates for planetary suicide by a decade or so”; Frank Fenner, 2010, “We’re going to become extinct. Whatever we do now is too late.” Many more in the same doomsday vein.

We have seen that the standard global warming models have a powerful built-in bias to exaggerate the rate of future temperature rise, as seen in (most of) them “hindcasting” temperature rises several times faster than actually observed. We have seen that forecasters commonly take “worst-case scenarios” as “likely scenarios in the absence of radical action” (eg reaching net zero carbon emissions by 2050), to the point where Nature recently published a paper sub-titled, “Stop using the worst-case scenario for climate warming as the most likely outcome”.

The dismaying thing is that scientists and advocates have been making catastrophising global warming forecasts of this kind for decades past, normally dated some 10 to 30 years into the future. The due date comes without catastrophe, but never a retrospective holding to account. Rather, on to the next catastrophising forecast another 10 to 30 years ahead. Scientists-writers-activists know the catastrophe forecasts get the attention, the clicks, the research funding. We saw the exaggeration mechanism spelled out by Richard Betts of the BBC, Holman Jenkins of the Wall St Journal, and climate scientist Judith Curry.

The built-in exaggeration of the costs of climate change blunts the parallel with nuclear power plants. We know with high certainty the costs of nuclear explosions. We know the costs of global temperature going above 1.5 C above “pre-industrial” much less certainly, and we can see the mechanisms by which the likely costs are being systematically exaggerated.

On the other hand, there is abundant evidence that even without the doomsday exaggerations the plausible risks of climate change could be very serious, in particular because of the inherent political economy difficulty of getting needed global or regional cooperation when political action is mostly at the level of sovereign nation states (see the G20).

Coal power generation is the single biggest source of GHG emissions, and emissions from coal consumption will probably not fall fast, whatever the promises. First, coal is cheap, accessible and generates reliable power for many developing countries; in Asia, coal alone generates 40 percent of energy consumption, much higher than the world average of 29 percent. (12) Second, developing countries, including China, assert a strong claim on carbon space to power their economic development. They see it partly as a matter of fundamental justice, since developed countries emitted most of the CO2 that is already in the atmosphere and seas as the necessary condition for them becoming developed. Developed countries promise finance and technical assistance on a massive scale to accelerate the energy transition in developing countries – and have a long track record of leaving promises as promises. (See the global distribution of Covid vaccines. See the results of vaunted “voting reform” in the World Bank, leaving the US with 17% and China with 6%.) What is more, the Japanese government plans up to 22 new coal power plants, as it closes nuclear plants in the wake of Fukushima.

Then comes a question: does drawing attention to the doomsday exaggerations of the CCC – “disaster”, “catastrophe”, “extinction”, “fiddling while the planet burns” - serve to reduce the political and public pressures for necessary ameliorative action, in a world where powerful fossil lobbies seek to block or delay such action for reasons independent of “evidence”? Should “Third Way” essays like this one not be published, because “give them (deniers, sceptics) an inch and they will take a mile”? To what extent must mass publics be “panicked” in order to induce enough collective political and business action – national, international – to substantially slow the growth of GHG emissions? If we can sustain emission- and temperature-curbing action only by holding up the certainty of disaster, catastrophe, extinction, then better to let the doomsday exaggerations continue as the necessary condition for that ameliorative action. What is the harm, when the alternative is ruin for humanity and the biosphere?

The danger is that the repeated wild exaggerations produce a public backlash, a discrediting, and a strengthening of the many “deniers” who see “leftists, governments, and the United Nations” as the source of malevolence in the world. A more accurate accounting of the evidence would (hopefully) produce a more calibrated and sustained public and business response.

What to do? (13)

The IPCC should allocate some 10% of its budget to a Red Team, dedicated to independent scrutiny of its evidence and conclusions (especially the Summary for Policymakers). (14) The IPCC should revise its mandate to require it explicitly to focus on interactions between natural forces and human actions, as it is now almost required not to, biassing its assessment of the state of scientific knowledge towards “man-made global warming” as an almost separate system.

Learned societies should more actively seek to understand and publicize the reasons for repeated large-scale discrepancies between “hindcasts” and “forecasts” on the one hand and actual observations on the other, discrepancies strongly biased towards “disaster”.

It is particularly important that the knee-jerk attribution of extreme weather events to global warming be challenged with reference to evidence. Judith Curry explained – quoted earlier -- why CCC advocates have a powerful incentive to attribute cases of extreme weather to global warming, tout court. She has recently written, “Apart from the reduced frequency of the coldest temperatures, the signal of global warming in the statistics of extreme weather events remains much smaller than that from natural climate variability, and is expected to remain so at least until the second half of the 21rst century.” She goes on to amplify a point made earlier about the limits of the climate models used for the IPCC assessment reports: they are driven mainly by predictions of future GHG emissions. They do not include predictions of natural climate variability arising from solar output, volcanic eruptions or evolution of large-scale multi-decadal ocean circulations. They do a particularly poor job of simulating regional and decadal-scale climate variability. (15)

Participants on both sides have to learn the art of respecting the principle of free speech while maintaining the standards of civil discourse.

While I have stressed the CCC’s support for urgent and radical changes to the way we live, work and govern, some CCC champions argue that the world economy could continue on a largely unchanged growth trajectory provided that we switch fast from fossil fuels to renewables. Indeed, this switch is beginning to happen fast, with coal and nuclear energy production unable to compete without subsidies in areas where natural gas, wind and solar resources are readily available.

But to say that life can continue as before provided we substitute renewables for fossil fuels obscures the huge difficulties for many developing countries of getting out of fossil fuels while growing fast enough to reduce the income gap with developed countries.

We must give high priority to investments in “clean coal” technologies, such as carbon capture, storage and use, to make the dirtier coal cleaner in existing and new coal-power plants; and link coal-power retirement to the coming on-stream of attractive alternatives. The multilateral development banks have recently or will soon announce bans on coal power. The G7 leaders meeting in mid 2021 promised to stop using government funds to finance new international coal power plants by the end of 2021. China’s Belt and Road Initiative should increase its pressure on host countries to cut back on dirty coal and boost clean coal and renewables.

A high and immediate priority is to build a robust financing and technical assistance mechanism for help from developed to developing countries. The Paris Agreement instituted a Mitigation pillar and an Adaptation pillar. Intense debate took place around the third, Loss and Damage, the name of a mechanism to compensate for the destruction that Mitigation and Adaptation cannot prevent. Developed countries by and large have sought to marginalize the Loss and Damage pillar, as they have long sought to marginalize Special and Differential Treatment for developing countries in trade and investment agreements. “Finance is something that really rich countries, particularly the US, have made sure that there is no progress and not even discussion on”, remarked Harjeet Singh, senior advisor at Climate Action Network International. (16)

My “forecast” is that in the next two to three decades to midcentury we will make rapid progress in scientific knowledge about weather and climate, helped by longer and more accurate satellite and ocean records and by a new generation of climate models that operate at one to ten kilometers scale (as distinct from the current models’ 50 kilometer scale). We will probably continue to make rapid progress in decoupling GHG from GDP growth, with a combination of state direction-setting and private innovation focused on transformations in energy, transport, buildings, industry and agriculture, using incentives like research and development subsidies and tax credits for technology investment, and penalties for carbon-intensive activities. (17) In transport, this entails coordination across urban planning decisions, public transport investment, future of remote working, infrastructures for electric charging and hydrogen loading. (18) Transformations in these systems are already underway, and the prospect of vast new green investments, supported and under-written by the state, will intensify them. These green investments will open productive investment opportunities previously limited by stagnant wages and rising debt, which have driven investment into increasingly speculative ventures. If by two or three decades ahead it looks as though the second half of this century could well experience globally extreme climate and ocean events, we will be much more knowledgeable about what to do than we are today. (19)

## Regs CP

#### Doesn’t compete – expands the scope of “core antitrust laws” by adding a new one

Sleet 99 – Judge, United States District Court, Delaware

Gregory M. Sleet, Scriptgen Pharms., Inc. v. 3-Dimensional Pharms., Inc., 79 F. Supp. 2d 409, United States District Court for the District of Delaware, December 1999, LexisNexis

Noting that the term "extent" is not defined in either one of the patent specifications, 3-DP contends that the ordinary meaning of the word should control. See, e.g., Zelinski, 185 F.3d at 1315; Desper Prods., 157 F.3d at 1336. Because "extent" in this instance would appear to serve as synonym for "amount" or "degree," 3-DP purports to advance this interpretation.3 While Scriptgen appears to take issue with this proposed definition, it fails to provide an alternate construction. After reviewing the language of the representative claim, which discusses "the extent to which the target protein occurs in the folded state, the unfolded state or both in the test combination and in the control combination," the court will afford the term "extent" its ordinary meaning, i.e., as meaning "amount" or "degree."

#### The CP makes it part of the ‘core’ antitrust laws

Clark 04 – Judge, United States District Court, Texas Eastern

Ron Clark, Motorola, Inc. v. Analog Devices, Inc., 2004 U.S. Dist. LEXIS 31301, United States District Court for the Eastern District of Texas, Beaumont Division, June 2004, LexisNexis

The definition offered by Motorola from the 1996 IEEE Dictionary is actually for the term "processor," rather than "core processor." The word "core" is defined as "the innermost or most important part: heart." Webster's II New College Dictionary (1995). The term "core processor" suggests something less than a "processor" as a whole.

#### Courts gut solvency – keeping Sherman Act precedent on the books ensures the court keeps applying the rule of reason in the same way when interpreting the NEW law

Widiss ’20 - Professor of Law, Associate Dean for Research and Faculty Affairs, and Ira C. Batman Faculty Fellow at the Indiana University Maurer School of Law

Deborah Widiss, “Communication Breakdown: How Courts Do - and Don't - Respond to Statutory Overrides” 104 Judicature 50 (2020), <https://www.repository.law.indiana.edu/facpub/2938/>

Note: Courts overturn precedent – Congress overrides precedent

Earlier commentators, including many well-respected judges, have offered thoughtful suggestions for facilitating communication from courts to Congress about problems in statutes that Congress might want to address.2 My research explores the opposite question. How effective is communication from Congress back to courts? The answer is: Not very.3 Even when Congress enacts overrides, courts frequently continue to follow the prior judicial precedent. This is likely due more to information failure than willful disregard of controlling law. Nonetheless, a key aspect of the separation of powers is broken.

My research shows that when the Supreme Court overrules a prior decision, lower courts quickly decrease their reliance on the old precedent and begin to apply the new rule. By contrast, when Congress enacts an override, citation patterns to the prior precedent change very little. Even a decade later, many overridden precedents, or what I have called “shadow precedents,” are still routinely cited as controlling precedent.

#### No DOJ NB – all reverse payment cases go to the FTC

Feldman 8/27 – Distinguished Professor of Law Chair & Director of the Center for Innovation, UC Hastings Law

Robin Feldman, Arthur J. Goldberg Distinguished Professor of Law, Albert Abramson ’54 Distinguished Professor of Law Chair, and Director of the Center for Innovation, The Price Tag of 'Pay-for-Delay', UC Hastings Research Paper Forthcoming, 27 Aug 2021, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3846484>

A presumption offers a variety of advantages to the judiciary and regulatory systems. It would ease the burdens on regulators such as the FTC, which tend to lack the resources needed to scrutinize and, if necessary, litigate each of the dozens of brand-generic settlements that occur annually. 183 [FN 183] 183 See Feldman & Misra, Fatal Attraction, supra note 8, at 260–261 (noting that, although all brand-generic agreements under the Hatch-Waxman Act must be filed with the FTC, the agency’s delays in publishing pay-for-delay reports, and the reports’ relative lack of specificity, suggests limited resources to address the problem of pay-for-delay). [End FN] In addition, by shifting the burden to the companies themselves, a presumption avoids rewarding those who concoct increasingly elaborate schemes. The company would have to establish how a complex and convoluted scheme works and why it is procompetitive.

#### They said they PROHIBIT, not INCREASE prohibitions – that’s bad and LTNB

Seth 8/6 – Interviewing Dan Leonard, CEO of the U.S. Association for Accessible Medicines

Akriti Seth, AAM CEO ‘Not Fully Aligned With Biden Administration On Pay-For-Delay Ban’, Generics Bulletin, *August 2021*, <https://generics.pharmaintelligence.informa.com/GB151157/AAM-CEO-Not-Fully-Aligned-With-Biden-Administration-On-Pay-For-Delay-Ban>

“We’ve been supportive of the Biden administration’s steps so far on a number of areas, but not all of them,” said Dan Leonard, CEO of the US Association for Accessible Medicines, as he talked about the recently signed executive order by US president Joe Biden asking the Federal Trade Commission to ban so-called “pay-for-delay” reverse-payment settlements.

In an exclusive interview with Generics Bulletin, Leonard acknowledged that “We’re not fully aligned with the administration on that particular topic.”

“We think there’s certainly an opportunity to work with the administration to make sure that a blanket change to patent settlements does not damage the marketplace for generics and that there has to be thoughtful patent legislation or an executive action on patent reform that we can partner on,” added Leonard.

Furthermore, Leonard pointed out that “there are many instances where patent settlements are pro-patient and because of patent settlements between the originator and generic company, affordable medications come online even sooner for patients.”

Talking about successful pro-consumer patent settlements, Leonard said, “There are many examples that we could cite. That’s the kind of thing we need to make sure that the administration and policymakers understand [so] that there isn’t just a sledgehammer that comes down.” Leonard expressed concern over the ban that could “ultimately make it harder for patients to have access to critical medications.”

“We have to educate policymakers to make sure that a blanket or broad-brush approach doesn’t damages patient access at the end of the day,” Leonard said, insisting that “there should be pro-consumer patent settlements like we have seen in the past.”

In a recent interview with Generics Bulletin, Jeff Francer, senior vice president and general counsel of the AAM, had expressed concern over Biden’s executive order, suggesting that “we could have a slowdown in the availability of generics and biosimilars, because [a ban on pay-for-delay] would force generics and biosimilars to always have to litigate to finality on dozens and dozens of patents, which is enormously expensive and time consuming.” (see sidebar)

## BBB DA

#### No link – decision is announced in June

**Think Progress**, Everything You Need to Know About Why The DC Circuit Delayed Arguments On Obama’s Climate Plan, May 17, 20**16**, https://thinkprogress.org/everything-you-need-to-know-about-why-the-dc-circuit-delayed-arguments-on-obamas-climate-plan-d172bc032359#.pq6syhcy5

So Monday evening the D.C. Circuit Court of Appeals announced it is bypassing its planned June 2 oral arguments over the Obama administration’s signature climate policy. “It is ORDERED, on the court’s own motion, that these cases, currently scheduled for oral argument on June 2, 2016, be rescheduled for oral argument before the en banc court on Tuesday, September 27, 2016 at 9:30 a.m.,” the D.C. Circuit’s announcement read. “It is FURTHER ORDERED that the parties and amici curiae provide 25 additional paper copies of all final briefs and appendices to the court by June 1, 2016. A separate order will issue regarding allocation of oral argument time.” What does this mean? The court thinks it’s important First, the D.C. Circuit thinks this is an important case — important enough to merit the attention of the full panel — and they understand that the Supreme Court can’t decide a close case following the passing of Justice Antonin Scalia. A win for the industry or for the administration is significant, with the D.C. Circuit functioning as something of a court of last resort with the Supreme Court likely to deadlock 4–4. **The decision won’t be an election issue** Second, **now it is clear that the court’s decision will come after the November election, instead of before it.** This impacts the case should it see an almost-certain appeal to the Supreme Court. Scalia’s replacement is likely to hinge on the result of the 2016 presidential election, which throws more uncertainty into the mix. **It’s already become a political issue in Congress**, with hundreds of conservative members (all Republicans except Sen. Joe Manchin (D-WV)) filing a brief opposing the rule, and hundreds of current and former legislators filing a brief in support.

#### Courts shield

Keith E. **Whittington 5**, Cromwell Professor of Politics – Princeton University, ““Interpose Your Friendly Hand”: Political Supports for the Exercise of Judicial Review by the United States Supreme Court”, American Political Science Review, 99(4), November, p. 585, 591-592

Political leaders in such a situation will have reason to support or, at minimum, tolerate the active exercise of judicial review. In the American context, the presidency is a particularly useful site for locating such behavior. The Constitution gives the president a powerful role in selecting and speaking to federal judges. As national party leaders, presidents and presidential candidates are both conscious of the fragmented nature of American political parties and sensitive to policy goals that will not be shared by all of the president’s putative partisan allies in Congress. We would expect political support for judicial review to make itself apparent in any of four fields of activity: (1) in the selection of “activist” judges, (2) in the encouragement of specific judicial action consistent with the political needs of coalition leaders, (3) in the **congenial reception** of judicial action after it has been taken, and (4) in the public expression of generalized support for judicial supremacy in the articulation of constitutional commitments. Although it might sometimes be the case that judges and elected officials **act in** more-or-less **explicit** **concert** to shift the politically appropriate decisions into the judicial arena for resolution, it is also the case that judges might act independently of elected officials but nonetheless in ways that elected officials find congenial to their own interests and are **willing** and able **to accommodate**. Although Attorney General Richard Olney and perhaps President Grover Cleveland thought the 1894 federal income tax was politically unwise and socially unjust, they did not necessarily therefore think judicial intervention was appropriate in the case considered in more detail later (Eggert 1974, 101– 14). If a majority of the justices and Cleveland-allies in and around the administration had more serious doubts about the constitutionality of the tax, however, the White House would hardly feel aggrieved. We should be equally interested in how judges might exploit the political space open to them to render **controversial decisions** and in how elected officials might anticipate the utility of future acts of judicial review to their own interests.¶ [CONTINUES]¶ There are some issues that politicians cannot easily handle. For individual legislators, their constituents may be sharply divided on a given issue or overwhelmingly hostile to a policy that the legislator would nonetheless like to see adopted. Party leaders, including presidents and legislative leaders, must similarly sometimes manage deeply divided or cross-pressured coalitions. When faced with such issues, elected officials may actively seek to turn over controversial political questions to the courts so as to **circumvent a paralyzed legislature** and **avoid the political fallout** that would come with taking direct action themselves. As Mark Graber (1993) has detailed in cases such as slavery and abortion, elected officials may prefer judicial resolution of disruptive political issues to direct legislative action, especially when the courts are believed to be sympathetic to the politician’s own substantive preferences but even when the attitude of the courts is uncertain or unfavorable (see also, Lovell 2003). Even when politicians do not invite judicial intervention, strategically minded courts will take into account not only the policy preferences of well-positioned policymakers but also the willingness of those potential policymakers to act if doing so means that they must assume responsibility for policy outcomes. For cross-pressured politicians and coalition leaders, **shifting blame** for controversial decisions to the Court and obscuring their own relationship to those decisions may preserve electoral support and coalition unity without threatening active judicial review (Arnold 1990; Fiorina 1986; Weaver 1986). The conditions for the exercise of judicial review may be relatively favorable when judicial invalidations of legislative policy can be managed to the electoral benefit of most legislators. In the cases considered previously, fractious coalitions produced legislation that presidents and party leaders deplored but were unwilling to block. Divisions within the governing coalition can also prevent legislative action that political leaders want taken, as illustrated in the following case.

#### Aff is absurdly bipartisan

Zakrzewski 10/14/2021 – technology policy reporter

Cat, “Senators aim to block tech giants from prioritizing their own products over rivals’” WaPo, 10/14/2021, <https://www.washingtonpost.com/technology/2021/10/14/klobuchar-grassley-antitrust-bill/>

A bipartisan group of senators plans to introduce a bill that they say would prevent tech platforms from using their power to disadvantage smaller rivals, signaling growing momentum in Congress to rein in Silicon Valley giants.

Sens. Amy Klobuchar (D-Minn.), chair of the Senate Judiciary Committee’s antitrust subcommittee, and Charles E. Grassley of Iowa, the top Republican on the Senate Judiciary Committee, announced that they will introduce legislation early next week making it illegal for Amazon, Apple, Facebook and Google to engage in “self-preferencing,” the tech giants’ practice of giving their own products and services a boost over those of rivals on their platforms.

The bill would effectively outlaw an array of behaviors that lawmakers describe as anticompetitive, like Amazon sucking up data from sellers on its platform to copy the products in-house or Google prioritizing its own services over rivals’ in search results.

Klobuchar said in an interview that the bill reflects a growing realization that competition laws, like the Sherman Act of 1890, which prohibits anticompetitive agreements and attempts to monopolize markets, need to be updated for the digital era. (Amazon founder Jeff Bezos owns The Washington Post.)

The American Innovation and Choice Online Act “really gets at the exclusionary conduct so unique to dominant platforms,” she said. “If there had been an Internet when Sen. Sherman was representing Ohio in the Senate, maybe they would have included this.”

The bill comes as recent cases targeting tech giants have tested existing antitrust laws. Advocates for tech regulation say legislation is needed because laws written in the era of railroads and oil barons are not equipped to address the unique ways that Silicon Valley can harm competition and consumers. Both Facebook and Apple have scored courtroom victories in recent months in high-profile antitrust cases.

The bill is widely viewed as a bellwether of whether Republicans and Democrats will be able to convert the mounting bipartisan animosity toward the tech industry into new laws. House lawmakers have already passed a companion version of this bill through the Judiciary Committee, and it awaits a vote on the House floor. The Klobuchar bill highlights the mounting bipartisan interest in both chambers of Congress in overhauling competition law to target the practices of a handful tech giants.

Klobuchar said the White House has also remained “informed” of her office’s work on the bill, as competition policy has emerged as a key focus of the administration. White House press secretary Jen Psaki said last week that President Biden “looks forward” to working with Congress on tech regulation, including antitrust legislation.

The bill’s announcement invited backlash from industry-backed groups arguing that, if passed, it would have a detrimental impact on tech companies. The bill would take a “hammer” to products that consumers love, said Adam Kovacevich, chief executive of the Chamber of Progress, an industry coalition that counts Google, Amazon and Facebook among its partner companies.

“Preventing Amazon from selling Amazon Basics and banning Google’s maps from its search results isn’t going to do anything to make the Internet better for families,” he said. “This is like calling a car mechanic to fix your laptop.”

Advocates for breaking up large tech companies praised the bill and said the recent bipartisan vote backing tech critic Lina Khan to serve on the Federal Trade Commission underscores there’s willingness in both parties to pass antitrust legislation. But they say this should only be the beginning of Congress’s work on these issues.

“The Senate must continue to reassert its power over the handful of men whose corporations undermine economic dynamism, eviscerate the free press, and threaten our democracy itself,” said Sarah Miller, executive director of the American Economic Liberties Project, a nonprofit organization that advocates for aggressive antitrust enforcement.

The Senate Judiciary antitrust subcommittee has hosted several related hearings, during which they’ve questioned witnesses on ways that the tech giants supposedly use their grip on the smart home or app stores to limit competition. Klobuchar noted that these concerns date back to the previous Congress, when a Republican-controlled committee hosted a hearing on self-preferencing, and lawmakers heard testimony from Google critic Yelp.

“Through it all was a common theme about how the dominant platforms were advantaged because they could exclude competitors as only a dominant platform can,” Klobuchar said.

A news release about the forthcoming legislation said it would give enforcers “strong, flexible tools to deter violations,” including steep fines of up to 15 percent of a company’s revenue during the time it was violating the legislation.

The bill also targets much of the conduct that was raised by House lawmakers last year in the findings of their more than year-long investigation into power in the tech industry.

#### Negotiations are dead

Everett 1/4 – Co-congressional bureau chief for POLITICO.

Burgess Everett, “Manchin on Biden’s spending bill: ‘no negotiation going on,’” *POLITICO*, 4 January 2022, https://www.politico.com/news/2022/01/04/manchin-biden-spending-bill-negotiation-526486.

President Joe Biden’s social and climate spending bill is making zero progress in the Senate, where Democratic holdout Joe Manchin said Tuesday there are “no discussions” going on about reviving it.

The West Virginia Democrat bluntly dismissed talk of progress from other members of his party over the last couple weeks and made clear he’s tired of discussing the $1.7 trillion proposal that focuses on education, climate action, health care, taxes and child care.

“I’m really not going to talk about Build Back Better because I think I’ve been very clear on that. There is no negotiation going on at this time,” Manchin told reporters outside his office.

Manchin’s comments amount to just the latest bad sign for the House-passed legislation, which is now interminably stalled in the Senate due to Manchin’s opposition. There have been no specific conversations about reviving the legislation since Manchin spoke with Biden in late December after coming out against the bill on Fox News.

Senate Majority Leader Chuck Schumer said that talks with Biden will pick back up soon enough, and said in his recent discussions with Manchin about voting rights over the past two weeks they have also touched on Biden's spending bill.

"I've talked to Sen. Manchin numerous times during the break," Schumer said on Tuesday afternoon. "I believe the Biden administration will be having discussions with Manchin with his cooperation and participation."

Democrats had hoped the year-end expiration of the expanded child tax credit might cajole Manchin into a deal. But his concerns are far broader and would require a significant rewrite of the legislation, extending to the bill’s short-term programs and longer-term financing.

That explains why the Senate is pivoting almost entirely to elections reform and debate over Senate rules changes, where Manchin stands as yet another blockade along with moderate Sen. Kyrsten Sinema (D-Ariz.). Manchin said he’s talking with Democrats about reforms to the Senate rules that might allow voting legislation to pass, but said as of now he’s “not agreeing to anything.”

Nonetheless, Schumer said Manchin will have to vote on Biden’s signature spending bill at some point. The legislation has yet to come to the Senate floor after Schumer had hoped to pass it before Christmas.

“I intend to hold a vote in the Senate on BBB and we’ll keep voting until we get a bill passed. The stakes are high for us to find common ground,” Schumer said Tuesday.

Still, after Manchin's comments Tuesday, the domestic spending bill seems in even worse shape than many in the party are willing to admit. And Democrats may have to seriously trim their ambitions to get Manchin’s vote, essential to pass the filibuster-proof spending bill in a 50-50 Senate.

Manchin called some of the bill “well-intended” but argued other parts are a “far reach." In the past, he has raised questions about the price of the expanded child tax credit as well as the legislation’s paid leave provisions. On Tuesday, Manchin suggested that focusing the bill on climate might be easier than lumping in a hodgepodge of provisions that amount to much of his party’s domestic wish list from the past few years.

## FTC Tradeoff DA

#### Fiat solves – new authority comes with new funding authorization

Bannan is policy counsel at New America’s Open Technology Institute, focusing on platform accountability and privacy, and Gambhir, New America's Open Technology Institute, ‘21

(Christine and Raj, “Does Data Privacy Need its Own Agency?” <https://d1y8sb8igg2f8e.cloudfront.net/documents/Does_Data_Privacy_Need_its_Own_Agency.pdf>)

Proposals delegating privacy law enforcement to the FTC generally bolster an existing bureau or establish a new bureau within the agency. Senator Wyden’s Mind Your Own Business Act of 2019 would create a new 50-person Bureau of Technology within the FTC and add 125 employees to the Bureau of Consumer Protection—100 of whom would do privacy enforcement work.102 This would bring the total number of FTC employees doing privacy enforcement work up to about 190. While the Wyden bill does not provide figures for how much adding 175 new employees would cost, former FTC Chairman Joseph Simons estimated that a $50 million budget increase from Congress would enable the FTC to hire 160 new staff.103 Under this proposal, the number of employees working on privacy would more than triple. However, it would still only be about one-tenth the size of the Eshoo-Lofgren DPA proposal.

#### FTC is already taking an aggressive approach in HC

Cornell 9/16 – Head of the U.S. antitrust practice at global antitrust powerhouse Clifford Chance LLP

Tim Cornell, 20 years of antitrust experience, has advocated on behalf of dozens of clients before the US Federal Trade Commission, the US Department of Justice, and the federal courts, with Robert Houck, Peter Mucchetti, and Brian Yin, Antitrust Litigation 2021, Last Updated September 16, 2021, <https://practiceguides.chambers.com/practice-guides/antitrust-litigation-2021/usa/trends-and-developments>

After an eventful year of antitrust litigation related to healthcare in 2020, all indications are that 2021 will be just as action-packed.

In October 2020, subscriber plaintiffs and defendants in the Blue Cross Blue Shield (BCBS) multi-district litigation (MDL) in Alabama reached a preliminary agreement on a USD 2.67 billion settlement fund, along with sweeping reforms aimed at restoring competition in the healthcare insurance industry. The litigation is an amalgamation of claims going back to 2012 accusing dozens of local insurers (so-called "Blues") of using restrictive practices to suppress competition.

Then in January 2021, President Trump signed the Competitive Health Insurance Reform Act, eliminating certain antitrust exemptions health insurers had previously enjoyed under the McCarran Ferguson Act. While these exemptions were limited, commentators have suggested that the availability of the defense may have had a chilling effect on antitrust litigation in healthcare. The plaintiffs' success in the BCBS cases and the elimination of these antitrust protections for health insurers may result in more antitrust cases against health insurers in the next few years.

Meanwhile, the multitude of suits in the long-running generic drug price fixing matters has continued to progress. In July 2020, the federal judge overseeing the multidistrict litigation initially selected the complaint filed by a coalition of 44 state attorneys general against Teva to act as a "bellwether" case (a procedure whereby a representative action among many lawsuits proceeds first to trial to help shape subsequent litigation). But in August 2020, a grand jury indicted Teva on criminal price-fixing charges, as part of the DOJ's ongoing antitrust investigation of the generic drug industry. Concerned for the complications the civil and criminal matters could pose to one another, the court vacated its bellwether selection. In May 2021, the judge instead chose the states' complaint asserting a price fixing conspiracy affecting various dermatology treatments and other drugs. Meanwhile, the DOJ has continued to pursue its own generic drugs investigations, having criminally charged at least seven companies and a number of executives, while indicating that more indictments are expected.

The FTC also has continued to make healthcare a priority for antitrust enforcement. In the Spring of 2020, the FTC announced that it would increase resources it put towards the review of previously consummated healthcare deals, sending requests for information to a number of health insurers that had recently merged. Around the same time, the FTC initiated a challenge of Jefferson Health's proposed acquisition of Albert Einstein Healthcare Network in Philadelphia. In a rare defeat for the agency, a federal court rejected the challenge in December 2020. Seemingly undeterred, however, the FTC has continued to challenge hospital mergers, including in Memphis [In re: Methodist Le Bonheur Healthcare and Tenet Healthcare Corporation, FTC No. 9396] and New Jersey [In re: Hackensack Meridian Health, Inc. and Englewood Healthcare Foundation, FTC No. 9399].

In his 9 July 2021 Executive Order, President Biden continued his administration's focus on antitrust and healthcare issues. The order directs federal agencies to seek solutions to address anticompetitive conditions affecting the US economy, including the high cost of prescription medication and healthcare services, increasing hospital consolidation, and other areas related to healthcare.

#### Plan reverses current tradeoffs

Feldman 8/27 – Distinguished Professor of Law Chair & Director of the Center for Innovation, UC Hastings Law

Robin Feldman, Arthur J. Goldberg Distinguished Professor of Law, Albert Abramson ’54 Distinguished Professor of Law Chair, and Director of the Center for Innovation, The Price Tag of 'Pay-for-Delay', UC Hastings Research Paper Forthcoming, 27 Aug 2021, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3846484>

Given that agreements between competitors are disfavored, the test for agreements between brands and generics in the context of Hatch-Waxman litigation should begin with a presumption that the agreement is anticompetitive. This approach respects the essential design of the Hatch-Waxman system to ensure rapid entry of generic drugs, in part, by providing an incentive for generic drug companies to challenge patents that are invalid or invalidly applied.182 Only when the public interest is clearly served should the presumption fall.

A presumption offers a variety of advantages to the judiciary and regulatory systems. It would ease the burdens on regulators such as the FTC, which tend to lack the resources needed to scrutinize and, if necessary, litigate each of the dozens of brand-generic settlements that occur annually. 183 [FN 183] 183 See Feldman & Misra, Fatal Attraction, supra note 8, at 260–261 (noting that, although all brand-generic agreements under the Hatch-Waxman Act must be filed with the FTC, the agency’s delays in publishing pay-for-delay reports, and the reports’ relative lack of specificity, suggests limited resources to address the problem of pay-for-delay). [End FN] In addition, by shifting the burden to the companies themselves, a presumption avoids rewarding those who concoct increasingly elaborate schemes. The company would have to establish how a complex and convoluted scheme works and why it is procompetitive.

#### Enforcement of <<their thing>> fails – new rulemaking agenda overstretches the agency

Wilson, FTC Commissioner, ‘12/10/21

(Christine S., Dissenting Statement of Commissioner Christine S. Wilson

Annual Regulatory Plan and Semi-Annual Regulatory Agenda, <https://www.ftc.gov/system/files/documents/public_statements/1598839/annual_regulatory_plan_and_semi-annual_regulatory_agenda_wilson_final.pdf>)

The context in which the Commission announces this ambitious and resource-intensive rulemaking agenda gives independent cause for concern. The “surge in merger filings” has been a central focus of Chair Khan since her arrival at the agency.2 To address the uptick in merger filings, staff from many non-merger divisions throughout the agency have been commandeered to review pre-merger notification materials.3 These filings are subject to statutory timeframes, but the FTC has struggled to meet its timing obligations.4 Consequently, the FTC’s Bureau of Competition is now sending warning letters to merging parties whose statutory timeframes have expired, warning that the agency’s investigations continue and threatening that if they proceed to consummate their transactions, they do so at their own peril.5 It is puzzling that we would unleash an avalanche of rulemakings while also confronting a tsunami of merger filings.

Merger wave or no merger wave, my Democrat colleagues have long aspired to a more expansive rulemaking agenda for the agency.6 This year, they began taking steps to implement that goal. Acting Chairwoman Slaughter created a new rulemaking group within the FTC’s Office of General Counsel to “help build [the] Commission’s rulemaking capacity and agenda for unfair or deceptive practices and unfair methods of competition.”7 She also launched a review of the Commission’s Rules of Practice to “streamline” rulemaking procedures under Section 18 of the FTC Act.8 Chair Khan then ushered those changes across the finish line.9 While the Annual Regulatory Plan and Semi-Regulatory Agenda characterize those changes to our Rules of Practice as “eliminating extra bureaucratic steps and unnecessary formalities,” in reality those changes fast-track regulation at the expense of public input, objectivity, and a full evidentiary record.10 The Statement of the Commission issued in conjunction with those rule changes confirmed a desire for an ambitious rulemaking agenda,11 which predictably is reflected in this plan.

The regulatory plan identifies many rulemakings that will be launched in the coming months, including a trade regulation rule on commercial surveillance “to curb lax security practices, limit privacy abuses, and ensure that algorithmic decision making does not result in unlawful discrimination.”12 This rule may implicate competition as well as consumer protection issues, as the Statement of Regulatory Priorities notes that “surveillance-based business models” impact not just consumers but competition.13

And taking a big step into uncharted waters, the plan states that “the Commission will also explore whether rules defining certain ‘unfair methods of competition’ prohibited by Section 5 of the FTC Act would promote competition and provide greater clarity to the market.”14 In deference to President Biden’s recent Executive Order,15 the Commission may consider competition rulemakings relating to “non-compete clauses, surveillance, the right to repair, payfor-delay pharmaceutical agreements, unfair competition in online marketplaces, occupational licensing, real-estate listing and brokerage, and industry-specific practices that substantially inhibit competition.”16 As if this list is insufficiently lengthy, the plan observes that “[t]he Commission will explore the benefits and costs of these and other competition rulemaking ideas.”17 In the absence of further detail, the reader is left to daydream about the additional rulemaking adventures that await.

# 1AR

## Prices Adv

No cards

## Innovation Adv

#### Retrenchment triggers every impact

Wright 20 – Director, Center on the US & Europe and Sr. Fellow, Project on Internat’l Order & Strategy at Brookings

Thomas Wright, director of the Center on the United States and Europe, senior fellow in the Project on International Order and Strategy at the Brookings Institution, contributing writer for The Atlantic, and nonresident fellow at the Lowy Institute for International Policy, The Folly of Retrenchment: Why America Can’t Withdraw From the World, March/April 2020, https://www.foreignaffairs.com/articles/2020-02-10/folly-retrenchment

For seven decades, U.S. grand strategy was characterized by a bipartisan consensus on the United States’ global role. Although successive administrations had major disagreements over the details, Democrats and Republicans alike backed a system of alliances, the forward positioning of forces, a relatively open international economy, and, albeit imperfectly, the principles of freedom, human rights, and democracy. Today, that consensus has broken down.

President Donald Trump has questioned the utility of the United States’ alliances and its forward military presence in Europe, Asia, and the Middle East. He has displayed little regard for a shared community of free societies and is drawn to authoritarian leaders. So far, Trump’s views are not shared by the vast majority of leading Republicans. Almost all leading Democrats, for their part, are committed to the United States’ traditional role in Europe and Asia, if not in the Middle East. Trump has struggled to convert his worldview into policy, and in many respects, his administration has increased U.S. military commitments. But if Trump wins reelection, that could change quickly, as he would feel more empowered and Washington would need to adjust to the reality that Americans had reconfirmed their support for a more inward-looking approach to world affairs. At a private speech in November, according to press reports, John Bolton, Trump’s former national security adviser, even predicted that Trump could pull out of NATO in a second term. The receptiveness of the American people to Trump’s “America first” rhetoric has revealed that there is a market for a foreign policy in which the United States plays a smaller role in the world.

Amid the shifting political winds, a growing chorus of voices in the policy community, from the left and the right, is calling for a strategy of global retrenchment, whereby the United States would withdraw its forces from around the world and reduce its security commitments. Leading scholars and policy experts, such as Barry Posen and Ian Bremmer, have called on the United States to significantly reduce its role in Europe and Asia, including withdrawing from NATO. In 2019, a new think tank, the Quincy Institute for Responsible Statecraft, set up shop, with funding from the conservative Charles Koch Foundation and the liberal philanthropist George Soros. Its mission, in its own words, is to advocate “a new foreign policy centered on diplomatic engagement and military restraint.”

Global retrenchment is fast emerging as the most coherent and ready-made alternative to the United States’ postwar strategy. Yet pursuing it would be a grave mistake. By dissolving U.S. alliances and ending the forward presence of U.S. forces, this strategy would destabilize the regional security orders in Europe and Asia. It would also increase the risk of nuclear proliferation, empower right-wing nationalists in Europe, and aggravate the threat of major-power conflict.

This is not to say that U.S. strategy should never change. The United States has regularly increased and decreased its presence around the world as threats have risen and ebbed. Even though Washington followed a strategy of containment throughout the Cold War, that took various forms, which meant the difference between war and peace in Vietnam, between an arms race and arms control, and between détente and an all-out attempt to defeat the Soviets. After the fall of the Soviet Union, the United States changed course again, expanding its alliances to include many countries that had previously been part of the Warsaw Pact.

Likewise, the United States will now have to do less in some areas and more in others as it shifts its focus from counterterrorism and reform in the Middle East toward great-power competition with China and Russia. But advocates of global retrenchment are not so much proposing changes within a strategy as they are calling for the wholesale replacement of one that has been in place since World War II. What the United States needs now is a careful pruning of its overseas commitments—not the indiscriminate abandonment of a strategy that has served it well for decades.

RETRENCHMENT REDUX

Support for retrenchment stems from the view that the United States has overextended itself in countries that have little bearing on its national interest. According to this perspective, which is closely associated with the realist school of international relations, the United States is fundamentally secure thanks to its geography, nuclear arsenal, and military advantage. Yet the country has nonetheless chosen to pursue a strategy of “liberal hegemony,” using force in an unwise attempt to perpetuate a liberal international order (one that, as evidenced by U.S. support for authoritarian regimes, is not so liberal, after all). Washington, the argument goes, has distracted itself with costly overseas commitments and interventions that breed resentment and encourage free-riding abroad.

Critics of the status quo argue that the United States must take two steps to change its ways. The first is retrenchment itself: the action of withdrawing from many of the United States’ existing commitments, such as the ongoing military interventions in the Middle East and one-sided alliances in Europe and Asia. The second is restraint: the strategy of defining U.S. interests narrowly, refusing to launch wars unless vital interests are directly threatened and Congress authorizes such action, compelling other nations to take care of their own security, and relying more on diplomatic, economic, and political tools.

In practice, this approach means ending U.S. military operations in Afghanistan, withdrawing U.S. forces from the Middle East, relying on an over-the-horizon force that can uphold U.S. national interests, and no longer taking on responsibility for the security of other states. As for alliances, Posen has argued that the United States should abandon the mutual-defense provision of NATO, replace the organization “with a new, more limited security cooperation agreement,” and reduce U.S. commitments to Japan, South Korea, and Taiwan. On the question of China, realists have split in recent years. Some, such as the scholar John Mearsheimer, contend that even as the United States retrenches elsewhere, in Asia, it must contain the threat of China, whereas others, such as Posen, argue that nations in the region are perfectly capable of doing the job themselves.

Since Trump’s election, some progressive foreign policy thinkers have joined the retrenchment camp. They diverge from other progressives, who advocate maintaining the United States’ current role. Like the realists, progressive retrenchers hold the view that the United States is safe because of its geography and the size of its military. Where these progressives break from the realists, however, is on the question of what will happen if the United States pulls back. While the realists favoring retrenchment have few illusions about the sort of regional competition that will break out in the absence of U.S. dominance, the progressives expect that the world will become more peaceful and cooperative, because Washington can still manage tensions through diplomatic, economic, and political tools. The immediate focus of the progressives is the so-called forever wars—U.S. military involvement in Afghanistan, Iraq, Syria, and the broader war on terrorism—as well as the defense budget and overseas bases.

Although the progressives have a less developed vision of how to implement retrenchment than the realists, they do provide some guideposts. Stephen Wertheim, a co-founder of the Quincy Institute, has called for bringing home many of the U.S. soldiers serving abroad, “leaving small forces to protect commercial sea lanes,” as part of an effort to “deprive presidents of the temptation to answer every problem with a violent solution.” He argues that U.S. allies may believe that the United States has been inflating regional threats and thus conclude that they do not need to increase their conventional or nuclear forces. Another progressive thinker, Peter Beinart, has argued that the United States should accept Chinese and Russian spheres of influence, a strategy that would include abandoning Taiwan.

IS LESS REALLY MORE?

The realists and the progressives arguing for retrenchment differ in their assumptions, logic, and intentions. The realists tend to be more pessimistic about the prospects for peace and frame their arguments in hardheaded terms, whereas the progressives downplay the consequences of American withdrawal and make a moral case against the current grand strategy. But they share a common claim: that the United States would be better off if it dramatically reduced its global military footprint and security commitments.

This is a false promise, for a number of reasons. First, retrenchment would worsen regional security competition in Europe and Asia. The realists recognize that the U.S. military presence in Europe and Asia does dampen security competition, but they claim that it does so at too high a price—and one that, at any rate, should be paid by U.S. allies in the regions themselves. Although pulling back would invite regional security competition, realist retrenchers admit, the United States could be safer in a more dangerous world because regional rivals would check one another. This is a perilous gambit, however, because regional conflicts often end up implicating U.S. interests. They might thus end up drawing the United States back in after it has left—resulting in a much more dangerous venture than heading off the conflict in the first place by staying. Realist retrenchment reveals a hubris that the United States can control consequences and prevent crises from erupting into war.

A U.S. pullback from Europe or Asia is more likely to embolden regional powers.

The progressives’ view of regional security is similarly flawed. These retrenchers reject the idea that regional security competition will intensify if the United States leaves. In fact, they argue, U.S. alliances often promote competition, as in the Middle East, where U.S. support for Saudi Arabia and the United Arab Emirates has emboldened those countries in their cold war with Iran. But this logic does not apply to Europe or Asia, where U.S. allies have behaved responsibly. A U.S. pullback from those places is more likely to embolden the regional powers. Since 2008, Russia has invaded two of its neighbors that are not members of NATO, and if the Baltic states were no longer protected by a U.S. security guarantee, it is conceivable that Russia would test the boundaries with gray-zone warfare. In East Asia, a U.S. withdrawal would force Japan to increase its defense capabilities and change its constitution to enable it to compete with China on its own, straining relations with South Korea.

The second problem with retrenchment involves nuclear proliferation. If the United States pulled out of NATO or ended its alliance with Japan, as many realist advocates of retrenchment recommend, some of its allies, no longer protected by the U.S. nuclear umbrella, would be tempted to acquire nuclear weapons of their own. Unlike the progressives for retrenchment, the realists are comfortable with that result, since they see deterrence as a stabilizing force. Most Americans are not so sanguine, and rightly so. There are good reasons to worry about nuclear proliferation: nuclear materials could end up in the hands of terrorists, states with less experience might be more prone to nuclear accidents, and nuclear powers in close proximity have shorter response times and thus conflicts among them have a greater chance of spiraling into escalation.

Third, retrenchment would heighten nationalism and xenophobia. In Europe, a U.S. withdrawal would send the message that every country must fend for itself. It would therefore empower the far-right groups already making this claim—such as the Alternative for Germany, the League in Italy, and the National Front in France—while undermining the centrist democratic leaders there who told their populations that they could rely on the United States and NATO. As a result, Washington would lose leverage over the domestic politics of individual allies, particularly younger and more fragile democracies such as Poland. And since these nationalist populist groups are almost always protectionist, retrenchment would damage U.S. economic interests, as well. Even more alarming, many of the right-wing nationalists that retrenchment would empower have called for greater accommodation of China and Russia.

A fourth problem concerns regional stability after global retrenchment. The most likely end state is a spheres-of-influence system, whereby China and Russia dominate their neighbors, but such an order is inherently unstable. The lines of demarcation for such spheres tend to be unclear, and there is no guarantee that China and Russia will not seek to move them outward over time. Moreover, the United States cannot simply grant other major powers a sphere of influence—the countries that would fall into those realms have agency, too. If the United States ceded Taiwan to China, for example, the Taiwanese people could say no. The current U.S. policy toward the country is working and may be sustainable. Withdrawing support from Taiwan against its will would plunge cross-strait relations into chaos. The entire idea of letting regional powers have their own spheres of influence has an imperial air that is at odds with modern principles of sovereignty and international law.

A fifth problem with retrenchment is that it lacks domestic support. The American people may favor greater burden sharing, but there is no evidence that they are onboard with a withdrawal from Europe and Asia. As a survey conducted in 2019 by the Chicago Council on Global Affairs found, seven out of ten Americans believe that maintaining military superiority makes the United States safer, and almost three-quarters think that alliances contribute to U.S. security. A 2019 Eurasia Group Foundation poll found that over 60 percent of Americans want to maintain or increase defense spending. As it became apparent that China and Russia would benefit from this shift toward retrenchment, and as the United States’ democratic allies objected to its withdrawal, the domestic political backlash would grow. One result could be a prolonged foreign policy debate that would cause the United States to oscillate between retrenchment and reengagement, creating uncertainty about its commitments and thus raising the risk of miscalculation by Washington, its allies, or its rivals.

Realist and progressive retrenchers like to argue that the architects of the United States’ postwar foreign policy naively sought to remake the world in its image. But the real revisionists are those who argue for retrenchment, a geopolitical experiment of unprecedented scale in modern history. If this camp were to have its way, Europe and Asia—two stable, peaceful, and prosperous regions that form the two main pillars of the U.S.-led order—would be plunged into an era of uncertainty.

## CP

#### Plan alone is goldilocks – presumes P4D is bad, but lets defendants rebut that presumption

Feldman 8/27 – Distinguished Professor of Law Chair & Director of the Center for Innovation, UC Hastings Law

Robin Feldman, Arthur J. Goldberg Distinguished Professor of Law, Albert Abramson ’54 Distinguished Professor of Law Chair, and Director of the Center for Innovation, The Price Tag of 'Pay-for-Delay', UC Hastings Research Paper Forthcoming, 27 Aug 2021, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3846484>

One could argue that presuming anticompetitiveness in the event of a settlement between brand and generic companies would disincentivize the ability of parties to enter into good faith settlements to avoid the costs of litigation.187 Litigating parties are generally encouraged to settle their differences, sparing the legal system the time and expense of a trial. A presumption, however, can be rebutted by appropriate evidence within the purview of the companies. It is far less drastic a test than certain other types of agreements between competitors, which are illegal per se under antitrust law, such as horizontal price-fixing, bid-rigging, and market-allocation schemes.188

#### Balance key—overly aggressive action undermines innovation

Robert D. Atkinson, president of the Information Technology and Innovation Foundation, Antitrust Can Hurt U.S. Competitiveness; Actions against RCA, AT&T and Xerox gave a leg up to European and Japanese firms, July 5, 2021, WSJ

When it comes to technology and the economy, the U.S. is grappling with two contradictory goals: competing with China in advanced technology industries and ramping up antitrust enforcement against leading U.S. tech companies.

Antimonopoly advocates argue that we can have our cake and eat it too. Go ahead and break up big tech, they say; we can still compete with China. But there is a long history of U.S. antitrust actions against technology companies, and the results suggest regulators should exercise caution.

Consider the case of Western Electric, AT&T's equipment subsidiary. By the early 1920s, it had factories in Austria, Belgium, Canada, China, Germany, France, Italy, Japan, the Netherlands, Russia and the U.K. But because AT&T relied on it exclusively for equipment, in 1925 the Justice Department threatened AT&T with breakup unless it divested Western Electric's foreign assets, creating International Telephone & Telegraph and ultimately giving birth to robust foreign-owned competitors.

Antitrust regulators also pressured AT&T's Bell Labs in the early 1950s to license its newly invented transistor technology. That spurred innovation because it helped emerging companies such as Texas Instruments and Fairchild. But because of government pressure, AT&T also licensed its technology, almost for free, to foreign companies. This eventually enabled Sony to take global leadership from the U.S. in consumer electronics, and it gave a major leg up to Europe's Ericsson and Siemens.

The U.S. also used to be the global leader in television technology thanks to the Radio Corp. of America, the pathbreaker in color television. But in the 1950s the Justice Department required RCA to let other U.S. companies use its patents at no charge. RCA had long relied on licensing revenue, so it started making money where it could—in Japan. "RCA licenses made Japanese color television possible," technology historian James Abegglen has written.

In 1972, the Federal Trade Commission brought a similar antitrust suit against Xerox, the world's then-leading producer of copier technology thanks in part to its Silicon Valley-based innovation incubator Xerox PARC. Evidently unimpressed, the head of the FTC's Bureau of Competition F.M. Scherer said he would be "dissatisfied if Xerox's market share isn't significantly diminished in several years." To that end, the FTC forced Xerox to give up its blueprints and other discoveries, allowing an estimated 1,700 patents to make their way to Xerox competitors. Sure enough, Xerox lost half its market share—mostly to Japanese firms such as Canon, Toshiba and Sharp. Xerox's only viable path to survival was to strengthen its alliance with Fuji, creating a new giant, Fuji Xerox.

Two years later in 1974, the Justice Department targeted AT&T again, forcing it to break up over the objections of Commerce Secretary Malcolm Baldridge that the suit jeopardized America's leadership position. This was the death knell for Bell Labs, arguably the most innovative organization that has ever existed.

None of this is to say that antitrust authorities should be passive or turn a blind eye to anticompetitive behavior. But they should recognize that firms' size can be an important factor in their ability to innovate. Rather than rely on market share as the alarm bell that signals the need for antitrust enforcement, regulators should focus more on firms' conduct, and they should look first to behavioral remedies, not structural ones. Antitrust analysis should also consider that tech companies compete globally, not nationally, so cutting them down to size usually has significant economic consequences.

The Federal Communications Commission has provided a model for the behavioral approach by conducting a series of inquiries starting in 1970 to investigate the convergence of telephone and computing services and establish rules enabling competition among established and upstart players across sectors that are increasingly intertwined. U.S. courts also provided a model in judgments against Microsoft, which compelled it to let other companies more easily integrate their software into Windows.

As policy makers now consider competition issues related to today's large technology firms, they would be well advised to learn from this history. With Chinese internet and tech companies waiting in the wings, aggressive antitrust actions against U.S. leaders run the risk of giving a new generation of foreign rivals the boost they need to dominate global markets, just as Japanese and European firms have benefited in the past.

## K

#### It’s impossible for the state to aggregate enough data to effectively allocate resources.

**Karlson et al. 20** --- Ratio Institute, Linköping University, Stockholm, Sweden.

Nils, Christian Sandström, & Karl Wennberg, 2020, “Bureaucrats or Markets in Innovation Policy? – a critique of the entrepreneurial state,” The Review of Austrian Economics, vol. 34, pg. 81–95.

Information problems concern the difficulty a public actor face in collecting the information and acquiring the knowledge enabling correct decision-making regarding, for example, the allocation of resources. As Hayek (1945) showed, it is practically impossible to aggregate information and knowledge about production conditions, business opportunities, customer preferences, etc. to any central unit in society. Such information is dispersed, local, and time-bound in character, even in today’s modern digital economy. With regard to innovation policy and the results reviewed above, there are numerous implications of Hayek’s argument.

First, the existence of a market failure is empirically difficult to prove, or measure. The original argument by Arrow (1962) was of a theoretical nature and has not been validated. One could expect the potential size of such a market failure to vary greatly depending upon institutional characteristics, industrial context, regional and national setting. Such differences along with the fact that it is a very methodologically challenging task to locate and compute the size of a market failure means that policymakers are put in the awkward position of trying to solve a problem that is unknown both in terms of its existence, size and location. Needless to say, such a situation is almost bound to result in malinvestments.

The second implication concerns that a market economy is more compatible with the notion of dispersed knowledge than a public policy intervention. Industrial development in a market economy characterized by innovations is often described as a complex evolutionary process (Nelson and Winter 1982). Through experimental search characterized by failures and unpredictable breakthroughs, the economy develops over time (Aldrich 1999). Individual market actors make mistakes and invest in the wrong technical solution or the wrong business model for a new technology (Delmar et al. 2011). If the actors themselves who operate in a market are unable to know which technology or business model is optimal, there is reason to question how a public actor in the form of a government agency or a policymaker can perform this task satisfactorily. Government involvement in the form of “picking winners,” that is, attempts to generate growth through government selection of technologies or firms, risks becoming expensive for taxpayers (Lerner 2009). Previous research has shown that venture capital investments tend to be highly spatial and build on social networks (Hochberg et al. 2007). The price mechanism provides aggregate information about customers’ demand, and the firms’ profits and losses. Information and knowledge are thus conveyed and generated among market actors in competitive markets who are nested together through social, economic and technological interdependencies, and this information is hard to extract from its origin and locate in a central policy unit.

#### Only competition allocates R&D investments effectively – profit motive is key

**Wu 16** --- Economic Analyst, Information Technology and Innovation Foundation

John, 11-29-16, “Despite China Favoring State-Owned Enterprises, Its Private Companies are More Innovative and Productive,” ITIF, <https://itif.org/publications/2016/11/29/despite-china-favoring-state-owned-enterprises-its-private-companies-are>

Private firms are not only more R&D intensive than SOEs, they too are better able to translate these R&D investments into productivity growth. Every 1¥ invested in R&D by a private firm returned an additional 0.16¥ in output, while every 1¥ invested in R&D by a SOE returned an additional 0.12¥ in output—[approximately a 30 percent difference](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2570736).

China’s own experience with privatizing some SOEs since joining the WTO in 2001 should give them even more reason to fully embrace market-based economic trade policies. A separate [economic analysis](http://socialsciences.cornell.edu/wp-content/uploads/2015/03/Intellectual-Property-Protection.pdf) covering firm data between 1990 and 2013 shows that, on average, when a SOE switched to private ownership, R&D as a share of net assets doubled, or an increase of 0.14 percentage points. This surge in innovative activity also explains why patenting increased by 7.2 percent, which was accompanied by high-quality patents and more collaborative R&D with international companies.

Market dynamics explain most of this sizable difference in productivity and innovation outcomes between firm ownership types. Privately-owned firms tend to operate in more competitive industries, which forces them to make more effective R&D investments to stay ahead of other firms. Conversely, state-owned firms tend to operate in less competitive industries or are insulated from market competition induced through SOE-favoring policies that limit competition in such industries and create an uneven playing field for both domestic and international private companies.

#### U.S. is dematerializing resource usage – market forces incentivize a switch away from resource-intensive practices

-air pollution

-GHGs

-ag

-nitrogen, potassium, phosphorus

-wood

-metal

McAfee 20 – Principal research scientist at MIT and co-director of the MIT Initiative on the Digital Economy. Doctorate in Business Administration from the Harvard Business School.

Andrew McAfee, “Why Degrowth Is the Worst Idea on the Planet,” *Wired*, 6 October 2020, https://www.wired.com/story/opinion-why-degrowth-is-the-worst-idea-on-the-planet/.

Easing Pollution, Not Exporting It

In some important areas, however, a very different pattern emerged after 1970: Growth continued, but environmental harm decreased. This decoupling occurred first with pollution, and first in the rich world. In the US, for example, aggregate levels of six common air pollutants have declined by 77 percent, even as gross domestic product increased by 285 percent and population by 60 percent. In the UK, annual tonnage of particulate emissions dropped by more than 75 percent between 1970 and 2016, and of the main polluting chemicals by about 85 percent. Similar gains are common across the highest-income countries.

How were these reductions achieved? The two possibilities are cleanup and offshoring. Either rich countries figured out how to reduce their “air pollution per dollar” so much that overall pollution went down even as their economies grew, or they sent so much of their dirty production overseas that the air at home got cleaner. The first of these paths reduces the total burden of human-caused pollution; the second just rearranges it.

The evidence is overwhelming that rich countries cleaned up their air pollution much more than they outsourced it. For one, a great deal of air pollution comes from highway vehicles and power plants, and rich countries haven’t outsourced driving and generating electricity to low-income ones. In fact, high-income countries haven't even offshored most of their industry. The US and UK both manufacture more than they did 50 years ago (at least until the Covid-19 pandemic sharply reduced output), and Germany has been a net exporter since 2000 while continuing to drive down air pollution. The rest of the world has been exporting its manufacturing pollution to Germany (to use degrowthers’ phrasing), yet Germans are breathing cleaner air than they were 20 years ago.

Rich countries have reduced their air pollution not by embracing degrowth or offshoring, but instead by enacting and enforcing smart regulation. As economists Joseph Shapiro and Reed Walker concluded in a 2018 study about the US, “changes in environmental regulation, rather than changes in productivity and trade, account for most of the emissions reductions.” Research about the cleanup of US waters also concludes that well-designed and enforced regulations have successfully reduced pollution.

It is true that the US and other rich countries now import lots of products from China and other nations with higher pollution levels. But if there were no international trade at all, and rich countries had to rely exclusively on their domestic industries to make everything they consume, they’d still have much cleaner air and water than they did 50 years ago. As a 2004 Advances in Economic Analysis and Policy study summarized: “We find no evidence that domestic production of pollution-intensive goods in the US is being replaced by imports from overseas.”

The rich world’s success at decoupling growth from pollution is an inconvenient fact for degrowthers. Even more inconvenient is China's recent success at doing the same. China’s export-led, manufacturing-heavy economy has been growing at meteoric rates, but between 2013 and 2017 air pollution in densely populated areas declined by more than 30 percent. Here again the government mandated and monitored pollution declines and so decoupled growth from an important category of environmental harm.

Prosperity Bends the Curve

China's progress with air pollution is heartening, but it's not surprising to most economists. It's a clear example of the environmental Kuznets curve (EKC) in action. Named for the economist Simon Kuznets, EKC posits a relationship between a country's affluence and the condition of its environment. As GDP per capita rises from an initial low level, so too does environmental damage; but as affluence continues to increase, the harms level off and then start to decline. The EKC is clearly visible in the pollution histories of today's rich countries, and it's now taking shape in China and elsewhere.

Also consider air pollution death rates around the world. As the invaluable website Our World in Data puts it, “Rates have typically fallen across high-income countries: almost everywhere in Europe, but also in Canada, the United States, Australia, New Zealand, Japan, Israel and South Korea and other countries. But rates have also fallen across upper-middle income countries too, including China and Brazil. In low and lower-middle income countries, rates have increased over this period.”

The EKC is a direct refutation of a core idea of degrowth: that environmental harms must always rise as populations and economies do. It's not surprising that today's degrowth advocates rarely discuss the large reductions in air and water pollution that have accompanied higher prosperity in so many places around the world. Instead, degrowthers now focus heavily on one kind of pollution: greenhouse gas emissions.

The claims made are familiar ones: that any apparent reductions in greenhouse gas emissions in rich countries are due to offshoring rather than actual decarbonization. Thanks to the Global Carbon Project, we can see if this is the case. GCP has calculated “consumption-based emissions” for many countries going back to 1990, taking into account imports and exports, yielding the greenhouse gas emissions embodied in all the goods and services consumed in each country each year.

For several of the world's richest countries, including Germany, Italy, France, the UK, and the US, graphs of consumption-based carbon emissions follow the familiar EKC. The US, for example, has 22reduced its total (not per capita) consumption-based CO2 emissions by more than 13 percent since 2007.

These reductions are not mainly due to enhanced regulation. Instead, they've come about because of a combination of tech progress and market forces. Solar and wind power have become much cheaper in recent years and have displaced coal for electricity generation. Natural gas, which when burned emits fewer greenhouse gases per unit of energy than does coal (even after taking methane leakage into account), has also become much cheaper and more abundant in the US as a result of the fracking revolution.

To ensure that these greenhouse gas declines continue to spread and accelerate, we should apply the lessons we've learned from previous pollution reduction success. In particular, we should make it expensive to emit carbon, then watch the emitters work hard to reduce this expense. The best way to do this is with a carbon dividend, which is a tax on carbon emissions where the revenues are not kept by the government but instead are rebated to people as a dividend. William Nordhaus won the 2018 Nobel Prize in economics in part for his work on the carbon dividend, and an open letter advocating its implementation in the US has been signed by more than 3,500 economists. It's an idea whose time has come.

How We Learned to Lighten Up

Tech progress and price pressure aren't just leading to the demise of coal. They're also causing us to exploit the planet less in many other important ways, even as growth continues. In other words, EKCs are not just about pollution any more.

A good place to start examining this broad phenomenon of getting more from less is US agriculture, where we have decades of data on both outputs—crop tonnage—and the key inputs of cropland, water, and fertilizer. Domestic crop tonnage has risen steadily over the years and in 2015 was more than 55 percent higher than in 1980. Over that same period, though, total water used for irrigation declined by 18 percent, total cropland by more than 7 percent. That is, over that 35-year period, US crop agriculture increased its output by more than half while giving an area of land larger than Indiana back to nature and eventually using a Lake Champlain less water each year. This was not accomplished by increasing fertilizer use; total US fertilizer consumption in 2014 (the most recent year for which data are available) was within 2 percent of its 1980 level.

The three main fertilizers of nitrogen, potassium, and phosphorus (NKP) are an interesting case study. Their total US consumption (once other uses in addition to agriculture are taken into account) has declined by 23 percent since 1980, according to the United States Geological Survey. Yet some within the degrowth movement find ways to argue that these declines are also an illusion. These materials thus serve to clearly illustrate the differences in methodology, evidence, and worldview between ecomodernists like myself and degrowthers.

The USGS tracks annual domestic production, imports, and exports of NKP and uses these figures to calculate “apparent consumption” each year. Consumption of each of the three resources has declined by 16 percent or more from their peaks, which occurred no later than 1998. This seems like a clear and convincing example of dematerialization—getting more output from fewer material inputs.

As I argue in my book More From Less, dematerialization doesn’t happen for any complicated or idiosyncratic reason. It happens because resources cost money that companies would rather not spend, and tech progress keeps opening up new ways to produce more output (like crops) while spending less on material inputs (like fertilizers). Modern digital technologies are so good at helping producers get more from less that they're now allowing the US and other technologically sophisticated countries to use less in total of important materials like NKP.

Forest products provide another clear example of dematerialization in the US. Total annual domestic consumption of paper and paperboard peaked in 1999, and of timber in 2002. Both totals have since declined by more than 20 percent. Could these be mirages caused by offshoring that’s not properly captured? That’s highly unlikely, as the country is now onshoring more than it’s offshoring. The US has been a net exporter of forest products since 2009 and is now the world’s largest exporter of these materials.

Is the US economy also dematerializing its use of metals? Probably, but it’s hard to say for sure. The USGS tallies do show dematerialization in steel, aluminum, copper, and other important metals. But these figures don’t include the metals contained in imports of finished goods like cars and computers. America is a net importer of manufactured goods, so it could be that we’re using more metal year after year, but that much of this consumption is “hidden” from official statistics because of imports of heavy, complex products. However, my estimates indicate that this is extremely unlikely and that the country is in fact now reducing its overall consumption of metals.

#### Capitalism is key to massive improvements in living standards, poverty, and environmental sustainability – any other system shuts that down and worsens environmental and social problems

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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 wellregulated 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

#### Their negative representation of capitalism has no analytical teeth – state mediated social markets make war unthinkable

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(Omer F. Orsun, visiting scholar at the Department of Government at Harvard University, Jameson Lee Ungerer, Koç University, and, Demet Yalçin Mousseau, Assistant Professor of International Relations at Koç University, “Capitalism and Peace: It’s Keynes, not Hayek,” in *Assessing the Capitalist Peace*, pg. 80-83)

Can capitalism promote peace among nations? For many this might seem like an odd proposition, given the strong traditional view in the field of international relations that capitalism produces "merchants of death" (Engelbrecht and Ilanighen 1934). Lenin blamed World War I on the capitalist quest tor investment outlets (1970 119171). While Karl Deutsch et al. (1957) observed the existence of a "security community" among the highly capitalist slates of Europe, **neo-Marxist world-systems theory blamed five centuries of war, imperialism, and slavery all on the shoulders of capitalism** (Wallersiein 1974).

But **what exactly do we mean** by "capitalism"? For Wallerstein (1974:399-400) and others in the world-systems school, "capitalism" can include **any form of economic exchange**, including the outright robbery of colonial imperialism, slavery, and even Soviet-style communism, as long as an economy is linked with global markets. By this definition **every major economic system** that has existed in the modern era **is capitalist**; according to this definition, capitalism must be associated with both peace and war, lacking all analytical value. Obviously, **any coherent discussion** of capitalism must give the concept analytical teeth, and in the newly burgeoning capitalist peace literature two distinctive definitions have emerged. Other chapters in this volume by Gartzke and Hewitt, and McDonald outline what we call "free-market" theories of capitalist peace, which equate "capitalism" with free markets or smaller government at home and abroad. Since these views also assume that free markets and less government ownership of property promote economic growth spontaneously, while government plays, at most, a minimal role in market creation and only a regulatory role in its maintenance, this view is perhaps best represented by the works of Friedrich Hayek (1994 [19441, I960).

However, neo-classical liberals do not have a monopoly on the definition of capitalism, and a second definition defines it simply as a way of life: the extent to which citizens in a society regularly contract with strangers located in a market to obtain goods, services, and incomes (Mousseau 2000). In this "**social-market" definition** there is no assumption that markets emerge spontaneously, or that state policies of interference and redistribution impede them. In fact, in all social-market (henceforth "market") capitalist economies of the modern era the state has historically **been highly involved in promoting capitalist development**, often by subsidizing various enterprises and, most consistently, by spending lavishly lo maintain steady rates of market growth (Glirr et al. 1990). Market capitalism is thus historically linked much more with the economic philosophy of John Maynard Keynes (1935), who advocated government spending to promote consumption, rather than with a small unobtrusive government that lets it rise (and fall) on its own.

It is this second, more-Keynesian. definition of capitalism and its role effecting foreign policy that is the subject of this chapter. As Identified by economic norms theory (Mousseau 2000, 2009), social market capitalism **causes peace by way of micro-level dependency on a market**, which causes citizenry dependence on a third party—government—for the enforcement of contracts. This micro-level dependency on contracting with strangers produces two nontrivial results. First, it creates a direct interest in the democratic rule of law as the best means for ensuring that government enforces contracts reliably and impartially. Second, **it creates a direct interest in the health and welfare of everyone else in the market,** since there is more opportunity to be had when others in the market are healthy and wealthy rather than dead or poor. Since others in the market can be both inside and outside a nation, dependency on a market makes war, both within and among capitalist nations, virtually unthinkable. Moreover, since nations have interests in each other's welfare, economic norms theory explicitly predicts a positive peace, rather than just a cold absence of militarized conflicts—an achievement unmatched by competing democratic peace and capitalist peace theories in the literature, all of which predict only a dearth of militarized conflict rather than actual friendship based on mutual interests. The ability to explain .1 shared positive peace offers a scientifically more progressive explanation of the observed phenomenon (lingerer 2012), **providing added explanatory power beyond free-market capitalist and democratic peace theories**, at the same time posing the far greater paradigmatic challenge lo the strong anarchic assumptions of mainstream realism and liberalism.

Because economic norms theory explicates how market capitalism can cause both democracy and peace among nations, **it offers a full explanation for the famous democratic peace**—the observation that democratic nations rarely fight each other—as well as the extant peace among the advanced nations**. Prior research has corroborated this view**: Mousseau (2009) showed that in the modern era not a single fatal conflict **has occurred among nations with impersonal economies**, which was gauged using a binary measure of contract flows within nations. Furthermore, the analysis found that democracy has no significant impact on peace. However, some defenders of the democratic peace have challenged these results: Russett (2010:201) thinks democracy might be revived if control is added for regime differences; Dafoe (2011) asserts that Mousseau's results are not a "compelling" explanation for the democratic peace, owing to the moderate correlation of capitalism and democracy only 26% of democratic dyads are excluded from the democratic peace. Moreover, he also calculates that if the democracy measure is made binary and far more restrictive, then democracies too have not had fatal disputes.

This chapter extends our understanding of the impacts of democracy and capitalism on peace in several significant ways. First, we report results using Mousseau's (2009) newer continuous measure of contract flows, providing **a solution to the perfect prediction problem** that besets analyses of conflict using the binary measure. Second, we switch from analyses of militarized interstate disputes (MIDs) to analyses of interstate crises using the Interstate Crisis Behavior (ICB) dataset (Hewitt 2003). Whereas MIDs are events that may not reflect actual slate intentions, crises are defined by perceptions of threats, including value threats, by policymakers, so we can be more confident in analyzes of crises that the antagonists genuinely perceive themselves as in conflict and thus engaging in actions that would be inconsistent with, and uncharacteristic of, nations engaged in a positive peace. Third, lo address Russell's concern about control for regime differences, this factor is considered in the analyses. Finally, we examine all the capitalist peace theories together in head-to-head tests.

The analyses of most dyads from 1961 to 2001 yield **clear and compelling results**: neither measures of democracy nor free markets have any significant impact on peace **once social-market capitalism is considered**, and the latter emerges as the most robust correlate among the crucial explanatory variables of interstate crises. The implications of these findings are far from trivial: economic norms theory provides an empirically corroborated explanation for why the advanced capitalist economies have been long adherents to the principles of democracy, while at the same time providing a theoretically powerful explanation of capitalism that consistently renders the existence of a negative and positive peace among nations. The real-world applicability is direct and clear: to promote peace among nations the successful strategy is not the support of democracy in other countries, but rather the promotion of their national economies.