# 1NC --- Districts R6

## OFF

### OFF

#### Topical affs must increase prohibitions on the entire economy:

#### 1---By identifies an agent

Lexico, ND (“BY English Definition and Meaning” https://www.lexico.com/en/definition/by)

PREPOSITION

1 Identifying the agent performing an action.

#### 2---“The” before a noun means whole

Webster’s 5 (Merriam Webster’s Online Dictionary, [http://www.m-w.com/cgi-bin/dictionary](about:blank))

The

4 -- used as a function word before a noun or a substantivized adjective to indicate reference to a group as a whole <the elite>

#### 3---“Private Sector” means all

Senate Manual 11 (Senate Document No. 112-1)//babcii

The term ``private sector'' means all persons or entities in the United States, including individuals, partnerships, associations, corporations, and educational and nonprofit institutions, but shall not include State, local, or tribal governments.112 S. Doc. 1

#### Violation: the plan only applies to companies doing patent thickening and hopping

#### Vote NEG for limits and grounds --- Subsets explodes the topic to thousands of affs, and removes core controversy

### OFF

#### The Federal Trade Commission should bring legal action adopting a standard of digital platform interoperability. The Supreme Court should, in a 6-3 decision, reverse that action on the grounds that it is unlawful under the current scope of antitrust law. The House of Representatives and Senate should schedule a vote on expanding the Supreme Court by four justices.

#### The CP creates an intra-branch conflict that results in court expansion AND later overturn and enactment of the plan

Dr. Jonathan B. Baker 10, Professor of Law at the Washington College of Law at American University, J.D. from Harvard and Ph.D. in Economics from Stanford University, “Preserving a Political Bargain: The Political Economy of the Non-Interventionist Challenge to Monopolization Enforcement”, Antitrust Law Journal, Volume 76, p. 648-649

Suppose that the Federal Trade Commission decided against Intel in the high-profile monopolization case it filed in late 2009,178 and the Supreme Court reversed that decision after an appellate review. Suppose further that the Court, building on recent decisions such as Trinko, wrote a broad and aggressively non-interventionist decision in favor of Intel-rejecting a reasonableness standard and adopting in its place a test that places a thumb on the scales to favor defendants (such as the disproportionate effects or no economic sense test)-and defended its decision with a strong endorsement of the six economic arguments against monopolization enforcement set forth in Part II.B.17 By doing so, the Court would make non-price exclusionary conduct cases as difficult to prove in the lower courts as predatory pricing is today.

Such a decision could fuel a political controversy both within and outside the antitrust world. The extent to which it would do so depends in part on internal factors, such as the breadth of the decision and its rationale, the extent to which the Court is split, and the vehemence of any dissent. Its political salience would also depend on external factors, particularly whether political actors opposed to the outcome can convincingly tie the hypothetical decision to others in order to frame the Court as coddling monopolists and looking out for the narrow interests of big business rather than the interests of consumers or the public as a whole. 180

If the hypothetical pro-Intel decision did come to fruition and created such a debate, other governmental institutions might respond by undoing its result' 81-with legislation overturning it, through aggressive enforcement of state competition laws governing the conduct of dominant firms, or, after the composition of the Court changes, with a new decision limiting or overruling the Court's modification of monopolization law. [FOOTNOTE] "81 Cf Barry Friedman, Benched: Why the Supreme Court Is Irrelevant, NEW REPUBLIC, Oct. 1, 2009, http://www.tnr.com/article/politics/benched ("Time and again throughout history, when the Court has run afoul of popular politics and the political branches, the justices have paid a price."). [END FOOTNOTE] Recognizing this possibility, 82 it would take an unusually self-confident and determined Court to provoke such a controversy on its own, 83 without a strong political wind at its back.18 4 [FOOTNOTE] 183 On the other hand, the current Supreme Court may be unusually self-confident and determined. "The current Court, the most conservative since 1937... has backtracked on the broad New Deal understanding of federal power to regulate interstate commerce and has invalidated federal statutes with something approaching abandon. .. ." Richard Posner, 1937, 2010, NEW REPuBLIc, Feb. 17, 2010, http://www.tnr.com/article/politics/1937- 2010. But cf Barry Friedman & Dahlia Lithwick, Speeding Locomotive: Did the Roberts Court Misjudge the Public Mood on Campaign Finance Reform? SLATE, Jan. 25, 2010, http://www. slate.com/id/2242557/ (until a 2010 decision on the constitutionality of campaign finance reform, the Roberts Court did "a remarkable job of conforming its behavior to the prevailing public mood, resisting the impulse to go too far"). The Court's upcoming decision in American Needle, Inc. v. National Football League, 538 F.3d 736 (7th Cir. 2008), cert. granted, 129 S. Ct. 2859 (June 29, 2009)) may provide a window into its willingness to pursue an aggressive non-interventionist approach to antitrust in the current political environment. [END FOOTNOTE]

#### The plan and perm eliminate the motive for court packing---that locks in judicial extremism

Dr. Thomas M. Keck 21, Michael O. Sawyer Chair of Constitutional Law and Politics and Professor of Political Science at Syracuse University‘s Maxwell School of Citizenship and Public Affairs, Research Affiliate at the Centre on Law & Social Transformation, M.A. and Ph.D. in Political Science from Rutgers University, “Court Packing and Democratic Erosion” in Democratic Resilience: Can the United States Withstand Rising Polarization?, Ed. Lieberman, Mettler, and Roberts, p. 158-165

The Roberts Court and Democratic Erosion

Scholars of democratic erosion have noticed the GOP’s partisan capture of the federal courts and flagged it as a potential warning sign, but may well have understated the severity of the danger to democratic norms and institutions. For example, remarking on the Supreme Court twenty months into Trump’s presidency, Kaufman and Haggard diagnosed “a serious threat that a constitutionally-created branch of the government – one that is already deeply divided along partisan lines – will become even more politicized and delegitimated.” On their reading, “[t]he most direct threat to American democracy would be judicial acquiescence to restrictions on voting rights.”61 Ginsburg and Huq have likewise noted that partisan judges, like legislators, “may be willing to allow a president to dismantle democratic governance so long as their own policy preferences are furthered.”62 Such judicial acquiescence in the face of legislative restrictions on voting rights is indeed a significant threat, but the bigger danger to American democracy is judicial evisceration of legislative expansions of voting rights. Consider David Landau and Rosalind Dixon’s account of “abusive judicial review,” by which they mean the use of judicial power to undermine the “minimum core of electoral democracy.” Drawing on comparative evidence from a range of states experiencing democratic erosion, Landau and Dixon identify two variants of the phenomenon. In its weak form, abusive judicial review involves courts “stand[ing] by passively as democracy is dismantled”; in its strong form, it involves courts actively undermining key democratic norms and institutions.63 The Roberts Court has engaged in both versions of the practice.

In this section, I briefly review two instances in which the contemporary Court has declined to check legislative infringements on fair democratic procedures, and two others in which it has reached out to actively thwart legislative enhancements of democratic procedures. In Crawford v. Marion County Election Board (2008), the Court upheld Indiana’s strict voter ID law, despite clear evidence that the photo identification requirement would “impose nontrivial burdens on the voting rights of tens of thousands of the state’s citizens … [, with] a significant percentage of those individuals … likely to be deterred from voting.”64 The law had been enacted on a party-line vote in Indiana’s Republican-controlled legislature, and Seventh Circuit Judge Terence Evans characterized it as “a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic.”65 In subsequent litigation regarding an even stricter law from Wisconsin, Circuit Judge Richard Posner noted that roughly 9 percent of registered voters in the state lacked the required state-issued identification. Posner also reviewed sworn testimony from multiple registered voters who had attempted to obtain such identification, but had been unable to do so.66 Relying on Crawford, Posner’s colleagues nonetheless upheld the Wisconsin law as well.

A decade after Crawford, the Court held in Rucho v. Common Cause (2019) that claims of intentional and excessive partisan gerrymandering are not subject to judicial resolution under the US Constitution. The case featured uncontroverted evidence that following the 2010 census, the Republican-controlled North Carolina legislature had “instructed their mapmaker to use political data to draw a map that would produce a congressional delegation of ten Republicans and three Democrats.” In all recent election cycles, votes for statewide offices and aggregate votes for House candidates have evinced a state split nearly fifty-fifty, with Democrats winning the aggregate House vote in 2012 and the Governor’s race in 2016. But the Republican gerrymander successfully maintained a 10–3 GOP majority in the House delegation across three consecutive election cycles. Despite this context, Chief Justice Roberts declined to impose any constitutional limits on the drawing of district lines to “subordinate adherents of one political party and entrench a rival party in power,” even where that desire represents the “predominant purpose” of the line drawing.67

The central premise of Roberts’s argument for allowing such partisan gerrymandering is that the Constitution grants such authority to state legislatures in the first instance (and to Congress secondarily), and hence that the American people should bring their complaints about existing districting practices to their elected representatives, not to the Court. But relying on self-interested legislators to reform the procedures under which they themselves have been elected has the same shortcomings that it had in Baker v. Carr (1962), which authorized courts to weigh in when district maps featured massive departures from the principle of “one person, one vote.” With the Court declining to serve as democratic guardrail, Crawford and Rucho are paradigmatic examples of weak-form abusive judicial review. Contrast the Court’s broad posture of judicial restraint in those cases with its aggressive interference with the 2002 McCain-Feingold Act and the 1965 Voting Rights Act. In Citizens United v. FEC (2010), the Court held that for-profit corporations have a First Amendment right to spend unlimited sums advocating the election or defeat of political candidates, thereby invalidating a central provision of the most significant federal campaign finance law since the Watergate era. Citizens United is the most notable in a long string of Roberts Court decisions invalidating campaign finance regulations, with the Court’s most conservative justices repeatedly holding that state and federal legislative institutions lack authority to limit election spending.68 In Shelby County v. Holder (2013), the Court gutted a central provision of the Voting Rights Act, holding that Congress had unconstitutionally required certain state and local jurisdictions to get federal approval for all changes to their election laws. Technically, Roberts’s opinion for the Court only invalidated the formula that determined which state and local jurisdictions were required to seek such federal “pre-clearance,” but both his majority opinion and a concurrence from Justice Thomas suggested that even with a revised coverage formula, the Court’s conservative majority would view such a requirement as an unconstitutional intrusion on state sovereignty. The decision unleashed a wave of new state restrictions on voting rights – with Republican legislatures and executives enacting voter ID laws, purging voter rolls, and closing polling sites – that previously would have required federal pre-clearance.69

As these examples make clear, the current Court’s relevance for democratic erosion is twofold. First, it has significantly scaled back its role as an institutional check against partisan attempts to undermine fair democratic procedures. It is not yet clear that it has abandoned this role altogether, but it is fair to say that its performance is not currently reliable. Indeed, early reports from the Bright Lines Project have shown that “Judiciary can limit executive” and “Judicial independence” are among the democratic norms and institutions on which both expert and mass public confidence dropped most sharply during the Trump era.70 Consider the Court’s response to legal disputes regarding vote counting in the 2020 presidential election. Once it was clear that Joe Biden had won a decisive victory, the Court dismissed multiple frivolous lawsuits seeking to reverse the results.71 But in the weeks leading up to the election, four conservative justices had signaled that they were prepared to give a sympathetic ear to Trump campaign arguments that could have reversed an election defeat if the outcome were close.72 Justice Barrett was not yet on the Court when those disputes were heard, and there is good reason to worry that she would have provided a fifth vote in such a scenario.73

Second, the Court has proven willing on key occasions to thwart legislative attempts to enhance fair democratic procedures.74 A variety of signs indicate that this latter effort has not yet run its course. In the campaign finance context, for example, Justices Thomas and Alito have set their sights on disclosure requirements, and Senate Majority Leader McConnell echoed their arguments in a January 2019 op-ed.75 On the gerrymandering front, reform advocates have used the ballot initiative process in several states to transfer redistricting authority from partisan state legislatures to nonpartisan commissions. The Supreme Court upheld such an initiative from Arizona in 2015, but it did so by a vote of 5–4, with Roberts, Thomas, and Alito (along with Scalia) in dissent.76 If any two of Trump’s three nominees agree with them, they now have the votes to hold that neither judges nor voters may take districting authority away from partisan legislators. Roberts’s dissenting opinion in the Arizona case suggests that this same judicial coalition may invalidate any congressional attempt to mandate nonpartisan redistricting as well.77

In sum, even before the Trump era, the Roberts Court was sometimes willing to actively deploy judicial power to undermine core features of electoral democracy. President Trump’s three appointments have shifted the Court’s median justice substantially to the right – both in general and on voting rights in particular. As such, Democratic advocates of democracy reform have reason for concern that, having retaken control of Congress and the White House in 2021, their Republican opponents have retired into the judiciary as a stronghold, from which they will block any new voting rights, gerrymandering reform, or campaign finance policies that Democrats enact. In this context, any comprehensive program of democratic preservation and renewal in the 2020s will need to grapple with the issue of court reform.78

Conclusion: Reestablishing the Court’s Role as Democratic Guardrail

Calls for Court reform are a recurring feature of US history. They have repeatedly been prompted by controversial actions taken by the justices themselves and by the partisan coalitions with which they are allied. Remarkably, contemporary Republican elites – acting across all three branches of the federal government – have provoked such calls in nearly every way that they have been provoked in the past. When Biden was sworn in as President in January 2021, he found himself facing a Court that had been illegitimately packed by the opposition party on its way out of power; that stands opposed to majoritarian, multiracial democracy; and that is committed to a constitutional vision under which much of the platform on which Biden was elected is constitutionally suspect. If history is any guide, Court reform will remain on the table until President Biden’s political coalition collapses or Chief Justice Roberts steers a non-obstructionist path. If neither of those paths unfold, serious discussion of Court reform is virtually inevitable, and it was therefore no surprise that Biden appointed a high-profile commission to study the issue in April 2021.79

In this concluding section, I highlight some key lessons from our constitutional history regarding how to pursue such reforms in ways that are most beneficial for – and least risky to – democratic health. On my reading of the relevant history, some instances of attempted court-packing contributed to democratic erosion in the United States, while others operated, on balance, to promote democratic preservation and renewal. Indeed, it seems to me incontrovertible that court-packing can be undertaken in ways that both hinder and foster democratic governance. If and when small-d democrats regain control of Hungary, Turkey, or Venezuela, would any decisions on their part to alter the size or structure of their judicial institutions be best understood as undue assaults on democratic norms? Surely we would need to know additional contextual details before reaching that judgment. As Joseph Fishkin and David Pozen have noted, “all acts of constitutional hardball create systemic risks, … [but] specific acts may be justified for a variety of contextual normative reasons; sound political judgment might even require that certain types of hardball be played in certain situations.”80

In the ongoing debates about how best to respond to processes of democratic erosion once they have been diagnosed, Levitsky and Ziblatt have famously called on opposition party elites to exercise forbearance, resisting the urge to respond to the authoritarian leader’s norm-breaking with more norm-breaking of their own. But such forbearance strategies may not be viable when facing incumbents – including judicial incumbents – who are deliberately tilting the playing field. In such circumstances, some sort of hardball opposition may be more effective at protecting and renewing democracy, particularly if small-d democracy advocates deploy such tactics in pursuit not just of their own narrow partisan interests but also pro-democratic reforms that promise to break the cycle of tit-for-tat escalation.81

If systemic threats sometimes justify constitutional hardball, then scholars of democratic erosion and resilience are in a good position to help policymakers reflect on how such tactics can be deployed in maximally legitimate fashion. One issue here is timing – that is, how to know when we have reached the point where hardball tactics are merited. With regard to Court expansion, both its normative legitimacy and its political viability are likely to increase if and when the Roberts Court acts as a partisan roadblock to a Democratic administration. If the conservative justices refrain from doing so, they may be able to forestall Court reform. But the historical pattern suggests that emergence of an obstructionist Court is likely, at which point Democratic Court reformers will be emboldened. I have argued that judicial obstruction of legislative expansions of voting rights (and related democracy reforms) would provide particularly weighty justification for Court reform. In theory, the threat of such judicial contributions to democratic erosion might justify preemptive action – for example, expanding the Court before it eviscerates a new voting rights act – but in practice, such preemptive action would require substantially greater political investment. Convincing the American public that court-packing is called for would be a tall order on any occasion, but it is more likely to succeed once the Court has begun actively obstructing a broadly popular policy agenda.

#### Extinction

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We realize that more perfect union necessarily has many more meanings, discovered and still undiscovered, for us today. The words express the hope that 50 states covering an abundant swath of planet earth’s surface can cooperate. There is of course nothing simple about the challenge of cooperation between the governments of 50 states and the federal government. But this is part of what the endless work of forming a more perfect union entails. Today, more perfect union involves whether states can cooperate with each other and with the federal government over the biggest problems of our times, including a pandemic, economic crisis, public health, social justice, climate change, gun violence, terrorism at home and abroad, immigration and a long list of other pressing issues for humanity and our life on earth.

In July, 2020, protestors and local officials in Portland, Chicago, Seattle, Washington, D.C., Albuquerque, N.M., Louisville, Ky., Kansas City, Mo. and other American cities decried the Trump Administration’s use of federal force in cities dealing with protests and violence in the wake of the police killing of George Floyd. In the disorienting summer of 2020, amid pandemic, recession, racial tension, protest, violence, and heated calls for police reform, the stressors on federalism are manifold. The Preamble’s more perfect union is a dream in the sense that Martin Luther King, Jr. had a dream. It uses poetic-sounding language to express the unavoidable interdependency between We the People and their constituted governments, state, local and federal. It is a dream based on the hard stuff of interdependency in a world where one person’s plastic ends up on another person’s shore. Or where an individual’s infection ends up infecting a community. Abraham Lincoln used the famous house divided, biblical metaphor to express what’s at stake in our dream of union: “A house divided against itself cannot stand.” For the Preamble, for Lincoln and for us today, the hard work of cooperation, of getting along with each other, of working together, of sacrificing some self-interest is a practical necessity if the republic is to stand.

What is the more perfect union we now seek today? What does it look like? What priorities, investments of time and effort, and sacrifices will it take?

To be sure, our work is now more than hand-stitching together the homespun of 13 colonies. For many today, a more perfect union means things like a safer neighborhood for their kids. Or the opportunity to achieve a better life. Or freedom from fear. Or a vaccine. Or getting back to normal after covid. Or returning to face to face classes. Perhaps we can imagine those kinds of dreams were in the hearts and minds of 18th century people as well.

The Preamble is realistic. It qualifies the word perfect with “more.” Our neighborhoods, we don’t realistically expect, will be perfectly perfect. But it is not too much to dream that our neighborhoods, along with our republic, can be better for more people.

Justice

What does the word justice mean to you? Recall those times in your life when you thought others didn’t treat you fairly. Our sense of justice is often based on our experiences with being treated fairly or unfairly. I can’t believe the ref called a foul on that. The other team has been getting away with murder. Whose side is the ref on? Or, why was that store clerk so rude to me but so nice to that other person? Or, everybody else on this highway is speeding and the cop pulls me over? What’s that about? Or, why was my starting salary $10,000 less that that guy’s? Our senses of justice, of comparative treatment and fairness, start young.

The Preamble’s “why” to “establish Justice” are the 16th and 17th words of the Constitution: i.e., one of the first and top priorities. The historical context of these words is monumental, linking to the July 4, 1776 Declaration of Independence and the Revolutionary War. The Declaration was mostly, in terms of word count, a recitation of injustices. The Declaration recited “a long train of Abuses and Usurpations” by the King, the monarch, George III, referred to as “He” repeatedly so as to reinforce, like a pointing and jabbing finger of blame, where the injustices had come from. Having declared independence from tyranny, the opposite of justice, the Preamble made establishing justice a top priority.

But we also know how contingent and imperfect that 18th century view of justice was, requiring later constitutional amendments to include African Americans, women, Native Americans and others within the meaning of justice. As we think about justice in today’s context, we see that the word “equality” is missing from the Preamble, at least expressly in the text. We’ll see that later amendments, especially the post-Civil War Fourteenth Amendment, put equality into the Preamble.

The word justice links to what we today call America’s justice system: courts, judges, lawyers, prosecutors, public defenders, police, jails and so on. “Equal justice under law” was engraved (in 1932) on the front of the U.S. Supreme Court building in D.C. American rule of law, despite many flaws and setbacks in actual practice, aspires to a preambular virtue of equal justice.

The Preamble’s reference to Justice connects to other language in the text, especially Article III and judicial powers. Federal judges, also known as Article III judges, preside in 94 federal judicial districts, including at least one district in each state, in D.C. and Puerto Rico. The U.S. courts of appeals (or circuit courts) are divided into 13 circuits, each one hearing appeals from the district courts within their boundaries. At the top is the U.S. Supreme Court, currently with 9 Justices.

The Constitution makes plenty of room for judicial power to be exercised with reason, wisdom and compassion, because the absence of those qualities leads to what the founding generation was breaking away from: tyranny. Read in the Declaration of Independence the list of “Facts... submitted to a candid World” about who and what makes “a Tyrant.” How do we know a Tyrant when we see one? Check the Declaration’s facts. A Tyrant makes judges “dependent on his Will alone,” obstructs the administration of Justice and refuses to assent to laws that establish judicial powers independent of the Tyrant’s will. American constitutionalism is indelibly stamped by the lived experience, by the real historical suffering and sacrifice, over the question: what makes a tyrant? Americans listed the facts of tyranny in the record, in the memory bank, in the Facts submitted to a candid world. Tyranny, in the American experience, is about arbitrary, coercive, unchecked and unreasonable abuse of power. It ties to the Hamiltonian question of rule by force. What forms of tyranny do you think still exist today?

Preambular Justice has a context, a story that includes its past and its present, a story of Americans rejecting “justice” dressed up as the will of a tyrant and choosing instead the rule of law. The rule of law includes judges who know the limitations on their power, the constitutional job of deciding cases and controversies based on the facts and the law

History influences the Supreme Court’s constitutional standing, legitimacy and reputation. The current Supreme Court under Chief Justice John Roberts is concerned about how the Court is viewed by the American public during times of political fracture. (More on this later.) A public perception that the Court is just as politicized as everything else in government is a big concern. What the Court actually does and what the public perceives it as doing are not always the same thing.

With both judges and ordinary people (which judges are too), reputations are more easily lost than won. The Supreme Court’s reputation, its historic role in American constitutionalism, includes but goes beyond the words in the concise text of Article III. Yes, it must decide cases and controversies. Litigants who pass through its doors win or lose. But the Court must also have an ear attuned to We the People. The Court is, after all, the creation of the Constitution and is thus part and parcel of its principles, including popular sovereignty. That doesn’t mean that We the People should decide cases. Or that the Justices should check which way the winds are blowing and decide cases on public opinion. It doesn’t mean that Justices must listen to a proverbial mob with pitchforks. It means instead that public trust and confidence in the Court and popular understanding of what judges do is essential to democracy. It means that the Court is part of the republican form of government the Constitution establishes. No, Justices are not supposed to be politicians or elected representatives making law. But neither should we expect them to be legal robots churning out decisions that are disconnected from the constitutional general welfare.

The Court’s reputation and role turns critically on the principle of an independent judiciary. If the public believes judges are deciding cases not on what the law is, but on what the judges’ politics and policy preferences are, the public will lose confidence not only in individual judges, but also more importantly in our Constitution’s highest Court which exceeds any individual judge. The Internet-juiced politicization of the Supreme Court nomination process and politically-charged Senate confirmation hearings feed the perception of pervasive politics.

When and if unelected judges go too far in overruling precedents and changing law that should be left instead to the legislative process (both state and federal), the judiciary opens itself to public opinion that it has overstepped its constitutional boundaries deciding “cases and controversies.” Public opinion tends to look to the courts as a default option when lawmakers are gridlocked or not doing what we want. But the Constitution doesn’t require that whenever We the People law-making gets stuck or screwed up, the Justices must ride to the rescue.

You may have heard the over-used term “judicial activism.” This term is an example of rhetoric that has lost real meaning because it cuts both ways. Charges of judicial activism, across the Supreme Court’s history, have been launched on both sides, with both liberals and conservatives claiming the Court was making policy rather than saying what the law is. The political rhetoric about judicial activism usually is in the eye of the beholder, shifting according to which side is on the winning or losing side. When my side wins, the Court is brilliantly constitutional. When my side loses, the Court is a bunch of judicial activists.

Domestic Tranquility

The Constitution’s choice to combine the words “domestic” and “tranquility” has multiple levels of meaning. Domestic as adjective means relating to home or family relations. It also means existing within a country. Not international. So domestic tranquility, to a generation that had fought a Revolutionary War meant peace at home, meaning peace in the new country.

But it also meant peace in the home, in the homes of We the People. Domestic tranquility encompasses both home and homeland. The Constitution wants both home and homeland tranquility, peace in both settings. The Constitution’s domestication, its respect for the homes of We the People, resonates from the Preamble to the Bill of Rights. There we find reference to “house” in Amendment III as well as to “peace.” “No Soldier shall, in any time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.” This is a recognition of the value of property, one’s house.

But it goes beyond the bare fact of material property rights. To a Revolutionary Ware generation, no more monarchs would quarter troops in their homes without their consent. No King could so enter the castles of We the People, their homes. How could one’s home be tranquil if soldiers could be quartered there without the owner’s consent? Further, the Third Amendment distinguishes “time of peace” and “time of war,” giving the government more leeway in the latter case to quarter soldiers in a house, but even then only by rule of law rather than royal prerequisite. We the People were fed up with royal perks.

Hard on the heels of Amendment III of the Bill of Rights, is another echo of the preambular idea of domestic tranquility in Amendment IV. “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” Again, we see the domestic tranquility theme in reference to “houses” but also, more broadly to “persons,” “papers,” and “effects.” Security of person. Security of home. Security of papers. Security of effects. The word “effects” means broadly personal belongings (and is today used in many homeowner insurance policies). Again, the Constitution has an interest not only in material property rights, but in the security of people and, in today’s lingo, our stuff. Our persons and our stuff include all sorts of stuff. Especially so in our 21st century consumer culture. Our cars and trucks. Our phones. Our apartments. Our computers. Our data. Our blood and DNA. Unreasonable searches and seizures by government actors without a court order, a warrant, is both unconstitutional and disruptive of domestic tranquility. In American law, search and seizure cases fill volumes and are a regular part of the dockets of our courts, especially in criminal cases.

Domestic tranquility relates to privacy, famously defined by Supreme Court Justice Louis Brandeis, as the right to be left alone. Does that resonate with you? Do you like being left alone when you want to be? The right to privacy is today well-established in American constitutional law, albeit sometimes in controversial form as the basis for the Roe v. Wade abortion precedent.

Domestic tranquility is also about homeland security. In November 2002, in response to 9/11, federal government created the United States Department of Homeland Security or DHS. Today DHS is the third largest Cabinet department in the Executive Branch (behind Defense and Veteran Affairs) with an annual budget of roughly $50 billion and 240,000 employees. The American experience of September 11 has had a profound impact on American constitutionalism including the ongoing War on Terror, immigration policies and practices, border security, homeland security regulations, searches and seizures, cyber-security, data privacy and lack thereof, due process rights and other legal areas. Now, domestic tranquility faces Covid-19.

When the words domestic tranquility were written, the United States was at the advent of its role as a geopolitical power. A major reason to constitute the United States, to form a more perfect union out of a handful of former colonies, was to say boldly to the world: America is now stepping onto the world stage. We are no longer on the bench, second string players to the British Empire. We will explore and expand across our “island” continent. We have enormous geographical and natural resources. Our enemies will need to cross oceans to disrupt our domestic tranquility.

After two plus centuries, America’s role as a geopolitical power has a vastly different world context. Domestic tranquility is now, as never before, linked to world affairs and a world connected by tech. The security of “persons, houses, papers and effects” is now seen as globally contingent. A virus spreads across the world, starting from remarkably small and inconspicuous places. Trade wars spike and drop stock markets. Build the wall is chanted at political rallies. Computers are hacked. Domestic election interference crosses oceans (faster than sailing ships). Identities are stolen. Account data is breached. Globally, refugees are fleeing hostile homelands to make new homelands. Xenophobia is ascendant.

A college student reflects on these times: “Our homes are not so peaceful. Our relationships are not sound. Our interactions with others lack substance, compassion, and kindness. We are divided politically, allowing our views to impact the way we act. We experience acts of ignorance, of hatred, or unprecedented violence.”

Another student writes about her home life before coming to college. She explains that when she hears talk of the blessings of liberty, she recalls painfully that she grew up in a home where there was one boss, one dictator, her father, whose frequent angry words were always final in her house and far too frequently laced with alcohol. Her father was an alcoholic. There was no domestic tranquility. Many of my students talk and write about school shootings and how that has changed their generation. “We grew up in the age of school shootings,” writes one student. “We remember where we were for Chardon, Newton and Parkland.” Older generations may remember where they were when JFK, or Bobby or Martin were shot. Or remember Cuban Missile Crisis nuclear attack drills and crouching under school desks. Today’s college students may have the double experience of violence and threatened violence in high school followed by a pandemic.

Domestic tranquility can seem very far away.

Common Defense

“How many of you are in the military, have served or are going into the military, or come from military families?” When I ask this question in class, many hands go up. More than you might imagine. The hands in the air have taught me not to postpone a central fact about American constitutionalism: many Americans, past, present and future have put on the uniform for the common defense. What is the common defense? How has it changed our lives? Like many words in the Constitution, they can sound large and abstract until we break them down into the facts of people’s lives.

Let’s start by asking: Does the common defense include but mean something more than military service? How do We the People defend each other and ourselves? How about neighborhoods where drugs and violence are a daily reality, causing some people to join together in neighborhood watch programs to look out for each other? Or how about those special souls who, during school and other mass shootings, have sacrificed their own lives and safety for others? Or the health care workers and other who have served and sacrificed during the pandemic?

New contexts expand what we understand as the common defense. Vaccination has become in the Age of Covid a world-wide priority for the common defense. Not smoking is a common defense against lung cancer. For some, responsible, safe and legal gun ownership is a common defense. Wearing seatbelts is a common defense. Protecting ourselves and others from addiction to opioids is a common defense. Protecting a healthful environment is a common defense. Masking is a common defense.

Maybe we see the common defense as speaking up and speaking out when we see other citizens being harmed. Our good ideas, old ones and new ones, may serve the common defense. Our legitimate self-defense may also serve the common defense. The college student who is aware of a sexual assault on campus serves the common defense by engaging the Title IX process of the university. Knowing and exercising our rights and responsibilities as citizens can help defend ourselves and others. For example, if the facts show that foreign powers have interfered with America’s constitutional voting systems and rights, then we serve the common defense by a resounding “NO” to that and voting in even greater numbers.

Today, America is engaged in a national debate and protest over police accountability. On the one hand, American cities, towns, neighborhoods and communities need good policing. Good police protect and serve. Good police uphold the rule of law. Good police are essential to the constitutional principle of the common defense. Yet within police forces across America there are exceptions and structures that erode public trust. The answer is not to condemn all police. There is no preambular justice in saying that all police are bad because some are.

The common defense is, like so much of our constitutionalism, shaped by technology. Cyber-attack and data theft by Internet scam artists have made cyber-security training of employees a common workplace defense.Whatever your job or career, cyber-security may very well affect you. Our e-mails and other business and personal modes of communication are not presumptively safe and secure. “Tech savvy” means something different today than having lots of cool gadgets and knowing how they work. The technology honeymoon is over: i.e. behind that enticing click or money solicitation or once-in-a-lifetime deal or interesting pic or personal information disclosure or privacy waiver may well be bad guys from all over the globe.

The common defense in the Digital Age is not only about cyber war and scam artistry by the certifiably criminal element around the world. The common defense will also have to include better data privacy protection for all Americans. How many of us know where our personal data is going, who is selling it to whom, how much money was paid for it, how it is being used out there and whether all those uses are okay with us? How much faith do and should we have in privacy and data protection systems set up by mega-companies with a business model based on monetizing our data to maximize profits? Like never before in human history, protecting private data should be part of our conversation about what it means to defend one another and ourselves in our 21st century republic.

We see that American constitutionalism is today intertwined with new, tech-infused variations on the common defense. But still, if we go back to that beginning question about military service, we see a common denominator that is not just about Digital Age threats. That common denominator has happened so often in American history that it is rightly part of what we may call the American character. Scholars, historians and others may disagree about whether there is such a thing as American character, or, if there is, how we know it when we see it. But one aspect of the American character that We the People can widely agree upon is this: there are millions of Americans who have served in the armed services, many of them very young, from all walks of life, all colors and creeds, who have paid an ultimate price defense of our constitutional freedoms. We need to regularly remind ourselves as citizens that this sacrifice is real. It is historical fact. It is part of the record. Not fake news. We need only visit a VA hospital or any number of places where veterans, living and dead, have a clear-sighted view of their history on behalf of the common defense, which is our history too. Sometimes a single picture can help focus our thoughts. We return to a famous black and white image of a group of Marines in a troop carrier headed for the Normandy shore on D-Day. Mostly we see their helmets, but the faces we do see are young, about the ages of the students I teach. What was it like for them? Can we imagine so many years later that among all that was packed in the small boat – all the soldiers, weapons, packs, fears, prayers, thoughts and emotions – there was also a mission on behalf of human liberty?

Another aspect of defending each other comes from volunteerism. The republic from its beginning has depended on voluntary associations, the generous giving of time, talent and treasure to help others. Many Americans stick up for each other by volunteering. We may not see the enormous variety of ways folks pitch in or the cumulative impact of American volunteerism. The school crossing guard on a busy street. The corporate leader working in a community garden. A ProKids advocate. A hospice volunteer. A museum docent. A spiritual advisor in a prison. A voting poll worker. A church delivering communion to a nursing home. A generous donation to help health care workers. The common defense is both common and extraordinary.

General Welfare

“Promote the general welfare.” Promote is an active verb that ties to the idea of progress, i.e., to further the progress of or to actively encourage something. General means concerning all people, places and things. Welfare means the health, happiness, and fortunes of a person or group. When these three words are combined in the Preamble, we have a purpose that is actively, broadly and powerfully expressed.

General welfare is repeated in the text. Wherever the Constitution repeats words, take notice: repetition means importance. (Other examples: the repetition of the words “people” or “persons.” Or “voting.”) General welfare goes form the Preamble to Article I, Section 8 where the powers of Congress are enumerated. This placement gives general welfare a central seat at the textual table, because it is the principle that leads into the listed powers of popular sovereignty, congressional lawmaking. Article I says that Congress has the power to “provide for the general welfare of the United States.” So general welfare is both a preambular why and a powers-expanding principle to guide lawmaking by We the People representatives.

Laws are supposed to promote the general welfare. We know that laws often get passed because of special interests, lobbying, the influence of big money and the re-election interests of politicians. If we think constitutionally rather than just politically, we see that the constitutional purpose of laws should primarily be to promote the general welfare of We the People.

Today, our divided politics sometimes narrow the idea of “welfare” to debates over “entitlement programs” and the “welfare state.” An executive branch department, the U.S. Department of Health and Human Services, administers 6 major “welfare” programs: Medicaid, Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF), Supplemental Nutrition Assistance Programs (SNAP), Earned Income Tax Credit (EITC) and housing assistance. The point of listing them here is to show that one manifestation of the Constitution’s general welfare principle is an extensive administrative structure, agency and programs. This is an important manifestation of general welfare to be sure, but it is not the only one. The Preamble’s why of general welfare goes way beyond one administrative agency. After all, for most of the Constitution’s 230 plus years, the Department of Health and Human Services and the federal agencies that preceded it didn’t exist. They are in part legacies of the New Deal Era of the 1930s during Franklin D. Roosevelt’s presidency when America was suffering to recover from the Great Depression.

So what are the larger, more complex and even more challenging meanings of general welfare in 21st century America? How do we bring these words into our times? What do they help us see about ourselves and our republic?

General welfare, we will see, highlights a major contemporary challenge for the republic: the erosion of community, excessive individualism and the isolation and loneliness of many Americans. As real communities erode, division increases and a more perfect union eludes us.

The Constitution befriends community. Look for a minute at how general welfare relates to the other whys in the Preamble. What is striking about the preambular words is how collective they are, how much they emphasize the group rather than just the individual. We hear collective connotations in every one of the eight preambular whys. We the People instead of me myself. A more perfect union rather than a house divided. Justice for all rather than perks for a few. Tranquility in our homeland and homes rather than a few safe havens of privilege. The common defense rather than everybody just get a gun and protect yourself. The general welfare rather than selfish or special interests. Liberty for ourselves not just ourself. Liberty for our posterity, for future generations, not just what I want right now. Indeed, the collectivism of the Preamble is echoed in the words of the very first amendment: i.e., “the right of the people peaceably to assemble.” The right to associate, to come together in groups of our own choosing, is just as fundamental as the right of individual free speech. A republic depends not only on government organizations but also on a myriad of private associations where citizens are free to pursue their interests, worship as they choose, support their communities and schools, build relationships, connections, alliances and friendships. Without this infrastructure of associational private organizations and communities, a republican form of government never could and never will be able to substitute itself for all the associations that We the People desire. Alexis de Tocqueville rightly observed how dependent democracy in America is on associations: “If men are to remain civilized, or to become so, the art of associating together must grow and improve in the same ratio in which the equality of conditions is increased. He called association both an “art” and a science” upon which democratic progress and We the People values of liberty and equality depend.

The Constitution forcefully and repeatedly emphasizes the collective. Yet, today, those who know the Constitution in name only, and only superficially, think the Constitution is all about their individual rights. My rights. My free speech. My religion. My property. My gun. My phone (it’s an iPhone not a yourphone). My Internet. My social media. My likes. My freedom to do what I want. But the Constitution is not just my rights. It’s our rights.

Like cells in our bodies that have permeable cell walls, the Constitution is permeable to the surrounding culture including its individualism. The 1960 and 70s saw a big expansion of laws and litigation emphasizing and expanding upon individual as well as collective rights. The Civil Rights Era including the landmark Civil Rights Act of 1964 was a necessary and important constitutional corrective directed at ending discrimination based on race, color, religion, sex or national origin. Ending discrimination serves both we and me, both general welfare and the individual. Yet, history shows it is one thing to pass a law and decide a legal case between litigants, but is quite another for our laws to be followed, enforced and effective agents of change. The Supreme Court’s landmark case of Brown v. Board of Education did not instantaneously result in desegregated public education. The case struck down de jure school segregation, but de facto segregation proved to be an elusive goal.

The Constitution is designed to operate through both collective and individual channels. The civic virtue of the general welfare means that the republic depends on its citizens not just to look out for their own interests, but, according to their capacities, the interests of others too. Today, the necessary constitutional balance between the me and the we is off balance in many ways. We the People know through direct experience that our communities need help. Our collective places are struggling. Our schools are not just worried about educational opportunity, but about active shooters. Our places of worship are not just worried about fewer congregants in the pews but about their safety. We’ve seen (and videoed) concerts, public events and shopping venues turning chaotic in an instant. Americans in vast numbers, especially the young and very young, are isolated on phones and video games. These surrogates for real social connection only go so far.

Awareness is growing that smartphones don’t build real community and are weak substitutes for live human interaction. People are learning that social media is a business marketing platform for consumerism built on monetizing data and targeting people as consumers of goods and services. Real relationships and real community transcend treating each other as marketing opportunities for buying and selling stuff. Real communities connect people through affinity, family, friendship, love, compassion, support, education and belonging.

The community erosion, hyper-individualism, and me-centeredness of our times has been well-researched, analyzed and explained in a number of books by prominent scholars, authors and commentators.§ The real Constitution can become invisible if we wrongly imagine it is just about me and my rights. Not only invisible but worse. Not hearing the Constitution’s collective voice can lead in the wrong direction if we think of our founding text only as a ringing endorsement of individualism. Instead, a commitment to the general welfare is at the heart of constitutional friendship.

Blessings of Liberty and Humility

If we put the Constitution on an unrealistically high pedestal, the Constitution can become unapproachable, distantly grandiose. The Constitution is more humble than we might imagine. The more we read it, get to know it, talk about it, kick it around and test its ideas, the more we will see its humility. By “humility,” we don’t mean shy. Diffidence is not our Constitution. Humility is not lack of confidence, but the wisdom of not being too sure we are right. Humility, we will see, goes hand-in-hand with true liberty.

“There is no such uncertainty as a sure thing,” said the Scottish poet Robert Burns. The need to be right all the time, the inability or unwillingness to admit facts that don’t fit with one’s always-rightness, is a sure road to ignorance. “Ignorance more frequently begets confidence than knowledge,” wrote Charles Darwin. “It is those who know little, not those who know much, who so positively assert that this or that problem will never be solved by science.” Imagination so essential to the sciences and arts includes imagining that this or that conventional wisdom may not be so wise. Imagination is essential to overcoming bias based on the identity of the speaker, the tendency not to listen to or credit ideas coming from those whose outward appearances don’t line up with one’s bias.

American history has a long track record, for example, of men too always-right in their own views to listen to the voices and ideas of women. The denial of women’s suffrage until the Nineteenth Amendment in 1920 was based on the certitude of men that the voices of women had no place in choosing representatives in a system of self-governance. Early in her early career as a law student, getting rejected for jobs in private law firms and striving to be heard over the voices of men, a diminutive, soft-spoken woman named Ruth Bader Ginsburg would have her voice heard by befriending the Constitution.

What does constitutional humility look like? The Constitution never claims perfection, other than to form an aspirational “more” (key word) perfect union. It doesn’t have all the answers. It isn’t a detailed rule book of do’s and don’ts. It has lots of gray, not all black and white. It creates no unlimited, absolute rights. It establishes a government of limited powers. It never expects to get it all right. It provides for its own amendment (which has happened 27 times). It admits its mistakes. In fact, it shows its original mistakes by keeping chronological track in writing how it was amended. It expects no perfect harmony, but realistically expects there will always be conflicting interests. It was designed for strong disagreements by giving us a process to handle them, not by having all the answers. The Constitution doesn’t think compromise is a weakness, but that it’s necessary. The Constitution is neither a liberal nor a conservative but realistically expects that both liberal and conservative views will exist and compete with each other, and that no side will always win forever. It doesn’t like unfettered power in any one person or group. It checks and balances power at every turn. It hopes but doesn’t expect public officials to check their own power. Other checks will click in.

The humility of American constitutionalism was well expressed by Learned Hand, one of America’s leading jurists and author of some two thousand decisions during his service as presiding judge of the Second Circuit Court of Appeals from 1939-1951 and a decade thereafter as senior judge. Here is what Judge Hand said in a speech delivered toward the end of World War II at an “I Am an American Day” ceremony in New York City’s Central Park. Keep in mind that his audience had been through national and personal sacrifice to defeat at great cost the powers of authoritarianism. In this chastened context, Judge Hand spoke to his audience about the spirit of liberty:

“What do we mean when we say that first of all we seek liberty? I often wonder whether we do not rest our hopes too much upon constitutions, upon laws, and upon courts. These are false hopes; believe me these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there, it needs no constitution, no law, no court to save it.”

How ironic: a famous judge who had dedicated so many hours of his life to law saying that we shouldn’t place too much false hope in constitutions, laws and courts. He’s not telling his audience how powerful he is; he’s telling them that his judicial powers are limited. His belief that liberty first lives or dies in the hearts of men and women is the soul of the Constitution itself. The Constitution makes no claim to be the prime creator of human liberty. Constitutionalism depends on a humanity pre-existing the Constitution.

Judge Hand asked the big question: “What, then, is the spirit of liberty?” With humility, he admits: “I cannot define it. I can only tell you my own faith. The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias; the spirit of liberty is the spirit of him who, near two thousand years ago, taught mankind that lesson it has never learned, but has never quite forgotten – that there may be a kingdom where the least shall be heard and considered side by side with the greatest.”

Let’s pause here and appreciate how counter-cultural these words may sound in our current American public dialogue: “I’m not too sure I’m right.” Will we hear that in our presidential debates? Will we see campaign signs that say: “Vote for Me. I’m Not Too Sure I’m Right.” Will we see humility expressed by any candidate for public office? Will anyone admit to gray areas of uncertainty in solving complex problems? Will anyone concede that the opposition may have some good ideas we might use? The spirit of liberty is not, in Hand’s judgment, simply a large-scale competition between factions. Rather, liberty depends on some willingness to sacrifice one’s own special, self-interests for the common good.

The spirit of liberty, Judge Hand reminds us, is not “the ruthless, the unbridled will; it is not freedom to do as one likes. That is the denial of liberty, and leads straight to its overthrow. A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few – as we have learned to our sorrow.” The “sorrow,” his World War II era audience understood, was the chaos unleashed by despotic leaders and the human sacrifice needed to defeat them.

While American constitutionalism depends on the blessings of liberty, it also depends on having enough civic virtue to recognize in what ways liberty as a citizen is checked. Constitutional civic virtue isn’t based on dogma or self-righteousness. It says: “Since we are both citizens, I weigh your freedoms along with my own.” What it doesn’t say is: “My way or the highway.” If we want our way as citizens, it will have to stand the Hamiltonian test of reflection and choice rather than coercion of others.

Today, social media spreads a cacophony of voices insisting they are right. Being right can become more important than being factually correct. Social media feeds confirmation bias: the tendency to interpret information as confirmation of one’s existing theories or beliefs. Being right insists on its own confirmation and unassailable rectitude. If you’re right all the time, then there’s not much room – not much freedom – for others to be right. In extreme forms, insistence on being always right morphs into the tactics of bullying, insult, name-calling, harassment, hate speech and violence. American constitutionalism accepts the inconvenient truth that liberty without checks isn’t liberty. But how well do we like the idea of our liberty being checked? Who likes it when TSA throws the over-sized toothpaste tube into the big bin? Who likes the myriad of reminders that freedom is contingent? Turn the music down. Wear the motorcycle helmet. Obey the speed limit. Put down that beer, you’re only 15. Lock your gun case. No smoking or vaping. Read the dress code. No head-and-neck tattoos. No shoes, no service. No fishing. No littering. No hunting. No trespassing. No spitting. Click It or Ticket. Pay taxes. Pay tolls. Apply for a license. Pay a fee. Construction Zone. Stop. The line forms here. Your passport? Your password? Sign this user agreement. Release your privacy rights. You get the picture.

In America we’ve set a big expectation as the land of the free, yet every day millions of people will necessarily and routinely experience limits on doing whatever we want. There’s a gap between freedom’s expectations and freedom’s limitations. This gap creates a recurring tension and has throughout our history. As American society grows in population, pluralism and complexity, so does the tension between freedoms in conflict with each other. That’s why the Second Amendment is one of America’s most hotly contested constitutional issues: some see guns as sacred rights, others see them as violence. Our ideals about freedom collide with the reality of a populous, technological, commercial, global, industrial, post-September 11, pandemic crisis America

Judge Hand’s view that liberty depends on seeking to understand the minds of other men and women and weighing their interests alongside our own “without bias” becomes a very tall order in the complex Digital Age in which we live. Our communication technologies bring us the wild, wild west of minds and mindlessness out there. News comes at us fast and keeps coming. We retreat into foxholes, get isolated and dig in digitally.

A college student suggests a radical approach: “reasoning.” She writes: “In order to truly understand those whom I do not agree with, I need to understand not only the reasoning behind the opinion of others, but also the reasoning behind my opinions.” An individual commitment like that is constitutional humility in action. She’s willing to test whether her opinions make sense, as part and parcel of testing whether the opinions of others make sense. This is something different than the reflex of digging in with your opinion.

You can tell real quickly, can’t you, if someone is dug in with their opinions? Body language. Tone of voice. Interrupting. We can feel it. I know a communications expert who advises: “People won’t always remember what you say, but they will remember how you made them feel.” This doesn’t mean you must always play nice with people you think are jerks. It means that if you’re interested in others listening to you and maybe even having a shot at changing your mind or their minds, you’ll try to convey a feeling that you are interested in their reasoning and in allowing your reasoning to be tested. How many of our disagreements over controversial issues relate to protectionism: i.e. really not wanting to risk the light of other views striking our own or being uncertain of our reasoning?

The Preamble’s reference to the blessings of liberty connects to the 1776 Declaration of Independence: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness.” Liberty and equality depend on each other. If one’s starting place with other citizens is an assumption of one’s superiority and supremacy, what will be the probable consequences of that arrogance? Will the person who assumes his supremacy be more or less likely to respect the individual liberty of others? Will he want to walk a mile in the other’s shoes? Does he understand his presumed superiority can evaporate in an instant, that the last will be first and the first last? Does he have sufficient humility to make room for the life, liberty and pursuit of happiness by people other than himself? Does he allow for the great likelihood that he is not omniscient about what others have lived or suffered?

Posterity

The final word of the Preamble is posterity, meaning future generations of people. Posterity as the last word links to the first words We the People. The Preamble has people bookends. It begins with We, Us, Ourselves – those who are living now. And it ends with the time travel word, posterity, that connects the past, present and future. Posterity confers historicism. It gives the Preamble a scope that looks beyond ourselves.

The blessings of liberty are to be secured not only for ourselves but for our posterity. The Preamble is saying: We are ordaining and establishing this Constitution, this republic, this United States of America, based on these purposes and writing it down for present and future generations so that all remember why we did and are doing this. Posterity links to history which links to memory. How, after all, are we and our posterity supposed to preserve, protect and defend the Constitution if we and they don’t remember what the Constitution is?

By writing it down, the Constitution knows a thing or two about the way people remember and don’t remember. There was no tape recorder going from May 25 to September 17, 1787 in the old Pennsylvania State House (now Independence Hall in Philadelphia) to record what the 55 delegates said. There were and are (you can read them on the Internet) the notes of James Madison. But these are not verbatim transcripts. But here’s the main point: even if there were a tape recording or verbatim transcript of the Constitutional Convention, we’d still debate what this or that means. After all, what is said in today’s impeachment hearings has the advantage of miraculous technology, TV, YouTube, recordings and verbatim transcription, but we still argue about who said what and what it all means. This he-said-she-said variation in memory and interpretation happens every day in every busy courtroom in America. To be human is to have memory that is not only imperfect, but is also constructed and re-constructed selectively through countless viewpoints, perspectives and lenses. Metaphorically speaking, our memories are much more like the compound eyes of dragonflies with thousands of lenses seeing different things from different vantage points than like the single lens of an artificial intelligence laboratory robot.

Lawyers who practice law long enough hear many stories from clients, witnesses, other lawyers, people in all sorts of situations and circumstances. Some people remember clearly, some don’t. Some deliberately create false memories. Some do so unconsciously. Some have impaired memory, a broad spectrum of deficits ranging from minor to dementia. Some memories are convenient and self-serving. What this boils down to is that the Constitution, in light of the way human memories operate, has its work cut out for it. How we remember the past shapes what we do in the present and future. Remembered stories about our own lives and those of others will always have the twists and turns of viewpoint, but stories still need to pass carrying old and new meanings and learnings. If we doubt this, consider the damage done when false memories, false witnessing and false stories are disseminated within and across generations. In the 20th century, the Holocaust is Exhibit A for how false narrative against Jews led to a most profound darkness. Still, today, anti-Semitism persists in some circles based on false, conspiratorial views of history. In another example, during America’s post-Civil War Reconstruction Era, Jim Crow discrimination and racial hatred was fueled by a large false memory of the Civil War called “The Lost Cause:” i.e., the pseudo-history that dismisses the role of slavery as the War’s main cause. Still, today, our conversations about race are shaped by whether and how we remember American history.

American constitutionalism has a track record and a thingness. It has a text, a physical writing of about 8,000 words, the Constitution of the United States, created on September 17, 1787, ratified on June 21, 1788 and taking effect on March 4, 1789. The first ten amendments are the Bill of Rights, not included with the original Constitution but added in 1791. Seventeen more amendments were added, the Twenty-Seventh Amendment ratified on May 7, 1992. (Maybe you already knew these facts.)

So we know our constitutionalism has an official text with a history. But let’s pause and think about this fact, this thingness, of an historical text. You might have assumed all constitutions are texts. True, the majority of the constitutions in the world now are. But the country from which America declared its independence has an “unwritten” constitution that draws from statutes, common law, parliamentary conventions and authorities. Brits have an un-codified constitution; Yanks wrote it down.

Constitutionalism is, broadly speaking, the Constitution as lived by We the People. It’s the Constitution’s history. It’s the people, places and things; the who, what, when, where and how; the ideas in action; the cases and controversies; the vast geography and environment; the record of achievement and failure; the progress and the regress; the countless ongoing cultural expressions and interpretations of our Constitution through millions of people living, creating, striving, surviving, and passing.

American constitutionalism is, simply put, the Big Story of what has happened since 1787 (and even before) as America has vividly lived its great experiment. And what is still happening. Trying to understand the U.S. Constitution without its history would be like trying to get to know a person without knowing anything about his or her past. We the People depend a great deal on our memories. American constitutionalism has a memory.

Have you ever experienced memory loss, in your life or the lives of others? Say, for example, you’ve witnessed an elderly family member who, through aging or disease, has lost memory. Those who experience such loss are sometimes able to talk about what it feels like. Memory loss can be frightening and disorienting. People speak of losing their sense of connection, their bearings and reference point, and their relationships with others whose names and faces and stories are lost. Our memories make us witnesses to the lives of others and to our own lives. Memories of where we’ve been help us figure out where to go. Our stuff, our possessions, our homes powerfully relate to memory. When asked why he was keeping his deceased wife’s clothes in the closet for so long, a man poignantly said: “Things keep ajar the door of memory.”

Stories that help us remember are the building blocks of American history. Ironically, the study of American history in higher education has generally declined at a time when we need it more than ever. Some assume studying history won’t make it any easier to get a job after graduation and pay off school loans. Some see history as irrelevant old stuff, especially when Digital Age technologies so relentlessly bring on the new stuff. We can hardly keep up with the present; so how can we keep up with the past?

The problem with not knowing or remembering our history is that it leads to misunderstanding of our present. As William Faulkner wrote: “The past is never dead. It’s not even past.” Knowing something about the past, and how it connects to the present, helps us learn from the trial and error of prior generations.

Historians have long debated the question of “the useable past,” some contending it’s not very useable and some saying it is. While the past rarely gives us the exact answers to present problems, it does instead work like memory and how memory can teach us.

Without memory, we can’t really determine if we’re making any progress. History teaches that progress in a country as large and varied as America doesn’t happen in a linear, always upward and onward way. Progress is often messy business, proceeding by fits and starts, with great uncertainty about whether progress is being made or will ever be.

The fact and idea of progress is far from universally accepted. Some say progress is an illusion, an overly optimistic model of wishful thinking. Others contend progress is real and, even more, is really measurable using big data. Regardless how much or how little progress we may think America is making, we have a Constitution that believes in progress. The 18th century American Enlightenment that shaped the Constitution’s intellectual origins believed in progress, through such things as reasoning, human development, spiritual awakening, enlightened self-government, freedom to discover and create, and progress in the arts and sciences. It took some chutzpah and still does. The constitutional text uses the word progress once, in Article I, Section 8, in the words: “To promote the Progress of Science and useful Arts.” For a composition of careful word choice, it’s really significant that the only reference to progress is side-by-side with arts and science promotion. More on this later. Hold this thought: arts and science progress means growth in the humanity, minds and discoveries of We the People.

Countless creations have shaped American progress. The sheer creative energy of American constitutionalism is sometimes forgotten. It’s easy to forget how the things we now take for granted happened over the course of time. Looking back from our vantage point in the present, we can make the mistake of assuming that this or that was bound to happen or that people back then were certain that their decisions would lead to this or that. Inevitability isn’t so inevitable. In reality, people in the past were, like us, living with great uncertainty over the outcome of their decisions, choices and efforts. It doesn’t make the Founders any greater if we imagine they had X-ray vision into the future and were sure of it. They didn’t know what we now know.

Have you learned to do something, say play a sport, by trial and error? How many times did you have to try, see the result, adjust and try again? How many times did you have to kick and dribble the soccer ball before you felt in control? No amount of coaching or instructions or thinking about it could substitute for actually doing it, practicing over and over, and then scoring a game goal. Think about the way great inventions happen. Do you like drones and drone photography? As Amazon drones fly to our doorsteps, let’s recall two tinkering brothers from Dayton, Ohio. After many trials and errors, the Wright Brothers used and patented a system of pulleys and cables to warp the trailing edges of the wings of their planes. Wing warping helped control the aircraft. This wing warping discovery (later replaced by ailerons) led, after more trial and error, to the Wright Flyer’s first successful heavier-than-air powered flight near Kitty Hawk, North Carolina on December 17, 1903. Without the Constitution, and its Arts & Science Clause, there would have been no American patent and intellectual property protection for the Wright Brothers or for the wings of drones.

American constitutionalism has been an engine of creativity, a creativity of trying this or that to see if it works. And if not, trying something else. The freedom to tinker, adjust, start over, and tinker again is often how innovation and progress happen.

It took step-by-step creativity to lead to the Digital Age, to progress across history and put our cell phones in our hands. Your phone’s battery traces back to early experiments by constitutional founder Benjamin Franklin who grouped a number of Leyden jars (now called a capacitor) into what he called a “battery,” using the military term for weapons working together. Our phones are tech-descendants of the much less powerful computer that took Apollo 11 to the moon and warned Neil Armstrong he had only seconds to go before Eagle would run out of fuel above the lunar surface, landing with only 17 seconds of fuel left. Think about the difference that 17 seconds made. Progress turns on such audacious near-misses. Vast amounts of trial and error led to that great moment of constitutional, scientific and human achievement.

Our constitutionalism is a memory bank of great risks taken and audacious experimentation. The Revolutionary War and Declaration of Independence can seem like inevitabilities today, but at the time they were stupendous risks against long odds. Without the remembered history of slavery and the Civil War, the Constitution’s Thirteenth, Fourteenth and Fifteenth Amendments have amnesia. Without the memory of World War I, a war that tested as never before America’s tolerance and intolerance for free speech, the First Amendment shrinks. The common defense includes the memory that on June 6, 1944, 156,000 Allied troops landed on five beaches along a 50-mile stretch of heavily fortified coast of France’s Normandy region, resulting in the liberation of Western Europe from Nazi control. The more perfect union includes the memory that on September 11, 2001, our union came together, albeit too briefly. Our collective memory includes the 100th anniversary of the 19th Amendment and the friends of civil rights in the mid-20th century. Without some memory of the trials and errors of Watergate, how are we to learn lessons about presidential power, the limits of executive privilege, and the value of checks and balances? Spending a day walking and experiencing the National Mall in D.C. is memorable as we feel the past, present and future simultaneously.

So we return to our question: Why did we write it down? Why have a text? One big answer is: so we remember generation to generation. Yes, the Constitution is law, the supreme law of the land. But law alone is not so intertwined with memory. The Internal Revenue Code is law, but the vicissitudes of tax law are not what unite ourselves and our posterity. The Constitution is more than a legal code. The Constitution is the only place where we’ve pulled together, in one composition, ratified by action of We the People, the ideas without which we’d forget who and what the United States of America is.

We wrote it down. But we didn’t chisel it in stone! In fact, one whole Article (Article Five) of the original 7 Articles is devoted to the Constitution’s changeability. So here we ask: when should we stand by things decided and when should we change things? When does our progress depend on remembering our past? And when does our progress depend on bravely swimming away from the shores we have known?

We can dig deeper into American constitutionalism because we have a text with a story of the Constitution’s origins and how, when and why it has changed. Textual history includes a record of established facts, the historical record. Today, some people doubt whether there really is such a thing as a historical record, or whether, instead, we just each have our own individual, subjective truths. That kind of extreme relativism is hard to connect to American constitutionalism and its historicism. Yes, historians have and will continue to write and re-write American history from new and different vantage points. But new assessments, interpretations, and discoveries of historic facts don’t lead to the conclusion that there’s no such thing as historic fact.

The idea of a “record” is a key one both in history and in law. Trial lawyers “make a record” in court through witnesses testifying and documents entered into evidence. While making a court record has rules of procedure and evidence that a historical record does not, the point here is that getting our facts and evidence right is important in both law and history. As Daniel Patrick Moynihan famously said: “Everyone is entitled to his own opinion, but not to his own facts.”

So, for example, we can read online the notes that James Madison took during the Philadelphia Constitutional Convention from May 25 to September 17, 1787. Or, we can read the Federalist Papers, 85 brilliant articles published between October 27, 1787 and May 28, 1788, written by Alexander Hamilton, James Madison and John Jay to persuade We the People to ratify the Constitution.

In addition to record facts such as these, the textual history involves questions of interpretation. For example, how was the Fourteenth Amendment shaped by the American Civil War experience? Or how do the Federalist Papers illuminate what the Founders intended and what the authors believed the public needed and wanted to hear in order to ratify the Constitution? Such questions of interpretation of the Constitution’s textual history naturally lead to lots of different perspectives, some closely aligned, some widely divergent.

As you listen to a person’s opinions about a constitutional issue, ask yourself whether, if at all, the opinion seems based on facts, on evidence, on history. We don’t have to be excessively chapter-and-verse about this in conversation. But, still, it’s fair to ask of ourselves and of others: “Where do you find that in the Constitution?” It’s amazing how often starting with the wrong facts leads to misguided opinions. To the constitutionalist, it’s not very persuasive for someone who has their facts wrong to say: “That’s my truth and so it’s just as right as anyone else’s truth.”

The good news is we have a text. One advantage of having a text is, well, to use it. What’s in it? And, what’s not in it? When we know what the Constitution says or doesn’t say, we can develop a “BS-meter” that goes off when others are making stuff up. In the age of fake news, we need good constitutional BS-meters. A recent poll suggested that 95% of Americans could not name the nine Supreme Court Justices when shown a photo of the Court. Unfortunately, public opinion about what’s in and what’s not in the Constitution can lump into one basket words and phrases. For example, the phrase “life, liberty, and the pursuit of happiness” is in the Declaration of Independence of July 4, 1776 but not, in that same form, in the Constitution. We should know why the Constitution never uses the word “democracy” but does use the word “republican form of government” (Article Four, Section 3). We should know if the Constitution mentions “God” or says “In God We Trust,” regardless of our religious faith or non-faith. (“Give me liberty, or give me death!” was a rousing line by Patrick Henry but didn’t make it into the text. The Constitution had to live longer than Patrick Henry and decided discretion was the better part of valor.)

In sum, the Preamble’s closing why, the idea of posterity, says that generations are woven together, or not, by memory, by history, by stories conveyed and lessons learned, by the threads of joy and tragedy, sacrifice and gain.

Part II: Articles: A Republican Form

In Part I, using our pyramid visualization of the Constitution’s structure, we have explored the first level, the foundation, the first layer of stones that the text puts in place. We have seen that while the Preamble is a concise composition textually, the principles and civic virtues it introduces are designed to last, for ourselves and our posterity, a republic with a shared history yes, but also a republic of now and of the future.

In Part II, we enter into a second area of the pyramid which the Constitution organizes into seven spaces called Articles. Here we remind ourselves that the Preamble and seven Articles were the sum total of the original 1787 text followed by thirty-nine signatures dated September 17, 1787 (i.e. thirty nine signers out of fifty five representatives at the Philadelphia Constitutional Convention.) The Amendments, which we explore in Part III, didn’t start until 1791.

In Part II we will walk through the seven rooms of the Articles. Picture here that the rooms each have a numbered nameplate with one word:

1. Legislative

2. Executive

3. Judicial

4. Federalism

5. Amendment

6. Supremacy

7. Ratification

As we walk through these seven rooms, note that they are inter-connected with open doors into the other rooms. Together, the seven Articles form the structure of what the Constitution calls “a republican form of government.”

In the following Part II chapters we will explore the Articles, not every nook and cranny, but selectively focusing on the following:

* Chapter Four: A Republic
* Chapter Five: Federalism
* Chapter Six: Powers
* Chapter Seven: Education, Arts & Science
* Chapter Eight: Commerce
* Chapter Nine: Sacred Oaths

Chapter Four: A Republic

The Constitution creates a republic and guarantees a republican form of government to the states. So what is a republic? If we are to be friends of the Constitution, what is the republic we are befriending? In current politics, we hear more about nationalism and less about republicanism (small r). How does a republic distinguish itself from a nation? Is there a difference between affinity with, or patriotism for a republic versus nationalism?

Let’s look first at the text. The word republic is in the Constitution’s text, referring to the government the Constitution forms and guarantees. The word “nation” is in the Constitution but in an international context of “foreign Nations” and “Law of Nations” (in Article I, Section 8). Some people would be surprised to learn the word democracy does not appear in the text. So should we conclude that democracy has no place in constitutionalism? No, we can say democracy is there, implied in the bold-font opening words, “We the People” and the popular sovereignty principle throughout the text. Pause here. What does the literal absence of the word “democracy” tell us about how to read the Constitution? What does this say about its hermeneutics (i.e. the method of interpretation the text suggests)? For example, the Constitution doesn’t use other words like “privacy,” “education,” “health care,” “assault weapons,” “the Internet” or “God.” If literalism were the Constitution’s hermeneutics, then it would follow that since the Constitution does not say “democracy,” it has nothing to do with democracy. But literalism is not the way to read our Constitution.

The Constitution chooses a republic, a form of democracy – but not a pure democracy as in ancient Greece. Here’s the difference. Let’s say we start a group discussion in a class of thirty students by voting whether to keep our phones on during class. In a pure democracy, 16 votes to turn the phones off would win the day (or lose it depending on your perspective). In a republic, the class of 30 would first vote for say 3 representatives who would then vote to keep phones off or on.

The Constitution references republic in the Guarantee Clause of Article I, Section 4: “The United States shall guarantee to every state in this union a republican form of government.” The Constitution prefers “union” or “republic” to “nation” when referencing the United States, reserving the word nation for an international context as noted above.

In public dialogue we may use nation and republic as interchangeable without considering the special meaning of the American republic. A republic is a representative form of government, but has become over two plus centuries of history more than just a governmental type for political science. The American republic is a set of ideas and ideals that have been and are being tried and tested through our American experience and culture in countless ways.

In public opinion, partisan politics can cloud the idea of republic. “Republican” today is a political party. Many don’t think of the difference between small “r” and large “R.” While the Constitution’s Guarantee Clause guarantees a republican form of government, it does not refer to a political party or equate republic to party. Nor does it ever mention political parties, or guarantee that political parties have to exist, or that there shall only be two of them. If and when you hear politicians from either side, liberal or conservative, equate their party with the Constitution, take note and beware. There’s a difference between party loyalty and constitutional loyalty, the latter being what the oath of office requires. You may believe your party’s policy platform is truer to the Constitution than the opposition’s, but a party platform isn’t a constitutional equivalency.

When the Constitution says the United States guarantees a republican form of government, we should read “guarantee” as its plain meaning suggests. Guarantee is a strong word. Both the United States and the individual states are guaranteed a republican form of government. The Guarantee redoubles its meaning when it is joined with the constitutional oath of office. See Article II, Section 1. The Constitution does not require an oath to a political party. The Oath is to “preserve, protect and defend” the Constitution. This includes its guarantee of a republican form of government.

The founding generation saw America as not just one more nation on the globe, but a republic, a new one unlike other nations. Republic comes from res publica meaning “a public thing.” A republic was emphatically not the private property of any person or persons. It was not a personification or extension of a powerful person or oligarchy owning and dominating it for private interests. That was a form of despotic monarchy, rejected in the Revolution, the Declaration and the Constitution. The idea of getting a public office for private profit or gain is rejected in the Constitution’s Emoluments Clauses. Emoluments mean profits or gains from holding office. There are actually three Emoluments Clauses: Foreign (Article I, Section 9); Domestic/Presidential (Article II, Section 1) and Ineligibility (Article I, Section 6). Collectively and respectively, these clauses are designed to prevent corruption via foreign gifts, preserve presidential independence from salary-leveraging, and preserve separation of powers.

A republic is not a business or a corporation. A corporation’s legitimate goals include making profits for the business, shareholders, owners, employees and other stakeholders. A republic’s goals are stated in the Preamble.

The central idea and ideal of a republic is consensual civic virtue: representative government by the consent of the governed whose civic virtue included the capacity to serve and sacrifice not only for oneself but for the common good, the general welfare.

The central idea and ideal of a republic is not coercion-by-power. That’s not to say a republic would not be powerful, would not understand power, its uses and abuses, or would ignore the role of power politics. To be sure, our Constitution isn’t naive about power and talks about power. But it does not make power an end in itself. Power for power’s sake isn’t the purpose of a republic.

A republic contains different questions than: will we be the most powerful nation on earth? What will be the relationships between a person and his/her civic self, between a person and other citizens, and between citizens and their government? What will be the relationships between sovereign states and the federal government? A republic does not center these relationships on the authoritarianism of whomever can dominate others and force them to obey. Instead, it centers the relationships on consent and freedom.

The Founders saw that powers would be necessary to accomplish the ends of a republic, but the powers would be separated, checked and balanced. Otherwise, a republic would become a test of coercion (who’s the biggest, baddest and strongest), not one of civic virtue (who’s willing to serve others as well as oneself). George Washington’s greatest republican achievement (among many) was his Farewell Address: his willingness to give up power that would have surely been his for the taking and instead cast America’s future as dependent on self-sacrificing civic virtue. The presidential paradigm in a constitutional republic puts civic virtue on behalf of the American republic, i.e. civic character, as the first and foremost presidential job requirement.

Once we adjust our lens on the meaning of a republic, we may see more clearly a useful way to distinguish nationalism and patriotism. American author George Orwell expressed the distinction. “Nationalism is not to be confused with patriotism,” he wrote. By patriotism Orwell meant “devotion to a particular place and a particular way of life, which one believes to be the best in the world but has no wish to force on other people.” Nationalism, Orwell noted, is “inseparable from the desire for power,” observing that the “abiding purpose of every nationalist is to secure more power.”

The Pledge of Allegiance goes first to the flag and “the republic” for which it stands. We pledge allegiance not to an abstract “nationalism” but to a republic that is our home country. Befriending our republic is saying this is my home, the place where I and others I care about were born or came. As many of us are the daughters and sons of immigrants or immigrants ourselves, we can see within immigration (even as it is fraught with partisan politics) the powerful desire to have and befriend a home.

America as a republic is more American than America cast as just a nation. The world is full of nations. Russia and China are nations, not constitutional republics like the United States. What are the ends that national power is to serve? Plenty of world nations have leaders whose end is power itself. World Wars have shown America and the world what happens when nationalism turns to total industrial warfare. Nationalism isn’t and shouldn’t be good enough for the American republic. When we see ourselves, our history and our place in the 21st century world as a republic with a track record, we may also discover a new way to think about patriotism as a form of civic friendship. This isn’t a narrow and dangerous game of who’s in/who’s out, a listing of who is un-American. Recall that this blacklisting was played to the hilt by the McCarthyism of the Cold War Era. Patriotism without the Constitution is a recipe for trouble. It can make us think that those who dissent or criticize are un-American, should shut up or go back where they came from. Unquestioning loyalty for nationalism’s sake is not the Constitution’s idea of loyalty.

During times of pandemic, recession and social justice conflict like the present, some may see little reason to speak more broadly about faithfulness to one’s homeland. But in neighborhoods across America we are seeing more flags flying, some at half-mast. Some folks behind those flags are saying: we are not only fair weather fans. The republic needs keeping. We have plenty of reason to be down, and plenty of injustices to fight, but we are not going to surrender into dividing our house, our republic, against itself.

Chapter Five: Federalism

Throughout the Articles, we see a balancing and separation of powers not only within the federal structure but between the federal government and state governments, as well as between the states. Popular opinion may tend to miss how much of the Constitution is about the states rather than just the feds in D.C.

So, what’s your state of mind? That is to say: What’s your home state, your city or town, your local reference point, the place you call home, and what does it look like in your mind’s eye? At Miami University and University of Cincinnati where I teach, students are from the Midwest along with a variety of other places:

“I’m from Chicago.”

“I’m from New York.”

“I’m from London, England.”

“I’m from India.”

“I’m from Cleveland.”

“Cincinnati.”

“Columbus.”

“Xenia.”

“Yellow Springs.”

“Portsmouth.”

“Monroe.”

Whether small towns or large cities, the local places we call home shape our lives. American constitutionalism has a geography. Our home-ness shapes our constitutionalism. We can drive the highways and backroads and see constitutionalism shaped by an immense and varied geography, a land, a physical place and places and also by our geographic ideas, how we relate to our urban and/or rural roots. I’m a Midwesterner, from Ohio, and this shapes my constitutionalism. The wonderful American historian John L. Thomas called this: “a country in the mind.” So where are you from? What’s your country in the mind?

The Constitution doesn’t just hang out around D.C. (Don’t get me wrong. I’m a D.C. fan, have family there and am inspired by D.C.’s museums and monuments.) “Constitution” tends to conjure the “Beltway.” We put on Beltway goggles. That’s where the usual familiar symbols and images of the federal government reside. But what if we look beyond just D.C. and see American constitutionalism in its real variety and scope? We’d see a voting booth in New Mexico. We’d see a courtroom in rural Ohio. We’d see a public school board meeting in Appalachia. We’d see a public arts project in Detroit. We’d see a highway bridge in Kentucky.

Our constitutionalism takes in a vast swath of the North American continent, fifty states, a federal district, five major self-governing territories and various possessions. American constitutionalism covers 3.8 million square miles and almost 330 million people. American constitutionalism is mega-diverse, from the Atlantic to the Pacific, the Great Lakes to the Gulf of Mexico, latticed with winding waterways and epic rivers, encompassing nine time zones, diverse geography, cities and towns, parks and wilderness, climates and weather patterns, a massive infrastructure and built environment, a gifted natural environment of plants and wildlife.

When we bring states within the picture frame, we see federalism. The happy face civics definition of federalism is the sharing of power between the state government and the federal government. But what does “sharing power” mean? What is the reality of federalism in actual practice? Federalism has a very complicated history, far from the congenial notion of “sharing” power. Federalism is an oceanic feature of American constitutionalism. The relationship between state and federal power is always ebbing and flowing, always dynamic, sometimes calm and sometimes erupting in the most violent storms in American history. There has not been one brand of federalism since America’s founding. Federalism has morphed depending on big events in American and world history. There is the federalism of the Founders. But then came Civil War Federalism, Reconstruction Federalism, Progressive Era Federalism, New Deal Federalism, State Sovereignty Federalism and today’s New Federalism.

The Civil War and its causes cast federalism into a chaotic bloodbath between North and South. Lincoln refused to accept a fractured federalism where states could break the Union, nullify the actions of the federal government and try to justify secession based on the Constitution. In Lincoln’s view, the Union simply could not be broken by the states. Never in the history of the Constitution was the Preamble’s idea of a more perfect Union been put to more brilliant, creative and consequential use than by Abraham Lincoln. Lincoln’s constitutionalism, the Civil War and the Reconstruction Amendments, including the Fourteenth, were a re-casting of federalism. This included the elimination of slavery in the states and making the 1791 Bill of Rights applicable (for the most part) to the states.

Before and after the Civil War, geography was destiny, Manifest Destiny, along with its 19th century notion that westward expansion was not only destined to happen, but was divinely ordained. Yet divine inspiration theories ran into harsh facts. Native American removal from the land was a tragic chapter in the larger story of America’s massive 19th century expansion, most notably via the Louisiana Purchase and western expansion following the war with Mexico. Adding new states forced the issue of slavery and forced the Constitution to finally correct its original sin. The American historian Federal Jackson Turner developed a highly influential if controversial “Frontier Thesis” that westward expansion shaped both American democracy and character.

The story of federalism reminds us that each state has its own story and distinct character: its own constitution, government, set of laws, rights and powers, along with its own citizens, demographics, geography, boundaries, history, traditions, politics, economy and culture. American constitutionalism includes state constitutions that often mirror the federal Constitution, but also, in interesting ways, may go beyond it. For example, some state constitutions expressly refer to education, health care and a healthful environment, while the U.S. Constitution does not use those words.

America was states before it had a United States Constitution. The failed experiment of the 1781 Articles of Confederation tried out the idea of a loose confederation of states rather than a republic with a strong central government. But the loose confederation was like a big family feud. The Founders sought to strike a balance between the powers of the states, state sovereignty, and the powers of a strong but limited federal government. The Tenth Amendment says that powers the Constitution did not delegate to the United States or prohibit to the States are “reserved to the States respectively, or to the people.”

After Founding federalism and Civil War federalism came Reconstruction Era federalism, during which the tides flowed away from civil rights. An example is the Supreme Court case of Plessy v. Ferguson, which established the separate-but-equal doctrine overturned in 1954 in Brown v. Board of Education. The Progressive Era, the First World War and later the Great Depression shifted the tides of federalism yet again with the New Deal Era vastly expanding the powers of the federal government and World War II accelerating the change. During the 1960s, 70s and 80s, much debate surrounded whether the balance of federalism intended by the Founders had given way to the so-called “imperial presidency” along with too much federal government involvement in peoples’ lives.

In the 1980s with a Supreme Court led by William Rehnquist, federalism flowed in the direction of state sovereignty. The Court used the Tenth Amendment to carve out zones of state autonomy and the Eleventh Amendment to use sovereign immunity as a concept to shield states from some types of lawsuits. The Court also used the Commerce Clause of Article I, Section 8, giving the green light to federal regulation of economic activity within the state that substantially affects interstate commerce; while giving the red light to federal regulation of non-economic intrastate activity.

Where is the Roberts Court going on federalism? It looks like continuing the direction of preserving zones of state autonomy. The Roberts Court will look more to limiting principles to keep federal powers within constitutional limits so as to protect state sovereignty. See, for example, the Court’s ruling (Murphy v. NCAA) that allowed states to pass statutes legalizing sports betting. The Court used the Tenth Amendment to say the feds can’t “commandeer” a power that the states have. Do we need a New Federalism for 21st century America? The states, as Supreme Court Justice Louis Brandeis said, are laboratories of democracy, each state having a republican form of government where citizens of the state and their representatives can initiate legislation and state constitutional amendments. The pluralism of the states can be a strength to address problems on a state and local level through the democratic process.

While the Supreme Court has the power of judicial review to say whether a state law is constitutional, it is also true that nine un-elected Justices in D.C. were never intended by the Constitution to be policy-making surrogates for the state democratic process. In 2019 in the case of Rucho v. Common Cause, the Roberts Court majority has said that the states will have to decide whether or not they want to reform partisan gerrymandering. The Roberts Court majority believes questions of political gerrymandering are political questions beyond the authority of federal courts to decide. This state-centered approach to the “who decides” question has disappointed those who looked to the Supreme Court to outlaw partisan gerrymandering. But others see renewed opportunities at the state level to press forward to reform gerrymandering in their states.

On the flip side, while each state has its own voting laws, consider the reality that foreign powers have interfered, are interfering and will likely interfere with our constitutional voting process. Article I, Section 4 of the Elections Clause reserves to the states and their legislatures the job of prescribing times, places and manner of holding congressional elections. But this does not mean that the federal government must leave each state on its own to deal with foreign power interference. Increased federal protection and resources against electoral cyber-attacks must be a priority for 21st century constitutionalism and voting rights protection. That is, one of the jobs of a New Federalism is to protect that most fundamental right of American citizenship, the right to vote, against new technological weapons used by foreign powers to disrupt American democracy.

The pandemic has created a monumental and new set of tensions and questions for federalism. What are the relative powers and authorities of the states, among and between states, and the federal government during a public health crisis. Typically, health and safety matters are part of the so-called police powers of state and local governments that are more proximate to the various conditions and circumstances in their local jurisdictions. But today in this crisis, states cannot do it alone. The enormity of the pandemic means we need cooperative federalism on a vast scale like never before. Our republic needs state and federal cooperation in the coordination of strategy, discovering a vaccine, effective leadership, ongoing health care support, deployment of resources, federal loans to help businesses stay afloat and to assist the struggling and unemployed.

Federalism also has a central role in large controversies like abortion rights as state legislatures test the boundaries of the Supreme Court’s so-called “undue burden” test which asks whether the state’s law places an undue burden on abortion rights. Remember that the Supreme Court gets to decide which cases it wants to take. You don’t get an automatic appeal to the Supreme Court and the Court doesn’t issue advisory opinions disconnected from actual cases. The Supreme Court has the power of its docket control. It can shape the law in controversial areas not only by what cases it wants to hear and does in fact decide, but also by saying: We’re not going to hear that case, not going to rule on what the state legislature did or didn’t do. In this way, Article III judicial powers shape federalism by checking and balancing the reciprocal exercise of powers by state and the federal governments. Federalism continues to morph into many different shapes. Consider for example the way recent and current presidents are using executive orders to exercise federal power, especially where the president wants to do something that he thinks he can’t get done via Congress, the courts or the states. Consider for example the Trump Administration’s executive order about free speech on campus. Is this a necessary order? What do you think? Is free speech on campus in need of federal protection? Should the state, the public university, be left alone to handle free speech issues on its campus without the strong arm of potentially losing federal funds? Is the executive order really designed to promote free speech or to favor a certain type of free speech it likes? How does an executive order on speech impact the higher education principle of academic freedom?

In another conversation we will consider the environment, the “greening” of our Constitution. Suffice it to say here that federalism – i.e. how power is shared between state governments and the federal government – is a major dynamic in environmental law and policy. Different states have vastly different environmental issues and laws. Think California versus West Virginia. Or Kentucky versus Hawaii. Or Alaska versus New York. We have a lot of pluribus when it comes to the environment. Yet air and water and other pollution doesn’t stop at the state line sign. Increased balancing and coordinating of state and federal regulatory powers has become a necessity. For the environment, we need unum as well as pluribus.

Federalism truly is an oceanic influence in our constitutionalism, ebbing and flowing, changing into many forms, and providing new and creative opportunities for dealing with the republic’s most pressing issues.

Chapter Six: Powers

When we read the text of the 7 Articles that follow the Preamble, one remarkable thing is how much those Articles accomplish in so relatively few words. The deed done was nothing less than building a republican form of government unlike any other at the time. There’s a famous story about Benjamin Franklin who was leaving Independence Hall on the Constitutional Convention’s final meeting day in 1787 when a bystander asked: “Well, Doctor, what have we got – a republic or a monarchy?” “A republic, if you can keep it,” Franklin responded. That quip sums up neatly what Articles I through VII do – they frame up a republic, if we can keep it. In this part of our book, we move from the Preamble’s whys to the Articles’ hows. Articles I through VII describe how a republic of We the People is to be kept, how it is to operate, how its powers are concentrated, limited, and balanced across the legislative, executive, and judicial branches, and how the powers of the states will be balanced within a system of federalism.

You’ve heard the familiar phrase “checks and balances.” But that’s only the surface description of a much more intricate interplay of the way the Constitution allocates powers. For every constitutional power, there’s not just one check and balance but multiple ones. For example, during the historic first week of February, 2020, the impeachment trial of President Trump involved a tug of war over Article I legislative power and Article II presidential power. Article III judicial power presided at the trial in the person of Chief Justice Roberts who very deliberately checked and balanced his role, limiting his involvement, refusing to issue tie-breaking votes, reminding advocates to be civil as the world watched the U.S. Senate, and maintaining his impartiality. The Senate tried two articles of impeachment, one alleging “abuse of power” and the other “obstruction of Congress.” Within each impeachment article was the question of how the balance of power between Article I and Article II would be struck. Impeachment itself is a check and balance. So is the electoral process, i.e., the fact that, for the first time in modern American history, the impeachment involved a president up for re-election (not the case with Richard Nixon or Bill Clinton). The Trump impeachment trial thus brought into play the constitutional electoral process, with many Senators saying that the voters should decide the president’s future in office or not. This let-the-voters-decide rationale chose one check and balance over another: the 2020 election over removal by impeachment.

While we need more historical distance to assess how the Trump Impeachment will ultimately play out, the Constitution, when faced with high stakes politics on fire, does not deliver an absolute, forever and final victory to either political faction. The sole power to impeach was exercised by the House. The sole power to try impeachment was exercised by the Senate. And the power to vote in 2020 is up to We the People.

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Let’s step back for a moment and think about powers generally. What are your powers? What are the limits on your power? How are your powers alike or distinct? How many depend on other people, on a community or team? You might think of your powers as being ones of body or mind or spirit.

One of my students came to class every day in his wheelchair. As I got to know him, he told me he played on the college intramural basketball team. One day he was late to class and explained that the elevator to the third floor of our classroom had been out of order. He had the power to play basketball, but not to make an elevator work. We fixed the elevator problem. It was a teachable moment for a Constitutional Conversation class to realize that one of their classmates was having trouble getting to class. Sometimes the powers we take for granted in ourselves are not so easy for others.

A paradox of power, whether individual, communal or constitutional, is that humility is powerful. Those with the humility to listen gain the power of understanding. Those who are humbled by loss learn that failure is not fatal and winning is not final. Those who defend the rights of others learn that by doing so their own rights are strengthened. Those who spend power and give it away get new powers in return. In Congress, both parties have experienced what-goes-around-comes-around. Power changes hands in a democracy. If you overplay it when you have the votes, expect the other side to do so when they have the votes.

We own powerful phones and use them a lot. But let’s say that lately we’ve been keeping track of how much screen time we spend daily. We may decide to limit our tech power but expand our other powers. We take out the headphones and listen to the quiet and the sounds of nature for a while. We put the phone down while we eat. We limit jazzed-up screen time before bedtime so, as we recharge our phones, we let the power of sleep recharge our batteries.

Consider also how many of your powers come from others, let’s say from an express grant of permission from a third party? An annual parking pass on a busy college campus is a power granted from the university to park a car. There’s the license, the power, granted by the State of Ohio to drive my car. There’s the license and power to practice law granted by the Ohio Supreme Court. There’s a license to access certain research and library services online. There’s voter registration granting the power to vote. In countless ways, powers get siphoned out, distributed around, granted and withheld, licensed, regulated, used and lost.

This thought game about powers is a way of realizing that the idea of “power” isn’t static or monolithic. Power is an idea that breaks down into many different forms of relative power depending on all sorts of circumstance, some coming from ourselves, some from others, some requiring grants of permission, some not, some powers expanding, some contracting. Powers are dynamic forces, always in motion. Often the boundaries of powers are ill-defined. Even mysterious. A young friend of mine has a habit of starting each day listening to positive messages, fifteen minutes or so of thoughts and advice for the day. He explains that, for him, starting the day with positive thoughts empowers him to see the day’s to-dos, boredoms or burdens in a different light. How empowering is this daily ritual of his? Hard to know. But it works for him and is powerful.

Types of power, legally speaking, come in different flavors. Powers may be implied, express, silent, reserved, retained, enumerated, separated, checked, balanced and so on. For a relatable example, let’s take a look at an iPhone Software License Agreement. The first line says: “By using your iPhone, you are agreeing to be bound by the following Apple and Third-Party terms.” Pause. What was that? You mean when I take the iPhone out of the box and use it, I’ve agreed to all Apple’s terms even though I haven’t signed the License Agreement? Yes, that’s right. Apple’s lawyers have drafted the Agreement, reserving to Apple and giving itself the express power to say: your use equals consent. (Note to Apple CEO: If you are reading this book, you hereby consent to protect all the digital data and privacy rights of the author.)

The License Agreement proceeds with other power moves. It enumerates (specifically lists) the powers you have and the ones you don’t. For example, the license gives you the power to use the iPhone software on one Apple-branded iPhone: i.e. the one you bought. It doesn’t give you the power to distribute the software to others over a network of users. Further, it gives you the express power to make digital copies with your phone via the content you store. But it limits this power, implying that other parties may have copyrights/intellectual property rights. Apple is saying that your license from Apple should not be deemed an implied power to violate another person’s copyright. That would potentially get Apple and you in trouble.

The license agreement goes on to disclaim warranties, saying (in bold type) that your use of the iPhone “is at your sole risk and that the entire risk as to satisfactory quality, performance, accuracy and effort is with you.” Evidently, Apple has reserved and retained its power to say: you assumed the entire risk of using this super-powerful computer.

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The Constitution is of course much more than an Apple Agreement. But thinking about the dynamics and types of power is a good warm-up to constitutional conversation.

The word “power,” in singular and plural form, is used early and often throughout the Constitution. “Power” is the leadoff hitter in Articles I, II and III. Article I begins: “All legislative Powers…” Article II begins: “The executive Power…” Article III begins: “The judicial Power…” The repetition of the word “Power” adds a three-part symmetry and organization to the first three Articles. It establishes a textual rhythm. Comparatively, the longest list of enumerated powers is in Article I, the legislative Powers. Article I is also placed first in line in the lineup of powers. This primacy of positioning shows that the legislative powers are the ones closest to the powers of We the People. Popular sovereignty powers are ordered one, two, three with elected legislators being nearest, unelected judges being farthest and the Electoral College presidency in the middle.

The Constitution uses the word “rights” in the Ninth and Tenth Amendments and “powers” in the Tenth Amendment to explain that the people (and the states in the Tenth Amendment) retain certain rights and powers. The Constitution’s Bill of Rights never says this is it, this is every right you have and no more. The Ninth Amendment says: “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” The Tenth Amendment says: “The powers not delegated to the United States by the Constitution, nor prohibited by it the States, are reserved to the States respectively, or to the people.” Rather than try to express every conceivable right and power the people have or will ever have for all time, the Constitution limits the powers of the three branches of government, with the people keeping the rest. Here, we see again, is popular sovereignty. Government by consent of the governed – a government of, by and for the people as Lincoln said at Gettysburg. The Constitution expects rights and powers to be highly dynamic forces because it designed a republic to last for the ages.

The Constitution deliberately pits powers against each other. If you’ve ever looked at the circuit breaker box in the basement of a house, you’ve seen that power flows through a bunch of circuits (to the kitchen, upstairs, bathroom, attic and so on) with breakers that check the power flow and stop it if it gets over-heated. Circuit breakers protect houses from burning. The Constitution’s many circuit breakers on many powers protect the republic from burning.

Article I enumerates the powers of Congress and also includes at the end the Necessary and Proper Clause. After the list of congressional powers, there is this catch-all power: “To make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all the Powers vested by this Constitution in the Government of the United States, or in any Department or Officers thereof.” What is necessary? What is proper? Note also there is an “and” joining these words. Clearly, in a complex 21st century nation, the list of necessary laws is long to say the least. But a law, to be necessary and proper, must be constitutional.

Over time, and especially as the country has grown in population, geography, scope and complexity, the Necessary and Proper language has been a large platform for the creation of a vast network of administrative agencies, departments and regulatory law. America is now debating the “administrative state,” some saying government regulation has morphed into a fourth branch of government. At the Supreme Court level, the Roberts Court along with Justices Gorsuch and Kavanaugh is debating how much power administrative departments, agencies and officials have constitutionally. Justice Kagan and others have opined that the Court’s conservative majority is re-engineering how 21st century American government works through administrative law and process. This debate over how much power the Constitution gives to administrative agencies, departments and officials is fundamentally about separation of powers. That is, the more right-leaning Justices are less inclined to say courts should defer to administrative agency judgments, actions or presumed expertise. Nor, in this view, should legislators give away or delegate their law-making authority and powers to non-elected personnel. Administrative law cases and controversies will continue to be a hot area for defining and re-defining constitutional powers.

What do you think? Is the so-called administrative state too powerful? Or not powerful enough? Should a 21st century Constitution be interpreted to expand or contract administrative law and powers? As the federal administrative powers expand, what about federalism and the powers of the states? Looking at current events, what are some examples of the branches of government fighting over separation of powers?

Judicial Power

- Due Process

The Constitution’s conception of Article III judicial power links closely with principles of due process. So we need to understand what due process means if we are to understand judicial power. Due process is one of the most enduring ideas of law and justice going back to well before the Constitution. Today, principles of due process are a big dynamic in many current contexts.

Let’s sort out some potentially confusing aspects of due process: first, the idea of state versus private action; second, the incorporation doctrine; third, the idea of general due process versus constitutional due process; and fourth, the idea of substantive versus procedural due process.

• State versus Private Action. The Constitution and its Due Process Clauses (in the Fifth and Fourteenth Amendments) limit action by government. That is, neither the federal nor state governments can deprive persons of life, liberty, or property without due process of law. In due process cases, courts sometimes use the words “governmental action” and “state action” interchangeably, using “state action” more broadly than a state.

The Due Process Clauses generally do not apply to private action between non-governmental entities. The credit card company that put an unauthorized charge of $71 on my card yesterday was, sorry to say, not in violation of the Constitution even though it took my money, my property, without due process. It’s a private company. It may have potentially broken its contract with me or other laws, but not the Constitution. On the other hand, a public, state university that expels a student without due process is potentially in violation of the Constitution (as well as state statutes).

• Incorporation Doctrine. Incorporation is a shorthand term in constitutional law used to describe a very long and intricate line of Supreme Court decisions and scholarly debate over the following “incorporation question:” does the Bill of Rights apply just to actions of the federal government or also to actions of the states? Short answer: to actions of the states (largely). The incorporation doctrine brings in, or incorporates, most of the provisions of the Bill of Rights through the Due Process Clause of the Fourteenth Amendment making the Bill of Rights applicable to the states as well as the federal government. Incorporation has been an important theory in many civil rights laws and cases. The incorporation doctrine developed case-by-case, through legal argument and persuasion by advocates and judges, and gives us insight into how constitutional judicial interpretation works over time.

• General Due Process versus constitutional Due Process. Because due process is an ancient concept of fairness and justice, many areas of law that are not necessarily constitutional law involve general due process. For example, a contractual grievance and arbitration procedure in a collective bargaining agreement between labor and management is based on general due process beliefs that say, in effect: the employer can’t fire you without giving you notice of the reasons, an opportunity to tell your side of the story and a hearing before a fair and neutral decider to determine if there’s just cause for your termination. This is not, technically speaking, the Constitution speaking where the contract is between a private employer and a private employee. No governmental action. It is a general type of due process commonly seen throughout law.

In the work of lawyers, judges and juries, due process is not a one-size-fits-all legal process. It depends on the type of legal dispute. In any given case, we ask: 1) does due process apply? and 2) if so, what process is due? Criminal cases and civil cases require different types and levels of due process. Generally speaking, this is because the stakes are higher for the individual defendant in a criminal case where the deprivations can be life (death penalty) and liberty (jail). Higher stakes generally lead to more due process. We will see in future conversations how death penalty cases can involve decades of due process.

• Substantive versus Procedural Due Process. Courts sometimes distinguish between two types of due process. Procedural due process is fairness of process, like a fair trial before an impartial judge. Substantive due process is a life, liberty or property right. Some substantive due process rights are expressly stated in the Constitution like freedom of religion. Some are not expressly stated, but are implied, like the right to privacy.

Here are some, but not all, of the many forms due process takes:

* A fair trial before a fair and impartial judge; 80
* A fair trial before a fair and impartial jury;
* Right to representation by legal counsel;
* An arrest warrant;
* Warnings of rights before arrest;
* Discovery of evidence;
* Right to confront witnesses;
* Direct and cross examination of witnesses;
* Rules of evidence;
* Rules of procedure.

- Article III Judges and Courts

The federal judicial power is set forth in Article III of the Constitution. But we also need to keep in mind that many more cases and controversies are decided by state and local courts. The Supreme Court of the United States is not the whole constitutional universe. Due process of law involves many other types of deciders: administrative law judges, magistrates, state and local judges, referees, private arbitrators, hearing officers, public boards and so on. Juries also have a due process role. More on that later.

When you read about a Supreme Court decision in the news or if you read the actual decision itself, keep in mind that it’s an appellate decision, not the decision of a trial court. The Supreme Court doesn’t preside over jury trials or a trial where an evidentiary record is being made. Also, the Supreme Court doesn’t issue what are called advisory opinions. It decides only cases and controversies. It doesn’t originate a case itself and then decide to publish its views or make public policy on whatever topic it chooses. Cases come to the Court with litigants and procedural histories including primarily lower court decisions by federal courts of appeals and district courts located in 13 federal circuits across the US. The federal district courts are the trial courts where cases, both civil and criminal, are tried to judges and juries.

Most cases come to the Supreme Court via a petition for a writ of certiorari. A “cert petition” is a request by the party who lost below to have the Court review the case. The Court doesn’t have to accept a cert petition appeal. In fact, out of about 7,000-8,000 cert petitions a term (i.e. the Court’s work time in session is called its “term”) the Court grants and hears oral argument in only about 80 cases in each term. The discretionary process of “granting cert” involves judgment calls by the Justices after appellate advocacy from litigants. A litigant trying to have his or her cert petition granted will often look for whether lower federal courts are split on an important constitutional issue, a “split in circuits” suggesting that the Supreme Court needs to settle the split and provide legal guidance. In addition to cert petitions, there are limited appeals as of right and emergency applications to, say, halt a lower court order, set bond, prevent alien deportation or stay an execution. 81

With only about 80 cases a term, a case in the Supreme Court is in rarefied air. Each case has its own record on appeal. The record consists of the transcript of proceedings below including testimony of witnesses and evidentiary materials and exhibits. The Court also has the written decisions of the courts below. The overall question is: was there error below? Did the courts below get it right or wrong? Additionally, the Court receives briefs in writing from counsel for the litigants, along with so-called amicus or friends-of-the-court briefs in support of one side or the other.

The Court hears oral arguments before it recesses to decide the case. Visitors can attend oral arguments at the Court. Also, thanks to the Oyez Project at the Chicago-Kent College of law, you can also listen to audio recordings of oral arguments on line. Listeners to oral arguments as well as Supreme Court advocates observe that oral argument is like a conversation, a constitutional conversation to be sure but still an exchange between Justices and counsel. Interruptions of counsel are frequent as the Justices ask questions and direct counsel to the points that the Justices (individually and/or collectively) think are key. Oral argument isn’t a one-sided monologue by a litigant’s lawyer. Deliberations by the Justices in deciding cases and controversies are secret. The process involves: discussion among Justices; making up one’s mind; potentially changing one’s mind and/or that of others; researching case authorities; reading briefs; discussing with law clerks; forming a majority consensus (or not); and writing majority, concurring and dissenting opinions. Cases have to be decided, if at all, by a majority. Advocacy, the art of persuasion, happens between Justices, not just between the lawyers for the litigants. Behind closed doors (as it should be in the decision-making process) the constitutional conversation continues.

The Constitution provides in Article II that the president “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint… Judges of the Supreme Court…” The Constitution does not specify qualifications for a Justice such as age, etc. Here’s a fun fact. A Justice doesn’t have to be a lawyer or have a law degree. James F. Byrnes, a Justice from 1941-42, did not attend law school, didn’t graduate from high school and taught himself law, passing the bar at age 23. (Good luck with that.)

The Constitution doesn’t set the number of Justices. Congress does. In 1789 the number was six. Since 1869 the number has been nine. A quorum of six is required to decide a case. Justices hold office “during good Behavior,” which means as long as they want to unless impeached which has only happened once: i.e. Associate Justice Samuel Chase in 1805 who was later acquitted by the Senate. Today there are two topics in the political air about the number and terms of Supreme Court Justices. The idea of limiting the terms of the Justices would require a constitutional amendment because the Constitution provides for lifetime appointment on good behavior. Such an amendment is unlikely to happen any time soon. The idea of increasing the number of Justice beyond 9 would not require a constitutional amendment. This idea, also known as “Court packing,” is based on FDR’s famous attempt to increase the size of the Court because he was frustrated that a conservative group of older Justices was declaring unconstitutional key legislative parts of FDR’s New Deal response to the Great Depression. In 2020 before the November presidential election, political advocates of a larger Supreme Court of say 11 or 13 Justices (the number would need to be an odd one to avoid even splits in voting) are worried that a second term for President Trump combined with potential vacancies could mean more Trump appointments. Thus they see a larger Court as a way to ideologically counter-balance.

### OFF

**The phrase “antitrust laws” includes the Sherman Act and the Clayton Act, but is explicitly exclusive of Section 5 of the FTC Act.**

**Whyte 07** – Judge, United States District Court, California Northern

Ronald M. Whyte, Hynix Semiconductor Inc. v. Rambus Inc., 2008 U.S. Dist. LEXIS 53220, United States District Court for the Northern District of California, San Jose Division, January 2008, LexisNexis. Decided: November 4, 2007

Section 5(a) accords prima facie weight to a final judgment brought "under the antitrust laws." The Clayton Act **specifically defines the phrase** "**antitrust laws**." See 15 U.S.C. § 12(a). The definition **includes** the **Sherman Act** and the **Clayton Act**, but it **does not list the Federal Trade Commission Act** (15 U.S.C. §§ 41, et seq). This exclusion accords with the final sentence of section 5(a), which **distinguishes** "**the antitrust laws**" **from** "**section 45**." 2

The Federal Trade Commission brought its proceeding against Rambus pursuant to Section 45, which is also known as **Section 5 of the FTC Act**. See In re Rambus, Administrative Complaint, Docket No. 9302, at 1, 31-33 (FTC June 18, 2002). 3 The FTC's final order found that "Rambus's acts of deception constituted exclusionary conduct under Section 2 of the Sherman Act, and that Rambus unlawfully monopolized the markets for four technologies incorporated into the JEDEC standards in violation of Section 5 of the FTC Act." In re [\*12] Rambus, Opinion of the Commission, Docket No. 9302, at 3 (FTC August 2, 2006). HN4 Section 5 of the FTC Act incorporates various standards from the antitrust laws and also forbids practices the FTC deems against public policy for other reasons. FTC v. Indiana Federation of Dentists, 476 U.S. 447, 454, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986). Although the FTC found that Rambus violated the Sherman Act, the FTC's order was in a proceeding under Section 5 of the FTC Act.

#### They violate — they expand FTC rulemaking under section 5 of the FTC Act

#### Prefer that —

#### 1 — limits and ground — justifies hundreds of thousands of minute changes to FTC Rulemaking that obviates links to core DAs and steals FTC rulemaking based CPs

#### 2 — precision — our interpretation is legally defined and has an intent to exclude the FTC Act — that’s preferable to the affirmative’s grab-all defintion

### OFF

#### The United States federal government should increase prohibitions on the private sector without using anti-trust law by establish a purpose-built competition agency comprised of industry and subject matters experts that establish basic rules of conduct, including at least establishing a standard of digital platform interoperability

#### CP solves --- establishes a new agency with full authority and acts fast

Lohr, 20 (Steve Lohr, Pulitzer Prize for Explanatory Reporting, a foreign correspondent for a decade, , 10-22-2020, accessed on 5-16-2021, The New York Times, "Forget Antitrust Laws. To Limit Tech, Some Say a New Regulator Is Needed.", <https://www.nytimes.com/2020/10/22/technology/antitrust-laws-tech-new-regulator.html)//Babcii>

But even as the [Justice Department filed an antitrust suit against Google](https://www.nytimes.com/2020/10/20/technology/google-antitrust.html) on Tuesday for unlawfully maintaining a monopoly in search and search advertising, a growing number of legal experts and economists have started questioning whether traditional antitrust is up to the task of addressing the competitive concerns raised by today’s digital behemoths. Further help, they said, is needed.

Antitrust cases typically proceed at the stately pace of the courts, with trials and appeals that can drag on for years. Those delays, the legal experts and economists said, would give Google, Facebook, Amazon and Apple a free hand to become even more entrenched in the markets they dominate.

A more rapid-response approach is required, they said. One solution: a specialist regulator that would focus on the major tech companies. It would establish and enforce a set of basic rules of conduct, which would include not allowing the companies to favor their own services, exclude competitors or acquire emerging rivals and require them to permit competitors access to their platforms and data on reasonable terms.

The British government has already said it would create a digital markets unit, with calls for a Big Tech regulator to also be introduced in the European Union and in Australia. In the United States, recommendations for a digital markets regulator have also been made in expert reports and in congressional testimony. It could be a separate agency or perhaps a digital division inside the Federal Trade Commission.

Significantly, the leading proponents of this path in the United States are mainstream antitrust experts and economists rather than break-’em-up firebrands. Jason Furman, a professor at Harvard University and chair of the Council of Economic Advisers in the Obama administration, led [an advisory group to the British government](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf) that recommended the creation of a digital markets unit in 2019.

Breaking up the big tech companies, Mr. Furman said, is a bad idea because that would risk losing some of the consumer benefits these digital utilities undeniably deliver. A regulator is necessary to police digital markets and the behavior of the tech giants, he said.

“I’m a small ‘c’ conservative, and I’m not a fan of regulation generally,” Mr. Furman said. “But it’s needed in this space.”

Regulators that focus on specific sectors of the economy are common in the United States. For financial markets, there is the Securities and Exchange Commission; for airlines, the Federal Aviation Administration; for pharmaceuticals, the Food and Drug Administration; for telecommunications, the Federal Communications Commission; and so on.

There is also precedent for picking out a handful of big companies for special treatment. In banking, the biggest banks with the most customers and loans are classified as “systemically important financial institutions” and subject to more stringent scrutiny.

Several supporters of a new tech regulator were officials in the Obama administration, which was known for being friendly to Silicon Valley. But the advocates said that experience — as well as the conservative, pro-big business drift of court rulings in recent years — left them [frustrated with antitrust law](https://www.nytimes.com/2018/09/07/technology/monopoly-antitrust-lina-khan-amazon.html) as the only way to restrain the growing market power and conduct of the big tech companies.

“The mechanism of antitrust is not working to protect competition,” said Fiona Scott Morton, an official in the Justice Department’s antitrust division in the Obama administration, who is an economist at the Yale University School of Management. “**So let’s do something else — use a different tool.”**

### OFF

#### Economy is metro boomin

Werlin, 21 (Ernest “Doc” Werlin, 35 years in fixed income as a trader and corporate bond salesman, including time as a partner at MorganStanley in charge of corporate bond trading, “Doc’s Prescription: U.S. economic outlook for 2022”, Herald Tribute, 12-27-21, https://www.heraldtribune.com/story/business/2021/12/27/economists-expect-u-s-enjoy-solid-economic-growth-2022/9022524002/)//babcii

There is a growing consensus that the United States will enjoy solid economic growth in 2022 despite concerns about inflation, supply chain disruptions, COVID-19 and Federal Reserve tightening. [The Conference Board,](https://www.conference-board.org/topics/global-economic-outlook/global-economic-outlook-2022-global-report) a research group comprising more than 1,000 public and private corporations, forecasts that the U.S. economy will grow by 3.5% in 2022.

The main challenges to the United States and the global economy in the next decade come from a continued trend toward [deglobalization](https://www.igi-global.com/dictionary/after-the-global-crisis-is-it-globalization-or-globalonelization/47261)and faster-than-expected inflation. The transition toward decarbonization of economies in response to climate change will create challenges and opportunities for global growth.

Despite the acceleration of new COVID-19 cases in December, largely associated with the delta and omicron variants, America enjoyed strong growth in Q4 2021.

COVID-19 remains a threat but its economic impact is fading. There remains uncertainty regarding the transmissibility, severity, and effectiveness of existing vaccines against omicron. [World Health Organization officials,](https://www.who.int/emergencies/diseases/novel-coronavirus-2019) in recognition of the dangers inherent with COVID-19, are advocating more coordinated and decisive efforts to vaccinate the world’s population to prevent the emergence of new, more dangerous variants.

The Food and Drug Administration recently granted emergency authorization to Pfizer’s COVID treatment pill for patients 12 years and up with mild to moderate COVID symptoms who are most likely to end up hospitalized. The agency said it should be prescribed as soon as possible after diagnosis and within five days of symptom onset.

The United States is experiencing robust but an uneven rebound from the pandemic. Demand growth is outstripping supply growth because of unprecedented fiscal and monetary stimulus.

A consensus of economists forecast a decline in the unemployment rate from the current 4.2%. The Bureau of Labor Statistics wrote, “As the nation’s demographic shift continues, with the baby-boom generation moving into retirement, the labor force participation rate will continue to decline, moderating growth.”

The U.S. Census Bureau released a report that the U.S. population grew at a slower rate in 2021 than in any other year since the founding of our nation. This year was the first time since 1937 that the U.S. population grew by fewer than one million people.

In response to COVID-19, households have redirected their spending away from activities that are “locked-down” (food and entertainment) and toward durable goods. Governments have eased COVID restrictions because of vaccines and the ability to more precisely target and curtail certain types of activities.

On Wednesday, in a fresh sign of his growing concerns about inflation, Federal Reserve Chairman Jerome Powell said the Federal Reserve can't be sure that price increases will slow in the second half of next year. To stem inflation, we can expect the Fed to stop bond purchases and raise interest rates three times in 2022.

#### Antitrust regs causes uncertainty and expands rent-seeking

Crews and Young 19 (Clyde Wayne Crews, Vice President for Policy and Senior Fellow @ Competitive Enterprise Institute, Ryan Young is a Senior Fellow @ Competitive Enterprise Institute, “The Case against Antitrust Law”, Competitive Enterprise Institute, 04/16/2019, <https://cei.org/studies/the-case-against-antitrust-law/>)//babcii

Uncertainty. Antitrust regulation creates an enormous amount of economic uncertainty. Nobody knows how it will be used at a given time. If antitrust statutes are interpreted literally, potentially any firm, no matter how small, can be charged with an antitrust violation—or for dominating its relevant market, however defined. If a business sells goods at a lower price than its competitors, it can be charged with predatory pricing. If it sells goods at the same price as its competitors, it can be charged with collusion. And if it sells goods at a higher price than its competitors, it can be charged with abusing market power. A century of case law has evolved some guidelines, but judicial precedents can be overturned any time a new case is brought. There are few bright-line legislative or judicial standards for antitrust enforcement. It is mostly guided by a mix of inconsistently enforced judicial precedents, regulators’ personal discretion, and political factors unrelated to market competition. Even the mere threat of antitrust enforcement can have a preemptive chilling effect on innovation, business strategies, and potential efficiency-enhancing arrangements. Rent-seeking. Neo-Brandeisians rightly want to reduce rent-seeking, but they routinely propose policies that will backfire because of a common misunderstanding of how governments work in practice. Government employees do not operate with only the public interest in mind. They are human beings, with the same incentives and flaws as other human beings. They want to increase their budgets and power and enjoy the publicity that accompanies big cases. It also makes regulators especially vulnerable to what is known as a Baptist-and-boot- legger dynamic. In Clemson University economist Bruce Yandle’s classic example, a moralizing Baptist and a profit-seeking bootlegger will both favor a law requiring liquor stores to close on Sundays, though for different reasons. A true-believing “Baptist” in Congress or at the Justice Department or the FTC would be inclined to listen seriously to the entreaties of corporate “bootleggers” who can come up with virtuous-sounding reasons for why regulators should give their businesses special favorable treatment.36 Oracle, one of Microsoft’s rivals, ran its own independent Microsoft investigation during that company’s antitrust case, for what it alleged were Baptist-style reasons. “All we did is try to take information that was hidden and bring it to light,” said Oracle CEO Larry Ellison. “I don’t think that was arrogance. I think it was a public service.”37 Former Sen. Orrin Hatch (R-UT), who counted Oracle among his constituents, was one of the loudest anti-Microsoft voices in Congress. Around that time, he also received $17,500 donations from executives at Netscape, AOL, and Sun Microsystems. Perhaps heeding Hatch’s admonition that, “If you want to get involved in business, you should get involved in politics,” Microsoft expanded its presence in Washington from a small outpost at a Bethesda, Maryland, sales office to a large downtown Washington office with a full-time staff plus multiple outside lobbyists.38 Microsoft quickly went from a virtual non-entity in Washington to the 10th-largest corporate soft money campaign donor by the 1997-1998 election cycle. Sen. Hatch’s campaign was among the beneficiaries.39 The lines between Baptist and boot- legger can be blurry, and some actors play both parts. But such ethical dynamics are an integral part of antitrust regulation in practice.

#### slow growth goes nuclear – breaks down global cooperation

**Landay 17** (Jonathan – Reuters National Security Correspondent, 1/9/17, “U.S. intelligence study warns of growing conflict risk”, <https://www.reuters.com/article/us-usa-intelligence-future-idUSKBN14T1J4>)

WASHINGTON (Reuters) - The risk of **conflicts** between and within **nations** will **increase** over the next five years to levels not seen since the Cold War as **global growth slows**, the post-World War Two order erodes and **anti-globalization** fuels **nationalism**, said a U.S. intelligence report released on Monday. “These **trends** will converge at an unprecedented pace to make governing and **cooperation** harder and to change the **nature of power** – fundamentally altering the **global landscape**,” said “Global Trends: Paradox of Progress,” the sixth in a series of quadrennial studies by the U.S. National Intelligence Council. The findings, published less than two weeks before U.S. President-elect Donald Trump takes office on Jan. 20, outlined factors shaping a “dark and difficult near future,” including a more assertive **Russia** and **China**, **regional conflicts**, **terrorism**, rising **income inequality**, **climate change** and **sluggish economic growth**. Global Trends reports deliberately avoid analyzing U.S. policies or choices, but the latest study underscored the complex difficulties Trump must address in order to fulfill his vows to improve relations with Russia, level the economic playing field with China, return jobs to the United States and defeat terrorism. The National Intelligence Council comprises the senior U.S. regional and subject-matter intelligence analysts. It oversees the drafting of National Intelligence Estimates, which often synthesize work by all 17 intelligence agencies and are the most comprehensive analytic products of U.S intelligence. The study, which included interviews with academic experts as well as financial and political leaders worldwide, examined political, social, economic and technological trends that the authors project will shape the world from the present to 2035, and their potential impact. ‘INWARD-LOOKING WEST’ It said the threat of **terrorism** would grow in coming decades as small groups and individuals harnessed “**new technologies**, ideas and relationships.” **Uncertainty** about the **U**nited **S**tates, coupled with an “inward-looking West” and the weakening of international human rights and conflict prevention standards, will encourage **China** and **Russia** to challenge **American influence**, the study added. Those challenges “will stay below the threshold of hot war but bring **profound risks** of **miscalculation**,” the study warned. “Overconfidence that material strength can manage escalation will **increase** the **risks** of **interstate conflict** to levels not seen since the Cold War.” While “hot war” may be avoided, differences in values and interests among states and drives for regional dominance “are leading to a **spheres of influence** world,” it said, The latest Global Trends, the subject of a Washington conference, added that the situation also offered opportunities to governments, societies, groups and individuals to make choices that could bring “more hopeful, secure futures.” “As the paradox of progress implies, the same trends generating near-term risks also can create opportunities for better outcomes over the long term,” the study said. THE HOME FRONT The report also said that while globalization and technological advances had “enriched the richest” and raised billions from poverty, they had also “hollowed out” Western middle classes and ignited backlashes against globalization. Those trends have been compounded by the largest migrant flows in seven decades, which are stoking “nativist, anti-elite impulses.” “**Slow growth** plus technology-induced **disruptions** in **job markets** will threaten poverty reduction and **drive tensions** within countries in the years to come, fueling the very **nationalism** that contributes to tension between counties,” it said. The trends shaping the future include contractions in the working-age populations of wealthy countries and expansions in the same group in poorer nations, especially in Africa and South Asia, increasing **economic**, employment, urbanization and welfare **pressures**, the study said. The world will also continue to experience weak **near-term growth** as governments, institutions and businesses struggle to overcome **fallout** from the Great **Recession**, the study said. “**Major economies** will confront **shrinking workforces** and **diminishing productivity** gains while recovering from the 2008-09 financial **crisis** with **high debt**, **weak demand**, and doubts about globalization,” said the study. “China will attempt to shift to a consumer-driven economy from its longstanding export and investment focus. **Lower growth** will **threaten poverty reduction** in developing counties.” **Governance** will become **more difficult** as issues, including global **climate change**, **environmental degradation** and **health threats** demand **collective action**, the study added, while such cooperation **becomes harder**.

### OFF

#### The United States federal government should

#### - Confer legislative rulemaking authority (Section 553 of the APA) to the Federal Trade Commission

#### - Substantially increase it’s funding and support for the development of smart cities, including a public relations campaign centered on creating trust with tech companies

#### - Ban the development of quantum computing, and negotiate tri-lateral arms control agreements with Russia and China over quantum computing

#### - Establish a Interoperable Information Infrastructure for Biodiversity Research

#### Plank 1 --- Solves advantage two (JCCC Blue)

1AC Pierce 15 – Richard J, Lyle T. Alverson Professor of Law, The George Washington University Law School. “The Rocky Relationship Between the Federal Trade Commission and Administrative Law”, Vol. 83, No. 6, <https://www.gwlr.org/wp-content/uploads/2016/01/83-Geo-Wash-L-Rev-2026.pdf>, 11-xx-2015

B. Give FTC the Power to Issue Legislative Rules

The FTC is extremely rare among administrative agencies. The vast majority of agencies have the power to use the notice and comment procedure described in APA Section 553 to issue legislative rules pursuant to each of the statutes implemented by the agency.107 In the antitrust context, the FTC lacks that power.108 It has no power to issue rules to implement the Sherman or Clayton Acts,109 and its power to issue rules to implement Section 5 of the FTC Act is so laden with burdensome, inefficient mandatory procedures that it is useless.110

The FTC could use rulemaking to issue legislative rules that perform important functions, like creating and describing the presumptions it will apply and the decisional frameworks and criteria it will use in various types of cases.111 Courts would be more likely to acquiesce in more aggressive interpretations and implementations of the Sherman and Clayton Acts when they are supported by the kind of detailed analysis courts require from an agency when it issues a legislative rule. Legislative rules that describe frameworks and criteria for application of the Sherman and Clayton Acts also would help to reassure business executives, legislators, and judges who fear that the FTC might abuse its power. Unlike policy statements, legislative rules bind agencies and cannot be rescinded or amended without going through the APA Section 553 notice and comment procedure.112

It would not be easy to persuade Congress to confer rulemaking power on the FTC in the antitrust context, but such an effort would have a chance of success if it is part of a package of statutory amendments that includes other changes like the repeal of Section 5 of the FTC Act. A congressional decision to repeal Section 5 and to confer on FTC power to issue legislative rules to implement the Sherman and Clayton Acts would simultaneously increase the FTC’s ability to persuade courts to uphold more aggressive interpretations of those statutes and reassure business executives, legislators, and judges that they need not fear that the FTC would engage in unduly intrusive regulation. That reassurance would come in part from the repeal of Section 5 and in part from the high likelihood that the FTC would impose reasonable limits on its discretion to interpret and apply the Sherman and Clayton Acts by issuing legislative rules.

#### It “gives the ftc teeth”

1AC Heather 21 – Sean, Senior Vice President, International Regulatory Affairs & Antitrust. “Why the FTC is Powerless When it Comes to Competition Rulemaking”, U.S. Chamber of Commerce, <https://www.uschamber.com/technology/why-the-ftc-powerless-when-it-comes-competition-rulemaking>, 08-12-2021

As designed, the FTC’s core statute gives the agency a dual purpose: it is tasked with enforcement against unfair methods of competition (antitrust) and unfair and deceptive practices (consumer protection) when such conduct arises in the marketplace. However, Congress intentionally avoided articulating precisely what qualifies as a violation under either prong of the FTC’s authority.

Instead, Congress gave the FTC broad authority to investigate and, on a case-by-case basis, determine violations. This open-ended power allowed the FTC to shape the law by bringing various cases that established fact-patterns that the marketplace over time would need to take into consideration. Where the FTC sees conduct it believes to be a violation of the law, it brings the case, and the courts provide a check and balance, but only on appeal, to ensure the FTC does not overreach.

Outside this case-by-case approach, the FTC was never granted legislative style rulemaking to determine what is and what is not an unfair method of competition or an unfair and deceptive practice. The FTC, given its status as an administrative body, already serves as prosecutor, judge, and jury. Congress, instinctively, has understood the problem of extending rulemaking powers to the agency allowing the agency to write the rules it is empowered to enforce. Such a super concentration of power is ripe for abuse, as an agency empowered to write the rules it enforces severely limits the scope of judicial review.

Today, some have suggested the FTC should aggressively pursue unfair methods of competition rulemaking. The FTC is powerless to do so, as explained in the U.S. Chamber of Commerce’s white paper on “Pushing the Limits? A primer on FTC competition rulemaking.” The paper, authored by Maureen Ohlhausen, former Acting Chair of the Federal Trade Commission and James Rill, former Assistant Attorney General for Antitrust at the Department of Justice, finds:

The FTC has a troubling history of rulemaking overreach, one that the courts and Congress have both stepped in to limit.

Congress has never explicitly granted legislative style rulemaking authority to the FTC related to either prong of its core legislative mandate.

Congress has only provided the FTC explicit, but limited rulemaking authority for unfair and deceptive acts and practices through specific procedures commonly referred to as “Magnuson-Moss authority”.

Congress has made no grant for unfair methods of competition rulemaking, instead empowering FTC to exclusively undertake case-by-case administrative adjudication of competition cases to shape the law.

#### Plank 2 solves smart cities --- Their only internal link is people not trusting big technology companies

#### Plank 3 solves the quantum internal link by ensuring it doesn’t escalate

#### Plank 4 Solves biod impact

Mark Ellisman, 17, Mark Ellisman UC San Diego/National Science Foundation; “EAGER: An Interoperable Information Infrastructure for Biodiversity Research (I3BR),” <https://www.nsf.gov/awardsearch/showAward?AWD_ID=1255035>, >Blucas

Biodiversity comprises all variations of life at all levels of biological organization, most of which arise from genomic diversity. As genomic technologies become available across the biological sciences, a full characterization of biodiversity demands a full characterization of genomes. Similarly, data synthesis across the full range of biodiversity research domains demands development, implementation, integration and harmonization of data exchange standards. Such interoperable informatics would be transformational for our understanding of biology, with consequent impact on environmental and conservation policy. Adding to the transformational potential is the fact that the microbial world represents half of the world's biomass and nearly all of its biodiversity, yet is still effectively invisible and intractable to traditional biodiversity research. Metagenomic data are not amenable to the concepts, standards, semantics, and methods of traditional eukaryotic biodiversity, and therefore, require an alternate informatics framework. The EAGER will transform the collaborations between two previously separate research communities: the informaticists of the traditional biodiversity community, who employ the Darwin Core (DwC) as a standard, and the informaticists of the Genomic Standards Consortium (GSC), who have developed the Minimal Information about any Sequence (MIxS) standard for genomics, metagenomics and marker genes. Together, these groups will engage in a unified informatics effort to develop three layers of interoperability. The EAGER will harmonize the observational (DwC) and genomic (MIxS) standards, building on a community dialogue and interdisciplinary networking hosted and established under an NSF Research Coordination Network. Standards interoperability is the basis for the next two layers. Syntactic interoperability (in the context of Internet APIs and a database Reference Model) will be supported. The EAGER will assemble experts from the two communities to (a) devise a database Reference Model that integrates the DwC and GSC MIxS standards; and (b) for effective data management, create specific implementations for different database platforms to foster adoption. The practical implementation of the reference model on/for different database systems will allow, for the first time, systematic comparative testing of technical performance and of use cases (e.g., which implementation best serves which complex data query). The EAGER will create task groups to establish the infrastructure for managing ontologies, and to construct a reference model on the purely semantic level in order to fuse the two worlds of data standards, both of which are advanced enough to engage in useful interoperability. In developing an interdisciplinary information infrastructure to achieve data interoperability across domains, this EAGER would advance understanding of complex environmental phenomena and, thereby, inform future policy decisions. Indeed, by leading to an informatics standards platform to conceive a novel conceptual and theoretical framework for the world of microbial ?dark matter,? the EAGER would have a transformational impact beyond science.

### OFF

#### Interoperability standards invites cyber vulnerabilities --- Causes side loading, forced IP sharing, and disincentivizes security standards

Ledgett, 21 (Rick Ledgett, Rick Ledgett is the former deputy director of the National Security Agency and a member of the advisory board for Beacon Global Strategies, which advises U.S. technology companies. Ledgett has an undergraduate degree in psychology and a graduate degree in strategic intelligence., 6-15-2021, accessed on 7-21-2021, C4ISRNet, "The growing threat of European tech regulation on US innovation", https://www.c4isrnet.com/opinion/2021/06/15/the-growing-threat-of-european-tech-regulation-on-us-innovation/)//Babcii

Such comments lay bare that although the DMA’s purported goal is to ensure competition, the DMA as drafted would specifically target a narrow set of American companies large enough to meet an arbitrary threshold of size metrics. Unlike the General Data Protection Regulation (GDPR), which impacts any company that collects the data of any EU citizen, only a handful of U.S. companies fit the criteria of what the DMA calls a “gatekeeper.” With EU officials unable to identify a single EU company that would have to comply with the strict requirements mandated for gatekeepers, it is clear whom these regulaations are intended to cover: American **platforms** that have achieved a competitive advantage within the nascent European technology market. Of note, Russian and Chinese companies are also exempted from the DMA, despite these companies being in a much stronger position than their European competitors to fill any gap caused by a U.S. “gatekeeper” being forced to change its business models to comply with the DMA. As a result, the DMA could effectively give a green light to **China** and **Russia** to further **expand** influence in the EU via their technology companies. Among the list of problematic challenges with the DMA, one of the obligations that stands out is a requirement that would force gatekeepers to allow third-party software to be downloaded directly from the internet. “**Side-loading**” is currently prohibited by companies like Apple, given concerns about the potential **vulnerabilities** that could be introduced when an unvetted app is able to bypass company security and safety controls. Many parts of the U.S. government prohibit side-loading on work devices for these very reasons, with the General Services Administration (GSA) stating in its IT Security Procedural Guide that side-loading apps present “**one of the greatest risks** to GSA’s environment.” The Department of Homeland Security (DHS) also recommends users “avoid (and enterprises should prohibit on their devices) sideloading.” The U.S. government is not the only entity to warn against sidel-loading: the EU’s own Agency for Cybersecurity (ENISA) states, ”users should not sideload applications if they do not originate from a legitimate and authentic source.” As is shown after each cybersecurity breach, from petty cybercrime to the seismic effects of the SolarWinds and Colonial breaches, having an integrated security system is essential to the overall security of a technology platform. In effect, the DMA risks introducing **additional vulnerabilities** to systems already **under near constant attack from adversaries**. Other concerning obligations would [require](https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608116887159&uri=COM%3A2020%3A842%3AFIN) U.S. companies to distribute proprietary information and **i**ntellectual **p**roperty to EU competitors, as well as provide competitors access to “operating system, hardware or software features” used by U.S. companies. This **forced sharing** of sensitive company methods and information could disincentivize gatekeepers from continuing to maintain cutting-edge **security standards** and innovative practices. With each new advancement, they could be [**forced to share**](https://www.csis.org/analysis/digital-services-act-digital-markets-act-and-new-competition-tool)**trade secrets** with direct competitors who had no obligation to do the same. Over the long term, this could hurt the U.S.’s ability to compete with the growing technology power of China.

#### Extinction

Klare 19, \*Michael T. Klare is a professor emeritus of peace and world security studies at Hampshire College and senior visiting fellow at the Arms Control Association; (November 19th, “Cyber Battles, Nuclear Outcomes? Dangerous New Pathways to Escalation”, https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation)

Yet another pathway to escalation could arise from a cascading series of cyberstrikes and counterstrikes against vital national infrastructure rather than on military targets. All major powers, along with Iran and North Korea, have developed and deployed **cyberweapons** designed to disrupt and destroy major elements of an adversary’s key economic systems, such as power grids, financial systems, and transportation networks. As noted, Russia has infiltrated the U.S. electrical grid, and it is widely believed that the United States has done the same in Russia.[12](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote12) The Pentagon has also devised a plan known as “Nitro Zeus,” intended to immobilize the entire Iranian economy and so force it to capitulate to U.S. demands or, if that approach failed, to pave the way for a crippling air and missile attack.[13](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote12)

The danger here is that economic attacks of this sort, if undertaken during a period of tension and crisis, could lead to an escalating series of tit-for-tat attacks against ever more vital elements of an adversary’s critical infrastructure, producing widespread chaos and harm and eventually leading one side to initiate kinetic attacks on critical military targets, risking the slippery slope to nuclear conflict. For example, a Russian cyberattack on the U.S. power grid could trigger U.S. attacks on Russian energy and financial systems, causing widespread disorder in both countries and generating an impulse for even more devastating attacks. At some point, such attacks “could lead to major conflict and possibly nuclear war.”[14](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote14)

These are by no means the only pathways to escalation resulting from the offensive use of cyberweapons. Others include efforts by third parties, such as proxy states or terrorist organizations, to provoke a global nuclear crisis by causing early-warning systems to generate false readings (“spoofing”) of missile launches. Yet, they do provide a clear indication of the severity of the threat. As states’ reliance on cyberspace grows and cyberweapons become more powerful, the dangers of unintended or accidental escalation can only grow more severe.

## Case

### 1NC --- Adv 1

#### Interop fails --- Can’t regulate metadata which is what matters, and they cause first mover lock in

**Fukayama et al., 21** (Francis Fukayama, Barak Richman, and Ashish Goel, Senior Fellow at Stanford University’s Freeman Spogli Institute for International Studies., Katharine T. Bartlett Professor of Law and Professor of Business Administration at Duke University School of Law., Professor of Management Science and Engineering at Stanford University., 1-26-2021, accessed on 7-23-2021, Foreign Affairs, "How to Save Democracy From Technology", https://www.foreignaffairs.com/articles/united-states/2020-11-24/fukuyama-how-save-democracy-technology?utm\_medium=promo\_email&utm\_source=lo\_flows&utm\_campaign=registered\_user\_welcome&utm\_term=email\_1&utm\_content=20210723)//Babcii

Data **portability faces a number of obstacles**, however. Chief among them is the **difficulty** of moving many kinds of **data**. Although it is easy enough to transfer some **basic data**—such as one’s name, address, credit card information, and email address—it would be far harder to transfer all of a user’s **metadata**. Metadata includes **likes, clicks, orders, searches, and so on**. It is precisely these types of data that are **valuable** in targeted advertising. Not only is the **ownership of this information unclear**; the **information** itself is also **heterogeneous** and **platform-specific**. How exactly, for example, could a record of past Google searches be transferred to a new Facebook-like platform?

An alternative method of curbing platforms’ power relies on privacy law. Under this approach, regulations would limit the degree to which a technology company could use consumer data generated in one sector to improve its position in another, protecting both privacy and competition. The GDPR, for example, [requires](https://gdpr.eu/gdpr-consent-requirements/) that consumer data be used only for the purpose for which the information was originally obtained, unless the consumer gives explicit permission otherwise. Such rules are designed to address one of the most potent sources of platform power: the more data a platform has, the easier it is to generate more revenue and even more data.

But relying on privacy law to prevent large platforms from entering new markets presents its own problems. As in the case of data portability, it is not clear whether rules such as the GDPR apply only to data that the consumer voluntarily gave to the platform or also to metadata. And even if successful, privacy initiatives would likely reduce only the personalization of news for each individual, not the concentration of editorial power. More broadly, such **laws** would close the door on a horse that has long since **left the barn**. The **tech**nology giants have already amassed vast quantities of customer **data**. As the new Department of Justice lawsuit indicates, Google’s business model relies on gathering data generated by its different products—Gmail, Google Chrome, Google Maps, and its search engine—which combine to reveal unprecedented information on each user. Facebook has also collected extensive data about its users, in part by allegedly obtaining some data on users when they were browsing other sites. If privacy laws prevented **new** competitors from amassing and using similar data sets, they would run the risk of simply locking in the advantages of these **first movers.**

#### Smart Cities fail

Zuo and Zhao 13 (Jian Zhen-Yu, School of Natural and Built Environments, University of South Australia, School of Economics and Management, North China Electric Power University in Beijing. Green building research–current status and future agenda: A review, Renewable and Sustainable Energy Reviews, Elsevier)

.3.4. Criticisms There is no lack of **negative experience with green buildings**. The higher **upfront cost presents** one of most significant issues to the investors. Under the current macroeconomic environment, it is difficult to convince clients to inject extra investment on green features to their developments. In addition, some studies have reported thermal comfort issues associated with green buildings such as high level of humidity, higher temperature during summer, etc. [67,77]. Paul and Taylor disagreed with the overwhelming benefits of green building in terms of thermal comfort [78]. Their study found that there is no significant difference between thermal comfort level of green buildings and that of conventional buildings (equipped with heating, ventilating, and air-conditioning systems). According to some occupants, it is a serious concern without the control of the thermal environment inside the building such as temperature, ventilation, and lighting [79]. This is often associated with reduced satisfaction of building users [80–82]. Indeed, the control of temperature, health, ventilation and heating is ranked by occupants as one of most important factors for the refurbishment of historic buildings [83]. Other issues include: the privacy due to the open space, noise, fire performance of eco-materials, structural safety issues due to installation of small scale solar PV or wind turbines [69,84–89]. The privacy and noise issues associated with green buildings are usually related to the office layout [90,91]. Some studies questioned the real performance of green building such as energy efficiency and water efficiency. For instance, Newsham et al. Analyzed energy data of 100 LEED certified buildings in US which confirmed that LEED certified building achieved an average of 18%–39% of energy savings per floor area compared to conventional counterparts [92]. However, their study also highlighted some 30% of LEED certified buildings consume more energy than conventionally designed buildings. Scofield examined the same set of buildings by Newsham et al.'s study with a consideration of off-site energy consumption, i.e. the generation and delivery of electricity to the building [93]. His findings showed that the source energy does not differentiate between LEED certified buildings and conventional buildings. Menassa et al. examined the energy performance of 11 U.S. Navy LEED-Certified Buildings [94]. Their analysis showed that majority of these buildings did not achieve the **mandatory energy and water efficiency target**. In fact, the energy consumption of majority of these buildings is higher than the national average level. Sabapathy et al.'s study found that LEED facilities achieved higher energy efficiency however does not necessarily translate into energy cost savings due to a number of factors such as the type of lease agreement and types of occupants [95]. Feige et al. examined 2500 residential buildings in Switzerland which found that sustainability feature of dwellings (e.g. water efficiency, health and comfort) helped to increase rental price [96]. However, there is negative correlation between energy efficiency of residential property and their rental premium which is arguably due to lease structures (e.g. bundling the energy cost with the rent). Therefore, more studies are required to provide evidence for cost benefit analysis of green buildings in a comprehensive manner so that decision making process is better informed. A longitudinal study helps to collect related data in a certain period of time. This will then allow a direct evidence-based comparison between performance of green buildings and that of conventional buildings

#### No quantum computing --- The qubit tech is literally impossible

Kulkarni, 20 (Viraj Kulkarni, Viraj Kulkarni has a master’s degree in computer science from the University of Calfornia, Berkeley, and is currently pursuing a PhD in quantum artificial intelligence., 9-29-2020, accessed on 2-27-2022, Science.thewire, "The Inconvenient Truth About Quantum Computing – The Wire Science", <https://science.thewire.in/the-sciences/quantum-computing-qubits-error-correction-no-cloning-theorem/#:~:text=Even%20the%20slightest%20interaction%20with,qubits%2C%20leading%20to%20computing%20errors.)//Babcii>

Qubit entanglement

Qubits can maintain superposition only for infinitesimally **small intervals** of time. Even the slightest interaction with the environment **causes a qubit to collapse** into a discrete state of either 0 or 1. This is called decoherence. And even before they decohere, random noise caused by non-ideal circuit elements **can corrupt the state** of the qubits, leading to computing errors.

All computational systems, including classical computers, suffer from numerical errors. To handle errors in classical computers, scientists have developed error-correcting algorithms that rely on redundancy. That is, the computer represents each logical bit by multiple physical bits. If a small number of physical bits is corrupted due to noise, say, the remaining bits can still be used to detect and correct the error.

For example, the logical bit 1 is represented by three physical bits, 111. If one of the physical bits gets corrupted to yield 101, we can still infer the correct value of the logical bit to be 1.

The [no-cloning theorem](https://physicstoday.scitation.org/doi/abs/10.1063/1.3086114) in quantum mechanics says that **we can’t make perfect copies of a qubit’s state**. This means we can’t directly use classical **error-correcting algorithms** for quantum computers.

To further complicate things, the act of measuring a qubit causes it to ‘collapse’ from a superposition of states to a single, discrete state. As a result, the error-correcting algorithm needs to detect and correct errors without interacting with the qubits.

Fortunately, although qubits can’t be copied, they can be entangled. When we entangle two qubits with each other, their individual quantum states fuse to form a single joint state. In this setup, if we measure one qubit from a pair of entangled qubits, our act of measurement will instantaneously affect the other qubit as well, and its state will change in a predictable way.

So by constructing a grid of entangled physical qubits to represent a single logical qubit, we can detect and correct quantum-computing errors. And the larger the grid, the more errors we can correct.

Quantum computers need sophisticated electronic circuits to initialise qubits before beginning a computation; perform a variety of mathematical operations on them via quantum gates; and measure the results afterwards. These activities need to be performed with high precision at ultra-low temperatures while keeping the qubits strictly isolated from the environment throughout the process. But however hard we try, some **unavoidable disturbances** inevitably produce small **errors**.

If the rate of these errors exceeds a certain threshold, entangling multiple qubits only increases the noise in the system instead of reducing it. So for error correction to work, it is vitally important that we become able to control qubits with an error rate that is below this threshold. We have still not been able to do this.

The largest quantum computers we have today consist of fewer than **100 qubits**. IBM announced [earlier in September](https://www.sciencemag.org/news/2020/09/ibm-promises-1000-qubit-quantum-computer-milestone-2023) that it plans to build a 1,000-qubit quantum computer by 2023.

Computers perform mathematical operations on data. In order to solve a problem, a quantum computer needs enough qubits to represent the input and store the output – in addition to the qubits required to process intermediate results of the computation. Researchers [estimate](https://spectrum.ieee.org/computing/hardware/the-case-against-quantum-computing) that a quantum computer will need between 1,000 to 100,000 **logical qubits** to solve computational problems encountered in practice.

And to keep errors in check, we will need to represent each logical qubit by 1,000 to 100,000 physical qubits – depending on how well we can control the qubits. All together, **we will need a few million qubits** to make quantum computers perform **useful** work that is also reliable.

From the point of view of quantum physics, a system with a million qubits is an enormously complex thing. Since qubits can exist in superpositions of two values at a time, a system of N qubits can encode 2^N states. A quantum computer with just **300** qubits will thus have more states than the total **number of atoms in the entire universe**.

Nobody has figured out exactly how we are going to control such large quantum systems while keeping errors in check. Small, focused groups are working on these challenges at universities and technology companies – but the rest of **the community has largely ignored them**. Computer science researchers are designing algorithms for quantum computers. Software companies are releasing platforms and libraries to implement these algorithms. Many members of both groups seem to have assumed that sufficiently large quantum computers will be available soon.

#### No species snowball

Sedjo, PhD, 2k, Roger A, PhD @ U Washington, Sr. Fellow, Resources for the Future, Conserving Nature’s Biodiversity: insights from biology, ethics & economics, eds. Van Kooten, Bulte and Sinclair, p 114

As a critical input into the existence of humans and of life on earth, biodiversity obviously has a very high value (at least to humans). But, as with other resource questions, including public goods, biodiversity is not an either/or question, but rather a question of “how much.” Thus, we may argue as to how much biodiversity is desirable or is required for human life (threshold) and how much is desirable (insurance) and at what price, just as societies argue over the appropriate amount and cost of national defense. As discussed by Simpson, the value of water is small even though it is essential to human life, while diamonds are inessential but valuable to humans. The reason has to do with relative abundance and scarcity, with market value pertaining to the marginal unit. This water-diamond paradox can be applied to biodiversity. Although biological diversity is essential, a single species has only limited value, since the global system will continue to function without that species. Similarly, the value of a piece of biodiversity (e.g., 10 ha of tropical forest) is small to negligible since its contribution to the functioning of the global biodiversity is negligible. The global ecosystem can function with “somewhat more” or “somewhat less” biodiversity, since there have been larger amounts in times past and some losses in recent times. Therefore, in the absence of evidence to indicate that small habitat losses threaten the functioning of the global life support system, the value of these marginal habitats is negligible. The “value question” is that of how valuable to the life support function are species at the margin. While this, in principle, is an empirical question, in practice it is probably unknowable. However, thus far, biodiversity losses appear to have had little or no effect on the functioning of the earth’s life support system, presumably due to the resiliency of the system, which perhaps is due to the redundancy found in the system. Through most of its existence, earth has had far less biological diversity. Thus, as in the water-diamond paradox, the value of the marginal unit of biodiversity appears to be very small.

### 1NC --- Adv 2

#### AI doesn’t cause extinction

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

Why AI is not an Existential Threat First, most AI doomsday prophecies are grounded in the false analogy between human nature and computer nature, or natural intelligence and artificial intelligence. We are thinking machines, but natural selection also designed into us emotions to shortcut the thinking process because natural intelligences are limited in speed and capacity by the number of neurons that can be crammed into a skull that has to pass through a pelvic opening at birth, whereas artificial intelligence need not be so restricted. We don't need to compute the caloric value of foods, for example, we just feel hungry. We don't need to calculate the waist-to-hip ratio of women or the shoulder-to-waist ratio of men in our quest for genetically healthy potential mates; we just feel attracted to someone and mate with them. We don't need to work out the genetic cost of raising someone else's offspring if our mate is unfaithful; we just feel jealous. We don't need to figure the damage of an unfair or non-reciprocal exchange with someone else; we just feel injustice and desire revenge. Emotions are proxies for getting us to act in ways that lead to an increase in reproductive success, particularly in response to threats faced by our Paleolithic ancestors. Anger leads us to strike out, fight back, and defend ourselves against danger. Fear causes us to pull back, retreat, and escape from risks. Disgust directs us to push out, eject, and expel that which is bad for us. Computing the odds of danger in any given situation takes too long. We need to react instantly. Emotions shortcut the information processing power needed by brains that would otherwise become bogged down with all the computations necessary for survival. Their purpose, in an ultimate causal sense, is to drive behaviors toward goals selected by evolution to enhance survival and reproduction. AIs -- even AGIs and ASIs -- will have no need of such emotions and so there would be no reason to program them in unless, say, terrorists chose to do so for their own evil purposes. But that's a human nature problem, not a computer nature issue. To believe that an ASI would be "evil" in any emotional sense is to assume a computer cognition that includes such psychological traits as acquisitiveness, competitiveness, vengeance, and bellicosity, which seem to be projections coming from the mostly male writers who concoct such dystopias, not features any programmer would bother including, assuming that it could even be done. What would it mean to program an emotion into a computer? When IBM's Deep Blue defeated chess master Garry Kasparov in 1997, did it feel triumphant, vengeful, or bellicose? Of course not. It wasn't even "aware" -- in the human sense of self-conscious knowledge -- that it was playing chess, much less feeling nervous about possibly losing to the reigning world champion (which it did in the first tournament played in 1996). In fact, toward the end of the first game of the second tournament, on the 44th move, Deep Blue made a legal but incomprehensible move of pushing its rook all the way to the last row of the opposition side. It accomplished nothing offensively or defensively, leading Kasparov to puzzle over it out of concern that he was missing something in the computer's strategy. It turned out to be an error in Deep Blue's programming that led to this fail-safe default move. It was a bug that Kasparov mistook as a feature, and as a result some chess experts contend it led him to be less confident in his strategizing and to second-guess his responses in the subsequent games. It even led him to suspect foul play and human intervention behind Deep Blue, and this paranoia ultimately cost him the tournamentt.[ 13] Computers don't get paranoid, the HAL 9000 computer in 2001 notwithstanding. Or consider Watson, the IBM computer built by David Ferrucci and his team of IBM research scientists tasked with designing an AI that could rival human champions at the game of Jeopardy! This was a far more formidable challenge than Deep Blue faced because of the prerequisite to understand language and the often multiple meanings of words, not to mention needing an encyclopedic knowledge of trivia (Watson had access to Wikipedia for this). After beating the all-time greatest Jeopardy! champions Ken Jennings and Brad Rutter in 2011, did Watson feel flushed with pride after its victory? Did Watson even know that it won Jeopardy!? I put the question to none other than Ferrucci himself at a dinner party in New York in conjunction with the 2011 Singularity Summit. His answer surprised me: "Yes, Watson knows it won Jeopardy!" I was skeptical. How could that be, since such self-awareness is not yet possible in computers? "Because I told it that it won," he replied with a wry smile. Sure, and you could even program Watson or Deep Blue to vocalize a Howard Dean-like victory scream when it wins, but that is still a far cry from a computer feeling triumphant. This brings to mind the "hard problem" of consciousness -- if we don't understand how this happens in humans, how could we program it into computers? As Steven Pinker elucidated in his answer to the 2015 Edge Question on what to think about machines that think, "AI dystopias project a parochial alpha-male psychology onto the concept of intelligence. They assume that superhumanly intelligent robots would develop goals like deposing their masters or taking over the world." It is equally possible, Pinker suggests, that "artificial intelligence will naturally develop along female lines: fully capable of solving problems, but with no desire to annihilate innocents or dominate the civilization."[ 14] So the fear that computers will become emotionally evil are unfounded, because without the suite of these evolved emotions it will never occur to AIs to take such actions against us. What about an ASI inadvertently causing our extinction by turning us into paperclips, or tiling the entire Earth's surface with solar panels? Such scenarios imply yet another emotion -- the feeling of valuing or wanting something. As the science writer Michael Chorost adroitly notes, when humans resist an AI from undertaking any form of global tiling, it "will have to be able to imagine counteractions and want to carry them out." Yet, "until an AI has feelings, it's going to be unable to want to do anything at all, let alone act counter to humanity's interests and fight off human resistance." Further, Chorost notes, "the minute an A.I. wants anything, it will live in a universe with rewards and punishments -- including punishments from us for behaving badly. In order to survive in a world dominated by humans, a nascent A.I. will have to develop a humanlike moral sense that certain things are right and others are wrong. By the time it's in a position to imagine tiling the Earth with solar panels, it'll know that it would be morally wrong to do so."[ 15] From here Chorost builds on an argument made by Peter Singer in The Expanding Circle (and Steven Pinker in The Better Angels of Our Nature[ 16] that I also developed in The Moral Arc[ 17] and Robert Wright explored in Nonzero[ 18]), and that is the propensity for natural intelligence to evolve moral emotions that include reciprocity, cooperativeness, and even altruism. Natural intelligences such as ours also includes the capacity to reason, and once you are on Singer's metaphor of the "escalator of reason" it can carry you upward to genuine morality and concerns about harming others. "Reasoning is inherently expansionist. It seeks universal application," Singer notes.[ 19] Chorost draws the implication: "AIs will have to step on the escalator of reason just like humans have, because they will need to bargain for goods in a human-dominated economy and they will face human resistance to bad behavior."[ 20] Finally, for an AI to get around this problem it would need to evolve emotions on its own, but the only way for this to happen in a world dominated by the natural intelligence called humans would be for us to allow it to happen, which we wouldn't because there's time enough to see it coming. Bostrom's "treacherous turn" will come with road signs ahead warning us that there's a sharp bend in the highway with enough time for us to grab the wheel. Incremental progress is what we see in most technologies, including and especially AI, which will continue to serve us in the manner we desire and need. Instead of Great Leap Forward or Giant Fall Backward, think Small Steps Upward. As I proposed in The Moral Arc, instead of Utopia or dystopia, think protopia, a term coined by the futurist Kevin Kelly, who described it in an Edge conversation this way: "I call myself a protopian, not a Utopian. I believe in progress in an incremental way where every year it's better than the year before but not by very much -- just a micro amount."[ 21] Almost all progress in science and technology, including computers and AI, is of a protopian nature. Rarely, if ever, do technologies lead to either Utopian or dystopian societies. Pinker agrees that there is plenty of time to plan

for all conceivable contingencies and build safeguards into our AI systems. "They would not need any ponderous 'rules of robotics' or some newfangled moral philosophy to do this, just the same common sense that went into the design of food processors, table saws, space heaters, and automobiles." Sure, an ASI would be many orders of magnitude smarter than these machines, but Pinker reminds us of the AI hyperbole we've been fed for decades: "The worry that an AI system would be so clever at attaining one of the goals programmed into it (like commandeering energy) that it would run roughshod over the others (like human safety) assumes that AI will descend upon us faster than we can design fail-safe precautions. The reality is that progress in AI is hype-defyingly slow, and there will be plenty of time for feedback from incremental implementations, with humans wielding the screwdriver at every stage."[ 22] Former Google CEO Eric Schmidt agrees, responding to the fears expressed by Hawking and Musk this way: "Don't you think the humans would notice this, and start turning off the computers?" He also noted the irony in the fact that Musk has invested $1 billion into a company called OpenAI that is "promoting precisely AI of the kind we are describing."[ 23] Google's own DeepMind has developed the concept of an AI off-switch, playfully described as a "big red button" to be pushed in the event of an attempted AI takeover. "We have proposed a framework to allow a human operator to repeatedly safely interrupt a reinforcement learning agent while making sure the agent will not learn to prevent or induce these interruptions," write the authors Laurent Orseau from DeepMind and Stuart Armstrong from the Future of Humanity Institute, in a paper titled "Safely Interruptible Agents." They even suggest a precautionary scheduled shutdown every night at 2 AM for an hour so that both humans and AI are accustomed to the idea. "Safe interruptibility can be useful to take control of a robot that is misbehaving and may lead to irreversible consequences, or to take it out of a delicate situation, or even to temporarily use it to achieve a task it did not learn to perform or would not normally receive rewards for this."[ 24] As well, it is good to keep in mind that artificial intelligence is not the same as artificial consciousness. Thinking machines may not be sentient machines. Finally, Andrew Ng of Baidu responded to Elon Musk's ASI concerns by noting (in a jab at the entrepreneur's ambitions for colonizing the red planet) it would be "like worrying about overpopulation on Mars when we have not even set foot on the planet yet."[ 25] Both Utopian and dystopian visions of AI are based on a projection of the future quite unlike anything history has given us. Yet, even Ray Kurzweil's "law of accelerating returns," as remarkable as it has been has nevertheless advanced at a pace that has allowed for considerable ethical deliberation with appropriate checks and balances applied to various technologies along the way. With time, even if an unforeseen motive somehow began to emerge in an AI we would have the time to reprogram it before it got out of control. That is also the judgment of Alan Winfield, an engineering professor and co-author of the Principles of Robotics, a list of rules for regulating robots in the real world that goes far beyond Isaac Asimov's famous three laws of robotics (which were, in any case, designed to fail as plot devices for science fictional narratives).26 Winfield points out that all of these doomsday scenarios depend on a long sequence of big ifs to unroll sequentially: "If we succeed in building human equivalent AI and if that AI acquires a full understanding of how it works, and if it then succeeds in improving itself to produce super-intelligent AI, and if that super-AI, accidentally or maliciously, starts to consume resources, and if we fail to pull the plug, then, yes, we may well have a problem. The risk, while not impossible, is improbable."[ 27]

#### Infectious diseases don’t cause extinction

Owen Cotton-Barratt 17, et al, PhD in Pure Mathematics, Oxford, Lecturer in Mathematics at Oxford, Research Associate at the Future of Humanity Institute, 2/3/2017, Existential Risk: Diplomacy and Governance, https://www.fhi.ox.ac.uk/wp-content/uploads/Existential-Risks-2017-01-23.pdf

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

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

#### No order impact.

Ikenberry 18 G. John Ikenberry, International Relations Professor at Princeton. [Why the Liberal World Order Will Survive, Roundtable: Rising Powers and the International Order, Ethics & Affairs, 32(1), p. 17–29]//BPS

Self-Reinforcing Characteristics of Liberal International Order The United States has dominated the post-war international order. It is an order built on asymmetries of power; it is hierarchical. But it is not an imperial system. It is a complex and multilayered political formation with liberal characteristics— openness and rules-based principles—that generate incentives and opportunities for other states to join and operate within it. Four characteristics reinforce and draw states into the order. First, it has integrative tendencies. Over the last century states with diverse characteristics have found pathways into its “ecosystem” of rules and institutions. Germany and Japan found roles and positions of authority in the post-war order; and after the cold war many more states—in Eastern Europe, Asia, and elsewhere—have joined its economic and security partnerships. It is the multilateral logic of the order that makes it relatively easy for states to join and rise up within the order. Second, the liberal order offers opportunities for leadership and shared authority. One state does not “rule” the system. The system is built around institutions, and this provides opportunities for shifting and expanding coalitions of states to share leadership. Formal institutions, such as the IMF and World Bank, are led by boards of directors and weighted voting. Informal groups, such as the G-7 and G-20, are built on principles of collective governance. Third, the actual economic gains from participation within the liberal order are widely shared. In colonial and informal imperial systems, the gains from trade and investment are disproportionately enjoyed by the lead state. In the existing order, the “profits of modernity” are distributed across the system. Indeed, China’s great economic ascent was only possible because the liberal international order rewarded its pursuit of openness and trade-oriented growth. For the same reason, states in all regions of the world have made systematic efforts to integrate into the system. Finally, the liberal international order accommodates a diversity of models and strategies of growth and development. In recent decades the Anglo-American model of neoliberalism has been particularly salient. But the post-war system also provides space for other capitalist models, such as those associated with European social democracy and East Asian developmental statism. The global capitalist system might generate some pressures for convergence, but it also provides space for the coexistence of alternative models and ideologies. These aspects of the liberal international order create incentives and opportunities for states to integrate into its core economic and political realms. The order allows states to share in its economic spoils. Its pluralistic character creates

possibilities for states to “work the system”—to join in, negotiate, and maneuver in ways that advance their interests. This, in turn, creates an order with expanding constituencies that have a stake in its continuation. Compared to imperial and colonial orders of the past, the existing order is easy to join and hard to overturn.

# 2NC

## T --- BTPS

### 2NC --- O/V

#### AND Substantial also means all --- Oxford and blacks law agree

Lorne Slotnick 15, Chair of the Arbitration Board, Labour Arbitration Awards has issued the following decision: IN THE MATTER OF AN ARBITRATION BETWEEN: St. Joseph’s Healthcare Hamilton -and- Canadian Union of Public Employees Local 786, Labour Arbitration Awards: St. Joseph’s Healthcare Hamilton v Canadian Union of Public Employees, Local 786, 2015 CanLII 18978 (ON LA), 2015

The union points to the definition of “similar” in the online Oxford English Dictionary as “having a marked resemblance or likeness; of a like nature or kind,” and in Black’s Law Dictionary as “nearly corresponding; resembling in many respects; somewhat like; having a general likeness, although allowing for some degree of difference.” In addition, “substantially” is defined in the Oxford English Dictionary as “in all essential characters or features; in essentials, to all intents and purposes, in the main,” and in Black’s [Law Dictionary] as “essentially; without material qualification; in the main; in substance; materially; in a substantial manner.” The fact that the collective agreement uses both words together must mean that the two shift rotations have to be essentially corresponding or resembling each other in all essential respects for the conditions to be met, the union argues.

### 2NC --- AT: by atleast

#### 2. By at least implies that the plan must expand law so as to increase prohibitions, not that all expansions of law *a priori* qualify as increased prohibitions

William H. Hanson, “The Formal-Structural View of Logical Consequence: A Reply to Gila Sher”The Philosophical Review , Apr., 2002, Vol. 111, No. 2 (Apr., 2002), pp. 243-258, Duke University Press on behalf of Philosophical Review

3. Logic, the A Priori, and the Empirical

The other major criticism I made in my 1997 of Sher's work was that FS violates the apriority criterion of my pretheoretic account of logical consequence. This is because under FS there are arguments we can know to be valid or invalid a posteriori but not a priori. As an example I gave an argument involving the quantifier 'Q\*', which I defined as behaving exactly like 'all' in models with domains of cardinality > n, but like 'at least one' in models with domains of cardinality < n, where the value of n is an integer we can know a posteriori but not a priori. (In my example n is the least number of whole seconds in which, up through the end of the twenty-first century, a human runs a mile.)9 The argument in question is:

(Q\*x) (Dog(x) → Black(x))

(Q\*x) Dog(x)

∴ (Q\*x) Black(x)

Since we know that n > 3, we know the argument is invalid, but we can't know this a priori. Yet 'Q\*' counts as a logical term according to FS, so FS violates my apriority criterion.10 [\*\*start footnote 10\*\* 10 That the operator expressed by 'Q\*' satisfies Sher's criterion for formal operators can be seen by consulting the account given in section 1 of how that criterion applies to unary quantifiers. Specifically, since for any two models with domains of the same car- dinality the operator expressed by 'Q\*' functions either as the operator expressed by 'all' in both models or as the operator expressed by 'at least one' in both, the operator expressed by 'Q\*' is formal for the same reasons these other two operator.\*\*end footnote 10\*\*]

This violation should be of concern to Sher, since my criterion is drawn directly from Tarski, whose work is in many ways the foundation of hers. Tarski wrote:

Certain considerations of an intuitive nature will form our starting-point. Consider any class K of sentences and a sentence X which follows from the sentences of this class. From an intuitive standpoint it can never happen that both the class K consists only of true sentences and the sentence X is false. Moreover, since we are concerned here with the concept of logical, i.e., formal, consequence, and thus with a relation which is to be uniquely determined by the form of the sentences between which it holds, this rela- tion cannot be influenced in any way by empirical knowledge, and in par- ticular by knowledge of the objects to which the sentence X or the sentences of the class K refer. The consequence relation cannot be affected by replacing the designations of the objects referred to in these sentences by the designations of any other objects. (1936, 414-15)

In formulating my apriority criterion, I was influenced by this passage, especially by the last part of the penultimate sentence: "[the logical consequence] relation cannot be influenced in any way by empirical knowledge, and in particular by knowledge of the objects to which the sen- tence Xor the sentences of the class Krefer" (emphasis added). This is, of course, somewhat obscure. Still it sounds compatible with, and I think even suggests, the standard I adopted, namely, that knowledge of whether the logical consequence relation holds in any particular case is knowledge that can be had a priori, if at all. Logic has long been held to be free, in some fundamental way, of all things empirical, and I believe many logicians have thought that logic achieves this freedom by meeting this (or a similar) standard.

### 2NC --- Limits / AT: Overlimiting

#### The plan explodes limits – the C/I excludes nothing so the plan could be firm specific there are

#### 158 sub industries

Dodonov, 20 (Vitalii Dodonov, Product owner @ Vhinny, 5-16-2020, accessed on 9-2-2021, Towards Data Science, "How Many Industries are There? - Towards Data Science", https://towardsdatascience.com/how-many-industries-are-there-74890132581b)

Sector vs. Industry Unlike conventional misconception, what many people call “an industry” is in fact called “a sector”. There are 11 sectors based on the Global Industry Classification Standard (GICS): Energy Materials Industrials Consumer Discretionary Consumer Staples Health Care Financials Information Technology Communication Services Utilities Real Estate These sectors are broken down further into 24 industry groups, 69 industries and 158 sub-industries.

#### 27 million private firms

Biery, 13 (Mary Ellen Biery, research specialist at Sageworks, a financial information company, 5-26-2013, accessed on 9-2-2021, Forbes, "4 Things You Don't Know About Private Companies", <https://www.forbes.com/sites/sageworks/2013/05/26/4-things-you-dont-know-about-private-companies/?sh=371cab55291a)//babcii>

Here are four things you might not know about private companies:

Private firms dominate. Out of the 27 million firms in the U.S., nearly all are privately held. Even among the 5.7 million firms with employees, less than 1 percent of them have shares listed on a U.S. exchange. And private firms are a growing majority of U.S. firms. The number of companies listed on U.S. exchanges has fallen from more than 7,000 in 2000 to fewer than 5,000 in 2012, according to statistics from the World Federation of Exchanges.

## 2NC --- CP

## A1

### 2NC --- No smart cities !

#### No natural limits to consumption

\*biod, nitrogen, phosphorous, ag, chemicals, pollution, waste, and govs check black swans

Peter **Kareiva 18**, Institute of the Environment and Sustainability, University of California, Los Angeles. 01/2018, “Existential Risk Due to Ecosystem Collapse: Nature Strikes Back.” Futures, CrossRef, doi:10.1016/j.futures.2018.01.001.

The interesting question is whether any of the planetary thresholds other than CO2 could also portend existential risks. Here the answer is not clear. One boundary often mentioned as a concern for the fate of global civilization is biodiversity (Ehrlich & Ehrlich, 2012), with the proposed safety threshold being a loss of greater than .001% per year (Rockström et al., 2009). There is little evidence that this particular .001% annual loss is a threshold—and it is hard to imagine any data that would allow one to identify where the threshold was (Brook et al., 2013; Lenton & Williams, 2013). A better question is whether one can imagine any scenario by which the loss of too many species leads to the collapse of societies and environmental disasters, even though one cannot know the absolute number of extinctions that would be required to create this dystopia. While there are data that relate local reductions in species richness to altered ecosystem function, these results do not point to substantial existential risks. The data are small-scale experiments in which plant productivity, or nutrient retention is reduced as species number declines locally (Vellend, 2017), or are local observations of increased variability in fisheries yield when stock diversity is lost (Schindler et al., 2010). Those are not existential risks. To make the link even more tenuous, there is little evidence that biodiversity is even declining at local scales (Vellend et al 2017; Vellend et al., 2013). Total planetary biodiversity may be in decline, but local and regional biodiversity is often staying the same because species from elsewhere replace local losses, albeit homogenizing the world in the process. Although the majority of conservation scientists are likely to flinch at this conclusion, there is growing skepticism regarding the strength of evidence linking trends in biodiversity loss to an existential risk for humans (Maier, 2012; Vellend, 2014). Obviously if all biodiversity disappeared civilization would end—but no one is forecasting the loss of all species. It seems plausible that the loss of 90% of the world’s species could also be apocalyptic, but not one is predicting that degree of biodiversity loss either. Tragic, but plausible is the possibility our planet suffering a loss of as many as half of its species. If global biodiversity were halved, but at the same time locally the number of species stayed relatively stable, what would be the mechanism for an end-of-civilization or even end of human prosperity scenario? Extinctions and biodiversity loss are ethical and spiritual losses, but perhaps not an existential risk. What about the remaining eight planetary boundaries? Stratospheric ozone depletion is one—but thanks to the Montreal Protocol ozone depletion is being reversed (Hand, 2016). Disruptions of the nitrogen cycle and of the phosphorous cycle have also been proposed as representing potential planetary boundaries (one boundary for nitrogen and one boundary for phosphorous). There are compelling data linking excesses in these nutrients to environmental damage. For example, over-application of fertilizer in Midwestern USA has led to dead zones in the Gulf of Mexico. Similarly, excessive nitrogen has polluted groundwater in California to such an extent that it is unsuitable for drinking and some rural communities are forced to drink bottled water. However, these impacts are local. At the same time that there is too much N loading in the US, there is a need for more N in Africa as a way of increasing agricultural yields (Mueller et al., 2012). While the disruption of nitrogen and phosphorous cycles clearly perturb local ecosystems, end-of-the-world scenarios seem a bit far-fetched. Another hypothesized planetary boundary entails the conversion of natural habitats to agricultural land. The mechanism by which too much agricultural land could cause a crisis is unclear—unless it is because land conversion causes so much biodiversity loss that is species extinctions that are the proximate cause of an eco-catastrophe. Excessive chemical pollution and excessive atmospheric aerosol loading have each been suggested as planetary boundaries as well. In the case of these pollution boundaries, there are well-documented mechanisms by which surpassing some concentration of a pollutant inflicts severe human health hazards. There is abundant evidence linking chemical and aerosol pollution to higher mortality and lower reproductive success in humans, which in turn could cause a major die-off. It is perhaps appropriate then that when Hollywood envisions an unlivable world, it often invokes a story of humans poisoning themselves. That said, it is doubtful that we will poison ourselves towards extinction. Data show that as nations develop and increase their wealth, they tend to clean up their air and water and reduce environmental pollution (Flörke et al., 2013; Hao & Wang, 2005). In addition, as economies become more circular (see Mathews & Tan, 2016), environmental damage due to waste products is likely to decline. The key point is that the pollutants associated with the planetary boundaries are so widely recognized, and the consequences of local toxic events are so immediate, that it is reasonable to expect national governments to act before we suffer a planetary ecocatastrophe.

### 2NC --- no biod !

#### Tech solves

Stossel 7 Journalist, winner of the Peabody Award, anchors ABC News, John, “Environmental Alarmists Have It Backwards”, http://www.realclearpolitics.com/articles/2007/04/how\_about\_economic\_progress\_da.html

Watching the media coverage, you'd think that the earth was in imminent danger -- that human life itself was on the verge of extinction. Technology is fingered as the perp. Nothing could be further from the truth. John Semmens of Arizona's Laissez Faire Institute points out that Earth Day misses an important point. In the April issue of The Freeman magazine, Semmens says the environmental movement overlooks how hospitable the earth has become -- thanks to technology. "The environmental alarmists have it backwards. If anything imperils the earth it is ignorant obstruction of science and progress. ... That technology provides the best option for serving human wants and conserving the environment should be evident in the progress made in environmental improvement in the United States. Virtually every measure shows that pollution is headed downward and that nature is making a comeback." (Carbon dioxide excepted, if it is really a pollutant.) Semmens describes his visit to historic Lexington and Concord in Massachusetts, an area "lush with trees and greenery." It wasn't always that way. In 1775, the land was cleared so it could be farmed. Today, technology makes farmers so efficient that only a fraction of the land is needed to produce much more food. As a result, "Massachusetts farmland has been allowed to revert back to forest." Human ingenuity and technology not only raised living standards, but also restored environmental amenities. How about a day to celebrate that? Yet, Semmens writes, the environmental movement is skeptical about technology and is attracted to three dubious principles: sustainable development, the precautionary principle, and stakeholder participation. The point of sustainable development, Semmens says, "is to minimize the use of nonrenewable natural resources so there will be more left for future generations." Sounds sensible -- who is for "unsustainable" development? But as the great economist Julian Simon often pointed out, resources are manmade, not natural. Jed Clampett cheered when he found oil on his land because it made him rich enough to move to Beverly Hills. But his great-grandfather would have cursed the disgusting black gunk because Canadian geologist Abraham Gesner hadn't yet discovered that kerosene could be distilled from it. President Bush chides us for our "addiction to oil." But under current conditions, using oil makes perfect sense. Someday, if we let the free market operate, someone will find an energy source that works better than oil. Then richer future generations won't need oil. So why deprive ourselves and make ourselves poorer with needless regulation now?

## A2

### 2NC --- no disease !

#### Their evidence assumes a level of virulence that has literally never occurred

Wendy Orent 15, anthropologist and freelance science writer whose work has appeared in The Washington Post, The LA Times, The New Republic, Discover, and The American Prospect, instructor in science journalism @ Emory, Ignore predictions of lethal pandemics and pay attention to what really matters, LA Times, 1/3/15, http://www.latimes.com/opinion/op-ed/la-oe-orent-pandemic-hysteria-20150104-story.html

Prophets of doom have been telling us for decades that a deadly new pandemic — of bird flu, of SARS or MERS coronavirus, and now of Ebola — is on its way. Why are we still listening? If you look back at the furor raised at many distinguished publications — Nature, Science, Scientific American, National Geographic — back in, say, 2005, about a potential bird flu (H5N1) pandemic, you wonder what planet they were on. Nature ran a special section titled — “Avian flu: Are we ready?” — that began, ominously, with the words “Trouble is brewing in the East” and went on to present a mock aftermath report detailing catastrophic civil breakdown. Robert Webster, a famous influenza virologist, told ABC News in 2006 that “society just can't accept the idea that 50% of the population could die. And I think we have to face that possibility.” Public health expert Michael T. Osterholm of the University of Minnesota, at a meeting in Washington of scientists brought together by the Institute of Medicine, warned in 2005 that a post-pandemic commission, like the post-9/11 commission, could hold “many scientists … accountable to that commission for what we did or didn't do to prevent a pandemic.” He also predicted that we could be facing “three years of a given hell” as the world struggled to right itself after the deadly pandemic. And Laurie Garrett, author of what must be the urtext for pandemic predictions, her 1994 book “The Coming Plague,” intoned in Foreign Affairs that “in short, doom may loom.” Although she followed that with “But note the may,” the article went on to paint a terrifying picture of the avian flu threat nonetheless. And such hysteria still goes on: Whether it's over the MERS coronavirus, a whole alphabet of chicken flu viruses, a real but not very deadly influenza pandemic in 2009, or a kerfuffle like the one in 2012 over a scientist-crafted ferret flu that also was supposed to be a pandemic threat. Along the way, virologist Nathan Wolfe published “The Viral Storm: the Dawn of a New Pandemic Age,” and David Quammen warned in his gripping “Spillover” that some new animal plague could arise from the jungle and sweep across the world. And now there's Ebola. Osterholm, in a widely read op-ed in the New York Times in September, wrote about the possibility that scientists were afraid to mention publicly the danger they discuss privately: that Ebola “could mutate to become transmissible through the air.” “The Ebola epidemic in West Africa has the potential to alter history as much as any plague has ever done,” he wrote. And Garrett wrote in Foreign Policy, “Attention, World: You just don't get it.” She went on to say, “Wake up, fools,” because we should be more frightened of a potential scenario like the one in the movie “Contagion,” in which a lethal, fictitious pandemic scours the world, nearly destroying civilization. But there were fewer takers this time. Osterholm's claims about Ebola going airborne were discounted by serious scientists, and Garrett seemingly retracted her earlier hysteria about Ebola by claiming that, after all, evolution made such spread unlikely. The scientific world has changed since 2005. Now, most scientists understand that there are significant physical and evolutionary barriers to a blood- and fluid-borne virus developing airborne transmission, as Garrett has acknowledged. Though Ebola virus has been detected in human alveolar cells, as Vincent Racaniello, virologist at Columbia University, explained to me, that doesn't mean it can replicate in the airways enough to allow transmission. “Maybe … the virus can get in, but can't get out. Like a roach motel,” wrote Racaniello in an email. H5N1, we understand now, never went airborne because it attached only to cell receptors located deep in human lungs, and could not, therefore, be coughed or sneezed out. SARS, or severe acute respiratory syndrome, caused local outbreaks after multiple introductions via air travel but spread only sluggishly and mostly in hospitals. Breaking its chains of transmission ended the outbreak globally. There probably will always be significant barriers preventing the easy adaptation of an animal disease to the human species. Furthermore, Racaniello insists that there are no recorded instances of viruses that have adapted to humans, changing the way they are spread. So we need to stop listening to the doomsayers, and we need to do it now. Predictions of lethal pandemics have — since the swine flu fiasco of 1976, when President Ford vowed to vaccinate “every man, woman and child in the United States” — always been wrong. Fear-mongering wastes our time and our emotions and diverts resources from where they should be directed — in the case of Ebola, to the ongoing tragedy in West Africa. Americans have all but forgotten about Ebola now, because most people realize it isn't coming to a school or a shopping mall near you. But Sierra Leoneans and Liberians go on dying.

# 1NR

## 2NC --- DA --- Cyber

### 2NC --- O/V

**Military escalation is guaranteed**

**Sagan and Weiner ’21** – Stanford Professors [Scott D.; Caroline S.G. Monroe professor of political science and senior fellow at the Center for International Security and the Freeman Spogli Institute at Stanford University; Allen S.; senior lecturer in law and director of the program in international and comparative law at Stanford Law School; 7-9-2021; "The U.S. says it can answer cyberattacks with nuclear weapons. That’s lunacy."; The Washington Post; https://www.washingtonpost.com/outlook/2021/07/09/cyberattack-ransomware-nuclear-war/; accessed 8-15-2021]

Under current U.S. nuclear doctrine, developed during the Trump administration, the president would be given the **military option** to launch nuclear weapons at Russia, China or North Korea if that country was **determined** to be behind such an attack.

That’s because in 2018, the Trump administration **expanded the role** of nuclear weapons by declaring for the first time that the United States would **consider** nuclear retaliation in the case of “**significant** non-nuclear strategic attacks,” including “attacks on the U.S., allied, or partner civilian population or infrastructure.” The same principle could also be used to justify a nuclear response to a devastating biological weapons strike.

But our analysis suggests that using nuclear weapons in response to biological or cyberattacks would be illegal under international law in virtually all circumstances. Threatening an illegal nuclear response weakens deterrence because the threat lacks inherent credibility. Perversely, this policy could also wind up **committing** a president to a nuclear attack if **deterrence fails**. While the American public would indeed be likely to want vengeance after a destructive enemy assault, the law of armed conflict requires that some military options be taken off the table. Nuclear retaliation for “significant non-nuclear strategic attacks” is one of them.

The Biden administration is now conducting its **own review** of the U.S. nuclear posture. The 2018 Trump change is an **urgent candidate** for reevaluation, but people have generally ignored it up to now. As officials work on this process, they have the chance to take full account of what could be called the “nuclear law revolution” — a growing recognition that international-law restrictions on warfare, and especially those that protect civilians, apply even to nuclear war.

#### Turns advantage one --- Cyber-attacks destroy start up dynamism and puts companies out of business

Steinberg, 20 (Scott Steinberg, 3-9-2020, accessed on 2-27-2022, CNBC, "Cyberattacks now cost companies $200,000 on average, putting many out of business", <https://www.cnbc.com/2019/10/13/cyberattacks-cost-small-companies-200k-putting-many-out-of-business.html)//Babcii>

“Modern IT infrastructures are more **complex and sophisticated** than ever, and the amount of virtual ground that we’ve got to safeguard has also grown exponentially,” explains Jesse Rothstein, CTO of online security provider ExtraHop. “From mobile to desktop interactions, cybercriminals can launch thousands of digital attacks designed to compromise your operations at every turn, only one of which ever needs to connect to cause serious disruption.”

As a result, he says, it’s guaranteed that virtually every modern organization’s high-tech perimeters will eventually be breached. This being the case, for small business owners it’s no longer **a matter of considering if security threats will arise**, but rather thinking in terms of when.

Worse, the **consequences of cyberattacks continue to grow**, with digital incidents now [costing businesses of all sizes $200,000 on average](https://www.hiscox.com/documents/2019-Hiscox-Cyber-Readiness-Report.pdf)[,](file:///D:\reviews\CNBC%202019\How%20to%20protect%20your%20business%20from%20hackers%20(Steinberg)%20Small%20business%20is%20just%20as%20vunerable%20to%20cyberattack%20as%20big%20business%20and%20the%20number%20of%20small%20organizations%20targeted%20this%20year%20has%20risen%20to%2061%25,%20according%20to%20Hiscox%20Cyber%20Readiness%20Report.%20As%20attacks%20rise%20more%20firms%20are%20failing%20the%20cyber%20readiness%20test.%20Unfortunately,%20the%20cost%20of%20each%20single%20incident%20is%20also%20rising,%20jumping%20from%20$34,000%20to%20$200,000%20this%20year.%20Experts%20recommend%20cyberinsurance%20and%20AI%20technology%20that%20can%20help%20thwart%20hackers.%20https:\smallbiztrends.com\2019\09\rise-in-cyber-attacks-small-business.html) according to insurance carrier Hiscox. **Sixty percent**[**go out of business**](https://www.inc.com/joe-galvin/60-percent-of-small-businesses-fold-within-6-months-of-a-cyber-attack-heres-how-to-protect-yourself.html)**within six months of being victimized.**

#### Turns advantage two --- Agencies cease enforcement during crisis's

Anika Dandekar 21, Political Science at University of California, San Diego, “Politics of Antitrust Enforcement: The Influence of Ideology and Party Control on Regulatory Behavior”, Senior Thesis, 3/29/2021, https://polisci.ucsd.edu/undergrad/departmental-honors-and-pi-sigma-alpha/A.Dandekar\_Senior-Honors-Thesis.pdf

1.3.3 Bureaucratic Approach

Some scholars have tried to explain varying antitrust by changing makeup or preferences of regulatory agencies themselves.

Some suggest that the agencies respond to external factors. Amacher et al. (1985) examined FTC enforcement of the Robinson- Patman Act and found that it was influenced by economic conditions, decreasing during business contractions and increasing during periods of expansion. They suggested that this means "the FTC moves to cushion producer losses" during hard economic times, but transfers "wealth to consumers" during economic upswings. Lewis-Beck (1979) found that while small increases in the division's budget did not reduce anticompetitive behavior, a major increase in the division's budget might significantly stem merger activity because of a "threshold effect”.

### 2NC --- UQ

#### Biden XO solves cyber attacks in the squo, but is reliant on data security and private investment

Williams, 21 (Sahara Williams, engineer, entrepreneur, and small-business advocate, 7-27-2021, accessed on 2-27-2022, The National Law Review, "Biden Executive Order Aims To Fight Off Government, Private Sector Cybersecurity Threats", <https://www.natlawreview.com/article/biden-executive-order-aims-to-fight-government-private-sector-cybersecurity-threats)//Babcii>

In May, President Biden issued [an **ex**ecutive **o**rder](https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/12/executive-order-on-improving-the-nations-cybersecurity/) establishing new guidelines for the United States to “identify, deter, **protect against**, detect, and respond to” **cyber**security threats. The order lays out eight directives for strengthening the nation’s response to cyber threats, **mostly focused on preventive** and **planning measures** but including responsive measures as well.

The president seeks to “lead by example” by guiding the **private sector** on how to best “adapt to the continuously changing **threat environment**” and ensure the products they develop are “built and operate securely.” The order calls for “bold changes and significant investments,” and invites the **private sector** to “**partner** with the Federal Government to foster a more secure cyberspace.”

Impact on Businesses

The order outlines directives for various federal agencies designed to improve security. These directives immediately flow down to government contractors through request for proposal (RFP) guidelines and contract provisions. Under the order, government contractors will need to make a **renewed showing** that they are taking cybersecurity seriously and have taken identifiable steps to **secure** government **data**.

### 2NC --- Link --- Interop

#### It discourages companies from pursuing stronger security defense

**Bolton and Pugh, 22** (Tatyana Bolton and Brandon Pugh, Policy Director, Cybersecurity and Emerging Threats, Policy Counsel, Cybersecurity and Emerging Threats, 1-20-2022, accessed on 2-27-2022, R Street, "The Ignored Aspects of the Senate's Antitrust Effort: Cybersecurity and Privacy - R Street", https://www.rstreet.org/2022/01/20/the-ignored-aspects-of-the-senates-antitrust-effort-cybersecurity-and-privacy/)//Babcii

Bill [authors](https://www.kennedy.senate.gov/public/2021/10/kennedy-klobuchar-grassley-introduce-american-innovation-and-choice-online-act-to-rein-in-big-tech) note, “As dominant digital platforms … increasingly give preference to their own products and services, we must put policies in place to ensure small businesses and entrepreneurs still have the opportunity to succeed in the digital marketplace.” Assuming the bill would actually promote this, **the cost would be high**: broad cybersecurity and data protection **weaknesses**. The manager’s amendment to this bill acknowledges some cybersecurity concerns, but fails to address the main concerns outlined here. On the whole, it is difficult for security experts to encourage resilience and diligence for platforms and networks along with the uptake of strong cybersecurity practices. It is even harder to convince businesses that cyber risk is a business risk, or encourage them to develop products with security in mind. While this is not a strict cybersecurity bill, it adds obstacles and restrains the application of security safeguards by platforms, which creates adverse incentives.

This bill would **punish companies with a business model that focuses on security**. From a policy perspective, we should encourage—not discourage—more companies to include more stringent security for all products, especially software that is sold at scale to millions of users. **Forced interoperability**, narrow requirements and obstacles for security updates through requirements for affirmative defense, as well as patchy security exclusions, **create a recipe for weaker cybersecurity** and should be reconsidered, amended or removed before any further movement on this legislation.

In terms of data security and protection, any provisions should be considered separately in a comprehensive bill, not as a portion of an antitrust bill. This is a challenging area with many tradeoffs that need to be carefully considered to achieve a suitable balance between consumer protection and business function, and an **anti-trust bill is not the place** to debate or determine these tradeoffs.

#### Forced transfers undermine cyber security --- Specifically new entrants will spur massive vulnerabilities

**CCIA, 21** (CCIA, The Computer and Communications Industry Association is an international non-profit advocacy organization based in Washington, DC, United States which represents the information and communications technology industries., 2021, accessed on 2-26-2022, Ccianet, "NATIONAL SECURITY ISSUES POSED BY HOUSEANTITRUST BILLS", https://www.ccianet.org/wp-content/uploads/2021/09/CCIA-KS-NatSec-White-Paper.pdf)//Babcii

Risking Misuse of U.S. Data and Intellectual Property by Foreign Actors Both H.R. 3816 and H.R. 3849 include a number of sweeping provisions on data portability, **interoperability**, and access to U.S. technical infrastructure. These broadly drafted provisions could have the unintended consequence of requiring U.S. online **platforms** to share sensitive or protected user **data and IP** with other companies, and could lead to forced IP transfers to foreign competitors and foreign entities controlled by U.S. adversaries. For example, the interoperability requirements in H.R. 3816 would force U.S. companies to allow foreign rivals to “connect to any product or service” and “access or interoperate with … platform, operating system, hardware and software features” offered by U.S. companies. This requirement to grant competitors direct access to U.S. **digital infrastructure** – including app stores, marketplaces, search engines, and other interfaces – is not accompanied by meaningful security requirements or safeguards regarding the scope of that access. This could entitle foreign companies, including those that are beholden to our adversaries, to **seek access to source code** associated with U.S. platforms, and to U.S. users’ data and behavioral insights via those platforms. Reducing the Effectiveness of Threat Information to Law Enforcement Major U.S. technology companies and online platforms work with U.S. law enforcement, military, and intelligence agencies to combat a variety of national security and criminal threats. The head of U.S. Cyber Command in 2020 discussed the importance of the U.S. government’s engagement with the tech industry, noting that “many leading U.S. companies find themselves on the frontlines of competition in cyberspace. Working collaboratively where we can allows us to improve collective defense and stay a step ahead of our adversaries.” The nature and scale of these platforms gives them a broad and deep view of the **threat landscape**. This allows those companies to secure U.S. data and infrastructure against foreign threats with an agility, speed and thoroughness that is not feasible for smaller, **fragmented companies** that have limited apertures. The critical missions of national security and law enforcement agencies, of course, also benefit from this security proficiency. Not only are the threats more rapidly detected and mitigated, but trend and threat analysis can be quickly shared with these agencies in multiple matured fora that have evolved over the last 10 years. This also means that government agencies can more effectively and confidently use the legal tools available to investigate threats posed by hostile foreign adversaries, including terrorists, proliferators, spies, and cyber actors. At a moment in history when it has never been more clear that cyber threats are very real and can impact the daily operation of the economy as well as essential services, the provisions in the House bills that seek to reduce the size, scale, and integration of a handful of leading U.S. tech firms, especially H.R. 3825 and H.R. 3816, could significantly hinder the ability of the agencies to fulfill their missions to defend against such threats. A scattered group of smaller, isolated platforms with scant perspective of the threats they each face, and fewer resources, will be unable to engage in the same level of threat detection, investigation, mitigation and information sharing. The loss to U.S. government efforts will be further significantly compounded if, as should be expected, foreign companies step in to take at least some of customers previously served by U.S. companies. Not only will these companies be less inclined to work with U.S. agencies, they will be outside the scope of statutory legal authorities granted to U.S. agencies to compel the production of information.

#### Specifically, forced interop side loading creates vulnerabilities in centralized systems

Brooks, 22 (Chuck Brooks, rooks is president of Brooks Consulting International, and is a professor in the graduate Cyber Risk Management program at Georgetown University., 2-1-2022, accessed on 2-26-2022, Barrons, "New Antitrust Legislation Could Open the Door to Cybersecurity Problems", https://www.barrons.com/articles/new-antitrust-legislation-could-open-the-door-to-cybersecurity-problems-51643664301)//Babcii

Technically speaking, companies’ security concerns aren’t off base. It is quite possible for malware, especially ransomware now commonly used by hackers, to exploit any walled garden operating system. **Nothing is invulnerable**. As we have witnessed in a series of high-profile hacks during the past year, including Solar Winds and Colonial Pipeline, **cybersecurity** is more of a **quest** than a **certainty**. Adversaries are always seeking **vectors** to **compromise targets** and are now automating attacks using advanced technologies such as **a**rtificial **i**ntelligence and machine learning to find vulnerabilities and execute breaches.

Installing any software application nowadays poses a cybersecurity threat from undiscovered **misconfigurations, zero day** vulnerabilities **and** clever **spoofs**. Adding unverified third party access and **interoperability** to operating system platforms on both Google and [Apple](https://www.barrons.com/market-data/stocks/aapl) AAPL+1.30%  products would make centrally orchestrating security and preventing downloading of malicious apps **a** more **difficult task**.

The interoperability focus of allowing third party apps to be sideloaded is a viable **cybersecurity concern**. The term sideloading means adding an application that has not been approved by the developer of the device’s operating system. Such apps can be cyber risky, especially if they are not been rigorously vetted and penetration tested by the developers and the platform host. Sideloaded apps may contain code that can grant hacker privileges that can be used to steal personal data or download malware to devices.

Many of the applications that would be introduced by small- and medium-sized companies in an open system would lack the proprietary and advanced cybersecurity tools and **solutions** used by larger tech companies that have developed software and processes to identify and discover gaps that can leave data and user privacy insecure. These larger tech firms have already made considerable investment in medium and small companies that work within their networks as partners. According to the research firm CB Insights, big tech companies [invested approximately $2.5 billion](https://www.cbinsights.com/research/facebook-amazon-microsoft-google-apple-cybersecurity/) into supporting cybersecurity companies that develop products which protect everything from login credentials, credit card information, and social security numbers.

### 2NC --- AT --- No link

#### Just in case --- No DMA in the Squo

Espinoza 10-10 (Javier Espinoza - FT’s EU Correspondent covering competition and digital policy from Brussels, 10-10-21, "Fighting in Brussels bogs down plans to regulate Big Tech," Financial Times, <https://www.ft.com/content/7e8391c1-329e-4944-98a4-b72c4e6428d0> accessed: 11-5-21) //bp

A frank intervention in the European parliament last month captured the frustrations that are blunting the EU’s attempts to curb the powers of Big Tech. Last year, the EU unveiled a radical blueprint for tech regulation that would put onerous responsibilities on the likes of Google, Facebook and Amazon to clean up their platforms and ensure fair competition. But since then, the package of measures has become bogged down in the European parliament, and now risks being watered down and heavily delayed. There are even fears in Brussels that the new rules will not be in place before Margrethe Vestager, the EU’s competition and digital policy chief, leaves her post in three years. “It sounded like we had agreed but that is not the case . . . at all. We are a long way from having a common position on this,” Evelyne Gebhardt, a German MEP, said in exasperation during last month’s debate. The slow progress also gives Big Tech more time to fully capture key sectors of the economy. “If we wait too long some markets will not be able to be repaired any more. This is about protecting consumers and small companies in Europe. We need to get this done as soon as possible,” said one person directly involved in the parliamentary debate. The two proposed bills are the Digital Markets Act (DMA), which is designed to force the so-called gatekeepers, such as Google, to ensure a level playing field on their vast online platforms, and the Digital Services Act (DSA), which clarifies the responsibilities of Big Tech for keeping illegal content off their services. But the package has split MEPs along a number of fronts. The biggest fight is over which companies should be captured by the regulation. Andreas Schwab, the lead MEP representing the powerful EPP Group in the parliament, has been pushing for the legislation to focus only on the largest platforms. But his rivals want the legislation to be wider in scope and target a number of digital services. “If the threshold is too low, it would also capture a number of traditional companies. But this law is not for the general economy but it is specifically to target digital gatekeepers that are shutting down markets,” Schwab told the Financial Times. Under his proposals, only companies with a market value in excess of €80bn would fall under the new laws. Schwab also wants to target solely the core digital services of each company, for example, targeting only Google’s search and advertising business. But the Socialists & Democrats (S&D), the second-largest political group in the European parliament, want to include other types of digital services, such as video streaming, music streaming, mobile payments and cloud services. “If we only go after five companies this won’t fix the problem,” said the Dutch MEP Paul Tang, who said companies worth more than €50bn should be regulated, a threshold that would also capture the Netherlands-based Booking.com, Germany’s SAP and Airbnb. “I fear new gatekeepers will rise instantly once you have dealt with Google and the rest. We need the legislation to be future proof,” Tang said. “We have waited more than 20 years to reform the rules of the internet and so we will need to make it strong enough for the upcoming 20 years.” He also said his party believed the legislation should go after those platforms that offer more than one service because “otherwise Big Tech will know how to bypass the laws with their army of expensive lawyers and this will be a missed opportunity”. Schwab, who has been quite vocal against Google’s business model, said too broad a focus would water down the EU’s ability to tackle the biggest problems. “We risk having a law that wants to cover everything and achieves nothing. If this happens, it will be a great win for Google and other big tech companies,” he said. The impasse will not be easily solved. “Everyone has a hard position and nobody is willing to move and compromise,” said a person involved in the debate. Some remain hopeful that a solution will emerge before EU states, the European Commission and the parliament gather for talks early next year, and before France, which holds the rotating presidency of the EU in 2022, heads into presidential elections in April. A meeting last week between all political parties aimed to bridge some of the gaps. Separately, MEPs are also fighting over the obligations large platforms should be submitted to. In line with the commission’s proposals, Schwab wants users to give consent over whether their data can be combined across services, for example between Google’s Gmail and YouTube. The socialists want this practice banned. The S&D is also pushing for the new rules to force Big Tech to prove that acquisitions of small businesses are not harming the market or block them from buying smaller rivals, a measure that Schwab considers too extreme. It also wants a ban on the controversial practice of targeting users with ads, but Schwab opposes this. Meanwhile, EU states are also vying to influence the outcome of the process. France wants individual states to have more power to fine big tech companies if they do not clean up their platforms. Ireland and Luxembourg, where several big tech companies are based, prefer the status quo. Under the current rules, only countries where large tech groups are headquartered have the power to impose onerous fines and force platforms to remove illegal content. “This is the main fight on the DSA that risks derailing it,” said one person with knowledge of the negotiations.

### 2NC --- AT --- FTC expertise

#### 2. The FTC is WORSE for cyber because it requires companies go through their bureaucracy to innovate --- Our evidence is specific to the bill the plan is based on

\* This evidence cites the Access Act which is the bill the plan is based on

Bolton, 21 (Tatyana Bolton, Policy Director, Cybersecurity and Emerging Threats, 11-13-2021, accessed on 2-27-2022, R Street, "Security in Antitrust: Implications of Two House Bills - R Street", <https://www.rstreet.org/2021/11/13/security-in-antitrust-implications-of-two-house-bills/>)//Babcii

Over the past several months, Congress has identified and prioritized the need to address what they see as unregulated behavior in large tech companies. By taking a look at two of the House bills which address **antitrust regulation**, this explainer analyzes sections which we believe will have detrimental, **unintended**, third-order **effects on cybersecurity**. Security at the pace of **bureaucracy is anathema** to the growth of a cybersecurity mindset and improved cybersecurity. Therefore, given the cybersecurity ramifications of these provisions, we recommend amending or removing existing language to address these concerns.

The analysis focuses squarely on the cybersecurity and data protection concerns of the identified provisions, and does not address the raging debate on the merits of the antitrust proposals more broadly, which R Street has come out against.

Rep. David Cicilline’s (D-R.I.) American Choice and Innovation Online Act (HR3816)

Introduced in the House of Representatives on June 11, 2021, the American Choice and Innovation Online Act aims to ban discriminatory conduct by covered platforms.

**\*Graph omitted\***

Rep. Mary Gay **Scanlon’s** (D-Pa.) Augmenting Compatibility and Competition by Enabling Service Switching (**ACCESS) Act** of 2021 (HR3849)

Introduced in the House of Representatives on June 11, 2021, the Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act of 2021 aims to promote competition, lower entry barriers, and reduce switching costs for consumers and businesses online.

**\*Graph omitted\***

These two bills, among the other antitrust bills that have been introduced, have three of the same challenges. They try to address antitrust concerns, but by doing so, they **undermine** the security of the networks the covered platforms control. First, they require more data to be shared and interoperable, opening up new and undetermined avenues for security threats and **data leaks** through unverified third parties. Second, as they require **interoperability** with third parties, they restrict or reduce the ability of entities themselves to use **data** available across their own platforms to create cheaper, more **effective** solutions for their **customers**. Third, these provisions include unacceptable obstacles to security **improvements** through conditioning updates and patches **on FTC approval** prior to implementation. Lastly, provisions in these bills impinge on the work of data security and privacy experts who are making strides to improve security through comprehensive legislation, and may be counterproductive to overarching data security goals. Unfortunately, Sen. Amy Klobuchar (D-Minn.)’s American Innovation and Choice Online Act (S. 2992) takes a similar guilty-until-innocent approach, which mentions security in only one of seven prohibited practices and would have much the same chilling effect on security as the House bills.

Saying nothing of the debates on the merits of the antitrust arguments, these bills create significant challenges to improving the **cybersecurity** and data security and privacy of users and networks. At a minimum, these provisions should be amended or removed as the House debates these bills.

### 2NC --- AT --- No !

#### Singular attacks spill out to take out whole systems and collapse the economy and it requires no technical capacity

**Schuermann, 18** (Til Schuermann, Schuermann is a partner in Oliver Wyman’s financial services practice and was a senior vice president at the Federal Reserve Bank of New York during the financial crisis., 9-14-2018, accessed on 2-27-2022, Harvard Business Review, "How a Cyber Attack Could Cause the Next Financial Crisis", https://hbr.org/2018/09/how-a-cyber-attack-could-cause-the-next-financial-crisis)

An attack on a **computer** processing or communications network could cause $50 billion to $**120 billion of economic damage**, a loss ranking somewhere between those of Hurricanes Sandy and Katrina, according to recent estimates. Yet **a much broader and more debilitating attack isn’t farfetched**. Just last month, the Federal Bureau of Investigation issued a warning to banks about a pending large scale attack known as an ATM “cash-out” strike, in which waves of synchronized fraudulent withdrawals drain bank accounts. In July, meanwhile, it was revealed that **hackers** working for Russia had easily penetrated the control rooms of US electric **utilities** and could have caused blackouts.

How might a financial crisis triggered by a cyber attack unfold? A likely scenario would be an attack by a rogue nation or terrorist group on financial institutions or major infrastructure. Inside North Korea, for example, the Lazarus Group, also known as Hidden Cobra, routinely looks for ways to compromise banks and exploit crypto currencies. An attack on a bank, investment fund, custodian firm, ATM network, the interbank messaging network known as SWIFT, or the Federal Reserve itself would represent a direct hit on the financial services system.

Another possibility would be if a so-called hacktivist or “script kiddy” **amateur** were to use malicious programs to launch a cyber attack without due consideration of the consequences. Such an attack could have a chain reaction, causing damage way beyond the **original intent**, because rules, battle norms, and principles that are conventional wisdom in most warfare situations but don’t exist in a meaningful way in the digital arena. For example, in 2016 a **script kiddie** sparked a broad denial-of-service attack impacting Twitter, Spotify, and other well-known internet services as amateurs joined in for mischief purposes.

Whether a major cyber attack is deliberate or somewhat accidental, the **damage could be substantial**. Most of the ATM networks across North America could freeze. Credit card and other payment systems could fail across entire nations, as happened to the VISA network in the UK in June. Online banking could become inaccessible: no cash, no payments, no reliable information about bank accounts. Banks could lose the ability to transact with one another during a critical period of uncertainty. There could be **widespread panic**, albeit temporary.