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Aerojet DA

#### The Lockheed-Aerojet merger will be approved soon because of existing antitrust precedent, but it’s a politicized test of the FTC

Marcus Weisgerber 21, Global Business Editor at Defense One, “Lockheed’s Proposed Aerojet Rocketdyne Purchase Sets Early M&A Test for Biden”, Defense One, 3/21/2021, https://seniordownsizingsolutions.com/rs1kstuq/frank-kendall-northrop-grumman

The Biden administration’s approval — or disapproval — of Lockheed Martin’s planned $4.4 billion acquisition of rocket engine maker Aerojet Rocketdyne could shape defense industry consolidation for years to come.

If approved, the deal would mean the absorption of the last independent American weapons-grade rocket maker. All U.S. rockets would be produced by Northrop, which bought Orbital ATK in 2018, and Lockheed, the world’s largest defense contractor. It would also turn Lockheed into a key supplier of Raytheon Technologies, its major rival in the missiles sector.

Lockheed executives told investors on a Monday morning call that the acquisition would allow the company to deliver weapons to the military faster and cheaper than it can today.

“This helps position us for even greater growth, in hypersonics, missile defense and space, which are key elements of the national defense strategy,” Lockheed CEO Jim Taiclet said.

Taiclet, who became Lockheed’s CEO in June, also cited flat U.S. defense spending projections as a reason for the sale.

“They're going to be asked to do more in these areas with a flattening budget,” Taiclet said. “Having a more efficient supplier and a more robust supplier ... in uncertain economic times is a positive for the Department of Defense and for NASA.”

The proposed deal — which is expected to close in late 2021 — comes two years after Northrop Grumman acquired rocket maker Orbital ATK, a deal stoked industry consolidation fears. The Federal Trade Commission put conditions on the deal that Northrop had to supply solid rocket motors to competitors.

“Our overall expectation is that that may be the same lens through which this particular transaction is viewed because of the similarities there,” Taiclet said.

Still, Boeing claimed Northrop’s buying Orbital ATK prevented it from entering a bid for an $85 billion contract to build new intercontinental ballistic missiles. That left Northrop as the only bidder.

Orbital ATK, now part of Northrop, and Aerojet Rocketdyne are the only two U.S. makers of the solid rocket motors used in ICBMs and missile interceptors.

“The proposed purchase of Aerojet Rocketdyne (AJRD) by Lockheed Martin (LMT) is the first test of the Biden Administration and its views on defense sector consolidation and structure,” Capital Alpha Partners analyst Byron Callan said in a Monday note to clients. “It may take weeks and months before those views are known.”

Loren Thompson, a consultant and defense industry analyst with the Lexington Institute, said Lockheed’s acquisition of Aerojet would create more competition for solid rocket motors.

“Aerojet Rocketdyne will now have the same kind of financial resources to draw on as Orbital did when it joined Northrop, assuring that both domestic suppliers of large solids can remain active in military and civilian markets,” Thompson wrote Monday in Forbes.

A number of government organizations — including the Defense Department — are involved in the regulatory approval process. When Lockheed acquired helicopter-maker Sikorsky in 2015, Frank Kendall, who served as the Pentagon’s top weapons buyer during the Obama administration, expressed concerns that the deal would reduce competition. Kendall is reportedly under consideration to become Biden’s deputy defense secretary.

#### The plan causes compensating denial of the deal

William E. Kovacic 20, Professor at the George Mason University School of Law, JD from Columbia University, BA from Princeton University, “Keeping Score: Improving the Positive Foundations for Antitrust Policy”, University of Pennsylvania Journal of Business Law, Volume 23, Issue 1, 23 U. Pa. J. Bus. L. 49, Lexis

THE POLITICAL ASSAULT ON THE FTC

From the late 1960s through the 1970s, the FTC pursued an extraordinarily ambitious agenda of competition and consumer protection matters. Significant antitrust litigation included challenges to dominant firm misconduct and collective dominance, distribution practices, horizontal restraints, and facilitating practices. Many matters involved powerful economic interests, and in a number of cases the Commission sought structural relief in the form of divestitures or the compulsory licensing of [\*75] intellectual property. In 1974, the agency also initiated a program that required certain large firms to provide "line-of-business" data concerning a range of performance indicators.

In the same period, the Commission used a mix of litigation and rulemaking to transform its consumer protection agenda. Through policy guidance and litigation, the agency introduced its advertising substantiation program that required firms to have support for factual claims made in their advertisements. The Commission initiated over twenty-five rulemaking proceedings and promulgated final rules involving a broad collection of product and service sectors.

As a group, the FTC's competition and consumer protection initiatives aroused fierce opposition from the affected firms and industries, which contested the agency's actions in court and before Congress. The complaints of industry resonated with a large, powerful bipartisan coalition of legislators who criticized the Commission's activism, proposed various measures to curb the agency's authority, and ultimately adopted a number of restrictions in The Federal Trade Commission Improvements Act of 1980 [\*76] (FTC Improvements Act). In 1980, bitter opposition to elements of the FTC's competition and consumer protection programs led Congress to allow the FTC's funding to lapse, forcing the agency to temporarily cease operations. Perhaps emboldened by the weak political support the Commission enjoyed before 1981, when the Democrats controlled the White House and both chambers of Congress, the Reagan administration briefly resumed the assault on the agency's funding. In January 1981, David Stockman, Ronald Reagan's first Director of the Office of Management and Budget (OMB), launched a short-lived effort to eliminate funding for the FTC's competition policy program.

The congressional and executive branch officials who criticized the FTC in this period advanced two positive claims to justify recommendations for withdrawing authority or funding for the Commission. One claim was that the agency's choice of competition and consumer protection programs had contradicted congressional guidance about how the FTC should use its authority and resources. Many legislators complained that the agency had disregarded the legislature's preferences and used its powers in ways that Congress never contemplated to fall within the FTC's remit. As Congress considered bills in 1979 to limit the Commission's powers, Congressman [\*77] William Frenzel captured the prevailing legislative mood:

It is bad enough to be counterproductive and therefore highly inflationary, but the FTC compounds its sins by generally ignoring the intent of our laws, and writing its own laws whenever the whimsey strikes it . . .

Ignoring Congress can be a virtue, but the FTC's excessive nose-thumbing at the legislative branch has become legend. In short, the FTC has made itself into virulent political and economic pestilence, insulated from the people and their representatives, and accountable to no influence except its own caprice.

The Commission, Frenzel concluded, was "a rogue agency gone insane."

The accusation of Commission disobedience figured prominently in Senate deliberations on the 1980 FTC Improvements Act. In less flamboyant but still pointed terms, the chief Senate sponsors of the FTC Improvements Act said restrictions were necessary to curb the agency's unauthorized adventurism. Senator Howard Cannon explained: "The real reason that we have proposed this legislation for the FTC is because the Commission appeared to be fully prepared to push its statutory authority to the very brink and beyond. Good judgment and wisdom had been replaced with an arrogance that seemed unparalleled among independent regulatory agencies."

The accusation of disregard for congressional will soon echoed in statements by high level officials in the newly arrived Reagan administration. OMB Director Stockman recited a variant of this theme in an appearance before a House of Representatives Committee early in 1981 to address his proposal to eliminate funding for the agency's competition mission. Stockman said, " . . . in recent years the FTC has served the public interest very poorly, in major part because it has sought to expand its power and influence beyond that envisioned by Congress."

Beyond generalized claims of institutional disobedience, the accusation of disregard for congressional will was invoked to justify proposals to impose restrictions on specific FTC initiatives. For example, in the fall of [\*78] 1979, the Senate Commerce Committee held hearings on a proposal by Senator Howell Heflin to eliminate the FTC's power to order divestiture or other forms of structural relief in non-merger cases. This was a shot across the bow of the FTC's pending "shared monopoly" cases involving the breakfast cereal and petroleum refining sectors, where the FTC had requested structural relief (divestitures and, in the cereal case, compulsory trademark licensing) to restore competition. Congress did not adopt the Helfin proposal, but the idea of eliminating or restricting the FTC's power to seek divestiture remained a serious threat to the agency. Roughly a year after the Commerce Committee hearings on the Heflin amendment, on the day before the balloting in the 1980 presidential elections, Vice-President Walter Mondale appeared at a campaign rally in Battle Creek, Michigan (the headquarters of the Kellogg Company). The Vice-President assured his audience that, if he and President Jimmy Carter were reelected, the Carter administration would seek legislation to ban the FTC from obtaining divestiture in the breakfast cereal shared monopolization case.

A second, related claim was that the FTC had abandoned any adherence to sound administrative practice and descended into utterly irrational decision making. The agency was not merely disobedient ("rogue") but [\*79] crazy ("insane"), as well. Here, again, Congressman Frenzel pungently made the point. The FTC, Frenzel said, "is a king-sized cancer on our economy. It has undoubtedly added more unnecessary costs on American consumers who it is charged with protecting, than any other half dozen agencies combined." David Stockman's initial broadside against the Commission in February 1981 echoed this sentiment. In a newspaper interview, Stockman said the FTC "is a passel of ideologues who are hostile to the business system, to the free enterprise system, and who sit down there and invent theories that justify more meddling and interference in the economy."

The accusation of disobedience and the diagnosis of insanity fit poorly, or at least awkwardly, with the positive record of the FTC's activities in the 1970s. As discussed immediately below, the rogue agency story clashes with the many instances, especially between 1969 and 1976, in which congressional committees and key legislators directed the agency to carry out an aggressive, innovative enforcement program against major commercial interests. In 1969, numerous legislators endorsed the view of two external studies that the FTC had used its authority timidly and ineffectively. Leading members of Congress demanded that the agency [\*80] transform its competition and consumer programs or face extinction. Congress described the content of the desired transformation in several ways. At a high level, oversight committees and individual legislators called for a dramatic boost in the agency's appetite to undertake ambitious, risky projects--to replace a cautious, risk-avoiding decision calculus with a bold philosophy that erred in favor of intervention and used the agency's elastic powers innovatively. Congress's admonition to be aggressive and use power expansively emerged again and again in confirmation proceedings and routine oversight hearings. During hearings in 1970 to confirm Caspar Weinberger to be the Commission's new chair, Senator Warren Magnuson, Chairman of the Senate Commerce Committee, told the nominee to "maintain the right kind of morale by recruiting strongly and expanding . . . Trade Commission programs in order to perform the job well." In setting out this charge, Magnuson seemed to recognize that the FTC would have to be steadfast in resisting backlash--including from Congress--that would emerge as the FTC went about "expanding" its programs. The Commerce Committee Chairman said Congress was calling on the FTC to perform "tasks that require a great deal of attention and a great deal of fortitude not to respond to any pressures that come from any place."

Weinberger's successor, Miles W. Kirkpatrick, received similar, and even more explicit congressional guidance, to apply the Commission's powers broadly and aggressively. In 1969, Kirkpatrick had chaired a blueribbon American Bar Association panel whose report recommended the FTC implement an ambitious antitrust agenda that involved significant doctrinal, operational, and political risks. In his appearances as FTC chair before [\*81] congressional committees, Kirkpatrick often heard legislators applaud the risk-preferring approach of the ABA study. In Kirkpatrick's first appearance before the Commission's Senate Appropriations subcommittee in 1971, the Subcommittee Chairman, Senator Gale McGee, provided the following guidance:

I think this is one of the Federal commissions that has a much larger responsibility and capability than sometimes it has been willing to live up to for reasons of congressional sniping at it in some respects or pressures put on it through the industry and the like.

Too often it has been either shy or bashful. . . . That is why we were having a rather closer look at your requests just in the hopes of encouraging you, if anything, to make mistakes, but I think the mistakes you are to make ought to be mistakes in doing and trying rather than playing safe in not doing.

I believe that is the most serious mistake of all . . . you are not faulted for making mistakes. You may be for making it twice in a row, for not learning properly but, we would rather you make a mistake innovating, trying something new, rather than playing so cautiously that you never make a mistake. . . .

In his appearance before the same subcommittee a year later, Senator McGee observed with approval that Kirkpatrick had "responded to the criticism . . . by both Mr. [Ralph] Nader and the American Bar Association by moving aggressively against some of the major industries in the United States." Recognizing that the approach he described could elicit opposition from affected business interests, McGee promised that he and his colleagues would exercise best efforts to watch the agency's back: "[I]f you step on toes you are going to catch flak for it, but I hope we will be able to push this even more aggressively by backing you more completely with the kind of help that I think you require." McGee closed the proceedings with [\*82] militant instructions:

"Stay with it and flex your muscles, clinch your fists, sharpen your claws, and go to it. We think this is desperately important in the interest of the Congress, whose creature you are, and the consumer whose faith and substantive capabilities in surviving hang very heavily upon what you succeed in doing."

Kirkpatrick served as the FTC's chair for just over twenty-nine months. The Commission's new chair, Lewis Engman, received the same policy guidance that Congress had provided Weinberger and Kirkpatrick. At Engman's confirmation hearing before the Senate Commerce Committee early in 1973, Senator Frank Moss observed:

Under . . . Weinberger and Kirkpatrick, the Commission has taken on new life beginning with the search for strong and imaginative, rigorous developers and enforcers of the law and reaching out with innovative programs to restore competition and to make consumer sovereignty more than chamber of commerce rhetoric.

With evident approval, Moss recounted how the FTC had "stretched its powers to provide a credible countervailing public force to the enormous economic and political power of huge corporate conglomerates which today dominate American enterprise." The members of the Senate Commerce Committee, Moss concluded, "consider it one of our solemn duties to protect the Commission from economic and political forces which would deflect it from its regulatory zeal." Member after member of the Commerce Committee echoed Moss's message to Engman. Senator Ted Stevens, an Alaska Republican, told the nominee, "I am really hopeful that . . . you will become a real zealot in terms of consumer affairs and some of these big business people will complain to us that you are going too far. That would be the day, as far as I am concerned."

The FTC got the message. The words and actions of Weinberger, Kirkpatrick, Engman, and other FTC leaders in this period reflected a preference for boldness, aggressiveness, innovation, and zeal. In a letter to Senator Edward Kennedy in July 1970, Weinberger reported that the FTC was trying "to make the most of that other resource given to us by Congress [\*83] -- our statutory powers." Weinberger said the Commission had "encouraged the staff to make recommendations to us which will probe the frontiers of our statutes," had made progress in "[p]robling the outer limits" and "exploring the frontiers" of the agency's authority, and had shown it "is receptive to novel and imaginative provisions in orders seeking to remedy unlawful practices." In a speech to a professional association in 1971, Kirkpatrick reported that the Commission was "moving into 'high gear' in the task of preserving and promoting competition in the American economy." He said he and his fellow board members "fully intend to be in the vanguard of exploration of the new frontiers of antitrust law."

By mid-1974, the FTC had launched several significant cases involving monopolization and collective dominance, including pathbreaking shared monopolization cases against the breakfast cereal and petroleum refining industries. With these matters underway, Engman in 1974 appeared at a congressional hearing of the Joint Economic Committee and received criticism that the FTC had been insufficiently active in challenging monopolies. The Joint Committee's chairman, Senator William Proxmire, told Engman "the FTC, like a number of other regulatory agencies seems to concern itself with minor infractions of the law, and to spend much of its time on cases of small consequence." Perhaps astonished to hear that cases to break up the nation's leading breakfast cereal manufacturers and petroleum refiners involved minor infractions or matters of small consequence, Engman replied, "The Federal Trade Commission today is very aggressive. . . . We have seen a total turnaround in terms of the types of matters which are being addressed by the Bureau of Competition."

[\*84] Beyond general policy exhortations to exercise power boldly and to err on the side of intervention, of doing too much rather than too little, Congress in the early to mid-1970s instructed the Commission to focus attention on specific commercial sectors and competitive problems within them. In the face of severe fuel shortages and price spikes for petroleum products in the early 1970s, numerous legislators demanded that the FTC conduct investigations and challenge the conduct of large, integrated petroleum companies. Many insisted that the FTC use its competition mandate to force integrated refiners to deal on equitable terms with independent refiners and distributors. The Commission's decision to file the Exxon shared monopoly case, which sought extensive horizontal and vertical divestiture remedies, can be explained as a response to these demands. In the same period, Congress applied strong pressure upon the FTC to examine and correct what it believed to be serious structural obstacles to effective competition in the food manufacturing industry. Here, also, the agency's decision to prosecute the shared monopolization case against the country's leading producers of ready-to-eat breakfast cereals can be seen as a response to this concern and faithful to the congressional prescription that the FTC use novel, innovative approaches to cure competitive problems. In these and other matters, the Commission explored the frontiers of its powers in the development of new cases.

When one aligns the guidance of Congress in the early to mid-1970s about the appropriate content of FTC policy making with the FTC's activity in the decade, it is apparent that the critique of the agency as disobedient to legislative will is a fiction, or at least badly misleading. A more accurate positive depiction of events in the 1970s is that the Commission faithfully followed legislative instructions given from 1970 up through the mid-1970s about the appropriate philosophy and means of enforcement, and that, as the decade came to a close, Congress changed its mind about what the FTC [\*85] should do and how it should do it. As described below in Section IV.D., that change in legislative temperament and the response by Congress to industry backlash against the FTC's program have important implications for how the FTC plans programs and selects projects in the future. Accurate positive analysis reveals that the agency was not disobedient to Congress but was inattentive to the operation of a political feedback loop that exposes Congress to industry pressure once the FTC implements programs that involve significant economic stakes and endanger powerful commercial interests.

Nor does a careful study of the positive record of the 1970s show that the FTC policy making was "insane." Measured by its contributions to institution-building, the Commission did many things that epitomize good public administration. It carried out important organizational and personnel reforms that upgraded its operations and personnel. As explained more fully below, the agency also improved its mechanisms for setting priorities and selecting projects to achieve them and strengthened investments in policy research and development (including a program to evaluate the effects of completed cases). The FTC successfully carried out new regulatory duties entrusted by Congress in the 1970s; most notable was the implementation of the premerger notification mechanism that Congress created in the Hart-Scott-Rodino Antitrust Improvements Act of 1976. In all of these areas, the Commission of the 1970s made enduring enhancements to the institution and set important foundations for successful programs that followed in the next forty years. An insane agency could not have done so.

[\*86] Another focal point for attention in assessing the FTC's performance in the 1970s was the quality of its substantive agenda. Was the FTC's substantive program in the 1970s "insane"? Many Commission competition and consumer protection initiatives in the 1970s encountered grave problems. FTC efforts to execute the bold, innovative, risk-preferring program that Congress had called for earlier in the decade generated a number of serious project failures. Insanity, on the part of individual leaders or the institution as a whole, does not explain the failures. These outcomes have more prosaic causes whose understanding is important to the future formulation of competition policy. Chief among the FTC's flaws were a lack of historical awareness about the political hazards associated with undertaking an agenda of bold, innovative cases against powerful commercial interests; inadequate appreciation for the demands of bringing large numbers of difficult cases and promulgating ambitious trade regulation rules would impose on the agency's improving but uneven human capital; and underestimation of the change in the center of gravity of economic learning that supports the operation of the U.S. antitrust system. As described below, many of these failings are rooted in weaknesses in the FTC's knowledge in the 1970s of the positive record of its past enforcement experience.

B. The Inadequate and Misdirected Enforcement Activity Narrative

Like the hyperactivity narrative described above, the inadequate activity narrative relies heavily on enforcement data to support the view that the federal antitrust agencies have brought too few cases overall and, when filing cases, have focused resources on the wrong types of matters.

Implicit or explicit assumptions about the level of enforcement activity have provided a central foundation in the modern era for broad normative claims of poor system performance. One collection of inadequacy critiques attacks federal enforcement program of the Reagan administration -- a period characterized by what one journalist described as an "almost total abandonment of antitrust policy." In 1987, in discussing Reagan-era [\*87] federal antitrust enforcement, Professor Robert Pitofsky said the DOJ and the FTC had produced "the most lenient antitrust enforcement program in fifty years." Professor Milton Handler remarked that in the Reagan era "a policy of nonenforcement has set in, much to the distress of those who believe that without antitrust the free market cannot remain free." Professors Lawrence Sullivan and Wolfgang Fikentscher observed, in addressing the treatment of civil nonmerger matters, "enforcement ceased."

A second body of commentary assails the work of the federal agencies in the George W. Bush administration. For example, in 2008, during his campaign to gain the Democratic Party's nomination for the presidency, Barack Obama said the George W. Bush administration "has what may be the weakest record of antitrust enforcement of any administration in the last half-century." The Obama statement did not compare activity levels across all administrations over the 50-year-long comparison period, but the statement suggested that the general claim was based on variations in activity over time.

A third version of the inadequacy narrative marks the beginning of the decline of effective enforcement at the outset of the George W. Bush administration and extending through the present.

A fourth variant writes off the entire period from roughly 1980 onward as an antitrust catastrophe. After noting that for most of the 20th century "antitrust enforcement waxed or waned depending on the administration in office," Professor Robert Reich recently wrote that "after 1980 it all but [\*88] disappeared." He added that Presidents Bill Clinton and Barack Obama "allowed antitrust enforcement to ossify, enabling large corporations to grow far larger and major industries to become more concentrated."

Presented below are categories of arguments that rely upon specific assertions about the positive record of modern antitrust enforcement. These arguments make positive claims regarding either the amount of activity, the reasons for observed behavior, or both.

GENERAL CRITICISMS OF ANTITRUST ENFORCEMENT: BORK, REAGAN, AND THE DESTRUCTION OF U.S. COMPETITION POLICY

Many commentators have offered explanations for why federal antitrust enforcement became inadequate after the late 1970s. One major positive explanation is that the modern Chicago School of antitrust analysis, grounded largely in the writings of Robert Bork, inspired a severe retrenchment of enforcement at the DOJ and the FTC and led the federal courts to narrow antitrust doctrine since the late 1970s. A major focus of this discussion of the causes for changes in enforcement involves rules governing the treatment of dominant firms.

A second cause offered to explain a redirection of enforcement is the ascent to the presidency of Ronald Reagan and his appointment of permissive leadership to the DOJ and the FTC. The Reagan administration [\*89] is said to have inherited a generally well-functioning antitrust enforcement system and run it into the ground.

The Chicago School, Bork-centric, and Reagan-centric explanations for policy change can be misleading due to mischaracterizations of what took place and their tendency to omit other forces that had helped narrow the scope of antitrust enforcement. Bork and the Chicago School unmistakably have exerted a significant impact upon modern antitrust policy, but the retrenchment of antitrust enforcement in some areas cannot accurately be attributed to them entirely or, for a number of important developments, even principally. Many proponents of the inadequacy narrative make little or no mention of the role of modern Harvard School scholars, such as Philip Areeda and Donald Turner, in leading courts and enforcement agencies to move the antitrust system toward a less interventionist stance.

Areeda and Turner encouraged courts to forego reliance on noneconomic goals in deciding antitrust cases. The two Harvard scholars also advocated the adoption of stricter procedural and doctrinal screens to counteract what they perceived to be flaws in the U.S. system of private rights of action. The inadequacy narrative often overlooks the influence of the modern Harvard School and thus misses how much the permissiveness of modern antitrust policy reflects the Harvard School's concern that private rights of action over-deter legitimate business conduct by dominant firms. [\*90] This yields a faulty positive diagnosis of the forces that have reduced the reach of the U.S. antitrust regime. As noted below, understanding how the institution-grounded limitations proposed by the modern Harvard School have imposed greater demands on plaintiffs has important implications for government plaintiffs seeking to devise a strategy to reclaim doctrinal ground lost since the 1970s.

Similar imprecision and omission characterize the portrayal of the Reagan administration as the force that swung antitrust policy away from a sensible interventionist equilibrium and gave it a durably noninterventionist orientation. Some elements of the Reagan-centric narrative turn events 180 degrees around from their positive roots. More significant, the narrative does not address how badly the Congress and the White House had damaged the FTC's stature and operations before Ronald Reagan took office in late January 1981. By the end of 1980, the Commission had been shoved into the equivalent of political bankruptcy by a Congress and a White House under the control of the Democratic Party.

By treating the 1980 presidential election as the cause of an abrupt change in federal antitrust enforcement policy, the Reagan-centric inadequacy narrative fails to grasp the significance of the political assault, led by Democrats, against the FTC in the late 1970s. Recognition of how the FTC's relationship with Congress changed over the course of the 1970s forces one to confront the question of why an agency that enjoyed powerful congressional support through much of the decade came to grief so quickly. The episode has a sobering cautionary lesson for contemporary policy making: it demonstrates how quickly congressional attitudes can change once powerful business interests affected by FTC actions bring their [\*91] resources to bear upon Congress, and how turnover in the legislature can erode vital political support. An accurate positive account of the 1970s suggests that an agency should strive to complete its cases and rulemaking initiatives as expeditiously as possible, lest long lags between the start and conclusion of matters expose the agency to debilitating political backlash. This policy making prescription becomes apparent only by forming an accurate picture of what happened to the FTC in the 1970s.

CHICAGO-SCHOOL INSPIRED FOCUS ON PRICE EFFECTS

Critics of modern FTC and DOJ law enforcement often state that the federal agencies focus entirely on price and output effects in selecting and prosecuting cases. This tunnel-visioned approach is said to ignore important considerations involving the harmful effects of business behavior on quality and innovation.

In 2019, in a newspaper op-ed, Rana Fordoohar, a journalist who covers the tech sector, stated: "But monopoly policy in America is currently driven by "Chicago School" thinking, which espouses the idea that as long as consumers aren't paying too much for a good or service, all is well." In August 2020, Joshua Brustein, a business journalist, said: "For decades, antitrust enforcers have centered on the consumer welfare standard, which defined price increases as the only valid focus of antitrust action."

Like the portrayal of activity levels, these positive descriptions of the policy concerns that have guided FTC and DOJ law enforcement are faulty. The claim that the federal antitrust agencies since the late 1970s have focused solely upon price and output effects overlooks the many important instances in which innovation and other quality-related effects were paramount in FTC and DOJ decisions to challenge mergers and bring nonmerger cases. Among other areas from the 1980s to the present, the DOJ and the FTC have emphasized innovation effects in analyzing competitive effects in deals involving defense contractors and transactions [\*92] in the health care sector.

[FOOTNOTE] See, e.g., Joint Statement of the Department of Justice and the Federal Trade Commission on Preserving Competition in the Defense Industry (Apr. 12, 2016) ("In the defense industry, the Agencies are especially focused on ensuring that defense mergers will not adversely affect short- and long-term innovation crucial to our national security. . . ."); Daniel L. Rubinfeld & John Haven, Innovation and Antitrust Enforcement, in DYNAMIC COMPETITION AND PUBLIC POLICY 65 (Jerry Ellig ed., 2001) (discussing DOJ emphasis on innovation-related effects in antitrust enforcement, including the Department's challenge to Lockheed Martin's effort to purchase Northrop Grumman in the late 1990s); William E. Kovacic, Competition Policy Retrospective: The Formation of the United Launch Alliance and the Ascent of SpaceX, 27 GEO. MASON L. REV. 863, 867-68, 899-900 (2020) [hereinafter Competition Policy Retrospective] (discussing centrality of innovation issues in modern antitrust analysis of aerospace and defense mergers). [END FOOTNOTE]

INADEQUATE ENFORCEMENT AGAINST DOMINANT FIRM MISCONDUCT

A recurring critique of modern U.S. federal enforcement is the failure of the DOJ and the FTC to police dominant firm misconduct. In 2002, Professor Robert Pitofsky wrote that "during the Reagan years, there was no enforcement whatsoever" against attempts to monopolize and monopolization. At a conference in 2009, Professor Harvey Goldschmid observed that during the George W. Bush presidency "there has been no enforcement" of Section 2 of the Sherman Act.

In a wide-ranging attack upon federal antitrust enforcement since the 1970s, Jonathan Tepper and Denise Hearn concluded:

The evidence confirms the death of antitrust. When surveying merger challenges, [Professor Gustavo] Grullon found that enforcement of Section 2 of the Sherman Act fell from an average of 15.7 cases per year from 1970-1999 to less than 3 over the period 2000-2014. . . . The recent failure to enforce antitrust is horrifying, considering how industries have become more concentrated every year.

In May 2018, Senator Richard Blumenthal and Professor Tim Wu [\*93] authored an op-ed piece that recited similar statistics: "Enforcement of the antimonopoly laws has fallen: Between 1970 and 1999, the United States brought about 15 monopoly cases each year; between 2000 and 2014, that number went down to just three."

Each of these statements about the amount of federal enforcement activity is incorrect. The Reagan antitrust agencies did not bring many cases involving attempted monopolization or monopolization, but the number exceeded what Professor Pitofsky called "no enforcement whatsoever". The number of FTC attempted monopolization and monopolization cases initiated from 2001 through 2008 exceeded what Professor Goldschmid called "no enforcement." From 1970 through 1999, federal enforcement of Section 2 of the Sherman Act and the enforcement of Section 5 of the FTC Act to challenge collective dominance or single-firm exclusionary conduct did not exceed four cases per year - a notably lower rate of activity than the number of cases per year reported by Senator Blumenthal and Professor Wu ("about 15 cases each year") and the number for the same period reported by Jonathan Tepper and Denise Hearn (15.7 cases per year).

[\*94] INADEQUATE MERGER ENFORCEMENT

Inadequacy narratives frequently use categorical statements about activity levels to demonstrate weaknesses in federal merger enforcement. In a discussion of Reagan administration antitrust policy, Professor Eleanor Fox observed that "U.S. federal merger enforcement ground to a halt." In the 2010 edition of their antitrust casebook, Professor Robert Pitofsky, Professor Harvey Goldschmid, and Judge Diane Wood observed that there was "no enforcement at all against vertical or conglomerate mergers during the Bush Administration." In a recent book discussing U.S. antitrust policy, Professor Tim Wu observed that the DOJ in the George W. Bush administration "did not block any major mergers."

The factual claims contained in these assessments are incorrect. Federal merger enforcement during the Reagan administration did not grind to a halt. The George W. Bush Administration did not challenge large numbers of vertical mergers, but the number was greater than the "no enforcement at all" amount claimed by Professor Pitofsky, Professor [\*95] Goldschmid, and Judge Wood. During the Bush administration, the DOJ sued and blocked mergers involving General Dynamics/Newport News Shipbuilding (nuclear submarine design and production) and United Airlines/US Airways (airline transportation services). Given the significance of the merging parties and the importance of the economic sectors at issue, competition law experts, in responding to Professor Wu, likely would score these proposed transactions as "major" mergers.

C. How Narratives Predicated Upon Mistaken Positive Assumptions Distort Understanding About the Functioning of the U.S. Antitrust Regime

Should the competition policy community of academics, advocacy groups, government officials, and practitioners care about these and other inaccurate depictions of federal enforcement activity? Indeed, they should. There is a danger that the fractured positive accounts of past activity will be taken as true and inform the debate about the future of competition policy. There is a fast-expanding literature that contends, as Professor Daniel Crane puts it, that "antitrust enforcement has drifted toward near-oblivion, with potentially dire consequences for our economy, and society more generally." The portrayal of inert federal agencies as abandoning a sensible earlier custom of robust enforcement is a particularly important pillar of modern calls for sweeping reform.

Failure to Learn from Earlier Enforcement Activities. A major hazard of the inadequacy narratives and their dismal depiction of modern antitrust policy is that they impede the learning by which an antitrust agency improves over time. If it is assumed as a fact that the federal antitrust enforcement [\*96] policy was devoid of useful activity for the past forty years or longer, then there is no point in looking for positive accomplishments. A listener who accepts as true the claim that nothing happened, or that what happened was the work of an insane agency, reasonably might conclude that there is nothing worth emulating from the earlier period.

There is a serious cost to embracing the excessive activity narrative or the inadequate activity narrative as resting on sound positive foundations. By writing off the relevant eras as a wasteland, one ignores noteworthy policy developments that modern analysts can use to guide policy going forward. Merger enforcement provides an example. If federal merger enforcement actually ground to a halt between 1981 and 1988, there would be no merger challenges to study. Yet the federal enforcers blocked a number of deals in this period and, in some instances, the government gained favorable judicial decisions that provide clues about how to formulate successful challenges in the future.

Perhaps the most notable of the government's merger litigation victories in the 1980s was the FTC's successful challenge to Hospital Corp.'s effort to acquire Hospital Affiliates International, Inc. and Health Care Corp. The Commission argued that the acquisitions would reduce competition by enabling the surviving firms to coordinate behavior more effectively with regard to pricing and other terms of service. The 117-page opinion for the Commission by Commissioner Terry Calvani is a textbook model of superb opinion-writing, what the Seventh Circuit called a "model of lucidity." Commissioner Calvani carefully set out the arguments of complaint counsel and the defendants, reviewed the precedent and literature regarding the coordinated effects theory of harm, and displayed [\*97] the type of erudition and expertise that is offered as a justification for entrusting antitrust adjudication to an expert administrative body.

Every commissioner who is assigned to write an opinion for the FTC should feel an obligation to read the Calvani Hospital Corp. decision to see the quality of analysis and style of presentation that can impress a court of appeals favorably. Rather than dismiss the period since 1980 as a barren era in federal enforcement, the advocates for a major expansion of intervention should assemble an accurate positive record of every decision and every initiative that can help them achieve their ends.

In the face of a demanding judiciary, the FTC will need every advantage it can obtain, including footholds provided by enforcement measures undertaken from the early 1980s forward. If proponents of fundamental change treat the past forty years as an empty space in antitrust policy, they will walk past precedents and practices that would advance their cause. If one assumes that timidity bordering on cowardice gripped the federal agencies after 1999, there is likewise no point in considering how the FTC in the 2010s achieved considerable success in three consecutive trips to the Supreme Court in antitrust cases - the first time the Commission had won three straight cases before the high court since the 1960s - or bothering to understand what mix of strategy and advocacy (and, perhaps, luck) made it possible.

The analysis of innovation issues provides another example of how an accurate grasp of the positive record can help build a new program. Consider the claim, noted above, that the federal agencies brought no vertical merger cases between 2001 and 2008. An observer who embraced this view is likely to overlook the FTC's decision to block the proposed merger of Cytyc and Digene. The Commission's analysis of this transaction teaches a lot about how to analyze innovation markets that reach back to the earliest stages of an R&D pipeline.

Adherence to the view that modern antitrust policy has ignored [\*98] innovation effects in merger analysis and in nonmerger cases likewise will miss important sources of insight. The experience of the two federal agencies since the early 1980s in reviewing aerospace and defense industry mergers illuminates how to analyze innovation issues and formulate successful merger challenges in dynamic, high technology sectors. The federal government's analysis of these transactions has been representative of a larger awareness that innovation concerns should be decisive, or at least equal in importance to price effects, in a significant number of merger reviews and nonmerger matters.

Diagnosing the Obstacles to Litigation Success and Overcoming Them. A second and closely related reason to resist faulty positive accounts of past experience is that they obscure the path to possible litigation success in single-firm monopolization cases. In the FTC's unsuccessful Rambus case, the U.S. Court of Appeals for the District of Columbia relied heavily on a Supreme Court decision ( NYNEX Corp. v. Discon, Inc. ) that was premised in part on concerns about overdeterrence that might arise from private treble-damage law suits. The FTC might have argued to the D.C. Circuit that the Commission, as a federal government agency, was a responsible steward of the public trust and need not be bound by doctrines designed to confine private litigants. Future attempts to use litigation to condemn dominant firm conduct, and extend the reach of antitrust oversight, might emphasize the distinctive role of public enforcement and, perhaps, resort more extensively to the FTC's administrative adjudication process.

In other words, seeing more clearly the foundations of defendant-friendly doctrine indicates what litigation strategy (i.e., premised on the distinctive role of the public prosecutor and the special capacity of the FTC's administrative process) promises the greatest prospects for success in what is today a daunting judicial environment. To use litigation to expand the zone of potential intervention, the Commission will need to study and build [\*99] upon litigation successes such as McWane, Inc. v. FTC, where the Commission prevailed on a monopolization theory of liability before a court of appeals that has not always been a favorable forum for the review of Commission antitrust cases. If one assumes, as some commentators suggest, that the federal agencies brought no monopolization cases in the past twenty years, then one is unlikely to look for or study McWane - to recognize the doctrinal footholds it provides for future cases, to analyze how the agency assembled a convincing factual record, and, more generally, to see how the agency can replicate the success in the future.

Setting a Common Foundation for Debate About Future Antitrust Enforcement. A third reason to remedy the uncertain grasp of the past is its importance to the modern debates about the proper direction for the U.S. antitrust system. Without a common understanding of what actually happened in the past, how can policy makers and commentators make sound normative judgments about what the U.S. enforcement agencies should do in the future? Professor Douglas Melamed recently has posited that the contestants in the modern debate about antitrust policy often talk past each other and do not engage on questions crucial to deciding whether and how much to modify current antitrust policy, or to create new competition policy instruments and institutions. It is doubtful that what Professor Melamed calls two largely disconnected "conversations" can be joined up without a better common understanding of what actually has taken place. In so many ways, accurate comprehension of what happened is the essential foundation for the processes of interpretation (What explains the behavior in question? What is its significance?), evaluation (Was the behavior good or bad?), and refinement (What should we do next time?).

Think of it in terms of teaching a class. Suppose the bases for the grade in the course are (a) regular attendance in class, (b) contributions to class discussion, and (c) performance on an end-of-term examination. Before we determine the quality of the student's work and assign a grade, we need first to agree about whether the student showed up for class, spoke in class, and turned in an exam. Modern discourse about U.S. competition law indicates a lack of agreement on equivalents of these basic predicates for a normative assessment of the performance of the antitrust enforcement system.

Appreciating How Institutional Arrangements Shape Substantive [\*100] Outcomes. Both of the inadequacy narratives described above lapse into describing the U.S. antitrust system as regularly succumbing to irrational (or, as Representative Frenzel put it, insane) swings in behavior, from wild overreaching in the 1970s and in earlier periods of antitrust history to excessive restraint from the late 1970s to the present. In their positive description of why events transpired as they did, the inadequacy narratives focus heavily on the role of agency leadership and personality. For example, the excessive enforcement narrative portrays federal enforcement officials in the 1960s as possessed by a deranged opposition to mergers and depicts Michael Pertschuk, the FTC's chairman from 1977-1981, as a singularly malevolent force who drove the agency off the rails. The inadequate enforcement narrative damns William Baxter, who chaired the DOJ Antitrust Division from 1981 through 1983, and James C. Miller III, who chaired the FTC from 1981 to 1984, as irrational extremists with no fidelity to norms that promote sound policy making.

The abilities and instincts of individual leaders are undoubtedly important to the success of a competition authority. Yet the personality-driven explanation for agency behavior overlooks the role that institutional arrangements have played in shaping outcomes - for example, by moderating policy impulses of some leaders and creating structures and mechanisms (such as a program of ex post evaluation of agency decisions) that improve policy making regardless of who is in charge. The single-minded focus on personalities also obscures the extent to which various institutional arrangements played central roles in the agency's achievement of successful policy outcomes. In short, one loses the ability to develop a [\*101] better sense of what accounts for policy successes and failures. Replacing a supposed pariah with a presumed miracle worker may not improve the status quo by much if deep-seated institutional weaknesses are major sources of observed policy failures.

#### Blocking the merger obliterates containment of hypersonic threats from Russia and China

Don Nickles 21, Chairman and CEO of The Nickles Group LLC, Former United States Senator, Former Director of Chesapeake Energy and Valero Energy, Degree in Business Administration from Oklahoma State University, “Why Lockheed's Acquisition of Aerojet Will Be A 'Boon for U.S. Innovation'”, Politico, 3/22/2021, https://www.politico.com/news/2021/03/22/lockheed-aerojet-acquisition-477491

The proposed acquisition by defense prime contractor Lockheed Martin of propulsion provider Aerojet Rocketdyne is facing some criticism due to alleged concerns that it would give Lockheed an unfair competitive advantage on missile and missile defense contracts.

Raytheon Technologies in particular has publicly complained that the combination would leave it dependent on a direct competitor for much of the propulsion in its missile offerings. Indeed, Aerojet Rocketdyne is a supplier of solid rocket motors and also is a source of defense technologies including hypersonic engines and the propulsive Divert and Attitude Control System that steers missile defense kill vehicles.

Such concerns ignore the important benefits, including the increased competition, which will result from this merger. And, Lockheed Martin has made it clear that Aerojet Rocketdyne will remain a merchant supplier, so these benefits will flow to all customers, including the U.S. government.

More importantly, the Lockheed-Aerojet merger will be a boon for U.S. innovation and competitiveness at a time when it faces growing threats from increasingly capable adversaries like China and Russia.

There are significant national advantages to bringing Aerojet Rocketdyne under the corporate roof of a prime contractor with $65 billion in annual revenue. Broadly speaking, it will provide financial stability for the propulsion provider while making more resources available for research and development in key technology areas.

As a stand-alone company with $2 billion in annual revenue, Aerojet Rocketdyne’s financial fortunes are tied to a few large programs that are subject to shifting political winds and the whims of prime contractors. A large program cancellation or a prime’s decision to change suppliers could substantially weaken the company, leaving it vulnerable to a takeover on unfavorable terms.

A well-resourced defense contractor like Lockheed Martin, by contrast, could be expected to invest in Aerojet Rocketdyne’s core propulsion capabilities. One area likely to see substantial investment is hypersonic weaponry, where the nation by some estimates has fallen behind Russia and China.

Moreover, by bringing a key link of its supply chain in house, Lockheed Martin will be positioned to offer better prices to its government customers and the transaction also will lead to efficiencies and innovation that will benefit the whole industry.

Such national benefits are not unique to the proposed Lockheed Martin-Aerojet Rocketdyne deal. Consider, for example, what United Technologies Corp. said in announcing its planned merger with none other than Raytheon, a deal which closed last year:

"By joining forces, we will have unsurpassed technology and expanded R&D capabilities that will allow us to invest through business cycles and address our customers' highest priorities,” said then-UTC chair and CEO Greg Hayes, who now sits at the helm of the combined company. “Merging our portfolios will also deliver cost and revenue synergies that will create long-term value for our customers and shareowners."

One of the public comments about the Lockheed Martin-Aerojet Rocketdyne deal is rooted in a commonly held assumption that vertical integration, in which primes take ownership of supply chains, stifles competition by giving these companies excessive marketplace clout. That view is myopic, especially in industries that are highly dynamic such as the defense industry.

Consider the case of United Launch Alliance, the Boeing-Lockheed Martin joint venture that until about a decade ago had a de facto monopoly on the business of launching operational U.S. government satellites. That monopoly was toppled by SpaceX, which builds some 85 percent of the components for its Falcon rockets, notably the engines, in house.

Experts have long cited SpaceX’s vertically integrated structure as the source of the company’s competitive strength, in large part because it eliminates supply chain profit margins. SpaceX founder Elon Musk has applied the same in-sourcing strategy in building up his Tesla electric car company, which has put U.S. industry at the forefront of a global trend in automobile manufacturing.

Vertical integration has been a fact of life in the aerospace and defense industry since the early 1990s, when the end of the Cold War triggered a wave of consolidation that continues today. On the propulsion side, a flurry of activity over a three-year period starting in 2001 reduced the number of U.S. solid rocket motor providers from five to just two: Aerojet Rocketdyne (then known as Aerojet); and ATK.

That situation lasted until 2014, when ATK merged with rocket and satellite maker Orbital Sciences Corp. to create the vertically integrated Orbital ATK. Less than five years later, Orbital ATK was acquired by aerospace and defense giant Northrop Grumman, a direct competitor to Lockheed Martin with nearly $37 billion in annual revenue.

Already the dominant supplier of large-diameter solid rocket motors, ATK can now draw on the resources of Northrop Grumman to advance its capabilities and boost competitiveness. Northrop Grumman recently won the prime contract for the nation’s next-generation ICBM, the Ground Based Strategic Deterrent, ensuring a healthy workload for its solid rocket motor business for years to come and ratcheting up the competitive pressure on Aerojet Rocketdyne.

As it happens, Northrop Grumman tapped Aerojet Rocketdyne for a smaller but significant role on its GBSD team, demonstrating that primes will join forces with competitors when it makes business sense.

Perhaps a better example — one that directly refutes assertions that competition requires subcontractor independence — is Northrop Grumman’s role in the Space Force’s all-important launch services program, where it supplied solid rocket motors for ULA’s Vulcan rocket even as it vied for that business with its own OmegA vehicle. In a similar vein, Blue Origin’s entry into that competition with its New Glenn vehicle didn’t stop it from supplying the main engine for Vulcan, which ultimately won the biggest share of launches.

The defense industry is replete with examples of companies supplying hardware and technology to rivals, even for programs where they compete head-to-head. Another relevant example: Raytheon in 1998 won a lucrative contract to supply missile defense kill vehicles incorporating DACS technology that at the time was supplied by Boeing — a competitor for that same contract.

For acquisitions that raise questions about access to critical capabilities, government regulators sometimes require consent decrees that commit the buyer to make these technologies available to competitors at market rates and to wall off proprietary information they might obtain in the process. In recent years, antitrust agencies have not shied away from investigating and enforcing compliance with consent decrees, including in the defense industry. There is no reason to think that would change in the future.

Some observers view the Lockheed Martin-Aerojet Rocketdyne merger as an early test of the Biden administration’s antitrust enforcement policies, and regulators will no doubt scrutinize it thoroughly to ensure competition is preserved. But there’s much more at stake here: This is about how the administration intends to deal with growing threats posed by peer and near-peer adversaries, who have eroded many of the technological advantages this nation has long taken for granted.

If the U.S. is to retake, and maintain, the lead in areas like hypersonic weaponry, a healthy and vibrant propulsion industry featuring players competing on a level playing field is essential. Regulators and policymakers should view this merger through that lens and render their decision accordingly.

#### Nuclear war

Dr. Richard H. Speier 17, Adjunct Staff with the RAND Corp, Founded the Office of Non- Proliferation Policy at the DOD, Recipient of the Meritorious Civilian Service Medal as the “Father of the MTCR,” now Consults in the Washington DC area; George Nacouzi, Senior Engineer at the RAND Corporation, Supports Projects within PAF (Project Air Force) and NSRD (National Security Research Division), Carrie A. Lee, Researcher at RAND, and Richard M. Moore, Researcher at RAND. 2017. “Hypersonic Missile Nonproliferation: Hindering the Spread of a New Class of Weapons.” RAND. https://www.rand.org/pubs/research\_reports/RR2137.html

Strategic Implications of Hypersonic Weapons Compressed Timelines The U.S. military uses an acronym to describe the decisionmaking and action process cycle: OODA (Observe, Orient, Decide, Act). These four steps take time, and hypersonic missiles compress available response time to the point that a lesser nation’s strategic forces might be disarmed before acting. As an illustration of the time required to act with respect to an existential missile threat, the Nuclear Threat Initiative organization estimated a timeline for a U.S. response to a massive Russian intercontinental ballistic missile (ICBM) attack, as follows:9 • 0 minutes—Russia launches missiles • 1 minute—U.S. satellite detects missiles • 2 minutes—U.S. radar detects missiles • 3 minutes—North American Aerospace Defense Command (NORAD) assesses information (2 minutes max) • 4 minutes—NORAD alerts White House • 5 minutes—first detonations of submarine-launched ballistic missiles • 7 minutes—locate president and advisers, assemble them, brief them, get decision (8 minutes max) • 13 minutes—decision • 15 minutes—transmit orders to start launch sequence • 20 minutes—launch officers receive, decode, and authenticate orders • 23 minutes—complete launch sequence (2 minutes max) • 25 minutes—Russian ICBM detonations. This timeline is not, of course, representative of two hostile parties in closer proximity or with less effective warning systems than Russia and the United States. Nor is it representative of less-than-Armageddon possibilities. However, for adjacent enemies within a 1,000-km range, a hypersonic missile traveling at ten times the speed of sound could cover that distance and reduce response times to about six minutes.10 Targets As discussed earlier, hypersonic missiles increase the threat over current generations of missiles in cases where the target nation has missile defenses. The targets in such nations would primarily be high value and heavily defended. Prime targets could include destroying a nation’s leadership and command and control, referred to as “decapitation,” to prevent the target nation from responding with an effective follow-on attack. Other key targets could be carrier strike groups, with the objective of striking a key blow or pushing the naval formation further from the coast. And, because of their time sensitivity, strategic forces and storage facilities for weapons of mass destruction (WMDs) could warrant hypersonic attack. Implications for Targeted Nations Any government faced with the possibility that hypersonic missiles would be employed against it—particularly in a decapitating attack— would plan countermeasures, many of which could be destabilizing. For example, countermeasures could include devolution of strategic forces’ command and control so that lower levels of authority could execute a strategic strike, which would obviously increase the risk of accidental strategic war; or strategic forces could be more widely dispersed— a tactic risking greater exposure to subnational capture. An obvious measure would be a launch-on-warning posture—a hair-trigger tactic that would increase crisis instability. Or the target nation could adopt a policy of preemption during a crisis—guaranteeing highly destructive military action. To be sure, such measures could be invoked against threats from current types of missiles.11 But, for nations with effective ballistic mis- sile and/or cruise missile defenses in the time frame when hypersonic missiles might proliferate, the hard choices would be forced when facing hypersonic threats. Advanced nations with adequate resources could take other steps against hypersonic threats. They could strengthen the resilience of their command and control, harden the siting of their strategic forces, and make a deterrent force mobile or sea-based. These tactics may or may not be effective, especially for lesser nations. And they certainly will be expensive—putting them out of reach of some. Even for major powers, the proliferation of hypersonic missiles will create new threats by allowing lesser powers to hold them at risk of effective missile attacks especially against “unhardened” targets, e.g., cities. Over the coming decades, the ability of a lesser nation with a handful of ICBMs to threaten major powers will continue to decrease as wide area missile defenses continue to improve. However, HGVs and HCMs will be more difficult to defend against. Implications for Major Powers The ability of hypersonic missiles to penetrate advanced missile defenses will increase the risks for nations with such defenses. Lesser powers with hypersonic weapons may see these weapons as a deterrent against greater power intervention, and feel free to pursue potentially destabilizing regional agendas. Moreover, lesser nations with hypersonic missiles could affect the force deployments of major powers. As noted above, carrier strike groups might be pushed further out to sea or an intervening power’s regional military bases might become exposed to more effective attacks. The Broader Picture of Increased Risk The ability of hypersonic forces to penetrate defenses and compress decision time could aggravate the instabilities in regions that are already tense—for example, Iran-Israel and North Korea–Japan. Conflicts in these regions could evolve to include major powers aligned on opposite sides. An Israel-Iran conflict, with the United States and much of Europe aligned with Israel and Russia and perhaps China aligned with Iran, would create new paths for escalation to an even-larger conflict. The basic roles of external actors would not necessarily change—the alignments would stay the same—but external powers might suddenly find themselves in a more-unstable situation in which their patron states are increasingly trigger-happy. As noted previously, lesser powers could gain influence over major powers by threatening a hypersonic attack. At the least, lesser powers might be emboldened if they saw themselves as possessing a deterrent against major power intervention. Finally, because hypersonic weapons increase the expectation of a disarming attack, they lower the threshold for military action.

### 1NC

Guidance CP

#### The United States federal government should issue a policy memorandum that separates platforms from commerce for platforms in the private sector.

#### The CP competes because it’s not legally binding BUT solves by shifting antitrust policy

Theodore Voorhees 17, Senior Litigator and Member of the Antitrust and Competition Law Practice Group at Covington & Burling LLP, JD from the Catholic University of America, Columbus School of Law, AB from Harvard University, and Leah Brannon, Partner at Cleary Gottlieb Steen & Hamilton LLP, JD from Harvard Law School, BA with Highest Distinction from the University of Virginia, ABA 2016 Presidential Transition Task Force, “Presidential Transition Report: The State of Antitrust Enforcement”, American Bar Association Section of Antitrust Law, January 2017, http://cartelcapers.com/wp-content/uploads/2017/01/ABA-SAL-Presidential-Transition-Report-1-18-17-FINAL-2.pdf

III. ENFORCEMENT MATTERS

A. Agency Enforcement and Policy

1. Guidance

Where there are uncertainties in the Agencies' enforcement policies or priorities, it is often essential for the Agencies to provide guidance. The formal guidance can take the form of formal guidance documents (such as the Horizontal Merger Guidelines of 2010) or FTC opinions. Informal guidance can take the form of agency reports, speeches by key agency personnel, amicus briefs, decisions to litigate, or closing statements. Agency guidance is important and beneficial for multiple reasons, such as providing clarity for businesses, moving competition policy in the right direction, and ensuring a U.S. perspective on the international arena. Agency guidance is also particularly useful to communicate a shift in enforcement policy or practice.3

[FOOTNOTE] 3 The recent guidance issued by the Division and the FTC communicating the decision to treat wage-fixing and no-poaching agreements as criminal violations going forward provides an excellent example of this. See DEP’T OF JUSTICE, ANTITRUST DIV., FED. TRADE COMM’N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (Oct. 2016), available at www.ftc.gov/system/files/documents/ public\_statements/992623/ftc-doj\_hr\_guidance\_final\_10-20-16.pdf. [END FOOTNOTE]

Furthermore, uncertainty as to the boundaries of antitrust laws may chill potentially procompetitive conduct or enable potentially anticompetitive behavior to continue unchecked. Businesses may be less willing to engage in novel business activities that could benefit consumers. Moreover, agency guidance and enforcement not only define the boundaries of how the Agencies view and enforce the law, but may also impact how courts rule in litigation.

Guidance also ensures a place for the U.S. perspective on the international stage. Because so many foreign antitrust authorities look to the Agencies for leadership and study U.S. enforcement decisions and cases, clearly articulated guidance helps achieve uniformity across jurisdictions. Moreover, an international presence and influence as to antitrust policy is particularly critical in an era in which some foreign competition agencies use the pretense of antitrust enforcement as a cover to mask decisions that are actually based on industrial policy or protectionism.

Speeches, while not binding on the Agencies or as long-lasting as more formal agency documents, can give advance notice of enforcement priorities and the views of agency leadership regarding how best to analyze certain forms of conduct. For instance, in her first speech as Acting Assistant Attorney General, Renata Hesse offered important insights into the use of bargaining models in analyzing vertical mergers and the Division's skepticism of procompetitive claims in horizontal mergers. Indeed, for changes in agency thinking, an agency speech or other non-enforcement guidance can be the fairer approach, at least in the first instance, than initially embarking on litigation.

Business review letters from the Division and advisory opinions from the FTC serve as another avenue for providing guidance on novel conduct. More important, by setting forth the respective agency's reasoning for how it views proposed conduct, these documents in effect make a policy statement as to what characteristics of the conduct are considered to be beneficial or harmful for consumers.

#### It preserves agency PC and avoids politics

Dr. Nicholas R. Parrillo 19, Professor of Law and Professor of History at Yale Law School, JD from Yale Law School, PhD in American Studies from Yale University, AB in History and Literature from Harvard University, “Should the Public Get to Participate Before Federal Agencies Issue Guidance? An Empirical Study”, Administrative Law Review, Volume 71, Issue 1, 71 ADMIN. L. REV. 57, Winter 2019, Lexis

II. BURDEN OF PUBLIC COMMENT ON GUIDANCE LESS THAN LEGISLATIVE RULEMAKING

If the agency is going to solicit public comment on guidance, why not just go the whole nine yards and proceed by legislative rulemaking, which unlike guidance is genuine binding law? The reason is that the actual taking of public comment is only a fraction of the burden that legislative rulemaking imposes, and even if one focuses on the taking of comment alone, it is often less burdensome for guidance than for rulemaking. Thus, for most agencies at least, "notice-and-comment guidance" is considerably faster and less expensive than notice-and-comment rulemaking.

In discussing why legislative rulemaking takes the amount of time and resources that it does, interviewees prominently cited five aspects of the process, all of which are either absent or less costly when the process is voluntary notice-and-comment for guidance. I discuss these in roughly descending order of prominence.

A. Mandates for Cost--Benefit Analysis

Before significant legislative rules can be proposed or finalized by executive agencies, they are reviewed by the President's Office of Management and Budget to ensure, inter alia, that the agency engaged in appropriate cost--benefit analysis. OMB also reviews executive agencies' "significant" guidance documents. The relevant Executive Order's definition of "significant" is, in many ways, open-ended. According to an official at the [\*80] EPA's Office of General Counsel, the decision on which guidance documents to submit to OMB for review is made at the senior management level of the agency, by political appointees, and the handling of the question changes depending on who is in the relevant agency-manager and OMB positions.

Generally, interviewees thought OMB review was less likely for guidance than for legislative rules and, when it occurred, less time-consuming. A former senior official at the EPA's Air Program office said he thought OMB review of guidance took less time than that of legislative rules. Lynn Thorp of Clean Water Action observed that OMB scrutiny of the EPA guidance was less than that for legislative rules. A former senior FDA official noted that OMB was not much engaged with the agency's day-to-day scientific guidance, while a former senior FDA career official said many FDA guidance documents did not go through OMB at all. William Schultz, former HHS General Counsel, in discussing differences between the notice-and-comment process for rulemaking and the notice-and-comment process for guidance, cited OMB delays, which he said can be severe. Daniel Troy, general counsel of GlaxoSmithKline and former chief counsel of the FDA, said one reason for FDA personnel's preference for guidance over legislative rulemaking was that it avoided OMB review. At [\*81] USDA NOP, which does notice-and-comment on "most" of its guidance, the head of the program cited OMB review as one of a few factors that makes legislative rulemaking generally slower than guidance. Richardson, the former chair of the NOSB, said legislative rulemaking was greatly delayed by agency economic analysis in contemplation of OMB review, which was not done for guidance; and whereas OMB was a focal point for private lobbying regarding legislative rules, causing further delay, this was not true of guidance. The result was that legislative rulemaking took "much longer" than guidance even when the latter went through public comment. At the Department of Transportation (DOT), said the former general counsel Kathryn Thomson, guidance, even with public comment, was "much faster" than legislative rulemaking, mainly because it was not necessary to do cost--benefit analysis in contemplation of OMB review; OMB would accept a fast process for guidance more than it would for a legislative rule. At the DOE appliance standards program, recalled a former Department division director, OMB could delay or accelerate legislative rulemaking depending on the administration's calendar and politics, but guidance was not subjected to OMB review.

In banking regulation, where most of the agencies are independent and therefore not subject to OMB review, economic analysis can still cause legislative rulemaking to take longer than guidance, as such analysis may be required on some matters by statute or agency practice. An interviewee who held senior posts at CFPB and other federal agencies said that at the independent banking agencies (i.e., those not funded with tax revenues and not subject to OMB review), where cost--benefit analysis may be required by statute, that analysis would be done for legislative rulemaking but not for guidance, which helped explain why the former took longer. A former senior Federal Reserve official noted that, while the Federal Reserve's legislative-rulemaking-specific cost--benefit analysis was "sometimes a bit skippy," [\*82] the CFPB did voluminous cost--benefit analysis because of its fear of D.C. Circuit case law striking down SEC action for violating cost--benefit requirements.

B. Building a Record and Responding to Comments in Anticipation of Judicial Review

The advent of "hard look" judicial review in the 1970s, ratified by the Supreme Court in Motor Vehicles Manufactures Ass'n v. State Farm, pushed agencies to develop voluminous administrative records to support their legislative rules and to devote countless hours to writing long preambles responding minutely to public comments. An EPA official--in comparing legislative rulemaking (which he said took an "excruciatingly" long time) with guidance (on which he said the agency was "much more nimble")--said that a "huge" difference between the two was the time spent developing the administrative record and replying to comments, both of which he placed under the heading of "judicial review accountability," that is, the agency's "fear" of investing in a legislative rule only to have it struck down in court. EPA lawyers, he explained, were "vigilant" about ensuring that the administrative record was "all there," including the development of supporting documents, with all data gathered and analyzed, which took a "ton of time." Likewise, lawyers were vigilant in making sure the agency accounted for all comments. By contrast, "very little" of this was required for EPA guidance. There might be some accompanying materials, but it was "very rare" to do a full supporting foundation, in part because much of the necessary information would already have been gathered for a prior relevant legislative rulemaking, or would have bubbled up from the implementation process for that prior legislative rule. And even if the EPA took public comment on a guidance document and responded (which it sometimes did), "we're coasting along the surface" compared to what is done for a legislative rulemaking preamble. A former senior official at the EPA Air Program Office concurred that, for guidance, supporting material did not need to be gathered because it had already been assembled in prior legislative rulemakings, and public comments did not need to be addressed [\*83] at the same level of detail as for legislative rulemaking.

There is a similar dynamic at the FDA, which, per the GGPs, takes public comment on a very large proportion of its guidance documents. A former senior FDA official explained the difference. Legislative rulemaking required support for everything in the record and a time-consuming response to comments, and the costs of this process had been part of the agency's drive since the 1990s to rely more upon guidance, for which the process, even with public comment, was much more "abbreviated." Whereas legislative rules were "law" and had to be supported, the agency in issuing guidance felt freer not to develop a voluminous record, and the comments on guidance did not require the kind of response that was required on legislative rules. The fact that the FDA was sued much more on legislative rules than on guidance, he said, was surely part of this. Similarly, a congressional staffer observed that, although the FDA took public comment on guidance, it generally did not give any response to comments, meaning there was not the same kind of " State Farm obligation" as for legislative rulemaking, and so the process did not ensure the same careful consideration of stakeholder views. A former senior FDA official thought the lack of a requirement to respond to comments was a crucial and salutary feature of the FDA's process for guidance: if you required a preamble, you might as well do legislative rulemaking, and the whole thing would become "unworkable." A former senior FDA career official, discussing the difference between legislative rulemaking and guidance, said responding to all substantive comments in a rulemaking in writing for publication added "significantly" to the time spent. Overall, said an FDA Office of Chief Counsel official, whereas legislative rulemaking was criticized for being "ossified," it was possible to issue guidance "pretty quickly."

[\*84] Elsewhere, too, the research and analytic demands are less for guidance than for legislative rulemaking. At OSHA, said the former deputy solicitor of the Department of Labor (DOL), guidance was faster than legislative rulemaking in part because of judicial decisions requiring that the agency in each rulemaking make a showing of significant risk and technological and economic feasibility. By contrast, headquarters might have a regional office draft a guidance document, noted John Newquist, a former assistant administrator of OSHA's Region V (headquartered in Chicago).

C. Taking Comments in Itself

The actual publication of the draft rule/guidance and the taking of comments on it (as distinct from the work of responding to those comments) takes time and effort in itself, but this time and effort did not figure nearly as prominently in the interviews as did cost--benefit analysis, record-building, or responding to comments. And in any event, the burden of taking comment per se tends to be less for guidance documents than for legislative rules. At the banking agencies, said an interviewee who held senior posts at the CFPB and other federal agencies, the comment period tends to be shorter for guidance, and the comments fewer. The comment period was also said to be shorter for guidance at the USDA NOP, and in EPA clean water regulation. Comments were said to be less voluminous on guidance compared to legislative rules at the FDA.

D. Drafting Challenges

Legislative rules are typically harder to draft than guidance, which adds further to the time and resources they demand. Because legislative rules are mandatory, said an EPA official, you "sweat each detail," seeking to account for all factors and contingencies, since once the rule is promulgated, "we can't go back to it for 15 years." Guidance, he said, does not involve the same sweating of details. As to the FDA, a former senior career official [\*85] there said that, in writing guidance, you need not be as careful on wording as on a legislative rule because the language is not binding and is described as reflecting the current thinking of the agency; you are therefore more free to put in details, use narrative form, Q&A form, and plain language, since the document is not "set in stone." He recalled one subject on which he and his colleagues initially sat down to write a legislative rule and found it impossible to start with "codified language," given the complexity of the matter; he therefore suggested handling the problem by writing guidance, as a "dry run," before drawing up binding requirements. In banking regulation, an interviewee who held senior posts at the CFPB and other federal agencies said that guidance was "easier" to write and could be written "faster" than a legislative rule because "you don't need to nail everything down," as the aim is to warn regulated parties to pay attention to certain risks, not prescribe mandatory requirements.

E. Dealing with Mobilized Stakeholders

The length, officially-binding status, and public salience of legislative rulemaking make it a focal point for the mobilization of interest groups to pressure the agency and enlist political allies in Congress, the White House, and elsewhere. This, in turn, makes legislative rulemaking expensive to the agency in terms of political capital. An official at a public interest organization working on immigrants' rights said that, in his experience seeking favorable policies from DHS, he had found that legislative rulemaking tended to "exhaust all [the agency's] political capital," more than issuing guidance did. Legislative rulemaking allowed time for the opponents of an initiative to marshal their forces. If an agency and its stakeholder allies sought to proceed by legislative rulemaking, he said, they were "declaring a grand war" and had to be prepared for greater opposition. A former DOE division director, explaining why there was "no comparison" between the processes for legislative rulemaking and guidance, emphasized that the "politics" of the former process "slowed it down," for whenever the proceeding seemed to veer in a direction that one interest group did not like, [\*86] that group would marshal evidence and political support to stop the process, enlisting friendly members of Congress or the White House. With respect to the USDA NOP, the president of an organic certifier, in discussing factors that slowed legislative rulemaking, immediately cited the agency's internal process for economic analysis (not applicable to guidance), which he said could become a "pawn" in political clashes between different parts of the industry, in which members of Congress might be involved.

### 1NC

Pharma DA

#### The plan creates a rippling, cross-industry effect that wrecks pharma innovation

Dr. Douglas Holtz-Eakin 21, Ph.D. in Economics from Princeton University, President of the American Action Forum, and B.A. in Economics and Mathematics from Denison University, “Losing Focus on Antitrust”, American Action Forum – The Daily Dish, 2/11/2021, https://www.americanactionforum.org/daily-dish/losing-focus-on-antitrust/

The point of antitrust law is to ensure that markets deliver the maximal possible benefits to Americans. Specifically, a prime tenet of competition policy is the consumer welfare standard. Vigorous market competition ensures that no firm is able to exploit consumers. Testing whether a business practice, merger, or acquisition diminishes consumer welfare is the right bottom line for checking on the quality of competition.

It is troubling, then, that Senator Amy Klobuchar introduced the Competition and Antitrust Law Enforcement Reform Act (CALERA), the first significant bill regarding potential changes to antitrust law in the 117th Congress. As AAF’s Jennifer Huddleston points out, most of the attention around competition is usually focused on Big Tech and the notion of a “kill zone” that allows Big Tech companies to gobble up competitors before they can rise to challenge the dominance of giants. Unfortunately, the kill zone is a fiction and the significant, deleterious changes in CALERA would apply economy-wide.

Among CALERA’s proposed changes are three important and troublesome aspects. The first is removing the need for enforcers to define the market in which a company is accused of acting anti-competitively. To the non-lawyer, this change is baffling. In absence of identifying the goal, how can enforcement authorities identify the impact that behavior has on competition for that goal? Competition is for something – a gold medal, a promotion, or the sale of a good or service. Identifying the market defines the goal, so leaving out any definition of the market leaves undefined the nature of the competition. This definition is often a critical point of debate in current antitrust cases, so eliminating the need for it gives enforcers a substantial advantage over firms.

The second change is to weaken the consumer welfare standard. Specifically, per Huddleston, “it would change the government’s requirement from proving that a merger would substantially lessen competition (and thereby reduce consumer options) to showing only that a merger would ‘create an appreciable risk of materially lessening competition.’” This is like changing the legal standard from “beyond reasonable doubt” to “beyond all doubt”; after all, there is always a risk of something. As a result, the regulatory cost for any merger would rise significantly, likely deterring even beneficial ones.

Finally, CALERA would change the burden of proof in analyzing the competitive impacts of mergers and acquisitions. This is literally a simple as switching from “innocent until proven guilty” to “guilty until you can prove you are innocent.” Not only does this again make beneficial mergers more difficult, but such a change flies in the face of the entire American legal tradition.

Why should one care about these changes? One can’t do the needed rigorous analysis of competitive behavior without a definition of the market; this change would allow decisions based on all sorts of ancillary considerations. The latter two are particularly harmful in markets (such as the technology or pharmaceutical sectors) where it is often difficult for anyone to predict where rapid changes may fundamentally change the market itself and where the role of mergers and acquisitions is misunderstood. This is a risk under the current standards, but under the proposed changes it could lead to a chilling effect or bureaucratic denial of mergers that would actually benefit consumers.

The current standards focus antitrust on clearly defined markets, the quality of competition in those markets, and the resulting consumer benefits. Losing focus on consumer welfare is tantamount to losing the rudder on a ship; who knows where it ends up?

#### Pharma innovation stops extinction from natural disease and bioweapons

Dr. Piers Millett 17, PhD, Senior Research Fellow at the University of Oxford, Future of Humanity Institute, and Andrew Snyder-Beattie, MS, Director of Research at the University of Oxford, Future of Humanity Institute, “Existential Risk and Cost-Effective Biosecurity”, Health Security, Volume 15, Number 4, 8/1/2017, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5576214/

Abstract

In the decades to come, advanced bioweapons could threaten human existence. Although the probability of human extinction from bioweapons may be low, the expected value of reducing the risk could still be large, since such risks jeopardize the existence of all future generations. We provide an overview of biotechnological extinction risk, make some rough initial estimates for how severe the risks might be, and compare the cost-effectiveness of reducing these extinction-level risks with existing biosecurity work. We find that reducing human extinction risk can be more cost-effective than reducing smaller-scale risks, even when using conservative estimates. This suggests that the risks are not low enough to ignore and that more ought to be done to prevent the worst-case scenarios.

Keywords: : Biothreat, Catastrophic risk, Existential risk, Cost-effectiveness, Cost-benefit analysis

How worthwhile is it spending resources to study and mitigate the chance of human extinction from biological risks? The risks of such a catastrophe are presumably low, so a skeptic might argue that addressing such risks would be a waste of scarce resources. In this article, we investigate this position using a cost-effectiveness approach and ultimately conclude that the expected value of reducing these risks is large, especially since such risks jeopardize the existence of all future human lives.

Historically, disease events have been responsible for the greatest death tolls on humanity. The 1918 flu was responsible for more than 50 million deaths,1 while smallpox killed perhaps 10 times that many in the 20th century alone.2 The Black Death was responsible for killing over 25% of the European population,3 while other pandemics, such as the plague of Justinian, are thought to have killed 25 million in the 6th century—constituting over 10% of the world's population at the time.4 It is an open question whether a future pandemic could result in outright human extinction or the irreversible collapse of civilization.

A skeptic would have many good reasons to think that existential risk from disease is unlikely. Such a disease would need to spread worldwide to remote populations, overcome rare genetic resistances, and evade detection, cures, and countermeasures. Even evolution itself may work in humanity's favor: Virulence and transmission is often a trade-off, and so evolutionary pressures could push against maximally lethal wild-type pathogens.5,6

While these arguments point to a very small risk of human extinction, they do not rule the possibility out entirely. Although rare, there are recorded instances of species going extinct due to disease—primarily in amphibians, but also in 1 mammalian species of rat on Christmas Island.7,8 There are also historical examples of large human populations being almost entirely wiped out by disease, especially when multiple diseases were simultaneously introduced into a population without immunity. The most striking examples of total population collapse include native American tribes exposed to European diseases, such as the Massachusett (86% loss of population), Quiripi-Unquachog (95% loss of population), and the Western Abenaki (which suffered a staggering 98% loss of population).9

In the modern context, no single disease currently exists that combines the worst-case levels of transmissibility, lethality, resistance to countermeasures, and global reach. But many diseases are proof of principle that each worst-case attribute can be realized independently. For example, some diseases exhibit nearly a 100% case fatality ratio in the absence of treatment, such as rabies or septicemic plague. Other diseases have a track record of spreading to virtually every human community worldwide, such as the 1918 flu,10 and seroprevalence studies indicate that other pathogens, such as chickenpox and HSV-1, can successfully reach over 95% of a population.11,12 Under optimal virulence theory, natural evolution would be an unlikely source for pathogens with the highest possible levels of transmissibility, virulence, and global reach. But advances in biotechnology might allow the creation of diseases that combine such traits. Recent controversy has already emerged over a number of scientific experiments that resulted in viruses with enhanced transmissibility, lethality, and/or the ability to overcome therapeutics.13-17 Other experiments demonstrated that mousepox could be modified to have a 100% case fatality rate and render a vaccine ineffective.18 In addition to transmissibility and lethality, studies have shown that other disease traits, such as incubation time, environmental survival, and available vectors, could be modified as well.19-21

Although these experiments had scientific merit and were not conducted with malicious intent, their implications are still worrying. This is especially true given that there is also a long historical track record of state-run bioweapon research applying cutting-edge science and technology to design agents not previously seen in nature. The Soviet bioweapons program developed agents with traits such as enhanced virulence, resistance to therapies, greater environmental resilience, increased difficulty to diagnose or treat, and which caused unexpected disease presentations and outcomes.22 Delivery capabilities have also been subject to the cutting edge of technical development, with Canadian, US, and UK bioweapon efforts playing a critical role in developing the discipline of aerobiology.23,24 While there is no evidence of state-run bioweapons programs directly attempting to develop or deploy bioweapons that would pose an existential risk, the logic of deterrence and mutually assured destruction could create such incentives in more unstable political environments or following a breakdown of the Biological Weapons Convention.25 The possibility of a war between great powers could also increase the pressure to use such weapons—during the World Wars, bioweapons were used across multiple continents, with Germany targeting animals in WWI,26 and Japan using plague to cause an epidemic in China during WWII.27

Non-state actors may also pose a risk, especially those with explicitly omnicidal aims. While rare, there are examples. The Aum Shinrikyo cult in Japan sought biological weapons for the express purpose of causing extinction.28 Environmental groups, such as the Gaia Liberation Front, have argued that “we can ensure Gaia's survival only through the extinction of the Humans as a species … we now have the specific technology for doing the job … several different [genetically engineered] viruses could be released”(quoted in ref. 29). Groups such as R.I.S.E. also sought to protect nature by destroying most of humanity with bioweapons.30 Fortunately, to date, non-state actors have lacked the capabilities needed to pose a catastrophic bioweapons threat, but this could change in future decades as biotechnology becomes more accessible and the pool of experienced users grows.31,32

What is the appropriate response to these speculative extinction threats? A balanced biosecurity portfolio might include investments that reduce a mix of proven and speculative risks, but striking this balance is still difficult given the massive uncertainties around the low-probability, high-consequence risks. In this article, we examine the traditional spectrum of biosecurity risks (ie, biocrimes, bioterrorism, and biowarfare) to categorize biothreats by likelihood and impact, expanding the historical analysis to consider even lower-probability, higher-consequence events (catastrophic risks and existential risks). In order to produce reasoned estimates of the likelihood of different categories of biothreats, we bring together relevant data and theory and produce some first-guess estimates of the likelihood of different categories of biothreat, and we use these initial estimates to compare the cost-effectiveness of reducing existential risks with more traditional biosecurity measures. We emphasize that these models are highly uncertain, and their utility lies more in enabling order-of-magnitude comparisons rather than as a precise measure of the true risk. However, even with the most conservative models, we find that reduction of low-probability, high-consequence risks can be more cost-effective, as measured by quality-adjusted life year per dollar, especially when we account for the lives of future generations. This suggests that despite the low probability of such events, society still ought to invest more in preventing the most extreme possible biosecurity catastrophes.

Here, we use historical data to analyze the probability and severity of biothreats. We place biothreats in 6 loose categories: incidents, events, disasters, crises, global catastrophic risk, and existential risk. Together they form an overlapping spectrum of increasing impact and decreasing likelihood (Figure 1).\*

A spectrum of differing impacts and likelihoods from biothreats. Below each category of risk is the number of human fatalities. We loosely define global catastrophic risk as being 100 million fatalities, and existential risk as being the total extinction of humanity. Alternative definitions can be found in previous reports,33 as well as within this journal issue.34

The historical use of bioweapons provides useful examples of some categories of biothreats. Biocrimes and bioterrorism provide examples of incidents.† Biological warfare provides examples of events and disasters. These historical examples provide indicative data on likelihood and impact that we can then feed into a cost-effectiveness analysis. We should note that these data are both sparse and sometimes controversial. Where possible, we use multiple datasets to corroborate our numbers, but ultimately the “true rate” of bioweapon attacks is highly uncertain.

Biocrimes and Bioterrorism

Historically, risks of biocrime‡ and bioterrorism§ have been limited. A 2015 Risk and Benefit Analysis for Gain of Function Research detailed 24 biocrimes between 1990 and 2015 (0.96 per year) and an additional 42 bioterrorism incidents between 1972 and 2014 (1 per year).36 This is consistent with other estimates of biocrimes and bioterrorism frequency, which range from 0.35 to 3.5 per year (see supplementary material, part 1, at http://online.liebertpub.com/doi/suppl/10.1089/hs.2017.0028).

Most attacks typically result in no more than a handful of casualties (and many of these events include hoaxes, threats, and attacks that had no casualties at all). For example, the anthrax letter attacks in the United States in 2001, perhaps the most high-profile case in recent years, resulted in only 17 infections with 5 fatalities.37 The 2015 Risk and Benefit Analysis for Gain of Function Research detailed only a single death from the recorded biocrimes.\*\* Only 1 of the bioterrorism incidents in the report had associated deaths (the 2001 anthrax letter attacks).36 Based on this data, for the purposes of this article, we assume that we could expect 1 incident per year resulting in up to tens of deaths.

Biological Warfare

Academic overviews of biological warfare†† detail 7 programs prior to 1945.38 A further 9 programs are recorded between 1945 and 1994.39 For most of the last century, at least 1 program was active in any given year (Table 1).

The actual use of bioweapons by states is less common: Over the 85 years covered by these histories (1915 to 2000), 18 cases of use (or possible use) were recorded, including outbreaks connected to biological warfare (see supplementary material, part 2, at http://online.liebertpub.com/doi/suppl/10.1089/hs.2017.0028). Extrapolating this out (dividing 18 by 85), we would have about a 20% chance per year of biowarfare. It is worth noting the limitations of these data. Most of these events occurred before the introduction of the Biological Weapons Convention and were conducted by countries that no longer have biological weapons programs. Since many of these incidents occurred during infrequent great power wars, we revise our best guess to around 10% chance per year of biowarfare.

We use 2 sets of data to estimate the magnitude of such events. The first dataset was Japanese biological warfare in China,40 where records indicate a series of attacks on towns resulted in a mean of 330 casualties per event and 1 case in which an attack resulted in a regional outbreak causing an estimated 30,000 deaths (see supplementary material, part 3, at http://online.liebertpub.com/doi/suppl/10.1089/hs.2017.0028). The second data set came from disease events that were alleged to have an unnatural origin.41 In one case study, a point source release of anthrax resulted in at least 66 deaths. In a second case study, a regional epidemic of the same disease resulted in more than 17,000 human cases. While these events were not confirmed as having been caused by biological warfare, contemporary or subsequent analysis has suggested that such an origin was at least feasible. Combined, these figures provide an estimated impact of between 66 to 330 and 17,000 to 30,000.

For the purposes of this analysis, we are assuming the lower boundary figures from biological warfare are indicative of events, with a likelihood of 10% per year and an impact ranging between tens and thousands of fatalities. The upper boundary figures from biological warfare are indicative of disasters, with a likelihood of 1% per year and an impact range of thousands to tens of thousands of fatalities.‡‡

Unlike standard biothreats, there is no historical record on which to draw when considering global catastrophic or existential risks. Alternative approaches are required to estimate the likelihood of such an event. Given the high degree of uncertainty, we adopt 3 different approaches to approximate the risk of extinction from bioweapons: utilizing surveys of experts, previous major risk assessments, and simple toy models. These should be taken as initial guesses or rough order-of-magnitude approximations, and not a reliable or precise measure.

An informal survey at the 2008 Oxford Global Catastrophic Risk Conference asked participants to estimate the chance that disasters of different types would occur before 2100. Participants had a median risk estimate of 0.05% that a natural pandemic would lead to human extinction by 2100, and a median risk estimate of 2% that an “engineered” pandemic would lead to extinction by 2100.42

The advantage of the survey is that it directly measures the quantity that we are interested in: probability of extinction from bioweapons. The disadvantage is that the estimates were likely highly subjective and unreliable, especially as the survey did not account for response bias, and the respondents were not calibrated beforehand. We therefore also turn to other models that, while indirect, provide more objective measures of risk.§§

Recent controversial experiments on H5N1 influenza prompted discussions as to the risks of deliberately creating potentially pandemic pathogens. These agents are those that are highly transmissible, capable of uncontrollable spread in human populations, highly virulent, and also possibly able to overcome medical countermeasures.44 Previous work in a comprehensive report done by Gryphon Scientific, Risk and Benefit Analysis of Gain of Function Research,36 has laid out very detailed risk assessments of potentially pandemic pathogen research, suggesting that the annual probability of a global pandemic resulting from an accident with this type of research in the United States is 0.002% to 0.1%. The report also concluded that risks of deliberate misuse were about as serious as the risks of an accidental outbreak, suggesting a 2-fold increase in risk. Assuming that 25% of relevant research is done in the United States as opposed to elsewhere in the world, this gives us a further 4-fold increase in risk. In total, this 8-fold increase in risk gives us a 0.016% to 0.8% chance of a pandemic in the future each year (see supplementary material, part 4, at http://online.liebertpub.com/doi/suppl/10.1089/hs.2017.0028).

The analysis in Risk and Benefit Analysis of Gain of Function Research suggested that lab outbreaks from wild-type influenza viruses could result in between 4 million and 80 million deaths,36 but others have suggested that if some of the modified pathogens were to escape from a laboratory, they could cause up to 1 billion fatalities.45 For the purposes of this model, we assume that for any global pandemic arising from this kind of research, each has only a 1 in 10,000\*\*\* chance of causing an existential risk. This figure is somewhat arbitrary but serves as an excessively conservative guess that would include worst-case situations in which scientists intentionally cause harm, where civilization permanently collapses following a particularly bad outbreak, or other worst-case scenarios that would result in existential risk. Multiplying the probability of an outbreak with the probability of an existential risk gives us an annual risk probability between 1.6 × 10–8 and 8 × 10–7.†††

Model 3: Naive Power Law Extrapolation

Previous literature has found that casualty numbers from terrorism and warfare follow a power law distribution, including terrorism from WMDs.46 Power laws have the property of being scale invariant, meaning that the ratio in likelihood between events that cause the deaths of 10 people and 10,000 people will be the same as that between 10,000 people and 10,000,000 people.‡‡‡ This property results in a distribution with an exceptionally heavy tail, so that the vast majority of events will have very low casualty rates, with a couple of extreme outliers.

Past studies have estimated this ratio for terrorism using biological and chemical weapons to be about 0.5 for 1 order of magnitude,47 meaning that an attack that kills 10x people is about 3 times less likely (100.5) than an attack that kills 10x–1 people (a concrete example is that attacks with more than 1,000 casualties, such as the Aum Shinrikyo attacks, will be about 30 times less probable than an attack that kills a single individual). Extrapolating the power law out, we find that the probability that an attack kills more than 5 billion will be (5 billion)–0.5 or 0.000014. Assuming 1 attack per year (extrapolated on the current rate of bio-attacks) and assuming that only 10% of such attacks that kill more than 5 billion eventually lead to extinction (due to the breakdown of society, or other knock-on effects), we get an annual existential risk of 0.0000014 (or 1.4 × 10–6).

We can also use similar reasoning for warfare, where we have more reliable data (97 wars between 1820 and 1997, although the data are less specific to biological warfare). The parameter for warfare is 0.41,47 suggesting that wars that result in more than 5 billion casualties will comprise (5 billion)–0.41 = 0.0001 of all wars. Our estimate assumes that wars will occur with the same frequency as in 1820 to 1997, with 1 new war arising roughly every 2 years. It also assumes that in these extreme outlier scenarios, nuclear or contagious biological weapons would be the cause of such high casualty numbers, and that bioweapons specifically would be responsible for these enormous casualties about 10% of the time (historically bioweapons were deployed in WWI, WWII, and developed but not deployed in the Cold War—constituting a bioweapons threat in every great power war since 1900). Assuming that 10% of biowarfare escalations resulting in more than 5 billion deaths eventually lead to extinction, we get an annual existential risk from biowarfare of 0.0000005 (or 5 × 10–7).

Perhaps the most interesting implication of the fatalities following a power law with a small exponent is that the majority of the expected casualties come from rare, catastrophic events. The data also bear this out for warfare and terrorism. The vast majority of US terrorism deaths occurred during 9/11, and the vast majority of terrorism injuries in Japan over the past decades came from a single Aum Shinrikyo attack. Warfare casualties are dominated by the great power wars. This suggests that a typical individual is far more likely to die from a rare, catastrophic attack as opposed to a smaller scale and more common one. If our goal is to reduce the greatest expected number of fatalities, we may be better off devoting resources to preventing the worst possible attacks.

Why Uncertainty Is Not Cause for Reassurance

Each of our estimates rely to some extent on guesswork and remain highly uncertain. Technological breakthroughs in areas such as diagnostics, vaccines, and therapeutics, as well as vastly improved surveillance, or even eventual space colonization, could reduce the chance of disease-related extinction by many orders of magnitude. Other breakthroughs such as highly distributed DNA synthesis or improved understanding of how to construct and modify diseases could increase or decrease the risks. Destabilizing political forces, the breakdown of the Biological Weapons Convention, or warfare between major world powers could vastly increase the amount of investment in bioweapons and create the incentives to actively use knowledge and biotechnology in destructive ways. Each of these factors suggests that our wide estimates could still be many orders of magnitude off from the true risk in this century. But uncertainty is not cause for reassurance. In instances where the probability of a catastrophe is thought to be extremely low (eg, human extinction from bioweapons), greater uncertainty around the estimates will typically imply greater risk of the catastrophe, as we have reduced confidence that the risk is actually at a low level.48 §§§

Given that our conservative models are based on historical data, they fail to account for the primary source of future risk: technological development that could radically democratize the ability to build advanced bioweapons. If the cost and required expertise of developing bioweapons falls far enough, the world might enter a phase where offensive capabilities dominate defensive ones. Some scholars, such as Martin Rees, think that humanity has about a 50% chance of going extinct due in large part to such technologies.49 However, incorporating these intuitions and technological conjectures would mean relying on qualitative arguments that would be far more contentious than our conservative estimates. We therefore proceed to assess the cost-effectiveness on the basis of our conservative models, until superior models of the risk emerge.

### 1NC

T-Scope Exemptions

#### ‘Scope’ is the extent of the area covered by the core laws

Oxford 22 – Oxford English Dictionary, ‘scope’, https://www.lexico.com/en/definition/scope

1 The extent of the area or subject matter that something deals with or to which it is relevant.

*‘we widened the scope of our investigation’*

#### It’s bounded by exemptions and immunities

Layne E. Kruse 19, Co-Chair, Melissa H. Maxman, Co-Chair, Vittorio Cottafavi, Vice Chair, Stephen M. Medlock, Vice Chair; David Shaw, Vice Chair; Travis Wheeler, Vice Chair; Lisa Peterson, Young Lawyer Representative; all on the Exemptions and Immunities Committee of the ABA Antitrust Section, “Long Range Plan, 2018-19,” American Bar Association, 3/18/2019, https://www.americanbar.org/content/dam/aba/administrative/antitrust\_law/lrps/2019/exemptions-immunities.pdf

D. Top 3 Accomplishments Since Last Long Range Plan in 2015

(1) Publications. In addition to our Annual ALD Updates, we are set to publish an update to the Noerr-Pennington Handbook, which should be out in 2019. We also published a new version of the State Action Handbook in 2016. The Handbook on the Scope of the Antitrust Laws was published in 2015.

(2) Commentary on Legislative and Regulatory Proposals. The Committee has been very active in supporting Section commentary on proposed legislation, regulations, and other policy issues.

For instance, in March 2018, the E&I Committee assisted former E&I Chair John Roberti in composing his article, “The Role and Relevance of Exemptions and Immunities in U.S. Antitrust Law”, presented to the DOJ Antitrust Division Roundtable on behalf of the ABA Antitrust Section.

In January 2018, in response to a request from the Section Chair, we submitted Section comments along with the Legislative and State AG Committees, addressing the proposed Restoring Board Immunity Act legislation that would impact the post-NC Dental exemptions and immunity climate. Previously, we commented on the Professional Responsibility Act.

(3) Spring Meeting Programs. We have sponsored or co-sponsored a program at every Spring Meeting since our last long range plan. In 2019 we will chair Sham Litigation after FTC v. AbbVie The FTC v. AbbVie decision – calling for the disgorgement of $448 million on the basis of sham patent litigation. In addition, we will co-sponsor in 2019 with the Trade, Sports & Professional Associations Committee, a program on “Antitrust Law's Anomalous Treatment of Sports,” addressing how US courts have shown broad deference to the "rules of the game," including near-immunity status for concepts such as "amateurism."

II. Major Competition/Consumer Protection Policy or Substantive Issues Within Committee’s Jurisdiction Anticipated to Arise Over Next Three Years

A. Issue #1: Will Certain Exemptions Be Eliminated or Expanded?

A goal of the current DOJ Antitrust Division is to streamline antitrust laws, and in particular, take a hard look at exemptions and immunities. This is in the wheelhouse of our Committee’s fundamental policy issue: How much of the economy has opted out of our antitrust system? Is that a problem or are ad hoc exemptions acceptable ways to fine tune the application of the antitrust laws?

We anticipate, therefore, that efforts to enact or to repeal existing statutory exemptions and immunities will continue. In recent years, there have been efforts to repeal the exemptions for railroads and (at least in part) the McCarran-Ferguson insurance exemption. The Section and the Committee has generally supported efforts to repeal statutory exemptions. Given that repeal issues are very political it is unlikely that we will see many exemptions actually repealed.

On the other hand, proposals for new exemptions and immunities will continue to be introduced in Congress. The Committee will improve on a template for use in assisting the Section in drafting comments to Congress on newly proposed exemptions and immunities.

One development that may continue in the health care area are issues over a "COPA" or "Certificate of Public Advantage" at the state level. A COPA is a state statutory mechanism that provides certain collaborations in the health care community with immunity from private or government actions under the antitrust laws by invoking the state action doctrine. The FTC has generally opposed such efforts at the state level, but several states have used them to immunize health care mergers. This is a major development that should be monitored.

Through programs, newsletters, and Connect entries, the Committee intends to educate its members about Congressional and other efforts to repeal, or introduce new, exemptions and immunities, as well as the application of existing statutory exemptions and immunities in the courts. The Committee’s Handbook on the Scope of Antitrust Law, published in 2015, addresses developments in the statutory immunities area. It built on the prior publication, Federal Statutory Exemptions from Antitrust Law Handbook in 2007. Our Scope book will need to be updated within the next three years.

B. Issue #2: Will There Be Legislative Solutions to State Action Issues at State and Federal Levels?

The FTC’s case against the North Carolina Board of Dental Examiners put the "active supervision" prong of the state action test front and center. North Carolina State Board of Dental Examiners v. Federal Trade Commission, 135 S.Ct. 1101 (2015). The Court agreed with the FTC’s position that state occupational licensing boards comprised of market participants must satisfy the active supervision requirement. This spurred additional suits against other types of state boards involving regulated professionals. Moreover, every State had to reassess its boards to determine if there is "active supervision." Courts and state legislatures are addressing those issues. We also expect the proper framing of the clear articulation prong of the state action doctrine will be addressed. The Supreme Court spoke to the clear articulation test in FTC v. Phoebe Putney Health System, Inc., 133 S.Ct. 1003 (2013), narrowing the foreseeability test to cover only situations in which the anticompetitive conduct is the “inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature.” How this test has played out in the lower courts will be of particular interest to the Committee and its membership. The COPA issues, at the state level, as previously mentioned, will impact this area.

The Committee expects to address these issues through updates to Connect, newsletters, Spring Meeting programs, committee programs, its contributions to the Annual Review of Antitrust Law Developments. The State Action Practice Manual addresses these issues, as well as the Committee’s Handbook on the Scope of Antitrust Law.

C. Issue #3: Will Noerr Be Restricted or Expanded?

The Noerr-Pennington doctrine is an exemption issue that is frequently litigated. In particular, the most likely area of further development is in the pharma industry. Alleged misrepresentations to government agencies has caught the attention of some courts. In addition, there may be more development on the pattern exception, which raises the issue of whether each act of petitioning in a pattern must satisfy the objectively and subjectively baseless requirements for sham petitioning. The Committee’s new Handbook on Noerr (forthcoming) and its earlier Handbook on the Scope of Antitrust Law addresses developments in the Noerr law.

III. Specific Long Term Plans to Strengthen Committee

The Committee provides important services to the membership of the Section through publications, drafting ABA Antitrust Section comments to proposed regulation and international competition proposed immunities, and programming. The goals of the Committee include: (1) to provide policy comments on key questions about the scope of the antitrust laws for legislation and policy-making; (2) produce a mix of publications and programming that provides relevant and useful information to our members; (3) to ensure that the Committee remains valuable to our members’ practices; and (4) to make the most productive use of electronic communications to deliver the Committee’s work product.

A. Potential Modifications to Charter: What is the Role of this Committee?

The Committee’s current charter accurately characterizes its purview—that is, addressing the scope of the antitrust laws. That scope, of course, is defined primarily in terms of exemptions and immunities (both statutory and non-statutory). The Committee, however, has dealt with other doctrines, such as preemption and primary jurisdiction. These areas may not necessarily be viewed as traditional exemptions or immunities, but they nonetheless directly affect the application and extent of the antitrust laws. In addition, the Committee expends significant efforts to address international issues, including statutory exclusions from the U.S. antitrust laws, including the FTAIA; the related doctrines of act of state, sovereign immunity, and foreign sovereign compulsion; and industry-specific exemptions and exclusions from non-U.S. antitrust laws, including blocking exemptions.

#### ‘Expand’ means to make greater, not clarify its current state by applying it differently

Terry J. Hatter 90 Jr., United States District Judge, California Central District, In re Eastport Assoc., 114 B.R. 686, 690, 1990 U.S. Dist. LEXIS 6308, \*10-11 (C.D. Cal. March 20, 1990), 3/20/1990, Lexis

Second, Eastport asserts that the presumption against retroactivity does not apply because the amendment was intended only as a clarification of existing law. HN7 Where an amendment to a statute is remedial in nature and merely serves to clarify existing law, no question of retroactivity is involved and the law will be applied to pending cases. City of Redlands v. Sorensen, 176 Cal. App. 3d 202, 211, 221 Cal. Rptr. 728, 732 (1985). The evidence in this case, however, does not support the conclusion that the amendment to section 66452.6(f) was simply a clarification of preexisting law. The Legislative Counsel's Digest specifically states that "the bill would *expand* the definition of development moratorium." Senate Bill 186, Stats. 1988, ch. 1330, at 3375 (emphasis added). Since the Legislative Counsel is a state official required by law to analyze pending legislation, it is reasonable to presume that the Legislature amended the statute with the intent and meaning expressed in the Counsel's digest. People v. Martinez, 194 Cal. App. 3d 15, 22, 239 Cal. Rptr. 272, 276 (1987). By its ordinary meaning, the term "expand" indicates a change in the law, rather than a restatement of existing [\*\*11] law. In light of the Counsel's comment, Eastport's argument is unpersuasive.

#### The aff intensifies the application of antitrust to already covered activities---it does not curtail an exemption or immunity.

#### Vote neg:

#### Eliminating exemptions provides a limited and predictable basis for prep and focuses debates on the balance between antitrust and regulation, ensuring conceptual unity.

### 1NC

Packing CP

#### The Federal Trade Commission should bring legal action adopting the principle of separating platforms from commerce for platforms in the private sector. 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.

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Politics DA

#### BBB will pass, but it’s the ultimate test of Biden’s political capital.

Kevin Liptak 1-1, Reporter covering the White House for CNN, “Biden's 2022 challenges revolve around Covid, Russia and dealing with Congress,” CNN Politics, 01-01-2022, <https://www.cnn.com/2022/01/01/politics/joe-biden-2022-pandemic-russia-ukraine-congress-democrats/index.html>

President Joe Biden will return to the White House from an abbreviated winter break facing a set of hurdles that will test his political, diplomatic and management skills at a trying moment for his presidency.

The raging pandemic, a crisis with Russia and uncertainty surrounding his prized domestic priorities all await Biden in the new year. Determined to reset after a series of struggles -- and to recalibrate expectations that some of his allies believe were unrealistic -- the President is hopeful the coming weeks can provide much-needed momentum as another election cycle dawns.

Biden spent much of his time away from Washington over the past week on the phone discussing the days ahead with advisers and others in his extended orbit, plotting next steps in what could prove a pivotal month for his presidential ambitions. That includes preparation for a speech marking next week's one-year anniversary of the January 6 Capitol riot, a moment that underscores the stakes of his tenure and the strained political environment in which he governs.

His team is still regrouping after Sen. Joe Manchin, the moderate West Virginia Democrat, threw the future of his sweeping economic plan into doubt the Sunday before Christmas. In the days after his announcement, which surprised and angered Biden's aides, Manchin made particular note of his annoyance with White House staff, claiming they undermined the negotiation process and cryptically citing a perceived slight that drove him to his "wit's end."

Since then, tensions seem to have cooled, though Biden told reporters on Tuesday he hadn't spoken to Manchin this week. White House officials are hopeful talks can be revived on a more limited bill, or set of bills, in the new year.

"President Biden, who I have worked for for many years ... has a habit of pulling legislative rabbits out of hats. And has done so many times," said Jared Bernstein, the president's top economist, on CNN. "He is not by any means done fighting for Build Back Better. When I talk to him about that, he has some confidence about that."

Democrats in Congress, who have been left politically vulnerable by retirements and GOP redistricting plans, enter the midterm election cycle eager for Biden and Manchin to strike some kind of accord, even if the final package lacks the ambition of the sweeping social and climate bill the President initially proposed.

"I think it is important we pass whatever components we can through Congress and get them signed into law," said Rep. Raja Krishnamoorthi, a Democrat from Illinois, this week. "If we do that, we make our own luck and increase the chances of doing better in the midterms and delivering for the American people."

Viewed by the President and his team as a rebuilding year after the tumult of the Donald Trump era, 2021 was marked by a series of challenges that dramatically eroded Biden's political standing. His approval rating entered negative territory over the summer and has not rebounded since.

The sour national mood belies a strong economic record, including the creation of nearly 6 million jobs. New jobless claims fell this week to a 52-year low. Other indicators have shown near-record levels of growth as the economy rebounds from pandemic-era shutdowns.

Biden was also able to pass two major pieces of legislation -- a Covid relief package and a massive infrastructure bill -- and successfully rolled out a vaccination campaign to hundreds of millions of Americans, even if a stubbornly large percentage of the country still refuses the shot.

Biden and his advisers have been frustrated those achievements were obscured by other challenges, like a messy withdrawal from Afghanistan, slogging negotiations among Democrats over the domestic spending bill, supply chain issues, high inflation and the still-raging pandemic.

Unlike some of his predecessors, Biden opted against convening a year-end press conference to discuss the year's achievements or his priorities for 2022. He sat for one news interview, with ABC, and appeared on Jimmy Fallon's late-night show, but otherwise left public assessments of his first year to others.

"Here's the deal," Biden told Fallon, "we've been in less than a year, a lot has happened. Look, people are afraid, people are worried, and people are getting so much inaccurate information to them. I don't mean about me, but about their situation. And so they're, you know, they're being told that, you know, Armageddon is on the way."

Biden spent two nights at his Rehoboth Beach, Delaware, home after Christmas with members of his extended family and a new German Shepherd puppy, emerging once to walk the dog -- which he received as a birthday gift from his brother -- along the Atlantic. He departed the beach one day earlier than originally planned to return to his main house in Wilmington, which is situated more privately than his oceanfront property.

It was from there he spoke by telephone with Vladimir Putin on Thursday, hoping to defuse a crisis on the Ukrainian border. The conversation did not yield much clarity over whether the Russian president plans to invade Ukraine, as the West fears he might. Biden, who spent the preceding days conferring with his secretary of state and national security adviser by telephone, is hopeful diplomatic talks early next month in Europe can help ease the situation.

The Ukraine standoff is an opportunity for Biden to repair a foreign policy reputation damaged by a chaotic and deadly withdrawal from Afghanistan over the summer, which angered US allies and led to questions about the President's diplomatic acumen.

The administration's admitted failure to foresee how quickly the Taliban would retake control was one in a roster of items that seemed to catch Biden and his advisers off-guard this year. Other examples included persistent inflation that officials once described as "transitory," the emergence of the highly transmissible Omicron variant and a shortage of Covid-19 tests that Biden is now hurriedly working to remedy.

The White House is expected to soon unveil details surrounding the rollout of the 500 million free at-home tests Biden promised all Americans last week, though a series of questions about the logistics and capacity of the program remain unanswered. The vaccine mandates he sought to implement will also face the Supreme Court this week.

The resurgent coronavirus shadowed the President's festive season as national case counts rose to record levels this week and strained hospitals in certain areas of the country. Over the Christmas weekend, Biden took notice of long lines at testing centers that aired on television.

It was, for Biden, another pandemic-related disappointment in a year that fell short of nearly everyone's expectations. A July 4 ceremony marking "Independence from Covid-19" was followed nearly immediately by a surge of the Delta variant. Biden said during a CNN town hall last February that he hoped by the Christmas holidays -- then still 11 months away -- "we'll be in a very different circumstance, God willing, than we are today."

"A year from now, I think that there'll be significantly fewer people having to be socially distanced, having to wear a mask," he said then -- a goal that, at the time, seemed dully unambitious.

The Bidens had once hoped to escape somewhere warmer for the week between Christmas and New Year's Day, as they usually did before the pandemic. But those plans were abandoned in mid-December, and instead the President's family requested a Christmas Eve at the White House.

Before departing for Delaware, Biden spoke by video link to the nation's governors and assured them he was standing ready to provide support to states in need, even as he acknowledged shortcomings in his testing strategy.

"It's clearly not enough," he said after listing which steps he has taken to ramp up test capacity. "If I had -- we had known, we would have gone harder, quicker if we could have."

At the same time, the White House has begun a concerted shift away from focusing exclusively on case counts as a barometer for the pandemic, hoping to hone in on severity of cases as measured in hospitalizations. A CDC decision this week to halve the number of recommended isolation days post-infection -- driven in part by a desire to keep businesses running as employees become infected -- reflected a response increasingly attuned to living with a virus that shows no signs of disappearing completely.

"If you're in office, you're accountable and you're always going to be subject to criticism. When you manage a pandemic, you're not running a popularity contest. You're trying to manage the situation so you minimize the amount of pain as much as possible and allow people to lead their lives," said Andy Slavitt, who was Biden's top pandemic adviser earlier in the administration.

Still looming in the middle distance is Biden's first State of the Union, a moment advisers hope to use to define the first year of Biden's presidency on their own terms. Tentatively set for early February, the speech will also provide a chance to adjust expectations for the coming months. Work has already begun on the outline of the address.

It could be Biden's final address to a Congress controlled in both chambers by Democrats, a matter of urgency if he hopes to pass the major items on his priority list. That includes protections for voting rights, an issue Biden has said has no equal when it comes to preserving American democracy.

The coming weeks will prove critical for the push to safeguard access to the ballot, and Biden along with Vice President Kamala Harris -- tasked with leading on the issue from within the White House -- are planning a renewed drive to pass stalled pieces of legislation. That includes using the January 6 anniversary to call for greater democratic protections.

Civil rights groups have called on Biden to get something done by the Martin Luther King Jr. holiday mid-month. How that is accomplished, however, remains an open question.

#### The plan trades-off

Peter C. Carstensen 21, Fred W. & Vi Miller Chair in Law Emeritus at the University of Wisconsin Law School, LL.B. from Yale Law School, MA in Economics from Yale University, “The “Ought” and “Is Likely” of Biden Antitrust”, Concurrences – Antitrust Publications & Events, February 2021, https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en

14. Similarly, despite bipartisan murmurs about competitive issues, the potential in a closely divided Congress that any major initiatives will survive is limited at best. In part the challenge here is how the Biden administration will rank its commitments. If it were to make reform of competition law a major and primary commitment, it would have to trade off other goals, which might include health care reform or increases in the minimum wage. It is likely in this circumstance the new administration, like the Obama administration’s abandonment of the pro-competitive rules proposed under the PSA, would elect to give up stricter competition rules in order to achieve other legislative priorities.

15. Another key to a robust commitment to workable competition is the choice of cabinet and other key administrative positions. Here as well, the early signs are not entirely encouraging. In selecting Tom Vilsack to return as secretary of agriculture, the president has embraced a friend of the large corporate interests dominating agriculture who has spent the last four years in a highly lucrative position advancing their interests. Given the desperate need for pro-competitive rules to implement the PSA and control exploitation of dairy farmers through milk-market orders, the return of Vilsack is not good news. Who will head the FTC and who will be the attorney general and assistant attorney general for antitrust is still unknown, but if those picks are also centrists with strong links to corporate America the hope for robust enforcement of competition law will further attenuate!

16. In sum, this is a pessimistic prognostication for the likely Biden antitrust enforcement agenda. There is much that ought to be done. But this requires a willingness to take major enforcement risks, to invest significant political capital in the legislative process, and to select leaders who are committed to advancing the public interest in fair, efficient and dynamically competitive markets. The early signs are that the new administration will be no more committed to robust competition policy than the Obama administration. Events may force a more vigorous policy—I will cling to that hope as the Biden administration takes shape.

#### Failure to rescue negotiations causes extinction-level climate change.

Jordan Weissmann 12-23, Senior Editor at Slate, “Up in Smoke,” Slate, 12-23-2021, <https://slate.com/business/2021/12/manchin-build-back-better-environment-biden.html>

The Build Back Better Act might be dead. Or maybe it’s just on life support. Nobody but Joe Manchin can say for sure. The West Virginia senator ambushed his party on Sunday by announcing he was a hard no on the bill, imperiling the core of the Biden administration’s domestic agenda. After the initial furious reaction, both the White House and Democrats in Congress have begun trying to rescue negotiations, but their chance of success is unclear.

One thing is quite certain, though: If the defibrillators fail and President Joe Biden can’t resuscitate a deal, it will be an absolute catastrophe for America’s attempts to combat global warming. The bill that House Democrats passed in November was not everything clean energy and environmental activists had hoped, since some of its most aggressive proposals to limit greenhouse gases were stripped to appease Manchin. But by providing hundreds of billions of dollars to speed up the country’s green transition, it would have been an absolutely crucial and historic step toward meeting the climate goals Biden announced when the U.S. rejoined the Paris accords earlier this year. Without it, the country is unlikely to come anywhere near those targets, even if in an abstract, technical sense they’d still be within reach.

“Let me put it this way. The U.S. can still achieve its [Paris commitments] through pathways that don’t require Build Back Better, which lean heavily on federal regulation and state action,” Anand Gopal, executive director of strategy and policy at the climate think tank Energy Innovation, told me. “But it will be damn hard.”

Here’s a simple way to think about the blow U.S. climate policy is facing. The Biden administration has pledged to reduce U.S. emissions 50 percent from 2005 levels by 2030. Under the House legislation, the United States would cut its carbon footprint by 44 percent, according to an analysis by the REPEAT Project at Princeton’s Zero Lab. But under current law, the U.S. would only cut emissions by 27 percent—not even in the ballpark.

It is possible that the Princeton analysis is overly optimistic about the impact Build Back Better would have. For instance, it factors in reductions from a fee on methane included in the House bill, which looked like it would be pared back in any final version. But almost every analysis of the bill’s key pieces has found that it would have a dramatic impact and potentially put our Paris targets within reach, thanks to roughly $325 billion of green energy, electric vehicle, and other tax credits that anchor its climate section (the bill’s total spending on climate amounts to $555 billion). Those subsidies would bring down the cost of a new solar or wind plant by 30 percent and shave thousands from the price of an EV, making clean tech even more competitive than it already is.

Without Build Back Better, the Biden administration will be left to rely almost exclusively on its regulatory powers to curb emissions. This is the strategy that some progressives already seem to be preparing for. “Biden needs to lean on his executive authority now,” Rep. Alexandria Ocasio-Cortez tweeted earlier this week. “He has been delaying and underutilizing it so far. There is an enormous amount he can do on climate, student debt, immigration, cannabis, health care, and more.”

There are certainly important ways Biden can flex his executive authority on climate. His administration has already announced a strict new rule on methane leaks and tougher fuel economy standards that it could ratchet up again in the future. States could also contribute significantly if, for instance, California follows through on its promise to ban the sale of new gas-powered cars by 2035.

But there are legal and political limits to what Biden can accomplish through regulation alone. The Environmental Protection Agency is often required by statute to weigh the cost to consumers and industry when crafting new rules. And the administration may blanch at pursuing aggressive new regulations on power plants that might increase electricity prices at a moment voters are worried about inflation (and are as sensitive to gas prices as ever).

The tax credits in Build Back Better were meant to lower both of these hurdles by making green technology less expensive. Without them, Biden has less room to be bold. “All of these regulatory actions and state actions are more politically feasible and easier when there’s half a trillion dollars in subsidies to smooth the way,” John Larsen, head of energy systems research at the Rhodium Group, told me. “Without those subsidies, maybe executive actions could make up some of the tons [of CO2 reductions] you don’t get from Build Back Better. But it’s a very big ask from the executive branch to deliver all of the tons without the financial support.” Congress’ failure to legislate will also make it harder for Biden to regulate.

And that’s before you factor in the Supreme Court. In 2016, the justices stayed President Barack Obama’s Clean Power Plan, suggesting they were ready to hem in the administration on climate. Since then, the court has moved further to right with a 6-to-3 conservative majority, and its members have shown an interest in rolling back the power of federal regulators across the government. At the moment, the justices are preparing to hear a case, West Virginia v. EPA, in which they may decide the administration does not have the authority to limit emissions from power plants. In an absolute worst-case scenario, they could revive a version of the nondelegation doctrine, a pre–New Deal idea that would essentially hobble the entire structure of modern administrative government by holding that Congress simply can’t hand certain decision-making powers to executive agencies, which would kneecap the EPA’s authority on climate and other issues.

We might not get to that point. But it’s not unthinkable. “Everyone from me to my first-year law students is guessing what this court is going to do,” Nathan Richardson, a University of South Carolina law professor specializing in climate policy, told me. “It seems inclined to constrain the administrative state more broadly, and the sharp end of that spear is climate.”

Given that Biden’s ability to regulate carbon is limited and vulnerable to being struck down by an activist court, passing Build Back Better may be our last shot at serious climate policy for the next decade. One of the questions hanging over the negotiations is whether Manchin is actually open to a serious green energy plan or has simply pretended to be in order to run out the clock on negotiations. Before talks exploded, he reportedly made a counteroffer to the White House that included $500 billion in climate spending. But the specifics of what the money was for are unknown. Manchin is also tightly connected to the coal companies that dominate his state, still has a financial interest in the family coal brokerage on which he made his personal fortune, and has lately adopted the industry’s talking points criticizing Build Back Better’s energy section. It’s possible he simply doesn’t want a deal, in the end.

If Manchin is still open to something that looks roughly like Build Back Better’s climate plan, though, Democrats should be willing to give up a lot to get the deal. Because when it comes to the future of the planet, our plan B doesn’t look so promising.

## Dynamism ADV

### Dynamism---1NC

#### Startups are booming---the pandemic created fertile ground for innovation.

Greg Rosalsky 21, Reporter at NPR, M.A. in Economics and Public Policy from the Woodrow Wilson School at Princeton University, “What America's Startup Boom Could Mean For The Economy,” NPR, 06-29-2021, https://www.npr.org/sections/money/2021/06/29/1010229557/what-americas-startup-boom-could-mean-for-the-economy

Back in November, the Planet Money newsletter reported that — despite a deadly pandemic and an ugly recession — America was seeing a boom in the creation of new startups. We spoke with University of Maryland economist John Haltiwanger, one of the leading scholars of business formation. Now Haltiwanger has a new study out, and the trend is clear: "The surge continues," Haltiwanger says. "We're now convinced this wasn't just a blip."

Like so many other areas of the economy, applications for new businesses pulled back in the first half of 2020 but then snapped forward again like a slingshot. Not only was 2020 the best year on record for new business creation since the Census Bureau began tracking it in 2004, but applications for new businesses have continued to soar, through at least last month. In May, there were a half a million applications for new businesses; the second highest month on record, below only last July. In total, there have been more than six million filings for new businesses since the pandemic began. The boom can be seen in both businesses composed of only one self-employed person and businesses that the Census expects will employ multiple people.

Over the last year and half, we have been reshuffling how and where we work and shop; and that shift has created all sorts of opportunities for entrepreneurs. With the pandemic, it's like someone ripped out an irrigation pipe for brick-and-mortar commerce and plugged it into virtual commerce. It's brought a drought to face-to-face businesses, and a bounty to businesses you interact with on a digital screen. The retail sector alone, driven by e-commerce, accounts for about a third of all the new startup growth. In addition, trucking, warehousing, and delivery services are all seeing surges — which makes sense, as we've seen a massive shift of spending on in-person services to tangible goods that are bought online.

We've also seen the rise of remote work and a reshuffling of the population, from city centers to suburbs, and from traditional job centers to "Zoom Towns." Where people go, they bring their dollars. It may help explain why the food and accommodation sector is the greatest area of growth. We've also seen huge growth in the types of businesses that can provide remote services.

There are at least two potential theories for what's going on. First, while the boom is undeniably good news, there is a slightly negative take: we've seen a surge in new businesses mainly because the pandemic forced two painful restructurings to the economy. It began by ravaging the face-to-face economy and creating an awkward marketplace where we could only do stuff six feet apart. This suffocated many existing businesses while providing oxygen for others, such as online retailers, video conferencing apps, drive-thrus, delivery services, mask and sanitizer companies, and the like. Yet, many of these new opportunities for pandemic-friendly businesses may prove to be only temporary. Many of them could die as we head back to normal.

Now that most of us are vaccinated, we're releasing the pressure cooker of our pent-up demand for going out. It's leading to the second major restructuring: new businesses — restaurants, bars, salons and so on — are growing out of the ashes of the businesses scorched by the pandemic. This is great news! It's better than no new businesses. But it's possible that we're now just heading back to normal, as opposed to something new and better. Think of it like the economy doing a pendulum swing from a normal economy to a pandemic economy and back to a normal economy again.

It's hard to completely rule out this Negative Nancy take. We don't have many details about what exactly the new businesses created during the pandemic are doing, or how big they're gonna get. More importantly, we still don't have great data on how many and what kinds of businesses died over the last year, and whether these new businesses are merely just filling the massive hole created at the beginning of the pandemic. The data suggests the biggest surges occurred at the beginning and tail ends of the pandemic, which is consistent with the idea that this was a pendulum swing.

But Haltiwanger offers a second, more optimistic theory, which says this is about way more than just a pendulum swing: it's a rocket ship to a better economy. As painful as the pandemic has been, he believes it has forced the business world to drop outdated ways of doing things and embrace technology in a new way. "I don't think any of us had a clue that we could do so much business activity remotely," Haltiwanger says. "That sparks all kinds of new ideas."

The MIT economist Erik Brynjolfsson told us last year that history suggests there is "a lot of inertia in the way people work" and that "unless there's a shock, most people will tend to continue to do things the old way." The pandemic, he said, provided that shock. It's forced businesses to fully embrace technologies that enable a whole raft of new business practices, including remote work. Moreover, he argued, these changes may finally result in real productivity growth after so many years of stagnation.

When Haltiwanger looks at the data on business creation, he sees signs that this pickup in productivity may be on the verge of happening. "I have been struck over the last six months at how much of a sustained increase this surge in new business applications has been," he says. "Here's the thing: when we've seen sustained increases like this in the past, it has boded well for job creation, innovation, and productivity growth in the United States."

The legendary Harvard economist Joseph Schumpeter developed a concept known as creative destruction that may help explain what's going on. It describes the cycle of business death and birth that remakes the economy into something more efficient and productive. Economists believe it's a vital process to improve society's living standards. As destructive as the pandemic has been, it's possible we'll look back and see it as the spark for creating a new and better economy.

#### Status quo solves---anti-trust is dynamic and applied consistently---changes destroy balance.

Thomas A. Lambert 20, Wall Chair in Corporate Law and Governance and Professor of Law at the University of Missouri School of Law, J.D. from the University of Chicago, “The Case Against Legislative Reform of U.S. Antitrust Doctrine,” University of Missouri School of Law Legal Studies Research Paper No. 2020-13, 05-12-2020, https://ssrn.com/abstract=3598601

To understand why the current antitrust statutes should be left as they are, it may help to revisit what the antitrust laws do and how they do it. Experience has taught us that market competition is the best way to secure low prices, high-quality goods and services, and product variety. Not only do competitive markets benefit consumers, they also ensure that society’s productive resources are put to their highest and best ends.2 The goal of antitrust, then, is to promote consumer and societal welfare by ensuring that markets remain competitive.3

To secure that goal, antitrust polices the situations in which competition breaks down, chiefly monopoly (or monopsony), where there is a single seller (or buyer), and collusion, where nominal competitors agree not to compete. The two primary provisions of the Sherman Act correspond to these two paradigmatic defects in competition: Section 1 aims at collusion, declaring “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce ... to be illegal”; Section 2 seeks to prevent firms from attaining monopoly power, making it illegal to “monopolize, or attempt to monopolize, or combine or conspire ... to monopolize” any market. Section 7 of the Clayton Act bolsters these provisions by forbidding business combinations (mergers and asset acquisitions) that are likely to cause a substantial lessening of competition in a market.

Given the sparseness of the statutory text (not to mention the fact that a literal reading of some provisions is nonsensical),4 determining the scope of antitrust’s prohibitions has largely been left to the judiciary. Indeed, most commentators view the antitrust statutes as an implicit delegation of authority to the federal courts to craft a common law of competition, one that evolves according to our ever-expanding learning about the effects of different business practices.

The courts have responded by positing (mainly) standards—not rules—for determining the legality of challenged business practices.5 They have interpreted Section 1 of the Sherman Act to forbid agreements that unreasonably restrain trade and Section 2 to condemn unreasonably exclusionary unilateral conduct by firms possessing market power.6 In both cases, reasonableness is determined by assessing the actual or likely effect of the challenged behavior on quality-adjusted market output. For a few business behaviors (e.g., naked price-fixing among competitors), experience has shown that the conduct is always or almost always output-reducing, so such practices are deemed per se unreasonable. Such ex ante rules, though, are the exception in antitrust; for the most part, the law consists of ex post standards that require case-by-case assessment. Courts have posited different standards for different types of business behavior, calibrating them (by adjusting the elements of liability, burdens of proof, available defenses, etc.) to reflect judicial experience and economic learning.

In so doing, the courts have been rightly concerned with the costs of the standards they set. One set of relevant costs consists of the welfare losses that result when a standard makes a mistake on liability. The behaviors antitrust polices—agreements that restrain trade, single-firm acts that make life hard for rivals, business combinations—can sometimes enhance market output and sometimes reduce it.7 If a legal standard mistakenly allows conduct that is, on net, anticompetitive, consumers will face higher prices and/or reduced quality, and a deadweight loss will occur. But if the standard wrongly forbids conduct that is, on balance, procompetitive, market output will be lower than it otherwise would be and, again, consumers will suffer. Both false convictions (Type I errors) and false acquittals (Type II errors) generate losses.

In addition to these so-called “error costs,” regulating competitive mixed bags entails significant costs of simply deciding whether contemplated or actual conduct is forbidden or permitted. Such “decision costs” must be borne by business planners (who are attempting to avoid liability), by litigating parties (who are trying to prove their case), and by adjudicators (who must decide whether the law has been broken).

Type I error costs, Type II error costs, and decision costs are intertwined. If courts try to reduce the risk of false conviction (Type I error) by making it harder for a plaintiff to establish liability or easier for a defendant to make out a defense, they will increase the risk of false acquittal (Type II error). If they ease a plaintiff’s burden or cut back on available defenses to reduce false acquittals, they will tend to enhance the social losses from false convictions. And if they make the rule more nuanced in an effort to condemn the bad without chilling the good, thereby reducing error costs overall, they enhance decision costs. As in a game of whack-a-mole, driving down costs in one area will cause them to rise elsewhere.

In light of the inevitable and intertwined costs that will result from any effort to police market power-creating conduct, antitrust standards should be crafted so as to minimize the sum of error and decision costs. The institutions charged with crafting antitrust policies—under the status quo, the courts—should not strive to prevent every anticompetitive act, to allow every procompetitive one, or to keep the rules as simple as possible. In keeping with Voltaire’s prudent maxim, “the perfect is the enemy of the good,” they should eschew perfection along any single dimension in favor of overall optimization. Such an approach ensures that antitrust accomplishes as much good as possible.

As I have elsewhere documented, this prudent approach has largely been embraced by the U.S. Supreme Court in recent years.8 Time and again, the Court has examined the economic learning on different business practices and crafted “structured” rules of reason aimed at separating the procompetitive wheat from the anticompetitive chaff, while keeping decision costs in check. For some practices (e.g., tying) the legal rules have not caught up with economic understanding, but the system as a whole is sound, and one would certainly expect the doctrine to evolve in a salutary direction. With respect to mergers and other business combinations, the judicial precedents are less sound, largely because few merger decisions are appealed to allow for an updating of controlling precedents in light of current economic understanding. In the merger context, though, the federal enforcement agencies (the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice) have taken the lead in updating the standards so as to minimize the sum of error and decision costs; the agencies’ enforcement guidelines, crafted with an eye toward optimizing antitrust interventions and regularly updated to reflect new economic learning, have been extremely influential among the lower courts and have largely remedied the deficiencies in controlling precedents.

To summarize this section, any effort to regulate potentially market power-creating conduct (collusion, exclusionary conduct, business combinations) is sure to create some losses in terms of errors (wrongful acquittals of harmful behavior and wrongful convictions of beneficial conduct) and administrative costs. The approach currently prevailing under the federal antitrust laws—an output-focused, standards-based, common law approach under which courts craft policies in light of evolving understandings of economics and with an eye toward minimizing the sum of error and decision costs—is generally working well.

#### No slow growth impact

Dr. Christopher J. Fettweis 17, Associate Professor of Political Science at Tulane University, PhD in Government and Politics from the University of Maryland, “Unipolarity, Hegemony, and the New Peace”, Security Studies, Vol. 26, No. 3, p. 434-442 [language modified]

Others are more skeptical of institutions’ potential to shape behavior, and believe instead that stability is dependent upon the active application of the hegemon’s military power.51

The second version of the hegemonic-stability explanation is based upon a different view of human nature than is the liberal, one less sanguine about the potential for voluntary cooperation. Actors respond to concrete incentives, according to this outlook, and will ignore rules or law if transgressions are not punished. The would-be hegemon must enforce stability, therefore, not merely establish it. Policing metaphors are common in this literature, with the United States playing the role of sheriff or globocop charged with keeping the peace.52

[FOOTNOTE]

52 Richard N. Haass, The Reluctant Sheriff: The United States after the Cold War (New York: Council on Foreign Relations Press, 1997); Colin S. Gray, The Sheriff: America's Defense of the New World Order (Lexington: University Press of Kentucky, 2004).

View all notes

[END FOOTNOTE]

Take away the police, or damage their credibility, and instability would soon return. “The present world order,” according to Robert Kagan, “is as fragile as it is unique,” and would collapse without sustained US efforts.53 “In many instances,” add Lawrence Kaplan and William Kristol, “all that stands between civility and genocide, order and mayhem, is American power.”54 Though this argument is commonly associated with neoconservatism55—and will be referred to as the neoconservative explanation from here on in—it is also accepted by a number of scholars and observers generally considered outside of that ideological approach.56

The two versions are united on this point: it is not unipolarity in general that accounts for the New Peace, but American unipolarity in particular. US hegemony is essentially benevolent, according to both liberals and neoconservatives. The United States has constructed an order that takes the interests of other states into account, which decreases revisionist impulses. At the very least, it is nonthreatening, and does not generate the kind of balancing behavior that might be expected to bring it to an end.57 In the liberal version, the order constructed by the United States is beneficial to all its members, who have a stake in its maintenance. Adherents of the more muscular version, whether neoconservative or not, assume that the default position of smaller states in a unipolar system is to bandwagon with the center.58 No one seems to suggest that there is an irenic structural logic of unipolarity independent of US behavior. The question is therefore not so much about the connection between unipolarity and the New Peace as much as it is whether US behavior, in one form or another, has brought it about.

Hegemonic stability is in some ways more theoretically elegant than the other possible explanations for the New Peace. For one thing, it does not suffer from questions regarding its causal direction. While it may be reasonable to suggest that peace produced the expansion of democracy and/or economic development rather than the other way around, peace did not produce unipolarity. In fact, if the United States is indeed supplying the global public good of security, it might be able to take credit for a number of these positive trends. Not just peace but democracy, economic stability, and development all might be beneficial side effects of unipolarity. 59 “A world without U.S. primacy,” argued Samuel P. Huntington, “would be a world with more violence and disorder and less democracy and economic growth.”60

There is a great deal at stake here, for both scholarship and practice. If hegemony is responsible for the New Peace, then its peaceful trends are unlikely to last much beyond the unipolar moment. The other proposed explanations described above are essentially irreversible: nuclear weapons cannot be uninvented, and no defense against their use is ever going to be completely foolproof; the pace of globalization and economic interdependence shows no sign of slowing; democracy seems to be firmly embedded in the cultural fabric of many of the places it currently exists, and may well be in the process of spreading to the few places where it does not. The UN, while oft criticized, shows no signs of disappearing. And finally, history contains precious few examples of the return of institutions deemed by society to be outmoded, barbaric, and/or futile.61 In other words, liberal normative evolution is typically unidirectional. Few would argue, for instance, that either slavery or dueling is likely to reappear in this century; illiberal normative recidivism is exceptionally rare.62 If the neoconservatives are correct and US hard power is primarily responsible for the New Peace, however, then it cannot be expected to last long after US hegemonic decline, or adjustment in its grand strategy toward retrenchment. If liberal internationalists are right and the New Peace is largely a product of the world order that the United States has forged, then it may have a bit more staying power beyond unipolarity, but not necessarily much.

Determining the relationship between hegemony and the New Peace has importance that goes beyond the academy. Whether or not decline is on the immediate horizon, unipolarity is unlikely to last forever. If the New Peace is essentially an American creation, that post-unipolar future is likely to be quite a bit more violent than the present.

Evidence for and against Pax Americana

Since the world had never experienced system-wide unipolarity prior to the end of the Cold War, judgments about its relative stability and likely duration are necessarily speculative.63 Extrapolations can be made from regional unipolar systems, like the Roman Mediterranean, but definitive system-wide statements cannot be made from one case. Still, if US power were primarily responsible for the New Peace, one would expect that it would leave some clues about its effects. This section reviews three kinds of evidence regarding Pax Americana in order to determine whether an empirical relationship can be said to exist between various kinds of US activity and global stability.

Conflict and Hegemony by Region

Even the most ardent supporters of the hegemonic-stability explanation do not contend that US influence extends equally to all corners of the globe. The United States has concentrated its policing in what George Kennan used to call “strong points,” or the most important parts of the world: Western Europe, the Pacific Rim, and Persian Gulf.64 By doing so, Washington may well have contributed more to great power peace than the overall global decline in warfare. If the former phenomenon contributed to the latter, by essentially providing a behavioral model for weaker states to emulate, then perhaps this lends some support to the hegemonic- stability case.65 During the Cold War, the United States played referee to a few intra-West squabbles, especially between Greece and Turkey, and provided Hobbesian reassurance to Germany’s nervous neighbors. Other, equally plausible explanations exist for stability in the first world, including the presence of a common enemy, democracy, economic interdependence, general war aversion, etc. The looming presence of the leviathan is certainly among these plausible explanations, but only inside the US sphere of influence. Bipolarity was bad for the nonaligned world, where Soviet and Western intervention routinely exacerbated local conflicts. Unipolarity has generally been much better, but whether or not this was due to US action is again unclear.

Overall US interest in the affairs of the Global South has dropped markedly since the end of the Cold War, as has the level of violence in almost all regions. There is less US intervention in the political and military affairs of Latin America compared to any time in the twentieth century, for instance, and also less conflict. Warfare in Africa is at an all-time low, as is relative US interest outside of counterterrorism and security assistance.66 Regional peace and stability exist where there is US active intervention, as well as where there is not. No direct relationship seems to exist across regions.

If intervention can be considered a function of direct and indirect activity, of both political and military action, a regional picture might look like what is outlined in Table 1.

These assessments of conflict are by necessity relative, because there has not been a “high” level of conflict in any region outside the Middle East during the period of the New Peace. Putting aside for the moment that important caveat, some points become clear. The great powers of the world are clustered in the upper right quadrant, where US intervention has been high, but conflict levels low. US intervention is imperfectly correlated with stability, however. Indeed, it is conceivable that the relatively high level of US interest and activity has made the security situation in the Persian Gulf and broader Middle East worse. In recent years, substantial hard power investments (Somalia, Afghanistan, Iraq), moderate intervention (Libya), and reliance on diplomacy (Syria) have been equally ineffective in stabilizing states torn by conflict. While it is possible that the region is essentially unpacifiable and no amount of police work would bring peace to its people, it remains hard to make the case that the US presence has improved matters. In this “strong point,” at least, US hegemony has failed to bring peace.

In much of the rest of the world, the United States has not been especially eager to enforce any particular rules. Even rather incontrovertible evidence of genocide has not been enough to inspire action. Washington’s intervention choices have at best been erratic; Libya and Kosovo brought about action, but much more blood flowed uninterrupted in Rwanda, Darfur, Congo, Sri Lanka, and Syria. The US record of peacemaking is not exactly a long uninterrupted string of successes. During the turn-of-the-century conventional war between Ethiopia and Eritrea, a highlevel US delegation containing former and future National Security Advisors (Anthony Lake and Susan Rice) made a half-dozen trips to the region, but was unable to prevent either the outbreak or recurrence of the conflict. Lake and his team shuttled back and forth between the capitals with some frequency, and President Clinton made repeated phone calls to the leaders of the respective countries, offering to hold peace talks in the United States, all to no avail.67 The war ended in late 2000 when Ethiopia essentially won, and it controls the disputed territory to this day.

The Horn of Africa is hardly the only region where states are free to fight one another today without fear of serious US involvement. Since they are choosing not to do so with increasing frequency, something else is probably affecting their calculations. Stability exists even in those places where the potential for intervention by the sheriff is minimal. Hegemonic stability can only take credit for influencing those decisions that would have ended in war without the presence, whether physical or psychological, of the United States. It seems hard to make the case that the relative peace that has descended on so many regions is primarily due to the kind of heavy hand of the neoconservative leviathan, or its lighter, more liberal cousin. Something else appears to be at work.

Conflict and US Military Spending

How does one measure polarity? Power is traditionally considered to be some combination of military and economic strength, but despite scores of efforts, no widely accepted formula exists. Perhaps overall military spending might be thought of as a proxy for hard power capabilities; perhaps too the amount of money the United States devotes to hard power is a reflection of the strength of the unipole. When compared to conflict levels, however, there is no obvious correlation, and certainly not the kind of negative relationship between US spending and conflict that many hegemonic stability theorists would expect to see.

During the 1990s, the United States cut back on defense by about 25 percent, spending $100 billion less in real terms in 1998 that it did in 1990.68 To those believers in the neoconservative version of hegemonic stability, this irresponsible “peace dividend” endangered both national and global security. “No serious analyst of American military capabilities doubts that the defense budget has been cut much too far to meet America’s responsibilities to itself and to world peace,” argued Kristol and Kagan at the time.69 The world grew dramatically more peaceful while the United States cut its forces, however, and stayed just as peaceful while spending rebounded after the 9/11 terrorist attacks. The incidence and magnitude of global conflict declined while the military budget was cut under President Clinton, in other words, and kept declining (though more slowly, since levels were already low) as the Bush administration ramped it back up. Overall US military spending has varied during the period of the New Peace from a low in constant dollars of less than $400 billion to a high of more than $700 billion, but war does not seem to have noticed. The same nonrelationship exists between other potential proxy measurements for hegemony and conflict: there does not seem to be much connection between warfare and fluctuations in US GDP, alliance commitments, and forward military presence. There was very little fighting in Europe when there were 300,000 US troops stationed there, for example, and that has not changed as the number of Americans dwindled by 90 percent. Overall, there does not seem to be much correlation between US actions and systemic stability. Nothing the United States actually does seems to matter to the New Peace.

It is possible that absolute military spending might not be as important to explain the phenomenon as relative. Although Washington cut back on spending during the 1990s, its relative advantage never wavered. The United States has accounted for between 35 and 41 percent of global military spending every year since the collapse of the Soviet Union.70 The perception of relative US power might be the decisive factor in decisions made in other capitals. One cannot rule out the possibility that it is the perception of US power—and its willingness to use it—that keeps the peace. In other words, perhaps it is the grand strategy of the United States, rather than its absolute capability, that is decisive in maintaining stability. It is that to which we now turn.

Conflict and US Grand Strategy

The perception of US power, and the strength of its hegemony, is to some degree a function of grand strategy. If indeed US strategic choices are responsible for the New Peace, then variation in those choices ought to have consequences for the level of international conflict. A restrained United States is much less likely to play the role of sheriff than one following a more activist approach. Were the unipole to follow such a path, hegemonic-stability theorists warn, disaster would follow. Former National Security Advisor Zbigniew Brzezinski spoke for many when he warned that “outright chaos” could be expected to follow a loss of hegemony, including a string of quite specific issues, including new or renewed attempts to build regional empires (by China, Turkey, Russia, and Brazil) and the collapse of the US relationship with Mexico, as emboldened nationalists south of the border reassert 150-year-old territorial claims. Overall, without US dominance, today’s relatively peaceful world would turn “violent and bloodthirsty.”71 Niall Ferguson foresees a post-hegemonic “Dark Age” in which “plunderers and pirates” target the big coastal cities like New York and Rotterdam, terrorists attack cruise liners and aircraft carriers alike, and the “wretchedly poor citizens” of Latin America are unable to resist the Protestantism brought to them by US evangelicals. Following the multiple (regional, fortunately) nuclear wars and plagues, the few remaining airlines would be forced to suspend service to all but the very richest cities.72 These are somewhat extreme versions of a

central assumption of all hegemonic-stability theorists: a restrained United States would be accompanied by utter disaster. The “present danger” of which Kristol, Kagan, and their fellow travelers warn is that the United States “will shrink its responsibilities and—in a fit of absentmindedness, or parsimony, or indifference— allow the international order that it created and sustains to collapse.”73 Liberals fear restraint as well, and also warn that a militarized version of primacy would be counterproductive in the long run. Although they believe that the rule-based order established by United States is more durable than the relatively fragile order discussed by the neoconservatives, liberals argue that Washington can undermine its creation over time through thoughtless unilateral actions that violate those rules. Many predicted that the invasion of Iraq and its general contempt for international institutions and law would call the legitimacy of the order into question. G. John Ikenberry worried that Bush’s “geostrategic wrecking ball” would lead to a more hostile, divided, and dangerous world.74 Thus while all hegemonicstability theorists expect a rise of chaos during a restrained presidency, liberals also have grave concerns regarding primacy.

Overall, if either version is correct and global stability is provided by US hegemony, then maintaining that stability through a grand strategy based on either primacy (to neoconservatives) or “deep engagement” (to liberals) is clearly a wise choice.75 If, however, US actions are only tangentially related to the outbreak of the New Peace, or if any of the other proposed explanations are decisive, then the United States can retrench without fear of negative consequences. The grand strategy of the United States is therefore crucial to beliefs in hegemonic stability. Although few observers would agree on the details, most would probably acknowledge that post-Cold War grand strategies of American presidents have differed in some important ways. The four administrations are reasonable representations of the four ideal types outlined by Barry R. Posen and Andrew L. Ross in 1996.76 Under George H. W. Bush, the United States followed the path of “selective engagement,” which is sometimes referred to as “balance-of-power realism”; Bill Clinton’s grand strategy looks a great deal like what Posen and Ross call “cooperative security,” and others call “liberal internationalism”; George W. Bush, especially in his first term, forged a strategy that was as close to “primacy” as any president is likely to get; and Barack Obama, despite some early flirtation with liberalism, has followed a restrained realist path, which Posen and Ross label “neo-isolationism” but its proponents refer to as “strategic restraint.”77 In no case did the various anticipated disorders materialize. As Table 2 demonstrates, armed conflict levels fell steadily, irrespective of the grand strategic path Washington chose.

Neither the primacy of George W. Bush nor the restraint of Barack Obama had much effect on the level of global violence. Despite continued warnings (and the high-profile mess in Syria), the world has not experienced an increase in violence while the United States chose uninvolvement. If the grand strategy of the United States is responsible for the New Peace, it is leaving no trace in the evidence. Perhaps we should not expect a correlation to show up in this kind of analysis. While US behavior might have varied in the margins during this period, nether its relative advantage over its nearest rivals nor its commitments waivered in any important way. However, it is surely worth noting that if trends opposite to those discussed in the previous two sections had unfolded, if other states had reacted differently to fluctuations in either US military spending or grand strategy, then surely hegemonic stability theorists would argue that their expectations had been fulfilled. Many liberals were on the lookout for chaos while George W. Bush was in the White House, just as neoconservatives have been quick to identify apparent worldwide catastrophe under President Obama.78 If increases in violence would have been evidence for the wisdom of hegemonic strategies, then logical consistency demands that the lack thereof should at least pose a problem.

As it stands, the only evidence we have regarding the relationship between US power and international stability suggests that the two are unrelated. The rest of the world appears quite capable and willing to operate effectively without the presence of a global police~~man~~. Those who think otherwise have precious little empirical support upon which to build their case. Hegemonic stability is a belief, in other words, rather than an established fact, and as such deserves a different kind of examination.

#### China won’t overtake the US.

Eugene Gholz & Harvey M. Sapolsky 21, Associate Professor, Political Science, University of Notre Dame; Emeritus Professor, Public Policy & Organization, MIT. Former Director, MIT Security Studies Program, "The Defense Innovation Machine: Why the U.S. Will Remain on the Cutting Edge," Journal of Strategic Studies, pg. 2-17, 06/25/2021, T&F.

Here we examine these concerns that the American military advantage in the Post-Cold War era has dissipated in large part because the Defense Department lags behind in developing advanced technologies. Our judgment is that the American defense research and development system, as honed during the Cold War and expanded since, is fully capable of handling any military challenge. It is a gigantic technology-generating, innovation-producing, war-fighting machine. U.S. ‘hard’ innovation capabilities – ‘input and infrastructure factors’ like R&D facilities, human capital, access to foreign technology, and availability of funding – far outstrip those of its potential rivals, even though those factors are the ones often thought of as easier for catch-up countries to obtain.3 Despite warnings that the United States no longer spends enough on R&D and that Chinese R&D spending is surging, the reality is that the United States dramatically leads in military innovation investment. In functional terms, the United States dominates all other countries, including China, in ‘input factors,’ starting with resource allocations to defense research and development.

More important, we believe that the American defense technology system is pushed toward innovation by specific contextual factors, the ‘soft’ categories of attributes and capabilities, that cannot readily transfer to likely rivals.4 First, the political culture of the United States values technology strongly: technology is assumed to be the solution to most problems, including military ones. American culture also has a strong casualty aversion driven by an economy traditionally burdened by labor scarcity and by responsive political institutions that encourage the substitution of capital for labor to keep its own people out of harm’s way.5 The All-Volunteer Force reflects this by making military service voluntary and thus making military service expensive for government and service personnel lives ever-more-valuable and in need of husbanding.

Second, competition is deeply engrained in defense, as it is in most of American society, stimulating new ideas and providing a diversity of approaches to any problem, in case one technology trajectory does not work out as hoped. Competition extends among the various military services and agencies, which each seek to propose solutions to the nation’s strategic problems, and among firms with different design-team philosophies.

Third, the United States also welcomes foreign ideas much more readily than other countries, given U.S. openness to immigration, especially among the highly skilled and technically expert. Finally, a Cold-War organizational innovation in the United States created special public-private hybrid organizations, Federally-Funded Research and Development Centers (FFRDCs) that offer unbiased technical advice and a mechanism for the accumulation of knowledge – a unique social, relational system for institutional memory and systems integration capability that generally works very well. Other nations, with different divisions between the public and the private and dramatically different governance institutions, cannot easily copy these capabilities.

These soft innovation factors particularly emphasize American advantages in the functional category of institutional factors – norms of seeing technology as a solution, trying hard to minimise casualties, using innovation as a means of competition among organizations, and welcoming foreign ideas. The institutional factors draw from the particular American mix of organizations, notably independent military services with strong identities, competitive firms in the defense industry that readily form networks or teams of suppliers even as each maintains its own core competencies and technical habits, and FFRDCs that help keep systems integration efforts honest and less parochial and that help preserve knowledge of false-start technology trajectories and craft skills that enable high-tech systems to function well.6

Because of the robustness of America’s input factors and the difficulty of copying its unique institutional factors, we conclude that the American defense innovation system will remain at the cutting edge and will not be surpassed by a potential international rival. In the final section, we explain why American leaders are so nervous anyway.

Is the United States losing its military overmatch?

In the early 1990s, with the disintegration of the Soviet Union that marked the end of the Cold War and the rapid defeat of Iraq in the Gulf War, the United States had a dominating military edge against all comers in terms of the capabilities of both its nuclear and conventional forces. Many trace this edge to the so-called Reagan Build-up, which actually began in the last two years of the Carter Administration and then expanded under President Reagan. The buildup involved investments of hundreds of billions of dollars to modernize nearly all parts of the American military. The modernization of nuclear forces, for example, included the acquisition of Ohio-class ballistic missile submarines, the highly accurate Trident D-5 and MX Peacekeeper missiles, the B-1B and B-2 bombers, and the acceleration of work on strategic command-andcontrol, anti-submarine warfare, and anti-ballistic missile systems. Conventional forces improvements included fielding the Abrams tank, Bradley infantry fighting vehicle, Apache attack helicopter, and the Patriot missile system, constructing a nearly 600-ship Navy, and deploying the A-10, F-15, F-16, F/A-18, and JSTARS aircraft, along with important technical improvements in realistic training and investments in troop quality.

The Soviets were especially challenged by the conventional warfare improvements: the battlefield integration of sensors, communication systems, and precision weapons, which they labeled as a ‘Military-Technical Revolution’ or, in later American terms, a ‘Revolution in Military Affairs’ (RMA). The combination of new technologies seemingly rendered useless their ability to mass armored forces in a potential drive westward. As the Gulf War demonstrated to the entire world, numerical advantage in heavy metal on the battlefield had been transformed from the source of military power into an easily reduced target set for American forces.

Among the consequences of the Soviet Union’s collapse were a one-third reduction in the size of the United States’ standing forces and an increased use of the remaining forces in interventions across the globe. Freed from a possible clash with its nuclear-armed rival, the United States could involve itself in various civil wars and, after the 9/11 attacks on the United States homeland, interventions to counter terrorist groups and regimes that might support them. The wars in Afghanistan and Iraq produced persistent insurgencies, where the RMA systems had little relevance and thus no major success.

But it is not the limitations of precision weapons but rather their diffusion that worries many. Both Russia and China, through clever tactics and the fielding of accurate offensive and defensive systems, seem to be on the verge of being able to blunt the global reach of American power.7 Add in their acquisition of space and cyber weapons, and America’s once unquestioned military edge appears in jeopardy. These threats to the previously established American technological advantages seem to require a new round of American innovation.

Strong input factors: Defense R&D spending and the FFRDCs

It is not that the United States cannot lag behind in some fields of militarily relevant technology or be surprised on the battlefield. Technology advances on many fronts and is pioneered in many places. Technological investment by potential adversaries surely can raise the costs to the United States of blithely sticking to operational concepts that previously promised great effectiveness at low cost.8 However, the United States has been mobilized on such scale, for so long, with a special emphasis on applying its vast science and engineering resources to its defense, that it will not readily fall behind in weapons technology or quality.

The United States invests heavily in defense-related research and development (R&D) activities. Figure 1 shows the past 40 years of history of U.S. inputs to defense research and development. Currently the United States invests more than 75 billion USD each year in defense R&D plus billions more in Department of Energy R&D investment for nuclear weapons. That is about two-thirds of what all other countries in the world, American friend or foe, spend on defense R&D.9 China is the only great power that spends more on its entire defense effort than the United States spends on just defense R&D. Seventy-five billion dollars is more than Russia, the United Kingdom, France, Germany, or Japan spends on defense.10

Moreover, the United States has invested at very high levels for more than 70 years. The United States substantially ramped up its defense R&D investment in the 1950s to levels comparable to today’s spending. While it is true that in inflation-adjusted terms, defense R&D totals in the 1950s were lower than today’s, that is mainly because of the lower complexity of that era’s technological frontier, not because of some subsequent policy shift to greater emphasis on defense R&D investment.11 The continuing drive to push the military-technological frontier has kept R&D spending high all along, and the overall spending trend has increased in parallel with the increasing complexity rather than lagging behind. While R&D budget increases have not been constant, their cycle (including as shown in Figure 1) has crested and troughed at very high levels. Annual spending has not dropped below 55 billion USD (in 2018 dollars) since 1983, and in several years, it has been very close to 100 billion USD. That high level of spending, year-in and year-out, has a cumulative effect, because it builds a foundation of tacit knowledge, experience in integrating complex systems, and human capital that understands the specialized parameters of military systems, which often differ from those of even high-end civilian systems. For comparison, the much-hyped Chinese defense budget (not the Chinese defense R&D budget) did not exceed the level of U.S. defense R&D spending until the late-2000s. Cumulative Chinese defense R&D investment is surely quite modest in comparison to cumulative U.S. defense R&D investment.13

Chart

Description automatically generated

The intensity of U.S. interest in defense research began at the start of the Second World War, with scientists rather than the military. American scientists had been frustrated by the failure of the military to use them effectively in the First World War, when they were confined to military laboratories and subject to military discipline. Led by Vannevar Bush of MIT, they approached President Roosevelt and gained their own organization to manage wartime research, what was eventually called the Office of Scientific Research and Development (OSRD). That organization, not the military, directed the effort to develop the atomic bomb, radar, and many of the other significant technical advances of the war.14

In the postwar years scientists remained active in bomb research, though with less independence, in the newly created Atomic Energy Commission (later absorbed in the Department of Energy) and in the expansion of R&D efforts in the newly established Department of Defense (DOD), which sought in particular to exploit the advances in missile, jet propulsion, and submarine technologies of the war, including those made by the Germans. Although OSRD itself was disbanded, at least parts of its work continued in various universityand contractor-managed organizations and laboratories, the Federally Funded Research and Development Centers and University Affiliated Research Centers. Those organizations play a vital role in creating ‘soft’ innovation capabilities in the United States – preserving the institutional memory about past R&D efforts, cultivating multiple design-team philosophies that enable diverse approaches to technological challenges, and using their independence to prevent the capture of the U.S. R&D effort by rent-seeking activities of government customers and private-sector suppliers.15

For example, the Radiation Laboratory at MIT, which worked on radar in the Second World War, was renamed Lincoln Laboratory and continued under MIT management as an FFRDC doing classified work for the Air Force. The University of California manages the nuclear bomb-design laboratories, Los Alamos and Livermore, designated national laboratories for the Atomic Energy Commission. The Navy has its own set of university-managed laboratories, often called Applied Physics Laboratories, at Johns Hopkins University, the University of Hawaii, Pennsylvania State University, the University of Texas, and the University of Washington. The armed services also set up several policy-focused FFRDCs, the best known of which is the RAND Corporation. As new issues came up over the decades, new organizations were created such as the Software Engineering Institute at Carnegie Mellon University and the Institute for Soldier Nanotechnologies at MIT.

FFRDCs and related organizations do more than provide the American military with cutting edge research on important technical and policy problems. As non-profits dedicated only to serve government agencies, they are a source of valued, unbiased technical advice.16 In fact, some FFRDCs, specifically MITRE and the Aerospace Corporation but others as well, specialize in advancing systems design and integration skills to help the American military build its biggest systems.17

Until the Second World War, contractors hired to produce America’s weapons during wars returned to their commercial business at each war’s end, as military needs soon faded. But the end of the Second World War was quickly followed by the Cold War and the continuing demand for weapons. Many firms stayed in the weapons business, some focusing exclusively on defense while others formed specialized divisions to serve the military. This was especially true in the aviation industry, where firms like Lockheed, Northrop, Grumman, McDonnell, Douglas, and Boeing grew large developing and building the aircraft and missiles that were central to the Cold War arms competition.

The peak technologies in the arms race changed over time, but the U.S. organizations and level of investment maintained the U.S. lead. The 1950s added space: the shock of the launch of the Sputnik satellite spurred dramatic increases in American R&D investments and the commitment to reach the moon before the Soviet Union. The lead the United States already had in ballistic missiles became obvious in the 1960s, as it met milestone after milestone in the quest to deploy strategic nuclear forces and build satellites to support them, all the while fighting a war in Vietnam and reaching the moon. As the Soviet Union sought to catch up, the United States began the investment in sensors and precision weapons that eventually undermined Soviet power and self-confidence. The American emphasis on strategic defenses, sometimes more potential than real, nevertheless threatened to cancel the advantages the Soviets had worked hard to achieve in nuclear missile numbers and warhead size.18 The conventional warfare revolution took away the Red Army menace that had kept half of Europe in its grip and the other half in its fear for decades.19 The Soviets lost hope of winning battles that were never fought.

Little of this R&D structure went away at the end of the Cold War. The increase in defense R&D spending that marked the Reagan Build-up was a ratchet. Today, the United States spends more on defense research, in real terms, than it did at the height of the Cold War. Defense industry mergers and base closures reshuffled ownership of some military research facilities but did not shrink many of them. DOD employs nearly 100,000 people in 63 research laboratories and centers.20 The FFRDCs and similar organizations continued their work supporting the military. The end of the Cold War was a dip, not a cliff.

Soft institutional factors: Incentives for innovation

What also didn’t go away with the end of the Cold War were the incentives that drive American military innovation – the institutional factors or ‘shared prescriptions guiding conduct [of] participants within the system’ that drive the American defense innovation system.21 There are at least three. One is a concern for avoiding casualties. A second is the rivalry that exists among the various components of the American defense establishment. And the third is the openness of American society to immigrants and their ideas.

The concern for avoiding casualties runs deep in American military operations and stems from both a persistent national labor shortage and the democratic nature of the American polity.22 There were never enough people to build the country, thus the constant importation of labor, free or not, to tend the fields or run the factories. The earliest defense forces were militias made up of all local men, but it was difficult to assemble significant troops for expeditions or to keep them deployed for long because of the need for their labor back home. Mobilization for wars relied heavily on state forces, which varied in quality and commitment. Later resort to conscription was contentious and often produced evasion and rioting. The United States resisted the maintenance of a large, professional military until the 1950s.23

Even when the United States succumbed because of the Cold War, it sought to limit the military’s growth through the intense application of technology. The World Wars drew the United States into the age of total war with huge armies, but the combat experience made the United States fully aware of the human costs inherent in modern industrialized warfare. The Army Air Corps became the champion of strategic bombing doctrine that called for fleets of bombers bypassing the carnage of the battlefield to destroy industries that were thought to be central to an opponent’s power.

Bombers themselves proved vulnerable in World War II, and when they failed to achieve the intended strategic effects, air power advocates repeatedly promised that with just a little more technological progress they would achieve the precision and invulnerability needed to make the operational concept work.24 The accuracy problem persisted through the Vietnam conflict, where the destruction of specific targets, usually bridges, often required risking the lives or capture of hundreds of pilots in multiple missions involving dozens upon dozens of aircraft each.25 Given the limited goals at stake in such conflicts, individual losses mattered much politically. Thus, the great and successful effort to improve the accuracy of conventional weapons and the speed and stealth of the platforms that carry them to the point where if a target can be identified and located, it can be destroyed with little or no risk to American personnel.26 The means depend upon the circumstance, often weather- or platform-determined, and include laser- and GPS-guided weapons. Now drones often take the place of manned aircraft.

The race to develop new weapons and doctrine is spurred on in the American system by inter-service competition.27 The United States military, unlike those of nearly all big nations, is not dominated by one armed service, the Royal Navy in the United Kingdom or the Red Army in the Soviet Union. The United States does not fear invasions across its borders by foreign armies, nor does it need a navy to link it to distant colonies. Instead, each of its armed services seeks special prominence among the others as being the answer to emerging dangers or the foreign policy desires of the president. There is overlap and duplication in their efforts – and the incentive to innovate.

It was this competition that gave the United States the lead in the race to develop ballistic missiles and satellites of all types.28 Civilian agencies, particularly the Central Intelligence Agency and the National Aeronautics and Space Administration, sometimes join in. The United States has several intelligence agencies, four air forces, three armies, and a navy or two, and each favors certain technologies and sees a particular threat best. They are rivals for attention, resources, and public acclaim.

The Goldwater-Nichols Act of 1986 and the intelligence reforms that followed the 9/11 terror attacks were intended to foster more cooperation and more central direction among the services and agencies. Certainly, the conflicts among the services are less visible, as all hail (in public) the virtues of Jointness. But it is a soft Jointness, more logrolling than subordination to a common doctrine or an agreed-upon set of priorities. The services still compete for attention and promote their vision of the threat that endangers the nation: witness the reactions of the Army and Marine Corps to the Navyand Air Force-conceived AirSea Battle doctrine.

The resistance to centralization is protected first and foremost by the military services’ strong cultures, with their proud traditions and their situations as ‘total organizations’ that control their members’ entire lives. Even the civilians who work for the services tend to have a relatively strong sense of their organization’s mission, compared to other government workers, because of the services’ relatively clear definitions of their critical tasks, although the services are also notably complex organizations, and in other circumstances such complexity tends to dilute organizational identity. But in addition to the organizations’ natural drive to nurture and protect their professional jurisdiction, Congress, which has often pushed for centralization and planning, also protects inter-service competition by separating out favored causes. At the same time that it passed Goldwater-Nichols, which emphasizes Jointness, Congress created the Special Operations Command, essentially a new service with its own global jurisdiction and budgetary independence. More recently, Congress has elevated cyberwarfare to a separate warfare command and laid the groundwork for the creation of a separate Marine Corps-like Space Corps from within the Air Force.29 One hand praises centralization and planning while the other advocates decentralization and competition, the stimulants of innovation.

The military power of the United States also benefits from immigration, which is a continuing source of new ideas and great energy. John Ericsson, the much-admired 19th Century American naval engineer who promoted steam propulsion and ironclads, was born in Sweden. John Holland, the pioneer of the modern submarine, was born in Ireland. Igor Sikorsky, the developer of the helicopter, was born in Russia, as was Alexander P. de Seversky, the great promoter of air power. America got to the atomic bomb first, thanks to Albert Einstein and other Jewish refugees from Nazi Germany. In aviation William Boeing was of German origin, the Lockheed brothers were of Scottish descent, and John Knudsen Northrop’s family was from Yorkshire. And Abraham Karem, the designer of the Predator drone, immigrated to the United States from Israel.30

Immigration may be under scrutiny in the United States these days, but illegal immigration is much more contentious than immigration itself. The United States still admits a million new permanent residents and naturalizes another three quarters of million people each year.31 Immigrants are part of every aspect of American life, but most particularly science and engineering and every field of technology development that is relevant for defense – computer science, aeronautical engineering, nanotechnology, robotics. Just look at American universities or a list of Silicon Valley technology startups.32 America’s main military rivals have no immigrants or asylum seekers. None except desperate North Koreans fleeing an even-more-oppressive regime.

The irrelevance of reform

But doesn’t the importance of private organizations (private firms and FFRDCs) for the development of military technology mean that the Department of Defense needs to take special care to connect to the most innovative parts of the United States like Silicon Valley, Cambridge, Massachusetts, and other centers of high technology? Relative labor scarcity and inter-service competition can help the military come up with ideas and wish lists for technology, but if the military intends to tap the technologies of the future, someone else is going to have to actually design and build the systems. Former Defense Secretary Ashton Carter set up initiatives like the DIUx (Defense Innovation Unit – experimental, now no longer experimental and known simply as DIU) during the Obama administration to make these connections, fueled by a concern that the military organizations’ style is a poor fit for the modern American culture of innovation.33 Will a new generation of research scientists relate well to defense’s mission of breaking things and accommodate at all to its requirement to apply reams of acquisition rules to its contracts and to take months for reviews in order to make any decisions? Can the private-sector world of stock options and public offerings be a part of the public world of government shutdowns, salary freezes, and debt-ceiling crises?34

Because the Defense Department relies heavily upon prime contractors such as Lockheed Martin and Northrop Grumman to design and build its most advanced weapon systems, the technology question really is: can the existing prime contractors effectively use advances in technology to build the best weapon systems? There is no indication that they cannot. With these primes, the United States still builds the best weapon systems. The primes already are the integrators of technologies produced by others, including the commercially oriented firms that DIU and the other new agencies are meant to reach.35 The primes’ job is to bring together a network of subcontractors with the appropriate technology and skills and manage them to an exacting schedule and within certain budget limits to build systems that can survive and dominate in the harshest environment of them all, a battlefield, usually after traversing another difficult environment like space or the ocean to get to the fight. The technologies are important, but it is weaponizing them by creating complex systems that can work when stressed that counts the most, and that is what Lockheed, Northrop, and the other primes do for the American military.

The Department of Defense taps into advanced technology by funding some basic research and lots of applied science and engineering at universities through its own research support agencies and its set of service-specific laboratories.36 For riskier efforts usually involving major prototyping or technology demonstrations, the military uses the Defense Advanced Research Projects Agency (DARPA).37 The FFRDCs, national laboratories, and dozens of defense-supported specialized institutes are linked in with all of this and have their own ties to academic research. It is this system that gave the United States the lead position in computers, created the internet, pioneered work in oceanography and ocean engineering, and pushed capabilities in remote sensing and satellite imaging.

The Defense Innovation Unit initiative may help a little. So, too, may the Defense Department’s Strategic Capabilities Office, the Defense Innovation Board, and the CIA’s experimental venture capital unit In-Q-Tel.38 These initiatives reinforce and complement what defense agencies in the United States have been doing for decades. More important, creating these agencies is also politically smart, as it shows defense agencies dealing directly with what the American public perceives to be the very cutting edge of technology and innovation. Likely unnecessary, but no harm done.

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No harm unless the Department of Defense gets so caught up in pursuing the new organizations that it somehow forgets that what it really buys is the expertise in designing and building complex systems specifically for military roles. Systems integration works in any field because the integrators understand their customers’ particularities and peculiarities. In defense, that means that the systems integrators that make complex weapons systems need to know a little bit about warfighting, the jargon that the military uses to talk about its unusual missions, and the political deal-making (organizational and electoral) that chooses which projects get funded and survive to eventual deployment with the operational military.39 The commercial technology companies are already in the mix of weapon systems’ supply chains, along with defense-unique suppliers; there is no real lack of technology access. And the commercial technology companies will never specialize in the defenseunique aspects of the weapons or be responsive enough to the military customers’ quirks to produce cutting-edge military systems or to keep the demanding military customers happy and to work gracefully with them in the complex political ballet of defense acquisition. DIU and the rest are just a veneer, a new part of that political dance.

Perhaps the perceived decline in American power that worries some is due to failures in the acquisition system, problems with its structure and the inflexibility of its regulations. The Congress obviously thinks so, as it often prescribes changes in both. For example, it recently required that the jurisdiction of the Undersecretary of Defense for Acquisition, Technology and Logistics be divided into separate undersecretaries for research and engineering and for acquisition and sustainment on the argument that technology and innovation needed their own high-level champion within the Defense Department. Of course, it was not too long ago that predecessor offices were combined because, as the argument went, technology development, weapon system acquisition, and the maintenance of complex equipment need to be thought of as one continuous activity and closely coordinated. It is striking that the recent reorganization takes the wiring diagram of the Department of Defense more or less back to what it was in the late-1950s.40

There is no more common project in defense than acquisition reform. There have literally been dozens of congressionally mandated and secretarially commanded studies of the weapons acquisition process over the years. Changes in bureaucratic structure and regulatory detail have been constant. Too often unacknowledged in all of this is the difficulty gaining agreement within the fragmented American political system on the value, schedule, and cost of particular weapons. The defense budget is cyclical, with periods of rapid growth and inevitable decline as war fears grow and decline. Advocates of particular systems push for quick commitments on the upside, increasing the likelihood of project cost growth and performance failures, while opponents seek delays, hoping to catch the budget downside, when new starts and regular progress are hard to make. Proponents are optimists, and rivals are pessimists. Disappointments beset all complex undertakings, weapon acquisitions included. There are no reform cures for most acquisition problems.41

Some believe the problem lies in the Congress itself, its lack of regular order, the reliance on continuing resolutions and the threat of shutdowns. All of this is said to harm defense, disrupting planning, slowing modernization, and hurting force readiness. There certainly have been important changes in Congress in recent years. The growth of party extremes, weakening greatly the opportunity for compromise, is one. Another is the elimination of earmarking, which was a way to gather votes in exchange for funding favorite projects in particular districts. And a third is the weakening of the power of committee chairmen, who used to rule with iron fists.

But the incoherence in Congress on defense matters likely reflects more the disagreement over the nature and saliency of the threats the United States faces than it does the general political cleavages in the society. The partisan divide on defense is in fact weaker than it has been in past.42 Gone also, though, is the imminent danger posed by the Soviet Union. Instead there is just a long list potential dangers – a resurgent Russia, a rising China, diffusing technologies, cyber hacking, terror threats, climate change – none galvanizing in the way the Soviet Union once was, all hidden off in some distant part of the globe, and many more potential than realized.43

The source of discontent

Why the insecurity, when the United States is a very secure country? Although American force structure was cut by about a third (from about 2.1 million to 1.4 million), little else in the security infrastructure created for the Cold War was downsized after the Soviet Union collapsed and the Warsaw Pact disbanded. Some Soviet experts left the field for new occupations, fleeing the unexpected wreckage that was suddenly their careers. But many other defense analysts did well by becoming ethnic-conflict experts or democracy-promotion specialists, the business of the day. Likely the threat assessment meetings were more relaxed sessions than in the past, and fewer serious military exercises were conducted, but nearly all of America’s Cold Warfocused think tanks, academic research institutes, and contract study groups stayed in place and began searching the globe for other security problems that could possibly replace the East/West one that had served so well as the source of their livelihoods for so long.

Business was good from the start because the American military did not go home, finding missions in Europe, Africa, and Asia trying to prevent ethnic slaughter or staving off famine and political chaos. The National Command Structure expanded rather contracted, adding four-star commands for North America and Africa to complete the globe-spanning regional listing and adding subordinate commands to the functional commands to raise the status of space or to give strategic warfare its due. As new developments occurred, accommodations were made for them: counter-terrorism operations and cyber defense joined the top tier along with nuclear proliferation.

The threat/policy opportunity radars have kept turning.44 There is reward for identifying new dangers. Terrorism, cyber, and climate change threats have an endless quality to them, ideal to justify continuing planning efforts and making new budget requests.45 The United States built up a large threat assessment apparatus to ask ‘what if’ questions for the Cold War. That apparatus, like the defense research and innovation establishment, was not disbanded at war’s end. It finds the threats for the others to solve.

The United States pays a lot to avoid being surprised. Part of that price pays for people and organizations that constantly call out dangers, potential gaps, or failures in its multiple layers of defenses. Analysts warn that America is not ready for biological warfare, that its cyber defenses are inadequate, and that it hasn’t been paying enough attention to space. Worse, they say, the Defense Department is too slow in fielding this system or that, there is too much red tape, and there is not enough initiative. They call for a defense budget big enough to build the 355-ship Navy, a new strategic bomber, and a new generation of modernized nuclear weapons. These continuing calls for defense investment, especially in new technologies, keep the U.S. defense R&D system on its toes, well supplied with inputs and opportunities to capitalize on the incentives to generate innovations.

## Dependency Trap ADV

### Dependency Trap---1NC

#### Inequality doesn’t cause populism

Brian Nolan 19, Professor of Social Policy and Director, Equity Employment and Growth Research Programme, University of Oxford, 8/13/2019, “Why We Can’t Just Blame Rising Inequality For The Growth Of Populism Around The World,” https://theconversation.com/why-we-cant-just-blame-rising-inequality-for-the-growth-of-populism-around-the-world-120951

The idea is now commonplace that income inequality is inexorably on the rise. The US experience in particular has become central to a new grand narrative prominent in public debate and taken to apply across rich countries: globalisation and technological change have polarised society into a small elite with highly paid, secure jobs on one side, and on the other side are growing numbers of people, including an increasingly “squeezed” middle class, in insecure, poorly-paid work.

This growing inequality is held responsible for a wide range of social and political ills. Not least the erosion of solidarity, social trust and faith in democratic institutions. And, politically, it caused the election of Donald Trump, the UK’s Brexit vote, and the broad rise of populism seen as threatening democracy.

This “grand narrative” undoubtedly captures important aspects of the US experience. But it does not represent the whole picture. And as far as other rich countries are concerned, examining the evidence highlights the diversity of their experiences over recent decades. As I’ve found in my research, this story is more often than not a poor fit for various countries around the world.

Different experiences

Household surveys show that income inequality has risen significantly since the 1980s in about two-thirds of the rich countries of the OECD – leaving one-third where it has not. The following graph shows what has happened to the Gini coefficient, the most commonly-used indicator of income inequality. Inequality did not rise everywhere and, where it did, the scale of that increase varied widely. Countries such as the UK and Sweden did see inequality go up as sharply as the US. But for others the increase was often much more modest and even decreased for some.

Inequality rose decade by decade in the US, but the UK’s increase was mostly concentrated in the Thatcher years of the 1980s, Sweden’s in the 1990s, and these contained “episodes”, rather than continuous rises, are also common elsewhere. Tax data show pre-tax income shares at the very top increasing in many countries, but again this varies widely across countries.

When it comes to ordinary living standards, middle class income growth has been even more varied. The next chart shows that middle incomes have stagnated in purchasing power terms since the early 1980s in Japan and Italy, as well as the US, and grown only modestly in Germany. But these are the poorest performers.

The UK, for example, saw substantial income growth around the middle from the late 1980s up to the mid-2000s, in sharp contrast to its lack of growth since then. Countries such as Australia, Belgium, Canada, Denmark, Finland and Sweden also saw periods of quite strong growth.

Crucially, across rich countries the relationship between inequality and middle income growth is weak – throwing into question the link that gets made between the so-called squeezed middle and populism. Middle incomes have generally lagged behind growth in GDP per head but again to widely varying extents, and rising income inequality is only one factor. Knowing what happened to inequality in a given country would have been of little help in predicting whether growth in middle incomes was strong or weak.

Not just the economy

The extent to which rising inequality and stagnating living standards over decades have driven the recent rise in populism across the rich countries is also open to question. Yes, the white working class population whose livelihoods have been hurt through decades of manufacturing decline provided the core constituency supporting Trump for president. But economic dysfunction combines with cultural and demographic factors in a way that makes them very hard to disentangle.

The fact that support for populist parties has risen in countries where inequality has been fairly stable over time (such as Austria and France), as well as ones where inequality has risen, and in countries where income growth has been quite robust (such as Poland), as well as ones where median incomes have stagnated (such as Hungary), illustrates the complexity of the factors at work.

#### What’s the internal link to the “digital divide?” Their ev says big tech might not be ideal for developing economies, but not a single 1AC card says that reinforces the digital divide or even defines what digital inequality means in this context.

#### No modeling---other countries see US antitrust as irrational, even if we get things right.

William E. Kovacic 15, Professor of Law and Policy at George Washington University, former General Counsel for the Federal Trade Commission, J.D. from Columbia University, “The United States and Its Future Influence on Global Competition Policy,” George Mason Law Review, Vol. 22, 2015, accessed via Lexis

One force that reduces the perceived legitimacy of the U.S. system is a widely accepted narrative, reflected in popular discourse and scholarly commentary, which portrays federal enforcement as irrational and unstable. 65 [\*1172] In this interpretation of modern U.S. enforcement history, antitrust policy undergoes recurring erratic shifts, with a small number of lucid intervals. For the most part, the irrationality narrative suggests that U.S. antitrust policy embraced unsupportable extremes of over-enforcement in the 1960s and 1970s, under-enforcement from 1981 to 1988 and 2001 to 2008, and achieved a sensible, balanced equilibrium only from 1993 to 2000 and 2009 to the present. 66 This accounting of antitrust history raises a troublesome question: why should any jurisdiction outside the U.S. respect a system that has lost its mind in roughly 41 of the past 55 years?

Policy-making in the irrationality narrative is sharply discontinuous, and the enforcement institutions have little evident capacity for self-assessment or correction over time. 67 Individual leaders count for everything, and institutional arrangements fail to discipline policy-making; 68 appoint a wise official and you get good results, but pick a zealot and the agency swerves toward frantic hyperactivity or utter indolence. The irrationality narrative is the public policy equivalent of an interpretation of Formula One racing that attributes the outcome in races entirely to the driver and treats the quality of the car and supporting team as largely irrelevant.

The irrationality account of U.S. enforcement history derives power from the stature of the narrators. Despite its unreliable reading of U.S. experience, the narrative's academic pedigree is daunting. Some of the greatest scholars in U.S. competition law have contributed to the story. If nonentities constructed the narrative, foreign observers would dismiss it out of hand. Instead, the narrative of irrationality and instability, often presented with the metaphor of a wildly swinging pendulum, originated and developed in the work of some of the field's most influential commentators. On many occasions outside the U.S., I have heard enforcement officials, practitioners, and scholars speak of the irrationality narrative as though it were an established truth. To these observers, the stature of the scholars who popularized the irrationality narrative invariably lends verisimilitude to the story.

As described below, the irrationality narrative of the U.S. system serves the aims of the right and the left in the debate about federal enforcement policy. For those who favor more intervention or less intervention, alike, the image of a system dangerously out of control serves to frame their own "sensible" policy proposals. By this technique, the narrator emerges as the voice of wisdom in a crazed policy environment.

[\*1173] The architecture of the modern irrationality narrative took shape in 1978 when Professor Robert Bork published the first edition of his transformative treatise, The Antitrust Paradox. 69 Professor Bork's central thesis was that "modern antitrust has so decayed that the policy is no longer intellectually respectable." 70 Each institution with a role in the implementation of the antitrust laws--the courts, the Congress, and the federal enforcement agencies--caused the decay. On antitrust matters, the Congress displayed the mentality of "the sheriff of a frontier town" who "did not sift evidence, distinguish between suspects, and solve crimes, but merely walked the main street and every so often pistol-whipped a few people." 71 With few exceptions, the courts embraced a view of antitrust law that "teaches the necessity for government intervention when no such necessity exists, and even when intervention is positively harmful." 72 Without regard to adverse economic effects, the DOJ and the FTC "must continually press on to fresh territory, seeking theories that broaden the application of the law and make violations easier to establish." 73

In Professor Bork's telling, the implementing institutions were capricious, reckless, or bent upon self-aggrandizement. 74 As a group, the institutions have gone mad, for they have no tendency or, perhaps, any capacity to reflect on their experience, identify error, and make corrections. 75 Instead, the U.S. antitrust system had "an inbuilt thrust toward greater severity or further extension." 76 Nothing, Professor Bork warned, seemed able to contain the destructive march of intervention: "This process has no obvious stopping point." 77

The image of a system out of control served Professor Bork's rhetorical aims; it showed the urgency for reform by presenting a system in shambles. The image also distorted (more mildly, misread) current trends substantially. When The Antitrust Paradox appeared in January 1978, each institution Professor Bork rebuked--the Congress, the courts, and the federal enforcement agencies--had taken steps to rebalance the antitrust system. 78 The adjustments came slowly, but they were coming, nonetheless. If Professor Bork had acknowledged that the seemingly out-of-control institutions [\*1174] were making important adjustments, his book would have lost some (maybe much) of its force.

A second decisive contribution to the irrationality narrative came in the late 1980s and early 1990s from one of Professor Bork's harshest critics, Professor Robert Pitofsky. Though Professor Pitofsky scorned Professor Bork's calls for a vast retrenchment of antitrust enforcement, he used his own version of the irrationality narrative while setting out a more interventionist agenda. 79 Describing federal merger enforcement from the early 1960s through the early 1990s, Professor Pitofsky wrote:

American antitrust policy has tried to balance possible threats to competition against merger benefits, but remarkably, has careened from one extreme to another in this balancing process. For example, the United States had by far the most stringent antimerger policy in the world in the 1960s, striking down mergers among small firms in unconcentrated markets. By the 1980s, the United States maintained an extremely lenient merger policy, regularly allowing billion dollar mergers to go through without government challenge, even when they involved direct competitors. 80

Like Professor Bork in The Antitrust Paradox, Professor Pitofsky presented a system run amok. Federal policy "careen[s] from one extreme to another," like an automobile with an impaired driver swerving across the centerline. 81 No institutional feature in the U.S. system provided needed balance. 82

In Professor Pitofsky's version of the narrative, the solution to the aberrant enforcement behavior came by way of appointments--including his own--to the federal agencies. 83 In 2002, after chairing the FTC from 1995 to 2001, Professor Pitofsky said federal merger control by the late 1990s "stopped careening from aggressive enforcement based in some part on a populist ideology to minimalist enforcement based on hostility to the core assumptions of antitrust . . . ." 84 Under the Clinton Administration's appointees, federal policy stopped "careening," avoiding the extremes of an overheated, populist-inspired activism of the 1960s and the "minimalist" program of the Reagan presidency with its "hostility to the core assumptions of antitrust." 85

For Professor Pitofsky, like Professor Bork, the narrative of a system gripped by irrational, erratic variations in behavior served an important instrumental purpose. The portrayal of a regime swinging wildly between extremes allowed Professor Pitofsky to claim the role--as suggested in the [\*1175] title of his 2002 article, Antitrust at the Turn of the Twenty-First Century: A View from the Middle--of the wise centrist. 86 Professor Pitofsky underscored the rationality of his own program by juxtaposing it against the irrationality of his predecessors. 87 Clinton Administration antitrust officials strove to claim the mantle of wise centrism. 88 As the following passage from an essay in The Economist in 2000 shows, they framed their program as a sensible middle way between the irrational interventionism of the 1960s and 1970s and the inactivity of the 1980s:

It helps that [DOJ Assistant Attorney General Joel] Klein and his counterpart at the FTC, Robert Pitofsky, have been deliberately low-key in talking about their activities, claiming that they are modest and in the legal mainstream of legal thought and economics. They concede that they have been more interventionist than the laissez-faire ideologues of the Reagan years, but they say they are nothing like the trust-busting zealots of the 1960s who saw evil in every big company or merger. 89

In reporting on the Clinton administration strategy, The Economist presents the federal enforcement policy just as the DOJ and FTC leadership wished: a "modest" and "mainstream" program standing between two eras of irrationality; one guided by "trust-busting zealots" and the other led by "laissez-faire ideologues." 90

Taken on its own terms, the irrationality interpretation of U.S. antitrust history provides a grim picture of the American system. One should be wary of a system that intermittently has lucid policymaking intervals, but its normal state is irrationality. If everything depends on the appointment of wise centrists to head the agencies, nothing good can happen when the [\*1176] choice of DOJ or FTC leadership is not so inspired. Because personalities are decisive, when the wise centrists depart, nothing in the institutions themselves can prevent the system from returning quickly to bad old habits.

As the quotation presented above illustrates, the wise centrism story acquires force if periods of thoughtless extremism bracket the sensible policy era. As developed by Professor Pitofsky and other antitrust scholars, the irrationality narrative derives its power from the system's tendency to embrace extremes. 91 Dramatic variations in performance demonstrate the absence of thoughtful policy-making. The narrator seems sane by comparison if all others appear to be deranged. Professor Pitofsky's article in 2002 about the future of antitrust policy used this framing technique. 92 He wrote that "during the Reagan years, there was no enforcement whatsoever against non-horizontal mergers and joint ventures, boycotts, minimum resale price maintenance, exclusive dealing contracts, tie-in sales, attempts to monopolize, and monopolization." 93

The passage quoted above highlights two recurring features of the irrationality narrative. First, Professor Pitofsky's statement uses sweeping, categorical language ("no enforcement whatsoever") to describe the period of extreme inactivity. 94 In the 2002 article and in other papers, Professor Pitofsky made strong claims of inactivity to portray the Reagan Administration antitrust program as a gross departure from good practice. 95 Second, the portrayal of events, though written with the utmost self-assurance, often cannot withstand fact-checking and is verifiably incorrect. 96

[\*1177] Professor Pitofsky has plenty of esteemed company in telling the U.S. irrationality story by making bold claims belied by actual enforcement experience. As noted above, Professor Bork's denunciation of antitrust policy circa 1978 ignored important doctrinal and policy developments that fit poorly with a system out of control. 97 The story of horrible decay is less compelling if the asserted flaws are not so horrible. Other accounts of U.S. enforcement experience by the field's leading commentators include claims that during the Reagan Administration "merger enforcement ground to a halt," 98 that antitrust "[e]nforcement ceased," 99 and that the DOJ and the FTC "did not file a single vertical case." 100 Why did the U.S. system lose its mind? The answer, say two of America's best scholars, is that "extremists" took control of the enforcement agencies. 101 Experts in the U.S. might excuse these descriptions of federal enforcement as careless hyperbole. In my experience, foreign observers are more likely to take them at face value.

The story of U.S. antitrust policy in the 1980s is considerably more complex. Crucial factual tenets of the irrationality narrative are unsupportable. Merger enforcement never halted, 102 enforcement never ceased, 103 and vertical restraints cases (at least a few) still appeared. 104 To look beyond the categorical statements of inactivity and recount enforcement developments [\*1178] accurately would reveal a more thoughtful enforcement program at work. There is a major difference, for example, between saying a merger enforcement program has disappeared, and saying that boundaries have been reset, but policed actively.

Would a fuller, more accurate account of federal enforcement trends over time reveal intense debate about the proper direction of policy? Of course. Has policy shifted across administrations, especially after a regime change? No doubt. Yet, liberated from the irrationality narrative's determination to accentuate the magnitude of changes and cast decision-makers as senseless extremists, a more faithful account of U.S. federal enforcement history would portray adjustments as more gradual and nuanced, in most cases, than the irrationality narrative suggests. The discipline imposed by institutional arrangements, not simply patterns in leadership appointments (whether irrational officials or prudent centrists), would account for refinements over time.

#### No LIO impact

G. John Ikenberry 18. Albert G. Milbank Professor of Politics and International Affairs at Princeton University in the Department of Politics and the Woodrow Wilson School of Public and International Affairs, also a Global Eminence Scholar at Kyung Hee University in Seoul. 2018. “Why the Liberal World Order Will Survive.” Ethics & International Affairs, vol. 32, no. 01, pp. 17–29.

In this essay I look at the evolving encounters between rising states and the post-war Western international order. My starting point is the classic “power transition” perspective. Power transition theories see a tight link between international order—its emergence, stability, and decline—and the rise and fall of great powers. It is a perspective that sees history as a sequence of cycles in which powerful or hegemonic states rise up and build order and dominate the global system until their power declines, leading to a new cycle of crisis and order building. In contrast, I offer a more evolutionary perspective, emphasizing the lineages and continuities in modern international order. More specifically, I argue that although America’s hegemonic position may be declining, the liberal international characteristics of order—openness, rules, multilateral cooperation—are deeply rooted and likely to persist. This is true even though the orientation and actions of the Trump administration have raised serious questions about the U.S. commitment to liberal internationalism. Just as importantly, rising states (led by China) are not engaged in a frontal attack on the American-led order. While struggles do exist over orientations, agendas, and leadership, the non-Western developing countries remain tied to the architecture and principles of a liberal-oriented global order. And even as China seeks in various ways to build rival regional institutions, there are stubborn limits on what it can do. Power Transitions and International Order There is wide agreement that the world is witnessing a long-term global power transition. Wealth and power is diffusing, spreading outward and away from Europe and the United States. The rapid growth that marked the non-Western rising states in the last decade may have ended, and even China’s rapid economic ascendency has slowed. But the overall pattern of change remains: the “rest” are gaining ground on the “West.” While there is wide agreement that the world is witnessing a global power transition, there is less agreement on the consequences of power shifts for international order. The classic view is advanced by realist scholars, such as E. H. Carr, Robert Gilpin, Paul Kennedy, and William Wohlforth, who make sweeping arguments about power and order. These hegemonic realists argue that international order is a by-product of the concentration of power. Order is created by a powerful state, and when that state declines and power diffuses, international order weakens or breaks apart. Out of these dynamic circumstances, a rising state emerges as the new dominant state, and it seeks to reorganize the international system to suit its own purposes. In this view, world politics from ancient times to the modern era can be seen as a series of repeated cycles of rise and decline. War, protectionism, depression, political upheaval—various sorts of crises and disruptions may push the cycle forward. This narrative of hegemonic rise and decline draws on the European and, more broadly, Western experience. Since the early modern era, Europe has been organized and reorganized by a succession of leading states and would-be hegemons: the Spanish Hapsburgs, France of Louis XIV and Napoleon, and post-Bismarck Germany. The logic of hegemonic order comes even more clearly into view with Pax Britannica, the nineteenth-century hegemonic order based on British naval and mercantile dominance. The decline of Britain was followed by decades of war and economic instability, which ended only with the rise of Pax Americana. For hegemonic realists, the debate today is about where the world is along this cyclical pathway of rise and decline. Has the United States finally lost the ability or willingness to underwrite and lead the post-war order? Are we in the midst of a hegemonic crisis and the breakdown of the old order? And are rising states, led by China, beginning to step forward in efforts to establish their own hegemonic dominance of their regions and the world? These are the lurking questions of the power transition perspective. But does this vision of power transition truly illuminate the struggles going on today over international order? Some might argue no—that the United States is still in a position, despite its travails, to provide hegemonic leadership. Here one would note that there is a durable infrastructure (or what Susan Strange has called “structural power”) that undergirds the existing American-led order. Far-flung security alliances, market relations, liberal democratic solidarity, deeply rooted geopolitical alignments—there are many possible sources of American hegemonic power that remain intact. But there may be even deeper sources of continuity in the existing system. This would be true if the existence of a liberal-oriented international order does not in fact require hegemonic domination. It might be that the power transition theory is wrong: the stability and persistence of the existing post-war international order does not depend on the concentration of American power. In fact, international order is not simply an artifact of concentrations of power. The rules and institutions that make up international order have a more complex and contingent relationship with the rise and fall of state power. This is true in two respects. First, international order itself is complex: multilayered, multifaceted, and not simply a political formation imposed by the leading state. International order is not “one thing” that states either join or resist. It is an aggregation of various sorts of ordering rules and institutions. There are the deep rules and norms of sovereignty. There are governing institutions, starting with the United Nations. There is a sprawling array of international institutions, regimes, treaties, agreements, protocols, and so forth. These governing arrangements cut across diverse realms, including security and arms control, the world economy, the environment and global commons, human rights, and political relations. Some of these domains of governance may have rules and institutions that narrowly reflect the interests of the hegemonic state, but most reflect negotiated outcomes based on a much broader set of interests. As rising states continue to rise, they do not simply confront an American-led order; they face a wider conglomeration of ordering rules, institutions, and arrangements; many of which they have long embraced. By separating “American hegemony” from “the existing international order,” we can see a more complex set of relationships. The United States does not embody the international order; it has a relationship with it, as do rising states. The United States embraces many of the core global rules and institutions, such as the United Nations, International Monetary Fund (IMF), World Bank, and World Trade Organization. But it also has resisted ratification of the Law of the Sea Convention and the Convention on the Rights of the Child (it being the only country not to have ratified the latter) as well as various arms control and disarmament agreements. China also embraces many of the same global rules and institutions, and resists ratification of others. Generally speaking, the more fundamental or core the norms and institutions are—beginning with the Westphalian norms of sovereignty and the United Nations system—the more agreement there is between the United States and China as well as other states. Disagreements are most salient where human rights and political principles are in play, such as in the Responsibility to Protect. Second, there is also diversity in what rising states “want” from the international order. The struggles over international order take many different forms. In some instances, what rising states want is more influence and control of territory and geopolitical space beyond their borders. One can see this in China’s efforts to expand its maritime and political influence in the South China Sea and other neighboring areas. This is an age-old type of struggle captured in realist accounts of security competition and geopolitical rivalry. Another type of struggle is over the norms and values that are enshrined in global governance rules and institutions. These may be about how open and rule-based the system should be. They may also be about the way human rights and political principles are defined and brought to bear in relations among states. Finally, the struggles over international order may be focused on the distribution of authority. That is, rising states may seek a greater role in the governance of existing institutions. This is a struggle over the position of states within the global political hierarchy: voting shares, leadership rights, and authority relations. These observations cut against the realist hegemonic perspective and cyclical theories of power transition. Rising states do not confront a single, coherent, hegemonic order. The international order offers a buffet of options and choices. They can embrace some rules and institutions and not others. Moreover, stepping back, the international orders that rising states have faced in different historical eras have not all been the same order. The British-led order that Germany faced at the turn of the twentieth century is different from the international order that China faces today. The contemporary international order is much more complex and wide-ranging than past orders. It has a much denser array of rules, institutions, and governance realms. There are also both regional and global domains of governance. This makes it hard to imagine an epic moment when the international order goes into crisis and rising states step forward—either China alone or rising states as a bloc—to reorganize and reshape its rules and institutions. Rather than a cyclical dynamic of rise and decline, change in the existing American-led order might best be captured by terms such as continuity, evolution, adaptation, and negotiation. The struggles over international order today are growing, but it is not a drama best told in terms of the rise and decline of American hegemony. Sources of Continuity in Liberal International Order If the liberal international order endures, it will be because it is based on more than American hegemonic order. To be sure, the United States did give shape to a distinctive post-war liberal hegemonic system, and many of its features— including the American-led alliance system and multilateral economic governance arrangements—are themselves quite durable. But the broader features of the modern international order are the result of centuries of struggle over its organizing principles and institutions. Rising states face an international order that is long in the making, one that presents these non-Western developing states with opportunities as well as constraints. The struggles over the existing international order will reshape the rules and institutions in the existing system in various ways. But rising states are not simply or primarily “revisionist” states seeking to overturn the order; rather, they are seeking greater access and authority over its operation. Indeed, the order creates as many safeguards and protections for rising states as it creates obstacles and constraints. For example, the World Trade Organization provides rules and mechanisms for rising states to dispute trade discrimination and protect access to markets. After all, more generally, it was this liberal-oriented international order—its openness and rules—that provided the conditions for China and other rising states to rise. Indeed, if the liberal international order survives, it will be in large part due to the fact that the constituencies for such an order that stretch across the Western and the non-Western worlds are larger than the constituencies that oppose it. We can look more closely at these sources of continuity and constituency.

## Systemic Risk ADV

### Systemic Risk---1NC

#### Big tech is not key to anything.

Stephen M. Walt 21, Robert and Renée Belfer Professor of International Relations at the John F. Kennedy School of Government at Harvard University, Ph.D. in Political Science from the University of California, Berkeley, “Big Tech Won’t Remake the Global Order,” Foreign Policy, 11-08-2021, https://foreignpolicy.com/2021/11/08/big-tech-wont-remake-the-global-order

Will Big Tech transform geopolitics and perhaps one day supplant the nation-state? In a recent article in Foreign Affairs, titled “The Technopolar Moment: How Digital Powers Will Reshape the Global Order,” Eurasia Group President Ian Bremmer argues we can’t rule that possibility out. In a provocative analysis of the rapidly evolving digital space, Bremmer writes that the major technology firms—Facebook, Apple, Google, Amazon, and foreign counterparts such as Alibaba, Huawei, and Tencent—have become powerful, autonomous actors that are “increasingly shaping geopolitics.”

In particular, he suggests that these firms have created a “new dimension in geopolitics—digital space—over which they exercise primary influence.” With increasing power over “how people spend their time, what professional and social opportunities they pursue, and, ultimately, what they think,” these firms are already “exercising a form of sovereignty,” he writes. The future geopolitical environment will take one of three forms: “one in which the state reigns supreme, rewarding the national champions; one in which corporations wrest control from the state over digital space … or one in which the state fades away.” These are starkly different alternative futures, but which one is most likely?

Taken as a whole, the article is vintage Bremmer: far-reaching, mind-stretching, bridging commerce, politics, and technology, and well worth reading. (Full disclosure: Bremmer and I are good friends—except when on opposite sides of a tennis court.) But I’m not persuaded that Big Tech is as powerful or as autonomous as he thinks, and I certainly don’t think these firms will supplant or replace the nation-state at any point in the foreseeable future. Of his three alternatives, the smart money should be on states.

Physical space is essential. Digital space is optional.

To see why, let’s start with the fundamental differences between physical space and digital space. Physical space is familiar and tangible: It is air, water, food, arable land, the built environment in which we dwell and work. Physical space is essential to human life; our species cannot eat, breathe, procreate, clothe and house itself, or do much of anything else without it. You can’t surf the internet or play a virtual reality game without a place to sit and plug in your device. Our inescapable dependence on the physical environment is why humans fight over territory, control of sea routes, and other physical resources, and it is why states created borders and devised institutions such as sovereignty to regulate political authority over the inhabitable land areas in which we dwell. To make an obvious point, the indispensability of physical space is why climate change looms so large today.

By contrast, nothing in digital space is essential to human life. Its various elements are useful, ubiquitous, seductive, convenient, and, in many cases, life-enhancing—but not strictly necessary. How do we know? Because humanity managed to survive and multiply to nearly 8 billion people and counting, most of them now enjoying levels of material well-being that would boggle the minds of their ancestors. Guess what? They did this without laptops, smartphones, Facebook, or any of the other elements of digital space.

Moreover, as Bremmer admits, “technology firms cannot decouple themselves from physical space”; they invariably touch ground in somebody’s sovereign territory. Servers must be located somewhere and connect to existing power grids. The employees who write algorithms or answer help lines or fill orders in warehouses must live and work and eat and sleep in specific locations that are subject to political authority. Amazon may live in the cloud, but it also depends on fleets of trucks to deliver merchandise to actual human beings. Even techno-utopians have to build their survivalist bunkers within the borders of a real country and in accordance with its zoning laws.

My point is that it is easy to imagine human life without the digital space; all we have to do is think back to what life was like a few decades ago. But trying to imagine human life absent the physical environment in which humans evolved transports us into the realm of science fiction. If Elon Musk’s fantasies of a Mars colony ever come to fruition (and I’ll take the under on that bet), it will be a remote and tiny outlet dependent on a steady stream of supplies from Earth and in all probability inhabited by robots, not people.

None of this is to deny the importance of the digital realm. The world economy would suffer significantly if the digital space collapsed tomorrow and we had to go back to snail mail, analog devices, and other pre-digital ways of doing business, but civilization would not collapse, and our species would probably adapt quickly. Some aspects of contemporary life—such as the level of civility in our political discourse—might even improve. If we destroy the biosphere or other essential features of our physical space, by contrast, we’re toast.

Equally important, today’s digital space is not going to collapse no matter what governments decide to do; no serious person wants to smash the servers and return us to an analog world. The real question is how much and in what ways it will be regulated. Imposing limits on Google and Apple and Facebook won’t drive them out of business, although it might make them slightly less profitable and slow the headlong pace of innovation somewhat. Regulating the use of artificial intelligence or other digital tools may reduce some of the benefits of unfettered technological autonomy, but it won’t halt all progress. When there are trade-offs between security and political authority and technological innovation—and clearly there are—governments (and societies) are likely to accept somewhat less of the latter to preserve the former.

Why states will win

For all their shortcomings, states remain the dominant political form in the world today. The number of independent states has grown steadily since 1945 because different ethnic or national groups continue to crave the security and autonomy that only self-government can provide. (If you don’t understand why groups want their own state, just ask Kurds or Palestinians what life is like without one.) Some states do not protect their own populations very well, but most states do a fair job of providing basic security most of the time. And when emergencies arise—9/11, the 2008 financial crisis, a catastrophic weather event—people don’t call Tim Cook or Sergey Brin to fix the problem; they turn to the government.

Even today, corporations, banks, NGOs, and Big Tech are all ultimately backstopped by rules enacted and enforced by governments. If corporations enjoy certain privileges (such as limited liability, legal personhood, or the protection of Section 230 of the U.S. Communications Decency Act), it is because governments have given these to them. When Huawei suddenly couldn’t get the chips it needed, it was because a government decided to block these sales. States also control the ultimate weapon: the legitimate use of force. It is states that decides when and whom to fight, and when they do, citizens in nearly every country willingly march into harm’s way.

No Big Tech firm commands similar power or loyalty. Alphabet’s leaders would be arrested if they tried to use force to protect their market share, and Facebook’s many users aren’t going to take up arms to defend Mark Zuckerberg from government regulation. In short, Big Tech does not possess anything remotely like the sovereignty possessed by states, by which I mean the authority and ability to do whatever is necessary to defend themselves. In the self-help world of international politics, states are often willing to blithely break the law and do horrendous things in the name of national security. No Big Tech firm has anything like that capacity.

Is Big Tech really different?

It is possible that today’s Big Tech is a wholly new phenomenon and that ossified, corrupt, and ignorant governments will be unable or unwilling to bring it to heel. But history suggests a degree of skepticism is in order. Back in the 1970s, scholars such as Raymond Vernon, Richard J. Barnet, and Ronald E. Muller believed that multinational corporations were imposing significant constraints on the nation-state (the title of Vernon’s best-known book is Sovereignty at Bay), a thesis that slighted the central role that U.S. power (and the liberal order it encouraged) played in enabling their activities. Even now, states are cracking down on the tax havens and accounting tricks that Big Tech (and other global firms) has exploited to bolster its profits.

Look back a little further. In the early 20th century, the United States Steel Corp. was as dominant and ubiquitous as some Big Tech firms are today, accounting for two-thirds of U.S. steel production in 1901. If you wanted to build a rail line, make an automobile, erect a skyscraper, or manufacture a plow back then, it was hard to avoid doing business with it. Despite years of lobbying to avoid government regulation and obtain a host of government subsidies, today the company’s share of domestic steel consumption is a mere 8 percent. Might a similar fate await some of the colossi that now loom large in the digital arena?

Or consider the precursor to today’s digital media giants: broadcast television. In 1950, hardly any Americans had TV sets; by 1960, they were in more than 80 percent of U.S. households. Yet apart from the rather insignificant public TV stations, the content you could watch on your sets came from just three “big tech” companies: NBC, CBS, and ABC. If you got your news from the boob tube, you had your choice of just three decidedly mainstream sources, which in turn gave them enormous influence over what Americans knew and thought. Is today’s Big Tech really different?

Writing in the Financial Times, Brooke Masters offers another cautionary tale. In the 19th century, she writes, for-profit railway companies in the United States “wielded monopoly power in the areas they served: new railway stations could create viable towns, and closures could destroy them. Variations in freight rates determined whether businesses were profitable.” She notes further that these powerful companies “fought off state regulation in the 1870s,” but Congress eventually got its act together, created the Interstate Commerce Commission, and brought the railway companies to heel.

Bremmer believes that regulating Big Tech will be more difficult and technically challenging, and I agree, but the writing seems to be on the wall here, too. China has already cracked down hard on its tech sector, and Russia’s Vladimir Putin is moving in this direction as well. The United States won’t go as far as these authoritarian states have, but a desire to bring these firms back down to earth is apparent across the political spectrum. Just last week, the Biden administration blacklisted the Israeli spyware firm NSO Group, the close relationship between the two countries notwithstanding. The bottom line: The unfettered environment in which these firms have grown is disappearing, as states around the world assert their authority over a wide range of activities in the digital space.

<<MARKED>>

But remember: Regulating the digital space does not mean killing it off entirely, rendering big firms unprofitable, or ending all innovation within this arena. Properly designed, greater regulation could increase innovation by breaking up restrictive monopolies while at the same time protecting society as a whole from Big Tech’s negative effects, whose magnitude we are only now beginning to recognize.

Digital technology affects our lives in myriad ways, and it will continue to do so in the years ahead. But so did electrification, the internal combustion engine, air travel, immunization, the harnessing of the atom, and the unlocking of the human genome. None of these scientific or technological revolutions transformed the geopolitical map, rendered borders irrelevant, or turned billions of people from citizens of a particular country to citizens of the world. Perhaps I lack the imagination to see the transformations that Bremmer thinks are possible in the not-too-distant future, but my money is on states.

Think of it this way: Which do you expect to be around in 100 years? Facebook or France? Apple or Argentina? Microsoft or Mexico? It’s rare for a corporation to survive an entire century, but nations and states turn out to be surprisingly long-lived. I won’t be around to see it, but I’d bet that the essential features of geopolitics in 2100 will look a lot like its core elements today. Specifically, nonstate actors of all types—including Big Tech firms—will continue to operate in a political and institutional framework set by national governments.

# 2NC

## Packing CP

### Perm: Do Both---2NC

#### The perm switches the court away from intransigence---that kills support for packing

Dr. Richard Mailey 20, Postdoctoral Fellowship at the University of Alberta, Ph.D. from the University of Luxembourg, LL.M. & LL.B. from the University of Glasgow, “Court-Packing in 2021: Pathways to Democratic Legitimacy”, Seattle University Law Review, 44 Seattle U. L. Rev. 35, Fall 2020, Lexis

Keeping this thought closely in mind, we can pick up the story by recalling that although FDR's plan suffered a massive defeat at the hands of an otherwise friendly 80 Congress, it is also seen as having provoked the Supreme Court's repudiation of the Lochner era 81in West Coast Hotel, the infamous "switch in time that saved nine" 82and that ended the Supreme Court's long, bitter resistance to the New Deal. How does Ackerman view this chain of events? The first thing to note is that, on his reading, the switch occurred toward the tail end of a period of intense constitutional politics, after the constitutional philosophy of the New Deal had already cleared an impressive succession of electoral hurdles and was for Ackerman on the brink of yielding a completed constitutional moment. In this regard, one may initially suppose that by 1937, the Supreme Court was increasingly unjustified, from a dualist point of view, in its institutional resistance. Did the increasing gulf between enduring public opinion and the Supreme Court's Lochner jurisprudence give Roosevelt a right to use a tactic as contentious and drastic as court-packing to constitutionally entrench the New Deal?

Not quite, as it turns out. Or at least, things are not as simple as saying in advance that court-packing is simply right or wrong, legitimate or illegitimate, thinkable or unthinkable. On the contrary, for Ackerman, the thinker of the constituent power in modern America, 83 everything hinges on how ordinary Americans, the distinctive "heroes" 84of Ackerman's [\*50] theory, would have responded to court-packing if it had been successfully implemented. In this sense, while a large majority of Americans went with Roosevelt in 1936 despite being warned that court-packing could be on the horizon (e.g., by FDR's opponent, Alf Landon 85), this does not tell us how voters would have reacted to court-packing as a definitive occurrence rather than an uncertain prospect. Indeed, when the Supreme Court eventually undertook its famous switch in time, it effectively "killed" 86what Ackerman refers to as a "remarkably sophisticated constitutional debate" 87 over whether "unconventional steps like court-packing" 88 would suffice to enact decisive constitutional change or whether reformists would ultimately need to take a much longer and more precarious walk home through Article V. What a shame, Ackerman seems to sigh, that we will never know how voters would have responded to and weighed in on this debate. 89This is especially so insofar as early Gallup polling suggested that public opinion was swinging in Roosevelt's favor before the switch, although it was still very much on a knife edge (as Ackerman says, "on the eve of the Court's 'switch,' Gallup was reporting a close division of opinion" 90). Would "continued judicial resistance . . . have played into [the President's] hands, allowing him to present court-packing as the only practical solution" 91 to the problem of a staunchly "intransigent" 92 and unpopular Supreme Court?

#### It doesn’t solve, even if it results in packing---removing the prior justification of obstruction flips the perception, making it anti-democratic

Dr. Richard Mailey 20, Postdoctoral Fellowship at the University of Alberta, Ph.D. from the University of Luxembourg, LL.M. & LL.B. from the University of Glasgow, “Court-Packing in 2021: Pathways to Democratic Legitimacy”, Seattle University Law Review, 44 Seattle U. L. Rev. 35, Fall 2020, Lexis

Since Buttigieg's initial comments, a number of other presidential candidates, including Senators Elizabeth Warren and Kamala Harris, joined him in expressing their openness to various forms of court-packing (or more specifically, Supreme Court expansion). 8The question is: where does this leave us? Is court-packing, a perfectly legal and constitutional tactic in the U.S., now politically and morally thinkable too? Or, to put it more precisely, can court-packing be framed as a plausibly *non-populist* response to the democratically questionable actions of Senate Republicans? This Article attempts to answer this question by engaging with the dualist theory of constitutional transformation that has been [\*38] elaborated over several decades by Yale law professor Bruce Ackerman. 9While Ackerman's theory is certainly not the only way of addressing this question, it has at least one key benefit when it comes to the quest for a non-populist defense of court-packing. Put simply, in contrast with populist constitutional theories (e.g., Carl Schmitt's 10) that are ready to endorse illegal or uncivil pathways to constitutional change on the basis of a change's popularity, Ackerman's theory withholds such endorsement until a series of stringent tests have been met, 11 thereby offering the possibility that democratically problematic tactics like court-packing can potentially be "made good" 12or "perfected" 13 without accepting the populist belief that a single group (even a public majority) is alone capable of legitimating such tactics (tactics that are broadly at odds, one might say, with America's prevailing "sense of justice" 14). 15In other words, Ackerman gives us what populism gives us vis-à-vis court-packing--i.e., the possibility of democratic legitimation-- without giving us populism (and in particular, without embracing the core populist doctrine of "organ [\*39] sovereignty," 16where a single group or entity is presumed competent to authoritatively represent the People at a particular moment in time).

Bearing this benefit of an Ackermanian perspective in mind, this Article will begin by offering a brief reconstruction of Ackerman's theory before examining three ways in which court-packing could potentially be democratically legitimated within Ackerman's theory: (1) as a way of consolidating an almost completed process of constitutional reform; (2) as a way of initiating a process of constitutional reform; and (3) as a constitutionally conservative reaction to another group's attempt to achieve the "factional abduction" 17 of the judiciary and constitutional law. To state my conclusion up front, I will argue that the third option could be successfully deployed as a justification for Democratic court-packing in 2021, provided that the Democrats tread carefully and slowly when it comes to pursuing a more comprehensive and controversial package of legal reforms. In this regard, one could say that my argument turns on a critical distinction between transformative court-packing, as practiced recently in countries like Poland, 18 and conservative court-packing in the face of an attempted but apparently illegitimate transformation of constitutional law by others. Thinking about it in this way, I hope, will do two things: (1) offer a way for American Democrats to philosophically distinguish their seemingly well-intentioned court reform plans from those of authoritarian populists like the Law and Justice Party in Poland (Erdogan's Turkey springs to mind as well 19) and (2) highlight the fragility of such a distinction--because if even Ackerman's theory of popular constitutional change leaves little room for justification despite its tolerance of illegal and broadly uncivil reform tactics, it should be clear that justification is a delicate business indeed.

### Perm: Do the CP---2NC

#### ‘Prohibition’ is itself an enforceable ban, not something that eventually leads to discouraging behavior

Stephen R. Barnett 3, Boalt Professor of Law Emeritus at the University of California, Berkeley, “No-Citation Rules Under Siege: A Battlefield Report and Analysis”, The Journal of Appellate Practice and Process, Fall, 5 J. App. Prac. & Process 473, Lexis

1. Are Discouraging Words "Restrictions" under Rule 32.1?

The committee's statement notwithstanding, it is not clear that discouraging words have to be considered "restrictions" on citation under the proposed Rule 32.1. These words may be wholly admonitory - and unenforceable. The Fourth Circuit's rule, for example, states that citing unpublished opinions is "disfavored," but that it may be done "if counsel believes, nevertheless, that [an unpublished opinion] has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well." 129 On the question of what counsel "believes," surely counsel should be taken at her word; counsel's asserted belief that an unpublished opinion has precedential or persuasive value should not be considered a falsifiable fact. Hence no sanction should be available for violating the Fourth Circuit's rule, and the rule's discouraging language in turn would not be a "prohibition or restriction" that was barred by Rule 32.1 as presently drafted.

In the rules of some other circuits, however, the language disfavoring citation of unpublished opinions is unmoored from anyone's "belief" and arguably does impose an objective "prohibition or restriction" determinable by a court. 130 A court might find, for example, that the required "persuasive value with respect to a material issue that has not been addressed in a published opinion" 131 was not present, and hence that the citation was not permitted by the circuit rule.

With what result? It would follow, paradoxically, that the opinion could be cited - because the circuit rule would be struck down under Rule 32.1 as a forbidden "restriction" on citation.

The committee's double-negative drafting thus creates a Hall of Mirrors in which citation of an unpublished opinion [\*494] would be allowed either way. If the local rule's discouraging language is merely hortatory, it is not a "restriction" forbidden by Rule 32.1; but that doesn't matter, because such a rule does not bar the citation in the first place. If, on the other hand, the local rule's language has bite and is a "restriction," then Rule 32.1 strikes it down, and again the citation is permitted.

2. What Difference Does It Make Whether Discouraging Words Are "Restrictions"?

There is one live question, however, that would turn on whether a local rule's discouraging language constituted a "restriction" on citation. If the language was a restriction, it would be condemned by Rule 32.1 132 and so presumably would have to be removed from the local circuit rule. Each circuit's rule thus would have to be parsed to determine whether its discouraging words were purely hortatory or legally enforceable; and each circuit thus would have to decide - subject to review by the Judicial Conference? - which of its discouraging words it could keep.

#### ‘Increase’ must be immediately effective, not a result

Dr. Howard Newby 4, BA and PhD from the University of Essex, Chair of the Higher Education Funding Council for England, Former Vice-Chancellor of the University of Liverpool, “Joint Committee on the Draft Charities Bill - Written Evidence”, Memorandum from the Higher Education Funding Council for England, 9/30/2004, http://www.publications.parliament.uk/pa/jt200304/jtselect/jtchar/167/167we98.htm

9.1 The Draft Bill creates an obligation on the principal regulator to do all that it "reasonably can to meet the compliance objective in relation to the charity".[ 45] The Draft Bill defines the compliance objective as "to increase compliance by the charity trustees with their legal obligations in exercising control and management of the administration of the charity".[ 46]

9.2 Although the word "increase" is used in relation to the functions of a number of statutory bodies,[47] such examples demonstrate that "increase" is used in relation to considerations to be taken into account in the exercise of a function, rather than an objective in itself.

9.3 HEFCE is concerned that an obligation on principal regulators to "increase" compliance per se is unworkable, in so far as it does not adequately define the limits or nature of the statutory duty. Indeed, the obligation could be considered to be ever-increasing.

#### ‘Substantial’ requires a certain mandate

Words and Phrases 64 (40W&P 759)

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

### Solvency---CP Causes Packing---2NC

#### 3. Striking it down causes political pressure that results in packing

Stephen M. Feldman 20, Jerry W. Housel/Carl F. Arnold Distinguished Professor of Law and Adjunct Professor of Political Science, University of Wyoming, JD from the University of Oregon, JSM from Stanford University, BA in Philosophy from Hamilton College, “Court-Packing Time? Supreme Court Legitimacy and Positivity Theory”, Buffalo Law Review, 68 Buffalo L. Rev. 1519, December 2020, Lexis

Hence, a third reason not to worry about the effect of court-packing on the Court's legitimacy: Our views of court-packing should be based on the political turn necessary for court-packing to be considered in the first place. In other words, if the Republicans retain control of the presidency or the Senate or both in the 2020 election, then the Democrats will be unable to try court-packing in 2021. Only if and when the Democrats sweep, gaining control of the presidency plus both houses of Congress, can the Democrats even attempt to pack the Court. Whenever a Democratic sweep occurs, whether in 2020 or subsequently, the thrust of public opinion might have shifted sufficiently in a progressive direction so as to make court-packing publicly palatable.

To be clear, I have not attempted to delineate a specific [\*1553] set of criteria that must be satisfied to justify court-packing. To the contrary, the determination must and will be made politically. The Court itself, of course, plays a significant role in this political determination. Have the justices been deciding cases that politically depart from a national political alliance? Most likely, "abusive judicial review"--issuing decisions denigrating and weakening rather than protecting and strengthening democracy--would provoke public concern. 97Yet even abusive judicial review would not be a prerequisite to court-packing; rather, in a still-functioning democracy, the totality of political circumstances would be determinative. In the end, as positivity theory suggests, sustained disappointment with the Court's decisions, especially in politically salient cases, would weaken diffuse (political) support for the Court. 98Consequently, if and when the Democrats sweep, Democratic voters would likely have soured on the conservative Roberts Court--which after all followed the conservative Rehnquist Court. In fact, although the Democrats have won the popular vote in six out of the last seven presidential elections, a conservative bloc of justices has controlled the Court for nearly thirty years. 99A Democratic sweep, quite possibly, would manifest in part public support to "rein in" the conservative justices of the Roberts Court. 100Historical evidence shows that, in the 1930s, New Deal voters generally supported FDR's court-packing plan. 101More recently, during the decade of the 2010s, at least ten states attempted court-packing in their respective state judiciaries, with two states being [\*1554] successful. 102If the people vote for a Democratic Congress and president, they very well might support a move to pack the Court.

Without question, in the political atmosphere after a Democratic sweep, a Democratic court-packing plan would contribute to the ongoing dialogue over Supreme Court power and decision making. As a matter of political strategy, congressional Democrats would not need to falsely celebrate the law-politics dichotomy--the myth of pure law--but they would likely benefit by emphasizing that the current Court has departed from principled decision making. 103 The result of a Democratic court-packing plan would likely be an increase in the size of the Court, but another possible result would be the shifting of one or more justices to a more progressive outlook, though such a shift seems unlikely, as mentioned above. 104Either way, the Court would be forced to bend to the political realities: If and when the Democrats electorally sweep Congress and the presidency, the Court will need to bend to Democratic political power. That necessity, that reality, is baked into the checks and balances of our tripartite national government. And history amply illustrates the operation of those constitutional grants of power to Congress and the president in the nomination and confirmation processes as well as in setting the size of the Court. 105

#### 4. Blocking core policy unifies Dems and causes them to retaliate---the threat alone backs down judicial extremism

Daniel Block 20, Executive Editor of the Washington Monthly, BA in Political Science and History from Swarthmore College, “The Case for Threatening the Courts”, Washington Monthly, November / December 2020, https://washingtonmonthly.com/magazine/november-december-2020/the-case-for-threatening-the-courts/

Today’s Chief Justice Roberts is also clearly concerned with the Court’s legitimacy and does not want it to be seen as a purely partisan body. And despite their impeccably conservative credentials, Kavanaugh and Gorsuch have both shown a willingness to break with orthodoxy on high-profile occasions—including, in the case of Gorsuch, a seismic expansion of LGBTQ rights.

Whether the Court can be pressured, then, may ultimately come down to just how much muscle Democrats are willing to employ. To truly constrain the Court, the party must, of course, win both the presidency and the Senate. But winning is not enough. They must be willing to credibly threaten the Court, something that requires a bold, unified front on the judiciary. Right now, such tenacity and unity are lacking. But that may well be changing. Senate Minority Leader Chuck Schumer, a procedural moderate, told reporters in late September that should Republicans fill Ginsburg’s seat, “nothing is off the table.” Biden, a former court-expansion opponent, now ducks court-expansion questions. Even Pennsylvania Senator Bob Casey, one of the only congressional Democrats who support overturning Roe v. Wade, told reporters he wants “to get through the election” before taking a stance.

Barrett’s confirmation is not the only thing radicalizing Democrats. Support for reining in the Supreme Court will become fevered if it actually strikes down, rather than “simply” menaces, cornerstone liberal policies. Not long after the election (and during whatever chaos comes next), the bench will hear its third challenge to the Affordable Care Act. If Democrats win the White House and Senate, and the Court still invalidates the ACA in the midst of a pandemic, the party of FDR may not be able to resist retaliatory measures. Biden famously called the act’s passage, which came while he was vice president, a “big fucking deal.” It is unlikely that he will let it go gentle into that good night.

Today’s justices, of course, know this. Like their counterparts in the 1930s, they do not exist in a soundproof room. If they nonetheless begin an aggressive assault on whatever New Deal–style social policies liberals enact—like a public health insurance option, major climate change legislation, or heavy regulations on internet giants—they will be wagering that Democrats are just full of hot air. They may well be right. The Court is generally more popular than Congress or the president, making attacks on it very risky. Even Roosevelt, operating at the peak of his powers, paid a political cost for battling the bench. Roosevelt’s plan helped save laws he had already passed. But it alienated many congressional Democrats, and his New Deal was effectively ended by the election of conservatives in 1938.

Nonetheless, modern Democrats cannot shy away from intimidation. The justices FDR confronted were almost all in their 70s; he might have been able to wait them out. Today’s conservatives are substantially younger. Barrett is 48, and if she’s confirmed and stays on the Court until Ginsburg’s age, she’ll be ruling until 2059. And as the 1970s showed, politicians don’t need to threaten the Court with expansion to get a response. Stripping legislation that limits the Court’s powers could also help Democrats send a powerful message. The party may not need to go as far as Roosevelt did to make their point.

But if they face serious defeat at the Court, they can learn from his resolve. “You’ve got to really rattle the saber,” Whittington said. “Then you get the justices to respond.”

### Solvency---AT: Certainty---2NC

#### They’ll transform antitrust law, expanding the scope and substantive standards

Alison Jones 20, Professor of Law at King's College London and Solicitor at Freshfields Bruckhaus Deringer LLP, and William E. Kovacic, Professor at the George Mason University School of Law, “Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy”, The Antitrust Bulletin, Volume 65, Issue 2, p. 239-240

A. Judicial Resistance to Extensions of Existing Antitrust Doctrine

As noted in Section II.A, judicial decisions since the mid-1970s have reshaped antitrust law; created more permissive substantive standards governing dominant firm conduct, mergers, and vertical restraints; and raised the bar to antitrust claims in a number of ways. This remolding has been facilitated by the Court’s conclusion that the Sherman Act constitutes “a special kind of common law offense,”81 so that Congress “expected the courts to give shape to the statute’s broad mandate by drawing on common-law tradition.”82 This has allowed the statutory commands to be interpreted flexibly and the law to evolve with new circumstances and new wisdom;83 for example, where there is widespread agreement that the previous position is inappropriate or where the theoretical underpinnings of those decisions have been called into question.84

The proposed solutions will depend, in the short term at least, on the ability of enforcement agencies to navigate the described jurisprudence to find an antitrust infringement and, in some instances, a further rethinking, refinement, and/or development of doctrine, through softening, modification, or even a reversal of current case law. Although such an evolution could, in theory, result, as it did over the last forty years, from a steady stream of antitrust cases, judicial appointments since 2017 have arguably made such a change in direction unlikely. Rather, it seems more probable that successful prosecution of major antitrust, and especially Section 2 Sherman Act monopolization cases, will remain challenging and may even become more difficult. Cases will be litigated before judges who are ordinarily predisposed to accept the current framework, either by personal preference or by a felt compulsion to abide by forty years of jurisprudence that tells them to do so.85 A new president could gradually change the philosophy of the federal courts by appointing judges sympathetic to the aims of the proposed transformation.86 The reorientation of the courts through judicial appointments is, however, likely to take a long time.87 [FOOTNOTE] 86. Id. at 1468–69 (noting the impact of President Reagan and President Bush on the acceptance of the consumer welfare framework). [END FOOTNOTE]

#### Khan will take the opportunity and run---the only obstacle is the courts

Tara L. Reinhart 10-6, Partner for Antitrust/Competition at Skadden, Arps, Slate, Meagher & Flom LLP, J.D. from the Catholic University of America Columbus School of Law, B.A. from the University of North Carolina, et al., “FTC Chair Khan Highlights Key Policy Priorities Going Forward, but Aggressive Agenda Faces Uphill Climb”, JD Supra – Newstex Blogs, 10/6/2021, Lexis

Practical Limitations on Implementation of Chair Khan's Policy Priorities

Chair Khan describes the antitrust agenda outlined in her memorandum as 'robust,' and the memo communicates her intention to attempt to reshape antitrust policy and enforcement. However, a revolutionary shift in antitrust enforcement by the FTC will face substantial practical challenges.

Most significantly, the path to reshaping antitrust enforcement will be constrained by the substantial body of existing antitrust law and the need to convince a federal judge that the conduct in question is unlawful. Chair Khan's memo generally advocates for a new, more expansive and holistic approach to identifying antitrust harms beyond the traditional focus on consumer welfare and price effects. However, courts have — and will likely continue to — rely on existing standards developed in the case law over many decades. Those standards focus on consumer welfare and predominantly price effects. Absent legislative change, then, a practical gap will persist between Chair Khan's vision of refocused and more assertive antitrust enforcement, on the one hand, and the law that would apply to any FTC enforcement action, on the other.2[2]

Moreover, Chair Khan's plan to revise the merger guidelines and her desire to target 'facially illegal deals' will also face constraints based on current law. First, the antitrust guidelines typically incorporate existing legal standards, making radical change difficult to achieve. The 1982 Guidelines, which impactfully affected merger enforcement with the implementation of the hypothetical monopolist test, provide the last dramatic revision. Whether courts will accept major revisions at this stage will be an open question. Second, agency merger review is shaped by the existing review process enacted by the Hart-Scott-Rodino Act, regardless of whether the FTC believes a deal is facially illegal. Unlike regulators in other jurisdictions, the FTC must file a lawsuit and prevail in court if the agency wants to block a pending transaction.

Relatedly, Ms. Khan's ability to implement her ambitious agenda will be subject to the fact that changing these legal frameworks will depend on either Congressional action, which is far from certain, or litigation victories, which require the commitment of significant resources at a time when the FTC claims to already be stretching its capacity. Despite her recognition of the demands already imposed on FTC staff and plan for 'intentional' resource allocation, Chair Khan envisions the FTC undertaking increased vigilance and a more assertive agenda. If the existing resource constraints grow in response to Chair Khan's enhanced enforcement ambitions, the FTC could face difficulty balancing its investigatory agenda with the ability to litigate those cases, particularly considering the complex nature of antitrust matters, which often take years to resolve and require millions of dollars for experts and other related costs as well as a large team of attorneys and staff to manage. In addition, though Chair Khan referenced her hope for increased cross-bureau coordination in cases, it is unclear that such coordination would be efficient or create the capacity needed to fulfill the new agenda, especially when attorneys from other government divisions have already been recruited to help reduce burdens on matters of antitrust enforcement.

Finally, Chair Khan's desire to expand the agency's regional footprint and supplement the staff with various nonlawyer roles may further strain the budgetary resources needed to keep pace with the new agenda and present their own management challenges. Whether funding from Congress is imminent, whether it would be used to onboard lawyers or the other potential staff Ms. Khan desires, and how quickly hiring could reach the scale necessary to support the FTC's newly announced enforcement priorities are not yet clear.

Conclusion

Given the challenges to implementing the generalized policy goals set by Chair Khan, we do not expect an immediate fundamental sea change in antitrust enforcement. The practical obstacles described above mean that Chair Khan's FTC will be unable to contest every instance of what the agency might perceive to be unlawful conduct or unfair competition. We expect that the FTC will need to continue to be selective in the cases that it brings, which may mean that in the near-term, it will focus available resources on sectors of the economy perceived as involving 'the most significant actors,' such as large technology firms that Chair Khan has frequently referenced, particularly to the extent they engage in transactions that implicate the novel considerations under the proposed 'holistic' approach to identifying antitrust harms.3[3] We still expect to see some matters receive extensive investigations and proceed to litigation, and the outcomes of these matters will likely partially signal the success of the new agenda.

#### Packing lets FTC action succeed

Michael Klarman 21, Kirkland & Ellis Professor at Harvard Law School, J.D. from Stanford Law School, BA and MA in Political Theory from the University of Pennsylvania, “The Democrats’ Last Chance to Save Democracy”, The Atlantic, 2/22/2021, https://www.theatlantic.com/ideas/archive/2021/02/expanding-court-now-or-never/618063/

These democratic deficits in the Senate and the Electoral College have enabled Republicans to dominate the Supreme Court, despite winning the support of a diminishing minority of voters. Presidents George W. Bush and Donald Trump, neither of whom initially entered the White House with even a plurality of the popular vote, together appointed five justices who are on the Court today—a majority. Four of those justices were confirmed by narrow majorities of Republican senators who did not represent a majority of the American people. If the Senate and the Electoral College were more reflective of majority will, today’s Supreme Court would look dramatically different. It could not possibly have become the most conservative Court in the past hundred years, as several academic studies have demonstrated it to be.

With their majority on the Court, the Republican justices have undermined labor unions, unleashed money in politics, protected corporations from class-action litigation and punitive-damage awards, curbed antitrust law, eroded the constitutional right to abortion, invalidated gun-control measures, struck down voluntary efforts by school boards to achieve integration through race-conscious means, and threatened to abolish race-based affirmative action. (Referring to justices as “conservative” or “Republican-appointed”—or “liberal” or “Democratic-appointed”—is conventional but this obscures the reality that in today’s ultra-polarized environment, the justices’ voting patterns display fairly consistent partisan preferences, not simply political ideologies. Given this pattern, I will refer to them as either “Republican justices” or “Democratic justices,” as that is what they are.)

Much as the Republican justices have generally promoted the policies favored by the Republican Party in other areas, so have they facilitated the Republican Party’s assault on democracy. In 2013, they effectively nullified the preclearance provision of the 1965 Voting Rights Act, which required mostly southern states to submit proposed changes to their voting practices to the federal government for advance approval in order to ensure the absence of a discriminatory racial purpose or a disparate racial impact. Republican justices have also upheld strict voter-identification laws and purges of voter rolls on the basis of the state’s interest in reducing voter fraud, despite numerous studies demonstrating that voter fraud is essentially nonexistent. In 2019, these justices refused to remedy the problem of partisan gerrymandering, which today mostly benefits Republicans. They have also let loose a virtually unrestricted flow of money into politics on the basis of contrived constitutional rationales, which disproportionately benefits wealthy donors, corporations, and well-funded interest groups. Rather than defending democracy, the Court under Republican control has become another engine of democratic degradation.

The run-up to the 2020 election demonstrated how far Republican officeholders are prepared to go in suppressing votes to win elections, and the extent to which Republican justices are willing to accommodate such efforts. Across the nation, Republican politicians sought to make voting harder during a once-in-a-lifetime pandemic: refusing in some states to expand excuse-based absentee balloting, restricting the availability of drop boxes to collect absentee ballots, declining to relax witness-signature requirements for absentee ballots, and disallowing the counting of absentee ballots postmarked but not received by Election Day.

Rejecting challenges to such actions by Republican politicians, the Republican justices invoked a principle that forbids federal courts to make election changes close to Election Day. Even during a historic pandemic, the justices reasoned, elected officials are best situated to weigh the costs and benefits of changing election rules. That approach makes sense—assuming that the elected officials are acting in good faith, rather than simply seeking political advantage for their side. Only by pretending that Republican officeholders were not deliberately seeking to reduce turnout by Democratic-leaning constituencies could Republican justices plausibly have claimed to be deciding voting-rights challenges according to “neutral principles” of law.

Had the results of the 2020 presidential election been a little bit tighter, legal challenges to late-arriving absentee ballots or to such ballots lacking clearly matching signatures might have determined its outcome. Prior to the election, Trump insisted that the Senate quickly confirm his nomination of Judge Amy Coney Barrett so that the Court would have its full complement of (Republican) justices to resolve any such challenges. The Court’s 2000 ruling in Bush v. Gore showed us that a Republican-majority Court would rule in favor of a Republican presidential candidate on the most minimally plausible of legal rationales. (Trump’s legal challenges to the 2020 election result were, thankfully, not even minimally plausible.) Democrats cannot run the risk of future elections being conducted under the watchful eye of Republican justices who have already demonstrated their disinclination to defend democracy in general or the right to vote in particular in the run-up to the most consequential presidential election since 1860.

Despite the best efforts of Republicans, the 2020 election results have afforded Democrats their second opportunity in 50 years to control the Supreme Court. The first chance came in February 2016, when Justice Antonin Scalia died suddenly during Barack Obama’s presidency. For a moment, Democrats seemed likely to finally secure the Supreme Court majority that the structural biases of the Senate and the Electoral College had long prevented. But Senate Majority Leader McConnell blocked that Democratic opportunity, stealing a Supreme Court seat for the first time in American history. McConnell insisted that historical precedent supported leaving Supreme Court vacancies unfulfilled during presidential-election years, but this was a lie. Never before had a Senate controlled by one party blocked a Court nominee selected by the president of another party simply because the vacancy occurred during a presidential election year. In 2020, McConnell confirmed his hypocrisy by ensuring that the Senate confirmed the nomination of Barrett—just eight days before the election.

Now in power, Democrats must work to remedy the antidemocratic tilt of the American political system. Doing so directly—by, say, ridding the country of the Electoral College or reapportioning the Senate according to population—is virtually impossible, though proposals for work-arounds, such as adding more states to the union and enacting the National Popular Vote Interstate Compact, do exist and should be pursued. Constitutional amendments would be required to fundamentally alter these institutions, and amendments are practically unattainable when one of the two major political parties benefits from the status quo.

Reforming the Supreme Court to undo its anti-Democratic bias, however, does not require a constitutional amendment; the size of the Court is set by statute, not the Constitution. Congress altered the Court’s size seven times in the 19th century (though not since 1869)—and sometimes for reasons that amounted to nothing more than raw partisanship. In 2021, Democrats have far greater justification. They should expand the Court by four seats to provide a center-left country with a center-left Court. Such a Court would, importantly, ensure the constitutionality of Democratic measures to expand access to health care, deal with gun violence, address human-caused climate change, and more fairly distribute the nation’s tax burden. But even more crucial, such a Court would not threaten Democratic attempts to undo the Republican Party’s recent efforts to undermine democracy through voter suppression and other electoral machinations.

### Perm: Intrinsic (Platforms)---2NC

#### Tech has unique political significance---it’s a focal point for public opinion AND a key area of political interest

Eve Smith 18, Senior Strategy Director at Merkle, Invisible Hand Strategies, LLC, “The Techlash Against Amazon, Facebook and Google—and What They Can Do”, The Economist, https://www.economist.com/briefing/2018/01/20/the-techlash-against-amazon-facebook-and-google-and-what-they-can-do

I imagine your concern about the simmering tech backlash has grown since we ran into each other in the desert in September. The heat directed at your firms has certainly risen. Attached to this e-mail you will find the full report I promised, analysing the grave political and business risks that your firms face. I hope you will read everything I am sending in full, and please do not distribute my work to your underlings, as none of us want this e-mail to leak to the press.

The takeaway is that it is looking more likely that one of you could end up like the giant structure at Burning Man which the crowd torches, watching with rapt attention as it burns down to ash.

Things have been rough in Europe for a while. They are getting worse. Having levelled a fine of $2.7bn against Google in 2017, the European Commission’s Magrethe Vestager wants to go further. National governments are also baring their teeth. In December Germany’s cartel office accused Facebook of unfairly using its position to track internet users. France has threatened to fine Facebook for sharing data between its various apps. Almost every day you get hammered for not properly policing the content, including extremists’ videos, revenge porn and fake news, that appears on your platforms.

America is not the haven it was. Under Barack Obama tech was treated as a dazzling national asset; he had your back. The candidates in 2020, whoever they are, are likely to run on an anti-tech platform of some sort. Democrats have already pledged to “crack down on corporate monopolies”. The Republicans—besides hating you for being coastal liberals desperate to promote your politically correct worldview—have some business worries, too. Just look at how the Department of Justice (DOJ) is trying to block AT&T’s acquisition of Time Warner, a content company. I know they gutted net neutrality: but that had more to do with hating everything Obama did than valuing a light touch with the internet.

Meanwhile a handful of state attorneys general, including Missouri’s, have launched probes into Google. Any of these could spark a fire. The federal antitrust case against Microsoft started after states investigated the company’s conduct; Texas played a pivotal role in handicapping Standard Oil in the 1880s. The Sherman Act of 1890 followed and by 1911—before the Clayton Act was even passed—John D. Rockefeller’s pride and joy, the greatest company of its day, was lying on the floor in 34 parts. Knowing that a consultant in Washington refers to Amazon, Facebook and Google as “Standard Commerce, Standard Social and Standard Data” should make you shudder.

Rockefeller was once the richest man in the world. Don’t think that crown will help whichever of you is wearing it when the music stops. The fact that four of the five most valuable publicly traded firms in the world are technology companies, with a combined market value of $3trn, gives you muscle. So do the massive revenues which most of you turn into profits. But the fact that all the figures associated with your industry are huge—except for your tax bills—is one reason you have so many enemies.

There is one ray of light. Almost all your services remain wildly popular with consumers; they use your products to communicate, to navigate, to search for stuff, to buy things and to socialise. They cannot imagine life without you. This is one reason investors have dismissed anti-tech rhetoric as political grandstanding. But today’s market sentiment could change quickly. An analyst at RBC Capital, Mark Mahaney, recently published a list of “top ten internet surprises for 2018”. “Material regulatory action” against tech was number one; he rated the probability as low but “higher than financial markets ascribe”. And the impact could be huge.

“Tech” is not yet a four-letter word, but it could soon become one.

#### The current narrative is that adapting antitrust to the digital economy is possible despite court conservativism AND that’s critical to a broader paradigm shift in law---the CP reverses that, making it clear that judicial ideology stands in the way

HLR 20 – Harvard Law Review, “Recent Publication”, Harvard Law Review, 133 Harv. L. Rev. 1508, Lexis

THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY. By Jonathan B. Baker. Cambridge, Mass.: Harvard University Press. 2019. Pp. 349. $ 45.00. The Chicago School's 1970s critique of anticompetitive rules gained ascendancy first in the academy, then in the political branches, and finally in the Supreme Court, where it lingers today. In The Antitrust Paradigm: Restoring a Competitive Economy, Professor Jonathan Baker argues that the experiment of the Chicago School has failed. At its core, the Chicago theory was a wager that relaxed antitrust rules would promote efficiency, producing consumer welfare gains without creating market power. The intervening decades do not support this prediction. Moreover, Baker argues, the economy has changed, with Internet giants dominating the market's valuation charts. Against the Chicago School, a new paradigm of antitrust law is needed, one that "[restores] a competitive economy by strengthening antitrust rules and enforcement" (p. 197), one that is tailored to the unique demands of an economy centered on information technology giants. Such reform is possible, Baker maintains, a conservative Supreme Court notwithstanding, because resolving antitrust disputes is a matter of economic analysis rather than political priorities or ideologies. It is a matter not simply of protecting consumer welfare, but also of improving economic outcomes. Baker's book is a powerful argument for antitrust reform to bring about the benefits long and emptily promised by the Chicago School.

#### The plan has the court be the driver of antitrust change because they’ll sign off on expansive policy---that emboldens them AND they’ll later swing to the right

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

184 The Trinko decision was handed down when the other branches of government, particularly the Executive Branch, were substantially more sympathetic to the non-interventionist perspective than they appear today. Even then, the Court did not accept the government's invitation to adopt the no economic sense test. See Brief of the United States and Federal Trade Commission as Amicus Curiae Supporting Petitioners, Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004), available at http://www.justice.gov/atr/cases/f201000/201048.htm. If, in a new monopolization matter like the hypothetical Intel case, the Court nevertheless issues an expansive non-interventionist decision, and the political reaction does not weaken or overturn its holding (contrary to what I have supposed), an emboldened Court and its allies in other branches of government might be expected to take further steps to dismantle the post-New Deal regulatory state, potentially upsetting the competition policy bargain and replacing it with a laissez-faire system to govern economic affairs.

## Dynamism ADV

### Slow Growth D---2NC

#### Primacy will survive slow growth

Robert Kagan 12, Senior Fellow with the Project on International Order and Strategy in the Foreign Policy Program at Brookings Institution, “Rumours of America’s Demise are an Exaggeration”, National Post, 3-10, http://nationalpost.com/opinion/robert-kagan-rumours-of-americas-demise-are-an-exaggeration

Measuring changes in a nation’s relative power is a tricky business, but there are some basic indicators: the size and influence of its economy relative to that of other powers; the degree of military power compared with potential adversaries’; the degree of political influence it wields in the international system — all of which make up what the Chinese call “comprehensive national power.” And there is the matter of time. Judgments made based on only a few years’ evidence are problematic. A great power’s decline is the product of fundamental changes in the international distribution of various forms of power that usually occur over longer stretches of time. Great powers rarely decline suddenly. A war may bring them down, but even that is usually a symptom, and a culmination, of a longer process.

Some of the arguments for America’s relative decline these days would be more potent if they had not appeared only in the wake of the 2008 financial crisis. Just as one swallow does not make a spring, one recession, or even a severe economic crisis, need not mean the beginning of the end of a great power. The United States suffered deep and prolonged economic crises in the 1890s, the 1930s, and the 1970s. In each case, it rebounded in the following decade and actually ended up in a stronger position relative to other powers than before the crisis. The first decade of the 20th century, the 1940s, and the 1980s were all high points of American global power and influence.

Less than a decade ago, most observers spoke not of America’s decline but of its enduring primacy. In 2002, the historian Paul Kennedy, who in the late 1980s had written a much-discussed book on “the rise and fall of the great powers,” America included, declared that never in history had there been such a great “disparity of power” as between the United States and the rest of the world. John Ikenberry agreed that “no other great power” had held “such formidable advantages in military, economic, technological, cultural or political capabilities … The preeminence of American power” was “unprecedented.” In 2004, Fareed Zakaria described the United States as enjoying a “comprehensive uni-polarity” unlike anything seen since Rome. But a mere four years later, Zakaria was writing about the “post-American world”; and Kennedy, again, about the inevitability of American decline. Did the fundamentals of America’s relative power shift so dramatically in just a few short years? The answer is no.

Let’s start with the basic indicators. In economic terms, and even despite the current years of recession and slow growth, America’s position in the world has not changed. Its share of the world’s GDP has held remarkably steady, not only over the past decade, but over the past four decades. In 1969, the United States produced roughly a quarter of the world’s economic output. Today it still produces roughly a quarter, and it remains not only the largest but also the richest economy in the world.

People are rightly mesmerized by the rise of China, India and other Asian nations whose share of the global economy has been climbing steadily, but this has so far come almost entirely at the expense of Europe and Japan, which have had a declining share of the global economy. Optimists about China’s development predict that it will overtake the United States as the largest economy in the world sometime in the next two decades. This could mean that the United States will face an increasing challenge to its economic position in the future. The sheer size of an economy, however, is not by itself a good measure of overall power within the international system. If it were, then early-19th-century China, with what was then the world’s largest economy, would have been the predominant power instead of the prostrate victim of smaller European nations. Even if China does reach this pinnacle again — and Chinese leaders face significant obstacles to sustaining the country’s growth indefinitely — it will still remain far behind both the United States and Europe in terms of per capita GDP.

Military capacity matters, too, as early-19th-century China learned, and as Chinese leaders know today. As Yan Xuetong recently noted, “Military strength underpins hegemony.” Here the United States remains unmatched. It is far and away the most powerful nation the world has ever known, and there has been no decline in America’s relative military capacity — at least not yet. Americans currently spend roughly $600-billion a year on defence, more than the rest of the other great powers combined. They do so, moreover, while consuming around 4% of GDP annually, a higher percentage than the other great powers but in historical terms lower than the 10% of GDP that the United States spent on defence in the mid-1950s or the 7% it spent in the late 1980s.

The superior expenditures underestimate America’s actual superiority in military capability. American land and air forces are equipped with the most advanced weaponry, are the most experienced in actual combat and would defeat any competitor in a head-to-head battle. American naval power remains predominant in every region of the world.

By these military and economic measures, at least, the United States today is not remotely like Britain circa 1900, when that empire’s relative decline began to become apparent. It is more like Britain circa 1870, when the empire was at the height of its power. It is possible to imagine a time when this might no longer be the case, but that moment has not yet arrived.

But what about the “rise of the rest” — the increasing economic clout of nations like China, India, Brazil and Turkey? Doesn’t that cut into American power and influence?

The answer is: It depends. The fact that other nations in the world are enjoying periods of high growth does not mean that America’s position as the predominant power is declining, or even that “the rest” are catching up in terms of overall power and influence. Brazil’s share of global GDP was a little over 2% in 1990 and remains a little over 2% today. Turkey’s share was under 1% in 1990 and is still under 1% today. People, especially businesspeople, are naturally excited about these emerging markets, but just because a nation is an attractive investment opportunity does not mean it is also a rising great power. Wealth matters in international politics, but there is no simple correlation between economic growth and international influence. It is not clear that a richer India today, for instance, wields greater influence on the global stage than a poorer India did in the 1950s and 1960s under Nehru, when it was a leader of the Non-Aligned Movement, or that Turkey, for all the independence and flash of Prime Minister Recep Tayyip Erdogan, really wields more influence than it did a decade ago.

## Systemic Risk ADV

### Cyberattacks D---2NC

#### No large-scale cyber attacks or retaliation

Dr. Joseph S. Nye 19, Jr., University Distinguished Service Professor and Former Dean of the Kennedy School of Government at Harvard University, “Global Cyber Conflicts Will Be Hard To Control”, The Statesman (Pakistan), 10/14/2019, Lexis

The problem of perceptions and controlling escalation is not new. In August 1914, the major European powers expected a short and sharp “Third Balkan War.” The troops were expected to be home by Christmas. After the assassination of the Austrian archduke in June, Austria-Hungary wanted to give Serbia a bloody nose, and Germany gave its Austrian ally a blank check rather than see it humiliated. But when the Kaiser returned from vacation at the end of July and discovered how Austria had filled in the check, his efforts to de-escalate were too late. Nonetheless, he expected to prevail and almost did.

Had the Kaiser, the Czar, and the Emperor known in August 1914 that a little over four years later, all would lose their thrones and see their realms dismembered, they would not have gone to war. Since 1945, nuclear weapons have served as a crystal ball in which leaders can glimpse the catastrophe implied by a major war. After the Cuban Missile Crisis in 1962, leaders learned the importance of de-escalation, arms-control communication, and rules of the road to manage conflict.

Cyber technology, of course, lacks the clear devastating effects of nuclear weapons, and that poses a different set of problems, because there is no crystal ball. During the Cold War, the great powers avoided direct engagement, but that is not true of cyber conflict. And yet the threat of cyber Pearl Harbors has been exaggerated. Most cyber conflicts occur below the threshold established by the rules of armed conflict. They are economic and political, rather than lethal. It is not credible to threaten a nuclear response to cyber theft of intellectual property by China or cyber meddling in elections by Russia.

According to American doctrine, deterrence is not limited to a cyber response (though that is possible). The US will respond to cyberattacks across domains or sectors, with any weapons of its choice, proportional to the damage that has been done. That can range from naming and shaming to economic sanctions to kinetic weapons. Earlier this year, a new doctrine of “persistent engagement” was described as not only disrupting attacks, but also helping to reinforce deterrence. But the technical overlap between intrusion into networks to gather intelligence or disrupt attacks and to carry out offensive operations often makes it difficult to distinguish between escalation and de-escalation. Rather than relying on tacit bargaining, as proponents of “persistent engagement” sometimes emphasize, explicit communication may be necessary to limit escalation.

#### No one has motive for large scale attacks

Dr. James Andrew Lewis 18, Senior Vice President at the Center for Strategic and International Studies, Ph.D. from the University of Chicago, January 2018, “Rethinking Cybersecurity: Strategy, Mass Effect, and States,” <https://tinyurl.com/y27xcqbb>, p. 7-11

Similarly, the popular idea that opponents use cyber techniques to inflict cumulative economic harm is not supported by evidence. Economic warfare has always been part of conflict, but there are no examples of a country seeking to imperceptibly harm the economy of an opponent. The United States engaged in economic warfare during the Cold War, and still uses sanctions as a tool of foreign power, but few if any other nations do the same. The intent of cyber espionage is to gain market or technological advantage. Coercive actions against government agencies or companies are intended to intimidate. Terrorists do not seek to inflict economic damage. The difficulty of wreaking real harm on large, interconnected economies is usually ignored.

Economic warfare in cyberspace is ascribed to China, but China's cyber doctrine has three elements: control of cyberspace to preserve party rule and political stability, espionage (both commercial and military), and preparation for disruptive acts to damage an opponent's weapons, military information systems, and command and control. "Strategic" uses, such as striking civilian infrastructure in the opponent's homeland, appear to be a lower priority and are an adjunct to nuclear strikes as part of China's strategic deterrence. Chinese officials seem more concerned about accelerating China's growth rather than some long-term effort to undermine the American economy.6 The 2015 agreement with the United States served Chinese interests by centralizing tasking authority in Beijing and ending People's Liberation Army (PLA) "freelancing" against commercial targets.

The Russians specialize in coercion, financial crime, and creating harmful cognitive effect—the ability to manipulate emotions and decisionmaking. Under their 2010 military doctrine on disruptive information operations (part of what they call "New Generation Warfare"). Russians want confusion, not physical damage. Iran and North Korea use cyber actions against American banks or entertainment companies like Sony or the Sands Casino, but their goal is political coercion, not destruction.

None of these countries talk about death by 1000 cuts or attacking critical infrastructure to produce a cyber Pearl Harbor or any of the other scenarios that dominate the media. The few disruptive attacks on critical infrastructure have focused almost exclusively on the energy sector. Major financial institutions face a high degree of risk but in most cases, the attackers' intent is to extract money. There have been cases of service disruption and data erasure, but these have been limited in scope. Denial-of-service attacks against banks impede services and may be costly to the targeted bank, but do not have a major effect on the national economy. In all of these actions, there is a line that countries have been unwilling to cross.

When our opponents decided to challenge American "hegemony," they developed strategies to circumvent the risks of retaliation or escalation by ensuring that their actions stayed below the use-of-force threshold—an imprecise threshold, roughly defined by international law, but usually considered to involve actions that produce destruction or casualties. Almost all cyber attacks fall below this threshold, including, crime, espionage, and politically coercive acts. This explains why the decades-long quest to rebuild Cold War deterrence in cyberspace has been fruitless.

It also explains why we have not seen the dreaded cyber Pearl Harbor or other predicted catastrophes. Opponents are keenly aware that launching catastrophe brings with it immense risk of receiving catastrophe in return. States are the only actors who can carry out catastrophic cyber attacks and they are very unlikely to do so in a strategic environment that seeks to gain advantage without engaging in armed conflict. Decisions on targets and attack make sense only when embedded in their larger strategic calculations regarding how best to fight with the United States.

There have been thousands of incidents of cybercrime and cyber espionage, but only a handful of true attacks, where the intent was not to extract information or money, but to disrupt and, in a few cases, destroy. From these incidents, we can extract a more accurate picture of risk. The salient incidents are the cyber operations against Iran's nuclear weapons facility (Stuxnet), Iran's actions against Aramco and leading American banks, North Korean interference with Sony and with South Korean banks and television stations, and Russian actions against Estonia, Ukrainian power facilities, Canal 5 (television network in France), and the 2016 U S. presidential elections. Cyber attacks are not random. All of these incidents have been part of larger geopolitical conflicts involving Iran, Korea, and the Ukraine, or Russia's contest with the United States and NATO.

There are commonalities in each attack. All were undertaken by state actors or proxy forces to achieve the attacking state's policy objectives. Only two caused tangible damage; the rest created coercive effect, intended to create confusion and psychological pressure through fear, uncertainty, and embarrassment. In no instance were there deaths or casualties. In two decades of cyber attacks, there has never been a single casualty. This alone should give pause to the doomsayers. Nor has there been widespread collateral damage.

# 1NR

## T Scope Exemptions

### Overview---1NR

#### Federal courts have decided 4,278 rule of reason cases.

--WestLaw search for “adv: antitrust & (Rule +2 Reason)”

--this is the search used by Carrier 9 to capture all rule of reason cases, but without the date limiter because Carrier was updating an older article with post-1999 data

--FYI

Michael A. Carrier 9, Professor at Rutgers University School of Law-Camden, “The Rule of Reason: An Empirical Update for the 21st Century,” George Mason Law Review, Vol. 16, Iss. 4, pp 827-837

I. METHODOLOGY

This survey is based on a Westlaw search of all federal cases decided between February 2, 1999, and May 5, 2009. I located the cases by searching broadly for all rule of reason cases: “DA(aft 2/2/1999) & antitrust & (Rule +2 Reason).”

Such a search is designed to pick up every instance in which a court applied rule of reason analysis. I assumed that any court conducting such analysis would at least mention the phrase “rule of reason.” This would appear to be a reasonable assumption given the importance of labels in antitrust. A court applying rule of reason analysis—as opposed to, say, per-se or quick-look analysis—should naturally refer to the concept. And I include “antitrust” as one of my search terms to restrict the universe of cases to antitrust cases, a helpful limitation given the prevalence of the phrase “rule of reason” in other settings such as environmental, patent, and criminal law.9

#### Defendants won 95% of those.

Sandeep Vaheesan 17, Regulations Counsel at the Consumer Financial Protections Bureau, “Resurrecting “A Comprehensive Charter of Economic Liberty”: The Latent Power of the Federal Trade Commission,” University of Pennsylvania Journal of Business Law, Vol. 19, Iss. 3, pp 645-699

In adopting the rule of reason, the FTC practically guaranteed that it would be able to bring few, if any, Section 5 cases. The statistics demonstrate, in practice, that the rule of reason means that the plaintiff almost always loses. A leading study found that, between 2000 and 2009, defendants received a favorable court ruling in more than ninety-five percent of antitrust cases implicating the rule of reason.146

#### Nearly all of those are dismissed based on a substantive finding of ‘no anticompetitive effect’---reversing any one of those would be T! Insert this chart.

Michael A. Carrier 9, Professor at Rutgers University School of Law-Camden, “The Rule of Reason: An Empirical Update for the 21st Century,” George Mason Law Review, Vol. 16, Iss. 4, pp 827-837

Table

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#### Legally, the phrase ‘by at least expanding the scope’ must be given independent meaning---it cannot be renedered mere surplusage

Dr. Peter M. Tiersma 1, Professor of Law and Joseph Scott Fellow at Loyola Law School, Ph.D. from the University of California, San Diego and J.D. from the Boalt Hall School of Law, “A Message in a Bottle: Text, Autonomy, and Statutory Interpretation”, Tulane Law Review, 76 Tul. L. Rev. 431, December 2001, Lexis

A final example is the "surplusage" rule: that every word in a legal text is to be given effect and that nothing is to be considered surplusage. 113

[FOOTNOTE]

See 2A Norman J. Singer, Statutes and Statutory Construction 46.06, at 119-20 (5th rev. ed. 1992); see also Tabor v. Ulloa, 323 F.2d 823, 824 (9th Cir. 1963) ("[A] legislature is presumed to have no superfluous words."); W. Wash. Cement Masons Health & Sec. Trust Funds v. Hillis Homes, Inc., 612 P.2d 436, 441 (Wash. Ct. App. 1980) ("Statutes are to be construed so as to give effect to every word.").

[END FOOTNOTE]

The fact of the matter is that a huge amount of ordinary language is needless verbiage, perhaps even verbal garbage, when it is closely examined. Many of the words we utter in everyday life are surplusage whose main purpose is to fill in awkward pauses in conversation, to recognize friends, engage in some sort of bonding, or simply to acknowledge the presence of someone else. This situation is different with autonomous texts, of course. Because words are chosen with care and almost always reviewed and edited once or twice, if not many more times, the surplusage rule makes sense - if at all - in autonomous texts.

### Violation---1NR

#### ‘Scope’ is whether antitrust law is available, not how it’s applied

Louis A. Bledsoe 19 III, Chief Business Judge on the North Carolina Business Court, “Rickenbaugh v. Power Home Solar, LLC”, North Carolina Superior Court, Mecklenburg County, 2019 NCBC LEXIS 109, 12/20/2019, Lexis

The question thus is whether the parties' agreement, through the incorporation of the AAA Construction Rules (and by that incorporation, the Supplementary Rules), that an arbitrator would decide the "scope" of the arbitration proceeding constitutes an agreement that the arbitrator would determine whether class arbitration is available in that proceeding. Giving the word "scope" its plain and ordinary meaning and considering it in the context [\*23] in which it is used in the AAA Rules, the Court concludes that it does. Other courts have agreed. See, e.g., JPay, 904 F.3d at 931 ("Formally, the question whether class arbitration is available will determine the scope of the arbitration proceedings."); Reed, 681 F.3d at 635-36 ("The parties' consent to the Supplementary Rules . . . constitutes a clear agreement to allow the arbitrator to decide whether the party's agreement provides for class arbitration."); Burkett, 2014 U.S. Dist. LEXIS 148442, at \*22 (holding that a rule vesting an arbitrator with authority to decide the scope of his or her own jurisdiction includes "the issue of 'who decides' class arbitrability").

#### There’s a two-step process: first, ‘scope’, which determines whether claims can be heard, and second, the application of a particular legal standard once the question of scope has been decided. The plan only affects the latter.

Lise A. Barrera 96, J.D. from Wayne State University Law School, “Is the Courtroom the New Front for the Resolution of Publishing Disputes?,” The Wayne Law Review, Volume 42, Summer 1996, Lexis

It is important to note the distinction between the expansion of the scope of section 43(a) and the standard that courts apply in granting relief to claims under this section. The scope of section 43(a) allows plaintiffs to claim the section provides them with protection and thus should grant them relief. The expansion of the scope allows a much broader range of claims to be brought legitimately under section 43(a). Once the scope of the statute allows the claim to be brought, the courts apply a standard to the claim in order to determine whether a plaintiff should be granted relief.22 The standard applied is also the product of years of judicial interpretation. While the scope of section 43(a) is expanding, however, the standard for relief seems to be becoming higher and harder to meet.

### AT: C/I---2NC

#### This dispute is the core of the topic.

Barak Orbach 14, Professor of Law, The University of Arizona College of Law, “The Implied Antitrust Immunity,” 7/1/14, https://awa2015.concurrences.com/IMG/pdf/ssrn-id2447718.pdf

Introduction

An important question antitrust courts have always been grappling with, is whether a federal regulatory scheme regulating a business activity impliedly precludes the application of antitrust law.2 [FOOTNOTE 2 BEGINS] 2 See, e.g., Donald F. Turner, The Scope of Antitrust and Other Economic Regulatory Policies, 82 HARV. L. REV. 1207, 1207 (1969) (“A pervasive and overriding issue of domestic economic regulatory policy is when and to what extent we should rely on free competitive markets and antitrust, and when and to what extent we should resort instead to regulation.”) [FOOTNOTE 2 ENDS] The argument, first introduced shortly after the enactment of the Sherman Act,3 is that the mere existence of a special regulatory scheme impliedly precludes the application of antitrust law. The persistent use of the argument contributed to the rise of the “implied antitrust immunity” doctrine, which in the past was also known as the “implied repeal doctrine” and today is also known as the “implied preclusion doctrine.”4

During its first seven decades, the implied immunity doctrine was largely an application of the presumption against implied repeals, which treats lawmaking as a rationalizable process and attempts to reconcile inconsistencies between statutes. 5 In the early 1960s, with no meaningful changes in its framing, the antitrust immunity departed from canon of statutory construction replacing the deference to legislative choices with a commitment to competition policy. In Philadelphia National Bank (“PNB”), Justice William Brennan’s clerk, Richard Posner, 6 gave new life to the immunity using the traditional wording of the presumption but stressing that the existence of “broad [regulatory] powers to enforce of the competitive standard” is the key criterion courts should consider when they evaluate “plain repugnancy.”7

During the five decades that have followed PNB, the implied immunity has considerably evolved, transforming from a presumption against implied repeals of antitrust law into a flexible evaluative framework whose underlying premises tilt its outcomes toward preclusion of antitrust law. Offering immunity from antitrust laws to regulated industries, the implied immunity is exceptionally important. Its interpretation influences the scope of antitrust law, giving courts the power to strike the balance between antitrust and other national economic policies. Notwithstanding, the doctrine, its transformation, and applications by courts are poorly understood. 8 This Article seeks to clarify the functions of the implied immunity, its structure, premises, and flaws.

#### Our evidence is from the ABA Antitrust Section’s Committee on Exemptions and Immunities, which literally wrote an authoritative text called “Handbook on the Scope of Antitrust!” It’s the T evidence gold standard.

Layne E. Kruse 19, Co-Chair; Melissa H. Maxman, Co-Chair; Vittorio Cottafavi, Vice Chair; Stephen M. Medlock, Vice Chair; David Shaw, Vice Chair; Travis Wheeler, Vice Chair; Lisa Peterson, Young Lawyer Representative; all on the Exemptions and Immunities Committee of the ABA Antitrust Section, “Long Range Plan, 2018-19,” American Bar Association, 3/18/19, https://www.americanbar.org/content/dam/aba/administrative/antitrust\_law/lrps/2019/exemptions-immunities.pdf

I. Current State of Exemptions and Immunities Committee

Even though we are a relatively small Committee, we address important policy issues that might not otherwise be addressed by the Antitrust Section. While we often work on issues alongside the Legislation Committee, our scope reaches judicial, as well as statutory exemptions. Our Committee is the one place within the Section that focuses on the concerns that may lead Congress or the courts to carve out certain conduct from traditional antitrust proscriptions.

In the 2017-2018 program year, we drafted and submitted four in-depth Section Comments at the request of the Council; produced six committee programs; published three newsletters; completed one ABA Handbook and are well underway on a second one; cosponsored two Spring Meeting Programs; co-sponsored one podcast; and participated in a Women in Leadership videoconference.

In the 2018-19 program year, we will chair an approved Spring Meeting Program; are cosponsoring a second approved Program; and we have been asked to revisit one of the Comments that we produced in the previous year. We are also working on committee programs, podcasts, and publications.

Perhaps most importantly, we are proud of our diversity achievements. In 2017-18, one of the E&I Co-Chairs was a woman for the first time, and our Young Lawyer Representative was LGBTQ for the first time. This year, we continue with a woman Co-Chair, a woman YLR, and we have added the first Vice Chair from the state of South Carolina on any Section Committee.

A. Scope of Charter: What is Role of Committee?

The Exemptions and Immunities Committee is chartered to address judicially created immunities from the antitrust laws, such as the Noerr-Pennington doctrine, state action, implied immunities, and filed rate doctrines, as well as statutory exemptions, including, among others, the McCarran-Ferguson and Capper-Volstead Acts. The Committee also addresses international issues, such as the Foreign Trade Antitrust Improvements Act (“FTAIA”), and other doctrines, such as antitrust preemption and primary jurisdiction, that affect the application and extent of the antitrust laws. The Committee strives to be the first and best resource for information on the fundamental question of defining the scope of the antitrust laws.

However, another key function of this Committee is an administrative role, rather than as a programming committee. This Committee serves as the de facto institutional memory before legislators and agencies for the Section's position on exemptions and immunities. The Section needs to have one place to look for what it has said in the past on exemption proposals, as well as commentary on DOJ or FTC attempts to narrow or expand exemptions. We believe this Committee has already served in that role and should serve in that role in the future. We want to improve on this function for the Section. We should have a Vice Chair designated as the point person to track prior comments and catalog the specific issues that have been raised. At the same time, we could develop a more standardized response. A related project would be a retrospective study of exemptions and their impact. We would join with International Task Force in its study of the impact of exemptions in other countries.

In short, the Committee should standardize the analysis of exemption proposals and reach out on the international front to catalog the differences in exemptions in different areas of the world.

B. Description of Reflective Evaluation of Membership Levels, Diversity, and Growth

The Committee currently has nearly 300 members, a 20% increase in membership in the last two years. Our members include government antitrust officials, private practitioners, corporate counsel and academics, and some practitioners based outside the United States. This variety of members ensures diverse views on the scope, applicability and appropriateness of antitrust exemptions and immunities.

Although other committees are larger, our Committee tends to include lawyers who specialize in specific antitrust issues. As most members of the Committee are members of other Section committees, the Committee may not be the primary committee that draws members into the Section. We believe that tracking the key issues surrounding the scope of the antitrust laws draws members of broader committees to also join E&I, and thus must continue to be a high priority for the Section.

#### They’re premier in the field

Jonathan B. Baker 19, Research Professor of Law at the American University Washington College of Law, “Market Power in an Era of Antitrust,” The Antitrust Paradigm: Restoring a Competitive Economy, 2019, pp. 11–31

Antitrust norms, especially the objection to collusive conduct, are consistently endorsed and upheld by enforcers and courts, regardless of political affiliation.12 These norms have spread throughout the world, particularly since the 1990s, with the aid of a growing global antitrust community. Annual attendance at the spring meeting of the American Bar Association’s Section of Antitrust Law—the premier gathering in the field—now exceeds 3,000, a threefold increase over the low ebb in the late 1980s. Several new academic journals dedicated to antitrust law, economics, and policy were launched in the last decade.

#### The introduction to their handbook provides an intuitive and predictable synthesis of the topic---should markets be protected by dictating outcomes or by protecting the competitive process?

Christopher L. Sagers 15, James A. Thomas Distinguished Professor of Law and Faculty Director of the Cleveland-Marshall Solo Practice Incubator at the Cleveland-Marshall College of Law, Cleveland State University, “Chapter 1: Introduction,” Handbook on the Scope of Antitrust, American Bar Association, Section of Antitrust Law, 2015, pp. 1–12

The Supreme Court’s many emphatic generalizations over several decades suggest that antitrust applies very broadly. “[A]ntitrust,” the Court has said, “[is] a fundamental national economic policy.”1 It is no less than a “charter of freedom”2 and our very “Magna Carta of free enterprise.”3 When describing the scope of antitrust law in the abstract, therefore, courts commonly speak in very broad terms. Because “Congress intended to strike as broadly as it could” in enacting the antitrust laws,4 “[l]anguage more comprehensive” than those statutes contain “is difficult to conceive.”5 The breadth accorded the antitrust laws by the courts “reflects the felt indispensable role of antitrust policy in the maintenance of a free economy... .”6

One might then have thought that the scope of antitrust would be a simple affair. If the law applies so broadly, then cases raising serious issues of applicability would be rare. But in fact it is not simple at all. The scope of antitrust is governed by dozens of federal statutes and by a variety of elaborate caselaw doctrines. Numerous cases every year raise difficult scope issues, and many hundreds or thousands of reported opinions now address them, often in meticulous, complex detail. The scope of antitrust has morphed into a large, distinct, and complex body of law.

No prior work appears to have considered the entire law of the scope of antitrust as one body, in any comprehensive and integrated way. Integrated treatment poses certain benefits. A primary goal of this book is to aid practitioners, because several of the scope doctrines have become complex and uncertain, and their interrelationships can be especially challenging.

Integrated treatment might also be useful for public policy purposes, given that scope issues have generated frequent reform efforts and debate.7 While this Handbook-takes no position on normative matters, a problem in those debates has been their oftentimes great complexity. As one example, commentators have criticized results in which different doctrines are applied in different ways to similar facts,8 and the Supreme Court, too, has occasionally indicated that scope doctrines applicable to different circumstances should nevertheless be theoretically consistent.9 Addressing questions of that nature, however, has been difficult simply because doctrinal scope issues are ordinarily considered in isolation, a fact that in itself reflects the complexity and scale of the issues. In those rare cases in which conflicts among scope doctrines are considered, courts have felt unable or unauthorized to resolve them.10

A. Why Are There Limits on the Scope of Antitrust?

Scope issues are as old as antitrust itself.11 They have also always been controversial. On the one hand, limits on the scope of antitrust are said to be disfavored. Traditionally, the courts observed a strong presumption against judge-made limits, in all but a few special situations,12 and there has been something of a consensus among commentators that courts should fashion limits with caution.13 Explicit statutory limits are disfavored as well. The courts read them narrowly,14 the enforcement agencies have long opposed them,15 and they have been criticized by each of the many blue-ribbon antitrust review commissions established by the President and Congress over the past several decades.16 The ABA Section of Antitrust Law has maintained a consistent opposition to them for many years.17 Other nations have widely come to hold similar views, having repealed large numbers of antitrust exemptions in recent decades.18

On the other hand, scope limits of various kinds have always existed. Congress explicitly limited antitrust by statute as early as 1914,19 and did so many more times during the rise of organized labor20 and the price-and-entry regulatory regimes of the Progressive and New Deal eras.21 Judge-made limits were likewise recognized as early as 1922, again mainly as a consequence of the new regulatory regimes.22 As new waves of health and safety regulation emerged during the 1960s and 1970s,23 defendants sought antitrust clemency with some increasing success.24 Courts have also long sought to protect the political process from antitrust, even though businesses have frequently turned to that arena for advantage within the marketplace.25

Interestingly, most other nations with competition laws have similar histories of complex scope limits. The European Union (EU), for example, built a process for exemption into the very first treaty creating its competition law,26 and much of the work of its competition authority has involved administration of that process. The national laws of several EU member states likewise included various exclusions before creation of the EU,27 and exemptions exist in Australia, Canada, Japan, and South Korea.28

This long history, in which the generally broad applicability of the antitrust laws has been fraught with controversial disputes, can be seen as a struggle between the general and the specific. For the most part, substantive antitrust insists on generality and purports to oppose special treatment for the idiosyncrasies of particular markets.29 Antitrust presumes, in other words, that in respects important to antitrust, markets are mostly the same. Thus, in the absence of an exemption, the U.S, antitrust laws apply to all exchanges of goods or services for consideration, anywhere within the domestic reach of Congress’s interstate commerce power, and quite broadly to overseas conduct as well, where anticompetitive effects are felt in the United States.30 Yet, that broad application, especially during periods in which antitrust laws were applied more strictly and many kinds of conduct were held per se illegal, invites arguments that some contexts simply cannot be subject to one-size-fits-all policies.31 There have been times, as during the heyday of “destructive competition” reasoning during the first part of the 20th century, when industries like transportation, communications, and insurance were quite successful in arguing that special economic problems prevented them from performing well under the rules of competition that antitrust imposed elsewhere.32 Similar arguments have found some traction in more recent times, even as during this purportedly deregulatory age we generally claim to have disposed of the longstanding fear of destructive competition. For example, recent, explicit antitrust exemptions now protect standard setting organizations,33 the placement program for medical residents,34 and charitable gift annuities.35

Accordingly, despite the strong commitment to generality often stated, we do in fact see limits on scope. For the most part, the courts and Congress have followed one consistent instinct in moderating these struggles between the general and the specific. They typically will relax the preference for antitrust only where there is some other public, politically accountable oversight of a particular market. In effect, antitrust exemptions usually reflect the instinct that we should have either regulation or antitrust in any given context, which is to say that any context should be regulated either by direct government oversight or by competition kept healthy through antitrust.36 Thus, at least traditionally, Congress rarely displaced antitrust without setting up an administrative agency to take its place. Likewise, where courts fashioned scope limitations, they generally did so only where a regulatory agency oversaw rates or conduct (as with the filed rate doctrine) or where the challenged conduct was actually the conduct of a government entity itself (as with the state action doctrine).

B. Sources of the Scope of Antitrust Law

The scope of federal antitrust law is governed by three separate authorities-: (1) the U.S. Constitution, (2) the language of the antitrust statutes themselves, and (3) the language of other federal statutes and regulations.

### AT: Overlimits

#### Here’s a comprehensive list---we’re inserting it.

Christopher L. Sagers 15, James A. Thomas Distinguished Professor of Law and Faculty Director of the Cleveland-Marshall Solo Practice Incubator at the Cleveland-Marshall College of Law, Cleveland State University, “Table of Contents,” Handbook on the Scope of Antitrust, American Bar Association, Section of Antitrust Law, 2015, <https://www.americanbar.org/content/dam/aba-cms-dotorg/products/ecd/ebk/140535931/5030623-TOC.pdf>

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### AT: Intent to Exclude

#### It’s purposefully designed to be a comprehensive and complete list of all limits on the scope of antitrust

Christopher L. Sagers 15, James A. Thomas Distinguished Professor of Law and Faculty Director of the Cleveland-Marshall Solo Practice Incubator at the Cleveland-Marshall College of Law, Cleveland State University, Handbook on the Scope of Antitrust, ePub

PREFACE

Throughout its life, federal antitrust law has been subject to literally dozens of limitations. Specific statutory exemptions have existed since 1914 and currently about 30 of them remain in force. Antitrust is likewise limited by several distinct, voluminous bodies of caselaw that set out judicially created exemptions, to shield politics, labor, and a broad range of industries subject to other regulation. Several of these doctrines have become complex and uncertain. The scope of antitrust, in other words, now comprises a substantial body of law in its own right. This new Handbook on the Scope of Antitrust offers a first-of-its-kind, user-friendly solution in the form of a one-stop, black-letter-focused book of practical guidance on *all* exemptions and immunities issues, treating them in an integrated fashion as components of one body of law.

As far as we are aware, no such

<<MARKED>>

book has ever existed. As for the statutory exemptions, no single book has ever covered them all. Even the Antitrust Section’s major Monograph on the topic1 is not well suited to most practitioners’ needs, and was not so intended. It covers only a sample of the exemptions that exist—while it mentions them all, it gives comprehensive treatment to only nine now in force—and its purpose was to assess empirical and theoretical evidence concerning their effects, not to aid practitioners. As to the caselaw doctrines, several books exist, some are practitioner-focused, and a few are recent (notably the Section’s Noerr Handbook and State Action Practice Manual). But none of them is comprehensive or integrated in any way, and there appear to be no recent practitioner works on important topics like implied repeal, the other regulated industries doctrines, or the labor exemption.

# 2NR

## Packing CP

### AT: 60 Votes---2NR

#### Dumbass, gov 101, only needs a simple majority. Sorry for slow rolling you in CX. Don’t need to name republicans.

Gabe Cohen 21, Reporter, citing Robert Peck, President of the Center for Constitutional Litigation, “VERIFY: Explaining the Senate filibuster and how Democrats could 'pack' the Supreme Court,” WUSA9, 01-28-2021, https://www.wusa9.com/article/news/verify/organizing-resolution-explained-what-is-court-packing-democrats-nuclear-option-biden-supreme-court-explained/65-a58cf185-7b47-4a84-92fe-b00263e44add

“It’s done by simple legislation,” Robert Peck, President of the Center for Constitutional Litigation, explained.

Congress can change the size of the Supreme Court by passing a bill with a simple majority in the House and Senate, both of which the Democrats control since Vice President Kamala Harris breaks the 50-50 tie in the Senate. President Biden’s signature is the final hurdle to pass such legislation.

“If they vote along party line, [Democrats] would have enough votes to pass legislation like that, absent of the filibuster,” Peck said.

#### It can happen through simple legislation

Johnna F. Purcell 21, JD Candidate at Cornell Law School, B.A in Political Science and Global and International Studies from The Schreyer Honors College at the Pennsylvania State University, “A Switch in Time to Destroy Nine”, Cornell Journal of Law & Public Policy, 30 Cornell J. L. & Pub. Pol'y 611, Spring 2021, Lexis

In response to an increasingly polarized federal bench, some progressives have called for the expansion of the Supreme Court. 138As explained earlier, 139 a simple act of Congress could expand the Supreme Court. 140However, even amongst advocates of court expansion, there have been a variety of proposals as to how the Supreme Court should be expanded. This section will overview a few of these proposals from legal scholars, journalists, and policymakers to give a broad view of what progressive court expansion could look like.

[FOOTNOTE] 140 This vote would have no special procedure. It would only require a majority in both chambers of Congress and the President's approval to become law. [END FOOTNOTE]

### AT: Moderate Dems---2NR

#### The CP flips moderate Dems

Rachel Bucchino 21, Reporter at the National Interest, “Will Democrats Succeed in Packing the Supreme Court? Experts Say No.”, The National Interest, 4/15/2021, https://nationalinterest.org/print/blog/politics/will-democrats-succeed-packing-supreme-court-experts-say-no-182844

“The chances of the court packing bill being passed in this session are higher than President Biden nominating me to the Supreme Court, but not by much. This is a bill that is primarily designed to demonstrate to voters back home in very progressive districts that their representatives are very progressive,” Mark A. Graber, a Regents Professor at the University of Maryland School of Law, said.

Ken Kollman, a political science professor at the University of Michigan, noted, “Expanding the court is a real long shot plan. Unless the Supreme Court makes some new, very unpopular decisions, I don’t see moderate Democrats fully signing onto such a plan. I also see it as a very risky move electorally for the Democrats preceding the 2022 elections.”

### AT: Filibuster---2NR

#### It could overcome a filibuster and pass if there’s resurgent support from obstruction

Dr. Aaron Belkin 21, Founder and President of Take Back the Court, Founding Director of the Palm Center, “The Urgent Need for Court Expansion”, SCOTUS Blog, 5/12/2021, https://www.scotusblog.com/2021/03/the-urgent-need-for-court-expansion/

6. How can court expansion survive a filibuster or win the support of moderate Democratic senators?

The politics of judicial reform and filibuster reform continue to shift rapidly. In less than two years, court expansion has gone from being viewed as a fringe issue to becoming a major part of the national policy conversation. In most polls, it’s now favored by a majority of Democratic voters and a plurality of Independents. Support will only continue to increase as Trump judges and justices take a wrecking ball to the widely popular Biden agenda.