# 1NC---Round 4---NDT

## OFF

### 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 Per Se

#### ‘Prohibiting’ a practice requires per se illegality.

Lee Mendelsohn 6, Director at Edward Nathan, “KIPA Conduct Amounts to Price Fixing”, Business Day (South Africa), 6/12/2006, Lexis

The first step in any competition law analysis is to define the relevant market. There are two components to an analysis of the relevant market, namely the relevant product market and the geographic market.

The relevant product market consists of those products and services that operate as a competitive constraint on the behaviour of the suppliers of those products and/or services.

The relevant product market is determined by ascertaining whether a small but significant non-transient increase in pricing of the product in question would cause buyers to substitute the product with another product or would cause suppliers of other products to begin producing the product in question.

The relevant geographic market is determined by ascertaining whether a small but significant non-transient increase in pricing of the product in question would cause buyers to purchase the product from other geographic areas, alternatively suppliers of the product in other geographic areas to supply those products into the area in question.

For the purposes of this case study, we are instructed to accept that each medical speciality constitutes a relevant product market and that the relevant geographic market for each of them is Kleindorpie.

The Competition Act provides that "an agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if … it involves … directly or indirectly fixing a purchase or selling price or any other trading condition".

An "agreement" is defined as including a contract, arrangement or understanding, whether or not legally enforceable. The term agreement is very widely defined. A "horizontal relationship" is defined as a "relationship between competitors".

The prohibition on the fixing of a purchase or selling price or any other trading condition is one of the so-called "per se" prohibitions which are included in our Competition Act. The prohibition is automatic and absolute and the fixing of prices or other trading condition cannot be justified on the basis of any technological, efficiency or other procompetitive gains that could outweigh the potential anticompetitive effect of the fixing of the price or trading condition. If the capitation plan of KIPA falls within the restrictive horizontal practice prohibiting price fixing and the fixing of other trading conditions, such practice will be a contravention of the act.

#### Limits---many standards, requiring distinct answers, make the topic unmanageable.

#### Ground---fringe standards dodge links and allow bidirectional permissiveness.

### 1NC

Remand CP

#### The FTC and DOJ should announce a legal interpretation that increases prohibitions on anticompetitive business practices by the People’s Republic of China’s private sector by expanding the scope of its core antitrust laws to restrict exemptions under foreign sovereign compulsion, international comity, and act of state where the private party and foreign sovereign did not affirmatively disclose their intent to act in an anti-competitive nature and seek judicial codification. The United States federal judiciary should unanimously decline to prohibit such conduct on the grounds that they are constrained from abstract issue creation in the presence of significant reliance interests, but announce support for the legal modification, remand the issue to district courts, and grant cert and expedited review upon appeal.

#### The CP has federal antitrust enforcers announce a new legal principle and bring it to the courts, but instead of prohibiting conduct, remands it to the district level---that solves the case because lower courts will follow the clear recommendation, modifying law in a test case that’ll later spill up through higher affirmation

Neil S. Siegel 17, Ph.D. in Jurisprudence and Social Policy and JD from UC Berkeley, David W. Ichel Professor of Law and Professor of Political Science at the Duke Law School, M.A. in Economics from Duke University, “Reciprocal Legitimation in the Federal Courts System”, Vanderbilt Law Review, May 2017, Volume 30, Lexis

Highlight

Much scholarship in law and political science has long understood the U.S. Supreme Court to be the "apex" court in the federal judicial system, and so to relate hierarchically to "lower" federal courts. On that top-down view, exemplified by the work of Alexander Bickel and many subsequent scholars, the Court is the principal, and lower federal courts are its faithful agents. Other scholarship takes a bottom-up approach, viewing lower federal courts as faithless agents or analyzing the "percolation" of issues in those courts before the Court decides. This Article identifies circumstances in which the relationship between the Court and other federal courts is best viewed as neither top-down nor bottom-up, but side-by-side. When the Court intervenes in fierce political conflicts, it may proceed in stages, interacting with other federal courts in a way that is aimed at enhancing its public legitimacy. First, the Court renders a decision that is interpreted as encouraging, but not requiring, other federal courts to expand the scope of its initial ruling. Then, most federal courts do expand the scope of the ruling, relying upon the Court's initial decision as authority for doing so. Finally, the Court responds by invoking those district and circuit court decisions as authority for its own more definitive resolution. That dialectical process, which this Article calls "reciprocal legitimation," was present along the path from *Brown v. Board of Education* to the unreasoned per curiams, from *Baker v. Carr* to *Reynolds v. Sims*, and from *United States v. Windsor* to *Obergefell v. Hodges*--as partially captured by Appendix A to the Court's opinion in *Obergefell* and the opinion's several references to it. This Article identifies the phenomenon of reciprocal legitimation, explains that it may initially be intentional or unintentional, and examines its implications for theories of constitutional change and scholarship in federal courts and judicial politics. Although the Article's primary contribution is descriptive and analytical, it also normatively assesses reciprocal legitimation given the sacrifice of judicial candor that may accompany it. A Coda examines the likelihood and desirability of reciprocal legitimation in response to President Donald Trump's derision of the federal courts as political and so illegitimate.

Text

INTRODUCTION

Given its legal and cultural significance, *Obergefell v. Hodges* has to be one of the most widely read and discussed Supreme Court decisions in recent memory. 1 Yet judging from the reactions in the law reviews, the casebooks, the blogosphere, the media, and even the dissenting opinions in the case, no one seems to have emphasized a potentially significant feature of the majority opinion. 2 The Court repeatedly implied that it was responding to developments in the federal courts, suggestions that were nothing but the truth. But they were not the whole truth. In all likelihood, the Court itself was partially responsible for causing those developments in *United States v. Windsor* 3 and its aftermath. 4 What is more, the Court may have intended to cause those developments.

In explaining why it had to decide whether states may prohibit same-sex marriage, the Court in *Obergefell* pointed to the existence of a circuit conflict. 5 And in holding that same-sex marriage falls within the scope of the fundamental right to marry, the Court made clear that it was adopting the majority view in the federal district and circuit courts--all listed in Appendix A to its opinion. 6 What the Court did not do is acknowledge that all of the federal court rulings in favor of same-sex marriage came after *Windsor*. Nor did the Court acknowledge that its opinion in *Windsor* seemed tailor-made to generating a lopsided circuit split in favor of same-sex marriage. The Court in *Obergefell* seemed to be trying to legitimate its controversial conclusion in part by portraying federal court decisions concerning same-sex marriage as if they were entirely independent of its decision in *Windsor*, when in all likelihood they were not.

The Court's conduct in *Windsor* and *Obergefell* is not sui generis; it is generalizable in at least two ways, one common and the other uncommon. First, the Court often alters judicial precedent, impacts the course of legislation, or affects public opinion and then later cites those changes in support of its own further conclusions. In so acting, the Court often does not acknowledge that it played a role in producing those changes. Second, when the Court takes on issues that deeply divide Americans, it characteristically takes steps to protect its public legitimacy, often in ways that are not fully candid. One way in which it may do so is by interacting dialectically with other federal courts.

The dialectical nature of the Court's interaction with other federal courts in *Windsor* and *Obergefell* was also evident (with a notable twist) in the conduct of the Court that decided *Brown v. Board of Education*, 7 the subsequent federal court decisions that expanded the scope of the Court's holding in *Brown* to racial segregation in other public settings, and the Court's unreasoned per curiams that validated the expansion. 8 A similar dialectic was present (with an important difference) in the Court's reapportionment decisions, beginning with *Baker v. Carr* 9 and culminating in *Reynolds v. Sims*. 10 By contrast, reciprocal legitimation has so far failed to result from the Court's decisions in *District of Columbia v. Heller* 11 and *McDonald v. City of Chicago*, 12 although what the Court intended in those decisions is unclear at this point.

The judicial phenomenon that this Article documents and generalizes can be understood as a process of reciprocal legitimation. The process is reciprocal because lower federal courts and the Supreme Court each enlist the support of the other. Specifically, district and circuit courts seek to legitimate their decisions by relying upon an initial Supreme Court decision (e.g., *Windsor*) as authority for expanding the scope of the decision, and the Supreme Court in a later decision (e.g., *Obergefell*) seeks to blunt threats to its own legitimacy by invoking those district and circuit court decisions as authority for validating the expansion.

Reciprocal legitimation takes two basic forms: it is either intended by the Court as an original matter, or it is unintended. In a case of intended reciprocal legitimation, such as *Brown*, the Court first intends for other federal courts to expand the scope of its initial decision and then later relies on those federal court decisions as authority in eventually validating the expansion. In a case of unintended reciprocal legitimation, such as *Baker*, the Court causes other federal courts to expand the scope of its initial decision without intending that result but nonetheless relies upon those federal court decisions as authority in eventually validating the expansion. This Article, while mindful of the perils of speculation absent internal evidence, will suggest that the Court may have intended reciprocal legitimation in *Windsor*. If that is correct, it is worth exploring why the Court deemed it desirable to proceed in that fashion. But even if the Court did not intend reciprocal legitimation in *Windsor*, it set the process in motion, and that process constitutes a potentially important part of how the American constitutional system functions.

#### Anchoring antitrust revisions in specific fact patterns that emerge in lower courts prevents an abrupt de novo ruling that undermines reliance interests and destabilizes the rule of law

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IV. Some Suggestions Going Forward

The last portion of this Article provides constructive ideas and suggestions that are intended to ensure that the case law remains coherent and cohesive despite the accepted understanding that stare decisis has a diminished role in antitrust. First, as noted earlier, courts can strive to avoid overruling cases based solely on newer economic models and instead rely on slow doctrinal development. However, inasmuch as antitrust law needs to keep up with rapidly changing commercial realities while at the same time upholding the rule of law and respecting reliance interests, some suggestions and innovations may help further those goals. For example, the Supreme Court - as well as district and circuit courts - can try to preemptively avoid situations in which overruling precedents will become a routine component of the law. Moreover, the Court can take greater care in shaping antitrust jurisprudence to give citizens a more stable base of reliance and to ensure that doctrinal changes are not unduly sharp and abrupt.

A. Moving From Per Se Rules to the Sliding Scale

In recent years, much of the Supreme Court's activity in overruling precedent has concerned the repeal of per se rules. For instance, Sylvania, State Oil, and Leegin involved the overruling of per se rules of conduct, and Illinois Tool abrogated an automatic presumption of market power. While this may be apparent only in hindsight, the idea of compartmentalizing antitrust scrutiny into tight boxes like per se rules versus the rule of reason does not seem to have served antitrust well and has led to the perceived need to overrule antitrust precedents with relative frequency. In fact, the Supreme Court, as well as numerous commentators, has more recently acknowledged that antitrust scrutiny should focus more on the ultimate harm to consumers with a sliding scale approach that takes into consideration the severity, overtness, and alternative potential purposes of the conduct that is alleged to be in restraint of trade. 211 This has particularly come to the fore with the acceptance of additional levels of review, such as the "quick look." 212

Thus, it appears that, moving forward, courts might do better by exhibiting more caution before imposing blanket restrictions - like per se rules - that go beyond the facts of a case in front of them. 213 Doing so may alleviate the need to overrule precedent solely on the basis of later economic advancements that suggest that a previously illicit practice has some redeeming pro-competitive virtues. Instead, courts will be free to focus more on the substance of various business practices, such as the evils inherent in particular contractual arrangements as well as the pro-competitive benefits, if any, that an entity is actually pursuing by engaging in that conduct. In some cases, this approach will indeed lead to more complex litigation and associated costs, but it is nonetheless preferable to a jurisprudence that leads to a cycle of rigid rules followed by frequent overruling leading to a state of legal flux. Importantly, a per se rule - or at least an approach including a bare minimum analysis - should remain appropriate in instances of "hard core" price fixing, bid rigging, or the like, inasmuch as that leaves the government sufficient room to enforce egregious violations without taking the time to re-litigate the anticompetitive nature of the most basic evils proscribed by the antitrust laws. 214

B. A Greater Role for the Antitrust Agencies

Another innovation that courts can utilize in order to assure stability in the development of antitrust law is greater emphasis on the opinions of antitrust enforcement agencies. Most, if not all, of the major antitrust doctrines are still developed by the courts. Thus, stare decisis should remain an important constraint on rapidly changing rules of law. That said, the Supreme Court does, and should, play a continuing role in refining antitrust doctrine to make sure that competition policy serves its goals in the twenty-first century and beyond. However, the Supreme Court does not have to act alone. Both the DOJ and the FTC are active in disseminating research and opinions about how antitrust laws are and ought to be enforced. Moreover, both agencies make an effort to ensure that their opinions and data are publically available. Thus, it is appropriate that the Court often takes note of the antitrust agencies' views in deciding cases, and it would be beneficial for that interplay to continue. 215

Taking the antitrust agencies' views into account in deciding antitrust cases - especially in matters where the Court overrules precedent - may help alleviate many of the problems that arise when stare decisis is ignored. For example, reliance concerns underlying stare decisis might be alleviated if the Court overrules a case in accordance with the public opinion of antitrust agencies. In such a case, those with an interest in antitrust matters would already be publically warned against over-reliance on an established rule of law. Additionally, the public work of antitrust agencies in reaching their conclusions may simplify the case by allowing the parties to focus their analysis on the issues as presented by the antitrust agencies.

For instance, in Illinois Tool, the fact that the DOJ and the FTC had publically come to the conclusion that patents should not automatically confer market power properly alleviated some of the concerns that the Court would normally face in overruling precedent. The Court stated that it found the common position of both the DOJ and the FTC convincing on the question of patents and that it mattered that the DOJ and FTC had both publicized this information in materials on their websites. 216 As such, there were already public signals that patent cases might be treated differently and that reliance interests had less significance. Moreover, allowing private plaintiffs to rely on legal assumptions that antitrust agencies have abandoned is arguably unfair inasmuch as part of the goal of private suits is to supplement the agencies' enforcement of uniform and consistent competition policy. 217

C. Using the Facts to Anchor the Common Law

Finally, courts can enhance the continuity of antitrust law by engaging in analysis that focuses on the actual conduct in question rather than on potential or theoretical economic aspects of conduct. 218 For instance, in determining whether a particular economic arrangement is in restraint of trade, the court should focus on the actual motivations and results of the economic arrangement, rather than asking what potential or hypothetical pro-competitive virtues might result from the practice. 219 Focusing on the former will allow the law to develop in a way that prohibits or permits particular arrangements with attention to the facts or circumstances that tend to make a practice more or less reasonable. Such a focus promotes reliance on the law as people and entities know what circumstances favor a finding of restraint of trade. Additionally, focusing on the actual motivations and results of economic arrangements obviates the need to overrule cases inasmuch as each case is tightly based on the facts before it. In contrast, deciding cases based on hypothetical economic models has tended to lead to broader legal rules. This practice, in turn, leads to the overruling of prior cases when the hypothetical models change based on novel economic understandings.

For instance, part of what precipitated the perceived need for overruling the per se rules against resale price maintenance in place before State Oil and Leegin was the new recognition that resale price maintenance could serve potential pro-competitive ends. Moving forward, however, the proper focus of the inquiry concerning resale price maintenance should not be on what an entity could do by imposing resale price maintenance but, rather, on what it has done in terms of attempting to curtail market forces or to promote interbrand competition. Such attention to the facts of each case will serve to promote case-by-case adjudication wherein broad legal rules do not need to be constantly reevaluated or overturned.

V. Conclusion

Antitrust law faces the formidable challenge of protecting economic freedoms while at the same time keeping up with ever changing commercial and economic realities. However, as the legal profession has long recognized, the law must maintain some semblance of continuity to maximize both efficiency and fairness. Thus, whatever substance antitrust law takes, society will be best served by a doctrine that properly promotes coherent policy goals while not abruptly breaking with precedent in each new case. To do so, courts - and especially the Supreme Court - should overrule prior cases only where there have been meaningful and gradual shifts that justify legal change. By contrast, it is usually unsettling and unfair to overrule cases based only on newer economic trends that point to theoretical justifications. On balance, the common law nature of the Sherman Act is best recognized by allowing it to adjust in much the same way as the common law itself does - through a deliberate process of doctrinal refinement.

### 1NC

Reliance DA

#### The plan declares old antitrust law invalid in the abstract, without the specific facts of a particularized case---that signals an abrupt legal shift that collapses the faith of a slew of reliance interests in the dependability of settled law

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Of the cases surveyed, a shift in contemporary economic understanding was used as a primary justification for departing from established precedent in Sylvania, State Oil, Illinois Tool, and Leegin. 169 Indeed, in Sylvania, State Oil, and Leegin it was the only substantive reason given for overruling prior law. 170 However, overruling cases in the name of heightened economic understanding, without gradual case law progression, is not without its problems. It might thus be reserved only for the most extreme cases in which there is virtual economic consensus that a prior rule is not merely non-ideal but, rather, that the older rule is demonstrably anticompetitive. This is not to say that economic theory plays no role in adjusting antitrust law - it surely does and should. 171 Rather, this Part argues that contemporary economic trends should not lead to abrupt breaks with stare decisis without sufficient time for the doctrine or economic consensus to develop.

As a practical matter, overruling antitrust precedent in the name of contemporary economic trends is not a suitable or fair endeavor for the legal counsel or judicial institutions involved in a case. For instance, to the extent the Supreme Court is willing to overrule precedent on the basis of economic trends, all parties involved will have to be steeped in economic literature and may be required to come to conclusions that mainstream economists have themselves failed to agree upon. 172 While it is generally fair to expect antitrust counsel to understand the business context and general commercial strategies of a client, it would seem odd to create a system where all antitrust counsel must be trained microeconomists. The problem, however, is not merely that lawyers or judges may lack economic backgrounds - undoubtedly some do and some do not - the more important point is that private lawsuits and case-by-case resolution may not be an institutionally effective way to handle large economic decisions. 173 While courts could, and do, take expert testimony in a case and use that in lieu of institutional research, the choice and contents of expert reports will generally be a decision of the private parties in an antitrust suit and, thus, may leave out factors that would be relevant to the broader commercial practice in question. 174 Likewise, excessive reliance on amicus briefs may undermine the integrity of the adversarial proceeding. 175

Moreover, if antitrust is left to develop through the adoption and overruling of legal doctrine, lawyers and judges will have to master more than just background economics. They will also have to remain up-to-date on contemporary economic trends in order to be able to argue that doctrines should be overruled at the proper time on behalf of a client. Requiring parties to ask the Court to overrule prior case law as a way to resolve litigation seems unfair because such parties will now be up against a steep hill to alter the status quo. 176 Likewise, leaving it to parties to constantly request changes in the law will not lead to an efficient and smooth administration of justice in the antitrust area. Thus, although the law often leaves it to private litigants to push for the reversal of law in other contexts, this should not be made the norm in antitrust litigation.

Additionally, allowing for frequent overruling in antitrust ignores many of the benefits that stare decisis usually confers. For instance, allowing parties to re-litigate settled questions of law may greatly increase the already heavy administrative costs associated with antitrust litigation. 177 This is especially true when the former legal scheme has not proved unworkable or impractical to apply in the first place. Furthermore, as a matter of fairness, this approach ignores the potentially weighty reliance interests on a whole slew of parties who may have expended effort and resources to conform their conduct to established rules of law. Thus, abrupt overruling of established precedent on the basis of contemporary economic trends should be disfavored. An exception, if any, might be appropriate for cases where there is virtual economic consensus that a prior rule is wholly anticompetitive and has little or no utility in advancing sound competition policy.

For instance, the Court in Leegin overruled a rule of law that was not demonstrated to be always inappropriate or unworkable as a scheme. 178 Although the Court cited to two cases imposing some limitations on the per se rule, it pointed to no declining influence of the per se rule against resale price maintenance. 179 As the dissent noted, there was also no consensus among economists concerning the full economic impacts of resale price maintenance. 180 Other than noting that stare decisis was less of a concern in antitrust, the Court did not deal with the substantive concerns that usually counsel against overruling precedent. For example, the dissent suggested that there was substantial reliance on Dr. Miles coupled with no prior indications that Dr. Miles was of diminished precedential value. 181 In fact, older cases that have been continually affirmed are thought to have greater precedential value. 182 Thus, the decision overruling Dr. Miles arguably disrupted the appearance of the consistent rule of law and upset settled private expectation interests. At the very least, the Court would have been more justified in focusing on what particular factual elements, if any, of the Leegin case made a per se rule inapplicable, thereby setting the stage for a potential gradual erosion of the per se rule against resale price maintenance.

B. Doctrinal Refinement Compels Overruling

In Copperweld, ARCO, and Illinois Tool, the Court explained its departure from stare decisis based upon doctrinal changes and the desire to keep elements of the law consistent with the underlying aims and purposes of the Sherman Act. 183 Aspects of change grounded in theoretical economic updates and doctrinal refinement do, or course, significantly overlap and are not divided by any bright line. However, the distinction between economic theory and doctrinal refinement may be meaningful for courts and antitrust practitioners to bear in mind in evaluating the continued validity of older rules. As described earlier, overruling a case based on economic trends can sometimes involve abruptly declaring older settled rules incorrect. This approach is often characterized by primary reliance on academic economic works as well as by abstract discussions of economic consequences. In contrast, doctrinal refinement is a mode of legal reasoning familiar to many other areas whereby courts refine legal rules over time to ensure that they continue to serve the underlying function of the discipline in question. This method is characterized by concern with how relevant precedent should or would apply to a case as well as by addressing the concrete facts as alleged in the case. In fact, this is the essence of the common law reasoning. 184 Such changes tend to be gradual and emphasize the way in which rules slowly erode to make room for new law that takes into account modern realities and practices. In other words, the process of doctrinal refinement does not focus on the incorrectness of prior doctrine but, rather, on the way that older rules may no longer be appropriate in contemporary settings.

#### Disrupting reliance interests cascades, destabilizing the entire edifice of regulatory law---that spills over, crashing investment in the energy sector

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A. Defining Reliance Interests, and Why They Matter

Reliance interests cannot be described as a neat set of criteria that are easily identified. Due to their nuance and often-backward-looking nature, reliance interests regularly go unconsidered. However, reliance interests play a rather large role in stabilizing other legal functions and can play a similar role in stabilizing regulatory judicial review. For instance, reliance interests are a well-understood element of "stare decisis," the legal concept that a court "should adhere to [the] rules [of] its prior decisions." 164 Reliance interests embody the idea that "private parties may ... shape their behavior around [regulatory and] judicial precedent such that sudden or significant change in ... applicable legal rules [may] be costly [or] unfair." 165 While it would be reasonable to say that a private actor should expect regulations to change, it is not reasonable that the change should happen under wildly erratic or frequently recurring conditions. 166Accordingly, reliance interests should be understood to protect against changes in rulemakings that, due to their irregular or sudden nature, implicate the unrealized investments of private parties in that regulation.

Perhaps the foremost argument for consideration of reliance interests is that considering the impact of a regulatory action on real stakeholders promotes stability in the law. Individuals and institutions operate around and build upon official representations of the law. That is, "private parties can and do shape their behavior around administrative regulations and adjudicative orders." 167 Generally, private stakeholders are incapable of managing the risk of legal change in a rational and effective manner, as they are unable to inoculate themselves against unforeseeable, broad swings in policy. 168 This is particularly true in a hyperactive regulatory environment, where regulated entities expect that they will at least have the opportunity to comply with a regulation, let alone benefit from it over time. Stability in regulation promotes efficiency, transparency, and ensures accountability upon departure from the status quo. 169 Judicial consideration of reliance interests thus functions to protect private stakeholders against those regulations that are both sudden and drastically alter the status quo. 170 [FOOTNOTE] 170 Cf. id. (noting the Judiciary's structural arrangement as a means to promote stability in the face of shifting political tides). [END FOOTNOTE] While there may be a time and place for sudden or drastic regulations, regulatory procedures, such as data publishing requirements and the notice-and-comment rulemaking processes, indicate that this sort of agency action ought not be the norm. Regulation, when necessary, should be deliberate and inclusive.

Private actors are not the only stakeholders who rely on legal consistency for efficiency in operational planning. Congress regularly builds upon the legal rules established by judicial interpretations and agency actions, 171 such that administrative law can fairly be characterized as a tangled web. This practice is so commonplace that "overruling an established judicial interpretation could, therefore, "unsettle a vast cluster of public and private expectations.'" 172 This argument applies with equal vigor to hyperactive regulatory change. As more regulations are prematurely altered or rescinded, operating costs and mid-to-long-term planning become more unpredictable, and thus costly. 173 Consideration of reliance interests in judicial review of regulatory change would provide important protections against regulations that fail to consider their practical impact on stakeholders and thus contribute to the stability of the regulatory sphere.

Without a common understanding of reliance interests, it will be difficult for courts and agencies to strike an appropriate balance in the application of reliance-interest considerations. This Comment recommends the following definition of reliance interests as it relates to regulatory change: Interests established or entered into by private parties for the purposes of adherence to a rulemaking or attendant requirement, or with an understanding that the rulemaking or attendant requirement would remain law for a period sufficient to justify investment by private parties. 174 The interest must have been established in reliance on the rule in question.

This definition of reliance interests accounts for both physical and non-physical investment in dependence on a rule. Understating that reliance-interest review is not dispositive, but rather a reliance interest will be weighted according to its role in a case, it is similarly important to be as inclusive as possible here. Any rule contemplating reliance interests must account for both physical and circumstantial investment. For example, an agency's assessment should account for the physical investment that must be made by private actors in energy, infrastructure, and in other sectors that are largely capital-intensive. These industries largely involve fixed assets, which must be altered, or their processes adapted, when regulations change. 175 [FOOTNOTE] 175 See, e.g., Laura Noonan, Regulatory Changes Force Investment Banks into "Capital Light' Activities, FIN. TIMES (Dec. 13, 2015), https://perma.cc/753K-MQVV (discussing how "the wave of regulation [following a] financial crisis" caused European banks to move their investments away from capital-intensive industries). [END FOOTNOTE] Similarly, a reliance-interest definition must capture investment similar to that sustained in Regents. 176 Where a regulation has encouraged individuals to invest in a certain way, or has incentivized certain economic behavior, it is reasonable that those individuals should expect to receive the returns on those investments. Accordingly, any reliance-interest assessment must capture these individuals' reliance interests for consideration by a reviewing court. In sum, a proper understanding of reliance interests considers both the industrial and individual, and the economic and the personal; these are the areas of life most susceptible to a loss of welfare due to hyper-regulatory activity.

#### Spiking regulatory risks in the energy sector crashes rapid decarbonization---extinction

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1. Introduction

Whilst it is evident that the COVID-19 pandemic containment measures including lockdowns have slowed down anthropogenic activity (closure of transport systems, less industrial activity etc) resulting into reduced emissions, accompanied by incidental natural environment gains such as cleaner air, clearer skies and water ways, and recuperating ecosystems (EEA, 2020), the question is how long these benefits will last, and whether they will move the world closer to its environmental sustainability and carbon neutral goals espoused in the 2015 Paris Agreement on Climate Change and 2030 Transformative Agenda on Sustainable Development. The lockdowns have been identified as one of the COVID-19 containment strategies in the absence of a specific vaccine or treatment in the short term (WHO, 2020).

Evidently, cities across the world registered gains in the natural environment with significant reductions in pollution of several environmental domains such as soil, water and air (Khan et al., 2020). The European Environmental Agency (EAA) reported decreasing amounts of air pollutant concentrations attributed to reduced traffic especially in major cities under lockdown measures (EAA, 2020). Relatedly, Sharma et al. (2020) reported that COVID-19 induced lockdowns improved air quality in various cities across the globe due to reduced emission levels of Particulate Matter (PM2.5, PM10), Carbon monoxide, and Nitrous Oxide. At city level, the scale of registered transitory planetary benefits seemed to depend on the length of the lockdowns. For instance, two weeks after the lockdown announcement on March 23rd, Nitrogen Dioxide (NO2) pollution in some of the UKs cities fell by 60% (Khoo, 2020) compared to the same time in 2019 while the worlds most polluted capital New Delhi (India) recorded a 60% drop in fine particulate matter (Meredith, 2020), a pollutant that is considered as the worlds deadliest air pollutant by the World Health Organization (WHO, 2020). Relatedly, Chinas carbon emissions plummeted by a quarter during the peak of its COVID-19 outbreak (Lauri Myllyvirta, 2020). However, the World Economic Forum (2020) expressed uncertainty about the length of these benefits asserting that although the COVID-19 pandemic triggered cleaner air through its containment measures, it will do little to address the issue of air pollution in the long term. Therefore, it can be concluded that celebrating the COVID-19 generated incidental positive gains on the natural environment is premature and focus should rather be on how to sustain the accrued gains through granular policy decisions during the design of COVID-19 stimuli and recovery packages.

Besides, albeit the COVID-19 pandemic has thrown a wrench into the 2020 global climate change and environmental action calendar, there is an opportunity to ramp up action by harnessing several stimuli and recovery packages being prepared by governments to energize their economies. For this reason, this article succinctly cautions against the premature celebration and focus on the positive environmental spillovers generated by COVID-19 induced lockdowns, enumerates the likely environmental and climate change setbacks triggered by COVID-19, and highlights strategies for adoption by governments to build back better by using the 2030 Agenda and 2015 Paris Agreement as pointers for the design of stimuli and recovery packages.

2. Methodology and approach

This article primarily relied on COVID-19 relevant literature in the form of articles and papers published in the wake of the COVID-19 pandemic between March 2020 and December 2020. It also inferred earlier reports such as the 2016 UN Environment Programme Frontiers Report which establishes an inextricable relationship between the health of the planet and public health. The Paper leverages these data sources to discuss how the world can simultaneously deal with the economic meltdown triggered by the COVID-19 pandemic while ensuring sustainable environmental management and climate change action.

3. Misleading narrative

Undoubtedly, the short term environmental and climate change benefits triggered by the COVID-19 induced lockdowns are commendable. However, since these have been achieved when the global economy is almost fully closed, caution ought to be taken to avert misconceptions and a misleading narrative that achieving climate change responsive goals and environmental sustainability will be largely disruptive, requires global lockdowns and is synonymous with economic decline. The incidental environmental benefits owing to COVID-19 containment measures have been accompanied by economic losses with the International Monetary Fund forecasting an imminent severe economic meltdown only second to the 1930s Great Depression (IMF, 2020). Conversely, climate change action and a green economy can be achieved with less disruptive interventions that decouple development from greenhouse gas emissions while building competitive economies and inclusive resilient societies simultaneously. The missing link is the recognition of climate change and environmental degradation as existential threats that equally require urgent prioritization and action to be contained.

Although there is a likelihood of COVID-19 incidentally contributing towards the attainment of certain SDGs such as segments of SDG 6 on Clean Water and Sanitation since hand washing with water and soap have been widely embraced as a preventive measure, a conclusive impact can only be ascertained at the end of the pandemic. Besides, the length of the current environment and climate change benefits owing to COVID-19 induced slowed economic activity is uncertain and may be wiped out on the onset of recovery programs implementation. Using the 2008 global financial crisis as an example, global carbon emissions fell by 1.4% in 2009 relative to 2008 but grew by 5.9% in 2010 in fossil-fuel combustion and cement production alone thus outstripping the incidental gains garnered during the financial crisis (Peters et al., 2011). The astronomical resurge in emissions was largely driven by global efforts to resuscitate economies. This implies that the longevity of accrued planetary benefits from the lockdown can only be established when the pandemic dust settles and their sustainability is tied to the direction of recovery packages, and the stimuli earmarked for revitalizing economies.

In the face of these short-term environmental benefits, the pandemic has also spurred setbacks in local and global action to combat climate change and ensure environmental sustainability as unearthed in the subsequent section.

4. Likely impact of COVID-19 on the achievement of Sustainable Development Goals (SDGs)

The COVID-19 pandemic and its associated partial and total lockdowns present a profound test of the resilience of the SDGs and the ability to achieve them by the set deadline of 2030. The intricate linkage and inter-relatedness nature of the various SDGs where none can be achieved in isolation of the rest is likely to compound the scale of dire implication of the pandemic on the goals realization. Notably, existing global inequalities will be exacerbated by the COVID-19 total and partial lockdowns. This is because whereas the global north can sustain lockdowns and provide adequate safety nets to its vulnerable sections of the population, the same cannot be said about the global south which hosts a greater proportion of people living in extreme poverty, with the World Bank, 2020a, World Bank, 2020b indicating that Sub-Saharan Africa alone accounts for 63% of the global poor population. Partial and total lockdowns in the global south will thus worsen pre-pandemic existing vulnerabilities such as income poverty and food insecurity directly reversing gains accrued in the race towards realizing SDGs. Therefore, although some sections of the population who live from hand to mouth with casual labour as their biggest asset may be shielded from COVID-19 through lockdowns, they will have to wrestle with other life-threatening challenges such as hunger and other forms of poverty– income and energy. Relatedly, albeit partial and total lockdowns were flagged as a silver bullet to COVID-19 containment by WHO, they are blind to the housing deficit experienced especially in the global south where several households live in single rooms with others lacking basic housing facilities. The lockdowns thus only cause congestion while fueling domestic conflict driven by scarcity of resources.

Considering the above, COVID-19 and its containment measures is likely to reverse progress on the achievement of SDGs on ending poverty (SDG1), zero hunger (SDG2), gender equality (SDG5), reduced inequalities (SDG 10) and climate action (SDG13) among others. In agreement, Naidoo and Fisher (2020) affirm that two thirds of the 169 SDG targets are either under threat as a result of this pandemic or not positioned to mitigate its impacts. This is premised on the SDGs success factors which is sustained economic growth and globalization, both thwarted by the COVID-19 pandemic. Quantitatively, the World Bank, 2020a, World Bank, 2020b projects that between 40 million to 60 million people will be pushed back into poverty by the end of 2020 making ending poverty by 2030 out of reach. Additionally, about 130 million people or more risk facing acute food insecurity as part of the damage trail left by COVID-19 (WFP, 2020). The World Bank in its Reversals of Fortune Report (2020) reported that for the first time in over twenty years, global poverty rose in 2020 due to the disruption of the COVID-19 pandemic. Therefore, the pandemic will erode progress made towards SDGs and may undermine their achievement by 2030 if the recovery packages are not designed in a way that salvages and builds on reminder gains garnered over the years.

5. Environmental and climate change setbacks triggered by the COVID-19 pandemic

The incidental natural environment gains from the pandemic notwithstanding, there are some setbacks in global environmental and climate action owing to the COVID-19 pandemic outbreak. For instance, with global and local focus on saving lives and containing the pandemic, the concern for climate change and environmental sustainability has dimmed, despite of 2020 being earmarked as the year of enhanced global climate action. Unfortunately, the climate change threat is an equally urgent emergency whose severity is increasing by day. Besides, a warmer planet will imply more frequent lethal pandemics given the scientifically proven nexus between environmental ecosystem health and public health.1

A 2016 UN Environment Programme Report2 indicates that 60% of all infectious diseases in humans are zoonotic (transmitted to humans via animals) as are 75% of all emerging infectious diseases with environmental degradation being the underlying driver. Therefore, failure to reverse the current trend of environmental degradation poses a huge threat to public health since habitat loss and deforestation bring humans into closer contact with wildlife, thereby compounding the risk and frequency of zoonotic pathogens spillover from wildlife to humans. All this disrupts economic, social, and environmental action. Specifically, the COVID19 pandemic has triggered the following setbacks to environment and climate change action:

1. Increasing volumes of unrecyclable waste and organic waste emanating from limited trade in perishable agriculture products due to travel restrictions, disruptions in supply chains and dumping of surplus produce (WEF, 2020). Severe cuts in agricultural and fishery exports followed by low domestic markets absorption have led to significant accumulation of organic wastes yet municipalities have suspended waste collection and recycling activities for fear of spreading COVID-19 in recycling centers (UNCTAD, 2020). Leaving waste to decay produces methane emissions (Shirmer et al., 2014) and these are likely to rise during and after the COVID19 crisis. Besides the organic waste, a new strain of waste (COVID-19 medical waste) has also emerged especially the single use masks, sanitizer containers which may aggravate the poor solid waste management systems in some cities across the globe;
2. With deployment of security forces to enforce COVID-19 lockdowns and containment measures, it implies that less security is available to protect habitats and curb illegal poaching and logging. For instance, illegal fishing remains high in Malaysia (Dian Septiari, 2020) while the rising unemployment caused by the crisis is likely to compound environmental degradation in the form of deforestation for charcoal making and land use changes in fragile biodiverse ecosystems such as wetlands.
3. Expectedly, the response to the pandemic at global and national level will be marred by budget cuts and reallocations. Saving lives and containing the pandemic are likely to receive the first call on resources at the expense of other pressing needs such as sustainable environmental management and climate action. The budget cuts and reallocations will be more apparent in developing countries with weaker disaster preparedness systems. The possibility of reallocating resources earmarked to combat climate change and environmental degradation cannot be ruled out. The Monitoba province government has already cut environmental funding (Lamber, 2020) as part of its plan to cope with the fiscal deficit resulting from the COVID-19 pandemic. Unfortunately, this will be counterproductive in the longrun since the health of the planet is intricately linked to public health;
4. There is likely to be a decline in Official Development Assistance flows between advanced economies and developing countries. This spells doom for climate action and environmental management projects and plans in Sub-Saharan Africa most of which are externally funded by development partners. The pandemic has diluted globalization indicated by growing nationalism rather than internationalism where countries are closing borders and mobilizing gigantic country or region-specific recovery packages with peanuts ear marked for concerted global recovery. For instance, whilst developed economies are poised to spend an estimated USD 11 trillion on domestic responses to COVID-19, appeals to raise only 0.3% of this amount (USD 35 billion) to avail COVID-19 vaccines, diagnostics, and treatments to all countries (Homi Kharas and John McArthur, 2020) are failing to come to fruition.
5. The UN Climate Change 26th Conference of Parties (COP 26) initially scheduled for November 2020 in Glasgow was postponed to 2021 (UNFCCC, 2020). Importantly, this conference was supposed to be preceded by submission of country specific enhanced climate change action (reviewed Nationally Determined Contributions - NDCs), as a five-year milestone towards achieving the 2015 Paris Agreement Goal of limiting global average temperature rise to below 2 °C above pre-industrial levels, and pursuing efforts to limit temperature increase to 1.5 °C above pre-industrial levels by the end of this century. With the discussions postponed, there is likely to be a delay in submissions of enhanced NDCs thus putting the Paris Agreement to a test regarding the achievement of its first milestone.

6. How to build back better

The COVID 19 pandemic has exposed the volatility of the current economic and development system, and it will be unfortunate to emerge out of the crisis and continue with the same frail system unaltered. The planet, financial and economic systems, and governments may lack the current resilience to withstand and recover from future related disasters if the global system is simply rebuilt back to the pre COVID-19 state. The price of oil, a life blood of several economies, fluctuated by 300% (Julianne Geiger, 2020) between January and April 2020, plunging to negatives in April, implying that oil producers and traders had to pay consumers to get rid of their black gold. Economies that are fully reliant on export of this fossil fuel are at a higher risk of the economic meltdowns triggered by the COVID-19. Therefore, building back better implies using the holistic sustainable development goals as the compass to design recovery packages and prioritizing interventions that work for the planet, people, and economy. This direction will hedge against addressing one challenge of the pandemic while worsening another – climate change and biodiversity loss. Design of the recovery packages should thus be underpinned by the following strategies:

1. Adoption of the One Health Approach in the design of Recovery packages. One health approach loosely means ensuring harmonious and healthy co-existence of people, animals, and ecosystems. It has increasingly been proven that the health of the planet determines public health and as such, building resilience against future pandemics requires holistic policies and strategies that cater for the health and integrity of biodiversity, humans, and ecosystems. WHO (2019) defines “One Health” as an integrated unifying approach that aims to sustainably balance and optimize the health of people, animals, and ecosystems. Recovery packages should desist from the temptation of fully focusing on economic recovery and resuscitation at the expense of social and environmental strategies that build happy resilient societies while conserving and sustainably managing biodiversity;

2. Conditioning highly polluting corporations, businesses and industries' access to recovery packages, bail outs and economic stimuli to a commitment to embark on sustainable reporting and reduced carbon footprint. A great deal of the recovery packages and bailouts will be disbursed to businesses in energy, transport and agriculture among others who have been prioritizing economic gain and profitability at any cost of the environment and biodiversity in the pre-pandemic era. Ensuring that one of the bailout packages access requirement is commitment to improved corporate environmental and climate action performance will go a long way in ensuring that COVID-19 recovery packages move the world closers to its climate and sustainability goals espoused in the 2030 Agenda and the Paris Agreement on Climate Change. Importantly, this does not imply denying highly polluting or environmentally non-compliant corporations bailouts but rather using them (bailouts) as an impetus to prompt corporations move towards sustainable corporate reporting, integration of climate risk in their conventional risk analysis, and reducing their carbon footprint with the access of the recovery or bailout packages henceforth. This will be a win-win for the economy, corporations, and the planet;

3. Integrate environmental sustainability and climate change action in the design of quick, short term, medium to long term COVID-19 stimuli and recovery packages respectively. As development gains traction, consumption patterns inevitably change thereby stimulating agriculture intensification to feed the growing global population estimated at 7.7 billion (UNDESA, 2019). This is accompanied by land use changes which habitat loss, deforestation, and biodiversity loss culminating into environmental degradation, both a key driver and an effect of climate change. Environmental degradation and climate change have been singled out as significant explanatory factors for the increased frequency of zoonotic infections (UNEP, 2019) such as Corona viruses. Accordingly, sustainable recovery will require a global paradigm shift from the status quo of waiting for the zoonotic diseases to strike and race towards finding a vaccine to a systemic approach that deals with underlying drivers of such pandemics. With environmental degradation and climate change identified among the underlying drivers, a robust recovery programme should move the globe towards addressing illegal wildlife trade, protecting water resources and oceans from pollution particularly plastics, conserving biodiversity and habitats, and reducing greenhouse gas emissions in a bid to achieve carbon neutrality by mid-century and limit temperature rise to below 2 °C by 2100 as committed in the Paris Agreement on Climate Change. This implies that sustainability must permeate across quick responses such as stimuli and medium to long recovery packages and plans. Prioritizing environmental sustainability and climate response in COVID-19 recovery measures will not only resuscitate ailing economies but also act as a medium to long term preventive strategy against related future zoonotic pandemics. Environmental degradation accompanied by habitat loss, biodiversity loss, and a warmer climate creates an amiable environment for emergency of dominant species, and viruses that cannot be controlled ecologically which evolve with the changing temperatures to find new hosts (UNEP, 2019). Fig. 1 below enumerates the primary drivers of previous disease emergencies while Fig. 2 indicates the past four major zoonotic diseases and their impact;

4. Pursue an inclusive approach in the design of COVID-19 Recovery packages to address the diversity of needs of all victims of the pandemic. Unlike previous global crises such as the 2008 global financial crisis that left largely financial and economic impacts, the COVID-19 pandemic is littered with multifaceted dire impacts transcending the economic, social, and environmental spheres. Therefore, addressing or recovering from these multiple setbacks cannot be solely addressed by governments but rather a consortium of actors such as the private sector, civil society, government, and development partners to thoroughly deal with various segments of the challenges at hand in the short, medium, and long term. These actors ought to foster a recovery that is hinged on futuristic planning that builds resilient competitive economies and inclusive societies, to reduce the severity of disruptions posed by future related disasters. Besides, replication of the scale of government coordination and public behavioral change demonstrated in the response to the pandemic to deal with other existential threats such as climate change and biodiversity loss is essential albeit its success will also be hinged on partnerships.

5. Leverage the rare window of gigantic government expenditures to combat climate change and environmental degradation. Albeit science has proven that climate change is an emergency, and a warmer planet will only imply increased frequency of disasters (IPCC, 2018), the response over the years has not matched with the magnitude of this existential threat, yet, the economic and social cost of climate change is evident. Achievement of the Paris Agreement goal of limiting temperature rise to 2°C by the end of this century, through racing towards carbon neutrality by mid-century will remain a mirage, if the recovery packages work against flattening the climate change and environmental degradation curve. The global economy is likely to rise with immense oomph to offset losses incurred during the COVID-19 lockdowns. The recovery process is therefore capable of sparking off an exponential rise in greenhouse gas emissions above normal circumstances thereby throwing the planet into a deeper dungeon of climate change and falling short of the required 7.6% annual reduction target in global missions to achieve zero net emissions by 2050 (UN environment 2019). There are granular interventions that can be captured in the recovery packages. These include; stimulation of uptake and deployment of affordable renewable energy technologies; de-risking of green investment opportunities to trigger private sector capital and ingenuity; leapfrogging to green technology to reshape unsustainable production patterns and foster green industrialization and circularity; and formulation of green fiscal instruments (subsidies on green technologies, carbon taxes and pricing) to nurture green capital markets expansion without imperiling financial stability. Equally important is resuscitating cities through retrofitting buildings to enhance energy efficiency, augmenting green public transport, and prioritizing affordable green housing since some catastrophes like COVID-19 call for self-isolation at home.

### 1NC

Foreign PIC

#### The United States federal government should increase its prohibitions on anticompetitive business practices by the People’s Republic of China’s private sector by expanding the scope of its core antitrust laws to restrict exemptions under international sovereign compulsion, international comity, and act of state where the private party and international sovereign did not affirmatively disclose their intent to act in an anti-competitive nature.

#### The plan’s use of the term ‘foreign’ communicates a notion of dangerous otherness that produces a culture of hostility in international relations and makes cooperation impossible---the CP’s discursive shift is necessary to prevent global violence

Cheryl Lynn Wofford Hill 2, J.D. from the Oklahoma City University School of Law, Master of Divinity degree from Perkins School of Theology, Southern Methodist University, “Restating International Jurisprudence in Inclusive Terms: Language as Method in Creating a Hospitable Worldview”, Oklahoma City University Law Review, 27 Okla. City U.L. Rev. 297, Spring 2002, Lexis

C. Awareness of "Foreign" as Misplaced, Hostile Other and Outsider

The terms "neighbor" and "foreigner" communicate different concepts. "Neighbor" communicates a dichotomy of other as opposed to self. In other words, this term creates the sense that a neighbor is one not in the same household or group as the speaker. The neighbor tends to be a welcomed insider in contrast to outsiders named with terms like "alien" or "foreigner." Although clearly a member of a different group, "neighbor" signals insider status because of linguistic connotations. On the other hand, the terms "foreign," "foreigner," or "alien" communicate otherness with stranger and outsider status. The phrase "neighboring nation" describes a less threatening concept than the phrase "foreign country."

People have been culturally conditioned to fear unknown people residing outside familiar territorial boundaries. William Polk explains why he believes that fear of strangers is innate:

Getting along with foreigners note , as the media constantly remind us [?], is the most dangerous problem of our [?] age. . . . [\*339] Fear of the foreigner note arises not just from a reading of his [?] pronouncements or an analysis of his [?] politics. It is not just conceptual or intellectual; it is visceral and inbred. 141

Polk explains that the term "foreigner" is a word that has been equated with the term "enemy" in ancient, medieval, and modern societies. 142 Polk suggests that fears of unknown neighbors "are a mixture of rational and irrational impulses so pervasive and deep-seated as to transcend individual experience or even historical memory." 143 This fear, Polk asserts, is "directed not just toward identified enemies but toward all aliens note." 144 Polk argues that since unknown neighbors cannot be eliminated, 145 relationships with strangers should be improved.

Many people use the term "foreign" without realizing its negative connotations. Developing an awareness of the negative impact of the term "foreign" to describe world neighbors will help to inspire more people to evaluate the effectiveness of language in international relationships.

D. The Advantage of Naming Others as Friends Rather Than as Foes

Christine Chinkin recognizes that the building of strategies for the development of greater world peace has not been given enough attention in international discourse. 146 One method of achieving greater peace among nations is through recognizing the advantage in naming others with words that communicate a sense of community rather than a sense of hostility. Words like "neighbors" and "friends" have more positive and peaceful connotations than words like "enemies, " "foreigners," "aliens," and "foes."

William Polk expresses a desire to help "broaden the concept of foreign note affairs." 147 Since the word "foreign" has a historical use with roots in the United States Constitution 148 and with its use pervasive in the language of law, even Polk, who recognizes the importance of getting along [\*340] with neighbors, 149 uses the historical and masculine phrase "foreign affairs." This phrase, however, is composed of two words that have negative connotations; "foreign" can carry a connotation of the dangerous other, and "affair" can carry a connotation of inappropriate sexual relationships with an identified or secret other.

The use of terms with positive connotations will foster greater respect and cooperation among nations. In a critique of United States relationships on the international level, Leon V. Sigal recognizes the importance of cooperation:

The trouble with American foreign note policy since the end of the Cold War is that the United States has been unwilling to use military force, or so the prevailing orthodoxy goes. American influence abroad is said to have waned because its threats are no longer credible. Yet that orthodoxy ignores another source of foreign note policy failure--American unwillingness to cooperate with strangers. . . .

. . . .

Cooperation works. 150

Sigal criticizes the United States' policies in dealing with neighboring nations, especially North Korea. Sigal recognizes that too often neighboring countries are treated as enemies rather than as friends, resulting in a reluctance of the United States to cooperate with other countries.

A foreign note policy establishment that emphasizes military might to the detriment of other ends and means of American engagement in the world may feed isolationism.

The establishment must be more willing to try cooperation. Cooperation means talking with strangers and listening to what they [?] have to say. It means making promises, not just threats.

Cooperation is often thought of as the norm with allies, not foes. 151

[\*341]

When language patterns create an assumption that neighbors are friends rather than enemies, relationships among nations may change. Rather than the term "neighbor" indicating a proximate entity, it refers to nations as members of a global neighborhood. When language is used as a method in constructing more hospitable relationships within international law, a more egalitarian global society will begin to emerge. This is a vision inspired by feminist method. Such a vision has been generally advanced by Margarita Chant Papandreou:

The feminist movement has a vision. We [?] understand, first of all, that we [?] have but one earth, shared by one humanity. This globe is home to all--all people, all life, all laughter, all love, all music, all art. We [?] will make it a woman's world, not in the sense of control, or power, or dominance, but in the sense of the revolutionary vision that we [?] have--a revolution of the human spirit. Those values that we [?] call women-centered values--caring and gentleness, equality, justice, dignity, compassion--will be diffused throughout society. . . . 152

### 1NC

T Subsets

#### ‘Prohibitions’ and ‘practices’ are plural, requiring more than one

Oxford 21 – Oxford Online Dictionaries, ‘plural’, https://www.lexico.com/en/definition/plural

1Grammar

(of a word or form) denoting more than one, or (in languages with dual number) more than two.

postpositive ‘the first person plural’

#### ‘The’ private sector refers to the group as a whole

Merriam-Webster’s 21 Online Dictionary, ‘the’, https://www.merriam-webster.com/dictionary/the

—used as a function word before a noun or a substantivized adjective to indicate reference to a group as a whole

*the* elite

#### It’s the entire segment

US Code 21 – “2 U.S. Code § 658 – Definitions”, https://www.law.cornell.edu/uscode/text/2/658#9

(9) Private sector

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

#### The plan only regulates a subset of industry

#### Vote neg---it’s key to limits and ground: forcing economy-wide change creates unique links and large-scale action AND avoids a proliferation of tiny industry cases with no good generics

### 1NC

Sohn DA

#### Sohn will be confirmed due to a Dem push---that’s key to net neutrality

John D. McKinnon 3-28, J.D. Degree from the University of North Carolina School of Law, Tax Policy and Fiscal Issues Reporter at the Wall Street Journal, Bachelor's Degree in History from the University of North Carolina at Chapel Hill, Attended Georgetown University’s School of Foreign Service, “Democrats Seek to Break Stalemate on Biden Nominees for FTC and FCC”, Wall Street Journal, 3/28/2022, https://www.wsj.com/articles/democrats-seek-to-break-stalemate-on-biden-nominees-for-ftc-and-fcc-11648459981?mod=hp\_lead\_pos4

Under pressure from progressive activists, Democrats are planning to employ a rarely used parliamentary maneuver to push through President Biden’s nominees for the Federal Trade Commission and Federal Communications Commission, according to people familiar with the matter.

Republicans on the Senate Commerce Committee have so far blocked the nominations of Georgetown University law professor Alvaro Bedoya to the FTC and consumer advocate Gigi Sohn to the FCC, largely on grounds that they are too partisan.

That left both commissions deadlocked with a 2-2 split between Democrats and Republicans, denying agency leaders the majorities they needed to advance the Biden administration’s priorities.

In response, Senate Democratic leaders are preparing to use a parliamentary maneuver known as a discharge petition to allow a floor vote on both nominees, the people familiar said.

The vote for Mr. Bedoya could happen as early as this week, the people familiar said. But the maneuver could be difficult to pull off and could take weeks to accomplish.

A majority vote of the Senate is required to advance the discharge petition and bypass a committee vote. Without Republican support—and so far at the committee level there has been none—that means all 50 Democratic-voting members along with Vice President Kamala Harris must be present to support the petition.

Covid-19 exposures and infections have complicated the Democrats’ effort. In the latest holdup, Sen. Bob Casey (D., Pa.), said March 22 that he had tested positive and would be isolated for five days.

But if Senate Democrats stay healthy this week, the discharge petition could be successfully deployed for Mr. Bedoya, the people familiar with the matter said.

The FTC is considered the higher-stakes vote by both parties. Under Biden-appointed chair Lina Khan, the FTC is expected to advance comprehensive consumer-privacy protections as well as detailed standards for judging whether industry competition is fair. FTC actions also could include new antitrust lawsuits challenging big companies’ dominance.

Many of the actions likely would target the tech industry, which Ms. Khan has criticized for years.

Mr. Bedoya’s work has focused on problems around facial recognition software and other technology that can disadvantage minorities. He declined to comment.

The U.S. Chamber of Commerce—which receives backing from major tech companies—has been so concerned that it publicly declared “war” on the FTC and Ms. Khan’s agenda late last year.

“It feels to the business community that the FTC has gone to war against us, and we have to go to war back,” Suzanne Clark, the chamber’s president and chief executive, said at the time.

Republicans also have chafed over the way Ms. Khan was appointed. Mr. Biden named her FTC chairwoman only after her Senate confirmation as a commissioner. Typically an agency chair is designated as such at the time of nomination, leading some conservatives to label the move a bait-and-switch.

Allies say opposition to Mr. Bedoya has little to do with his qualifications and instead is aimed at derailing the FTC’s regulatory agenda.

“The Republicans are simply trying to keep the FTC deadlocked, without a fifth commissioner, for as long as they can,” said David Vladeck, a former head of the FTC consumer protection bureau during the Obama administration, who is also a Georgetown law professor.

Ms. Khan has said in the past that big internet platforms have helped to create addiction, discrimination and predatory advertising, which she has compared to environmental pollution.

She recently said that the FTC’s regulatory agenda for 2022 would focus on those problems stemming from big tech platforms and the surveillance-based internet economy they have helped build up.

Gigi Sohn has drawn Republican criticism for tweets on political topics.

“Among the many pressing issues consumers confront in the modern economy, the abuses stemming from surveillance-based business models are particularly alarming,” the commission wrote.

The chamber, meanwhile, has followed through on its threats, employing its lobbying resources to focus on defeating the FTC initiatives.

Its lobbying disclosures for late 2021 show that it lobbied on the “overall direction of the Commission,” as well as “policies and practices related to the FTC expanding its authority” and the agency’s strategic plans for coming years.

As Mr. Bedoya’s selection for the FTC was being debated in the Senate, the chamber also lobbied in late 2021 on “nominations at Federal Trade Commission,” according to its disclosures, without providing details.

Several Republicans have argued that Mr. Bedoya’s past tweets on political topics such as immigration show him to be a Democratic partisan who would further polarize the FTC.

“I remain concerned by the frequency with which he has publicly expressed divisive views on policy matters rather than using a more measured and unifying tone,” Sen. Roger Wicker (R., Miss.), the Commerce Committee’s top Republican, argued before a vote on Mr. Bedoya’s nomination in early March.

“There has been a troubling trend of politicization at the FTC which we have not had in the past and I fear Mr. Bedoya would not bring the cooperative spirit that is so greatly needed.”

The vote was a tie, 14-14.

Democrats also hope to use the parliamentary maneuver to gain a floor vote on Mr. Biden’s nominee for the FCC, Ms. Sohn.

Ms. Sohn served as counselor to former FCC Chairman Tom Wheeler and led Public Knowledge, a public-interest group that advocates for stronger antitrust enforcement.

The outspoken progressive consumer advocate has drawn GOP fire for tweets on political topics that conservatives view as partisan—for example, tweeting that Fox News amounts to “state-sponsored propaganda” because of a lack of opposing viewpoints.

Fox News parent Fox Corp. and Wall Street Journal parent company News Corp share common ownership.

Ms. Sohn declined to comment. Progressives view her confirmation as important to a number of FCC priorities, including expanding access to broadband and re-establishing net-neutrality rules, which require internet service providers to treat all internet traffic equally. She also has drawn support from some conservative businesspeople and activists.

#### 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.

#### Net neutrality prevents global internet balkanization

Ido Kilovaty 17, Research Scholar in Law, Cyber Fellow at the Center for Global Legal Challenges, and Resident Fellow at the Information Society Project at Yale Law School, LL.B. from the Hebrew University of Jerusalem, LL.M. from the University of California, Berkeley, School of Law, and S.J.D. from the Georgetown University Law Center, “Repealing Net Neutrality, National Security, and the Road to a Dictatorial Internet”, Harvard Law Review Blog, 12/22/2017, https://blog.harvardlawreview.org/repealing-net-neutrality-national-security-and-the-road-to-a-dictatorial-internet/

On Thursday, December 15, 2017, the Federal Communications Commission (FCC) voted to repeal the Open Internet Order, often referred to as “net neutrality.” This should be no less than a bombshell, as the Internet was originally conceived as a free and open platform, not governed by economic interests, where service providers are neutral as to the data packets flowing through their infrastructure. To solidify that notion, Obama administration rules prohibited internet service providers from discriminating between different websites or services based on whom they wish to promote for financial, ideological, or other reasons. But this net neutrality concept is now being reversed, and we should be thinking about it as no less than a regime change, leading us towards a dictatorial, and potentially not so safe, Internet.

This is not a moment to herald the passing of the Internet entirely. The Internet is still going to be a significant part of our daily lives. However, we are about to witness a true regime change of the Internet. With the FCC’s repeal of net neutrality, the United States, being the leader and proponent of a free and global Internet for at least two decades, is about to create a dictatorial Internet.

This significant Internet regime change could have two important implications, both less intuitive than the commonly discussed consumer-focused concerns. First, internet giants will further consolidate their power, thus increasing our dependence on their services. Subsequently, it could increase their susceptibility to foreign information operations, and potentially pressure them to increase censorship and restrictions on speech, stemming from this national security concern. Second, this will result in an Internet that is less global, encouraging authoritarian regimes to further restrict their own internet, for ideological and political ends.

Consolidation of Power and National Security

Internet giants such as Facebook, Twitter, Amazon, YouTube, and Google, are already in control of a substantial portion of our content consumption, communication, and data hosting activities. It is already difficult for new players to successfully compete against these established Internet players. Without net neutrality, we are about to become even more dependent on these platforms, because they are the ones who will be able to afford more bandwidth and thus be able to block new players from competing under the same rules. This could lead to serious impediments to free speech, but more importantly – new speech and innovation.

But this particular problem goes even further. Consider the Russian meddling in the U.S. presidential election of 2016. The reason why the Russians have been so successful in achieving their goal is due to our already existing dependence on these platforms. Facebook, Google, and Twitter recently came under fire for not acting on the Russian disinformation campaigns on their respective platforms that directly flows from their influence on large groups of people.

Consider this – the Russian disinformation and meddling campaigns took place when net neutrality was still the rule. Whereas repealing net neutrality will result in these Internet giants potentially consolidating their power, which would mean that even more Internet users would be dependent on their almost exclusive services and content, given the convenience of ISP prioritization allowed by the repeal. A post-net neutrality reality will amplify the effects of foreign governments who would attempt to interfere with U.S. internal affairs. Such a scenario could pressure these leading tech giants into censoring and limiting speech allegedly to protect national security interests, to prevent additional foreign meddling.

Such restriction would be in addition to the more intuitive adverse impact on speech with the repealing of net neutrality. This intuitive impact is due to the anticipated prioritization of certain platforms of speech, following the repeal of net neutrality, meaning that no speech will be created equal online. Thinking about the non-intuitive national security implications of the net neutrality repeal described in this section should raise the concern and opposition of other agencies and departments responsible for cybersecurity and national security.

Finally, FCC Chairman, Ajit Pai, has previously claimed that net neutrality provides an excuse for authoritarian states to further isolate their Internet from the global grid. However, repealing net neutrality, and backing off from promoting the Internet as a global and free platform of ideas, will lead to the same. In fact, it will serve as a model for these regimes, whether for commercial or ideological reasons. The result is the same – certain portions of the Internet will be effectively censored.

“Balkanized” Internet

Balkanization of the Internet is a phenomenon that has been discussed over the years, particularly in the context of China, and its approach to Internet governance. The Chinese government has been consistently working on ensuring that the flow of information is heavily controlled, and that the Internet in China is regulated in line with ideological and economic interests. Other countries, like Brazil, have followed suit, particularly in the aftermath of the Snowden revelations. When certain governments are interventionist and paternalistic, the Internet varies from country to country, meaning that transnational communications and information exchanges could be significantly restricted.

With net neutrality about to become a thing of the past, the role of the U.S. as a champion of a free and global internet, where information is flowing across borders and free expression is a central aspect, is diminishing. This should alarm every single one of us, because there is potentially no equivalent leader to assume the role of the champion of a free and global Internet. In Canada, for example, recent Supreme Court decision could have far-reaching implications on the freedom of the Internet. The Court ruled that Google is under obligation to remove search results globally if they hold information pertaining to an ongoing patent infringement trial. Similarly, the European Court of Justice is considering whether EU’s right to be forgotten could apply to search results outside of EU borders. This shows that states are pushing for their conflicting Internet narratives, with potential global implications, while the U.S. is repealing its net neutrality principles, which would remove it from its role of leading the idea of a free and open internet across the globe. This gap in value-driven leadership could reshape the Internet for the decades to come, with voices to regulate and balkanize the Internet becoming louder throughout the world.

#### Extinction

Dr. Nick Merrill 20, Director of the Daylight Lab at the UC Berkeley Center for Long-Term Cybersecurity, PhD from UC Berkeley’s School of Information, and Dr. Konstantinos Komaitis, Senior Director for Policy Strategy and Development at the Internet Society, PhD in Information Technology and Telecommunications Law from the University of Strathclyde, “The Consequences of a Fragmenting, Less Global Internet”, Brookings Institution – Tech Stream, 12/17/2020, https://www.brookings.edu/techstream/the-consequences-of-a-fragmenting-less-global-internet/

But the global internet is now under existential threat from fragmentation. And the problem with fragmentation is that it puts global cooperation at risk, as differences in the internet across borders are predictive of international trade and military relations, according to research conducted as part of the University of California, Berkeley Daylight Security Research Lab.

Such findings should recast discussions about internet fragmentation. Internet fragmentation does not concern narrowly the “free” movement of information (an ideal that has never been fully accomplished), nor does it merely challenge the internet’s “distributed” design, another ideal whose implementation has only ever been partial. Rather, a fragmenting internet is representative of and has the possibility of contributing to a fragmenting world order.

Such analysis of a fragmented internet looks at different layers of the internet “stack”—the building blocks that cobbled together comprise the internet—to quantify, for example, how similar France’s internet is to that of Germany, Canada, or Thailand. Using these country-to-country comparisons, we produce a network graph, with each country related to every other in a web of national internets that are, more or less, interoperable with one another. The graph reveals clusters that correlate with everything from military alliances to trade agreements—even to political principles such as freedom of speech. For example, content blocking patterns in European Union countries are significantly more similar to one another than they are to non-EU countries. The same is true of NATO countries.

Notably, these findings do not indicate that blocking policies cause, for example, freedom of speech to decline. Nor that restrictions on free speech cause a country to block websites. Rather, they indicate that website blocking patterns—the types of websites a country blocks—reveal information about a country’s position on the global stage.

In one sense, the strength of that relationship is unsurprising. The internet is, and has always been, both a product and a driver of political realities on the ground. From the role it played during the Arab Spring in 2012 to the way it has been used as a tool to interfere with the U.S. elections in 2016, the internet is a powerful tool for driving political change.

Internet fragmentation has always existed, but the fact that the internet has evolved the way it has, becoming global, is evidence that interoperability is more than just aspirational. World-scale collaboration, while difficult, is possible. It is as possible now as it was in the late 20th century.

Interoperability opens doors to participation and invites collaboration. To this end, the internet, and the threats to its operation as a global system, are a continuous invitation to work together. Not to agree, per se, but to agree to continue talking. To continue speaking the same proverbial language. Interoperability is not an end in itself. It is a means toward achieving shared goals. As cross-border goals emerge, from containing COVID-19 to battling climate change, interoperable ways of observing and discussing the world become more crucial.

Moving forward, policymakers must safeguard the fundamental interoperability of the global internet. Rules and legislation should prevent fragmentation, enshrining the principles of a decentralized network made from open, interoperable components. As our research shows, the rewards for doing so come in trade, military alliance and social freedoms.

To get to these regulations, policymakers must understand the internet’s ecosystem. Climate change provides an illustrative example: Cooperation is necessary, but action is impossible without understanding.

## China ADV

### China ADV---1NC

#### Enforcement abroad fails—host countries block investigation.

Shen 20—(L.L.M, J.S.D., Washington University School of Law). Weimin Shen. 2020. "The Role of Transnational Legal Process in Enforcing WTO Law and Competition Policy." Journal of Transnational Law & Policy 30 (2020-2021): 59-118.

Concerns, however, may arise in the case of export cartels with similar effects. For example, suppose authorities in these importing jurisdictions are unable to cooperate effectively in investigating cartels. In that case, their investigative efforts may not easily yield necessary evidence on the producers' conduct in exporting jurisdictions. 60 Multiple jurisdictions may repeat the same investigative steps, resulting in extra costs for business subject to investigations. 61 Meanwhile, cooperation with the authorities of those jurisdictions may be hampered by the fact that they may not perceive an immediate interest in tackling the cartel if it does not create harmful effects for the national economy. 62 Some countries specifically exempt "export cartels" from competition law, while many others will only investigate cartels if there are adverse effects within their jurisdictions. 63 Some international cartels may be beyond the effective reach of the laws in the countries where they have their most pernicious effects.64 According to the Organization for Economic Co-operation and Development ("OECD") report, most countries in which violations occur may not have access to the evidence necessary to determine the guilt or innocence of the parties involved. 65 Therefore, cartels may at times remain undiscovered due to lack of cooperation. Harmful cartel activity could go unpunished in these importing jurisdictions when enforcing national competition law against such cartels.

Also, the extraterritorial reach of competition law, the "effect doctrine," is a sensitive issue and jurisdictional conflicts may occur. For example, two different countries may assert their own jurisdiction in the same case, leading to potential divergent assessments. 66 In such circumstances, "positive comity" provisions are now included in many bilateral cooperation agreements between countries, whereby competition authorities can request another jurisdiction to address anti-competitive conduct that might best be fixed with an enforcement action in the country that is the recipient of the request.67 However, as I will illustrated in the following Chapter, international cartels could in theory be carried out either by the State or by State controlled firms. In examining their legitimacy both under WTO treaty obligations and under antitrust laws, there could be opportunities for nations to play one system against the other.

In sum, numerous changes in enforcement activity against international cartels have occurred over the past two decades: the adoption of antitrust policies prohibiting hardcore cartels by countries around the globe, vastly increased enforcement against international cartels by antitrust authorities, increased use of leniency policies, application of extraterritoriality, and a slow but growing trend toward criminalization of price-fixing. The net effect of these changes is that numerous competition policy agencies now vigorously pursue and successfully prosecute international cartels, levying increasingly large fines. However, even where international cartel activity can be tackled effectively by national competition laws, inefficiencies may occur during the investigation of international cartels and lead to underenforcement of competition policy and laws. In the absence of well-functioning and institutionalized cooperation mechanisms, multiple jurisdictions may repeat the same investigative steps, resulting in extra costs related to the investigations for business and costs to competition authorities from unnecessary duplication. As a result, harmful cartel activity could go unpunished, consumers would be harmed, and future harmful behavior will not be deterred.

#### Chinese ‘gaming’ compels the US to reinvest in the LIO---turns all their impacts.

Dominic Tierney 21, Professor, Political Science, Swarthmore College. Senior Fellow, Foreign Policy Research Institute, "Why Global Order Needs Disorder," Survival, Vol. 63, Issue 2, pg. 115-116, 2021, T&F.

The answer is something of a paradox: the global liberal order requires disorder. A grave menace like the Soviet Union is a clear and present danger to the liberal system, but it also prompts the United States to buttress the order by strengthening alliances and constructing institutions. By contrast, when there is no major peril, as there was not after the Cold War ended, the system may seem to be in optimal health and yet decay from within as Americans lose interest in global order and turn their attention to domestic issues. Therefore, the liberal order rests on an uneasy balance. Too much disorder and the system will weaken. Too much order and the system may also start to weaken. As a result, the liberal order is never as weak or as strong as it looks. At the time of greatest peril, the order may be primed for renewal. At the apex of its triumph, the order can become a victim of its own success.

Understanding these vexing dynamics is vital because the liberal order is an engine of peace and prosperity. After the Second World War, there were no big global financial crises until the 1970s; major wars between countries largely disappeared (although civil wars remained prevalent); and the United States and its allies ultimately won the Cold War. By contrast, eras of US retreat from liberal order, such as the 1920s, encouraged beggar-thy-neighbour economics and the rise of hyper-nationalist states like Germany, Italy and Japan.

Today, Chinese economic growth is often viewed as a significant – and perhaps existential – challenge to the liberal model of global governance.2 But the rise of Beijing may spur revitalisation. Order requires disorder, and the Chinese threat could inspire Americans to re-engage with alliances and global institutions.

#### Containing transnational threats are inevitable---if they cross borders, states have to cooperate

#### Ilaw violations are inevitable in the U.S. and globally, but there’s no impact because i-law’s toothless

Luke Hiken 12, JD, Attorney Who Has Engaged in the Practice of Criminal, Military, Immigration, and Appellate Law, and Marti Hiken, Former Associate Director of the Institute for Public Accuracy and Former Chair of the National Lawyers Guild Military Law Task Force, “The Impotence of International Law”, Foreign Policy in Focus, 7/17/2012, https://fpif.org/the\_impotence\_of\_international\_law/

Whenever a lawyer or historian describes how a particular action “violates international law” many people stop listening or reading further. It is a bit alienating to hear the words “this action constitutes a violation of international law” time and time again – and especially at the end of a debate when a speaker has no other arguments available. The statement is inevitably followed by: “…and it is a war crime and it denies people their human rights.” A plethora of international law violations are perpetrated by every major power in the world each day, and thus, the empty invocation of international law does nothing but reinforce our own sense of impotence and helplessness in the face of international lawlessness.

The United States, alone, and on a daily basis violates every principle of international law ever envisioned: unprovoked wars of aggression; unmanned drone attacks; tortures and renditions; assassinations of our alleged “enemies”; sales of nuclear weapons; destabilization of unfriendly governments; creating the largest prison population in the world – the list is virtually endless.

Obviously one would wish that there existed a body of international law that could put an end to these abuses, but such laws exist in theory, not in practice. Each time a legal scholar points out the particular treaties being ignored by the superpowers (and everyone else) the only appropriate response is “so what!” or “they always say that.” If there is no enforcement mechanism to prevent the violations, and no military force with the power to intervene on behalf of those victimized by the violations, what possible good does it do to invoke principles of “truth and justice” that border on fantasy?

The assumption is that by invoking human rights principles, legal scholars hope to reinforce the importance of and need for such a body of law. Yet, in reality, the invocation means nothing at the present time, and goes nowhere. In the real world, it would be nice to focus on suggestions that are enforceable, and have some potential to prevent the atrocities taking place around the globe. Scholars who invoke international law principles would do well to add to their analysis, some form of action or conduct at the present time that might prevent such violations from happening. Alternatively, praying for rain sounds as effective and rational as citing international legal principles to a lawless president, and his ruthless military.

#### Alt causes thump trade

Terrence Mullan 22, Assistant Director, International Institutions and Global Governance at Council on Foreign Relations, and Ania Zolyniak, Intern for International Institutions and Global Governance at the Council on Foreign Relations, “Diplomacy Reset: Ten Global Summits to Watch in 2022”, 1/12/2022, https://www.cfr.org/councilofcouncils/global-memos/diplomacy-reset-ten-global-summits-watch-2022

World Trade Organization Ministerial Conference, Geneva (tentatively scheduled for March)

The repeated rescheduling of the twelfth World Trade Organization (WTO) Ministerial Conference (MC12)—it was postponed twice last year because of COVID-19—reflects the current dysfunction of the WTO. Ministerials generally occur every two years, but by March it will have been five years since the last conference, leaving Director General Ngozi Okonjo-Iweala’s first ministerial with a long list of agenda items. Okonjo-Iweala has called on members to conclude agreements on the WTO’s response to the pandemic—including a proposal to waive intellectual property rights for COVID-19 vaccines and treatments—and on fisheries subsidies by the end of February 2022. The outcome of these negotiations remains uncertain due to disagreements mostly between developed and developing countries. Discord between the developed and developing world on trade rules and a trend toward more discriminatory and protectionist measures will most likely hamper major progress at MC12. However, gains could come in the form of plurilateral agreements in areas such as e-commerce, investment facilitation, and services regulation.

#### Trade’s resilient AND regional agreements fill-in

Dr. Alexis Crow 22, Senior Fellow at ORF, Global Head of the Geopolitical Investing Practice at PricewaterhouseCoopers, Senior Fellow at Columbia Business School, and Young Global Leader in the World Economic Forum, “Annual Outlook 2022: Decoding the Macroeconomic, Geopolitical, and Long-Term Investing Landscape”, Observer Research Foundation, 2/3/2022, https://www.orfonline.org/research/annual-outlook-2022-decoding-the-macroeconomic/

II. Geopolitical Landscape – The Future of Trade: Bottlenecks in the West, Dynamism in Asia, and the Great Dispersal

A dominant theme in the geopolitical landscape for strategic planning in 2022 and beyond concerns the future of trade. As this author has written previously,[36] despite the pre-pandemic trade tensions, and the exceptional dislocations to the movements of goods around the world throughout successive waves of the COVID-19 virus and its variants, the global trade map remains resilient, if partially rewritten. Notably, even after several years of declaration of a trade ‘war’ and subsequent protectionist measures – in the form of the imposition of tariffs, rewriting or withdrawing from trade agreements, or commitments to onshore elements of production – the US trade in goods deficit stands at an all-time high.[37] As nearly 70% of GDP is driven by household consumption, it is little wonder that the IMF downgraded its forecast for US GDP given continuing supply chain bottlenecks and port congestion.[38] In Europe, supply chain bottlenecks continue to weigh on activity within key manufacturing countries such as Germany, also prompting downgrades to the outlook for the exporter and for the euro area as a whole.[39] (There are, however, early indications that some of these price pressures are easing, in both the US and Europe.)[40]

In regional terms, such supply chain bottlenecks and corollary pressures appear to be largely a transatlantic phenomenon. Looking across to Asia, some estimates calculate that while the cost of shipping a container within Asia has only doubled during the pandemic, in contrast with an increase of fivefold in shipping from Asia to Europe.[41] Within ‘Factory Asia’, multiple nodes of production meant that companies could access inputs from various jurisdictions, in the event of a COVID-related shutdown in a key supplier country (such as Vietnam or Malaysia).

Such resilience has been further formalised on the 1st January 2022, as the Regional Comprehensive Economic Partnership (RCEP) trade agreement takes effect among 10 key members (with a further four remaining signatory countries to be incorporated). Encompassing one-third of global GDP and of the world’s population, RCEP marks the first time that Japan and South Korea have been joined together in a free trade agreement. Effectively, the agreement weaves together rich income Asia with other developing Asian countries: in theory, it will eliminate tariffs on more than 90% of goods traded within the bloc.[42] In a recent report, UNCTAD highlights that the ‘trade dynamism’ within RCEP has the potential to ‘make it a centre of gravity for global trade.’[43]

As RCEP has been enacted in light of supply chain difficulties persisting in other parts of the world, policymakers note that joining such agreements has the potential to further ‘stabilize’ supply chains, thus creating stronger opportunities for exporting companies and hence for domestic economic growth.[44] Such beneficial trade ties might also exist in the realm of ‘minilateralism’: that is, countries convening around a specific issue area, which can be at a bilateral level (such as between Japan and Vietnam);[45] a trilateral level (such as Australia, India, and Japan); or indeed at a cross-regional level (such as the Digital Economy Partnership agreement launched by Singapore, New Zealand, and Chile).[46] Crucially, such clustering does not detract from the overarching multilateral efforts: on the contrary, ‘creative minilateralism’ has the potential to deepen ties of trade in goods, services, and human capital via both formal as well as informal linkages.

Cross-border supply chain activity: the great dispersal

In scoping the geopolitical landscape for 2022 and beyond, the lessons for business executives and investors is that our ties of interdependence for resources, raw materials, inputs, finished goods, digital services, and indeed human capital remain robust. Thus, while some politicians speak to the need to reduce supply chain vulnerabilities, and to bolster ‘economic security’, the reality on the ground is that of a ‘great dispersal’ rather than a wholesale localisation or onshoring. Even the rise of ‘semiconductor nationalism’ implies cross-border links between countries, R&D, and the prowess of production of specific companies: be it between the US and Malaysia, or between Taiwan and Germany or Japan.[47] The same can certainly be said for the potential emergence of electric vehicle (EV) nationalism:[48] as countries move to secure critical inputs to meet their own expanding mandates for the energy transition, it is evident that such activity inherently involves trade in materials, R&D, and human capital.

Thus, rather than sparking an end to globalisation, several years of trade tensions – as well as the COVID-19 induced supreme disruptions to supply, production, and to logistics – have actually ushered in an era of greater ‘geographical diversification in sourcing’ as well as sales.[49] Original equipment manufacturers (OEMs) have tacitly shifted from a ‘just in time’ mentality to a ‘just in case’ operational strategy in supply chain management.[50] Accordingly, in terms of strategy, some companies are opting for ‘local for local’; others are investing in smart logistics by using digital trackers to receive real-time alerts about parts and deliveries.[51] Three MaaS (mobility as a service) companies have also jointly invested in a data-sharing alliance in order to better support their businesses in times of disruption.[52] Logically, this transition to smart logistics also has the potential to generate opportunities for deep-pocketed real estate and institutional investors in the logistics space, particularly for those with a prowess in PropTech.

#### No trade impact.

Victoria Pistikou et al. 21, Assistant Professor, International Political Economy, Democritus University of Thrace; Eftychia Tsanana, Lecturer, Economics, University of Macedonia; Thomas Poufinas, Faculty Member, Economics, Democritus University of Thrace, "A Financial Analysis Approach on The Impact of Economic Interdependence on Interstate Conflicts," Theoretical Economics Letters, Vol. 11, No. 5, 09/03/2021, Sci-Hub.

This indicates that the increase of economic interdependence does not lead to a decrease of the interstate conflict as captured by defense expenses. On the contrary the increase of exports of country 1 to country 2 leads to an increase of the expenses of both countries. Hence, both countries seem to consider the conflict as vivid even though some trade activity is built. This may be attributed to the fact that the defense expenses of these countries are not necessarily related to the particular interstate conflict with the investigated pair in the dyad. It could also be due to the fact that the economic crisis has potentially led to a decrease of both the economic activity and the defense expenses in some cases. This explains partially the results. Furthermore, country 1 is not always the stronger economy. In addition, it is not necessarily the country that has initiated the conflict. These findings indicate that the topic needs to be further investigated so as to incorporate more dyads and potentially additional proxies of interstate conflict and economic interdependence in order to realize whether the latter impacts the former.

[Table omitted]

The impact of the independent variables and their explanation is summarized in Table 4.

In political terms, policymakers may find these empirical results interesting as they show that they cannot rely solely on the strengthening of bilateral trade in order to end or reduce the conflict. In addition, according to other studies, establishing a free trade area may be the way for fostering economic ties and interdependence with potential rivals, however, it will be difficult to have a critical impact on conflict if this cannot happen in bilateral level without any degree of economic integration. Therefore, we cannot expect, at least for the mentioned cases, de-escalation or elimination of the conflict caused by increased economic activity between the rivals. Therefore, other routes need to be explored so that an interstate conflict can be reduced or eliminated through trade.

6. Conclusions and Further Research

In the present analysis, a study of the impact of economic interdependence on interstate conflict was attempted with the use of a sample that consisted of three dyads of countries facing a similar context of interstate conflict: India-Pakistan, Russia-Ukraine and Yemen-Saudi Arabia. The results show that only exports from country 1 to country 2 have an impact on the level of defense expenses either for country 1 or for country 2. This indicates that economic interdependence does not necessarily reduce interstate conflicts, since both countries 1 and 2 increase the defense expenses even though exports from country 1 to country 2 increase. Our contribution in the current literature relies upon the correlation between defense expenses and bilateral trade and is in the direction of the research of Seitz et al. (2015). There has been a big diversity of dependent variables employed in the relevant studies, such as trade expectations (Copeland, 1996), common interests (Li and Sacko, 2002), interaction between domestic politics and the international system (Kapstein, 2003), income ratio (Martin et al., 2008), Preferential Trade Agreements (Herge et al., 2010; Long, 2008), trade (Barbieri and Levy, 1999; Long and Leeds, 2006), Militarized Interstate Disputes (MIDs) (Copeland, 1996; Oneal and Russett, 1999; Gartzke et al., 2001; Powers, 2004; Martin et al., 2008; Li and Reuveny, 2011). As all studies, it has certain limitations that primarily stem from data availability; three dyads where analyzed and certain proxies were used. Consequently the results depend purely on the span of the dataset. Our future research venues include the extension to additional dyads to more variables that are relevant to the interstate conflict as well as the economic interdependence, provided data become available. Furthermore, as indicated by the anonymous reviewers, it is worth investigating whether the strength of defense can affect the mutual trade of two countries. In addition, as recommended by the anonymous reviewers it would be interesting to apply game theoretical approaches in order to establish the hypotheses around economic interdependencies prior to the investigation of the correlation of the latter to the interstate conflict.

#### Antitrust protectionism now AND inevitable

Anu Bradford 12, Henry L. Moses Distinguished Professor of Law and International Organization at the Columbia Law School, 2012, “Antitrust Law in Global Markets,” Research Handbook on the Economics of Antitrust Law, Ed. By Einer Elhauge, Edward Elgar Publishing, https://scholarship.law.columbia.edu/faculty\_scholarship/1976

B Emergence of Antitrust Protectionism

Some commentators believe that states employ antitrust laws to further protectionist goals.122 As traditional trade barriers have fallen following multiple rounds of trade negotiations, states are expected to look for alternative ways to protect their domestic markets.123 Domestic firms seeking protection may increasingly turn to antitrust authorities, urging them to block the entry of foreign rivals on antitrust grounds, or to tolerate domestic firms’ monopolistic practices in an effort to bolster their international competitiveness.124 If successful, these protectionist pressures can convert antitrust laws into instruments of industrial policy, severely undermining the gains of trade liberalization.

Antitrust protectionism can take several forms: states may engage in systematic under- or overenforcement of antitrust laws depending on their terms of trade (‘tradefl ow bias’). States may also exempt domestic firms from antitrust scrutiny altogether (‘statutory bias’). Similarly, antitrust agencies may engage in selective enforcement practices, disproportionately targeting foreign fi rms at the expense of domestic fi rms in their investigations (‘enforcement bias’). Yet the key assumption behind all forms of alleged antitrust protectionism is the same: each antitrust jurisdiction internalizes the costs and the benefits incurred by its domestic producers and consumers, while externalizing the costs and the benefits sustained by producers and consumers in another jurisdiction.

#### No weaponized interdependence.

Daniel W. Drezner 22, Professor of International Politics in The Fletcher School at Tufts University, Ph.D. in Political Science from Stanford University, “Where's My Stuff?”, Reason, January 2022, <https://reason.com/2021/12/05/wheres-my-stuff>

Americans can be forgiven for thinking that every critical system we rely on is breaking down. The country—nay, the globe—has endured years of social, political, environmental, and epidemiological upheaval. Pick your shock: COVID-19, wildfires, George Floyd protests, climate change, January 6. They all seem like harbingers of a chaotic future.

But backlogs in Pottery Barn orders are when shit gets real.

From Bosch dishwashers to bucatini to chicken wings to pipette tips, the past year has seen a raft of press coverage about delays, price spikes, and other disruptions to the production and shipment of goods to the United States. Strains in the global supply chain caused semiconductor shortages and big price increases for used cars. Toyota, Ford, and General Motors have all scaled back production in recent months because of the dearth of computer chips. When the container ship Ever Given temporarily ran aground in the Suez Canal, the Financial Times asserted that the accident showed "the inherent fragility of tightly stretched global supply chains at the very moment when they are already being buffeted by a pandemic and in an era when the philosophical underpinnings of global trade are being challenged."

Journalists aren't the only folks freaking out. Less than six weeks into his term, President Joe Biden issued an executive order mandating that eight cabinet departments examine the resilience of U.S. supply chains, warning that "pandemics and other biological threats, cyber-attacks, climate shocks and extreme weather events, terrorist attacks, geopolitical and economic competition, and other conditions can reduce critical manufacturing capacity and the availability and integrity of critical goods, products, and services." More recently, Biden has floated multiple policy responses, including using the National Guard to untangle snarled supply chains.

The administration's concern about global supply chains fits in with the political elite's larger ideological pivot away from trade liberalization and toward a more mercantilist posture. Indeed, this is the area where the Biden and Trump administrations sound the most similar. Biden's U.S. trade representative, Katherine Tai, stated in a congressional hearing that trade liberalization and tariff reductions were no longer her office's principal goals. In June, Biden's National Economic Council director, Brian Deese, declared that "resilient supply chains must be at the center of a 21st century industrial strategy." One of Biden's senior directors at the National Security Council has told me that "the U.S. is not a trade-dependent nation." Another administration official questioned to me whether the notion of comparative advantage in trade still exists. Never one to be outdone in policy freakouts, Sen. Josh Hawley (R–Mo.) has introduced a bill requiring more than half the value-added of any critical good to be domestically sourced.

The recent convulsions in global supply chains do highlight ways the globalization of the past decade differs from the idealized models taught in introductory economics courses. Globalization has produced far more market concentration than would have been expected a generation ago. The tripling of the Baltic Dry Index (which measures the cost of shipping dry goods such as coal or steel between ports) and the quintupling of U.S.-China container shipping rates over the past year demonstrate that frictionless markets do not exist. Rising geopolitical tensions between the United States and China reveal the ways that great power competition will complicate cross-border exchange. And the pandemic showed how the global economy can be buffeted by shocks that textbooks typically do not discuss.

A closer look at global value chains reveals ways that both public-sector and private-sector actors have prioritized short-term efficiency at the expense of long-term resilience. But it also reveals a mismatch between a lot of overheated political rhetoric and an actual understanding of how the global economy works. Many of the past year's issues are temporary—and when it comes to strained global supply chains, globalization is more often the solution than the problem.

When Ford completed its massive River Rouge plant in 1928, it created a factory that controlled every facet of car production, including its own steel mill. Trade volume was high during this era, but very few intermediate goods crossed borders. In the time since then, the industrial organization of production has changed a wee bit.

Whereas trade a century ago was primarily in finished goods, manufacturing now has disaggregated itself into myriad chains of subcontractors. As one MIT Sloan Management Review article summarized the phenomenon, we have a "deeper tiering of supply chains whereby suppliers draw upon their suppliers who in turn draw on their own networks of suppliers in multistage production networks."

Why did this happen? The end of the Cold War eliminated most geopolitical concerns about where to locate production facilities. Basic trade theory meant an awful lot of facilities expanded in China, the low-cost manufacturing locale. The reduction of transportation and communication costs made it easier for production to be disaggregated and managed at a distance. "Just-in-time" manufacturing encouraged companies to hold minimal inventories and count on suppliers to respond quickly to fluctuations in consumer demand. Management consultants stressed the efficiency of offshore outsourcing.

The most widely cited example of the globalized supply chain is Apple's iPhone. Most people know that the iPhone is manufactured in China and exported to the United States. What is less well known is that China plays only a minor role in the creation of its added value. The iPhone's flash drive comes from the Japanese firm Toshiba. Samsung, a South Korean firm, provides the application processor. A German company provides the camera module, and a U.S. subcontractor provides the Bluetooth application. All of these parts are then assembled by a Taiwanese firm, Foxconn, with operations in Shenzhen, China.

The management consultants were right about the efficiency. While productivity in the service sector stagnated after the turn of the century, manufacturing productivity continued to soar.

The political economy advantages were also apparent after the collapse of Lehman Brothers. The last time a financial shock of that magnitude hit, the trade wars of the Great Depression began. 2008 was different. A World Bank study examined trade restrictions immediately after 2008 and found that "vertical specialization" was the most powerful economic factor that limited tariff increases. The more a country's economy was enmeshed in global supply chains, the less likely it was to raise barriers to trade. Global supply chains help explain why the Great Recession did not lead to trade wars like those of the Great Depression.

So these global value chains seemed like an unalloyed good. And then the 2010s happened.

As global supply chains grew more and more complex, there were signs of trouble on the horizon. In 2011, the Chao Phraya River floods in Thailand severely but temporarily constricted production of hard disk drives, because close to half of global output was sourced from Thailand. In 2017, U.S. hospitals faced an acute shortage of IV bags after Hurricane Maria knocked out a key production facility in Puerto Rico.

The 2011 earthquake and tsunami that hit Fukushima in Japan affected key nodes in global manufacturing. Some firms suspended sales of cars in certain colors because key ingredients were stored near Fukushima and inaccessible. An iPhone designer warned The New York Times that "there are all kinds of little specialized parts without second sources, like connectors, speakers, microphones, batteries and sensors that don't get the love they deserve. Many are from Japan."

These supply chain hiccups highlighted one underanticipated phenomenon of globalization: Rather than strengthen market competition, it strengthened market concentration. Consumer-facing firms from Walmart to Ford to Apple to Home Depot stressed cost minimization ubër alles. Firms that excelled at efficiently producing one part became near-monopolists for that component. This is how Taiwan Semiconductor Manufacturing Company (TSMC) became the dominant global supplier of customized semiconductor chips. Other chipmakers focused on design, subcontracting to the Taiwanese firm for the physical production. As TSMC accrued comparative advantages in chip production, even established competitors such as Intel struggled.

The return of geopolitical competition has also flummoxed producers. China is a critical node in almost every global value chain. Over the last decade, as Xi Jinping has consolidated his power, the Chinese state has taken a number of steps that have raised hackles in Western capitals. Some of these, such as the Belt and Road Initiative, have been overhyped. Others, such as the subjugation of the Uyghurs, repression in Hong Kong, increasing control over United Nations agencies, and the expansion of China's nuclear arsenal, have not. Xi's "wolf warrior diplomacy" has triggered evaluations in the United States, Europe, and Pacific Rim about just how vulnerable their economies are to disruptions from Chinese suppliers. The 2010 rare earth embargo on Japan in response to a territorial dispute in the East China Sea offered a warning about how China could weaponize the interdependence of global value chains; Huawei's dominance in 5G offered another. Erratic U.S. policies during the Trump administration served in turn as a warning about how Western governments could disrupt global value chains.

Finally, the COVID-19 pandemic exacerbated the problems of both market concentration and political whimsy. As China reeled from the pandemic's first wave, there were disruptions across the global economy. China exercised state power to seize domestically produced personal protective equipment and other medical supplies; the United States soon reciprocated. According to Global Trade Alert, 157 export controls on medical supplies and medicines were put in place across 86 jurisdictions in the first six months of the pandemic. U.S. leaders expressed concerns about vulnerability to China weaponizing its role in medical supply chains. So did journalists: In May 2021, 60 Minutes warned that "COVID showed that the global supply chain of chips is fragile." The Washington Post concurred: "The pandemic has exposed fragile global supply chains across multiple continents."

Countries exercised vaccine nationalism, stunting global immunization against COVID-19, which in turn facilitated the development of more dangerous variants of the novel coronavirus. The delta variant has penetrated Chinese port facilities, Malaysian chip factories, and Bangladeshi textile plants, leading to periodic shutdowns that have spiked container shipping prices and lengthened order backlogs.

Throughout all this, producers seemed to be stuck in quicksand. The past decade has not been shy in signaling to firms that there might be risks to increasingly disaggregated global supply chains. If natural disasters, pandemics, and geopolitical tensions were not enough, now management consultants are piling on. The same consultants who urged offshoring a generation ago are now telling firms to retrench from globalized supply chains. But most firms do not seem terrifically interested in changing their practices. Multinational corporations like Apple have not altered their supply chains in response to political pressure. Whether one looks at business surveys or journalistic accounts, the results are the same: Most U.S. firms do not plan on moving their supply chains away from China.

A world in which the distribution of goods is held up due to constant supply chain disruptions seems less than ideal. What can be done about it?

One thing that would be great is if everyone would acknowledge that a lot of the issues with global value chains right now have to do with demand more than supply.

When the pandemic began, there was an immediate and acute contraction of demand. Producers assumed that this would be the new normal and reduced their output. They were mistaken. The combination of emergency COVID-19 relief and the work-from-home phenomenon led to a resurgence of demand. The affluent class had considerable sums of disposable income. The pandemic made spending on services a less viable option, so instead they spent it on stuff: cars, furniture, home office equipment, gaming systems, house renovations, and so forth. The shortage of semiconductor chips was caused by the unexpected twin rebounds in demand for cars and consumer electronics. As one Federal Reserve analysis explained, "the pause in demand was much shorter and the rebound in demand was much stronger than anticipated." These demand surges surprised suppliers and led to the production bottlenecks that are currently seizing up Pottery Barn orders.

While demand has been stronger than expected, supply in critical sectors coped better than expected. The predicted pandemic breakdowns in supply chains for food and medical supplies proved to be overstated. Surveys of logistical firms last year revealed that the pandemic had minimal effects on their operational capabilities. Even when it came to medicines and personal protective equipment, there were only minor disruptions after the initial shock in March 2020. Claims that the global supply chain in medical products rendered states vulnerable to weaponized interdependence proved to be wildly exaggerated. The pandemic affected service sectors such as tourism far more severely than any manufacturing sector. Indeed, Slate's Jordan Weissmann pointed out recently that "imports were up 5 percent year-over-year in September, and up 17 percent compared with the same time in 2019." This happened despite the decline in air passenger traffic, which restricted yet another means of shipping goods by air. Supply has increased—it's just that demand has surged even more.

The private sector is responding to market signals by ramping up production and ensuring multiple supply lines. Intel, Samsung, and TSMC are all spending tens of billions of dollars to build new chip foundries in the United States. Skyrocketing shipping prices are incentivizing additional construction of new container ships. The Wall Street Journal reports that in the first five months of 2021, there were nearly twice as many orders for new container ships as there were in all of 2019 and 2020 combined. To ensure holiday inventory, large retailers like Walmart and Home Depot have chartered their own container ships. Container shipping rates have already started to decline from September peaks.

But these capital investments designed to boost resilience will take years to kick in. This time lag is one reason private-sector actors have been so slow to invest in resilient supply chains in the past. If disruptions are expected to be temporary, such investments might seem like overreactions. Given the billions of dollars at stake, this sort of risk aversion is unfortunate but understandable.

Long-term investments in resilience make some sense, but short-term investments in robustness make even more sense. Resilience is the ability to adapt in response to permanent shocks to the system. Robustness is the ability to maintain output levels in response to a short-term hit. The most obvious way that firms can enhance their robustness is to warehouse supplies of key components. Car manufacturers, for example, are pledging to ramp up their inventories of critical components to ensure a more reliable production stream.

Yet the auto sector appears to be the exception and not the rule in bolstering inventories. For most firms, increasing reserves of component parts is an expensive proposition. To a corporation, holding inventory is like holding cash: Why sit on an asset that yields no rate of return? Lean manufacturing was popular in the first place because it boosted profits.

Even as semiconductors have grown scarce, chipmakers and chip customers have battled over which firms will shoulder the costs of carrying greater inventory. Under the just-in-time system, the chipmakers had held the inventory. As one semiconductor CEO said earlier this year, the shortage has shifted the balance of power: "If they expect the semiconductor [suppliers] to be the bank, to keep having a big working capital to support them, they can forget it."

Bottlenecks in the global supply chain threaten the macroeconomic and microeconomic health of the United States. On the macro side, supply chain issues are driving fears of inflation; if not brought under control, this could cause the Fed to prematurely raise interest rates. A related problem is consumer panic over rumored shortages. See, for example, the effect of the ransomware attack on Colonial Pipeline—drivers panicked and went to gas stations to top off their tanks, temporarily worsening the problem.

On the micro side, the high price of inventories and shipping imperils market competition. Supply risks privilege larger firms over small and medium enterprises. Multinational corporations have the capacity to make large-scale investments in resilience and robustness. They are also able to use their market power to ensure continued access to scarce container billets in ships; your local bodega, by contrast, is unable to charter an entire container ship. The more stretched the global supply chain, the more sectors that look like monopolies rather than a competitive marketplace.

When it comes to fixes, there has been a surplus of really dumb ideas about what the government could do. Hawley's idea of essentially nationalizing supply chains stands out as the dumbest. Such a move would take well more than the three-year window he proposes to execute. Prices would permanently rise due to new inefficiencies. The opportunities for rent-seeking are legion; every sector would be lobbying Washington that what they produce is "critical." It is also worth remembering that Hawley's go-to policies of protectionism and immigration restriction shoulder much of the blame for the lack of truck drivers that have contributed to delivery delays.

The Biden administration's responses have run the gamut. White House Press Secretary Jen Psaki tried to laugh it all away by reducing the issue to "the tragedy of the treadmill that's delayed." That will not play well with a country used to just-in-time delivery and trying to move past the pandemic. Nor will Biden's proposal to open the port of Los Angeles 24/7 have much of an effect. While ports are currently jammed, there are also bottlenecks in railroad cars and truck drivers—both of which are issues that predated the pandemic. Even if the port gets unstuck, the traffic jam will just migrate to America's railroads and highways.

Looking at manufacturing more generally, some firms have acknowledged that they were unaware of the geographic distribution of their suppliers prior to the pandemic. This is one area where the Biden administration's efforts to collect data on supply chains could be useful.

If the federal government can identify (or even stock) priority components that would affect multiple sectors, those strategic reserves could theoretically bolster the robustness of the U.S. economy. But not if such investments become a stalking horse for protectionism.

All of the evidence of the past year suggests that globalization helps economies recover more quickly from supply chain difficulties than aggressive efforts at homeshoring. This is because most shocks are localized, and access to global value chains facilitates recovery more quickly. Indeed, protectionism is partly to blame for the current mess. As the Cato Institute's Scott Lincicome recently noted, the Jones Act, which mandates use of U.S.-built, crewed, and flagged ships to move cargo from one U.S. port to another, has raised the costs of coastwise shipping, putting even more pressure on truck and train transport.

Unsurprisingly, U.S. producers seeking relief from skyrocketing shipping rates have asked the Biden administration to reduce tariffs. Protectionism isn't the solution to these breakdowns in our supply chains; it's part of the problem.

#### The US isn’t key to their impacts, AND challengers don’t want wholesale revision.

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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.

#### Cooperation fails AND is unsustainable.

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The Doha round of trade negotiations is deadlocked, despite eight successful multilateral trade rounds before it. Climate negotiators have met for two decades without finding a way to stem global emissions. The UN is paralyzed in the face of growing insecurities across the world, the latest dramatic example being Syria. Each of these phenomena could be treated as if it was independent, and an explanation sought for the peculiarities of its causes. Yet, such a perspective would fail to show what they, along with numerous other instances of breakdown in international negotiations, have in common. Global cooperation is gridlocked across a range of issue areas. The reasons for this are not the result of any single underlying causal structure, but rather of several underlying dynamics that work together. Global cooperation today is failing not simply because it is very difficult to solve many global problems – indeed it is – but because previous phases of global cooperation have been incredibly successful, producing unintended consequences that have overwhelmed the problem-solving capacities of the very institutions that created them. It is hard to see how this situation can be unravelled, given failures of contemporary global leadership, the weaknesses of NGOs in converting popular campaigns into institutional change and reform, and the domestic political landscapes of the most powerful countries. A golden era of governed globalization In order to understand why gridlock has come about it is important to understand how it was that the post-Second World War era facilitated, in many respects, a successful form of ‘governed globalization’ that contributed to relative peace and prosperity across the world over several decades. This period was marked by peace between the great powers, although there were many proxy wars fought out in the global South. This relative stability created the conditions for what now can be regarded as an unprecedented period of prosperity that characterized the 1950s onward. Although it is by no means the sole cause, the UN is central to this story, helping to create conditions under which decolonization and successive waves of democratization could take root, profoundly altering world politics. While the economic record of the postwar years varies by country, many experienced significant economic growth and living standards rose rapidly across significant parts of the world. By the late 1980s a variety of East Asian countries were beginning to grow at an unprecedented speed, and by the late 1990s countries such as China, India and Brazil had gained significant economic momentum, a process that continues to this day. Meanwhile, the institutionalization of international cooperation proceeded at an equally impressive pace. In 1909, 37 intergovernmental organizations existed; in 2011, the number of institutions and their various off-shoots had grown to 7608 (Union of International Associations 2011). There was substantial growth in the number of international treaties in force, as well as the number of international regimes, formal and informal. At the same time, new kinds of institutional arrangements have emerged alongside formal intergovernmental bodies, including a variety of types of transnational governance arrangements such as networks of government officials, public-private partnerships, as well as exclusively private/corporate bodies. Postwar institutions created the conditions under which a multitude of actors could benefit from forming multinational companies, investing abroad, developing global production chains, and engaging with a plethora of other social and economic processes associated with globalization. These conditions, combined with the expansionary logic of capitalism and basic technological innovation, changed the nature of the world economy, radically increasing dependence on people and countries from every corner of the world. This interdependence, in turn, created demand for further institutionalization, which states seeking the benefits of cooperation provided, beginning the cycle anew. This is not to say that international institutions were the only cause of the dynamic form of globalization experienced over the last few decades. Changes in the nature of global capitalism, including breakthroughs in transportation and information technology, are obviously critical drivers of interdependence. However, all of these changes were allowed to thrive and develop because they took place in a relatively open, peaceful, liberal, institutionalized world order. By preventing World War Three and another Great Depression, the multilateral order arguably did just as much for interdependence as microprocessors or email (see Mueller 1990; O’Neal and Russett 1997). Beyond the special privileges of the great powers Self-reinforcing interdependence has now progressed to the point where it has altered our ability to engage in further global cooperation. That is, economic and political shifts in large part attributable to the successes of the post-war multilateral order are now amongst the factors grinding that system into gridlock. Because of the remarkable success of global cooperation in the postwar order, human interconnectedness weighs much more heavily on politics than it did in 1945. The need for international cooperation has never been higher. Yet the “supply” side of the equation, institutionalized multilateral cooperation, has stalled. In areas such as nuclear proliferation, the explosion of small arms sales, terrorism, failed states, global economic imbalances, financial market instability, global poverty and inequality, biodiversity losses, water deficits and climate change, multilateral and transnational cooperation is now increasingly ineffective or threadbare. Gridlock is not unique to one issue domain, but appears to be becoming a general feature of global governance: cooperation seems to be increasingly difficult and deficient at precisely the time when it is needed most. It is possible to identify four reasons for this blockage, four pathways to gridlock: rising multipolarity, institutional inertia, harder problems, and institutional fragmentation. Each pathway can be thought of as a growing trend that embodies a specific mix of causal mechanisms. Each of these are explained briefly below. Growing multipolarity. The absolute number of states has increased by 300 percent in the last 70 years, meaning that the most basic transaction costs of global governance have grown. More importantly, the number of states that “matter” on a given issue—that is, the states without whose cooperation a global problem cannot be adequately addressed—has expanded by similar proportions. At Bretton Woods in 1945, the rules of the world economy could essentially be written by the United States with some consultation with the UK and other European allies. In the aftermath of the 2008-2009 crisis, the G-20 has become the principal forum for global economic management, not because the established powers desired to be more inclusive, but because they could not solve the problem on their own. However, a consequence of this progress is now that many more countries, representing a diverse range of interests, must agree in order for global cooperation to occur. Institutional inertia. The postwar order succeeded, in part, because it incentivized great power involvement in key institutions. From the UN Security Council, to the Bretton Woods institutions, to the Non-Proliferation Treaty, key pillars of the global order explicitly grant special privileges to the countries that were wealthy and powerful at the time of their creation. This hierarchy was necessary to secure the participation of the most important countries in global governance. Today, the gain from this trade-off has shrunk while the costs have grown. As power shifts from West to East, North to South, a broader range of participation is needed on nearly all global issues if they are to be dealt with effectively. At the same time, following decolonization, the end of the Cold War and economic development, the idea that some countries should hold more rights and privileges than others is increasingly (and rightly) regarded as morally bankrupt. And yet, the architects of the postwar order did not, in most cases, design institutions that would organically adjust to fluctuations in national power. Harder problems. As independence has deepened, the types and scope of problems around which countries must cooperate has evolved. Problems are both now more extensive, implicating a broader range of countries and individuals within countries, and intensive, penetrating deep into the domestic policy space and daily life. Consider the example of trade. For much of the postwar era, trade negotiations focused on reducing tariff levels on manufactured products traded between industrialized countries. Now, however, negotiating a trade agreement requires also discussing a host of social, environmental, and cultural subjects - GMOs, intellectual property, health and environmental standards, biodiversity, labour standards—about which countries often disagree sharply. In the area of environmental change a similar set of considerations applies. To clean up industrial smog or address ozone depletion required fairly discrete actions from a small number of top polluters. By contrast, the threat of climate change and the efforts to mitigate it involve nearly all countries of the globe. Yet, the divergence of voice and interest within both the developed and developing worlds, along with the sheer complexity of the incentives needed to achieve a low carbon economy, have made a global deal, thus far, impossible (Falkner et al. 2011; Victor 2011). Fragmentation. The institution-builders of the 1940s began with, essentially, a blank slate. But efforts to cooperate internationally today occur in a dense institutional ecosystem shaped by path dependency. The exponential rise in both multilateral and transnational organizations has created a more complex multilevel and multi-actor system of global governance. Within this dense web of institutions mandates can conflict, interventions are frequently uncoordinated, and all too typically scarce resources are subject to intense competition. In this context, the proliferation of institutions tends to lead to dysfunctional fragmentation, reducing the ability of multilateral institutions to provide public goods. When funding and political will are scarce, countries need focal points to guide policy (Keohane and Martin 1995), which can help define the nature and form of cooperation. Yet, when international regimes overlap, these positive effects are weakened. Fragmented institutions, in turn, disaggregate resources and political will, while increasing transaction costs. In stressing four pathways to gridlock we emphasize the manner in which contemporary global governance problems build up on each other, although different pathways can carry more significance in some domains than in others. The challenges now faced by the multilateral order are substantially different from those faced by the 1945 victors in the postwar settlement. They are second-order cooperation problems arising from previous phases of success in global coordination. Together, they now block and inhibit problem solving and reform at the global level.

# 2NC

## Remand CP

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

#### 2. It rules immediately, without telegraphing change AND de novo, without a specific case. That shuts down case development.

Joseph W. Mead 12, Senior Counsel at the Institute for Constitutional Advocacy and Protection at the Georgetown University Law Center, Assistant Professor of Urban Studies at Cleveland State University, JD from the University of Michigan School of Law, “Stare Decisis in the Inferior Courts of the United States”, Nevada Law Journal, Volume 12, Summer 2012, Lexis

Though it included needlessly broad language, the opinion did not deal with horizontal stare decisis, but with the distinct issue of whether the district court erred by giving binding weight to an opinion from a different district court in a different circuit. 143 (As dicta, the observations on district court stare decisis enjoy no stare decisis weight themselves.) Notwithstanding, the opinion suggests that district courts may not give any deference to their own precedent because doing so would interfere with the district court's duty to declare the law 144 and give each individual litigant a day in court. 145 If true, this would be fatal to any district court stare decisis, but this reasoning does not withstand scrutiny. 146 Litigants come to court encumbered by many legal rules, including Supreme Court precedent and circuit court precedent, yet applying these rules to a litigant's case represents not the abandonment, but the fulfillment, of a judge's duty. 147 Moreover, this objection would be equally fatal to horizontal stare decisis practices at the circuit court level, but circuit court stare decisis practices are universally unchallenged.

Yet it must be conceded that the district court's authority to develop precedent succumbs to the supervisory power of appellate courts, which presumably could insist upon or prohibit a particular horizontal stare decisis practice. 148 Several circuits have indicated that there is no law of the district, but these statements are not to the contrary as they are descriptive rather than proscriptive. 149 In other words, the circuit court opinions note that there is no rule of binding precedent at the district court level, but at the same time, they do not forbid its creation. 150

Indeed, because circuit courts employ de novo review of district court judgments on questions of law, regardless of the reason for the error, they would rarely have an opportunity to hold that a law-of-the-district rule is invalid. 151 In any event, to the extent that these cases do actually forbid law of the district - only one aspect of horizontal stare decisis - they do not interfere with the general power to adopt other, even strong, stare decisis practices. When circuit courts have been squarely confronted with district court stare decisis - for example when assessing whether a litigant has the authority to intervene as of right because he or she "is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest" 152 - the courts of appeals have recognized that stare decisis can exist among district courts. 153

There are reasons to expect circuit courts to leave it up to districts to determine their own stare decisis practices. Notably, circuit courts adopted their own policies without Supreme Court intervention 154 and strongly resisted attempts by others to interfere with the weight given to precedent. 155 This reflects a general principle that stare decisis is a decision that is best left to the court at issue, within broad bounds of reasonableness. 156 Each court is uniquely qualified to decide what level of deference to give its own opinions. Each court understands the practicalities and politics present in the district and can weigh the policy considerations accordingly. Thus, unless and until this power is removed from them, district courts have the authority to adopt a wide range of horizontal stare decisis practices.

But should they exercise this power?

IV. The Case for Law of the District

There has been virtually no attention by courts, and still less by the scholarship, as to what type of stare decisis a district court should follow. 157 Moving down the federal judicial hierarchy, different institutional characteristics lead to a different balance of goals. 158 Like the Supreme Court, circuit courts believe the benefits of following their own precedents outweigh the costs of allowing a "wrong" decision to remain law. In addition, collegiality, which is not a basis for stare decisis at the Supreme Court, becomes an important rationale for stare decisis at the lower courts where decisions are not made by all judges of the court. 159 Despite differences between the circuit and district courts, these policies also support district court stare decisis practices.

This Part proposes that district courts adopt a particularly strong horizontal stare decisis practice. Predictability, fairness, appearance of justice, judicial economy, and collegiality weigh strongly in favor of stare decisis, while the costs of having an "incorrect" district court decision bind the district court are minimal. The district courts' position within the federal judicial hierarchy - trial courts most days but appellate courts on others - leaves district courts fully able to exercise the responsibility of creating precedent commensurate with their location.

A. The Proposal

For purposes of argument, consider a law-of-the-district rule that mirrors the law of the circuit. 160 Each individual district judge can decide whether to mark that judge's written opinion for publication, subject to certain criteria. Some courts may allow litigants to have a say in the publication decision, and some courts may ask that opinions be circulated around the bench in advance when feasible, but these features are wholly up to the individual court. Once an opinion is designated as published, every other judge in that district follows its holdings until and unless an intervening circuit or Supreme Court decision upsets it.

A natural complement to a strong stare decisis policy is an en banc procedure that would allow all judges of the court to announce the entire court's position on an issue. 161 Currently, district court en banc proceedings are extremely rare, which could be a reflection of the minimal weight placed on the district's precedent. 162 En banc proceedings vest final control over stare decisis precedent with the court as a whole, and not one particular judge or panel. It provides an opportunity for the court to keep its law in conformity with the views of a majority of its judges and eliminates the inevitable inconsistent opinions. 163 It also provides a "credible threat" to reverse a decision that strays from the law of the district. 164

There is no doubt that district courts can proceed en banc. 165 While there is no explicit statutory authorizations for district court en banc proceedings like those that exist for circuit courts, 166 courts have the power to proceed en banc unless Congress forbids the practice. 167 There is ample authority that Congress meant to leave this power undisturbed. 168 However, while en banc district courts do occur, the infrequency of en banc district courts has led to an undeveloped procedural terrain, where litigants and judges alike are unaware of "how they are initiated, the reasons why they are convened, [and] the number of judges on them and their effect." 169 With the rise of the law of the district, en banc district court proceedings become more important, and district courts could take the opportunity to detail the circumstances and procedures governing their use. Some districts may want to allow en banc proceedings at any stage of a case to correct serious problems that might otherwise follow if the case is set on the wrong path. 170 Other districts may share the circuit courts' view of en banc proceedings as a disfavored chore 171 and only provide for en banc in limited circumstances. Whatever the particular en banc procedure that a district adopts, this possibility ensures that the entire court has the final say over its precedent.

B. The Policies

1. Predictability

The law of the circuit provides considerable predictability for all cases where vertical precedent does not bind the circuit court. Once a published decision is issued, all concerned parties within the circuit's scope can safely expect the decision will be applied to their case. Thus, for individuals and courts within the jurisdiction of the circuit, being able to rely on circuit law bolsters informed decision making. 172

However, circuit law is subject to being overturned by the circuit en banc or by the Supreme Court. As a result, circuit court decisions deserve less reliance than decisions issued by the Supreme Court. 173 Yet, the infrequency of further review insulates much circuit law for long periods of time. 174

The law of the district would also further predictability. 175 The general practice among district courts of extending little or no deference makes it impossible to predict which legal rule will be applied to one's case when the circuit court is silent on an issue. 176 For a number of relatively minor cases, where the economic incentives to appeal an adverse ruling are not present, the district court may be the only decision maker. 177 Without the law of the district, a litigant will learn which judge is assigned to the case (and, consequently, which law applies) during litigation, far too late to conform behavior to that judge's view of the law.

Moreover, current district court stare decisis practices are unclear to the point of being unpredictable. When stare decisis is applied inconsistently, it provides no assurance to the wary litigant. A clear, public stare decisis rule would benefit both judges and litigants.

2. Fairness

Stare decisis by circuit courts is strongly compelled by the desire to treat similarly-situated litigants in the same way, more so than stare decisis by the Supreme Court. Because of the justices' long tenure, the Supreme Court changes its mind slowly and somewhat rarely (even in the absence of stare decisis). 178 Oftentimes, a court composed of the same members will decide the same legal issue in the same way, even when presented with it repeatedly. 179 In contrast, without stare decisis among circuit courts, two identical litigants could have their cases decided in the same week by the same court with different results, solely because of the differing views of the judges.

Both circuit courts and district courts rely on random assignment to match cases with judges. 180 When there is serious disagreement between district judges on a legal issue and there is no horizontal stare decisis, the applicable law depends solely on the judge assigned. This in turn relies on a process functionally the same as a lottery or a flip of a coin. 181 "There is something particularly unfair about the outcome of a case turning upon a computer's random selection of judges within [the] same building." 182 Stare decisis constrains this arbitrariness by minimizing luck through maximizing precedent. Of course, some differences between judges will remain despite stare decisis, but at least the rule of law would be uniform. 183

It must be conceded that even under a law of the district, randomness will persist on legal questions. First, unpublished opinions allow similarly-situated litigants to be treated differently, as is the case at the courts of appeals. This is the consequence of a tradeoff of fairness concerns: between equal treatment on one hand and the imposition of ill-considered law on the other. Second, random assignments determine which judge presides over the earliest case presenting a legal issue. However, barring a judge who simply cannot be trusted to fashion fair or reasonable (even if "incorrect") rules of law, this form of randomness is arguably less invidious because all litigants are at least treated equally, even if the ruling is not ultimately upheld.

3. Appearance of Justice

Appearance of justice requires that it appear that a court is expounding law separate and distinct from its judges. At the level of the Supreme Court, justices serve on the Court for long periods of time and all justices vote in almost every case. In contrast, generally only a subset of the judges of a lower court decide each case that comes before that court. 184 This makes it more difficult to preserve the idea of a court larger than the individual judge or judges who decide a particular case. 185 The litigant and the public might well question the legitimacy of a legal system whose rules appear to depend on chance and on personality.

The appearance of justice rationale acquires a new force at the district court level. For most cases, a district judge will be the primary - and indeed, may be the only - human face of the judicial system. Through status conferences, settlement negotiations, multiple motions, and oral arguments, district judges are far more engaged with cases and litigants than circuit judges. 186 These numerous interactions provide greater opportunity for the judge's personality to come through, which may make it difficult for the public and litigants to maintain the belief that the judge is deciding the case based on law and not personal preference.

Too often at the district court level, the attention is unduly focused on the judicial officer and not the law. Litigants have been known to manipulate case assignment practices at the district court level through refilling cases, 187 marking them as companion or related cases, 188 or seeking a recusal, 189 when confronted with a "bad draw." 190 These practices - which are severely criticized by courts - reflect a view among litigants that their case depends on the judge assigned. 191 When one judge refuses to follow the decision of another judge on the court, this view is confirmed.

The focus on judge-shopping is well illustrated by a case from the Southern District of Florida. 192 Several, but not all, judges of the district court had concluded that an organization (a frequent litigant) lacked standing to bring lawsuits to enforce the Americans with Disabilities Act. 193 When the organization lost, it would refile a virtually identical case in the hopes of obtaining a judge who felt differently. 194 Although the district had a rule requiring counsel to inform the court if a case was related to an earlier one, the organization did not do so. 195 The district court's failure to articulate a legal rule for the district on the contested issue led the litigant to focus on getting a favorable judge assigned, rather than to focus on the law. The law of the district redirects attention back to the law and away from attempts to manipulate judicial assignment. 196

4. Judicial Economy

The concerns of judicial economy identified by the Supreme Court are amplified considerably for lower courts. The Supreme Court - which considers fewer than 100 cases a year - finds it difficult to revisit precedent. This difficulty is multiplied several times over in the circuit court where there are considerably more cases.

It is also costly even to consider overruling precedent. 197 The Supreme Court, which does overrule its precedent from time to time, need not delve into a lengthy analysis of each precedent's viability in every case. 198 Rather, through its certiorari jurisdiction, it selects cases and issues that allow it to reconsider precedent on its own time. 199 When the Court decides that a previous decision may be in jeopardy, it often asks the parties to brief whether precedent should be overruled. 200 The Court must still confront petitions questioning precedent, but it can dispose of these quickly and without explanation if it so chooses through a simple denial of certiorari. 201

The circuit court accomplishes the same goal through the use of the law of the circuit and discretionary en banc panels. It would be unduly time-consuming for each individual three-judge panel to analyze whether precedent should be overruled or not. By forbidding panels from overturning circuit law, the law of the circuit saves the panels from this expense. 202 Those arguments instead must be made to the circuit on rehearing en banc. 203 The en banc court can leave precedent in place without providing an explanation by declining to rehear a case - much as the Supreme Court does with its denials of certiorari. 204

Stare decisis by district courts would also further judicial economy. District judges have more cases than circuit court judges, 205 and have the added burden of dealing with many litigants' kitchen-sink approach to pleading, where only a few of the many legal theories advanced are promoted with a straight face, and even fewer will be appealed. 206 Moreover, district courts must handle the day-to-day burdens of managing a case: scheduling, monitoring discovery, dealing with evidentiary issues, and, if necessary, overseeing trial. As a result of these numerous demands, conservation of judicial resources is particularly important at the district court level. Often, the case will be controlled by vertical precedent; when it is not, requiring each district judge to individually wrestle with questions of law already tackled by a colleague wastes valuable judging time. 207

#### 3. The perm short-circuits the sequence of prior trial court review that’s essential to perceptions of impartiality

Jonathan Remy Nash 19, Robert Howell Hall Professor of Law at the Emory University School of Law, Director of the Emory University Center for Law and Social Science, Co-Director of the Emory Center on Federalism and Intersystemic Governance, “Federal Courts, Practice & Procedure: State Spending: State Standing for Nationwide Injunctions Against the Federal Government”, Notre Dame Law Review, Volume 94, May 2019, Lexis

Fourth, the availability of nationwide injunctions might short-circuit the ordinary "percolation" of issues up to the United States Supreme Court. 37 Percolation tees up issues for the Court, and is seen to improve the Court's resolution of cases. 38 Percolation allows the Court to consider an issue once numerous lower courts have had a chance to weigh in. Whether they agree or not, the Court benefits from the input of the lower courts: if the lower courts largely agree, then the Court has a strong suggestion that the shared resolution enjoys considerable support. 39 On the other hand, to the extent that the lower courts disagree, the Court receives the benefit of the lower courts having engaged the issue and debated one another over the proper outcome. 40

The issuance of a nationwide injunction may tend to reduce the opportunity for percolation, perhaps especially cases brought by states against the federal government. On the one hand, if an initial decision by one court to issue a nationwide injunction binds other courts, then the decision by the lower courts is set inexorably in stone with no opportunity for percolation. Indeed, the Court relied on precisely this consideration to conclude that another procedural device - offensive nonmutual collateral estoppel - should not apply in suits against the federal government. 41 [FOOTNOTE] 41 In United States v. Mendoza, 464 U.S. 154, 160 (1984), the Court explained: A rule allowing nonmutual collateral estoppel against the Government … would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari. For discussion, see Morley, supra note 28, at 627-30. Some commentators argue that Mendoza should be read narrowly, see Alan M. Trammell, Demystifying Nationwide Injunctions, 98 Tex. L. Rev. (forthcoming 2019) (manuscript at 32), https://papers.ssrn.com/sol3/papers.cfm?abstract id=3290838 ("The better reading of Mendoza … is that it did not categorically prohibit using nonmutual preclusion against the government."), or overruled altogether, see Zachary D. Clopton, National Injunctions and Preclusion, 118 Mich. L. Rev. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract id=3290345##. [END FOOTNOTE] On the other hand, even if other lower courts remain free to disagree with the first lower court's ruling, still in the context in which we are interested - states suing the federal government - it may likely be that the issuance of a nationwide injunction raises such important stakes that percolation is not a practical option. (One should note, however, that that well may be the case even if the injunction the court issues is not nationwide.)

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

#### ‘Prohibition’ is binding

Francis Jacobs 90, Member of the European Court of Justice, DPhil from the University of Oxford, Former Professor of European Law at the University of London and Director of the Centre of European Law for King's College London School of Law, “Commission of the European Communities v French Republic – Opinion of Mr Advocate General Roberts,” European Court Reports 1990 I-00925, Case C-62/89, 2/2/0/1990, p. 942

20. In my view, those arguments cannot be accepted. It is plain from the wording of Article 10(2) of Regulation No 2057/82 and from the scheme and objectives of the Community legislation that Member States are required to anticipate the exhaustion of the quota and to act to prohibit fishing provisionally before the quota is exhausted . That the exhaustion of the quota must be anticipated is indicated by the requirement in Article 10(2) that each Member State shall determine the date from which its vessels "shall be *deemed to have exhausted* the quota ..." ( emphasis added ). The use of the word "prohibit" in Article 10(2) and the mandatory wording of the second subparagraph of Article 10(3) (" Fishing vessels ... shall cease fishing ...") indicate that the measures taken to halt fishing provisionally must be of a binding nature. It is moreover apparent from the scheme of the legislation that the obligation imposed on Member States by Article 10(2) is of crucial importance for ensuring respect for quotas: the obligation must therefore be construed strictly. An interpretation of Article 10(2) which would permit Member States to wait until after the quota was exhausted before taking action, or to adopt measures of a non-binding nature, would be inconsistent with the binding character of the quotas. It would also undermine the underlying objective of quotas, i.e. the conservation of scarce fishing resources.

#### So is ‘law’

David G. Campbell 20, Senior United States District Judge; United States District Court for the District of Arizona, “United States v. Mitchell,” 2020 U.S. Dist. LEXIS 145849, \*18-19, 2020 WL 4698056, 8/13/2020, Lexis

In concluding that state "law" does not include informal execution protocols, Judge Rao relies on Chrysler Corp. v. Brown, 441 U.S. 281, 99 S. Ct. 1705, 60 L. Ed. 2d 208 (1979). In that case the Supreme Court considered a provision of the Trade Secrets Act that protected confidential information by prohibiting its disclosure unless "'authorized by law.'" Id. at 294 (quoting 18 U.S.C. § 1905). The Supreme Court held that a regulation issued pursuant to an agency's "housekeeping" statute and without notice-and-comment procedures did not qualify as "law" under the Act. Id. at 309-16. From this, Judge Rao concludes that the word "law" in § 3596(a) does not include informal state protocols, but is limited to "binding law prescribed through formal lawmaking procedures." 955 F.3d at 132 (Rao, J., concurring).

#### ‘Support’ for modification is dicta that nudges the lower courts BUT is unquestionably not binding

Adam N. Steinman 13, Professor of Law and Michael J. Zimmer Fellow at the Seton Hall University School of Law, LLM from the Georgetown University Law Center, JD from Yale Law School, BA in Economics and International Studies from Yale University, “To Say What The Law Is: Rules, Results, and The Dangers of Inferential Stare Decisis”, Virginia Law Review, Volume 98, December 2013, Lexis

2. Non-Binding Law's Influence

In examining what it means to declare that some piece of law is binding, it is also worth keeping in mind that legal materials can be quite influential even if they are unquestionably not binding. 211 [FOOTNOTE] 211 See, e.g., Charles A. Sullivan, On Vacation, 43 Hous. L. Rev. 1143, 1196-1206 (2006) (examining how non-binding authorities can be persuasive). [END FOOTNOTE] Dictum in a judicial opinion - even a Supreme Court opinion - is not formally binding on future courts. Yet such dictum is cited quite frequently. 212 One could make similar points about the tendency of judges to value support from outside the relevant jurisdiction: different circuits or districts, different state courts, even different countries. Even in civil law countries, where there is no formal doctrine of stare decisis, judges often rely on prior judicial decisions 213 - so much so that practitioners have characterized it as a "nearly mandatory rule." 214

There may be any number of reasons why non-binding aspects of judicial opinions can prove to be influential. Judges may find it inherently desirable to find support in aspects of prior decisions even if they are not bound to do so, and judges may believe their opinions will be better received (by whatever audience) if they can invoke and claim consistency with non-binding aspects of prior decisions. With respect to non-binding aspects of superior court decisions (for example, Supreme Court dicta), judges may view them as good predictors of how those courts will resolve issues in the future, such that following them will increase the likelihood of affirmance. 215 All this said, the use of such content by judges does not make that content binding. 216 [FOOTNOTE] 216 After all, judges might also cite a law review article, speech, novel, op-ed, or poem - no one would contend that such sources are formally binding as a matter of stare decisis. See, e.g., Sullivan, supra note 211, at 1198 (describing judicial citations to the New York Review of Books and the National Review). [END FOOTNOTE] The crucial difference is that judges may always - at the end of the day - choose to disregard non-binding content.

### Net-Benefit---Reliance---2NC

#### 4. STARTING POINT---trial courts with unique fact-finding expertise must be the point of origination. The plan’s abstract ruling looks unhinged and abrupt.

Joan Steinman 12, Distinguished Professor of Law at the Chicago-Kent College of Law, Illinois Institute of Technology. A.B. from the University of Rochester, J.D. from Harvard University Law School, “Federal Courts, Practice & Procedure: Article: Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts' Resolving Issues in the First Instance”, Notre Dame Law Review, Volume 87, Lexis

Professor Frost's analysis makes a good case for the legitimacy of judicial "issue creation" in narrow circumstances, but she considers in only a very limited way how the role of an appellate court, as such, should constrain appellate courts in taking the first stab at resolving issues that the appellate court introduces into a case. Thus, Professor Frost notes:

There are good reasons for appellate judges to be cautious about raising new legal questions at this late stage of the litigation. An issue that turns on facts that are not in the record or not fully developed would be better left unmentioned for fear of prejudice to the parties. Moreover, any question of law that requires development of new facts would likely be tangential to the questions the court is asked to resolve, and thus would not qualify as a case in which issue creation was essential to avoid erroneous statements of law. 36

I would note, moreover, that even if an appellate court has power to raise new issues and would not abuse its discretion in doing so in a particular case, 37 the appeals court that raises a new issue could remand the case to the district court to address the newly identified issue in the first instance, rather than taking the first stab at it. Such a remand would result in some disappointment to litigants who hoped for a quicker end to the litigation, and it would entail some delay and disruption, but these might be prices worth paying in order for the trial court to play its customary role of decider in the first instance and for the appellate court to adhere to its customary role of reviewing court. After all, some disappointment and delay would ensue even if it were the appellate court that required the parties (or intervenors or amici) to address the newly identified issue. As the discussion below will demonstrate, federal intermediate appellate courts do not limit themselves to deciding new issues in the circumstances in which Professor Frost finds that it would be appropriate for them to raise new issues. But, as noted earlier, the two are not the same; an appellate court can raise a new issue but not decide it in the first instance, and an appellate court can decide a new issue that it did not raise, but a party did, for the first time, in the court of appeals.

I. The Importance of the Issues Raised Here

The subject of this Article is important. It affects who decides issues; what issues are decided; at what point in the course of a case (when) they are decided, where (by what courts) they are decided; and potentially how those issues are decided. Issues may be decided differently when they are decided in the first instance by appellate courts, rather than by trial courts, in part because such appellate resolution of issues affects the standards of decision that an appellate court uses. Whenever a court of appeals decides an issue that was not decided by an inferior court, it is acting de novo, not correcting only clear error in fact-findings or abuses of discretion, and not deciding issues of law with the benefit of the thinking of the lower court. This activity goes to the heart of the role and function of appellate courts, and of how our judicial system is designed. Constitutional, statutory, prudential, and functional considerations all are involved.

Sequencing Theory

Sequencing theory reinforces the importance of the subject explored in this Article by shedding light on additional consequences of the order in which courts resolve issues in litigation. Professor Peter Rutledge opines that "the order in which courts decide issues has a significant and underappreciated impact on the law;" 38 this order influences the parties' behavior in litigation, the incentives they have to settle, and the development of the law - that is, which areas of law get more attention and which get less - and in turn influences the investment of judicial resources. 39 Horizontal sequencing rules, which "determine the sequence in which a single decision-maker … determines issues," apply to an appellate court, as they apply to trial courts, and they thus influence how (i.e., on what grounds) a case will be resolved. 40 As a result, horizontal sequencing rules also affect the outcomes of future cases. In addition, vertical sequencing rules, which determine when reviewing courts can review particular decisions of inferior tribunals, obviously influence the relationship between trial courts and appeals courts, and also can influence the parties' behavior in litigation and the incentives they have to settle, the development of the law, and the amount and allocation of investment of judicial resources. 41 Thus, for example, the immediate appealability of denials of motions to dismiss based upon qualified immunity allows defendants to require an investment of resources by the appellate courts, evokes precedential decisions from the appellate courts, and enhances the settlement position of defendants. 42 Moreover, both horizontal and vertical sequencing rules can be rigid or flexible and thus affect the degree of discretion that a court has in sequencing the decisions of the issues it faces. 43

What relevance does Rutledge's decisional sequencing theory have to the issues raised in this Article? When an appellate court takes the first stab at an issue it is not reversing the normal and expected vertical sequence of decision, because the district court is not going to follow the appellate court, in time, and review the appellate court's work. However, for the appellate court to take the first stab typically changes the sequence in which decisions are made at the same time that such "first stabs" constitute a re-allocation of authority from the district court to the appellate court, which in turn changes the question that the court of appeals will address. No longer will the question be whether the district court erred in deciding the issue through its misunderstanding of the law or its clear error in determining the relevant facts or its abuse of discretion. The questions will be de novo: What is the law on this issue? What do the facts in the record establish as to this issue? How will the appellate court exercise discretion as to a particular matter? This Article will consider the circumstances under which such a reallocation of decision-making authority may be acceptable and when it would not be, 44 but Rutledge helps us to appreciate several additional consequences of this reallocation of authority. For instance,

(a) The reallocation might be regarded as problematic in that the usual consequences of a district court decision, had it been made in a timely manner, will be changed by the alteration of the time frame in which the decision is made, as well as by the status of the decision maker. For example, if no party raises forum non conveniens ("fnc") in the district court, with the result that that court does not address the issue but proceeds to decide the case on the merits, the investment that the district court makes in the case increases, and a defendant that loses on the merits in the district court has less settlement leverage than it would have had if the court had dismissed on fnc grounds. If the fnc issue is raised for the first time on appeal and the appeals court decides the issue and orders the case dismissed without prejudice, the judicial investments, the settlement dynamics, and the law that has been announced all differ from what they would have been had the district court dismissed on fnc grounds.

The extent of delay before resolution of an issue that is first presented to a court of appeals and the change in the sequence of the rulings made by the trial and appellate courts may be influenced by whether the appellate court takes on an issue raised for the first time on appeal or sends the new issue back to the trial court. If proceedings in the trial court have not been stayed pending appeal, the trial court may continue to issue rulings while the appellate court is considering the issue newly raised there, whereas the trial court might address the "new issue" raised on appeal before it ruled on other matters, if the appeals court remanded the new issue for the trial court's consideration. The order in which the district court addresses the issues presented to it after remand, including whether it regards the appellate court as having commanded it to address initially the issue that was raised for the first time on appeal and was remanded, again may affect the extent of judicial investment, the settlement dynamics, and the law that is announced.

If an appellate court chooses to address an issue that is raised for the first time on appeal rather than remand the case back to the district court, that choice also may change the nature of the decision to be made because, on remand, the parties might re-frame the issue or offer the district court alternative grounds on which it could decide the case. It seems more likely that this would occur in the district court on remand than that it would occur in the court of appeals.

Recognizing these facts in the abstract does not say anything about whether the court of appeals should proceed to decide the new issue itself or remand the case so that the district court will take the first stab at it. In a particular fact setting, however, a court of appeals might consider the different effects when choosing its course of action.

(b) More obviously relevant is the fact, discussed below, 45 that the appellate court as an institution may be more or less competent than the trial court to address the new issue. To the degree that a new issue requires fact finding based on oral testimony or an exercise of discretion as to a matter that trial courts often deal with and appellate courts seldom deal with, an appellate court presumably will be less competent than the trial court would have been.

#### 5. Tethering judicial application of antitrust to specific facts lets a gradual rollout gain experience to prevent misapplication

Michael L. Katz 20, Sarin Chair Emeritus in Strategy and Leadership at the Haas School of Business and Professor Emeritus in the Department of Economics at the University of California, Berkeley, and A. Douglas Melamed, Professor of the Practice of Law at Stanford Law School, Stanford University, “Competition Law as Common Law: American Express and The Evolution of Antitrust”, University of Pennsylvania Law Review, Volume 168, June 2020, Lexis

In any event, by writing brief and imprecise statutes, Congress has established a common law-like process, and that is not likely to change. The concerns about the ability of courts to wisely embed economic propositions in legal rules might suggest some adjustments to the role of stare decisis in antitrust cases. First, when adjudicating antitrust cases, courts might be less deferential to past decisions that reached conclusions regarding economic theories and techniques through a highly imperfect process. Second, holdings that incorporate new learning should be narrowly tailored to the specific facts of the case at hand until more experience has been accumulated. In Microsoft, the D.C. Circuit held "that the rule of reason, rather than per se analysis, should govern the legality of tying arrangements involving platform software products" because there was not enough experience to apply a per se approach. 24 The same logic supports judicial restraint with respect to making sweeping pronouncements about how to apply new economic principles. 25 There is also another, potentially more important means for courts to help optimize the common law evolution of antitrust law: courts should construe and apply the rule of reason, not only to aid correct application of existing legal principles to the facts of the case, but also to facilitate the selection and evolution of optimal legal principles.

### Solvency---AT: Chaos/Agencies---2NC

#### The effect is law creation while avoiding an initial ruling without a case at hand

Aaron-Andrew P. Bruhl 20, Associate Dean for Research and Faculty Development and Rita Anne Rollins Professor of Law at the William & Mary Law School, JD from Yale Law School, MPhil from the University of Cambridge, BA from Pomona College, “The Remand Power and The Supreme Court's Role”, Notre Dame Law Review, November 2020, Volume 96, Lexis

Whether to remand at all, and how much instruction to give the lower court, obviously can affect the resolution of the specific dispute at hand, and some remedial decisions, like the one in Brown, have serious social consequences. But practices regarding appellate remedies also have systemic effects on the operation, and ultimately the character, of the whole judiciary. Remands distribute judicial work and delegate the authority and responsibility to apply the law. A general practice of open-ended remands allows an appellate court to focus on pure questions of law rather than the messy details of law application and case resolution. The modern Supreme Court's heavy reliance on remands both reveals and facilitates its self-conception as a law-declaring court.

The Supreme Court's power to remand cases is confirmed by a federal statute of extraordinary breadth. It authorizes federal appellate courts to affirm, reverse, vacate, or modify a judgment or to remand for further proceedings with no apparent limitation except that the chosen remedy "be just under the circumstances." 4 Using this authority, the Court remands in a wide range of circumstances. Most of these remands are uncontroversial, for they simply require the lower court to do the work of applying newly clarified law to the case at hand, but certain types of remands have attracted criticism on the grounds that they overstep the proper appellate role. 5 The remands that attract criticism tend to involve cases in which the Court vacates and remands without identifying error in the ultimate judgment under review or, sometimes, even identifying a material error in the reasoning of the decision under review. More specifically, the controversial remands can be organized into two categories, which we could call law-shepherding remands and justice-ensuring remands. As we will see, the two categories are quite different and are subject to criticism and defense on different grounds.

An example of a law-shepherding remand is a case in which the Supreme Court requires the lower court to reach a different ground of decision - to decide the case on the basis of one issue instead of another - in circumstances in which there is no mandatory sequence of decision and without finding the lower court's initial ground to be incorrect. 6A striking example of such a remand for resequencing is Beer v. United States, the lawsuit brought by federal judges complaining that Congress's failure to grant cost-of-living increases amounted to a cut in pay in violation of Article III's Compensation Clause. 7The U.S. Court of Appeals for the Federal Circuit turned away the judges' suit based on circuit precedent that had previously rejected the same argument. 8The Supreme Court then summarily vacated and remanded for the Federal Circuit to consider an alternative ground for dismissing the case, namely that the judges' lawsuit was barred by issue preclusion based on their participation in prior litigation. 9"The Court considers it important that there be a decision on the [preclusion] question," the terse order read, "rather than that an answer be deemed unnecessary in light of [the Federal Circuit's] prior precedent on the [constitutional] merits." 10Justice Scalia dissented based on his view that the Court "[has] no power to set aside the duly recorded judgments of lower courts unless we find them to be in error, or unless they are cast in doubt by a factor arising after they were rendered." 11

A few things are clear about Beer, but other aspects of the case are obscure. Clearly the Supreme Court had jurisdiction. It could have addressed preclusion, as the issue had been pressed by the government in the lower court. It is also clear that the Court's decision did not conclude that the Federal Circuit's ruling on the Compensation Clause was wrong on the merits. And, though this is perhaps a bit less certain, the Federal Circuit did not err by relying on circuit precedent rather than addressing preclusion, a nonjurisdictional issue. 12One thing that is obscure, by contrast, is the Court's reasoning, as the order was only a few sentences long and cited no authorities. Also unclear is the Court's motive for the remand, though it looks like the Court hoped to delay and perhaps avert a clash with Congress over judicial salaries.

As Beer reveals, law-shepherding remands are hard to classify into familiar (if troubled) categories of activism and restraint. The decision in Beer was not activist in the sense of unduly reaching or hastening the resolution of weighty questions. But it was not passive either, at least not in the sense of taking the cases as they come. Instead, and as it does with other procedural tools and doctrines at its disposal, 13 the Court is using remands to maximize its control over the timing and circumstances of the judiciary's exercise of its law-declaring function. That is the sense in which the remand in Beer, and other cases like it, shepherd the development of the law.

#### This tees up the issue for final approval, but only after a factual application

Aaron-Andrew P. Bruhl 20, Associate Dean for Research and Faculty Development and Rita Anne Rollins Professor of Law at the William & Mary Law School, JD from Yale Law School, MPhil from the University of Cambridge, BA from Pomona College, “The Remand Power and The Supreme Court's Role”, Notre Dame Law Review, November 2020, Volume 96, Lexis

B. Remands' Attractions for Olympian, Agenda-Setting Courts

Some of the features of remands listed above are especially attractive to courts with discretionary jurisdiction and institutional roles that emphasize law-clarifying, law-making, and system administration rather than the "mere" adjudication of particular disputes. The Supreme Court is such a court. Its jurisdiction is now almost entirely discretionary. 33It chooses to exercise its discretion in ways that give itself a small docket devoted mostly to settling conflicts in the lower courts and addressing questions of great national significance. 34Moreover, it aggressively uses the tools at its disposal to shape when and how questions come before it. 35This Section describes how such a court would find, and the Supreme Court has found, particular utility in several different kinds of remands.

1. Remands That Aid the Making and Shepherding of the Law

Start with "remands for resequencing." Beer, discussed in the Introduction, was an example of a case that could have been decided for the same party based on two different grounds that had different stakes. 36To choose another, very common example, courts deciding a government official's qualified-immunity defense may rule in favor of the official either (1) by determining that there is no violation under current law, (2) by deciding only that the law was at least not clearly established against the officer's conduct at the time of the conduct, or (3) by deciding that there was a violation under current law but the violation was not clear at the time of the conduct. 37 The prospective impact of the different options differs substantially. In particular, the first and third options establish the law going forward (though different law is established in each case), while the second option leaves the law unsettled and officers immune from damages until the law is clarified. 38

In situations in which there are multiple potential grounds of decision, one could imagine a reviewing court with a keen interest in shepherding the development of the law vacating and remanding not because it finds error but because it prefers that the lower court rely on different grounds. To stick with the qualified-immunity example, the Court might vacate a decision that the law was not clearly established in order to obtain the lower court's ruling on the constitutional question itself, thus teeing up that question for the Court's consideration. Conversely, the Court might vacate a decision finding a violation but no clearly established law, with the idea that vacating the constitutional ruling could forestall a circuit split and thus push an issue off the Court's agenda. Similar opportunities for shaping the development of the law - bringing issues forward, pushing them back - present themselves in many contexts. 39

#### The result is nationalized law that’s comparatively more credible

Doni Gewirtzman 12, Associate Professor of Law at the New York Law School, Skadden Fellow at Lambda Legal Defense and Education Fund, JD from the University of California-Berkeley, BA from Wesleyan University, “Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System”, American University Law Review February 2012, Volume 61, Lexis

II. The Normative Function of Discretionary Space: Policymaking Through Percolation

While discretionary space may create problems for the precedent model, it provides a terrain for lower courts to make constitutional policy. This policymaking function serves a competing set of constitutional values, most of which are summarily dismissed in models of how lower courts should exercise the discretion they have. This suggests the need for a new approach to lower court constitutionalism, one that recognizes the full set of normative values advanced by an interpretive system that empowers lower courts to make choices about constitutional meaning.

A. Policymaking and Error Correction

The precedent model advances the circuit courts' primary constitutional function: error correction. 117 This function requires appellate courts to ensure that decisions made by trial courts and agencies within their jurisdiction comply with established law and contain no clearly erroneous findings of fact.

The precedent model, and the corresponding hierarchical relationship between the Supreme Court and the circuits, enables circuit court judges to perform their error correction role efficiently. 118 To "correct" errors, there must be some benchmark of what constitutes a "correct" interpretation. 119 Within constitutional law, there are numerous potential sources of authority with no consensus about how to prioritize or interpret those authorities. 120 The precedent model focuses lower courts on a single source of authority and interpretive methodology: the application of Supreme Court precedent through common law reasoning. 121 This dramatically shrinks the scope of relevant authority and allows appellate court judges to apply the same familiar methodology used in other areas of law. For lower courts, the model resolves the critical questions of constitutional interpretation - what authority to use and how to interpret that authority - in a clear and efficient way.

If the precedent model is a way of structuring organizational relationships to help lower courts fulfill their error correction function, discretionary space helps them perform a second institutional function: policymaking. 122 Unlike the error correction function, which creates law from the top down, the policymaking function envisions law made from the bottom up, created through a dialogue between different levels of the federal judiciary.

In areas where the Supreme Court has not spoken, or where it is unclear whether or how existing law applies, circuit courts act as "percolators" for the development of constitutional law. Before the Court chooses to nationalize a particular constitutional rule, it gets a chance to see how the rule "writes," 123 and the opportunity to use lower courts as smaller "laboratories" 124 for experimentation to assess the rule's consequences. 125 [FOOTNOTE] 124 See McCray v. New York, 461 U.S. 961, 963 (1983) ("It is a sound exercise of discretion for the Court to allow [lower courts] to serve as laboratories in which the issue receives further study before it is addressed by this Court."). [END FOOTNOTE] Through the percolation process, the federal judicial system harnesses the benefits of "the wide diversity of skills, experience, and backgrounds" among lower courts to produce optimal rules, 126 as well as internalizing the benefits of the deliberation that occurs among lower courts as they respond to one another's decisions. 127 [FOOTNOTE] 127 See Estriecher & Sexton, supra note 123, at 699 n.68 (proposing that percolation "encourages the courts of appeals to examine and criticize each other's decisions, which … can generate solutions that are not obvious on a first or second look"). [END FOOTNOTE] Indeed, the release of a new Supreme Court opinion often ushers in a "period of learning within the circuits," in which different lower courts follow different doctrinal paths, culminating in the Supreme Court selecting one of the alternatives and nationalizing it. 128 Once the process is completed, it has the potential to bring added legitimacy to judge-made constitutional law. When judges on multiple diverse courts converge on the same outcome, the rule is more likely to be seen as the correct one. 129

#### 2. PRESSURE---the persuasive power of lower courts shapes Supreme Court doctrine, overriding prior preference

Pamela C. Corley 11, Associate Professor in the Political Science Department at Southern Methodist University, JD and PhD in Political Science from Georgia State University, Paul M. Collins Jr., Professor of Political Science at the University of Massachusetts, and Bryan Calvin, PhD Candidate at Colorado State University; “Lower Court Influence on U.S. Supreme Court Opinion Content”, The Journal of Politics, January 2011, Volume 73

In order to comprehend the content of the Court’s opinions, one must recognize that the Court does not operate in a vacuum. Rather, the legal rules articulated in the Court’s opinions are very much shaped by the actors involved in the litigation environment (Wahlbeck 1997). When a case reaches the Supreme Court, the justices rely primarily on four sources of information to render their decisions (e.g., Stern et al. 2002). First, the plenary conflict in any given case involves the parties to litigation, which attempt to persuade the Court to render a favorable decision through their legal briefs. Second, interest groups provide the Court with their own subjective interpretations of the correct application of the law by filing amicus curiae (“friend of the court”) briefs. Third, the justices obtain information regarding the litigants’ desired applications of law at oral arguments, in which each litigant is typically granted thirty minutes to persuade the justices to endorse its position. Finally, the justices obtain information to assist them in adjudicating the controversy based on the opinions of the lower courts that initially disposed of the case.1

While political scientists have generally failed to systematically address how these informational sources influence the Court’s opinions, a small body of research reveals that the Court’s opinions are shaped by the party’s briefs on the merits (e.g., Corley 2008), amicus curiae briefs (e.g., Samuels 2004; Spriggs and Wahlbeck 1997), and oral arguments (e.g., Johnson 2004). Specifically, Corley (2008) compares the litigants’ briefs with the majority opinions of the Court utilizing plagiarism detection software and finds that the percentage of the Court’s majority opinions coming from each party’s brief is driven by the quality of the brief, the ideological compatibility of the brief’s argument with the Court, and the political salience of the case. With regard to amicus briefs, Samuels (2004) and Spriggs and Wahlbeck (1997) uncover evidence that the Supreme Court’s majority opinions adopt language and legal rules forwarded by interest groups. Relating to oral arguments, Johnson’s (2004) analysis indicates that the Court focuses a major portion of its opinions on issues that are discussed during oral arguments. Despite the significant progress that has been made toward scientifically understanding the content of Supreme Court opinions, scholars have not yet systematically addressed the extent to which lower courts influence the content of the Court’s opinions.

The fact that this lacuna in our understanding of Supreme Court opinion content exists is troubling. To remedy this state of affairs, we embark on the task of examining the influence of lower court opinions on the Supreme Court’s majority opinions. Exploring this relationship is significant for a number of reasons. First, this research provides a more complete picture of the factors that shape the content of Supreme Court opinions than currently exists. Indeed, Justice Thomas is especially clear in articulating the significance of lower court opinions at the Supreme Court. Thomas explains the process by which the justices deliberate cases on the merits as follows: “We work through the case, as I read the briefs, I read what they’ve written, I read all of the cases underlying, the court of appeals, the district court. There might be something from the magistrate judge or the bankruptcy judge. You read the record” (quoted in Greenburg 2007). As Thomas makes evident, the justices do not start from scratch in their deliberation of cases. Rather, they digest the lower court opinions, litigant briefs, and amicus curiae briefs, all of which have the potential to shape the doctrinal content of the justices’ opinions. Second, this research is important in that it sheds fresh light on how the Supreme Court interacts with lower courts. While there is a voluminous literature on this topic, it overwhelmingly focuses on lower court interpretation of, and compliance with, Supreme Court precedent (e.g., Canon and Johnson 1999; Klein 2002; Sanders 1995), ignoring how lower courts shape Supreme Court precedents. As such, the current paper holds the promise of illustrating the ability of lower courts to shape the doctrinal course of federal law as it is articulated in Supreme Court opinions. Finally, this research is significant in that it views the judicial system as a web of interactions among different levels of federal judiciary. Rather than studying a single court without regard to its relationship to other courts, we paint a much more realistic picture of the federal judiciary by examining how the Supreme Court incorporates the language of lower court opinions into its own opinions that set precedent for the entire American judiciary.

THE MEANING OF LOWER COURT INFLUENCE

There are myriad methods by which lower courts can influence the Supreme Court. A lower court opinion that demonstrates a strong grasp on the corpus of federal law might motivate the justices to deny a certiorari petition, shaping the Court’s agenda setting decisions. A well-crafted lower court opinion might induce the justices to affirm the lower court ruling, influencing the ultimate outcome of the case. Conversely, a rogue lower court that steps too far out of line with existing law may motivate the justices to reverse that court’s decision, again influencing a case’s disposition. Here, we focus on perhaps the most significant means of influence: the ability of lower court opinions to shape the content of Supreme Court majority opinions.

#### This overwhelms even deep opposition---the ultimate Supreme Court priority is comity with lower courts, needed for all enforcement---that guarantees deference, even when there’s conflicting preference

Pauline T. Kim 15, Charles Nagel Professor at the Washington University School of Law, St. Louis, AB from Harvard University, JD from Harvard Law School; “Beyond Principal-Agent Theories: Law and The Judicial Hierarchy”, Northwestern University Law Review, https://scholarlycommons.law.northwestern.edu/nulr/vol105/iss2/3/

In their study of the Supreme Court's certiorari decisions, Charles Cameron, Jeffrey Segal, and Donald Songer acknowledge that their approach focused on the Court's "enforcement [of its] doctrinal preferences … throughout the judicial hierarchy but ignored … the evolutionary creation of doctrine." 179 Emphasizing the latter - "the incremental, fact-soaked creation of new rules" 180 - suggests that controlling lower court outcomes is less important than finding appropriate cases for identifying areas in need of development and for articulating rules to address them. Not only must the Supreme Court rely on the lower courts to provide these vehicles for law development, but it also must procure their cooperation in applying its precedents to create a coherent body of rules. Because of its limited capacity and the infinite variety of factual situations that may arise in the future, the Court necessarily creates incomplete doctrines. These imprecise rules are subsequently elucidated by the lower courts through their application to a broad variety of concrete situations. Thus, the meaning of a particular doctrine cannot be fixed in advance by the Supreme Court but will necessarily evolve through the process of implementation by lower courts.

This depiction of law is in many ways like descriptions of the development of the common law but with a focus on interactions between courts within a hierarchy rather than over time. Intractable value conflicts are ultimately resolved by reference to hierarchical authority, but such resolutions can never be completely final. Thus, if the Supreme Court disagrees with a doctrine established in a circuit court, it can overturn that doctrine and articulate its own rule. That rule, however, will in turn be subject to interpretation by the lower courts in subsequent cases.

In struggling over policy, different levels of the judiciary could try to erode the power of the other. For example, the Supreme Court might impose increasingly rigid rules in an effort to limit the discretion of lower court judges, while lower courts might attempt to undermine Supreme Court authority by increasingly distinguishing and limiting its precedent. Taken to an extreme, coordination between the courts could break down, destroying the coherence of legal doctrine and the legitimacy of the system as a whole. 181 Thus, although each level of the judiciary has incentives to pursue its own interests, a complete failure of coordination risks an outcome in which all are left worse off. On the other hand, cooperation, even though it necessarily entails some suppression of individual policy preferences, may enhance overall coherence and legitimacy, thereby working to the mutual benefit of both the Supreme Court and lower federal courts.

Viewing the Supreme Court and lower courts as players jointly engaged in the production of law, whose interactions are characterized by both cooperation and conflict, leads to a different view of the function of information. As discussed above, principal-agent theories suggest that informational asymmetries allow agents to avoid scrutiny of their activities and thereby afford them greater discretion. Agents therefore seek to exploit their informational advantage, while the principal will employ mechanisms to force information sharing. If upper and lower court interactions are characterized by both cooperation and conflict, however, then the role of information becomes more complicated. Lower courts may sometimes value transparency in their decisionmaking. For example, publishing detailed written opinions aids upper courts by providing information about developing areas of law or new factual contexts. At the same time, only by making their activities visible can lower court judges hope to influence policymaking in these evolving areas of law. Even when disagreeing with an upper court, a lower court may choose to visibly contest an established doctrine - for example, by arguing that a related factual situation should be distinguished - in an attempt to shape policy by limiting its reach, rather than to "shirk" in the traditional sense by avoiding scrutiny. The Supreme Court, on the other hand, may deliberately tolerate or encourage informational asymmetries - for example, by reviewing certain lower court decisions deferentially 182 - in order to focus resources on law development rather than on controlling outcomes in particular cases.

Elevating the role of law in this way does not entail formalist conceptions of law as a determinate body of rules or a "brooding omnipresence" waiting to be discovered through legal reason. Nor does it endorse the more recent claim that judges merely act as umpires calling balls and strikes. To the contrary, this view of the judicial hierarchy argues that judges are very much engaged in the project of making law. But it argues that in doing so they are engaged in a cooperative venture. No single court has the capacity or the expertise to develop a useful body of rules alone. All have an interest in cooperating in order to enhance the quality of their output and their collective legitimacy. At the same time, articulating legal rules entails choices, and those choices often implicate policy concerns. The existence of varying policy preferences within the judiciary means that value conflicts are unavoidable, and the law is also a ground of contestation over policy. Though inevitable, these policy conflicts are cabined to some extent by the need for cooperation.

#### 3. AGENCY RECOMMENDATION---FTC and DOJ lobbying flips the court

Daniel J. Gifford 95, Robins, Kaplan, Miller & Ciresi Professor of Law, University of Minnesota Law School, LLB from Harvard University, AB from Holy Cross, JSD from Columbia University, “The Jurisprudence of Antitrust”, Southern Methodist University Law Review, July-August 1995, Volume 48, Lexis

VIII. SUCCESSFUL ANTITRUST POLICY DEVELOPMENT

Antitrust policy was largely unproblematic during its first fifty years because the caselaw could be understood as a judicial effort to foster and to reinforce a norm of competitive-market behavior. The basic components of such a norm were widely understood to consist of avoiding cartel-like activity: business firms should not agree on price with their rivals nor should they attempt to corner the market on goods. There were, of course, other rules which in hindsight might be questionable but which could be generally accepted as falling within the imprecisely defined concept of a free and open market: no vertical price-fixing agreements 171 and no tying unpatented goods to patented products. 172 The success of the caselaw lay in the largely norm-reinforcing role which was performed by judicial antitrust decisions.

While some of these decisions were issued in private litigation, most of these expansionary antitrust decisions were issued in government actions where the Court was responding to the urgings of government litigators. In short, the responsibility for this transformation in antitrust law from symbolic reaffirmation of a widely accepted norm to a set of coercive rules lay not on the Court alone. Courts always rely heavily upon the input of the parties before them. The Supreme Court had reason to give special deference to the government's positions, because the government possessed the institutional capacity and resources (which the Court lacked) to develop a coherent position on antitrust issues as a whole. Indeed, if antitrust was to develop beyond the largely symbolic role that it had hitherto played, the government would be the institutional actor best equipped to guide that development.

#### 4. CERT---the CP fiats both a declaration of support, creating audience costs AND cert on appeal---both tip the court to affirm

Barry Friedman 9, Jacob D. Fuchsberg Professor of Law at the New York University School of Law, JD from the Georgetown University Law Center, BA from the University of Chicago; Presentation at The Centre for Comparative and Public Law and Department of Politics and Public Administration at The University of Hong Kong, “The Politics of Judicial Review”

3. Setting the Agenda: The Certiorari Game. - One Court practice deserves special mention here: the process by which the Court grants review. Not only does certiorari practice serve as a bridge to the next influence on the Justices, 182 but it has an enormous impact on the Court's agenda. 183 [FOOTNOTE] 183 See S. Sidney Ulmer, The Supreme Court's Certiorari Decisions: Conflict as a Predictive Variable, 78 Am. Pol. Sci. Rev. 901, 901 (1984) ("In many instances this agenda-building process determines what and whose problems are to be given national attention, discussion in the media, and possible resolution."). [END FOOTNOTE] On this subject there may be the grossest disparity between the copious attention fostered by positive theorists 184 and the relative neglect of the legal literature.

Many positive scholars view certiorari as a strategic game in which Justices vote at the review stage based on their ideological preferences on the ultimate merits. 185 They realize that this is not all that occurs at the certiorari stage. The Court may take many cases just to resolve uncertainty in the law, 186 or simply because the Executive Branch is anxious to have a case heard. 187 But central to positive scholarship is the notion that the Justices are strategic in using their almost unlimited control over their docket to manage their agenda along ideological terms. 188 Thus, a Justice who would like to affirm a lower court decision will not vote to grant certiorari unless she is sure she has [they have] four other votes on the merits. 189 With those votes, however, she might engage in an "aggressive grant," 190 just as a Justice who would like to review a case but fears he lacks the votes on the merits will vote to deny review, a "defensive denial." 191 [FOOTNOTE] 190 The following is an example of an agressive grant: "On a conservative court with a case decided conservatively below, conservative justices, taking into account the likely outcome on the merits, will vote to grant certiorari and strengthen the lower court's decision … ." Caldeira et al., supra note 184, at 558. [END FOOTNOTE] The positive literature on this subject varies as to the prevalence of these practices, 192 though there seems to be little doubt that they occur. 193

It apparently is the case that the Justices know what they are looking for and simply search for the right vehicle in which to pronounce their judgment. It also seems to be the case that agenda setting is at least partly ideological, 194 and that the ideological majority on the Court will grant review of the matters they wish to pursue. This agenda setting accounts for the direction of constitutional law, just as the opinions themselves account for its substance. Although judges are sometimes painted as passive actors, the Court's discretionary docket gives an ideologically committed Court broad ability to push selected areas of the law in preferred directions, while leaving others entirely alone.

### Solvency---AT: No Lower Court Compliance---2NC

#### Legislators will read the tea leaves AND respond to the Court’s dicta

Neil S. Siegel 17, Ph.D. in Jurisprudence and Social Policy and JD from UC Berkeley, David W. Ichel Professor of Law and Professor of Political Science at the Duke Law School, M.A. in Economics from Duke University, “Reciprocal Legitimation in the Federal Courts System”, Vanderbilt Law Review, May 2017, Volume 30, Lexis

The Court can have an impact on the course of legislation that is similar to its impact on the course of judicial precedent, and it may subsequently take advantage of that impact without being entirely candid about what is going on. Perhaps the best example is Eighth Amendment jurisprudence, where the Court expressly looks in part to objective indicia of "evolving standards of decency" in order to determine whether a national consensus rejects a particular punishment for a particular crime. 74 For example, in holding in *Kennedy v. Louisiana* that the Constitution categorically prohibits the death penalty for child rape, the Court emphasized that only six states permitted capital punishment for that offense. 75 In dissent, Justice Alito charged that "this statistic is a highly unreliable indicator of the views of state lawmakers and their constituents." 76 Dicta in the Court's decision thirty years earlier in *Coker v. Georgia*, 77 he explained,

gave state legislators and others good reason to fear that any law permitting the imposition of the death penalty for this crime would meet precisely the fate that has now befallen the Louisiana statute that is currently before us, and this threat strongly discouraged state legislators--regardless of their own values and those of their constituents--from supporting the enactment of such legislation. 78

The Court is also characteristically not candid about its previous role in causing legal or social change when it invokes shifts in public opinion. The Court has a history of first affecting public opinion (admittedly, in complex ways 79) and then later citing those effects in support of more controversial conclusions. One example is the Court's notation in *Loving* of the fourteen states that had repealed their prohibitions on interracial marriage over the previous fifteen years. 80 That development was likely affected by the Court's decisions leading up to, including, and following *Brown*.

#### The result is legislative codification, even without higher court approval

Amanda Frost 15, Professor of Law at the American University Washington College of Law, “Inferiority Complex: Should State Courts Follow Lower Federal Court Precedent on the Meaning of Federal Law?”, Vanderbilt Law Review, January 2015, Volume 68, Lexis

1. Percolation

The Supreme Court often allows an issue to percolate in the lower courts before addressing it, waiting for several federal circuits and/or state high courts to weigh in before granting certiorari. 189 The Court justifies this delay because the Justices benefit from the reasoning of the divided lower courts, from observing how the federal issue arises in a variety of different contexts, and from watching the lower courts' varied interpretations play out in practice. 190 Indeed, "percolation" is cited as one of the reasons to maintain our current system's lack of intercircuit stare decisis, in which the decision of one federal circuit does not bind another. Presumably, the Court reaps similar benefits by allowing the state courts to weigh in on federal issues as well. 191

Input from the state court systems can be particularly valuable in the development of federal law. State courts provide a unique regional perspective that is (mostly) absent from federal courts. 192 State judges are elected or appointed, usually after participating for some period of time in a state's legal or political system. As a result of this experience, they have an understanding of how federal regulations, statutes, and constitutional provisions operate within state government and affect state citizens - knowledge that many federal judges will lack. 193

Furthermore, percolation benefits more than just the Supreme Court. Congress can observe the dialogue among the federal and state courts as well, which then informs the contents of future legislation. 194 [FOOTNOTE] 194 Rochelle C. Dreyfus, Percolation, Uniformity, and Coherent Adjudication: The Federal Circuit Perspective, 66 SMU L. Rev. 505, 523 (2013) (noting that "percolation provides important information to Congress"). [END FOOTNOTE] Most obviously, the lower courts benefit from each other's discussion of hard questions of federal law. Like the Supreme Court, a federal court of appeals will gain insights from the decisions of those who have already grappled with the issue. 195

### Solvency---AT: Certainty Key

#### Once the Supreme Court affirms, the effect is indistinguishable

Richard M. Re 16, Assistant Professor at the UCLA School of Law, JD from Yale Law School, MPhil from the University of Cambridge, AB from Harvard University, “Narrowing Supreme Court Precedent from Below”, Georgetown Law Journal, April 2016, Volume 104, Lexis

If limited to situations of precedential ambiguity, narrowing from below would actually reinforce important features of higher court control over the creation of legal uniformity. When the higher court wants to flex its managerial muscle, it may do so by being clear in its precedents, 118 thereby precluding legitimate narrowing from below. By contrast, the existence of ambiguity in a higher court precedent can itself be regarded as a meaningful message to lower courts, suggesting that the higher court deliberately postponed resolution of certain issues. Higher courts realize that disuniformity can sometimes be helpful in fostering "percolation"--that is, experimentation and reflection on what might otherwise be stale legal rules. 119 And once percolation has run its course, the higher court can intervene to issue a clear ruling and establish uniformity. Some temporary disuniformity, after all, may be preferable to permanent, uniform error.

#### Solvency proves that’s fast AND the CP text grants cert and expedited review, but in the interim, the CP makes it exceedingly clear that the court is intent on modifying doctrine

Daniel M. Tracer 15, JD from the Benjamin N. Cardozo School of Law, General Attorney for the Offices, Boards and Divisions at the Department of Justice, Degree from Yeshiva University, “Stare Decisis in Antitrust: Continuity, Economics, and the Common Law Statute”, DePaul Business and Communication Law Journal, Volume 12

B. Stare Decisis's Diminished Role in Antitrust

In the wake of recent antitrust case law, 31 scholars now take for granted the fact that stare decisis plays a diminished role in the area of antitrust. 32 In particular, the Supreme Court has understood the Sherman Act to implement a common law approach whereby antitrust law can adapt and change course as needed. 33 Scholars thus assume that stare decisis is simply not as big of an obstacle to change in the antitrust context as it is in other legal contexts. 34 For instance, it is understood that antitrust precedent may not survive as long and that antitrust legal tests may frequently change. 35 Indeed, because of the widespread belief that antitrust's legal doctrine can and will be overruled and repealed as appropriate, scholars frequently attempt to predict which formerly binding rules of law will be abandoned next and which, if any, have staying power. 36

To be sure, the diminished function of stare decisis in antitrust is a welcome development in the eyes of some. Those who subscribe to this understanding primarily highlight the flexibility that results from a weaker version stare decisis. 37 Accordingly, antitrust law is thought to benefit from the Court's ability to more easily abandon precedent that no longer fits with contemporary economic views and the Court's ability to keep the antitrust laws up-to-date with economic thinking. In other words, this trend marks a triumph of economic reality over legalistic formality in the antitrust realm. Of course, one serious consequence of a weaker version of stare decisis is that the antitrust practitioner must also be an economist. 38 Thus stated, this view of stare decisis would hardly surprise students of the Chicago School and its understanding of antitrust law as nothing more than a branch of applied microeconomics. 39

In contrast, a somewhat more dominant view of stare decisis takes a negative attitude of such a state of affairs. As an initial matter, scholars have criticized the predominance of economic theory over traditional legal reasoning in antitrust law due to a concern that judges may lack the proper expertise to fully base their decision on economic analysis. This concern goes beyond a judge's possible lack of formal economic training, taking into account the institutional impediments of a court in deciding economic matters and the lack of consensus among economic scholars themselves on the costs and benefits of various business practices. 40 Moreover, to the extent that the Court's antitrust decisions are in tension with stare decisis, the Court's tendency to overrule antitrust precedent goes against the Court's function to interpret law rather than promulgate policy. 41 The consequences of failing to abide by stare decisis, especially in economic matters, include the following: the inability of businesspeople to confidently transact under the assumption of settled law, 42 diminished public confidence in the Court, 43 and a lack of fairness or evenhandedness in the way justice is administered, which tends to undermine the concept of the rule of law. 44 In other words, many of the benefits associated with stare decisis may be lacking in antitrust law.

One final perspective that has gained traction in recent years is the notion that weaker stare decisis in the field of antitrust flows - or ought to flow - from the regulatory nature of the antitrust laws. 45 Under this view, it is assumed that regulatory agencies, as opposed to courts, tend to change the rules and doctrines they apply very quickly, often reflecting shifting policies and priorities of incoming executive administrations as well as the technical expertise of the agency involved. 46 Thus, if one assumes there is some carryover in the way that courts and the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) are involved in the interpretation and enforcement of the antitrust laws, it may be somewhat less surprising that stare decisis should play a less pronounced role. 47

In any event, for better or worse, stare decisis's diminished status in antitrust appears to be beyond real debate. While it is difficult to gather precise data on the relative frequency of cases being overruled by the Supreme Court, many well-known antitrust doctrines have been retired by the Court in the last five decades - at a time when the Court rarely hears more than one or two antitrust cases per term 48 - suggesting a unique willingness to override stare decisis in this area. Part II.C now turns to a sampling of cases that have overruled antitrust precedent and the justifications for these decisions.

C. Major Supreme Court Cases Overruling Precedents And Their Internal Justifications

While the majority of antitrust cases spend most of their time in the district courts and courts of appeal, the major antitrust doctrines ultimately come - sooner or later - from the Supreme Court. While the Supreme Court rarely addresses more than a single antitrust case per term, and sometimes not even that, when it does select an antitrust case for review, it is almost always to establish, modify, or repeal a major antitrust doctrine. This Part focuses on the major Supreme Court cases since the 1970s that have repealed important, and usually longstanding, antitrust rules or doctrines. While this survey is not exhaustive, it displays prime examples of the Court's willingness to overrule precedent in the name of developing competition policy, and it includes the major justifications that the Court has given for this practice. The cases are presented chronologically in order to demonstrate the erosion of stare decisis over four decades. For instance, this progression highlights the ascendency of neoclassical economic analysis in antitrust law and the way in which the Court has relied on older cases to justify repealing prior decisions despite stare decisis - itself a noteworthy, though perhaps circular, version of stare decisis. To round out the perspective presented here, this Part concludes with a discussion of the most notable exception to the notion of a weakened version of stare decisis: the Supreme Court's continuing commitment to Major League Baseball's exemption from antitrust law in the face of immense academic opposition.

## Foreign PIC

## Case

### Transnational Threats D---2NC

### Trade D---2NC

#### Prefer evidence controlling for every variable

Katherine Barbieri 13, Associate Professor of Political Science at the University of South Carolina, Ph.D. in Political Science from Binghamton University, “Economic Interdependence: A Path to Peace or Source of Interstate Conflict?” Chapter 10 in Conflict, War, and Peace: An Introduction to Scientific Research, google books

How does interdependence affect war, the most intense form of conflict? Table 2 gives the empirical results. The rarity of wars makes any analysis of their causes quite difficult, for variations in interdependence will seldom result in the occurrence of war. As in the case of MIDs, the log-likelihood ratio tests for each model suggest that the inclusion of the various measures of interdependence and the control variables improves our understanding of the factors affecting the occurrence of war over that obtained from the null model. However, the individual interdependence variables, alone, are not statistically significant. This is not the case with contiguity and relative capabilities, which are both statistically significant. Again, we see that contiguous dyads are more conflict-prone and that dyads composed of states with unequal power are more pacific than those with highly equal power. Surprisingly, no evidence is provided to support the commonly held proposition that democratic states are less likely to engage in wars with other democratic states.¶ The evidence from the pre-WWII period provides support for those arguing that economic factors have little, if any, influence on affecting leaders’ decisions to engage in war, but many of the control variables are also statistically insignificant. These results should be interpreted with caution, since the sample does not contain a sufficient number wars to allow us to capture great variations across different types of relationships. Many observations of war are excluded from the sample by virtue of not having the corresponding explanatory measures. A variable would have to have an extremely strong influence on conflict—as does contiguity—to find significant results. ¶ 7. Conclusions This study provides little empirical support for the liberal proposition that trade provides a path to interstate peace. Even after controlling for the influence of contiguity, joint democracy, alliance ties, and relative capabilities, the evidence suggests that in most instances trade fails to deter conflict. Instead, extensive economic interdependence increases the likelihood that dyads engage in militarized dispute; however, it appears to have little influence on the incidence of war.

### LIO D---Resilient---2NC

### LIO D---Fails---2NC

# 1NR

## Reliance DA

### Impact---2NC

#### It’s the only existential risk

Samuel Miller-McDonald 19, PhD Candidate in Geography and the Environment at the University of Oxford, “Deathly Salvation”, The Trouble, 1/4/2019, https://www.the-trouble.com/content/2019/1/4/deathly-salvation

A devastating fact of climate collapse is that there may be a silver lining to the mushroom cloud. First, it should be noted that a nuclear exchange does not inevitably result in apocalyptic loss of life. Nuclear winter—the idea that firestorms would make the earth uninhabitable—is based on shaky science. There’s no reliable model that can determine how many megatons would decimate agriculture or make humans extinct. Nations have already detonated 2,476 nuclear devices.

An exchange that shuts down the global economy but stops short of human extinction may be the only blade realistically likely to cut the carbon knot we’re trapped within. It would decimate existing infrastructures, providing an opportunity to build new energy infrastructure and intervene in the current investments and subsidies keeping fossil fuels alive.

In the near term, emissions would almost certainly rise as militaries are some of the world’s largest emitters. Given what we know of human history, though, conflict may be the only way to build the mass social cohesion necessary for undertaking the kind of huge, collective action needed for global sequestration and energy transition. Like the 20th century’s world wars, a nuclear exchange could serve as an economic leveler. It could provide justification for nationalizing energy industries with the interest of shuttering fossil fuel plants and transitioning to renewables and, uh, nuclear energy. It could shock us into reimagining a less suicidal civilization, one that dethrones the death-cult zealots who are currently in power. And it may toss particulates into the atmosphere sufficient to block out some of the solar heat helping to drive global warming. Or it may have the opposite effects. Who knows?

What we do know is that humans can survive and recover from war, probably even a nuclear one. Humans cannot recover from runaway climate change. Nuclear war is not an inevitable extinction event; six degrees of warming is.

#### It’s fast---extinction within 5 years

Dr. Jim Garrison 21, PhD from the University of Cambridge, MA from Harvard University, BA from the University of Santa Clara, Founder/President of Ubiquity University, “Human Extinction by 2026? Scientists Speak Out”, UbiVerse, 7/1/2021, https://ubiverse.org/posts/human-extinction-by-2026-scientists-speak-out

This may be the most important article you will ever read, from Arctic News June 13, 2021. It is a presentation of current climate data around planet earth with the assertion that if present trends continue, rising temperatures and CO2 emissions could make human life impossible by 2026. That's how bad our situation is. We are not talking about what might happen over the next decades. We are talking about what is happening NOW. We are entering a time of escalating turbulence due to our governments' refusal to take any kind of real action to reduce global warming. We must immediately and with every ounce of awareness and strength that we can muster take concerted action to REGENERATE human community and the planetary ecology. We must all become REGENERATION FIRST RESPONDERS, which is the focus of our Masters in Regenerative Action.

#### It makes nuclear war inevitable in every region

Dr. Michael T. Klare 20, Five Colleges Professor of Peace and World Security Studies at Hampshire College, Ph.D. from the Graduate School of the Union Institute, BA and MA from Columbia University, Member of the Board of Director at the Arms Control Association, Defense Correspondent for The Nation, “How Rising Temperatures Increase the Likelihood of Nuclear War”, The Nation, 1/13/2020, https://www.thenation.com/article/archive/nuclear-defense-climate-change/

Climbing world temperatures and rising sea levels will diminish the supply of food and water in many resource-deprived areas, increasing the risk of widespread starvation, social unrest, and human flight. Global corn production, for example, is projected to fall by as much as 14 percent in a 2°C warmer world, according to research cited in a 2018 special report by the UN’s Intergovernmental Panel on Climate Change (IPCC). Food scarcity and crop failures risk pushing hundreds of millions of people into overcrowded cities, where the likelihood of pandemics, ethnic strife, and severe storm damage is bound to increase. All of this will impose an immense burden on human institutions. Some states may collapse or break up into a collection of warring chiefdoms—all fighting over sources of water and other vital resources.

A similar momentum is now evident in the emerging nuclear arms race, with all three major powers—China, Russia, and the United States—rushing to deploy a host of new munitions. This dangerous process commenced a decade ago, when Russian and Chinese leaders sought improvements to their nuclear arsenals and President Barack Obama, in order to secure Senate approval of the New Strategic Arms Reduction Treaty of 2010, agreed to initial funding for the modernization of all three legs of America’s strategic triad, which encompasses submarines, intercontinental ballistic missiles, and bombers. (New START, which mandated significant reductions in US and Russian arsenals, will expire in February 2021 unless renewed by the two countries.) Although Obama initiated the modernization of the nuclear triad, the Trump administration has sought funds to proceed with their full-scale production, at an estimated initial installment of $500 billion over 10 years.

Even during the initial modernization program of the Obama era, Russian and Chinese leaders were sufficiently alarmed to hasten their own nuclear acquisitions. Both countries were already in the process of modernizing their stockpiles—Russia to replace Cold War–era systems that had become unreliable, China to provide its relatively small arsenal with enhanced capabilities. Trump’s decision to acquire a whole new suite of ICBMs, nuclear-armed submarines, and bombers has added momentum to these efforts. And with all three major powers upgrading their arsenals, the other nuclear-weapon states—led by India, Pakistan, and North Korea—have been expanding their stockpiles as well. Moreover, with Trump’s recent decision to abandon the Intermediate-Range Nuclear Forces (INF) Treaty, all major powers are developing missile delivery systems for a regional nuclear war such as might erupt in Europe, South Asia, or the western Pacific.

### AT: Legitimacy Low

#### Reliance is consistently integrated into regulatory review BUT tenuous---maintaining the trend requires case-specific adjudication.

Gary M. Bridgens 21, J.D. Candidate at the George Mason University, Antonin Scalia Law School and Executive Editor of the George Mason Law Review, BA from Ohio University, Former Consultant for Public Affairs at APCO Worldwide, Former Summer Associate at Michael Best & Friedrich LLP, “Demystifying Reliance Interests in Judicial Review of Regulatory Change”, George Mason Law Review, Volume 29, Fall 2021, Lexis

II. The Emerging But Under-Theorized Role of Reliance Interests

From the 1990s to present day, reliance interests have grown in importance and earned their place in hard look judicial review of agency decision-making. 67While scholars have noted the importance of reliance interests in judicial precedent and in review of long-standing agency interpretations, none have traced the evolution of reliance interests in Supreme Court jurisprudence. 68Accordingly, this Part examines the treatment of reliance interests in landmark cases, and observes that a series of small doctrinal shifts, taken together, have elevated reliance interests to the fore.

A. Reliance Interests, Historically

While scholars have examined in-depth the importance and effect of reliance as it relates to precedent and the concept of stare decisis, 69 no modern analysis traces reliance interests in the context of judicial review and regulatory change. 70An account of scholarship on reliance interests suggests that reliance interests are not only reasonable for courts to consider but are entitled to judicial respect. 71 Offering judicial endorsement of this notion, Justice Scalia once wrote that reliance on "unabandoned" precedent "is always justifiable reliance." 72Notably, Professor Anita Krishnakumar has observed that the overruling of a long-standing agency interpretation "implicates all of the same private reliance concerns as an overruling of one of the Court's own statutory precedents." 73Accordingly, while scholars have acknowledged the potential for reliance interests to play a larger role in judicial review of agency behavior, they consider reliance interests only secondarily and have not observed the evolution of reliance interests over a period of time. 74

The Supreme Court has historically been mum as to the virtues and application of reliance interests, but this neglect of reliance interests has diminished over time. 75The Supreme Court's contemporary opinions pointedly addressed the engenderment of reliance interests in administrative change since as early as 1973, ten years before the Court's decision in State Farm. 76 Mentions of reliance interests in landmark decisions have grown considerably more prominent over time. 77 This trend indicates a natural evolution in administrative law and highlights the possibility for reliance interests to play an outsize role in future judicial review. Early cases implicating reliance interests either turned on issues of official representations, thus involving estoppel concerns, or they failed to convince the Court of anything. 78When the Court laid down its State Farm decision in 1983, which can be categorized as a watershed moment in administrative law jurisprudence, it failed to discuss reliance interests whatsoever. 79In fact, the word "reliance" does not appear in the decision one time. 80It was not until the Supreme Court's 1996 decision in Smiley v. Citibank (S.D.), N.A. 81that the Court enhanced its focus on reliance interests. 82

The petitioner in Smiley alleged that a fee charged to him by the respondent-bank was impermissible because the Comptroller of Currency regulation that authorized the fee departed from prior agency policy. 83Here, citing State Farm, the Court held that "sudden and explained change, or change that does not take account of legitimate reliance on prior interpretations, may be "arbitrary, capricious [or] an abuse of discretion.'" 84The Court continued, however, concluding its analysis in Smiley to say that "if these pitfalls are avoided, change is not invalidating ... ." 85Ultimately, the Court declined to accept that an official change had even taken place and upheld the agency interpretation. 86Though reliance interests made no discernable difference in the outcome of Smiley, the Smiley opinion formed a bridge between the Court's older and newer cases, which helped to establish the first somewhat clear understanding of the reliance-interest application. 87Synthesizing the piecemeal reliance jurisprudence it alluded to in Smiley, the Court later established its axiomatic rule of reliance in FCC v. Fox Television Stations, Inc. 88>The agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes [an agency] must - when, for example ... its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy. 89

B. Fox 's Placeholder on Reliance Interests

Fox, for the purposes of this Comment, represents a reaffirmation and expansion of the State Farm standards and the Court's post-millennium revival of reliance interests in judicial review. 90Although the facts and holding in Fox may be somewhat ordinary, the case exposed a divide in how the incumbent justices viewed judicial review of agency decision-making. 91While there is great merit to the idea that technical experts (e.g., agencies) should have autonomy over technical programs and decisions, there has long been concerns about how much autonomy these non-elected decisionmakers should enjoy. 92These concerns materialized in Fox, in the form of an unlikely, five-justice coalition favoring more rigorous judicial review. 93

In Fox, the Court was asked to determine whether the FCC provided adequate reasoning for its change in position on the use of isolated expletives in broadcasting. 94The Court held that the FCC had met the standards of judicial review as laid out in State Farm, which required only that the FCC "examine the relevant data and articulate a satisfactory explanation for its action." 95The majority's opinion further emphasized the deference that reviewing courts ought to exercise, stating the reasons for a change in administrative policy do not need to be better than previous policy. 96The effect of the Court's opinion in Fox was a somewhat more detailed test for arbitrary and capricious review, which can be summarized as follows: "(1) The agency must explicitly acknowledge its change in policy; and (2) the agency must give good reasons to support its change, which turns on whether (A) the change is in accordance with the agency's organic statute; and (B) the agency believes it to be better than the prior approach." 97

Interestingly, and often overlooked, the majority in Fox did acknowledge that an agency changing course must provide a "more detailed justification than what would suffice for a new policy" when the "prior policy has engendered serious reliance interests that must be taken into account." 98This consideration, however, did not factor into the majority's decision. 99Justice Kennedy joined operative parts of the majority opinion in Fox but wrote separately to suggest that these reviews are more nuanced than the majority admits. 100Though concurring in the judgment, Justice Kennedy wrote, "the question [of] whether a change in policy requires an agency to provide a more reasoned explanation than when the original policy was first announced is not susceptible ... to an answer that applies in all cases." 101He went on to underscore that "reliance interests in the prior policy may also have weight in the analysis." 102Justice Breyer's dissent, which was joined by Justices Stevens, Souter, and Ginsburg, shared Justice Kennedy's concerns. 103Justice Breyer believed that an agency reversing its position should be required to address not just "why the new policy [was] a good one," but why the change was occurring in the first place. 104In his reasoning, Justice Breyer stated that the FCC's explanation for the new policy discussed several factors that were well known to the agency the first time around, which itself provides no justification for a change of policy. 105To this end, in Justice Breyer's view, an agency seeking to justify change may always do so by simply saying it's the policy they prefer. 106The dissents in Fox can be summarized by a question Justice Breyer posited: "Where does, and why would, the APA grant agencies the freedom to change major policies on the basis of nothing more than political considerations or even personal whim?" 107

Fox, like State Farm, concerned an agency departure from an established policy. 108While State Farm clearly stated that hard look review should apply to rule rescissions, Fox went one step further to state that hard look review also applies to changing rules and that more explanation is not required for a changing rule than is required for a newly promulgated rule. 109However, a more careful analysis of Fox reveals that for many justices, a more detailed showing should be required by the agency when that agency appears to be disregarding its prior factual findings or significant reliance interests. 110To this end, the majority wrote that "it would be arbitrary or capricious to ignore such matters." 111While the majority found no basis to pursue such an inquiry, 112the concurring and dissenting justices raised multiple forms of reliance-based concerns. 113Justice Kennedy emphasized in his partial concurrence that reliance interests may weigh into these considerations. 114Justice Breyer, joined in dissent by Justices Stevens, Souter, and Ginsburg, discussed the importance of capital compliance costs and reliance on technological investments. 115Justice Breyer notes that all the FCC needed to do was "consider [these issues] and either grant ... exemptions or explain why it [would] not grant [them]." 116

The Supreme Court's Fox decision made a meaningful contribution to reliance-interest jurisprudence by acting as a placeholder for the doctrine to mature. By reaffirming State Farm, but importing key reliance-interest concepts into the discussion, Fox essentially cemented reliance interests as an - albeit minor - piece of hard look judicial review. While the Court may have done this unknowingly, it is reasonable to believe that the themes of reliance that appear throughout the Fox decision represent an intentional effort to encourage agency due diligence and restrain hyperactive regulatory change. Read in this way, Fox planted seeds for future use of reliance interests as an accountability-promoting measure.

C. Recent Decisions Elevating Reliance Interests

The principles on display in Fox remained the undisputed guiding authority on judicial review of administrative change until 2016, 117when the Supreme Court decided Encino Motorcars, LLC v. Navarro. 118 Encino addressed "whether a federal statute required payment of increased compensation to certain automobile dealership employees for overtime work." 119In 1987, the Department of Labor "amended its Field Operations Handbook to clarify that service advisors should be treated as exempt" pursuant to a 1978 formal opinion letter. 120The opinion letter, as an interpretive document, did not carry the force of law. 121Twenty-one years later, in 2008, the Department of Labor "issued a notice of proposed rulemaking," stating its intent to align its regulations "with existing practice by interpreting the exemption ... to cover service advisors." 122Then, in 2011, the Department of Labor changed course again, and instead of proceeding with its proposed rule, completed its 2008 notice-and-comment rulemaking by issuing a final rule that took the opposite position from the proposed rule - service advisors were no longer exempt under the Fair Labor Standards Act ("FLSA"). 123The Supreme Court held that the policy change failed to consider serious reliance interests, and an agency action inadequately explained is arbitrary and capricious. 124

In Encino, the Supreme Court's first step was to determine what sort of deference was owed to the agency's interpretation. 125The majority opinion explained that because administrative rulemakings must be lawful, they may not be procedurally defective. 126Thus, deference cannot apply where a regulation is procedurally defective, in that the agency did not follow the correct procedures in promulgating the rule. 127After walking through the basic principles set forth in Fox, Smiley, and other cases, 128the Court stated it was an "unavoidable conclusion ... that the 2011 regulation was issued without the reasoned explanation that was required in light of the Department's change in position and the significant reliance interests involved." 129Continuing on this point, the Court specified that while "[a] summary discussion may suffice in [some] circumstances," it is particularly inadequate in this case, where the affected industry relied on the previous long-standing regulation. 130The Department of Labor explained that it "carefully considered all of the comments, analyses, and arguments made for and against the proposed changes," 131and alleged that the new approach would be more consistent with statutory language. 132The balance of Justice Kennedy's opinion is another display of the Court's noncommittal relationship with reliance interests, as it does not - in any clear way explain - when reliance interests were given the weight on display in Encino. 133However, the Court does state that dealerships not in compliance with the new regulation could face serious liability under the FLSA, and taken in that context, the conclusory statements and lack of analysis provided by the agency do not suffice to justify departure from the existing policy. 134In sum, Encino stands as what some may consider the Court's most prominent application of reliance interests, as the case essentially incorporates consideration of reliance interests as a procedural requirement incumbent on agencies. 135

Four years later, in June of 2020, the Supreme Court decided Department of Homeland Security v. Regents of the University of California. 136The case revolved around a controversial immigrant naturalization pathway program known as the Deferred Action for Childhood Arrivals ("DACA"). 137The DACA program, adopted in 2012 by the U.S. Department of Homeland Security ("DHS"), postpones the deportation of undocumented immigrants who came to the United States as children, allowing them the opportunity to integrate into American society. 138In 2017, the newly elected Trump Administration began phasing out DACA, and the legality of this rescission was the focus of Regents. 139As part of the DACA phase-out, the Attorney General advised the Acting Secretary of Homeland Security that the DACA program embodied serious legal flaws and should be rescinded. 140In reliance on that advisory, the Acting Secretary decided to terminate the program. 141

Put simply, the DACA program had two operative elements: benefits eligibility and forbearance. 142The Court found that, "in short, the Attorney General neither addressed the forbearance policy at the heart of DACA nor compelled DHS to abandon that policy." 143If this sounds familiar, it's because the agency reasoning repeats the error the Court identified in State Farm. 144In Regents, the Acting Secretary similarly rescinded the whole DACA program without addressing the rationale for rescission of the forbearance component. 145As a result, the Court found the rescission arbitrary and capricious. 146

While the Acting Secretary's inadequate explanation forms the strongest legal basis for the Court's conclusion, Justice Roberts also asserted that the Acting Secretary failed to address whether there was "legitimate reliance" on the DACA memorandum and program. 147He continued, citing Encino, stating "when an agency changes course, as DHS did here, it must "be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.'" 148To ignore such matters would be arbitrary and capricious, and that is what the Acting Secretary did. 149The government contended in Regents that the Acting Secretary was not required to consider reliance interests, because the DACA program "conferred no substantive rights." 150Justice Roberts dismissed this argument summarily, stating that no legal authority establishes the preclusion of reliance interests, and while these disclaimers may be pertinent in considering the strength of reliance interests, the consideration must be undertaken by the agency in the first instance. 151Respondents in Regents gave many examples of the alleged reliance interests at play, including enrollment in degree programs, embarkment on careers, starting of businesses, purchasing of homes, marriage, and family investment. 152Justice Roberts deemed these reliance interests "certainly noteworthy concerns, but ... not necessarily dispositive." 153The Court's final position on these reliance interests was that, even if DHS determined the value of the new policy outweighed the reliance interests, the agency was still required to consider them. 154

Regents is a natural evolution from Encino and represents a meaningful expansion of the Supreme Court's reliance interest jurisprudence, as it can be read to substantively expand the scope of reliance-interest application. 155Foremost, the invoking of reliance interests is not dependent on a rulemaking's conferral of substantive rights. 156This is important because it precludes a defense against reliance-interest consideration on purely procedural grounds. Moreover, the Court demonstrated that reliance interests go beyond the simple query of how long the regulation has stood; 157 reliance interests are topical, case-specific inquiries that agencies are required to assess, regardless of their effect on the final decision. 158As illustrated in this Part, the Supreme Court's treatment of reliance interests has evolved considerably, particularly over the last two decades. The doctrine has evolved from general notions of fairness and estoppel 159to explicit mention in Smiley, 160to mentions by the majority, concurring, and dissenting justices in Fox, 161 to full-on application in Encino, 162 to proliferation in Regents. 163 Despite the Supreme Court's long history of lip service on the need for reliance-interest considerations, reliance interests are finally positioned to serve as a meaningful element of hard-look judicial review.

### AT: Sua Sponte Now

#### 3. It’s only been used to affirm previous rulings---the plan’s different because it reverses prior law

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One exception is that courts might raise new issues sua sponte only to affirm the trial court. 157 The reason is that merely affirming a lower court based on different reasoning would not waste judicial resources because no further proceedings would be necessary and the lower court arrived at the correct judgment anyway. 158 Another court has laid out four notable exceptions to the general rule for when a court can raise issues sua sponte for the first time on appeal. 159 The First Circuit, in United States v. Krynicki, 160 heard an appeal where the government raised an argument that was not raised below in the trial court. 161 The court acknowledged the general rule but also acknowledged Singleton, which allows courts to consider issues for the first time on appeal in "exceptional cases or particular circumstances." 162 The court outlined four reasons for its departure from the general rule. 163

#### 4. Previous departures have been pro-defendant

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As it happens, every one of the Court's controversial rulings and departures from sound common law adjudication benefitted the defendants. Its decision to review the case extended the precedential significance of the Second Circuit's decision. Its restatement of the rule of reason added the implication that the defendant wins if it can show any procompetitive benefit, no matter how insignificant and no matter how great the harm to competition caused by its conduct. The Court's requirements that relevant markets must be proven in all cases involving vertical restraints and that the market must include both sides of a transaction platform put an additional and very likely difficult and often unnecessary burden on plaintiffs. Its requirement that harm to competition in a transaction-platform case requires proof of two-sided prices above competitive levels or of reduced output places what can be an impossibly difficult burden of proof on plaintiffs and rejects the likely possibility that harm to competition can in some transaction-platform cases be shown by other kinds of proof. Finally, its readiness to credit defendant's purported justification without serious factual inquiry makes defending against claimed justifications very difficult.

#### 4. It’s about issue raising, not new grounds for decision

Michael J. Donaldson 17, Partner at Burnet, Duckworth & Palmer, LLP, LL.M. from Columbia University, LL.B. from the University of British Columbia, B.A. from Queen's University, “Justice in Full is Time Well Spent: Why the Supreme Court Should Ban Sua Sponte Dismissals”, Quinnipiac Law Review, Volume 36, Lexis

How can this be? Appearances matter tremendously in court. The legal system shouldn't just be fair; it should also appear to be fair. As Lord Chief Justice Hewart put it in the famous Sussex Justices case, "justice should not only be done, but should manifestly and undoubtedly be seen to be done." 4 This article is about a troubling practice in which some federal district courts sacrifice due process in the name of efficiency and, with the explicit blessing of their circuit courts of appeals, dismiss supposedly hopeless cases without giving the plaintiff notice of the impending dismissal or an opportunity to be heard.

There is a vast difference between a court raising an issue sua sponte and the court deciding an issue sua sponte - by which I mean deciding an issue that only the court has raised, without hearing from the parties on that issue. 5 This article deals only with the latter. Is it ever appropriate for a district court, after identifying what it sees as an important issue the parties have missed, to decide that issue without first giving the parties notice and an opportunity to be heard? This is an issue on which the circuit courts are split 6 and on which the Supreme Court has so far declined to give a clear answer. 7

#### This is about lower court sua sponte, NOT SCOTUS---I read these lines verbatim in CX.

[Kentucky in green].

1AC Shannon 12 (Bradley Scott, Professor of Law, Florida Coastal School of Law, “Some Concerns About Sua Sponte,” 2012, <https://kb.osu.edu/bitstream/handle/1811/75482/OSLJ_Furthermore_V73_027.pdf>, DOA: 11-13-2021) //Snowball //footnote included, denoted by brackets

Quietly, and without much fanfare, sua sponte2 decisionmaking has become de rigueur. The Supreme Court of the United States has shown a particular interest in sua sponte decisionmaking, having confronted this issue in a number of recent cases.3 [BEGIN FOOTNOTE 3] 3 See, e.g., Wood v. Milyard, 132 S. Ct. 1826, 1835 (2012) (reversing a court of appeals’ sua sponte dismissal of a habeas corpus proceeding for expiration of the applicable statute of limitations); Greenlaw v. United States, 128 S. Ct. 2559, 2562 (2008) (vacating a court of appeals’ sua sponte increase in a criminal defendant’s sentence); Day v. McDonough, 547 U.S. 198, 202 (2006) (affirming a district court’s sua sponte dismissal of a habeas corpus proceeding for expiration of the applicable statute of limitations). [END FOOTNOTE 3] Further evidence of its growing popularity can be found in Federal Rule of Civil Procedure 56, which was recently amended to expressly approve of sua sponte consideration of summary judgment.4 For the most part, this movement toward a greater use of sua sponte decisionmaking has generated little opposition or scholarly criticism.5

### AT: Yes Test Case

#### A ‘test case’ is only half the equation---there must both be an available litigant and they have to make the precise legal holding of the plan. A similar case is not a perfect case, which means the Court will have to decide it sua sponte.

Rosemary Krimbel 89, JD at the Chicago-Kent College of Law, “Rehearsing Sua Sponte in the U.S. Supreme Court: A Procedure for Judicial Policymaking”, Chicago-Kent Law Review, Volume 65, Lexis

Indeed, the Court hears only a small proportion of the thousands of cases that request Supreme Court review. 159 Which cases the Court chooses to decide indicates its policies and priorities as well as the extent of its influence upon the political discourse both in our government and among citizens. Despite this considerable discretion, the Court is still limited to the cases and issues which the litigants choose to present. This limitation assures that an activist Court may not reach out and decide just any issue of its choice. In other words, even an activist Court must bide its time waiting for the "perfect" case.

This control of the issues by the litigants is central to our adversarial system of law. The Constitution embodies the adversarial system in section two of Article III which extends the judicial power to all "Cases" or "Controversies." 160 It does not extend the power to all "issues of interest to the Justices." In addition to this constitutional constraint on the Court's jurisdiction, the Court has created rules of self-restraint, including the doctrine of advisory opinions, ripeness, standing, and mootness. 161 Both the constitutional limitation of case or controversy and the [\*942] judicially created doctrines comport with the Court's duty to avoid constitutional questions unless necessary. 162

Since the presentation of issues and arguments to the Court are the litigants' responsibility, rehearing requests should also be their responsibility. The Court should be limited to very specific grounds before it can request rehearing upon its own motion. It is the litigants' responsibility to point to the Court's error and request rehearing in cases where the Court has misunderstood specific facts or where the Court has overlooked binding authority. In either of these situations, it will be obvious to the litigants that the Court has erred, and likewise, the litigants will know to request rehearing.

Had the litigants requested reargument in Patterson to consider the Runyon issue, the Court could have granted the request with little fanfare. The litigants, however, did not raise the Runyon issue. 163 This lack of litigant initiative troubled the dissenting Justices, one of whom stated: "the adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review." 164

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

The greater problem with unrestricted sua sponte rehearing is the possibility that the procedure will be used by an activist Court or Justice to further a personal agenda. 165 Justice Kennedy's statement in Patterson [\*943] that "some Members of this Court believe that Runyon was decided incorrectly" 166 could support the argument that the Rehnquist Court has such an agenda regarding civil rights. Such argument, however, is mere speculation. The real problem with unregulated sua sponte rehearing is that the Court is perceived as having a personal agenda whether it does in fact have one or not.

When the parties choose the issues, there is little opportunity for judges to pursue their own agendas and, as a consequence, the proceedings are not only fairer, but are perceived as fairer. 167 As Justice Blackmun said in his dissent to the Patterson memorandum decision that requested rehearing *sua sponte*:

I am at a loss to understand the motivation of five Members of this Court to reconsider an interpretation of a civil rights statute that so clearly reflects our society's earnest commitment to ending racial discrimination, and in which Congress so evidently has acquiesced. I can find no justification for the bare majority's apparent eagerness to consider rewriting well-established law. 168

Such commentary, especially from a member of the Court, raises questions as to the impartiality of the Court's actions, and such speculation tarnishes the Court's legitimacy. Litigant control of the issues is important to satisfy not only the parties, but society as well. As stated by the Supreme Court: "[J]ustice must satisfy the appearance of justice." 169 When the Court solicits issues that the litigants have not presented, the Court erodes its credibility and trespasses on the soul of the adversarial system.

#### The plan starts outside the trial level of courts---that creates incorrect fact patterns

Joan Steinman 12, Distinguished Professor of Law at the Chicago-Kent College of Law, Illinois Institute of Technology. A.B. from the University of Rochester, J.D. from Harvard University Law School, “Federal Courts, Practice & Procedure: Article: Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts' Resolving Issues in the First Instance”, Notre Dame Law Review, Volume 87, Lexis

Several justifications have been argued in support of the general rule that an appellate court should not address issues that the district court did not address or at least have the opportunity to address by virtue of presentation by the parties. One could take the stricter position that appellate courts should review only the decisions made by the district court judge and not consider even issues that the parties presented to the district court but that the district court did not address. Consider the institutional and functional justifications for each of these positions.

The general rule maintains the trial as the "main event." 331 Limiting appellate courts to issues that the district court did address, or that the district court at least had the opportunity to address, has been thought to encourage parties to raise their issues and voice their objections in the trial court, where the judge can take immediate steps to avoid or correct party errors or proposed conduct by the court itself that would be erroneous. 332 Party motions and objections also provide the occasion for trial courts to explain their rulings. All of this assists appellate courts in their work. The general rule also has been championed as avoiding prejudice to the adverse party that might result from the belated raising of an objection or an issue, when it is too late for the adverse party to respond effectively with additional evidence or argument. 333 It avoids reversals of a trial judge on the basis of points that were not brought to his or her attention. And it helps to lead to a trial that is complete and the record of which is complete, so that the appellate court has a fully developed record to consult when it reviews the issues that the parties bring to it. The general rule also limits the number and scope of appeals by limiting the issues that the appellate court will entertain and, insofar as it operates, it ensures that every issue that comes before an appellate court has been teed up for, if not actually passed upon by, a trial court.

Furthermore, even assuming that federal appellate courts pursue worthy goals when they take the first stab at issues, practical problems, as well as structural issues, are raised by appeals courts' addressing issues that were not raised before or ruled upon in the trial court. Some problems derive from appellate courts' procedures: They are not built to take new evidence, for example, though they occasionally do so. Other problems derive from appellate courts' presumptively inferior competence to do certain tasks: They are less experienced than trial judges at making fact-findings and in making discretionary judgments of the kind that trial judges often have to make. They are perceived to be inferior to trial courts in resolving questions of fact, particularly those that depend on witness credibility. 334 Thus, at the level of function, it is questionable for appellate courts to reach new issues that would require fact-gathering, initial fact-finding - particularly that which must be based in whole or in part on oral testimony - or the exercise of discretion as to certain kinds of issues.

### AT: Link Turn

#### Bypassing fact-specific ruling makes the court look unhinged, creating cascading fear of revision in other areas

Daniel M. Tracer 15, JD from the Benjamin N. Cardozo School of Law, General Attorney for the Offices, Boards and Divisions at the Department of Justice, Degree from Yeshiva University, “Stare Decisis in Antitrust: Continuity, Economics, and the Common Law Statute”, DePaul Business and Communication Law Journal, Volume 12

I. Introduction

Students of introductory antitrust courses are exposed to a body of doctrine characterized by distinctly sharp and disjunctive contours. Unlike many other areas of the law, the body of federal antitrust law that has developed over the past 120 years is marked by numerous seemingly sudden adoptions and abandonments of substantive rules of law. In past decades, the Supreme Court has not hesitated to overturn antitrust doctrines that were, in its view, no longer consistent with sound competition policy or economic theory. What has resulted is a historical continuum of case law adopting certain rules and tests only to have those tests wiped away years or sometimes decades later. Despite the strong general judicial policy in favor of stare decisis - the norm of adhering to past precedent when approaching newer cases - the Supreme Court has expressly and impliedly opted to revise and reexamine the antitrust laws on numerous occasions. 1 While antitrust law's need to keep up with the rapidly changing pace of business and technology may require it to possess an enhanced degree of flexibility, it cannot be denied that a large break with stare decisis tends to erode the appearance of the rule of law and leave business entities hopelessly uncertain.

Following in the footsteps of the Supreme Court, scholars now take it for granted that stare decisis has a somewhat modified application in the area of antitrust. Though certain notable exceptions have persisted in the case law, scholars and practitioners are no longer sure that any particular rule or doctrine will survive the next grant of certiorari. While some scholars have highlighted the benefits and appropriateness of such a modified stare decisis in the antitrust realm, others have cited this trend with disapproval. Notable names in the field rely on this tendency to direct the crosshairs and divine what now-passe antitrust doctrine may be up next for retirement. 2

Despite the widespread acknowledgement of this trend by both the Court and commentators, the idea of a modified stare decisis in the realm of antitrust remains to be fully addressed on its own terms. For one thing, the decision to override the normal rigors of stare decisis in any field is serious enough to warrant additional scrutiny and evaluation. Moreover, to the extent that the Supreme Court has grappled with this point - both explicitly and implicitly - the Court has failed to present a single and coherent justification for this practice or to apply the practice in a uniform manner. In fact, the Court has even contradicted itself, at times applying the strong form of stare decisis associated with statutory interpretation, while other times treating the Sherman Act as an open-ended common law statute. This Article tackles the question of stare decisis in antitrust by bringing together and analyzing what the Court has actually said - and to what ends - in major antitrust cases over the last few decades in the process of overruling formerly controlling legal rules. In doing so, the Article tracks the major relevant Supreme Court cases, isolates the various justifications for departures from stare decisis in antitrust, and gathers alternative understandings and insights into this trend. 3 In addition, this Article critically considers the strengths and weaknesses of those justifications and proposes ways in which antitrust jurisprudence may avoid some of the problems that stem from a perceived lack of stare decisis and the benefits associated therewith. 4

In particular, this Article's analysis focuses on the distinction between abrupt overrulings based upon new economic theory - such as finding pro-competitive benefits in places where none were recognized earlier - and overrulings based upon doctrinal refinement. The latter occur, for example, when the Supreme Court acts to ensure that the legal scheme of antitrust continues to function in a smooth manner consistent with the goals of the antitrust laws. This Article explores the Supreme Court's understanding of the Sherman Act as a "common law statute" 5 and the history of that adage. The Article concludes that it is undesirable to overrule established antitrust precedent without adequately addressing the stare decisis concerns generally recognized in common law fields. Likewise, it is inappropriate to rely on the "common law statute" maxim to hastily displace precedent on the sole basis of alternative economic understandings.

#### The effect isn’t contained to antitrust---disruption of reliance creates systemic uncertainty about the durability of law that chills investment throughout the economy

Henry J. Dickman 20, J.D. from the University of Virginia School of Law, Law Clerk on the U.S. Court of Appeals, Former Research Intern at the Heritage Foundation, BA in Accounting and Economics from the University of Notre Dame, “Conflicts of Precedent”, Virginia Law Review, Volume 106, October 2020, Lexis

iv. Reliance

Protection of the reliance expectations held by would-be litigants is a central rationale for why courts adhere to their past rulings. It fosters the stability needed to safeguard economic interests and also promotes fundamental rule-of-law values. 142 When a court overrules its own precedent, that generates two distinct costs. First, parties affected by the new rule face the transition costs of adapting to and understanding the new legal rule. 143 Second, when courts frequently overturn precedent, they increase systemic costs based on the general uncertainty resulting from shifting rules. 144 For example, investment and risk-taking may generally be over-deterred as a result of the lack of clarity on the durability of legal rules. 145 This suggests that reliance costs are minimized by strong adherence to past precedent.

### AT: Winner Win

#### 2. Positive reactions are only in the long-run---the link outweighs.

Ura 13. Joseph Daniel, Assistant Professor, Department of Political Science, Texas A&M University, Backlash and Legitimation: Macro Political Responses to Supreme Court Decisions, American Journal of Political Science July 19 2013

This paper offers a first attempt to develop and assess the competing predictions of the thermostatic model of public opinion and legitimation theory for the likely responses of public mood to Supreme Court decision-making. While thermostatic theory predicts a negative relationship between the ideological direction of Supreme Court decisions and changes in public mood, legitimation theory predicts that changes in public mood should be positively associated with the ideological content of the Court’s actions. To assess these rival expectations, I estimated a model of the dynamic relationship between changes in public mood and Supreme Court decisions controlling for policy choices made by Congress and the president as well as the state of the macro economy. The results show that both thermostatic and legitimizing forces bear on the response of public mood to the Supreme Court. The model predicts that the public’s initial response to changes in aggregate Supreme Court liberalism is negative. When the Supreme Court hands down salient decisions in one ideological direction, public mood shifts in the opposite direction in the short run, which is consistent with thermostatic accounts of public mood. However, the model predicts that this negative response ultimately decays and is replaced by a positive response to Supreme Court decisions. Aggregate Supreme Court liberalism is significantly and positively associated with liberalism in public mood over the long run. Though the model shows mood to be a reasonably slowly adjusting time series, there is significant evidence that public mood shifts towards the ideological position of the Supreme Court.

### AT: Plan Solves

#### 2. It’s a random Republican from Wyoming citing…nothing!---I’ll insert it.

[Kentucky in green].

**Barrasso**, 21 (John Barrasso, John Anthony Barrasso III is an American physician and politician serving as the senior United States Senator from Wyoming. graduating Phi Beta Kappa in 1974 with a Bachelor of Science degree in biology. He received his M.D. degree from Georgetown University School of Medicine in 1978. He conducted his residency at Yale Medical School in New Haven, Connecticut., 4-30-2021, accessed on 5-24-2021, U.S. Senate Committee on Energy and Natural Resources, "Barrasso Op-Ed: China's Goal is Domination, Not Cooperation. It's Playing Biden and America for Fools.", https://www.energy.senate.gov/2021/4/barrasso-op-ed-china-s-goal-is-domination-not-cooperation)//Babcii

#### 3. China can’t afford to weaponize semiconductors.

Terry Daly & Jordan Schneider 21, Senior Fellow in the Council on Emerging Market Enterprises at The Fletcher School of Law and Diplomacy at Tufts University, M.A. in International Economics from The Fletcher School of Law and Diplomacy at Tufts University; Adjunct Fellow in the Technology and National Security Program at the Center for a New American Security, China Technology Analyst at The Rhodium Group, M.A. in Economics from the Yenching Academy at Peking University, “Will China Retaliate Against U.S. Chip Sanctions?”, Lawfare, 07-16-2021, <https://www.lawfareblog.com/will-china-retaliate-against-us-chip-sanctions>

Over the course of the trade war with the U.S., the Chinese government has been surprisingly reluctant to escalate economically on Western firms. In the past few years, Beijing has certainly heightened border disputes and its diplomatic rhetoric. However, aside from matching Trump’s tariffs during the height of the trade war, the Chinese government has largely kept its powder dry. Take, for instance, the recent controversy over Xinjiang cotton. Initially, Chinese state media escalated grassroots criticism of Western apparel brands for criticizing forced labor. But aside from some frivolous safety screenings of apparel imports, Western states haven’t taken actions against Chinese firms. Similarly, while domestic anti-monopoly actions have dramatically affected the prospects of firms like Ant Financial and Meituan, companies like Apple, which faces anti-monopoly challenges in the West, have largely been left unscathed.

Why has the Chinese government not taken some of the aggressive measures outlined above in retaliation for the United States’ actions on Huawei and ZTE? Fundamentally, China still needs foreign investment and, more importantly, foreign technology. Both investment and foreign technology are necessary for China to upgrade its domestic industry and talent base. China has no qualms about blocking foreign companies from operating in China when domestic firms are at the precipice of challenging Western firms technologically. All foreign companies currently operating or selling into the PRC have already passed a cost-benefit analysis of Beijing believing that it’s better for China’s long-run economic and technological progress if the firm operates. Given the importance that CCP leadership has put on self-reliance, economic bureaucrats believe that chip firms currently doing business in China are, for the time being, more useful than not to keep around.

#### 4. No REM cut-off AND no impact

--not that rare we’d adapt

--tons of reserves in US, brazil, Canada, Australia, US

--impact is CCP propaganda

--nobody is worried

--did it in 2010 no impact

--smugglers export

--industry shift to use less

--reserves mean military is fine

James Vincent 19, Reporter, AI and Robotics at the Verge. "Rare Earth Elements Aren’t The Secret Weapon China Thinks They Are”, The Verge, 5/23/2019, https://www.theverge.com/2019/5/23/18637071/rare-earth-china-production-america-demand-trade-war-tariffs

One particularly chaotic option would be a ban on the export of rare earths — raw materials that are crucial for electronics. These elements are produced mostly in China, and used in the US for everything from electric cars to wind turbines, smartphones to missiles.

Chinese state media have backed the idea, calling America’s dependence on Chinese rare earths “an ace in Beijing’s hand.” President Xi Jinping hinted at that possibility when he visited a rare earth facility at the beginning of this week. (As a ministry spokesperson commented with what seemed like a nod and a wink: “It is normal that the top leader investigates relevant industrial policies. I hope everyone can interpret it correctly.”)

Rare earth elements are sometimes described as the “vitamins of chemistry,” as small doses produce powerful salutary effects. A sprinkle of cerium here and a pinch of neodymium there makes TV screens brighter, batteries last longer, and magnets stronger. If China suddenly shut off access to these materials, it would be like rewinding the tech industry back a few decades. And no one wants to ditch their iPhone and go back to a BlackBerry.

Experts in the field, though, are much less concerned about such a chilling scenario. They say that while a restriction on rare earth exports would have some immediate adverse effects, the US and the rest of the world would adapt in the long run. “If China really cuts off supply entirely then there are short term problems,” Tim Worstall, a former rare earth trader and commodities blogger tells The Verge. “But they’re solvable.”

Far from being an ace in the hole, it turns out rare earths are more of a busted flush.

The reasons for this are numerous, and span geography, chemistry, and history. But the most important factor is also the simplest to explain: rare earths just aren’t that rare.

A group of 17 elements, rare earths are what the USGS (United States Geological Survey) describe as “moderately abundant.” That means they’re not as common as oxygen, silicon, and iron, which make up the vast majority of the Earth’s crust, but some are on a par with elements like copper and lead, which we don’t consider exotic or scarce. Significant deposits exist in China, but also Brazil, Canada, Australia, India, and the United States.

The challenge with producing rare earths (and the reason they were given their name) is that they’re rarely found in concentrated lumps. These are chemically sociable elements, happy to bond with other compounds and minerals and tumble about in the dirt. This makes extracting rare earths from common earth like convincing a drunk friend to leave a raucous party: a lengthy and harrowing procedure. As Eugene Gholz, a rare earth expert and associate professor of political science at the University of Notre Dame puts it: “Once you take it out of the ground, the big challenge is chemistry not mining; converting the rare earths from rock to separated elements.” Unlike convincing that drunk friend, though, this process involves a series of acid baths and unhealthy doses of radiation. This is one of the reasons that countries like the US have been more or less happy to cede production of rare earths to China. It’s a messy, dangerous business, so why not let someone else do it? Other factors also helped, including lower labor costs and the existence of Chinese mines that produce rare earths as a byproduct. China’s sway in the rare earths market is a fairly recent state of affairs. Between the 1960s and the 1980s, the majority of the world’s supply was actually produced in America, from the Mountain Pass mine in California. The mine’s processing plant was shut down in 1998 after problems disposing of toxic waste water, and the whole site was mothballed in 2002. It’s only from the 1990s onward that China has shouldered the bulk of production, along with the associated environmental costs. (In 2010, the Chinese government estimated that the industry was producing 22.05 million tons of toxic waste each year.) An oft-referenced figure is that China now produces some 95 percent of the world’s rare earths, but Gholz says this statistic is “wildly out of date.” The USGS pegs China’s part as closer to 80 percent.

That’s still a substantial chunk of the world’s supply, though, and with no doubt that these are important commodities, the question is: what happens if China does cut off the US?

Luckily, we have a very good idea of what would happen next because it’s already happened before. Back in 2010, China stopped exports of rare earths to Japan following a diplomatic incident involving a fishing trawler and the disputed Senkaku Islands. Gholz wrote a report of the fallout from this incident in 2014, and found that despite China’s intentions, its ban actually had little effect.

Chinese smugglers continued to export rare earths off the books; manufacturers in Japan found ways to use less of the materials; and production in other parts of the world ramped up to compensate. “The world is flexible,” says Gholz. “When you try to restrict supplies to politically influence another country, people don’t give up, they adapt.”

He says that although his report examined the rare earth industry as it was in 2010, the “conclusions are pretty much the same” in 2019.

If China did turn off the rare earth tap, there would be enough private and public stockpiles to supply essential sectors like the military in the short term. And while an embargo could lead to price rises for high-tech goods and dependent materials like oil (rare earths are essential in many refining processes), Gholz says it’s highly unlikely that you would be unable to buy your next smartphone because of a few missing micrograms of yttrium. “I don’t think that’s ever going to happen. It just doesn’t seem plausible,” he says.

Even though a ban on rare earth exports is just speculation at this point, companies have begun to preempt any new Chinese restrictions. American chemical firm Blue Line Corp and Australian rare earth miner Lynas have already proposed new production facilities in the US, and rare earth stocks around the world have surged in response to the threat.

In the event of a ban, one of the most important backstops would be America’s Mountain Pass mine. Although the mine was closed after Chinese rare earths drove down prices, the facility is intact and resumed production last January. Recent estimates suggest it’s already supplying one-tenth of the world’s rare earth ores (though not their processing), and in the event of an embargo, it would be possible to bring Mountain Pass back up to speed.

### Turns Case

#### The link alone turns the case---the perception of arbitrariness crashes business certainty AND clarity for enforcers---both nuke solvency

A. Douglas Melamed 20, Professor of Law at Stanford Law School, JD from Harvard Law School, BA from Yale University, “Antitrust Law and Its Critics”, Antitrust Law Journal, Volume 83, p. 284-286

Perhaps more important, the institutions of antitrust law are not well suited to address multiple and often conflicting objectives. Antitrust law is enforced on a case-by-case basis. Were antitrust law to serve multiple objectives, it would need criteria to guide decisions in the many instances when those objectives would conflict. There is, however, no algorithm for weighing inequality or political power, on the one hand, against economic welfare, on the other.98 There is not even a common metric for measuring them. Absent such a metric or algorithm, antitrust decisions would necessarily be arbitrary and perceived as arbitrary.

That would have three serious costs. First, if antitrust decisions are perceived as arbitrary, the widespread legitimacy of antitrust law would erode. The antitrust laws were first passed in 1890, and the most important statutory provisions are more than 100 years old. It is not an accident that populist critics have expressed their concerns largely in antitrust terms. The perpetuation of that legitimacy cannot be taken for granted.

Second, if antitrust decisions are perceived as arbitrary, they will be more easily subject to regulatory capture because there will not be seemingly principled bases to cabin antitrust decision-making. The beneficiaries of a regime susceptible to capture are likely to be the powerful, not the powerless. Ironically, therefore, adding equality and dispersion of economic and political power to the objectives of the antitrust laws could prove detrimental to those very objectives.

The third and perhaps most important cost is rooted in the general application and decentralized enforcement of antitrust law." Antitrust law applies to almost all businesses, and it can be enforced by at least 52 government entities and any entity that has been harmed by an antitrust violation. Antitrust law thus has a widespread effect on business conduct throughout the economy. Its principal value is found, not in the big litigated cases, but in the multitude of anticompetitive actions that do not occur because they are deterred by the antitrust laws, and in the multitude of efficiency-enhancing actions that are not deterred by an overbroad or ambiguous antitrust law.

If antitrust law is perceived as arbitrary, it will provide a far less certain guide to business conduct. The effect might be disregard of antitrust law in circumstances in which it seems unpredictable. More likely, the effect will be excessive caution by businesses uncertain about the consequences of aggressive or novel forms of competition. The effectiveness of antitrust law in promoting competition and economic welfare will be seriously impaired.

#### Warming turns every impact

Mark Nevitt 21, Associate Professor of Law at the Syracuse University College of Law, “Is Climate Change a Threat to International Peace and Security?”, Michigan Journal of International Law, 42 Mich. J. Int'l L. 527, Lexis

I. Introduction

We must make no mistake. The facts are clear. Climate change is real, and it is accelerating in a dangerous manner. It not only exacerbates threats to international peace and security; it is a threat to international peace and security. 1

The climate-security century is here. Both the United Nations Intergovernmental Panel on Climate Change ("IPCC") and the U.S. Fourth National Climate Assessment ("NCA") recently sounded the alarm on climate change's "super-wicked" and destabilizing security impacts. 2Scientists and [\*528] security professionals alike reaffirm what we are witnessing with our own eyes: The earth is warming at a rapid rate; climate change affects international peace and security in complex ways; and the window for international climate action is slamming shut.

Yet how did we respond to these climate alarm bells? We did little, largely shrugging a collective global shoulder in response to the loss of life and bleak scientific reports. U.S. climate leadership slithered away from the world stage, announcing its withdrawal from the Paris Climate Accord. 3Brazil's leadership refused to enforce environmental forest regulations, resulting in devastation to the Amazon rain forest - the vital and purifying "lungs of the planet." The Trump Administration continued massive environmental regulatory rollbacks, even dismissing its leading climate scientists. 4Despite a temporary coronavirus-driven carbon crash, the Global Greenhouse Gas ("GHG") levels are the highest in recorded human history. 5The Arctic ice caps melted at an extraordinary rate. Australia and California burned.

Today, there is an ever-widening gap between our understanding of climate change's threats and the international community's willingness to respond to these threats. The IPCC estimates, for example, that the world has a shrinking window - approximately one decade - to take massive substantive action to reduce GHG emissions or else face the wrath of an angry, sick planet. 6Failure to close the emissions gap will result in enormous, climate-driven disruption. 7

[\*529] Beyond the global emissions gap, there is an ever-widening global governance gap. As climate change destabilizes the physical environment, it also destabilizes existing institutions, forcing us to look at their role in combatting the climate crisis. Indeed, we must heed earlier calls to action that all "relevant organs" within the United Nations intensify their efforts to face the climate challenge. 8Failure to take substantive international action now will result in further physical destabilization and the potential loss of four nations. 9After all, climate change is legally and politically agnostic: It will continue to destabilize and destroy our physical environment irrespective of our international governance response.

The Security Council ("Council") is assuredly one such "relevant organ." After all, the Council possesses relatively expeditious and broadly delegated authorities to take immediate climate action today. Indeed, the Council is empowered with powerful legal tools in service of its mission to uphold "the maintenance of international peace and security." 10In executing this role, the Council acts on behalf of all 193 Member nations - who agree [\*530] to be bound by the Council's actions. 11The Council's authority and expertise in international security matters can serve a gap-filling, complementary role that works in concert with ongoing climate efforts at the United Nations Framework Convention on Climate Change ("UNFCCC"), Economic and Social Council ("ECOSOC"), and the General Assembly. 12As Professor Richard Lazarus has explained, climate change is unlike any other problem facing humanity - it is truly a "super-wicked" problem that cuts across many disciplines. 13To meet this super-wicked problem, innovative legal governance solutions are required.

Of course, any Council climate action must overcome current political paralysis and criticism that climate change is outside the Council mandate. But the stakes for Council climate inaction are also high. 14Failure to comprehensively address climate change presents its own unique costs, particularly as climate change threatens the territorial integrity and very sovereignty of several small island nations. The U.N. Charter has sought to uphold the principle of sovereign equality of all its Members for the past seventy-five years. In doing so, it has played a critical, stabilizing role in shaping the post-World War II international order. But climate change is the ultimate physical and institutional destabilizer, swallowing nations' territorial integrity whole, forcing us to look at the international governance landscape with fresh eyes. Indeed, the Council's indifference to nation extinction is fraught with its own legitimacy and credibility costs - can the Council afford to stand by as climate change swallows nations whole?

To be sure, any Council climate action faces political headwinds. In part, this can be traced to the Council's institutional design: Any member of the Permanent Five ("P5") possesses veto power over any proposed Council action. 15Meanwhile, P5 membership (the United States, Russia, the United [\*531] Kingdom, France, and China) remains frozen in time, despite calls for membership expansion to better reflect modern geopolitical and economic realities. Further complicating matters, the Council is comprised of the world's worst climate offenders who emit the most GHG emissions. 16

Yet the Council has been, in many ways, a dynamic institution since the end of the Cold War, at times even demonstrating a willingness to address the root causes of global instability. For the Charter's first forty-five years, its original premise of a robust "collective security" agenda was largely thwarted by Cold War political realities. Council stonewalling gave way to a rejuvenated "Council 2.0" commencing in 1990 with Council action against Iraqi aggression and follow-on peacekeeping and peacebuilding missions. Since then, the Council has expanded its aperture for action to address an increasing menu of non-traditional security threats to include global health crisis (Ebola and, belatedly, COVID-19), the spread of weapons of mass destruction, and the underlying causes of conflict and human suffering. 17

This article argues that climate change's destabilizing impacts require us to look at existing international governance tools at our disposal with fresh eyes. As such, Council climate action cannot and should not be dismissed out-of-hand. As conflicts rise, migration explodes, and nations are extinguished, how long can the Council remain on the climate sidelines? 18Hence, my call for a re-conceptualized "Council 3.0" to meet the climate-security challenges this century.

This article proceeds as follows. In Part II, I describe and analyze the current state of climate science and the climate-security threats facing the world. This includes an analysis of the Council's unique role and responsibility to maintain international peace and security within the U.N. Charter system. In Part III, I describe how the Council's agenda has evolved in recent years to include a focus on non-traditional security threats to include climate change. 19In doing so, I offer a possible roadmap for Council climate [\*532] action, showcasing how climate change's existential threat to the territorial integrity and sovereignty of four Pacific Small Island Developing States ("SIDS") will stress and test Council engagement on climate change. 20Part IV addresses the challenges and opportunities to Council climate action. Part V argues that the Council should use its authority under article 39 of the U.N. Charter to affirmatively declare climate change a threat to international peace and security. Doing so activates a series of measured, gradually escalating steps that the Council should take to address the growing international climate governance gap. Rather than dismissing Council climate-involvement, I argue that we should adopt an "institutional risk allocation" approach where numerous institutions address climate change in a holistic, complementary way. 21This will require a rejuvenated and reimagined "Council 3.0" that requires a normative reconceptualization of the Council's role in upholding peace and security. Part VI concludes.

II. Climate Change Meets International Peace and Security

A. Climate Change's Destabilizing Security Impacts

We are entering the climate-security century. As climate change destabilizes the physical environment, it also destabilizes existing governance structures. 22The destabilizing effect of climate change forces us to reexamine the root causes of instability and the accompanying tools at our collective disposal required to combat the climate crisis. According to IPCC and a near-universal scientific consensus, climate change is "extremely likely" caused by human activity. 23And a growing number of scholars now persuasively argue that we must broaden our definition of security to encompass [\*533] climate change, pandemics, and non-traditional threats that have debilitating impacts on health and human security. 24

Consider just a few recent examples of climate change's destructive path. In the past two years, massive wildfires destroyed large swaths of Australia and California. 25Hurricanes Michael and Florence ravaged the coastlines of Florida and North Carolina. 26Water shortages, food security, and crop instability - all exacerbated by climate change - contributed to a rapidly deteriorating security situation in many developing nations. 27Scholars now make data-driven, empirical connections between climate change and increases in violent conflict. 28Both climate scientists and national security professionals forecast a dangerous world increasingly defined by climate change. 29Consider the following four ways that climate change impacts international peace and security:

\* Extreme Weather. The American Meteorological Society recently found that anthropogenic climate change increased the likelihood and severity of fifteen out of sixteen recent extreme weather events. 30As climate scientists refine their models, we [\*534] will be able to predict with greater certainty the future likelihood of extreme weather events and better pinpoint their size, location and devastating effects.

\* Climate migrants. 31We have witnessed the rise of cross-border climate change migrants that are fleeing their homes in response to climate-exacerbated drought and other environmental hazards. Future climate migrant estimates look bleak: one study found that two-thirds of the world's population faces severe water shortages, a driver of cross-border human migration. 32The Syrian refugee crisis, for example, was preceded by a massive, climate-exacerbated drought that saw internal displacement from rural areas to cities within Syria. This created the conditions for political unrest that quickly spread outside Syria's borders. 33Yet there is a widening international governance gap to address this pending explosion in climate migration. 34Will the Council play a role in mitigating the effects on the hundreds of millions of climate migrants anticipated this century?

\* Climate Change and Armed Conflict. Studies predict an increasingly dangerous, Hobbesian world where climate-driven food insecurity, resource wars, and physical destabilization lead to armed conflict, violence, and chaos. 35Scholars now demonstrate a linkage between climate change's impacts and violent conflict. 36The Council specifically connected climate [\*535] change's impacts to a conflict area in a series of recent Security Council Resolutions. This reinforces the Council's competence in tackling threats to international peace and security in conflict areas. 37Will the Council build upon these efforts in addressing climate change's role in resource wars and conflict?

\* Nation Extinction. Scientists now predict that four Pacific Small Island Developing States will be uninhabitable by mid-century due to climate change-driven sea level rise and wave-driven flooding. 38These nations will lose large swaths of their territory, potentially leading to wholesale abandonment. Will the Council - which has the express responsibility to maintain peace and security - stand by while nations lose their territorial integrity and, potentially, their sovereignty? 39

These four examples - extreme weather, climate migration, armed conflict, and nation extinction - are a mere snapshot of climate change's security impacts this century.

Despite these threats, our international legal governance institutions have not kept pace. They have lagged behind on making scientific advances, failing to address climate change's security implications. As of this writing, we lack a legally binding path forward to lower worldwide GHG emissions. Indeed, scientists and security professionals estimate that our collective failure to keep the average global temperatures from rising above two degrees Celsius will have devastating consequences, particularly for developing nations with limited climate adaptation resources. 40Increases in global temperature beyond two degrees could potentially trigger climate "tipping points," pouring gasoline on an already simmering climate fire. Further, climate attribution science advances showcase that climate change increases the likelihood of extreme weather throughout the world. 41

In response to our increased understanding of climate change's security impacts, scientists and policy experts have begun to adopt a security vernacular. Climate change is not just an environmental concern - it acts as both a "threat multiplier" and a "catalyst for conflict." 42The 2015 Paris [\*536] Climate Agreement labels climate change an "urgent threat" while recognizing climate change's pernicious impacts on food security. 43Due to scientific advances, we now have a much clearer understanding of the relationship between human activity, climate change, and global security. 44

COVID-19's ongoing deadly global impact - the United States has lost more people to COVID-19 than all conflicts since World War II - bolsters the need to reconceptualize and broaden traditional notions of threats to human and national security. 45Tragically, the novel coronavirus crisis may foreshadow even greater global health threats as climate change accelerates the spread of vector-borne diseases around the world. 46But COVID-19 may signal the beginning of a new era of public health threats, forcing us to reconceptualize traditional notions of security.

B. The Security Council's Responsibility for the Maintenance of International Peace and Security

In the following section, I analyze the Council's institutional design, delegated legal authorities, and how conceptions of "legitimacy" impact potential Council climate action. 47

1. The Council's Delegated Legal Authorities & Institutional Design

The Council is composed of both permanent and non-permanent members. P5 membership has remained constant since 1945, a source of enormous controversy and criticism since the Charter's inception. The remaining ten Council seats are held by rotating, non-permanent Members elected for two-year terms. 48Highly competitive and sought after, membership eligibility [\*537] for these ten seats must take into account both "equitable geographic distribution," as well as Member nations' respective contribution to the maintenance of international peace and security. 49In addition, thirty-eight of the 193 U.N. Members states are designated SIDS that most acutely suffer from climate change's debilitating effects. 50The Charter's guidance on Council non-permanent membership eligibility, and a comparably large contingent of SIDS, suggest that climate change will play a role in the Council's rotating membership. 51

As a parliamentary matter, the Council does not require the vote of every Member nation - any Council vote simply requires nine affirmative votes and the concurrence (or abstention) of all five permanent members. 52If this voting threshold is met, Council decisions bind the other Member States. 53Hence, the Council could potentially serve as an expedient international venue to address climate change. 54

The U.N. Charter's express purpose is to maintain international peace and security, 55and "is based on the principle of the sovereign equality of all of its members." 56Article 2(4) of the U.N. Charter reaffirms the prohibition on the use of force. Member nations must "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state..." 57And under article 24 of the U.N. Charter, the Council has "primary responsibility" to ensure international peace and security. 58With this authority comes a special responsibility - with affirmative duties - for the Council to take measures on behalf of other Member nations to ensure international peace and security.

[\*538] The Council, acting on behalf of all other Member States, can tap into its broad enforcement authorities, but only when it has first made a determination that a situation rises to a "threat to the peace, breach of the peace, or act of aggression" within the meaning of article 39. 59While the Council has broad discretion in making this legal determination, doing so must still conform with the U.N. Charter's governing Purposes and Principles. 60And the Council must follow-through with effective enforcement and follow-through - something that the Council has historically struggled to do.

Of course, there must be a bona fide threat to international peace and security - purely domestic impacts are beyond the Council's purview. The Council is prohibited from intervening "in matters which are essentially within the domestic jurisdiction of any state..." 61GHG emissions and climate change's corresponding impacts do not respect neat political boundaries. And there is an increased understanding that seemingly domestic climate change matters can spill across international borders quickly, making the international and domestic distinction increasingly a gray area and not a strict dichotomy. 62

2. Council Action: Legitimacy Concerns

Simply because the Council can take an action, does that mean it should? To be sure, the Council possesses discretion in determining what rises to a "threat to the peace," a key term that is undefined under the U.N. Charter. 63If the Council determines that climate change is a threat to the peace within the meaning of article 39, the door is unlocked to powerful Chapter VII authorities. 64But core legal and political legitimacy concerns are always lurking in the background. These must be considered prior to the Council tackling climate change.

Broadly speaking, legitimacy is the belief of an agent that a rule or institution has a right to be obeyed. 65The Council has few instruments to ensure compliance with its decisions. While Council resolutions are legally [\*539] mandatory, they still depend on states "believing that they have an interest in going along with them." 66Professor Dan Bodansky and others have convincingly argued that democratic government legitimacy principles can be applied to international governance. As international institutions gain greater authority, their consensual underpinnings erode. 67Legitimate authority is synonymous with justified authority. "Legitimacy" has a normative and socio-political dimension where perceived legitimacy can affect the Council's ability to carry out decisions. 68

Consider the growing connection between sociological-based legitimacy and climate activism surrounding Council membership elections. In the last Council election for non-permanent Membership, nations had their climate policies and commitment to sustainability heavily scrutinized. 69Greta Thunberg and other climate change activists, for example, recently spoke out against the climate policies of two prospective non-permanent Security Council members (Canada and Norway) in this year's Council election. The climate activists argued that these nations were overly reliant on fossil fuels and should take steps to divest their economies from fossil fuels as a condition for Council membership. 70

While the precise efficacy of these climate-advocacy efforts remains unclear (Norway was elected, but Canada was not), it nevertheless showcased the increasing role that climate policies will have on shaping governance structures and their follow-on actions. The increased awareness of climate change's devastating impacts - embodied by the work of international climate activists such as Greta Thunberg, popular writing such as David Wallace-Wells's Uninhabitable Earth, and advocacy-legislation such as the American Green New Deal - suggest a growing acceptance for international climate action and a groundswell of support for popular legitimacy. 71

C . Chapter VI Authorities: Pacific Settlement of Disputes

Chapter VI of the U.N. Charter ("Pacific Settlement of Disputes") reinforces the U.N. Charter's underlying goal of settling disputes by peaceful means, laying out the Council's broad investigation powers. 72Chapter VI actions can be taken without an article 39 "threat to the peace" determination. [\*540] Article 34 outlines the Council's broad investigatory powers to "investigate any dispute or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security." 73

The Council may act on disputes by "recommending appropriate procedures or methods of adjustment." 74In addition, any Member nation may bring "any dispute" to the attention of the Council or General Assembly. 75The Council, in turn, may recommend "appropriate procedures" to settle the dispute or take a specific action such as referring the dispute to the International Court of Justice ("ICJ"). 76

Under article 96 of the U.N. Charter, either the Council or the General Assembly may request that the ICJ "give an advisory opinion on any legal question." Alternatively, the Secretary-General may bring any matter which may threaten the maintenance of peace and security to the Security Council. 77Climate-security matters could, theoretically, be brought before the ICJ. 78But as Professor Michael Gerrard and others have opined, the ICJ is not a particularly promising path for transformative or even substantive climate action. 79Outside the climate change context, the ICJ's jurisdiction and enforcement mandate is not universally accepted. 80Other international tribunals have recently addressed climate security matters, shining much needed light on asylum seekers from SIDS. 81Under my institutional risk allocation approach to climate governance discussed below, I welcome efforts from competent international tribunals to address climate-security matters - [\*541] provided that they act within their competence and jurisdiction. But I ultimately share Professor Gerrard's skepticism that the ICJ or other relevant international human rights bodies can or will play a leading role in addressing climate change.

D . Climate Change and the Council's Chapter VII Authorities

Under Chapter VII, the Council enjoys broad powers to restore and maintain international peace and security. 82Before the Council can activate these broad enforcement authorities, it must first determine whether a "threat to the peace, breach of the peace, or act of aggression" exists under article 39. 83In making this critical determination, the Council shall:

Determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security. 84

Of the three possible article 39 determinations - (1) threat to the peace; (2) breach of the peace; or (3) act of aggression, the Council heavily relies upon "threat to the peace" when addressing non-traditional security threats. 85"Threat to the peace" is undefined within the Charter; the Council is granted broad discretion in making this determination. 86If the Council makes an article 39 determination, its powerful Chapter VII authorities are then actuated - a legally expedient approach but one that must take into account core legitimacy concerns. 87If the Council overcomes political paralysis in declaring climate change a threat to the peace, what steps might the Council take?

Article 40 of the U.N. Charter authorizes the Council to "call upon the parties concerned to comply with such provisional measure as it deems necessary or desirable." 88If article 40 measures prove ineffective, the Council could next employ article 41 economic or diplomatic measures against nations [\*542] engaging in extremely harmful climate activities. This authorizes non-military measures, such as economic sanctions, against nations that engage in actions that threaten international peace and security. 89To be sure, moving from article 40 to 41 will increase the action's underlying legitimacy risk as the Council ratchets from soft measures to hard compliance measures. As discussed infra Part V, article 41 sanctions could take many forms. The Council could directly sanction so-called "climate rogue states" or move to ban the import of a particularly harmful climate product or individual. Brazil's massive deforestation efforts that destroy the Amazon rainforest are but one prominent example. But well-intentioned economic sanctions may counter harmful state action and also end up harming the most vulnerable citizens. 90

If the article 41 non-military measures prove to be inadequate, the Council can next turn to its awesome article 42 military powers. 91Article 42 states:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations. 92

As I discuss infra Part V, I do not recommend the Council employ military measures to address climate change now or in the foreseeable future. Regardless of the legitimacy or practicality of the Council taking climate action today, the Council has the authority to act in a relatively expeditious manner.

E . Climate Change and the Inherent Right of Self-Defense

Independent of the Council's Chapter VI and VII authorities, each Member nation possesses the inherent right of self-defense in the event of an "armed attack." 93"Armed attack" includes self-defense against non-state [\*543] actors, but climate change poses additional, practical problems in addressing both its causality and attribution. 94Nevertheless, some scholars have begun to theorize that climate change provides a just cause for war, at least in principle. 95Professor Craig Martin has opened the dialogue for expanding the doctrine of self-defense in the case of atmospheric intervention. 96

How might the right of self-defense apply to climate-security impacts? Consider the case of a SIDS whose territory is threatened by sea level rise and wave-driven flooding. Climate change is not a traditional armed attack within the meaning of article 51, but its security impacts - loss of land through sea level rise, extreme weather, drought - are no less devastating. But lowering the legal bar or fundamentally changing our collective understanding of what constitutes an armed attack has enormous normative consequences for article 51 and the right to use force. 97

It is beyond the scope of this paper to fully address the enormous normative implications that a fundamental reconceptualization of article 51 as applied to climate change would entail. The slowly burning climate crisis and widening emissions gap is, nevertheless, forcing scholars to try to reconcile climate change with traditional use of force conceptions. 98As discussed below, the Council has shown an increased willingness to address the root causes of armed conflict, to include an increased willingness to address climate change in Council resolutions and Council-sponsored debates. 99

III. Security Council Engagement on Non-Traditional Security Threats

In what follows, I analyze the Council's steady evolution and willingness to address the root causes of threats to international peace and security. In some cases - such as its Ebola response - the Council made an article 39 threat to the peace determination. The Council's action on Ebola, in particular, offers a potential roadmap for future climate engagement. While political obstacles remain, the Council has demonstrated a halting, but unmistakable, [\*544] willingness to broaden its jurisdiction to address the root causes to threats to international peace and security. 100

A. The Council's Evolving Definition of "Threat to the Peace"

Following limited Council action during the Cold War - where the United States and Soviet Union threatened to veto each other's actions, thus nullifying any Council action - the Council has shown a willingness to expand its definition of what rises to a threat to international peace and security. Beyond the changing political reality, what might account for this change?

First, "threat to the peace" lacks a precise definition within the Charter. The Council is essentially afforded extraordinary discretion in making such a critical legal determination. The Council's broad discretionary authority in making a threat to the peace determination was reaffirmed in the International Criminal Tribunal for the Former Yugoslavia's decision in Prosecutor v. Tadic. In Tadic, the Court held that while an "act of aggression" is more amenable to a legal determination, "threat to the peace" is more of a political concept. 101As a political rather than a legal judgment, the Council's authority "expands each time it finds a new kind of problem to be a threat to the peace." 102Of course, any Council action remains bound by a variety of factors, including the Charter's Purposes and Principles and the action's accepted legitimacy from other Member States. 103

Second, we now have a better awareness of the linkage between the underlying causes of conflict and its corresponding effects. This includes the threat to international peace and security posed by environmental destruction, non-state actors, weapons proliferation, and global pandemics. In what follows, I analyze five key instances where the Council displayed a willingness to go beyond traditional collective security matters, expanding its conception of what may constitute a threat to international peace and security.

1. Root Causes of Conflict: Environmental and Climate Security

The Council was confronted with massive environmental destruction by Iraqi leadership during the 1990 Persian Gulf War. In the aftermath, the Council passed a resolution declaring that Iraq was "liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources ... as a result of Iraq's unlawful invasion [\*545] and occupation of Kuwait." 104Following the conclusion of the armed conflict, in 1992, the Council acknowledged that ecological and social issues could also constitute threats to international peace and security:

The absence of war and military conflicts amongst states does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian, and ecological fields have become threats to peace and security. 105

The then-Iraqi President Saddam Hussein's destruction of the oil fields was inextricably linked to the Council's Resolution and action in an international armed conflict. By recognizing and acknowledging the destructive capacity of ecological harms, however, the Council took an initial step toward conceptualizing a broader framework of threats to international peace and security beyond merely interstate conflict.

The environmental security connection was further addressed in 2004, when then-U.N. Secretary General Kofi Annan addressed new and emerging threats to international security. He specifically identified environmental degradation and climate change as the driver of natural disasters that undermine international peace and security. 106In 2005, U.N. Secretary General Kofi Annan stated:

The threats to peace and security in the twenty-first century include not just international war and conflict but civil violence, organized crime, terrorism and weapons of mass destruction. They also include poverty, deadly infectious disease and environmental degradation since these can have equally catastrophic consequences. 107

In 2005, the Council reaffirmed that it was prepared to address the root cause of armed conflict - in the context of conflict's disparate effects on women and gender issues more broadly - in an effort to "adopt a broad strategy of conflict prevention." 108In 2006, Secretary Annan followed up his earlier pronouncements on environmental security, stating that "global climate change must take its place alongside [the] threats [of]... conflict, [\*546] poverty, [and] the proliferation of deadly weapons ... that have traditionally monopolized first-order political attention." 109

2. The Legislative Council: Terrorism (2001) and the Spread of Weapons of Mass Destruction (2004) 110

In the aftermath of the September 11th terrorist attacks against the United States, the Council passed Resolution 1373 on September 28, 2001. The Council expressly declared that the terrorist attacks in New York, Pennsylvania, and Washington "constitute a threat to international peace and security." 111In doing so, it reaffirmed the need to "combat by all means ... threats to international peace and security caused by terrorist acts." 112Drawing upon its broad Chapter VII authorities and (at that time) overwhelming international support for action, the Council required all Member States to pass domestic legislation to both "prevent and suppress the financing of terrorist acts" and "freeze ... funds and other financial assets ... of persons who commit ... terrorist acts." 113Each Member nation was further required to adopt domestic legislation to criminalize the "willful provision or collection, by any means ... of funds by their nationals or in their territories with the intention that they are to be used, in order to carry out terrorist acts." 114

Three years later, in 2004, the Council made a similar determination addressing the spread of weapons of mass destruction ("WMD") - to include nuclear, chemical, and biological weapons. In making an article 39 threat to the peace determination, 115the Council cracked down on terrorism financing and strengthened border controls to counter the illegal import of WMD materials. 116Specifically, the Council required states to "refrain from permitting non-state actors access to WMDs and their means of delivery, enforce domestic laws prohibiting non-state actors access to WMDs, and [\*547] develop and maintain border controls to prevent the proliferation of WMDs." 117

The Council's sweeping actions to address terrorism and the spread of WMDs via implementing domestic legislation remain controversial to this day. Nevertheless, they showcased the Council's ability to go beyond interstate conflict and state aggression in making a threat to the peace determination within article 39 and follow through with aggressive Chapter VII mandates. It also demonstrated how quickly the Council can take ex post action following a catastrophic event. This marked an expansion of the Council's jurisdiction, which is a significant transformation from the Council's Cold War stasis.

3. Security Council Action and Natural Disaster Response: Haiti (2010)

The Council has also shown a willingness to act, ex post, in response to natural disasters. In responding to a devastating earthquake in Haiti in 2010 that killed up to 300,000 people, the Council adopted Resolution 1908. 118This Resolution expanded a pre-existing United Nations Stabilization Mission in Haiti to include the "immediate recovery, reconstruction and stability efforts" undertaken by the Government of Haiti. 119In response to the earthquake, the Security Council also authorized an increase in the number of military and police personnel assigned to the mission. 120

The Council did not explicitly mention climate change in the Resolution, and it is unclear if the Council would have ever acted in Haiti if an existing U.N. security mission was not already in place. Yet recent climate attribution science advances elucidate that climate change will cause an uptick in extreme weather, stressing the international community's ability to respond to future natural disasters. 121The Council's response in the 2010 Haitian earthquake suggests, however, that ex post responses to extreme weather events are already within the Council's zone of competence. It remains to be seen, however, whether the Council will take proactive, ex ante climate measures outside of armed conflict or independent of an existing U.N. mission.

[\*548]

4. The Council & International Public Health Crisis: HIV/AIDS (2000, 2011)

In 2000, the Council addressed the global HIV/AIDS health crisis via Resolution 1308. 122The Resolution "stressed the need of coordinated efforts of all relevant United Nations organizations." 123It further noted that the HIV/AIDS pandemic, "if unchecked" may pose a risk to stability and security, 124reaffirming the Council's role and "primary responsibility for the maintenance of international peace and security." 125While stopping short of making an article 39 threat to the peace determination, it encouraged Member States to work with the international community and international organizations such as the Joint United Nations Programme on HIV/AIDS ("UNAIDS") to develop "long-term strategies for HIV/AIDS education, prevention, voluntary and confidential testing and counselling ... as part of their participation in peacekeeping operations." 126In 2011, the Council built on this earlier effort in addressing HIV's debilitating impacts on international peace and security via Resolution 1983. 127The Council recognized HIV/AIDS as "one of the most formidable challenges to the development and stability of societies that required a global response." 128

In each instance the Council did not find that the HIV/AIDS crisis was a direct threat to international peace and security within the meaning of article 39, thus activating its Chapter VII authority. But the Council's willingness to more generally address the HIV/AIDS crisis signaled a continual willingness to address underlying threats that destabilize peace and security, not unlike the Council's 1991 recognition that ecological degradation can threaten peace and security. Similar to climate change, HIV/AIDS acts as a destabilizing force that disproportionately impacts developing nations. As discussed in the Ebola case study below, the Council's ability to successfully navigate a global health crisis could serve as a roadmap for future climate action.

5. The Council and the 2014 Ebola Public Health Crisis: A Potential Roadmap for Climate Action?

In the summer of 2014, the lethal Ebola virus rapidly spread through the developing world, devastating several West African nations. Thousands died. Fear and misinformation spread throughout the region, further undermining the crisis. In August 2014, the Presidents of Liberia, Sierra Leone, [\*549] and Guinea requested that the United Nations take measures to respond to the growing Ebola crisis. Shortly thereafter, the World Health Organization ("WHO") put in place an "Ebola Response Roadmap" designed to help coordinate the complex international response. As the Ebola virus cut an increasingly lethal path through Africa, it became clear that additional international action was needed to combat the crisis. Shortly thereafter the Council acted, declaring that the Ebola outbreak in Africa "constituted a threat to international peace and security" within the meaning of article 39. 129

In making a threat to the peace determination, the Council called on all Member States to take four specific actions while reserving its most potent Chapter VII authority. 130First, it called on Member States to lift travel and border restrictions that were imposed as a result of the Ebola outbreak. 131Second, it called on nearby Member States to take measures to facilitate the delivery of humanitarian supplies and trained personnel to Ebola-affected areas. 132Third, it called on Member States to actively fight an Ebola-disinformation campaign in an effort to provide information to the public to follow proper health and safety protocols. 133Fourth, the Council called on all Member States to provide urgent resources and equipment to the region. 134

The Ebola crisis was a fast-moving global health crisis and U.S. leadership under then-President Obama proved critical in galvanizing a Council response. Climate change, in contrast, is largely characterized by the slow onset of events - such as sea level rise and wave-driven flooding - punctuated by extreme weather. 135

But there are many similarities and even a direct connection between public health threats such as Ebola and climate change. Researchers have drawn linkages between environmental factors (such as a changing climate) and increased risk to infectious diseases. 136Similar to climate change's destabilizing [\*550] characteristics, the Council was deeply concerned that Ebola's spread would lead to "civil unrest, social tensions and a deterioration of the political and security climate." 137Similar to Ebola, security professionals illuminate how climate change - a "catalyst for conflict" - can lead to unrest and suffering. In its Ebola response, the Council had to navigate other international institutions and global health efforts both inside and outside the United Nations. 138The Council's willingness to address a non-traditional security threat while navigating the work of the World Health Organization, U.N. stakeholders, and other international organizations suggests that future climate action may be within the Council's zone of competency.

Of course, the Council's prior willingness to address an increasing menu of non-traditional threats is not guaranteed. For example, witness the Council's sluggish response to the COVID-19 crisis. The Council has not (yet) declared the COVID-19 crisis a threat to international peace and security. 139But this, too, may be changing. In July 2020, the Council addressed the novel coronavirus crisis via Resolution 2532, calling for a general and immediate cessation of hostilities as the world responds to the novel coronavirus crisis. The Council specifically called upon all parties to armed conflict to engage in a ninety-day "durable humanitarian pause" to facilitate the safe, unhindered and sustained delivery of humanitarian assistance." 140Yet it is difficult to predict whether the Council's slow response to COVID-19 signals a broader trend toward retrenchment on global collective action issues. [\*551] Table A provides a snapshot of recent Council responses to effectively address non-traditional security threats.

[TABLE A OMITTED]

B. Security Council Climate Debate & Resolutions: A Stepping-Stone for Climate Action?

In addition to the Council's willingness to address environmental security matters and other non-traditional security threats, since 2007 the Council has sponsored several high-level forums discussing climate change's destabilizing effects on international peace and security. 149Concurrent with scientific advances, U.N. leadership has increasingly spoken out about the link between climate change and international peace and security. 150While the Council has not yet determined that climate change is a threat to international peace and security within the meaning of article 39, it has gradually - albeit in an ad hoc manner - addressed climate security matters via a variety of fora. 151The Council has examined the linkages between climate change and security via an open debate forum four times: April 2007, July 2011, July 2018, and January 2019. 152

In 2007, the Council convened its first open debate on climate change and security at the initiative of the United Kingdom. 153This meeting offered the first insight into how different states view Council action on climate security matters, foreshadowing Member nations one day possibly supporting broader Council action. From the onset, many Pacific SIDS and many European Union members argued that the Council should expand its role to address climate change's security implications. 154Among the P5 members, France envisioned a more active role for the Council in line with Resolution 1625's call to address the root causes of armed conflict. Meanwhile, the United Kingdom argued that the Council should raise awareness on the root causes of armed conflict. 155Perhaps not surprisingly, many of the SIDS - who are at climate change's frontlines - put forward that the Council had an affirmative obligation to address climate change's devastating effects. 156The island nation of Tuvalu, for example, described climate change as a "conflict... [\*553] not being fought with guns and missiles but with weapons from everyday life - chimney stacks and exhaust pipes." 157

In contrast, China, Russia, and many nations within the Group of 77 (representing much of the developing world) vocally discouraged any Council climate action. In part, this was aligned with historic antipathy toward a greater role for the Council shared by many developing nations. They argued that Council climate action encroached on the General Assembly, ECOSOC, and the Framework Convention's governing mandate. 158

Despite the lack of a cohesive position on Council climate action, the Pacific SIDS kept the issue of climate security alive, bringing climate change's adverse impacts before the U.N. General Assembly in 2009. Here, the U.N. General Assembly passed a Resolution that both reaffirmed the Framework Convention as the "key instrument for addressing climate change" while explicitly labeling climate change as a "threat multiplier." 159It also called on other U.N. organs to consider climate change's security implications, leaving the door open for future Council engagement. 160

At the behest of several Pacific island nations and Germany - two consistent cheerleaders for Council climate engagement - the Council sponsored its second formal climate-security debate in 2011. 161This Council-sponsored debate focused on addressing climate change's role in rising sea-levels and food insecurity. 162Once again, Russia and China opposed Council climate engagement, but the U.S. Ambassador to the U.N., Ambassador Susan Rice, supported a Council climate role as part of the Council's core responsibilities. Further, a divide began to emerge between the Pacific and [\*554] Caribbean states on Council climate action. Many Caribbean developing nations remained suspicious of the Council wielding greater power while some Pacific SIDS welcomed any international action and attention. 163The 2011 debate concluded with a Presidential Statement that acknowledged climate change's potential to aggravate existing threats to international peace and security, while highlighting climate change's impact on sea-level rise on small low-lying island states. 164

In 2017, the Council took the historic step of referencing climate change as a destabilizing security impact in a Security Council Resolution. In addressing the deteriorating security situation in the Lake Chad region, the Council specifically highlighted the "adverse effects of climate change and ecological change" in destabilizing the security situation in the Lake Chad Basin. 165The Council followed up in 2018 by recognizing climate change's destabilizing effects on the ongoing conflict in Somalia, Darfur, West Africa and the Sahel, and Mali. 166

The Council held its third open debate on climate change in July 2018. Member nations proposed a new "Special Representative of the Secretary General on Climate and Security" as well as the establishment of an institutional hub for climate-security matters within the United Nations system. 167The Nigerian U.N. Deputy Secretary General, Amina Mohammed, highlighted climate change's grave threat to African food security, noting that the world's most vulnerable people face the greatest risk of droughts and food insecurity. 168While Russia and China continued their skepticism of Council climate engagement, the meeting highlighted another frontline climate security issue: climate change's debilitating impacts on food insecurity in the African Sahel. The Sahel is one of the poorest regions in the world that is uniquely vulnerable to food insecurity and drought - ninety percent of the economy is agriculture-based. 169

[\*555] The Council held its most recent open climate change debate in January 2019. 170Here, the U.N. political affairs chief acknowledged that climate-related disasters are a present-day reality for millions around the globe. Further, the debate highlighted the complex relationship between climate-related risks and conflict, which intersects with political, social, economic, and demographic factors. Both the Administrator of the U.N. Development Program ("UNDP") and representatives from the U.N. World Meteorological Organization ("WMO") were in attendance to brief the Council on the link between climate and extreme weather. 171The Council invited the WMO to the 2019 debate. The WMO Chief Scientist stated that:

Climate change has a multitude of security impacts - rolling back the gains in nutrition and access to food; heightening the risk of wildfires and exacerbating air quality challenges; increasing the potential for water conflict; leading to more internal displacement and migrations ... it is increasingly regarded as a national security threat. 172

This dialogue between the security and scientific communities represents a positive step as the Council seeks to better understand climate change's security impacts. These efforts and similar engagement should be built upon at future Council-sponsored climate dialogues.

At this most recent debate, the Council's youth representative specifically requested a resolution that formally recognized climate change as a threat to international peace and security. 173This 2019 debate stopped short of the Council determining that climate change is a "threat to the peace" within the meaning of article 39. 174While this specific request fell short of achieving its goal, the 2019 debate demonstrated that a steady, growing core group of Member States (seventy were in attendance) are invested in examining the complex relationship between climate change and security under the umbrella of Council leadership. 175

[\*556] In sum, while these four debates and more informal Council-sponsored Arria-Formula 176meetings on climate are not legally binding, they provide the building blocks for a greater potential role for Council climate engagement. Whether this increased Council climate engagement portends substantive follow-on action remains to be seen. But as discussed below, climate change's existential threat to several SIDS virtually ensures that the Council will grapple with climate change in some capacity. Table B provides an overview of the core Council debates and actions on climate change.

[TABLE B OMNITTED]

C. Nation Extinction: A Growing International Climate Governance Gap

How might Council climate engagement be accelerated beyond debates and forums? In what follows, I analyze possible pathways for future Council climate action. Of course, a "green swan" event such as the breaking off of the East Antarctic ice sheet or sudden polar ice cap melting - resulting in massive global sea level rise - could spur immediate Council action. 185Such an apocalyptic "Climate 9/11" event could spark the Council to overcome gridlock, not unlike the Council's sweeping action on terrorism in the aftermath of the September 11th attacks.

But regardless of a future green swan event, two forthcoming global climate report cards will continue to pressurize Council action and attention. 186First, the widening emissions gap will be highlighted in the IPCC Sixth IPCC Assessment, scheduled for 2022. The Sixth Assessment is widely anticipated to paint a bleak picture of collective GHG emissions, building off its 2018 "Global Warming of 1.5 Celsius" Report that highlighted the ten-year window to massively reduce global emissions. 187Second, the Paris Accord's first comprehensive "global stocktake" is set to take place in 2023 (with a second one to follow in 2028). As of this writing, the global stocktake is anticipated to fall far short of expectations, thus ensuring a continual international spotlight on our widening emissions gap. 188

Climate-driven environmental deterioration will continue to display the terrifying consequences of the world's collective failure to address our collective GHG emissions gap. The emissions gap will continue to manifest itself in a vivid and violent manner through increased violent unrest, climate-drive migration and conflict. 189And as discussed below, the stakes associated with the threat of nation extinction will continue to force climate change on the Council's agenda regardless of political preferences and Council paralysis.