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#### SCOTUS will avoid sweeping ruling in West Virginia v. EPA – a broad ruling wrecks climate response and turns the case

Farah 11-1 [Niina H. Farah, E&E News legal reporter, 11-1-2021 https://www.eenews.net/articles/what-the-supreme-courts-move-means-for-epa-climate-rules/]

The Supreme Court may be poised to put new guardrails on the Biden administration’s climate agenda after justices agreed last week to consider the extent of EPA’s authority to regulate carbon emissions.

The court sent shock waves through the legal world when it agreed Friday to consider a consolidated challenge from Republican-led states and coal companies. The challenge stemmed from a federal court ruling that struck down a Trump-era regulation gutting EPA’s climate rule for power plants (E&E News PM, Oct. 29).

When the justices issue their ruling in the EPA case, which is expected by next summer, the decision could provide the first indication of how the court’s new 6-3 conservative majority will approach questions of the federal government’s role in curbing global climate change.

“This is likely to result in one of the most significant environmental rulings the court has ever reached,” said Robert Percival, director of the Environmental Law Program at the University of Maryland’s law school.

The court’s decision could place new limits on how expansively EPA can interpret its authority to use the Clean Air Act to address climate change.

Friday’s order coincided with the beginning of global climate negotiations at the 26th Conference of the Parties, or COP, in Glasgow, Scotland. It also comes as Congress is negotiating a Democratic spending package that would pump more than $500 billion into addressing climate change. The Biden administration’s goal is to cut U.S. greenhouse gas emissions in half by 2030 and put the electricity sector on a path to zeroing out carbon emissions by 2035.

West Virginia Attorney General Patrick Morrisey (R) praised the justices’ decision to review the ruling earlier this year by the U.S. Court of Appeals for the District of Columbia Circuit, which scrapped the Trump administration’s Affordable Clean Energy rule and handed the Biden team a clean slate to draft a new regulation for coal-fired power plant emissions (Greenwire, Jan. 19).

“This is a tremendous victory for West Virginia and our nation. We are extremely grateful for the Supreme Court’s willingness to hear our case," Morrisey said in a statement Friday.

"This shows the Court realizes the seriousness of this case and shares our concern that the D.C. Circuit granted EPA too much authority," he continued. "Given the insurmountable costs of President Biden’s proposals, our team is eager to present West Virginia’s case as to why the Supreme Court should define the reach of EPA’s authority once and for all."

White House national climate adviser Gina McCarthy said yesterday that the administration believes the high court will uphold EPA’s ability to regulate carbon emissions across the electricity sector.

"The courts have repeatedly upheld the EPA’s authority to regulate dangerous power plant pollution," she told reporters on a call. She noted that the appeals court had struck down the Trump-era rule that would have weakened power plant regulations.

McCarthy said the White House is confident that the Supreme Court will rule in a way that affirms that “EPA has not just the right but the authority and responsibility to keep our families and communities safe from pollution."

Critics of the Supreme Court decision to hear the case said that in most instances, federal courts wait for an agency to enact a rule before they weigh in on a legal controversy around the agency’s power to regulate.

"In that sense, this seems like a power grab. But we don’t know yet," said Bethany Davis Noll, executive director of the State Energy & Environmental Impact Center at New York University School of Law.

Instead of reinstating the Obama-era Clean Power Plan — which interpreted the "best system of emission reduction" to include emissions trading or shifting generation to renewable energy — EPA under Biden opted to start from scratch. The power sector has already surpassed the 2015 Clean Power Plan’s emissions reductions target a decade early.

The agency under Biden has yet to publish a draft proposal, and observers says it may now choose to wait for the Supreme Court’s decision before writing a new carbon rule.

EPA did not respond to a request for comment on the Supreme Court’s order but agency Administrator Michael Regan defended the agency’s authority Friday on Twitter.

"Power plant carbon pollution hurts families and communities, and threatens businesses and workers," he tweeted. "The Courts have repeatedly upheld EPA’s authority to regulate dangerous power plant carbon pollution."

Agency powers

Several observers said the Supreme Court’s eventual ruling in the case could be limited to power plants, while others predicted a bigger blow to emissions regulation for other sectors.

"The issue just gets dumped back in Congress’ lap," said Jeff Holmstead, a partner at the law and lobbying firm Bracewell LLP, of the possible consequences of the court’s limiting EPA’s power.

"Any kind of meaningful regulatory program could be well off the table," he said.

A more concerning — but less likely — possibility would be if the high court used the case to more broadly undermine the regulatory authority of federal agencies.

"It’s possible that what the court is seeking to review here is Section 111(d) itself," said Michael Burger, executive director of Columbia Law School’s Sabin Center for Climate Change Law.

He referred to the part of the Clean Air Act that EPA used to regulate carbon emissions from existing power plants under former presidents Obama and Trump.

"If that’s the case, the broadest threat here is not just about climate change, or about EPA’s authority, but it’s about the power of the court to review congressional authorizations of agency action," he said.

In a worst-case scenario, the high court could give itself authority to tell Congress "in almost any instance" that it has to be more specific about delegating authority to agencies, Burger added.

In their petitions to the Supreme Court, the coal companies and states targeting EPA’s power to regulate raised concerns about whether Congress had clearly given the agency the authority to address utility emissions on a broad, systemwide basis.

The challengers also asked the justices to weigh in on whether Congress could lawfully allow EPA to act on emissions under Section 111(d) of the Clean Air Act under the non-delegation doctrine, which says that lawmakers cannot hand off their legislative authority to executive agencies. The Supreme Court’s conservative wing has expressed interest in reviving the long-dormant legal doctrine.

That argument could threaten not only Biden’s rule proposals, but also existing regulations.

#### The plan causes institutional balancing – SCOTUS couple’s the plan’s expansion of agency enforcement with an equal and opposite ruling in West Virginia constraining agencies

HLR 11 – Harvard Law Review, “ADVISORY OPINIONS AND THE INFLUENCE OF THE SUPREME COURT OVER AMERICAN POLICYMAKING”, June, 124 Harv. L. Rev. 2064, Lexis

In assessing the Court's power relative to the elected branches, it is first necessary to be clear about what motivates the Supreme Court. When exercising judicial review, the Court seeks to vindicate its constitutional vision by striking down legislation repugnant to that vision. This is true whether one believes that the Court seeks in good faith to divine the true meaning of the Constitution and impose it on the elected branches, attempts to interpret the Constitution faithfully but subconsciously imports its own policy views, or disingenuously strives to implement its policy preferences in the guise of neutral interpretation. For the purposes of the present argument it is irrelevant which view or combination of views is most accurate, and the phrase "constitutional vision" will stand for any and all of these. Yet as suggested above, the Court is not unconstrained when it seeks to effect its constitutional vision through judicial review: if it strays too far from the political mainstream, n55 it will face consequences that undermine its constitutional [\*2076] vision even more than would the upholding of a disfavored statute. n56 The upshot is that the Court operates under conditions of scarcity and must economize on its political capital to go as far in implementing its constitutional vision as political realities allow, which sometimes means upholding (or declining to review) government actions that contravene that vision. n57 And, as a distinct matter, most [\*2077] Justices have displayed a desire to conserve the Court's political capital and maintain its institutional prestige as much as possible even where the Court was not immediately threatened with any hard political constraints. n58 This conservatism is especially understandable given that the Justices are generally not political experts and lack the sophisticated public relations apparatuses of the elected branches, and that the elected branches have substantial capacity to shift public opinion about the Court if they so choose; these factors make it rational for the Court to be parsimonious with its political capital in order to avoid blind overreaching.

[FOOTNOTE]

n57. Thus, the Court's decisionmaking process in a judicial review case incorporates its internal preferences and its view of external constraints as follows: R = B / C, where B equals the benefits to the Court's constitutional vision of invalidating a given piece of legislation, C stands for the cost the Justices expect to incur in terms of political capital, and R gives the trade-off rate between costs and benefits in any given case, such that the Court will expend its political capital in those cases where R is highest, so long as R > 1.

A reasonable objection to the model elaborated in this Part is that although the Court is politically constrained, this "bank account" model in which the Court has finite political capital to "spend" by striking down popular government actions is unrealistic: the Court can also increase its prestige - its institutional capital - by exercising judicial review, which has been the effect of Marbury and Brown, two decisions without which the Court would be much weaker now. Nonetheless, most countermajoritarian decisions do seem to cost the Court rather than increase its capital (Marbury was a refusal to make the countermajoritarian decision, see Friedman, supra note 53, at 60-62, and Brown jeopardized rather than solidified the Court's power over the years immediately following the decision, see Klarman, supra note 53, at 312-43). This is especially true in the short run, while the decision remains countermajoritarian, and it is the short run that counts for the current Justices: the fact that Brown is today sacrosanct did not help the Court when Southern resistance threatened that decision's efficacy in the years immediately after its announcement. Cf. Daryl J. Levinson, Parchment and Politics: The Positive Puzzle of Constitutional Commitment, 124 Harv. L. Rev. 657, 743 (2011) ("Evidently, the Court can build up a savings account of approval that it can then spend down by issuing unpopular decisions without losing public support."). The necessary implication of Levinson's statement is that the "savings account" - and thus the Court's countermajoritarian capacity - is finite. At any rate, the Court's position is no different from that of any other political actor: though the presidency as an institution, for instance, would certainly lose influence as a result of a string of weak, unassertive presidents, and might gain it through the acts of a strong leader, any given President at any given time is undoubtedly limited by political constraints.

#### Biden delegation key to every impact – especially key to end COVID, solve climate change, manage nuclear waste, and regulate Juul

Mullen and Singh 20 ---- Hannah Mullen is a Graduate Fellow at the Appellate Courts Immersion Clinic (Georgetown Law) and a former clerk on the D.C. Circuit for the Honorable Merrick Garland with a JD (Harvard Law School), Sejal Singh is a Justice Catalyst Fellow at Public Citizen Litigation Group, former labor policy expert at the Congressional Progressive Caucus Center, and former Teaching Fellow in Constitutional law (Harvard Law School) with a JD (Harvard Law School), “The Supreme Court Wants to Revive a Doctrine That Would Paralyze Biden’s Administration,” *Slate*, 12/1, <https://slate.com/news-and-politics/2020/12/supreme-court-gundy-doctrine-administrative-state.html>

Joe Biden promised us an FDR-sized presidency—starting with bold action to halt the spread of COVID-19, end the worst economic downturn in decades, and stop the climate crisis. Biden could use regulation and executive action to move quickly to decarbonize the economy, cancel student loan debt, and raise wages. But a Biden administration has an even bigger problem than two long-shot special elections in Georgia: the new 6–3 conservative majority on the Supreme Court may soon burn down the federal government’s regulatory powers.

At least five conservative justices have signaled that they are eager to revive the “non-delegation doctrine,” the constitutional principle that Congress can’t give (“delegate”) too much lawmaking power to the executive branch. On paper, the rule requires Congress, when delegating power to an agency, to articulate an “intelligible principle” (like air pollution regulation needed “to protect public health”) to guide the agency’s exercise of that power. But in practice, the nondelegation doctrine is effectively dead. The court has only struck down two statutes on nondelegation grounds—and none since 1935.

Today, most of the government’s work is done through the “administrative state,” the administrative agencies and offices, like the Environmental Protection Agency, the Department of Labor, and the Department of Education, which issue regulations and enforce laws. Congress doesn’t have the capacity to pass laws that nimbly address complex, technical, and ever-changing problems like air pollution, COVID-19 exposure in workplaces, drug testing, and the disposal of nuclear waste. So Congress tasks agencies staffed with scientists and other specialists to craft regulations that directly address those problems. This division of responsibility—Congress legislates policy goals and agencies implement them effectively—is the foundation of functional government.

Take, for example, the Clean Air Act. In 1963, Congress ordered the EPA to regulate air quality standards “at a level that is requisite to protect public health.” Based on that authority, the EPA routinely issues lifesaving regulations limiting lead in the air, air pollutants coming from chemical plants, and, critically, greenhouse gasses. Biden can use the CAA to start tackling the climate crisis on Day One. The dormant nondelegation doctrine is the foundation of thousands of regulations across dozens of agencies, allowing agencies to make technical decisions about, say, hospital reimbursement rates to administer Medicare or wage and hour rules that protect workers from exploitation.

But last year, in a case called Gundy v. United States, four conservative justices announced that they wanted to bring the nondelegation doctrine back to life. Gundy arose out of a national sex offender registry law that explicitly applied to everyone convicted after the law took effect but delegated authority to the Department of Justice to determine when and how it applied to people convicted before the law took effect. Herman Gundy, who was convicted before the registry law took effect, argued that the law violated the nondelegation doctrine. The court upheld the law. But in a dissent joined by Chief Justice John Roberts and Justice Clarence Thomas, Justice Neil Gorsuch wrote that the court should revive the dormant nondelegation doctrine.\* Gorsuch’s dissent argued that Congress may only delegate policymaking power to agencies under three narrow circumstances: to “fill up the details” of a legislative scheme; for executive fact-finding to determine the application of a rule; and to assign nonlegislative responsibilities to the executive and judicial branches. Justice Samuel Alito wrote separately to say he’d like to “reconsider” the nondelegation doctrine—just not in a case about sex offenders’ rights.

Justice Brett Kavanaugh wasn’t on the court in time to hear Gundy. But last fall, in a separate opinion, he signaled his support for Gorsuch’s new, revived nondelegation doctrine. That makes five votes for resurrecting the nondelegation doctrine and taking a hatchet to landmark labor, environmental, and consumer protection law—even without Justice Amy Coney Barrett, who, administrative law experts warn, shares the conservative justices’ hostility to the administrative state.

As Justice Elena Kagan pointed out in Gundy if the conservative justices bring back the nondelegation doctrine, “most of Government is unconstitutional.” Exactly how much government would be unconstitutional, though, isn’t clear. What does Gorsuch mean when he writes that Congress may give agencies the power to “fill up the details” of a legislative scheme? What does Kavanaugh’s test—that Congress may not delegate “major policy questions” to agencies—actually forbid in practice? Would Biden’s EPA be permitted to issue regulations about greenhouse gasses or new, dangerous chemicals leaking into our public waters? Congress relies on OSHA experts to set workplace safety standards that are “reasonably necessary or appropriate to provide safe or healthful employment.” Does that “delegate” too much power to OSHA to act fast to issue COVID-19 safety standards for transportation, grocery stores, and meatpacking workers, as Joe Biden has promised to do? What about the EEOC’s power to interpret anti-discrimination to address workplace dress codes that discriminate against Black women’s natural hair? What about the FDA’s authority under the Family Smoking Prevention and Tobacco Control Act to subject “any” tobacco products to federal regulations—is “tobacco products” narrow enough under Gorsuch and Kavanaugh’s tests? Or would an FDA decision to regulate Juul just like cigarettes be a “major policy question” outside agencies’ powers?

The uncertainty alone could give special interests like fossil fuel companies and Juul grounds to sue to stop, or at least hold up, lifesaving regulations issued by the Biden administration. They’re already trying—just last year, e-cigarette company “Big Time Vapes” argued that the FDA’s power to regulate “any” tobacco product violated the nondelegation doctrine. The U.S. Court of Appeals for the 5th Circuit rejected that challenge. But in its opinion, the 5th Circuit hinted that similar challenges could soon be successful, as the Supreme Court “might well decide—perhaps soon—to reexamine or revive the nondelegation doctrine.” And if that happens, all bets are off.

Such a decision would not only threaten existing regulations. It endangers every piece of future progressive legislation, too. Big, transformative legislative packages, like a Green New Deal or “Medicare for All,” would require a million and one technical decisions that Congress is poorly positioned to make. Biden and Congress can pass legislation phasing the United States toward 100 percent clean energy by 2030—but someone will have to actually sweat the details about which engines can be included in which cars.

Government doesn’t work without the administrative state. But that’s sort of the point. The conservative justices have long been hostile to regulation and executive action. And now they may finally have the votes to bring virtually any regulation to a halt. At least five justices are ready to drop a 1,000-pound anvil on any Biden administration rule that displeases them.

### 2

#### The FTC should issue clear enforcement guidance that the presently-existent phrase “unfair methods of competition in or affecting commerce” in Section 5 of the FTCA includes anticompetitive practices by nucleus participants at the root layer of blockchains. The FTC should release a clear statement and data sets that reflect and, accordingly, enforce this. The Commission should write an opinion announcing a broad perspective of its Section 5 powers – but clarify that it has concluded that Intel’s conduct did not violate Section 5.

#### There is broad range for the FTC to target blockchain under section 5

Thomas 20 --- Ryan C. Thomas is a partner in the Washington, DC office of Jones Day. Peter Julian is an associate in the firm’s San Francisco office. The authors wish to recognize and thank Jones Day summer associate and UC Hastings College of Law student Amul Kalia for his valuable contributions to this article. The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of Jones Day, BLOCKCHAIN TECHNOLOGY: A FUTURE ANTITRUST TARGET?, The Journal of the Antitrust, UCL and Privacy Section of the California Lawyers Association, Vol 30, No. 2 Fall 2020

Section 5 of the FTC Act prohibits unfair competition.76 The FTC has adopted an expansive and at times controversial interpretation of its enforcement powers under this statute, asserting that Section 5 applies to any “deceptive, collusive, coercive, predatory, unethical, or exclusionary conduct or any course of conduct that causes actual or incipient harm to competition,” including conduct that is not covered by the Sherman Act.77 One of the more common applications of Section 5 involves invitations to collude—efforts by one firm to enter into an anticompetitive price fixing or market allocation agreement with one or more of its competitors.78

Because blockchains can be used to share information, they could potentially be used to “signal” future plans to rivals and invite them to follow suit. For example, a competitor could use blockchain transaction histories to demonstrate to its competitors that it had been consistently charging a particular price, and then—successfully or unsuccessfully— suggest that they do the same. Or if a blockchain allowed rivals’ access to prospective pricing or other competitively sensitive information, that could be used to signal plans and invite others to follow. Such activity may be viewed as an invitation to collude in violation of Section 5, particularly if there is evidence that competitors’ subsequent transactions and posted prices were impacted by the signal.

#### No SCOTUS rollback- the Cplan has a plank that has the FTC find in favor of Intel. That strategy tempers risks of unfavorable judicial review.

Crane ‘10

Daniel A. Crane - Professor of Law, University of Michigan. “Reflections on Section 5 of the FTC Act and the FTC's Case Against Intel” - The CPI Antitrust Journal (Competition Policy International) – February, 2010, (2) – modified for language that may offend - #E&F - https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2369&context=articles

IV. A MARBURY V. MADISON STRATEGY FOR THE INTEL CASE

For the reasons set forth above, the Intel action raises serious risks of setting back the FTC’s antitrust enforcement powers. Certainly, the Commission risks losing the matter in a probusiness appellate court46 or the Supreme Court during a time of economic trouble when antitrust cases are historically difficult for the Government to win.47 But the risk goes far beyond losing this individual matter. There is a very real risk that an appellate court will write an opinion rebuking the Commission for asserting independence from the Sherman Act, thus setting a precedent that could constrain the Commission’s enforcement mission for years to come.

Nonetheless, there is a way forward that could turn Intel into a victory for the Commission’s enforcement power. It is what I will call a Marbury v. Madison48 strategy. Should the Commission conclude that Intel’s conduct did not violate Section 5, it could nonetheless create a precedent for more expansive enforcement powers in the future. Indeed, such an opinion could work to the Commission’s long-run advantage, since it would be insulated from immediate and potentially hostile appellate review—just as Marbury created a long-run victory for judicial power even while deciding against judicial power on the narrow facts of that case.

To provide a very abbreviated recap on Marbury, early during the Jeffersonian period, Chief Justice Marshall faced a dilemma: Although he wanted to affirm in principle the power of judicial review of acts of Congress, he risked seriously damaging the Court’s long-run effectiveness and prestige by striking down an act only to have the newly elected Jeffersonians, who were hostile to the Federalist Supreme Court, disregard the Court’s decision.49 Hence, Marshall wrote an opinion that at once declared Madison’s refusal to deliver Marbury’s commission illegal, but also the Judiciary Act unconstitutional insofar as it assigned a mandamus power, a species of original jurisdiction, to the Supreme Court. The upshot was that the Court declined to issue the writ of mandamus sought by the Federalists, even while affirming the power of the Court to strike down an Act of Congress. Though hostile to the Court’s assertion of the power of judicial review, the Jeffersonians were impotent to challenge the decision since it left the status quo undisturbed and denied the Federalist justices of the peace their commissions. In the long run, establishing the principle of judicial review proved far more lasting a victory for the Federalist view of judicial power than winning the narrow skirmish over justice of the peace commissions.

The FTC could pursue a similar strategy here by writing an opinion announcing a broad ~~view~~ (perspective) of its Section 5 powers and independence from the Sherman Act, even while finding in favor of Intel and thus avoiding an immediate and probably hostile judicial reaction. Such an opinion would demonstrate the FTC’s self-control over its enforcement powers and assuage concerns that divorcing Section 5 from the Sherman Act would lead to unchecked administrative discretion and an abandonment of the “rule of law.” The opinion could announce a framework for future judicial review of Section 5 decisions—perhaps announcing a set of limiting principles for independent Section 5 challenges along the lines of those proposed above. In the future, courts might be much more inclined to respect the Commission’s views on Section 5 if it had previously articulated a self-disciplining set of limitation principles and censured itself without the need for judicial intervention.

### 3

#### FTC independence in the US key to *global norms* that support agency independence. Vital for *free trade* and *GLO*.

* United States’ FTC practices are modeled *by several nations* – including South Korea – and *will continue to be modeled* by nations that are still amid transitions towards industrialization;
* Global attentiveness to the United States’ FTC practices *remains ongoing* and - “*to this day*” - are a *central obstacle* to aspired free trade norms;
* The root of the loss of the global public’s confidence in free trade stems from the success of zero-sum strategies. *The root of that* is an interpretation of the FTCA that permits politicized intervention;
* Ambiguity in the United States’ FTCA permit the Act to be exercised *EITHER with a great deal of agency discretion* – *OR* alternatively, *with the perceived influence of external political branches*;
* Current US FTC practices lean away agency independence – and that’s *a central obstacle* to international agencies countering the growth of protectionist mercantilist norms
* More broadly, this hampers *general support for internationalism/GLO*

Nam ‘18

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ABSTRACT:

The Federal Trade Commission Act of 1914 (“FTC Act”), a model for many other countries that set up their own competition agencies, combines the control afforded by presidential appointment and removal powers over FTC commissioners with an exceedingly discretionary mandate. This Article contends that the FTC Act’s outmoded openness to strong presidential direction, where adapted abroad, has helped detract from antitrust regulator independence. Even advanced players in the liberal international economic order such as South Korea have made use of the United States’ original blueprint for unitary executive-stamped antitrust enforcement without sharing a long historical evolution of counterbalancing regulatory norms, e.g. the judicial check that was Humphrey’s Executor v. United States, 295 U.S. 602 (1935).

Strong executive direction in antitrust enforcement is particularly suited to capitalist economies helmed by administrations with mercantilist policies, given their belief that the state and big business must cooperate in the face of zero-sum international competition. South Korean President Lee MyungBak’s term (2008-2013) serves as an apt recent case study, featuring dirigiste calibration of antitrust enforcement against a backdrop of global recession. This Article examines the parallels between the FTC Act and the South Korean Monopoly Regulation and Fair Trade Act (“MRFTA”) before scrutinizing the enabled silo-like enforcement patterns of the Korean Fair Trade Commission under the Lee administration. Increasingly widespread erosion of public confidence in free and competitive trade demands a better understanding of the forces preventing global convergence in antitrust enforcement, and of their roots.

We have created, in the Federal Trade Commission, a means of inquiry and of accommodation in the field of commerce which ought both to coordinate the enterprises of our traders and manufacturers and to remove the barriers of misunderstanding and of a too technical interpretation of the law. —President Woodrow Wilson, September 1916

[Our companies] are fighting with unfavorable conditions amid competition in the global economy. To do so, they must be allowed to escape various regulations. Let’s take just a half step forward to move beyond the pace of change in the global economy. —South Korean President Lee Myung-bak, March 2008

It is clear that, at the beginning of the 21st century, we cannot afford to operate, to enforce our competition laws, in national or regional silos. We must not remain isolated from what happens in other jurisdictions. Even if markets often remain regional or national in terms of competitive assessment, fostering global convergence in our legal and economic analysis is essential to ensuring effectiveness of our enforcement and creating a level playing field for businesses across our jurisdictions. —Joaquín Almunia, Vice-President of the European Commission for Competition Policy, April 2010

The [U.S.] Agencies do not discriminate in the enforcement of the antitrust laws on the basis of the nationality of the parties. Nor do the Agencies employ their statutory authority to further nonantitrust goals. —The U.S. Department of Justice and the Federal Trade Commission, April 1995

INTRODUCTION

The International Competition Network’s founding in October 2001, with the aim of “formulat[ing] proposals for procedural and substantive convergence” among its stated goals,5 sought to usher in a future with more cosmopolitan and coherent global antitrust enforcement. Although U.S. regulatory leadership maintained that “consistently sound antitrust enforcement policy cannot be defined and decreed for others by the U.S., the EU, or anyone else,” many countries (turned) ~~looked~~ to the U.S. as a role model while developing their competition regimes.6 It is ironic, then, that to this day a central obstacle to the aspired international “culture of competition” can be found in none other than the influence of the U.S.’s own FTC Act.7

American antitrust priorities around the time of the legislation’s passage oscillated between tempering trusts and shepherding business to further national economic strength, all towards the domestic interest. They shaped a regulatory environment that would reemerge abroad in many later-developing countries.

The deepening global retreat from internationalism *and* free market principles in the present day, with the specter of trade wars looming, is exacerbated by nationalist competition regimes that are derivative of a U.S. model predating the modern world economy. Domestic critics of open markets often overlook the U.S.’s own past vis-à-vis protectionist governments today. Illiberal or nominally liberal, they walk the kind of dirigiste path once treaded by the American School through the early twentieth century.8

#### Globally, independence of antitrust agencies will prove key – checks spiraling economic nationalisms that’ll crush liberal peace.

Nam ‘18

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National antitrust silos are not a novel phenomenon. Former European Commissioner for Competition Joaquín Almunia warned of them years ago,152 and scholarship touching upon the furtherance of nationalist goals by various antitrust agencies dates back decades.153 However, a creeping loss of public confidence in open markets—coupled with the obstacles to coherent global antitrust enforcement that bear the FTC Act’s influence, as illustrated in this Article—risks amplifying the problem. As anti-free trade agendas continue to garner more mainstream popularity for formerly counter-establishment parties, a proliferation of protectionist silos could tempt even governments that, for the most part, had moved past them. Why, American officials may ask, should the U.S. continue championing the liberal international economic order when an illiberal China or an ostensibly liberal South Korea bends regulatory rules to disadvantage American companies, workers, and consumers? Skepticism towards a liberal democratic “end of history”154 in general, and failures of economic liberalism in particular, are threatening to motivate political circles accordingly. Even perennial norms and conventions of the U.S. competition regime which evolved to safeguard regulator independence at home are no longer above disruption; the ambiguous statutory articulations that carried over abroad to empower strong executives are likewise playing a paper tiger role domestically of late.155

Protectionist policies designed to compromise market competition—for all its documented excesses and inadequacies—would sap its creative vitality and the concurrent liberal peace156 often taken for granted. Economic liberalism ails not so much from the intrinsic failings of core tenets, but from their more egregious nation-state and corporate violators. Proposals for greater accountability and harmonization have ranged from presumption of an underlying coordination scheme in antitrust investigations of a culpable country’s companies,157 to an international competition regime binding on member states in at least some areas of antitrust.158 Each has associated costs, but their very debate harnesses polycentric dialogue lacking in nationalist regulatory agendas and calls for “our country, right or wrong” protectionist silos. It should be emphasized to policymakers and politicians collectively that lasting convergence in antitrust enforcement is unachievable without global coherence in regulator autonomy, and the FTC Act’s formative influence is not above scrutiny or reproach. Still-elusive realization of the liberal economic international order’s intended form will require an expanded constellation of independent competition regulators empowered to enforce antitrust laws consistently.

#### Global free trade reversals will cause *multiple existential impacts*.

* Arctic conflict
* Space conflict;
* Global nuclear prolif;
* Structural wars;
* Climate;
* Geo-engineering;

Langan-Riekhof ‘21

et al; Maria Langan-Riekhof is the Lead Author and is the new Director of the Strategic Futures Group at the National Intelligence Council, leading the Intelligence Community’s assessment of global dynamics and charged with producing the quadrennial Global Trends product for the incoming or returning administration. She has spent more than 27 years in the intelligence community as both a senior analyst and manager, serving at the CIA and on the NIC. She brings a background in Middle East studies and has spent more than half her career analyzing regional dynamics. Her leadership roles include: Chief of the CIA’s Red Cell, founder and director of the CIA’s Strategic Insight Department, and research director for the Middle East. She was one of the DNI’s Exceptional Analysts in 2008-09 and the Agency’s fellow at the Brookings Institution in 2016-17. She is a member of the Senior Analytic Service and the Senior Intelligence Service and hold degrees from the University of Chicago and the University of Denver - National Intelligence Council - Global Trends 2040 – Form the section: “Scenario Four – Separate Silos” - MARCH 2021 - #E&F - https://www.dni.gov/files/ODNI/documents/assessments/GlobalTrends\_2040.pdf

With the trade and financial connections that defined the prior era of globalization disrupted, economic and security blocs formed around the United States, China, the EU, Russia, and India. Smaller powers and other states joined these blocs for protection, to pool resources, and to maintain at least some economic efficiencies. Advances in AI, energy technologies, and additive manufacturing helped some states adapt and make the blocs economically viable, but prices for consumer goods rose dramatically. States unable to join a bloc were left behind and cut off.

Security links did not disappear completely. States threatened by powerful neighbors sought out security links with other powers for their own protection or accelerated their own programs to develop nuclear weapons, as the ultimate guarantor of their security. Small conflicts occurred at the edges of these new blocs, particularly over scarce resources or emerging opportunities, like the Arctic and space. Poorer countries became increasingly unstable, and with no interest by major powers or the United Nations in intervening to help restore order, conflicts became endemic, exacerbating other problems. Lacking coordinated, multilateral efforts to mitigate emissions and address climate changes, little was done to slow greenhouse gas emissions, and some states experimented with geoengineering with disastrous consequences.

*Note to students*: this ev appears to advance a cemented future – but it is an ebook report by the National Intelligence Council outlining possible futures \*if\* certain premises were to take place. Perhaps this is best explained by an except from the opening of this report: “Welcome to the 7th edition of the National Intelligence Council’s Global Trends report. Published every four years since 1997, Global Trends assesses the key trends and uncertainties that will shape the strategic environment for the United States during the next two decades. Global Trends is designed to provide an analytic framework for policymakers early in each administration as they craft national security strategy and navigate an uncertain future. The goal is not to offer a specific prediction of the world in 2040; instead, our intent is to help policymakers and citizens see (aware of) what may lie beyond the horizon and prepare for an array of possible futures”.

### 4

Systemic Risk PIC

#### Counterplan:

#### The United States federal government should legalize anticompetitive practices by nucleus participants at the root layer of blockchains that reduce systemic risks.

#### Narrowing the scope of antitrust prohibitions is key to prevent systemic risks unique to procompetitive, decentralized blockchain applications

Weinstein 21 (Samuel N. Weinstein, Associate Professor of Law, Benjamin N. Cardozo School of Law, “Blockchain Neutrality,” Georgia Law Review, vol.55, Winter 2021, 55 Ga. L. Rev. 499, https://www.georgialawreview.org/article/21202.pdf)

Although blockchain has significant procompetitive potential, certain blockchain applications also pose serious fraud and systemic risks. Many ICOs have turned out to be fraudulent,14 and decentralized financial-products trading will make regulators’ task of tracking and mitigating systemic risks more difficult. Blockchain’s ultimate impact in the financial markets—and in the broad range of other markets it might remake—will depend in large part on governments’ competition policy responses.15 Will regulators create the conditions for blockchain-based businesses to transform markets, as they did for the Internet in the past quarter century, or will they disfavor these new business models to protect gatekeeper institutions? To answer this question, financial regulators must weigh blockchain’s potential for increasing competition against its very real risks; so far, they are erring on the side of risk prevention.16

This Article argues that emerging blockchain-based financial services networks offer a rare chance to make the financial sector less concentrated, more competitive, and more democratic. Financial regulators are uncertain stewards for this type of transformation. If the regulatory agencies maintain their narrow focus on fraud prevention and systemic-risk management, they may miss a significant opportunity to help modernize the markets they oversee. Instead, they should seek ways to promote the increased competition that blockchain technology promises to create.

To meet this challenge, this Article proposes a regulatory strategy, modeled on early Internet regulation, to unlock blockchain’s competitive potential while mitigating the risk of fraud. It contends that regulators should promote vigorous blockchain competition—and the resulting market decentralization—except in cases where specific applications are shown to harm consumers or threaten systemic safety. To safeguard the full flowering of blockchain competition, regulators also should ensure open access and non-discrimination on dominant blockchain networks. This strategy will serve traditional antitrust goals of lowering prices, increasing output, and promoting innovation,17 while also potentially achieving broader economic and social ends by reducing the power and influence of the biggest financial institutions. These institutions, especially Wall Street banks, have exercised control over financial-services markets for some time.18 Access to capital is dominated by leading Wall Street firms and Silicon Valley VCs; Wall Street also controls most financial products trading. 19 Blockchain-based networks offer the opportunity to release this stranglehold, giving individuals and firms more freedom about how they consume financial services. This shift might serve distributive goals, too. Availability of financial services historically has been limited by class and race.20 By providing widely accessible competitive alternatives to traditional banks and VCs, public blockchain-based networks could broaden opportunities for individuals and firms from diverse backgrounds to raise capital and enter the financial markets.

A burgeoning body of legal scholarship has documented the spread and implications of blockchain, addressing how the technology works and its potential to upend various markets.21 Much of that scholarship has focused on the financial markets, especially the development of cryptocurrencies.22 A handful of scholars have addressed the regulatory challenges blockchain presents, including in the financial services sector,23 but this literature is still in its infancy. This is particularly true for antitrust and competition scholarship, which is especially sparse.24 This Article addresses that gap in the blockchain literature.

In doing so, the Article draws a distinction between antitrust and competition policy. The former term is used here to refer to enforcement of federal and state antitrust statutes, particularly the Sherman and Clayton Acts.25 This Article treats the latter term as a broader concept encompassing not only decisions about antitrust enforcement priorities, but a wider set of choices made by Congress, the executive branch, sector regulators, and state and local governments that establish the terms on which competition takes place in various markets.26 It argues that concerns among some scholars and practitioners that blockchain threatens effective antitrust enforcement are premature.27 Despite the technology’s disruptive nature, the substantive antitrust challenges blockchain poses are not novel and can be addressed using current law and enforcement strategies. Indeed, the transparency blockchain offers may simplify discovery and prosecution of antitrust violations. Rather than locating and sifting through hundreds of thousands of documents to prove a price-fixing conspiracy, enforcers may find the relevant evidence permanently recorded on a cartel’s blockchain. The ability of blockchain users to mask their identities by employing pseudonyms may raise some technical enforcement challenges, but pseudonymity does not guarantee anonymity.28 Violators typically can be identified, and remedies can attach.29

In contrast, this Article contends that blockchain presents new and difficult competition policy issues that will require innovative regulatory solutions. Because blockchain-related technologies have applications across industries, multiple regulators may be positioned to make blockchain competition policy. Even if the details differ between regulatory regimes, the question these regulators will face should be similar: how to manage markets where incumbents are under attack by new competitors using blockchainbased systems to decentralize and deconcentrate industries. Agencies charged with developing blockchain-related competition policy must grapple with at least three fundamental challenges: (1) balancing the benefits of the increased competition that blockchain networks will make possible against concerns for marketplace and consumer safety; (2) determining how much market decentralization to promote or tolerate; and (3) deciding whether and how to promote standardization, open-access, and nondiscrimination requirements on blockchain networks.

This Article focuses on the financial-services industry, where blockchain-based technologies might fundamentally alter the way business is conducted. Cryptocurrencies like Bitcoin are the leading edge of this transformation, but they likely are just the first step in remaking the financial sector. Bigger changes may be coming in capital markets and equities and derivatives trading. Blockchain technologies are enabling firms to raise significant amounts of capital directly from the public. Several companies already have used ICOs to raise over $100 million each, 30 more than an average initial public offering (IPO) raises, and, in 2019, companies used blockchain-based IEOs to raise $1.7 billion.31 These new funding models might endanger traditional sources of capital formation: if businesses can use token sales to raise public money directly, fewer reasons exist to pay VCs and Wall Street for these services. Blockchains are also being used to build equities and derivatives trading and clearing platforms that can reduce or eliminate the need for traditional dealers and big banks in these markets.32 These platforms allow individual users to trade directly with one another from their personal terminals.33

Together, these blockchain-based services potentially could compete for large chunks of incumbent financial institutions’ most profitable businesses. This development could have significant economic and social consequences. The financial services sector represents seven percent of U.S. GDP,34 and Wall Street banks—for many decades—have been among the most important private institutions in the country.35 The outsized profits these institutions garner have played a role in the nation’s growing income inequality,36 and their gatekeeper function has limited which firms can raise money and who can trade in financial products. Blockchain-based networks offer the opportunity to reshape this financial-services landscape.

Because they oversee financial markets—including capital markets and equities and derivatives trading—sector regulators, especially the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC), likely will play a significant role in determining whether blockchain realizes its transformative potential. In doing so, they must determine how to balance enhanced blockchain competition against marketplace and consumer safety, how to manage market decentralization, and whether to promote standardization, open-access, and nondiscrimination on blockchain networks.

Of these issues, perhaps the most pressing is how to weigh the prospects for increased blockchain-related competition and its many benefits against threats to consumer safety and systemic soundness arising from blockchain networks. In antitrust cases, agencies and courts typically reject safety-related justifications for competition restrictions.37

**[FOOTNOTE 37]**

37 See, e.g., FTC v. Ind. Fed’n of Dentists, 476 U.S. 447, 462–64 (1986) (holding that the Federation’s policy requiring members to deny insurers’ requests for dental x-rays violated section 1 of the Sherman Act and section 5 of the Federal Trade Commission Act and rejecting the Federation’s argument that the restraint was lawful under the rule of reason because it was designed to protect patients from being deprived of adequate dental care); Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 693–95 (1978) (rejecting defendant’s proffered safety justification for its ban on competitive bidding and stating that defendant’s attempt to justify the ban “on the basis of the potential threat that competition poses to the public safety and the ethics of its profession is nothing less than a frontal assault on the basic policy of the Sherman Act”).

**[/FOOTNOTE 37]**

Sector regulators view this balance differently. Despite statutory mandates to promote competition,38 the SEC and CFTC strongly favor consumer safety and systemic risk prevention over competition concerns.39 These agencies have been active in the blockchain space, especially with regard to ICOs and cryptocurrencies.40 Considering their regulatory priorities, it is unsurprising that the agencies’ focus to date has been on fraud prevention and classification and registration of financial products and entities.41 Less attention is being paid to broader competition issues. This approach is not balanced; it tilts heavily toward harm prevention.

This Article argues that sector regulators should promote the increased competition that blockchain-based networks make possible, rather than focusing solely on the need to ameliorate the potential systemic risk and fraud-related harms those networks may engender. FCC regulation of the telephony system and, later, the Internet provides a useful model for the financial regulatory agencies in this regard. Net neutrality rules and earlier FCC regulations struck a balance between promoting innovation and competition and protecting the public from unsafe practices.42 These rules prohibited networks from discriminating against downstream competitors except when their applications were harmful or fraudulent.43 A similar approach makes sense for the SEC and CFTC as they grapple with emerging blockchain-related competition-policy issues. In general, the agencies should think systematically about how to encourage blockchain-based competition. A narrow focus on fraud and registration requirements misses the forest for the trees.

Market decentralization poses related but distinct challenges for regulators. Among blockchain’s most lauded attributes is its potential to democratize and decentralize markets.44 In theory, blockchain technology offers the possibility for markets to become more competitive by reducing the power of gatekeeper firms— including platform companies—and by creating the potential for new competitors to emerge. This decentralization may have noneconomic benefits too, including spreading opportunity beyond elite institutions and offering market access to underserved populations. But decentralization also raises challenges for regulators. The more decentralized a market becomes, the more problematic it is for regulators to monitor market participants.45 In financial markets, decentralization can create significant difficulties. One only has to recall the role derivatives products played in the 2008 financial crisis to be reminded of the risks posed by widespread, unregulated financial contracts. Presently, the CFTC and SEC can monitor much of the world’s riskiest financial activity by keeping tabs on the largest regulated banks.46 Decentralization through blockchain will likely complicate that task and may compromise consumer safety and systemic stability.

#### Cascades to extinction

Pamlin and Armstrong 15 (Dennis Pamlin, Executive Project Manager Global Risks, Global Challenges Foundation, and Stuart Armstrong, James Martin Research Fellow, Future of Humanity Institute, Oxford Martin School, University of Oxford, “Global Challenges: 12 Risks that threaten human civilization: The case for a new risk category,” Global Challenges Foundation, February 2015, p.90-93, https://api.globalchallenges.org/static/wp-content/uploads/12-Risks-with-infinite-impact.pdf)

3. Twelve Global Challenges / 3.1 Current risks

3.1.5 Global System Collapse

Global system collapse is defined here as either an economic or societal collapse on the global scale. There is no precise definition of a system collapse. The term has been used to describe a broad range of bad economic conditions, ranging from a severe, prolonged depression with high bankruptcy rates and high unemployment, to a breakdown in normal commerce caused by hyperinflation, or even an economically-caused sharp increase in the death rate and perhaps even a decline in population. 310

Often economic collapse is accompanied by social chaos, civil unrest and sometimes a breakdown of law and order. Societal collapse usually refers to the fall or disintegration of human societies, often along with their life support systems. It broadly includes both quite abrupt societal failures typified by collapses, and more extended gradual declines of superpowers. Here only the former is included.

3.1.5.1 Expected impact

The world economic and political system is made up of many actors with many objectives and many links between them. Such intricate, interconnected systems are subject to unexpected system-wide failures due to the structure of the network311 – even if each component of the network is reliable. This gives rise to systemic risk: systemic risk occurs when parts that individually may function well become vulnerable when connected as a system to a self-reinforcing joint risk that can spread from part to part (contagion), potentially affecting the entire system and possibly spilling over to related outside systems.312 Such effects have been observed in such diverse areas as ecology,313 finance314 and critical infrastructure315 (such as power grids). They are characterised by the possibility that a small internal or external disruption could cause a highly non-linear effect,316 including a cascading failure that infects the whole system,317 as in the 2008-2009 financial crisis.

The possibility of collapse becomes more acute when several independent networks depend on each other, as is increasingly the case (water supply, transport, fuel and power stations are strongly coupled, for instance).318 This dependence links social and technological systems as well.319 This trend is likely to be intensified by continuing globalisation,320 while global governance and regulatory mechanisms seem inadequate to address the issue.321 This is possibly because the tension between resilience and efficiency322 can even exacerbate the problem.323

Many triggers could start such a failure cascade, such as the infrastructure damage wrought by a coronal mass ejection,324 an ongoing cyber conflict, or a milder form of some of the risks presented in the rest of the paper. Indeed the main risk factor with global systems collapse is as something which may exacerbate some of the other risks in this paper, or as a trigger. But a simple global systems collapse still poses risks on its own. The productivity of modern societies is largely dependent on the careful matching of different types of capital325 (social, technological, natural...) with each other. If this matching is disrupted, this could trigger a “social collapse” far out of proportion to the initial disruption.326 States and institutions have collapsed in the past for seemingly minor systemic reasons.327 And institutional collapses can create knock-on effects, such as the descent of formerly prosperous states to much more impoverished and destabilising entities.328 Such processes could trigger damage on a large scale if they weaken global political and economic systems to such an extent that secondary effects (such as conflict or starvation) could cause great death and suffering.

3.1.5.2 Probability disaggregation

Five important factors in estimating the probabilities of various impacts:

1. Whether global system collapse will trigger subsequent collapses or fragility in other areas.

2. What the true trade-off is between efficiency and resilience.

3. Whether effective regulation and resilience can be developed.

4. Whether an external disruption will trigger a collapse.

5. Whether an internal event will trigger a collapse.

1. Increased global coordination and cooperation may allow effective regulatory responses, but it also causes the integration of many different aspects of today’s world, likely increasing systemic risk.

2. Systemic risk is only gradually becoming understood, and further research is needed, especially when it comes to actually reducing systemic risk.

3. Since systemic risk is risk in the entire system, rather than in any individual component of it, only institutions with overall views and effects can tackle it. But regulating systemic risk is a new and uncertain task.

4. Building resilience – the ability of system components to survive shocks – should reduce systemic risk.

5. Fragile systems are often built because they are more efficient than robust systems, and hence more profitable.

6. General mitigation efforts should involve features that are disconnected from the standard system, and thus should remain able to continue being of use if the main system collapses

7. A system collapse could spread to other areas, infecting previously untouched systems (as the subprime mortgage crisis affected the world financial system, economy, and ultimately its political system).

8. The system collapse may lead to increased fragility in areas that it does not directly damage, making them vulnerable to subsequent shocks.

9. A collapse that spread to government institutions would undermine the possibilities of combating the collapse.

10. A natural ecosystem collapse could be a cause or consequence of a collapse in humanity’s institutions.

11. Economic collapse is an obvious and visible way in which system collapse could cause a lot of damage.

12. In order to cause mass casualties, a system collapse would need to cause major disruptions to the world’s political and economic system.

13. If the current world system collapses, there is a risk of casualties through loss of trade, poverty, wars and increased fragility.

14. It is not obvious that the world’s institutions and systems can be put together again after a collapse; they may be stuck in a suboptimal equilibrium.

### 5

Exemptions T

#### The scope of antitrust law is exclusively bounded by exemptions and immunities

ABA 7 (American Bar Association, ABA Section of Antitrust Law, Monograph 24, “Chapter 1 Introduction,” *Federal Statutory Exemptions from Antitrust Law*, American Bar Association, 2007, ISBN: 978-1-59031-864-5, pp.4-7)

A. Background: The Broad Scope of Antitrust, and an Introduction to Statutory Exemptions

Because this monograph concerns statutory constraints on the reach of antitrust law, a word is in order about the broad scope of antitrust principles.

Sherman Act sections 1 and 2 apply to “trade or commerce among the several States, or with foreign nations,”11 but the act leaves that phrase undefined. The Clayton and Federal Trade Commission Acts both define the “commerce” to which they apply,12 but give it only a jurisdictional meaning similar to that under the Commerce Clause of the federal Constitution.13 The courts have thus been left to decide just how broadly antitrust applies. Despite some uncertainty in the first half of the twentieth century,14 and with one lingering exception,15

**[FOOTNOTE 15]**

15. Namely, neither the Court nor Congress has ever overruled the Court’s sui generis 1922 rule that professional baseball is not “commerce.” See Fed. Club. 259 U.S. at 209.

**[/FOOTNOTE 15]**

modem courts define this scope very broadly. The inclusive modem definition is perhaps the natural culmination of the Supreme Court’s long-held belief that “Congress intended to strike as broadly as it could in Section 1 of the Sherman Act,”16 a view it developed because “[l]anguage more comprehensive” than that in Section 1 “is difficult to conceive.”17

This view probably also reflects the broad definition given to the terms “trade” and “commerce” for various purposes at common law, as some courts have explicitly held that antitrust was meant to incorporate those ideas." Thus, the courts have held generally that any exchange of money for a good or service, between any persons, is in ‘trade or commerce,”19 and the Supreme Court itself has described “commerce” to include any “exchange of...a service for money.’00 Indeed only in very limited, and sometimes exotic, circumstances have modem courts found conduct to be outside the scope of antitrust.21

**[FOOTNOTE 21]**

21. See. e.g., Dedication & Everlasting Love to Animals v. Humane Soc’y of the U.S., 50 F.3d 710 (9th Cir. 1995) (holding that solicitation of gratuitous charitable donations is not trade or commerce).

**[/FOOTNOTE 21]**

Therefore, in the absence of an explicit statutory exemption or a judicially created immunity, and so long as it is in the interstate or foreign commerce of the United States, the giving of essentially anything in return for money or barter is subject to federal antitrust.

Understanding the scope of modem antitrust also requires recognition of contemporary developments that affect enforcement of antitrust and its substantive reach. The United States is one of the few of more than 100 nations with competition laws that permit private antitrust suits.22 U.S. antitrust has permitted those suits dating from the initial adoption of the Sherman Act in 1890,23 and they comprise by far the largest component of antitrust enforcement.24 However, recent caselaw developments may increase barriers to the private lawsuits on which U.S. enforcement heavily depends. During the past thirty years or so, the federal courts have gradually raised doctrinal barriers to private enforcement of federal antitrust law, particularly through the rule of antitrust injury and the developing doctrine of antitrust standing.25 Partly as a result of these developments, private enforcement has declined.26

#### ‘Expand’ must make more expansive---NOT merely clarify existing principles

Terry J. Hatter, Jr. 90, Judge, US District Court, California Central, “In re Eastport Assoc.,” 114 B.R. 686, Lexis

[\*\*10] Second, Eastport asserts that the presumption against retroactivity does not apply because the amendment was intended only as a clarification of existing law. HN7 Where an amendment to a statute is remedial in nature and merely serves to clarify existing law, no question of retroactivity is involved and the law will be applied to pending cases. City of Redlands v. Sorensen, 176 Cal. App. 3d 202, 211, 221 Cal. Rptr. 728, 732 (1985). The evidence in this case, however, does not support the conclusion that the amendment to section 66452.6(f) was simply a clarification of preexisting law. The Legislative Counsel's Digest specifically states that "the bill would expand the definition of development moratorium." Senate Bill 186, Stats. 1988, ch. 1330, at 3375 (emphasis added). Since the Legislative Counsel is a state official required by law to analyze pending legislation, it is reasonable to presume that the Legislature amended the statute with the intent and meaning expressed in the Counsel's digest. People v. Martinez, 194 Cal. App. 3d 15, 22, 239 Cal. Rptr. 272, 276 (1987). By its ordinary meaning, the term "expand" indicates a change in the law, rather than a restatement of existing [\*\*11] law. In light of the Counsel's comment, Eastport's argument is unpersuasive.

#### The AFF just clarifies the application of antitrust to already covered practices – it does NOT curtail an exemption or immunity

#### Vote NEG – eliminating exemptions and immunities provides a limited AND predictable basis for prep, and focuses debates on the balance between antitrust and regulation, ensuring conceptual unity

### 6

#### Text:

#### The United States federal government should create a domestic competition network over anticompetitive practices by nucleus participants at the root layer of blockchains, and advocate for prohibition.

#### Solves case – builds consensus

Kovacic 13 (William E. Kovacic, Commissioner, U.S. Federal Trade Commission, and Professor, George Washington University Law School, “Distinguished Essay: Good Agency Practice and the Implementation of Competition Law” European Yearbook of International Economic Law 2013. European Yearbook of International Economic Law, vol 4, <https://link.springer.com/chapter/10.1007/978-3-642-33917-2_1>) MULCH

If the answer to all of these queries is to leave the status quo in place, then it is incumbent upon the public agencies with competition or consumer protection duties to spend more effort than they do today to achieve a greater convergence of approaches and to see how collaboration can permit them to achieve results that exceed the grasp of single agencies acting alone. One place to start is to create a domestic competition network and a domestic consumer protection network to engage the public authorities in the kind of discussions and cooperation that U.S. agencies pursue with their foreign counterparts.17 There is no forum in which the U.S. public institutions assemble regularly to discuss what they do and consider, as a group, how the complex framework of federal, state, and local commands might operate more effectively. At best, the U.S. public authorities perform these network building functions in piecemeal fashion at bar association conferences and other professional gatherings. There also are bilateral discussions involving some public bodies.18 These measures are useful, but they are not good substitutes for the establishment of a more comprehensive framework of interagency regulatory cooperation. The U.S. competition agencies spend more time seeking to develop effective mechanisms for cooperation with foreign authorities than they devote to the integration of policymaking across federal and state agencies domestically.

Good examples of how to achieve greater levels of cooperation exist abroad. In the middle of the previous decade, the European Union (EU) created the European Competition Network (ECN) to coordinate the work of the national competition authorities of the EU member states and the European Commission’s Competition Directorate (DG COMP). The ECN meets regularly to discuss matters of common concern and to promote information sharing and other forms of cooperation. The network has achieved considerable success in avoiding conflicts that might have arisen from the EU’s decision to devolve greater levels of responsibility to the member states as part of a modernization of the EU’s competition policy framework.

As suggested above, government agencies in the United States would do well to emulate the European experience and create domestic networks for competition policy and consumer protection, respectively. A domestic competition network could begin with a memorandum of understanding adopted by the public agencies with competition policy duties, including the two federal antitrust agencies, sectoral regulators such as the Federal Communications Commission (FCC) and the antitrust units of the state attorneys general. The agreement might commit the participants to participate in regular discussions about matters such as the coordination of inquiries involving the same transaction or conduct, the development of common analytical standards, information sharing about specific cases, staff exchanges, and the identification of superior investigative techniques. Cooperation could progress toward the pursuit of joint research projects and the preparation of a common strategy to address various commercial phenomena. The network would be a platform for replicating activities that have become core elements of the ECN, such as interagency sharing of practical know-how and sector-specific experience, the development of common training exercises, and benchmarking of procedures across agencies.

#### Federal preemption destroys state prototyping – AND pushback turns case – DCN solves

Hyman and Kovacic 20 (David A. Hyman, Chair in Law and Professor of Medicine, University of Illinois, former Special Counsel at the Federal Trade Commission; and William E. Kovacic, Global Competition Professor of Law and Policy, Professor of Law, and Director of the Competition Law Center, at George Washington University Law School, former General Counsel, Commissioner, and Chairman of the Federal Trade Commission; “State Enforcement in a Polycentric World,” BRIGHAM YOUNG UNIVERSITY LAW REVIEW, 2019(6), Summer 9-1-2020, <https://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=3248&context=lawreview>) MULCH

What are the implications of our findings for federalism? To the extent there are differences of opinion within the polycentric federal administrative state on an issue that raises issues of federalism, the case for deference to the approach preferred by the federal government (let alone preemption) is much weaker. After all, if the federal government can’t speak with one voice or one mind on the issue, why should the states lose to an internally divided federal government in federalism cases?53 A hard-nosed approach to this problem will create a substantial incentive for the federal government to do a better job of getting its act together (in every sense of those words) and take the necessary steps to fix the organizational structure of the federal administrative state.

B. Engineering, Not Physics in Managing Federalism

During three years of private practice in the 1980s, one of us (Kovacic) worked extensively with engineers in companies that had participated in the U.S. space program in the 1960s. In a number of conversations, the engineers recounted their frustration in listening to physicists talk about space travel without addressing the practical difficulties associated with sending humans 240,000 miles to the moon—and then returning them alive. As Kovacic recalls, one engineer observed that “the physics of going to the moon was relatively straightforward—but the engineering was really difficult.” Brilliant physics without equally brilliant engineering would guarantee mission failure.

Discussions about public policy often reflect an analogous form of tunnel vision. Politicians and policymakers (particularly those who wish to be thought of as visionary leaders) routinely set out a grand vision without thinking hard about the steps needed to actually implement that vision in practice. Big policy ideas (the physics of public administration) are destined to disappoint, unless they are accompanied by skillful implementation (the engineering of public administration).

In the federal-state relationship, the tension between policy diversification and policy coherence poses daunting implementation challenges. But treating the matter as one of engineering (rather than of physics) suggests various strategies for moderating these challenges. At the outset, we set aside the most dramatic solution of vesting sole responsibility in federal agencies, and automatic preemption of state efforts and participation. On the whole, we believe the benefits of decentralized authority—notably, useful policy experimentation and prototyping, the supplementation of federal resources with state funding, and a critical safeguard against simultaneous fifty-state catastrophic failure— warrants continuation of a significant state role in multiple policy domains.54 The politics of these issues are also quite daunting. Stated differently, fair-weather federalism is far more common than all-weather federalism.55

**[FOOTNOTE 55]**

55. See, e.g., Glenn Harlan Reynolds, Chuck Schumer and Elizabeth Warren Are All for State Autonomy—When the GOP’s in Charge, USA TODAY (Apr. 23, 2018), https://www. usatoday.com/story/opinion/2018/04/23/chuck-schumer-elizabeth-warren-marijuanafederalism-column/540253002/ (“Schumer and Warren’s interest in federalism would be welcome if it were general and sincere, but it is limited and insincere.”); Michael Jonas, Progressive Politics From the Ground Up, COMMONWEALTH (Jul. 11, 2017), https://commonwealthmagazine.org/politics/progressive-politics-from-the-ground-up/ (“[B]oth sides are fair-weather federalists. Both sides will, depending on the politics of the moment, prefer state or national power, depending on where they’re in control.”) (quoting Dean Heather Gerken); Jacob Sullum, Fair-Weather Federalists, REASON (July 2012), https://reason.com/2012/06/14/fair-weather-federalists/ (noting selective invocations of federalism arguments); Garrett Epps, The Opportunists Friend (and Foe): State’s Rights, N.Y. TIMES (Nov. 20, 2001), https://www.nytimes.com/2001/11/20/opinion/the-opportunist-sfriend-and-foe-states-rights.html (“[W]hen it comes to states’ rights, we are all hypocrites. . . One scans American history in vain to find a major figure whose position on states’ rights was not directly connected to his or her position on the underlying political question. When it suits our leaders, they are in favor of broad federal power; when it does not, they claim ‘states’ rights.’”)

For a recent example, see Kendall, supra note 13 (noting opposition by Democrats in Congress to a federal antitrust investigation of four automobile companies that “struck a deal with California on vehicle-emissions standards”)

**[FOOTNOTE 55]**

At the same time, we think there is considerable room to achieve greater policy coherence and more effective use of public resources through “softer” forms of cooperation. We acknowledge that our proposals are neither earth-shattering nor flamboyant—a weakness which we believe is more than offset by the reality that our modest strategies actually work well in practice, unlike the more sweeping solutions that have been floated.56

**[FOOTNOTE 56]**

56. Three rationales justify starting small. First, such measures can make useful contributions by themselves. Second, in the aggregate, they can create an environment in which bolder approaches might flourish, while simultaneously operating as a test bed for developing prototypes for more elaborate programs in the future. And third, small steps stand a greater chance of success because their scale is more manageable, and they are less likely to trigger push-back than “swinging for the fences.”

[FOOTNOTE 56]

#### Prototyping solves emerging tech and AI best – turns case

McGinnis 11(John, George C. Dix Professor of Law, Northwestern Law School, “LAWS FOR LEARNING IN AN AGE OF ACCELERATION,” <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3404&context=wmlr>)

The twenty-first century’s information age has the potential to usher in a more harmonious and productive politics. People often disagree about what policies to adopt, but the cornucopia of data that modern technology generates can allow them to better update their beliefs about policy outcomes on the basis of shared facts. In the long run, convergence on the facts can lead incrementally to more consensus on better policies. More credible factual information should over time also help make for a less divisive society, because partisans cannot as easily stoke social tensions by relying on false facts or exaggerated claims to support conflicting positions. Thus, a central task of contemporary public law is to accelerate a politics of learning whereby democracy improves a public reason focused on evaluating policy consequences. Government should be shaped into an instrument that learns from the analysis of policy consequences made available from newly available technologies of information.1 Greater computer capacity is generating more empirical analysis.2 The Internet permits the rise of prediction markets that forecast policy results even before the policies are implemented.3 The Internet also creates a dispersed media that specializes in particular topics and methodologies, gathers diverse information, and funnels salient facts about policy to legislators and citizens.4 But a public reason focused on policy consequences will improve only if our laws facilitate it. For instance, constitutional federalism must be reinvigorated to permit greater experimentation across jurisdictions, because with the rise of empiricism, decentralization has more value for social learning today than ever before.5 Congress should include mandates for experiments within its own legislation making policy initiatives contain the platforms for their own selfimprovement.6 Creating a contemporary politics of democratic updating on the basis of facts is a matter both of great historical interest and of enormous importance to our future. In the historical sweep of ideas, a government more focused on learning from new information moves toward fulfilling the Enlightenment dream of a politics of reason—but a reason based not on the abstractions of the French Revolution, but instead on the hard facts of the more empirical tradition predominating in Britain. By displacing religion from the center of politics, the Enlightenment removed issues by their nature not susceptible to factual resolution, permitting a focus on policies that could be improved by information.7 The better democratic updating afforded by modern technology can similarly increase social harmony and prosperity by facilitating policies that actually deliver the goods. For the future, a more consequentially informed politics is an urgent necessity. The same technological acceleration that potentially creates a more information-rich politics also generates a wide range of technological innovation—from nanotechnology to biotechnology to [AI] artificial intelligence. Although these technologies offer unparalleled benefits to mankind, they may also create catastrophic risks, such as rapid environmental degradation and new weapons of mass destruction.8 Only a democracy able to rapidly assimilate the facts is likely to be able to avoid disaster and reap the benefits inherent in the technology that is transforming our world at a faster pace than ever before. Every industry that touches on information—book publishing, newspapers, and college education to name just a few—is undergoing a continuous series of revolutionary changes as new technology permits delivery of more information more quickly at lower cost. The same changes that are creating innovation in such private industries can also quickly create innovation in social governance. But the difference between information-intensive private industries and political institutions is that the latter lack the strong competitive framework for these revolutions to occur spontaneously. This Essay thus attempts to set out a blueprint for reform to make better use of some available information technologies. Part I describes the reality of technology acceleration as the acceleration both creates the tools for democratic updating and prompts its necessity. Technological acceleration is the most important development of our time—more important even than globalization. Although technologists have described and discussed its significance, its implications for law and political structure have been barely noticed. Part II briefly discusses how better social knowledge can change political results. A premise of the claim is that some political disagreements revolve about facts, not simply values. As a result, better social knowledge can help democracies design policies to achieve widely shared goals. Social knowledge energizes citizens to act on those encompassing interests, like improved public education, because they come to better recognize the policy instruments to advance those interests. Better social knowledge provides better incentives for citizens to vote on these interests. Part III considers the mechanisms for creating a contemporary politics of democratic updating that begins to meet the needs of the age of accelerating technology. It focuses on two of the new resources that can have substantial synergies in improving social common knowledge and shows how an increase in common knowledge can systematically improve political results by providing better incentives for citizens to work for encompassing social goods. First, Part III considers the improvement in empirical analysis of social policy that flows from increasing computational capacity. It then discusses how specialized and innovative media does much more than disseminate opinions: it widely distributes facts and factual analysis. The combination of these technologies can better discipline experts and representatives, providing stronger incentives for them to update on the basis of new facts. Part IV discusses the information-eliciting rules that will maximize the impact of new technologies of information. These steps include a program of restoring, where possible, governmental structures that permit appropriate decentralization for experimentation, empirical testing, and learning. Congress and regulatory agencies should structure legislation and regulations to include social experiments when such experiments would help resolve disputed matters of policy. The Supreme Court should generally refrain from imposing new substantive rights for the nation so that it is easier to evaluate the consequences of different bundles of rights chosen by the states. But it should also protect the dispersed media, like blogs, from discriminatory laws, because this dispersed media plays a crucial role in modern policy evaluation. In short, the Supreme Court needs to emphasize a jurisprudence fostering social discovery and the political branches need to create frameworks for better social learning. Constitutive structures encouraging and evaluating experimentation become more valuable in an age where better evaluation of social experiments is possible. I. TECHNOLOGICAL ACCELERATION It is the premise of this Essay that technological acceleration is occurring and that our political system must adapt to the world it is creating. The case for technological acceleration rests on three mutually supporting kinds of evidence. First, from the longest-term perspective, epochal change has sped up: the transitions from hunter-gatherer society to agricultural society to the industrial age each took progressively less time to occur, and our transition to an information society is taking less time still. Second, from a technological perspective, computational power is increasing exponentially, and increasing computational power facilitates the growth of other society-changing technologies like biotechnology and nanotechnology. Third, even from our contemporary perspective, technology now changes the world on a yearly basis both in terms of hard data, like the amount of information created, and in terms of more subjective measures, like the social changes wrought by social media. From the longest-term perspective, it seems clear that technological change is accelerating and, with it, the basic shape of human society and culture is changing.9 Anthropologists suggest that for 100,000 years, members of the human species were hunter-gather- ers.10 About 10,000 years ago humans made a transition to agricultural society.11 With the advent of the Industrial Revolution, the West transformed itself into a society that thrived on manufacturing.12 Since 1950, the world has been rapidly entering the information age.13 Each of the completed epochs has been marked by a transition to substantially higher growth rates.14 The period between each epoch has become very substantially shorter.15 Thus, there is reason to extrapolate to even more and faster transitions in the future. This evolution is consistent with a more fine-grained evaluation of human development. Recently, the historian Ian Morris has rated societies in the last 15,000 years on their level of development through objective benchmarks, such as energy capture.16 The graph shows relatively steady, if modest, growth when plotted on a log linear scale, but in the last 100 years development has jumped to become sharply exponential.17 Morris concludes that these patterns suggest that there may be four times as much social development in the world in the next 100 years than there has been in the last 14,000.18 The inventor and engineer Ray Kurzweil has dubbed this phenomenon of faster transitions “the law of accelerating returns.”19 Seeking to strengthen the case for exponential change, he has looked back to the dawn of life to show that even evolution seems to make transitions to higher organisms ever faster.20 In a more granulated way, he has considered important events of the last 1000 years to show that the periods between extraordinary advances, such as great scientific discoveries and technological inventions, have decreased.21 Thus, both outside and within the great epochs of recorded human history, the story of acceleration is similar. The technology of computation provides the second perspective on accelerating change. The easiest way to grasp this perspective is to consider Moore’s Law. Moore’s Law—named after Gordon Moore, one of the founders of Intel—is the observation that the number of transistors that can be fitted onto a computer chip doubles every eighteen months to two years.22 This prediction, which has been approximately accurate for the last forty years,23 means that almost every aspect of the digital world—from computational calculation power to computer memory—is growing in density at a similarly exponential rate.24 Moore’s Law reflects the rapid rise of computers to become the fundamental engine of mankind in the late twentieth and early twenty-first centuries.25 The power of exponential growth is hard to overstate. As the economist Robert Lucas has said, once you start thinking about exponential growth, it is hard to think about anything else.26 The computational power in a cell phone today is a thousand times greater and a million times less expensive than all the computing power housed at MIT in 1965.27 Projecting forward, the computing power of computers twenty-five years from now is likely to prove a million times more powerful than computing power today. To be sure, many people have been predicting the imminent death of Moore’s Law for a substantial period now,29 but it has nevertheless continued. Intel—a company that has a substantial interest in accurately telling software makers what to expect—projects that Moore’s Law will continue at least until 2029.30 Ray Kurzweil shows that Moore’s Law is actually part of a more general exponential computation growth that has been gaining force for over a 100 years.31 Integrated circuits replaced transistors that previously replaced vacuum tubes that in their time had replaced electromechanical methods of computation.32 Through all of these changes in the mechanisms of computation, its power increased at an exponential rate.33 This perspective suggests that other methods under research—from carbon nanotechnology to optical computing to quantum computing—are likely to continue growing exponentially even when silicon-based computing reaches its physical limits.34 Focusing on the exponential increase in hardware capability may actually understate the acceleration in computational capacity in two ways. First, a study considering developments in a computer task using a benchmark for measuring computer speed over a fifteen-year period suggests that the improvements in software algorithms improved performance even more than the increase in hardware capability.35 Second, computers are interconnected more than ever before through the Internet, and these connections increase collective capacity, not only because of the increasing density among computer connections, but because of the increasing density of connections among humans made possible by computers. The salient feature of computers’ exponential growth is their tremendous range of application compared to previous improvements. Almost everything in the modern world can be improved by adding an independent source of computational power. That is why computational improvement has a far greater social effect than improvements in technologies of old. Energy, medicine, and communication are now being continually transformed by the increase in computational power.36 As I will discuss in Part II, even the formulation of new hypotheses in natural and social science will likely be aided by computers in the near future. The final perspective on accelerating technology is the experience that the contemporary world provides. Technology changes the whole tenor of life more rapidly than ever before. At the most basic level, technological products change faster.37 Repeated visits to a modern electronics store—or even a grocery store—reveal a whole new line of products within very few years. In contrast, someone visiting a store in 1910 and then again in 1920—let alone in 1810 and 1820—would not have noticed much difference. Even cultural generations move faster. Facebook, for instance, has changed the way college students relate in only a few years,38 whereas the tenor of college life would not have seemed very different to students in 1920 and 1960. Our current subjective sense of accelerating technology is also backed by more objective evidence from the contemporary world. Accelerating amounts of information are being generated.39 Information, of course, is a proxy for knowledge. Consistent with this general observation, we experience exponential growth in practical technical knowledge, as evidenced by the rise in patent applications.40 Thus, the combination of data from our present life, together with the more sweeping historical and technological perspectives, makes a compelling case that technological acceleration is occurring. It is this technological acceleration that creates both the capacity and the need for improving collective decision making. As technology accelerates, it creates new phenomena, from climate change to biotechnology to artificial intelligence of a human-like capacity. These technologies may themselves have very large positive or negative externalities and may require government decisions about their prohibition, regulation, or subsidization to forestall harms and capture their full benefits. They may also cause social dislocations, from unemployment to terrorism, that also require certain collective decisions. Society can best handle these crises not only by making better social policy to address them directly but by improving social policy more generally to create both more resources and more social harmony to endure them. Thus, society must deploy information technology in the service of democratic updating if it is to manage technological acceleration

## blockchain

### 1NC – SQ Solves

#### Blockchain does NOT inhibit enforcement now

Weinstein 21 (Samuel N. Weinstein, Associate Professor of Law, Benjamin N. Cardozo School of Law, “Blockchain Neutrality,” Georgia Law Review, vol.55, Winter 2021, 55 Ga. L. Rev. 499, https://www.georgialawreview.org/article/21202.pdf)

In doing so, the Article draws a distinction between antitrust and competition policy. The former term is used here to refer to enforcement of federal and state antitrust statutes, particularly the Sherman and Clayton Acts.25 This Article treats the latter term as a broader concept encompassing not only decisions about antitrust enforcement priorities, but a wider set of choices made by Congress, the executive branch, sector regulators, and state and local governments that establish the terms on which competition takes place in various markets.26 It argues that concerns among some scholars and practitioners that blockchain threatens effective antitrust enforcement are premature.27

**[FOOTNOTE 27]**

27 See, e.g., Schrepel, supra note 24, at 335 (“In the face of blockchain, current antitrust law may well be eliminated.”).

**[/FOOTNOTE 27]**

Despite the technology’s disruptive nature, the substantive antitrust challenges blockchain poses are not novel and can be addressed using current law and enforcement strategies. Indeed, the transparency blockchain offers may simplify discovery and prosecution of antitrust violations. Rather than locating and sifting through hundreds of thousands of documents to prove a price-fixing conspiracy, enforcers may find the relevant evidence permanently recorded on a cartel’s blockchain. The ability of blockchain users to mask their identities by employing pseudonyms may raise some technical enforcement challenges, but pseudonymity does not guarantee anonymity.28 Violators typically can be identified, and remedies can attach.29

### 1NC – No ABP

#### No chance of anticompetitive exclusions on decentralized blockchains – BUT, if they’re right, then enforcing the aff is impossible

Pike 20 (Chris Pike, Competition Policy Expert at the Organization for Economic Cooperation & Development; and Antonio Capobianco, Deputy Head of the OECD Competition Division; “Antitrust and the trust machine,” 2020, https://www.oecd.org/daf/competition/antitrust-and-the-trust-machine-2020.pdf)

Permission-less blockchains both compete in, and are in effect, governed by markets. They have no formal governing body. Rather they exist as decentralised organisations, their governance controlled in effect by the validators that vote on whether to adopt the protocols that are proposed by developers and which then define the decision-making of the blockchain, rather than alternative protocols that would create a fork in the chain. These validators are therefore responsible for the service that the blockchain offers to the market.

However, these validators are numerous and their identities are pseudonymous. This means that, as a practical matter, it is extremely difficult to change the behaviour of the blockchain, since forcing the adoption of a protocol requires a degree of consensus amongst the validators of the chain. In effect, permission-less blockchains might therefore be seen as a huge employer-owned mutual (e.g. John Lewis), that can propose motions and vote on the firm’s detailed decision-making, while being unable to delegate decision-making to a board, nor even to recognise one another.4

Now, although we liken this governance framework to a market, the validators would appear unlikely to be considered to be independent contractors (as for example is claimed in the case of ride-sharing platforms), since they follow strict protocols in the gig-work they do for the blockchain. If they are workers or employees they would not face the risk of being accused of colluding with one another, however, this is being tested in the United American Corp. v. Bitmain, Inc. complaint.5

In a sense, they might be seen as a gig-working co-operative who collectively determine the blockchain’s offer to users (like Partners in a law firm), while individually having to follow the collectively determined protocols (like drivers on a ride-sharing platform). Like an oversized board, they may try to agree on the price that should be set. However, as noted, the prospects of countless pseudonymous validators successfully agreeing either to boycott validation of low-margin blocks, or to adopt new ‘price-raising’ protocols, appears far-fetched. Permission-less blockchains may therefore be seen as platforms which might potentially hold latent significant market power, but which are incapable of exercising that power.

As such, competition agencies would be well-advised not to spend time worrying about decentralised permission-less blockchains. Indeed, this form of blockchain offers a number of reasons for competition advocates to be cheerful (see Pike & Carovano, 2020).6 However, a caveat to this is that if – and it is a big if – if, somehow, a decentralised permission-less blockchain were to engage in anticompetitive behaviour, then big questions on practical enforcement arise.7

Firstly, how would you punish an entity with no assets, no bank account, no office, and such a large and pseudonymous board? Secondly, how would you stop the anticompetitive behaviour that was identified? Who would you instruct to change their behaviour. These would be extremely challenging questions. However, for now at least, they appear to be theoretical and not practical problems.

### 1NC – Scalability

#### Technical barriers to scalability thump – BUT overcoming all barriers is inevitable

Li 19 (Kenny Li, Editor of Worthyt and Secure AI Labs, “The Blockchain Scalability Problem & the Race for Visa-Like Transaction Speed,” 1-30-2019, https://towardsdatascience.com/the-blockchain-scalability-problem-the-race-for-visa-like-transaction-speed-5cce48f9d44)

When examining the previous four scenarios under a proof-of-work consensus, we saw that simply increasing the block size or reducing the mining complexity could only take us so far. Even a combination of this would be limited due to transaction propagation time. Trying to mine new blocks faster than old blocks can propagate will lead to some pretty big security issues. SegWit has helped alleviate some of the TPS issues in the meantime, but a more scalable solution is still needed to achieve Visa-like TPS.

It seems that moving any piece into place to increase TPS moves another piece out of place somewhere else in the blockchain puzzle; regardless, there are projects and startups working to achieve the TPS answers needed to push blockchain adoption into a scalable stage.

Existing and Future Approaches to Solve Scalability

When looking for the potential answer to the scalability problem, multiple other issues arise. For example, if the answer is only applicable for one particular blockchain, then it relies on the assumption that the particular blockchain will be the one that needs that scalability in the future; otherwise, the effort is undue or misplaced. Another consideration is to understand what the trade-off may be. Right now, all solutions available come with limitations.

1. Batch Payments into One Transaction

Pros: Reduces the size of a transaction record by putting multiple transactions into one, allowing for more transactions overall per block, which can increase TPS to an extent.

Cons: Cannot batch multiple wallet’s transactions together; risks privacy

Batch payments has been a feature of Bitcoin (and therefore, Bitcoin’s forks including Digibyte, Dogecoin, Bitcoin Cash, etc.) through the RPC sendmany. Exchanges already do this, and you can see it when you try to look up your transaction ID on a blockchain explorer. What you might end up seeing is one wallet sending out to multiple different wallets. In that case, it’s a batch transaction.

The advantage of this is that putting it into one transaction means that 1) you only have to pay one transaction fee, and 2) you don’t have to write a full transaction that is, as I described previously, approximately 380 bytes, for each transaction. In fact, out of the 380 bytes that the transaction may be, only 34 bytes of that might be the transaction information.

If, for example, I wanted to send ten transactions at once, and I sent them as separate transactions, then it would be 380 x 10 = 3,800 bytes of space that I would take up on a block. On the other hand, if I batched the transaction together, the first transaction in the block would be included in the 380 bytes, and the next 9 would just be 34 bytes each; i.e., 380 + (34 x 9) = 686 bytes, which is 5.5x smaller.

It does come with limitations, though; different transactions from different wallets cannot be batched. In other words, if there were ten people in line for coffee, those ten people can’t put all their transactions into one batch and send it off the Starbucks. Each would have to produce an individual transaction. Batch transactions are limited to one-to-multiple, not multiple-to-one. A batch transaction would be great, for example, in paying bills (electricity, Internet, phone, NetFlix, Hulu, insurance, etc.) at once.

Furthermore, a batch transaction may not be something you want to do for privacy’s sake. As

David A. Harding

mentions in his article about Bitcoin batch transactions, one issue of privacy in batch transactions may arise if you were to do payroll — anyone could check their transaction and see what other wallets (employees) were sent.

2. Bitcoin Cash

Pros: can store more transactions than Bitcoin in one block, which increases capable TPS

Cons: is only a temporary solution, as its TPS is still far below the 1,700 global TPS that Visa conducts on an average day. The solution is also limited to Bitcoin Cash, so it cannot be a solution for other blockchains.

If you look back at the scenarios that I proposed previously to theoretically scale TPS, scenario 1 might sound familiar. That’s because an attempt at it has already occurred — namely, the Bitcoin Cash hard fork, which occurred in August 2017. The primary motivator of the hard fork was to increase the block size to 8MB (an increase of 8x) from 1MB non-SegWit Bitcoin blocks.

But in a best-case scenario, this solution is still far from the answer that the world is looking for in regards to scalability.

Bitcoin Cash is a hard fork of Bitcoin, designed as an alternative to Bitcoin with the added value proposition of faster transactions. It does primarily increasing the block size (B); even though it has increased transaction speed compared to Bitcoin, it still does not have nearly enough TPS to compete in the global transacting space.

3. The Lightning Network

Pros: near-instant transactions between parties, with no fees

Cons: transacting occurs off-chain, requires users to have a lightning node, and is limited to Bitcoin-core-based blockchains (e.g., Bitcoin Cash, Litecoin, Digibyte, Dogecoin)

Going into the details of how the Lightning Network works on a granular level will be a bit too detailed for this article, but there are plenty of resources that guide you in a way that I think is easy to understand. In a nutshell, the Lightning Network lets you take your Bitcoins off the blockchain and transact with another party privately. For example, I might plan to have coffee every morning for the next month. I want to transact in Bitcoin, but I don’t want to stand in front of the coffee line waiting for my block confirmations like a dweeb who doesn’t know what Lightning Network is.

So what I do is, I can create what’s called a payment channel on the Lightning Network. This new payment channel doesn’t run transactions through the Bitcoin blockchain — instead, think of it as a reserve. I deposit, say 0.5 BTC into it, and that’s a reserve that I can then use to pay anyone else that I’m connected with on the Lightning Network.

Once I’m done, I come back to the blockchain and tell it, “Hey, I sent Starbucks 0.1 BTC for coffee over the course of a month, just deduct that from the balance I put in initially.” Then I have 0.4 BTC left over. Of course, this is a very simplified way of explaining what actually goes on, so definitely take a look at other resources if you want to learn about the features of the Lightning Network.

Unfortunately, it is a Bitcoin-only solution for off-chain transacting, available for Bitcoin and Bitcoin-forked blockchains like Digibyte and Litecoin. The advantage that the Lightning Network delivers is its instant and zero-fee transacting, which enables micro-transacting as well as the ability to buy coffee without the wait.

In its current stage, though, creating the payment channel requires a bit more knowledge than what the average Bitcoin buyer might be comfortable with, and it still requires on-chain transacting before and after the life of a user’s Lightning node. Therefore, the Lightning network is a great solution for scaling TPS for Bitcoin and Bitcoin-like cryptocurrencies, but it only solves the problem off-chain.

4. EOS & Other High-Performance Blockchains

Pros: high theoretical scalability

Cons: centralization, which can lead to (and has historically led to) censorship

High-performance blockchain projects use different consensus mechanisms. One of the most popular alternatives to Proof of Work (PoW) is Proof of Stake (PoS). A recent project, EOS, uses what it calls a delegated proof-of-stake (dPoS), which is a modified version of PoS. In dPoS, users like you and me who stake aren’t actually part of the virtualized mining process; instead, we vote on who is. EOS use delegated PoS (dPoS)to claim up to 3,996 TPS but the trade-off is centralization, which gives key stakeholders more power than the rest of the community.

EOS only has 21 nodes (Block Producers), and in June 2018, those Block Producers froze seven EOS accounts. While the reasoning behind the freezing may be justified, it demonstrates the amount of authority one organization has on the entire blockchain, and their ability to execute on that authority.

The blockchain community wants scalability, which is what gave rise to the popularity of EOS, but the trade-off is censorship and control due to centralization. For a list of other additional flaws that can compromise the integrity of EOS, take a look at this article: EOS is not a blockchain, it’s a glorified cloud computing service (disclaimer: the research was funded by Consensys, and the founder of Consensys is the cofounder of Ethereum).

5. bloXroute

Pros: it is a on-chain solution and blockchain-agnostic, so it can be an answer for scalability for potentially all blockchains

Cons: it is still in development, and building/operating a global CDN is an expensive feat that is yet to be accomplished in the blockchain space

Outside of blockchain-specific projects, startups are starting to emerge to tackle the problem on a larger scale. One of the most interesting projects I’ve seen so far in the space is a startup called bloXroute. I discovered the company last week during my research into the blockchain space. The idea behind the company is to transpose a content delivery network (CDN) onto blockchain networks to solve the scalability issues.

What Is a CDN?

CDNs are what supercharge Internet speed today. They are the reason why, when you turn on your next YouTube video, it no longer needs to show you the loading spinner and make you wait three minutes to watch a one-minute video. If you’ve never experienced those issues before, you’re just too young to understand.

### 1NC – AT: ! Energy / Waste / Supply Chains / Filter

#### No blockchain impact---reject their ev from a blockchain consultant (deVries) and head of bitcoin magazine (McShane)

Paul Krugman 21, Distinguished Professor at the City University of New York Graduate Center, won the 2008 Nobel Memorial Prize in Economic Sciences, 5/20/21, “Technobabble, Libertarian Derp and Bitcoin,”

A number of readers have asked me to weigh in on Bitcoin and other cryptocurrencies, whose fluctuations have dominated a lot of market news. Would I please comment on what it’s all about, and what’s going on?

Well, I can tell you what it’s about. What’s going on is harder to explain.

The story so far: Bitcoin, the first and biggest cryptocurrency, was introduced in 2009. It uses an encryption key, similar to those used in hard-to-break codes — hence the “crypto” — to establish chains of ownership in tokens that entitle their current holders to … well, ownership of those tokens. And nowadays we use Bitcoin to buy houses and cars, pay our bills, make business investments, and more.

Oh, wait. We don’t do any of those things. Twelve years on, cryptocurrencies play almost no role in normal economic activity. Almost the only time we hear about them being used as a means of payment — as opposed to speculative trading — is in association with illegal activity, like money laundering or the Bitcoin ransom Colonial Pipeline paid to hackers who shut it down.

Twelve years is an eon in information technology time. Venmo, which I can use to share restaurant bills, buy fresh fruit at sidewalk kiosks, and much more, was also introduced in 2009. Apple unveiled its first-generation iPad in 2010. Zoom came into use in 2012. By the time a technology gets as old as cryptocurrency, we expect it either to have become part of the fabric of everyday life or to have been given up as a nonstarter.

If normal, law-abiding people don’t use cryptocurrency, it’s not for lack of effort on the part of crypto boosters. Many highly paid person-hours have been spent trying to find the killer app, the thing that will finally get the masses using Bitcoin, Ethereum or some other brand daily.

But I’ve been in numerous meetings with enthusiasts for cryptocurrency and/or blockchain, the concept that underlies it. In such meetings I and others always ask, as politely as we can: “What problem does this technology solve? What does it do that other, much cheaper and easier-to-use technologies can’t do just as well or better?” I still haven’t heard a clear answer.

Yet investors continue to pay huge sums for digital tokens. The values of major cryptocurrencies fluctuate wildly — Bitcoin fell 30 percent Wednesday morning, then made up most of the losses that afternoon. Their collective value has, however, at times exceeded $2 trillion, more than half the value of all the intellectual property owned by U.S. business.

Why are people willing to pay large sums for assets that don’t seem to do anything? The answer, obviously, is that the prices of these assets keep going up, so that early investors made a lot of money, and their success keeps drawing in new investors.

This may sound to you like a speculative bubble, or maybe a Ponzi scheme — and speculative bubbles are, in effect, natural Ponzi schemes. But could a Ponzi scheme really go on for this long? Actually, yes: Bernie Madoff ran his scam for almost two decades, and might have gone even longer if the financial crisis hadn’t intervened.

Now, a long-running Ponzi scheme requires a narrative — and the narrative is where crypto really excels.

First, crypto boosters are very good at technobabble — using arcane terminology to convince themselves and others that they’re offering a revolutionary new technology, even though blockchain is actually pretty elderly by infotech standards and has yet to find any compelling uses.

Second, there’s a strong element of libertarian derp — assertions that fiat currencies, government-issued money without any tangible backing, will collapse any day now. True, Britain, whose currency was still standing last time I looked, went off the gold standard 90 years ago. But who’s counting?

Given all this, are cryptocurrencies headed for a crash sometime soon? Not necessarily. One fact that gives even crypto skeptics like me pause is the durability of gold as a highly valued asset. Gold, after all, suffers from pretty much the same problems as Bitcoin. People may think of it as money, but it lacks any attributes of a useful currency: You can’t actually use it to make transactions — try buying a new car with gold ingots — and its purchasing power has been extremely unstable.

So when John Maynard Keynes called the gold standard a “barbarous relic” way back in 1924, he wasn’t wrong. But the metal’s mystique, and its valuation, live on. It’s conceivable that one or two cryptocurrencies will somehow achieve similar longevity.

Or maybe not. For one thing, governments are well aware that cryptocurrencies are being used by bad actors, and may well crack down in a way they never did on gold trading. Also, the proliferation of cryptocurrencies may prevent any one of them from achieving the semi-sacred status gold holds in some people’s minds.

The good news is that none of this matters very much. Because Bitcoin and its relatives haven’t managed to achieve any meaningful economic role, what happens to their value is basically irrelevant to those of us not playing the crypto game.

### 1NC – AT: ! Bees

#### Pollinator collapse does not cause extinction

Dr. Toby Ord 20, Senior Research Fellow in Philosophy at Oxford University, DPhil in Philosophy from the University of Oxford, The Precipice: Existential Risk and the Future of Humanity, Hachette Books, Kindle Edition, p. 118

And while extinction is a useful measure of biodiversity loss, it is not the whole story. It doesn’t capture population reductions or species disappearing locally or regionally. While “only” 1 percent of species have gone extinct on our watch, the toll on biodiversity within each region may be much higher, and this may be what matters most. From the perspective of existential risk, what matters most about biodiversity loss is the loss of ecosystem services. These are services—such as purifying water and air, providing energy and resources, or improving our soil—that plants and animals currently provide for us, but we may find costly or impossible to do ourselves.

A prominent example is the crop pollination performed by honeybees. This is often raised as an existential risk, citing a quotation attributed Einstein that “If the bee disappeared off the surface of the globe then man would only have four years of life left.” This has been thoroughly debunked: it is not true and Einstein didn’t say it.109 In fact, a recent review found that even if honeybees were completely lost—and all other pollinators too—this would only create a 3 to 8 percent reduction in global crop production.110 It would be a great environmental tragedy and a crisis for humanity, but there is no reason to think it is an existential risk.

## ftc

### 1nc – innovation turn

**Tech innovation high --- expanding the scope of antitrust laws stifles it --- Causes China tech dominance**

**Packard 21** --- Clark Packard, Trade Policy Counsel, Finance Insurance & Trade, R-Street, “Hamstringing America’s most innovative firms is no way to compete with China”, JUN 22, 2021, https://www.rstreet.org/2021/06/22/hamstringing-americas-most-innovative-firms-is-no-way-to-compete-with-china/

The United States is locked into a **geopolitical competition with China** over the commanding heights of the 21st century economy. Much of the competition revolves around the nexus of international trade and investment and technology. **Washington has very legitimate concerns about China’s pursuit of indigenous innovation through high tech industrial policy**, but the situation warrants a smart response. At a time when policymakers are signaling their desire to outcompete China economically, **why are they also rushing to** ~~hobble~~ **[stifle] private sector American tech**nology **and innovation?**

Over the last several weeks, lawmakers have introduced five separate bills in United States House of Representatives aimed at cracking down on “Big Tech.” I’m not an antitrust scholar, but as my colleague Dr. Wayne Brough has written, the bills would, if enacted, “impose the most significant overhaul of the nation’s antitrust laws in our country’s history.” Rather than broad and durable antitrust principles that apply to all sectors of the economy, which have guided our competition policy for more than a century, the legislation under consideration is aimed squarely at large tech companies in the United States.

It is worth considering the **geopolitical and international economic ramifications of such a radical departure from existing law.**

In 2018, the United States released a report documenting China’s predatory commercial practices, which served as an indictment of sorts. The overarching theme of the report is that Beijing uses a number of unfair and pernicious methods to acquire American technology with the ultimate goal of supplanting the United States as the global leader in high tech innovation. Specifically, the report alleges that China pressures American firms into transferring technology to Chinese joint-venture partners as the cost of doing business—reaching the 1.4 billion potential consumers—in the country; China abuses intellectual property; engages in targeted foreign investment to acquire strategic American firms and assets; and with pervasive state support, hacks into commercial networks to steal trade secrets. On top of that, China provides massive subsidies to its leading technology firms to pursue research and development in critical areas. **These are very serious problems**, and demand a thoughtful and targeted response.

Instead, the United States has flailed at China. The Trump administration imposed tariffs, which triggered predictable retaliation against American exporters, imposed significant costs onto American consumers—both families and firms—and will almost certainly fail to change Beijing’s predatory commercial practices. It is estimated that the tariffs cost about 300,000 American jobs and lowered market capitalization by about $1.7 trillion through diminished investment, according to the New York Federal Reserve. In other words, the tariffs made the United States weaker and less competitive. Now, some in Congress want to pursue misguided antitrust policies that will unintentionally undermine the United States’ global competitiveness.

The firms targeted by the proposed legislation are among America’s **most globally competitive and innovative.** They drive **significant investment in cutting-edge tech**nologies like robotics and artificial intelligence, the types of research China is pursuing through its Made in China 2025 indigenous innovation industrial policy. A recent report from the Progressive Policy Institute (PPI) highlights how many of the largest American tech firms—Amazon, Alphabet (Google’s parent company), Intel, Facebook, Microsoft and Apple—were among the top 15 nonfinancial firms driving U.S. capital expenditures in 2020. Together, PPI estimates that these six firms made nearly $90 billion worth of private investment in 2020—up 6 percent from 2019, which is remarkable considering that the U.S. economy was lagging in 2020 due to the outbreak of COVID-19. Cracking down on these firms will mean less investment in research and development.

These American firms already must compete with heavily subsidized foreign competitors and face discriminatory foreign practices, particularly in China. Despite these hurdles, the American tech industry pushes the envelope on exactly the type of research and development that policymakers in the United States should welcome. These firms lead the world in current and next-generation technologies. Instead of embracing this type of American global commercial and technological leadership, or at least staying neutral toward it, the legislation under consideration would **favor foreign competitors** by [stifling] ~~kneecapping~~ our domestic technology firms with **heavy-handed regulation**, which will almost certainly benefit their foreign competitors.

The American tech industry is the envy of the world. That’s why China, the European Union and others are trying to mimic it through subsidies and discriminatory practices against foreign competition. Yet those policies are no match for a relatively free and dynamic economy fostered by existing competition policies. It simply **belies common sense** that the way to outcompete Beijing is by making the United States **weaker, less efficient and less dynamic through misguided efforts to single out** our most **globally competitive and successful firms**.

### No Air/Naval Impact---1NC

#### Military Primacy fails

Dr. Andrew Bacevich 20, Professor of History and International Relations at Boston University, Ph.D. in American Diplomatic History from Princeton University, and Graduate of the U.S. Military Academy, “The Endless Fantasy of American Power”, Foreign Affairs, 9/18/2020, https://www.foreignaffairs.com/articles/united-states/2020-09-18/endless-fantasy-american-power

Unfortunately, this frenetic pace of military activity has seldom produced positive outcomes. As measured against their stated aims, the “long wars” in Afghanistan and Iraq have clearly failed, as have the lesser campaigns intended to impart some approximation of peace and stability to Libya, Somalia, and Syria. An equally unfavorable judgment applies to the nebulous enterprise once grandly referred to as the “global war on terrorism,” which continues with no end in sight.

And yet there seems to be little curiosity in U.S. politics today about why recent military exertions, undertaken at great cost in blood and treasure, have yielded so little in the way of durable success. It is widely conceded that “mistakes were made”—preeminent among them the Iraq war initiated in 2003. Yet within establishment circles, the larger implications of such catastrophic missteps remain unexplored. Indeed, the country’s interventionist foreign policy is largely taken for granted and the public pays scant attention. The police killing of Black people provokes outrage—and rightly so. Unsuccessful wars induce only shrugs.

THE CHIMERA OF “AMERICAN LEADERSHIP”

With something approaching unanimity, Americans “support the troops.” Yet they refrain from inquiring too deeply into what putting the troops in harm’s way has achieved in recent decades. Deference to the military has become a rote piety of American life. In accepting the Democratic Party’s nomination for the presidency, for example, Joe Biden closed his remarks with an appeal to the Divine on behalf of the nation’s soldiers: “And may God protect our troops.” Yet nowhere in his 24-minute address did Biden make any reference to what U.S. troops were currently doing or why in particular they needed God’s protection. Nor did he offer any thoughts on how a Biden administration might do things differently.

Americans don’t particularly want to hear about war or the possibility of war in the present season of overlapping and mutually reinforcing crises. And Biden obliged them in the most important speech of his career. The famously garrulous politician mentioned recent U.S. wars only in passing, briefly referring to his late son, who served in Iraq, and excoriating U.S. President Donald Trump for not responding more aggressively to revelations that Russia put bounties on U.S. soldiers in Afghanistan.

This aversion to taking stock of recent U.S. wars is by no means unique to Biden or confined to the Democratic Party. It is a bipartisan tendency. It also inhibits a long overdue reexamination of basic national security policy.

Between the fall of the Berlin Wall and the 2016 presidential election, leaders of both political parties collaborated in trying to demonstrate the efficacy and necessity of what they habitually referred to as “American global leadership.” Embedded in that seemingly benign phrase was a grand strategy of militarized primacy. Unfortunately, the results achieved by this assertion of global leadership proved to be anything but benign, as turmoil in Afghanistan and Iraq attest. Although the defense industry and its allies have profited from American wars, the American people have done less well. Protracted wars are not making Americans freer or more prosperous. They have instead saddled the nation with enormous debt and diverted attention and resources from neglected domestic priorities.

In 2020, further occasions for bristling, militarized U.S. leadership beckon. China offers the most obvious example for hawks, with demands that the United States confront the People’s Republic growing more insistent by the day. Many in Washington appear to welcome the prospect of a Sino-American cold war. Other prospective venues for demonstrating assertive U.S. leadership include in operations against Iran, Russia, and even poor benighted Venezuela, with prominent figures in the Beltway eager to have a go at regime change in Caracas.

To cling to this paradigm of U.S. global leadership is to perpetuate the assumptions and habits defining post–Cold War U.S. national security policy—and above all the emphasis on amassing and employing military might. The United States grants itself prerogatives allowed to no other country to remain, in its own estimation, history’s “indispensable nation.” To judge by the results achieved in Afghanistan, Iraq, and other recent theaters of war, this imperative will only continue to wreak havoc in the name of freedom, democracy, and humane values.

### 1NC---AI Global Governance Fails

#### AI global governance fails.

-international community is slow at adopting new rules; strategic competition will contribute to regulatory fragmentation

Camino Kavanagh 19, visiting fellow in the Department of War Studies at King’s College London, “New Tech, New Threats, and New Governance Challenges: An Opportunity to Craft Smarter Responses?,” Carnegie, https://carnegieendowment.org/2019/08/28/new-tech-new-threats-and-new-governance-challenges-opportunity-to-craft-smarter-responses-pub-79736

CHALLENGES TO EFFECTIVE GOVERNANCE AND COORDINATION

The international environment is hardly conducive to discussions of how best to coordinate responses to the complex, cross-border dilemmas emerging around new technologies. In some corners, existing multilateral platforms are increasingly perceived as unsuitable for resolving these challenges. The international community is notoriously slow at adopting new rules and institutions to deal with new challenges, and the quandaries posed by questions of national sovereignty and democratic legitimacy are persisting. In contrast, corporate actors appear to be racing ahead, intent on shaping the “science, morality and laws” of new technologies such as AI, with limited public debate underpinning or guiding their efforts.8 Many of these same companies and the technologies they produce or exploit are increasingly viewed as instruments of state power, a fact that only adds to these sovereignty and legitimacy-related questions.

Meanwhile, growing strategic competition between the world’s leading powers, especially in high-tech sectors, does not bode well for multilateral efforts to respond cooperatively and effectively. Such a competitive landscape is contributing to regulatory fragmentation and will likely delay much needed normative and regulatory action. This potential impasse places strains on existing efforts and could further delay the attainment of pressing social and economic objectives such as the 2030 UN Sustainable Development Goals, which are already under stress. Moreover, the resulting trust deficit between countries poses a significant threat to international peace and security, one that existing political institutions are not necessarily prepared to handle.

### 1NC---Squo Solves Global AI Governance

#### Or it will be effective now---norms for safe development will sideline China

Lewin Schmitt 21¸ predoctoral researcher at Institut Barcelona Estudis Internacionals, 8/17/21, “Mapping global AI governance: a nascent regime in a fragmented landscape,” AI and Ethics, https://doi.org/10.1007/s43681-021-00083-y

The preceding overview of the global AI governance landscape allows for several relevant observations, which are discussed in the following section.

First, there is a clear tendency to accommodate governance initiatives within the existing architecture, both by state and non-state actors. This could have several potential explanations. States and other global governance actors might be wary of foundational innovation and starting from scratch. Instead, they prefer to build on existing, proven governance arrangements. Alternatively, more attempts might have been made with new instruments and these might simply have been less fruitful and thus did not feature in this overview. In any case, the case of the GPAI suggests a gravitational pull towards established governance mechanisms.

Second, there is a fairly equitable distribution of labor between national governments (state-led) and international organizations (non-state-led). The community of international organizations moved early to occupy an open policy space, thus carving out a considerable competence vis-à-vis its member states. These, in return, offloaded some of the AI policy work to international organizations (CoE, OECD via GPAI). This would suggest that states accept their role as useful fora for international cooperation and the steering of AI development into globally beneficial directions. However, global coordination in this realm has so far not touched upon legally binding treaties. It may well be that governments decided to transfer some authority to IOs only as long as they deal with rather abstract principles or soft governance, but would withdraw or stall as soon as work proceeds towards more regulatory, hard governance. Whether the CoE will produce any meaningful conclusions by the end of the year may be a good indication of the potential for such binding international rules.

Thirdly, international standards organizations play a role in the development of AI governance, as is the case for most emerging technologies. More worrying is the shift towards geopolitics: in the last years, the development of international AI standards has increasingly received attention from key governments such as China, the EU, and the US. Their renewed interest and subsequent strategic engagement risks contention and the encroachment of geopolitical considerations into domains that ought to be technical [62, 63]. This may not only affect the quality of standards but also obstruct debates around AI ethics. As standards cannot be completely detached from the policy world, scholars of global AI governance need to have a sound understanding of the proceedings in the international standard-setting arena. Future research should explore the interactions and means by which governments aim to steer the development of standards to further their own perceived interests.

Lastly, sub-state actors from the public sector are practically not present in the discussions around global AI governance. This is in stark contrast to other policy domains such as global climate change governance, where city networks play an important role. It is also a bit surprising, given that cities are one of the focal points of AI rollout and several cities have subsequently taken notable actions with regards to AI policy. However, to date, these actions are isolated and do not engage at the supranational or global level.

In light of the fuzzy nature of AI, it is barely surprising that the current landscape is somewhat fragmented. Promising moves towards some degree of centralization and coordination are found in the prominent role of the OECD. With its epistemic authority and its norm- and agenda-setting power, it managed to act as a reference point for the G7 and G20. Through its close collaboration with other multilateral actors such as the European Commission, the UN, and the CoE, and by using the GPAI as a dedicated tool for advancing global AI governance, it may continue to play a leading role.

With all this in mind, this article argues that we are witnessing the first signs of consolidation in this fragmented landscape. The nascent AI regime that emerges is polycentric and fragmented but gravitates around the OECD, which holds considerable epistemic authority and norm-setting power. It is polycentric because it features different epistemic communities and multiple centers of decision-making, each operating with some degree of autonomy. It is fragmented because there is substantial overlap in different actors’ membership and the topics addressed by these initiatives; the well-connected epistemic communities are equally overlapping. As with other polycentric governance architectures, global AI governance will likely continue to struggle with the challenge of coordination [64]. While epistemic and membership overlap may benefit consolidation or convergence, topic overlap tends to foster fragmentation and adds complexity to the regime.

This article has been mostly agnostic to the content of what these global governance initiatives and arrangements actually entail. It was a deliberate choice to focus the analysis on structure, actors and instruments, to avoid confusion between structure and content. Nevertheless, a quick look at the main developments suggests that there is convergence on a certain type of AI values and principles, as put forward by the European Commission and the OECD. These are focusing on trustworthy, human-centric AI.

Such terms are of course abstract and somewhat vague, thus leaving room for interpretation. This interpretation, contextualization, and operationalization of AI values will without doubt experience major contestation by different actors. While China is side-lined from most of the above initiatives, its role in AI governance cannot be understated. The government has signaled willingness to engage in global governance as a responsible actor, and specifically on AI ethics has made some steps towards conciliation. Yet, it will want to interpret AI ethics in accordance with its own cultural context and promote these views globally. Hence, how China engages with the GPAI and other governance initiatives (and vice-versa) will be an interesting space to watch and leaves ample room for future research.

# 2NC

## Section 5

**2NC v PDCP**

**We compete on four phrases:**

* **“Law v. Reg”** – (POGO ev – below - CP expands and enforcement Agency’s Regs/Rules – not external “Law”)
* **“increase prohibitions”** (selectively under-enforced v. more enforcement)
* **“expand scope”** (“agency interp” vs. “a larger legal scope than presently exists on paper”)
* **“core laws”** (FTCA vs Sherman and Clayton)

**First, Aff severs *“Law”***

* We aren’t prohibiting or expanding anything (below);
* But *if we were*, it’s NOT an expansion of the LAW:

**P.O.G.O. ‘15**

Project On Government Oversight *- Internally quoting Chief Justice Roberts’ Majority Opinion in US Supreme Court’s 7-2 decision in Department of Homeland Security v. MacLean* (2015) - which dealt largely with statutory interpretation. The Project On Government Oversight (POGO). POGO’s investigators are experts in working with whistleblowers and other sources inside the government who come forward with information that we then verify using the Freedom of Information Act, interviews, and other fact-finding strategies. We publish these findings and release them to the media, Members of Congress and their constituents, executive branch agencies and offices, public interest groups, and our supporters. In addition to quoting the Majority Opinion from the Chief Justice, this article was authored by POGO’s Phillip Shaverdian – who is currently a Judicial Law Clerk within the U.S. District Court System and, at the time of the writing, was an intern within and correspondent on behalf of the Project On Government Oversight - “Agency Rules and Regulations Are Not Laws” - FEBRUARY 10, 2015 - #E&F – modified for language that may offend - https://www.pogo.org/analysis/2015/02/agency-rules-and-regulations-are-not-laws/

Agency Rules and Regulations **Are Not Laws**

In January, in one of the most riveting cases of the current session, the Supreme Court ruled **7-2** in favor of Transportation Security Administration (TSA) whistleblower Robert MacLean, holding that **agency rules and reg**ulation**s** **do not equate** to **laws**. **Chief Justice John Roberts wrote the majority opinion for the Court.** And now that we’ve had time to celebrate the victory for MacLean, it’s time to turn our focus to what Department of Homeland Security v. MacLean may mean for whistleblowers in general.

Current federal whistleblower protection law—the Whistleblower Protection Act (**WPA**)—protects individuals against backlash from employers for disclosing information about “any violation of any **law,** **rule** or regulation” or “a substantial and specific danger to public health or safety” by a federal agency. However, in the same statute there exists an exception for disclosures that are “specifically **prohibited** by ***law***.”

The question the Court sought to answer was whether MacLean’s disclosures were “specifically **prohibited** by ***law***.”

The Homeland Security Act of 2002 states that the **TSA’s** “Under Secretary shall prescribe **reg**ulation**s** prohibiting the disclosure of information obtained or developed in carrying out security” if they decide that the disclosure of that information would “be detrimental to the security of transportation.” The resultant **reg**ulation**s** thus **prohibit** the disclosure of “sensitive security information” (**SSI**) without the proper authorization. Among the various types of information that could be designated SSI is “information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations.”

The government argued that **MacLean’s** disclosures were “specifically prohibited by law” and that the WPA did not offer protection **for two reasons: 1)** the disclosure was prohibited by specific TSA **regulations** on SSI; **and** **2)** the **H**omeland **S**ecurity **A**ct authorizes the TSA to promulgate the **regulations**.

The Court addressed and subsequently **rejected both arguments**, affirming the judgment in favor of MacLean by the U.S. Court of Appeals for the Federal Circuit.

The Court **rejected the** government’s **argument** that a disclosure that is prohibited **by regulation** **is** also “specifically prohibited **by law,”** as prescribed by federal whistleblower statute.

The Court elaborates that **in the WPA** Congress repeatedly used the phrase “law, rule, or regulation,” but did not use the same phrase in the statutory language at question in this case. Instead, Congress used the word “law” alone, suggesting that it meant to exclude rules and regulations from the specific stipulation. Congress’s omission of “rule, or regulation” **must be** ~~viewed~~ (**considered**) as **deliberate** because of the use of “law” and “law, rule, or regulation” in the same sentence, as well as the frequent use of the latter phrase throughout the statute. These “two aspects of the whistleblower statute make Congress’s choice to use the narrower word “law” seem quite deliberate,” opined the Court.

After creating an exception for disclosures “specifically prohibited by law,” the WPA also creates a second exception for information “specifically required by Executive order to be kept secret.” The second exception is limited to actions taken by the President, and thus suggests that the first exception and the use of “law” is limited to actions by Congress.

The Court also reasons that “If **‘law’** included **agency rules and reg**ulation**s**, then an agency could insulate itself from the scope of Section 2302(b)(8)(A) merely by promulgating a regulation that ‘specifically prohibited’ whistleblowing.” Instead, “Congress passed the whistleblower statute precisely because it did not trust agencies to regulate whistleblowers within their ranks.” **The Court concluded** that “it is unlikely that Congress meant to include rules and regulations within the word ‘law’” and that **the specificity of the phrase** “specifically **prohibited by law**” was meant to deliberately **exclude rules and reg**ulation**s**.

* **Second is *“Increase prohibition*”;**

**The underlying conduct’s *already prohibited* – albeit in vague terms which beg questions of enforcement and interpretation. That’s Khan – we’re re-including for clarity, but 1NC read all this:**

**NOTE**: All highlighted portions (green and blue) of this card were read in the 1NC. The 1NC card made solvency and competition claims – and, to offer context, we’ve used blue highlighting to outline the parts of the ev that augment our perm/competition claims.

**Kahn ‘21**

et al; This is a recent joint statement released by the five Federal Trade Commissioners. The Chair of the Federal Trade Commission is Lina Khan - an Associate Professor of Law at Columbia Law School. Also on the Commission is Rohit Chopra – who was previously The Assistant Director of the Consumer Financial Protection Bureau, as well as Rebecca Slaughter - an American attorney who was previously the acting chair of the Federal Trade Commission. Two others also sit on the Commission. “STATEMENT OF THE COMMISSION On the Withdrawal of the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act” - July 9, 2021 - #E&F – modified for language that may offend - https://www.ftc.gov/system/files/documents/public\_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf

**Section 5** of the **F**ederal **T**rade **C**ommission **A**ct **prohibits** “unfair methods of competition in or affecting commerce.”1 In 2015, the Federal Trade Commission under Chairwoman Edith Ramirez published the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (hereinafter “2015 Statement”), which established principles to guide the agency’s exercise of its “standalone” Section 5 authority.2 Although presented as a way to reaffirm the Commission’s preexisting approach to Section 5 and preserve doctrinal flexibility,3 the 2015 Statement contravenes the text, structure, and history of Section 5 and largely writes the FTC’s standalone authority out of existence. In our ~~view~~ (perspective), the 2015 Statement abrogates the Commission’s **congressionally mandated duty** to use its expertise to identify and combat unfair methods of competition even if they do not violate a separate antitrust statute. Accordingly, because the Commission intends to restore the agency to this critical mission, the agency withdraws the 2015 Statement.

I. Background

On August 13, 2015, the Federal Trade Commission issued the 2015 Statement, which announced that the Commission would apply Section 5 using “a framework similar to the rule of reason,” by only challenging actions that “cause, or [are] likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications[.]”4 The 2015 Statement advised that the Commission is “less likely” to raise a standalone Section 5 claim “if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm.”5

In a statement accompanying the issuance of these principles, the Commission explained that its enforcement of Section 5 would be “aligned with” the Sherman and Clayton Acts and thus subject to “the ‘rule of reason’ framework developed under the antitrust laws[.]”6 In a speech announcing the statement, Chairwoman Ramirez noted that she favored a “common-law approach” to Section 5 rather than “a prescriptive codification of precisely what conduct is prohibited.”7 She also acknowledged that the Commission’s policy statement was codifying an interpretation of Section 5 that is more restrictive than the Commission’s historic approach and more constraining than the prevailing case law.8 She added, “[W]e now exercise our standalone Section 5 authority in a far narrower class of cases than we did throughout most of the twentieth century.”9

With the exception of certain administrative complaints involving invitations to collude, the agency has pled a standalone Section 5 violation just once in the more than five years since it published the statement. 10

II. The Text, Structure, and History of Section 5 Reflect a Clear Legislative Mandate Broader than the Sherman and Clayton Acts

By tethering Section 5 to the Sherman and Clayton Acts, the 2015 Statement negates the Commission’s core legislative mandate, as reflected in the statutory text, the structure of the law, and the legislative history, and undermines the Commission’s institutional strengths.

In 1914, Congress enacted the **F**ederal **T**rade **C**ommission **A**ct to reach beyond the Sherman Act and to provide an alternative institutional framework for **enforcing** the **antitrust** laws. 11 After the Supreme Court announced in Standard Oil that it would subject restraints of trade to an open-ended “standard of reason” under the Sherman Act, lawmakers were concerned that this approach to antitrust delayed resolution of cases, delivered inconsistent and unpredictable results, and yielded outsized and unchecked interpretive authority to the courts.12 For instance, Senator Newlands complained that Standard Oil left antitrust regulation “to the varying judgments of different courts upon the facts and the law”; he thus sought to create an “administrative tribunal … with powers of recommendation, with powers of condemnation, [and] with powers of correction.”13 Likewise, a 1913 Senate committee report lamented that the rule of reason had made it “impossible to predict” whether courts would condemn many “practices that seriously interfere with competition, and are plainly opposed to the public welfare,” and thus called for legislation “establishing a commission for the better administration of the law and to aid in its enforcement.”14 **These concerns spurred the passage of the FTC A**ct, which created an administrative body that could police unlawful business practices with **greater expertise** and **democratic accountability** than courts provided.15

**At the heart of the statute was Section 5,** which declares “unfair methods of competition” **unlawful**.16 By proscribing conduct using this new term, rather than codifying either the text or judicial interpretations of the Sherman Act, the plain language of the statute makes clear that Congress intended for Section 5 to reach beyond existing antitrust law. The structure of Section 5 also supports a reading that is not limited to an extension of the Sherman Act. Notably, the FTC Act’s remedial scheme differs significantly from the remedial structure of the other antitrust statutes. The Commission cannot pursue criminal penalties for violations of “unfair methods of competition,” and Section 5 provides **no private right of action**, shielding violators from **private lawsuits** and treble damages. In this way, the institutional design laid out in the FTC Act reflects a basic tradeoff: Section 5 grants the Commission extensive authority to shape doctrine and reach conduct not otherwise prohibited by the Sherman Act, but provides a more limited set of remedies.17

The legislative debate around the FTC Act makes clear that the text and structure of the statute were intentional. Lawmakers chose to **leave it to the Commission** to determine which practices fell into the category of “unfair methods of competition” rather than attempt to define through statute the **various unlawful practices**, given that “there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.”18 Lawmakers were clear that Section 5 was designed to extend beyond the reach of the antitrust laws. 19 For example, Senator Cummins, one of the main sponsors of the FTC Act, stated that the purpose of Section 5 was “to make some things punishable, to prevent some things, that cannot be punished or prevented under the antitrust law.”20

The Supreme Court has repeatedly affirmed this view of the **agency’s Section 5 authority**, holding that **the statute**, **by its plain text**, does not limit unfair methods of competition to practices that violate other antitrust laws. 21 The Court, recognizing the Commission’s expertise in competition matters, has given “deference”22 and “great weight”23 to the Commission’s determination that a practice is unfair and should be condemned.

**The CP has an agency alter its enforcement discretion related to an existing statutory prohibition. That’s not an increase in prohibitions.**

**Kusserow ‘91**

R.P. Kusserow, Inspector General, Department of Health and Human Services - 42 Code of Federal Regulations - Part 1001, RIN 0991-AA49 – “Medicare and State Health Care Programs: Fraud and Abuse; OIG Anti-Kickback Provisions” - Monday, July 29, 1991 (56 FR 35952) - AGENCY: Office of Inspector General (OIG), HHS. ACTION: Final rule - #E&F - https://oig.hhs.gov/fraud/docs/safeharborregulations/072991.htm

Response: This regulation covers many categories of business arrangements, providing standards to be met within each safe harbor provision. If a person participates in an arrangement that fully complies with a given provision, he or she will be assured of not being prosecuted criminally or civilly for the arrangement that is the subject of that provision.

**This regulation does not expand the scope of activities that the statute prohibits**. The **statute itself** describes **the scope of illegal activities**. The legality of a **particular** business arrangement must be determined by comparing the **particular facts** to the proscriptions of **the statute.**

The failure to comply with a safe harbor can mean **one of three things**. **First,** as we stated in the preamble to the proposed rule, it may mean that **the arrangement does not fall within the ambit of the statute**. In other words, the arrangement is not intended to induce the referral of business reimbursable under Medicare or Medicaid; so there is no reason to comply with the safe harbor standards, and no risk of prosecution.

**Second,** **at the other end of the spectrum**, **the arrangement could be a clear statutory violation** and also not qualify for safe harbor protection. In that case, assuming the arrangement is obviously abusive, prosecution would be very likely.

**Third,** the arrangement may violate the statute in a less serious manner, although not be in compliance with a safe harbor provision. Here there is no way to predict the degree of risk. Rather, the degree of the risk depends on an evaluation of the many factors which are part of **the decision-making process** regarding case selection for investigation and prosecution. Certainly, in many (**but not** necessarily **all**) instances, prosecutorial discretion would be exercised not to pursue cases where the participants appear to have acted in a genuine good-faith attempt to comply with the terms of a safe harbor, but for reasons beyond their control are not in compliance with the terms of that safe harbor. In other instances, there may not even be an applicable safe harbor, but the arrangement may appear innocuous. But in other instances, we will want to take appropriate action.

We do not believe the Medicare and Medicaid programs would be properly served if we assured protection in all instances of "substantial compliance," "technical violations," or "de minimis" payments. **Unfortunately**, these are vague concepts, **subject to differing interpretations.** In this regulation, we have attempted to provide bright lines, to the extent possible, for safe harbors in order to provide clarity and predictability as to what conduct is immune from government action. Our endorsement of the concepts mentioned above would only serve to blur these lines and produce litigation as to what "substantial," "technical" and "de minimis" really mean. The OIG therefore declines to adopt these concepts.

**Third they sever “expand scope”.**

**Agencies can *lean on interpretive discretion to reverse selective under-enforcement*. That’s distinct from *expanding legal scope on paper*.**

**Theoretically, Section 5 could already challenge the practice outlined by the Aff.**

**Federal Register: Rules and Regulations - ‘9**

Federal Trade Commission - *16 Code of Federal Regulations*- 255 Guides Concerning the Use of Endorsements and Testimonials in Advertising Federal Acquisition Regulation; *Final Rule* - “Rules and Regulations” - Federal Register - Vol. 74, No. 198 - Thursday, October 15, 2009 - #E&F - https://www.ftc.gov/sites/default/files/documents/federal\_register\_notices/guides-concerning-use-endorsements-and-testimonials-advertising-16-cfr-part-255/091015guidesconcerningtestimonials.pdf

b. Examples 7-9 – New Media Several commenters raised questions about, or suggested revisions to, proposed new Examples 7-9 in Section 255.5, in which the obligation to disclose material connections is applied to endorsements made through certain new media.91 Two commenters argued that application of the principles of the Guides to new media would be inconsistent with the Commission’s **prior commitment** to address word of mouth marketing issues on a case-by-case basis.92 Others urged that they be deleted in their entirety from the final Guides, either because it is premature for the Commission to add them, or because of the potential adverse effect on the growth of these (and other) new media.93 Two commenters said that industry self-regulation is sufficient.94

The Commission’s inclusion of examples using these new media is not inconsistent with the staff’s 2006 statement that it would determine on a case-by-case basis whether law enforcement investigations of ‘‘buzz marketing’’ were appropriate.95 All Commission law enforcement decisions are, and will continue to be, made on a case-by-case basis, evaluating the specific facts at hand. Moreover, as noted above, the Guides **do not expand the scope** of liability **under Section 5**; they simply provide guidance as to how the Commission intends **to apply** governing **law** **to** various **facts**. **In other words**, the Commission ***could*** challenge the dissemination **of deceptive representations made via these media** **regardless of whether the Guides contain these examples**; thus, not including the new examples would simply deprive advertisers of guidance they otherwise could use in planning their marketing activities.96

**Those cards access the Precision and Context warrants.**

**They’re from the formal Code of Federal Regs, use topic phrases, and get at whether agency interps “prohibits” or “expands scope”.**

**Fourth they sever “core laws”**

**Core laws are Sherman and Clayton**

**Felsenfeld 93** – Carl Felsenfeld Professor of Law, Fordham University School of Law. “The Bank Holding Company Act: Has It Lived Its Life?,” *Villanova Law Review*, Vol. 38, January 1993, https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=2821&context=vlr

It is well established that, despite the "extensive blanket of state and federal regulation of commercial banking, much of which is aimed at limiting competition,"480 the United States' core antitrust statutes (the Sherman and Clayton Acts) apply to banks.481 There is respectable opinion that "existing antitrust laws are fully adequate to guard against anticompetitive mergers or acquisitions, or other anticompetitive activity, in the banking industry."482 A proposal to remove the BHCA, however, is not a suggestion that only the Sherman and Clayton Acts would impose antitrust limitations on banks. The other bank laws and regulations would continue in effect.483

Whether the antitrust laws are sufficient to curb bank abuse that is otherwise dealt with by the BHCA has been disputed. One relatively early opinion suggested that illicit bank behavior is "almost impossible to detect and prove in a court of law" and, consequently, explicit legislation, like the BHCA, which foreclosed banks from other fields was desirable. 484 In contrast, a former Deputy Assistant Attorney General for Antitrust later opined that bank antitrust problems within the BHCA sphere are simply traditional antitrust issues that can be dealt with by those laws.485 He was countered by a then current Attorney General for Antitrust who believed the BHCA was essential to keep banks separate from commerce.486 Because these last two views were expressed in 1969 and 1970, one must assess current antitrust laws to analyze what view is valid today.487

There is a high degree of flexibility in the antitrust laws. One of the functions of the antitrust laws is to adapt their application to the particular industry under consideration and to the particular markets within which the industry operates.488 The general approach of the antitrust laws towards a merger or consolidation of the sort that currently requires preapproval under the BHCA is to accept the industry in its existing form as the norm and then to establish the effects of the merger or acquisition in terms of its effects on that norm. The net effect is the antitrust laws' disposition in favor of the existing structure.

The Justice Department has the power under existing law to challenge banking mergers and acquisitions for violation of the antitrust laws even when the Fed has first found the BHCA's antitrust tests satisfied.489 For example, in December 1990, the Justice Department challenged the acquisition of First Interstate of Hawaii, Inc. by First Hawaiian, Inc. under the BHCA even though the Fed had approved the transaction. The suit was settled by the agreement of the parties to a divestiture plan proposed by the Justice Department.490 In July 1991, the Justice Department challenged an acquisition by Fleet/Norstar of assets from the FDIC after the transaction was approved by the Fed under the Bank Merger Act.491 As these two cases show, the Justice Department has sufficient regulatory authority to police the antitrust aspects of bank acquisitions effectively without the BHCA statutory protections.

2. Federal Trade Commission Act

Secondary to the core antitrust laws, and of more potential than experiential significance in regulating bank holding company behavior in the absence of the BHCA, is the Federal Trade Commission Act (FTC Act). \492 In its broad scope the FTC Act is inapplicable to banks. 493 The FTC, however, may require banks to produce documentary evidence required during agency investigations. 494 The FTC Act's basic function is the prevention of precisely the type of activity that banks and their nonbank affiliates were accused of in the initial drafting of and amendments to the BHCA 495 - the perpetration of "unfair methods of competition." 496

**Aff severance a voter – Plan’s the locus, we’re reactive, so it’s worse for them. No clash or in-round education. Independently proves they are not topical!**

**2NC – McGinnis**

McGinnis is entirely theoretical and ignores the key distinctions of the counterplan – data, policy statements, guidance, etc…

**One – SCOTUS is a firewall.**

**1NC Khan says The Court’s repeatedly affirmed the FTC’s Section 5 authority.**

**And, their args don’t assume the 1NC distinctions in our CP Text.** **Our planks about *policy statements* and *data sets* mean CP avoids politics and rollback.**

* Assumes rollback efforts from either Political and Judicial actors.
* Empirical examples of FTC rollback go *Neg* – those episodes DID NOT include policy statements or data sets.

**Kovacic ‘15**

et al; William E. Kovacic - Global Competition Professor of Law and Policy, George Washington University Law School; Non-Executive Director, United Kingdom Competition and Markets Authority. From January 2006 to October 2011, he was a member of the Federal Trade Commission and chaired the agency from March 2008 to March 2009. - “The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness” - 100 Iowa L. Rev. 2085 (2015) - #E&F - https://ilr.law.uiowa.edu/print/volume-100-issue-5/the-federal-trade-commission-as-an-independent-agency-autonomy-legitimacy-and-effectiveness/

Longevity for its own sake is hardly a worthy aim. There is little evident value in preserving a competition agency that ensures its survival by committing itself to unobtrusive law enforcement and declining to confront important and potentially controversial market failures. If a competition agency is to retain an economically significant enforcement role, one must ask how the agency is to perform that role without: (a) succumbing to pressure that undermines its capacity to make merits-based decisions about how to exercise its power to bring and resolve cases or use other instruments in its policy-making portfolio; and (b) losing the accountability and effectiveness that requires some connection to and engagement with the political process. What measures might enable a competition agency to resist suggestions that it undertake fundamentally flawed initiatives? How can one protect meritorious enforcement programs from political attack and intervention by political branches of government as such programs come to fruition? Presented below are some possible solutions.

A. Greater Specification of Authority

One approach is to avoid extremely open-ended grants of authority which application invites objections that the agency has overreached its mandate or inspires political demands that it use seemingly elastic powers to address all perceived economic problems. A fuller specification of powers and elaboration of factors to be considered in applying the agency’s mandate can supply a more confident basis for the authority’s exercise of power and a stronger means to resist arguments that it enjoys unbounded power.

B. More Transparency, Including Reliance on Policy Statements and Guidelines

Greater transparency in operations can increase the agency’s perceived legitimacy and supply a useful **barrier** to destructive political intervention. The foundations of a strong transparency regime include the compilation and presentation of **complete data sets** that document agency activity and matter-specific transparency devices, such as the preparation of statements that explain why the agency closed a specific investigation.

Competition agencies can usefully rely extensively upon policy statements and guidelines to communicate their enforcement intentions and delimit the intended application of their powers. One purpose of such statements is to suggest how the agency defines the bounds of the more open-ended and inevitably ambiguous grants of authority its enabling statutes. For example, the FTC’s policy statements in the early 1980s concerning consumer unfairness and deception were important steps towards defining how the agency intended to apply its generic consumer protection powers. By articulating the bases upon which it would challenge unfair or deceptive conduct, **the Commission strengthened external perceptions** (within the business community and **within Congress**) that it would exercise its powers within structured, principled boundaries, and it increased, as well, its credibility before courts. The FTC has never issued a policy statement concerning its authority to ban **u**nfair **m**ethods of **c**ompetition, and the failure to do so has impeded the effective application of this power.

A second important use of policy statements is to introduce plans for innovative enforcement programs. Before embarking upon a new series of initiatives, the competition agency would issue a policy statement that identifies conduct it intends to examine and, in stated circumstances, proscribe. Here, again, **the FTC**’s experience provides a useful illustration. Policy statements would be useful when the agency seeks to use **section 5** of the FTC Act to reach beyond existing interpretations of the Sherman and Clayton Acts, or to apply conventional antitrust principles to classes of activity previously undisturbed by antitrust intervention. **By issuing a policy statement before** commencing lawsuits, the FTC would give affected parties an opportunity to comment upon the wisdom of the agency’s proposed course of action and to adjust their conduct. Such an approach would likely **increase confidence** within industry and **within Congress** that the Commission is acting fairly and responsibly, and it could well make courts more receptive to the FTC’s application of section 5 as well.

**Prefer SCOTUS *precedent* AND *empirics dipped from when the Court’s ideology was most aligned with the Chicago School*.**

**Dagen ‘10**

Richard – Formerly, Adjunct Professor Boston University School of Law (Aug 2005 - Dec 2006) specializing in Antitrust; former Kramer Fellow - Harvard Law School. At the time of this writing, the author served as Antitrust, High Tech and Antitrust Special Counsel to the Director, Bureau of Competition, Federal Trade Commission “RAMBUS, INNOVATION EFFICIENCY, AND SECTION 5 OF THE FTC ACT” – BOSTON UNIVERSITY LAW REVIEW - Vol. 90 - #E&F - http://www.bu.edu/law/journals-archive/bulr/documents/dagen.pdf

The FTC enforces Section 5, which makes unlawful “unfair methods of competition.”118 **In FTC v. Sperry** & Hutchinson Co., the Supreme Court held that Section 5 “empower[s] the Commission **to define** and **proscribe** an unfair competitive practice, **even though the practice does not infringe either the letter or the spirit of the antitrust laws**.”119 Many believe that the interpretation of Section 5 as broader than the Sherman Act is a remnant of a bygone era. But **even during the Chicago School era**, the Supreme Court reaffirmed its understanding that Section 2 and Section 5 differed. **For example, in Copperweld Corp**. v. Independence Tube Corp., while attempting to limit the reach of the Sherman Act, the Reagan antitrust team, led by Assistant Attorney General William Baxter, and FTC Chairman James Miller, submitted an amicus brief highlighting that “[t]he courts have held that some forms of less dangerous, but nonetheless anticompetitive, unilateral conduct may be subject to Section 5 of the Federal Trade Commission Act.”120 The Court thereafter explained that single firm conduct was governed not only by Section 2 but also by Section 5.121 In 1986, the Court more specifically and directly referenced the “spirit” of Section 5, stating that Section 5 “encompass[es] not only practices that violate the **Sherman** Act and **other antitrust laws**, . . . but also practices **that the Commission determines are against public policy for other reasons.”**122

**Our *Guidance distinction* means no rollback**

* Agencies can issue *“Guidance”* (and enforce) – or they can create *“Rulemaking”* – both have legal force, but the latter tends to encounter more judicial review/resistance.

**Raso ‘10**

CONNOR N. RASO – J.D., Yale Law School expected 2oo; Ph.D., Stanford University Department of Political Science expected 2010 - “Strategic or Sincere? Analyzing Agency Use of Guidance Documents” – Yale Law Journal – v. 119:782 - #E&F - https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5196&context=ylj

**5. Judicial Challenge**

Agencies concerned that the courts will invalidate their policy decisions will be motivated to use **guidance documents** more frequently relative to **legislative rules.** Guidance documents are advantageous because **they are less likely to be challenged**. **Even if challenged**, agencies have a reasonable **probability of winning** on **ripeness** or finality grounds.

**Rollback assumes Core Antitrust *at present* – it’s less likely precisely because the Aff *expands beyond* current core understandings.**

**Dagen ‘10**

Richard – Formerly, Adjunct Professor Boston University School of Law (Aug 2005 - Dec 2006) specializing in Antitrust; former Kramer Fellow - Harvard Law School. At the time of this writing, the author served as Antitrust, High Tech and Antitrust Special Counsel to the Director, Bureau of Competition, Federal Trade Commission “RAMBUS, INNOVATION EFFICIENCY, AND SECTION 5 OF THE FTC ACT” – BOSTON UNIVERSITY LAW REVIEW - Vol. 90 - #E&F - http://www.bu.edu/law/journals-archive/bulr/documents/dagen.pdf

In Part III, I provide a more comprehensive analysis of Section 5. I begin with a general discussion of the breadth of Section 5 and then address the concern that using Section 5 to fill in gaps in the antitrust laws will cause mayhem. Although some maintain that the FTC should not use Section 5 because three different appellate courts chastised the FTC in the 1980s for trying to expand the antitrust laws, those defeats involved core competition practices that the courts protect the most. **As** the **conduct moves** away **from** either **the core** or the essential, authority under both the Sherman Act and **the FTC A**ct is broader.

**2NC – A2: Vahessan**

**This is uber empirically false**

Khan –EXPLICITLY SAID she intends to be more aggressive with Section 5. There’s been no agency stripping or political retal. – Vahessan talks about the 70s which were much more in support of unrestrained business than now

**AND - Clear standards solve**

**Salop ‘21**

et al; Steven C. Salop, Professor of Economics and Law, Georgetown University Law Center “A New Section 5 Policy Statement Can Help the FTC Defend Competition” – Public Knowledge – July 19th - #E&F - https://publicknowledge.medium.com/a-new-section-5-policy-statement-can-help-the-ftc-defend-competition-a76451eacb39

We generally agree with the **F**ederal **T**rade **C**ommission’s decision to rescind its 2015 Section 5 Policy Statement. Just as the Department of Justice and Federal Trade Commission Merger Guidelines are regularly updated on the basis of agency experience, legal and economic developments, so should this type of policy statement. Rescinding the old statement is particularly relevant in light of the growing recognition of the hurdles preventing effective antitrust enforcement.

Calls for reform have not come solely from Neo-Brandeisian commentators (including both FTC Chair, Lina Khan, and Tim Wu, now a member of the National Economic Council). The need for reform and a varied set of proposals has also been expressed by economics-oriented commentators, including this group of former Justice Department enforcers, Jonathan Baker and Herbert Hovenkamp, among others. Chair Khan in her statement suggested that the Commission would next consider replacing the Policy Statement with a new statement explaining **how they plan to use Section 5** to increase competition. We think this would **be a valuable way to** show parties and courts what is coming. This article provides several suggestions that would be useful to consider and possibly include in the revised Section 5 Policy Statement. It should not be taken as an exhaustive list; there certainly may be other approaches to a revised statement that could also be effective.

A revised Policy Statement should make it clear that Section 5 is not identical to the Sherman and Clayton Act and that conduct can be challenged as an **unfair** method of **competition** under Section 5 even if it would not violate these other antitrust laws. In fact, even the original 2015 Policy Statement explicitly made this point. But the distinction between Section 5 and these other statutes is often ignored or suppressed by commentators who object to more vigorous antitrust enforcement by the FTC. Eventually, the FTC’s cases and rules under Section 5 will likely face the scrutiny of the courts. At that time, it may be **particularly helpful** to have **a clear** Policy **Statement of how the FTC is** **interpreting** Section 5. This can help maximize the impact the FTC can have, while assuaging concerns of detractors who say there is no limiting principle.

**Adv---Blockchain**

**2NC---AT: I/L**

**Blockchain doesn’t complicate enforcement---existing methods solve, particularly DOJ**

Samuel N. **Weinstein 21**, Associate Professor of Law, Benjamin N. Cardozo School of Law, Winter 2021, “Blockchain Neutrality,” Georgia Law Review, 55 Ga. L. Rev. 499

Large financial institutions will not allow these transformations to occur without a fight, however. To ensure that fight is fair, antitrust authorities and regulators must consider how best to shape antitrust enforcement and competition policy for blockchain technologies. Much of the competition-related scholarship on blockchain has focused on the technology's potential impact on [\*538] antitrust risks and enforcement, and the bulk of that literature has sounded **dire warnings** about blockchain's anticompetitive potential and the possibility that it will enable cartel members to escape prosecution. 161 These concerns are **premature**.

Blockchain's primary effect in the antitrust arena may be to **facilitate collusion**. 162 As a general matter, distributed ledgers make sharing information among participants easier. When that sharing includes competitively sensitive data, such as pricing information, firms may be able to use blockchains to form and maintain price-fixing cartels. Some have suggested that blockchains, combined with the Internet of Things and artificial intelligence, could serve to monitor adherence to a cartel agreement (for example by measuring and reporting production volumes) and automatically punish defectors through smart contracts. 163 Even without explicit collusive agreements, blockchain's enhanced information-sharing capabilities might facilitate tacit collusion among participants. 164

[\*539] Another antitrust harm that might arise from blockchain use is anticompetitive access denial to permissioned ledgers. In the case of DTCC's blockchain-based, derivatives-processing network, for example, participating big banks potentially could disadvantage derivatives-dealing rivals by excluding them from the ledger. 165

Price-fixing cartels and denial of access to competitively necessary facilities fall **squarely within the ambit of standard antitrust theory and enforcement practice**. The Antitrust Division of the U.S. **D**epartment **o**f **J**ustice is **equipped** to root out price-fixing conspiracies in a range of technological settings. In 2015, the Division prosecuted participants in a cartel that relied on algorithms to fix prices for posters sold on the Amazon Marketplace. 166 While the technology this cartel employed was different than that used in the proverbial smoke-filled rooms of the nineteenth and twentieth centuries, the Division and the Federal Bureau of Investigation were capable of uncovering the scheme and prosecuting the participants. 167 The Division's prosecutorial tools should **prove as effective in the blockchain setting as in any other context**. This is **especially** true of the Leniency Program, under which the Division grants prosecutorial immunity to cartel members who are first-in-the-door to report cartel activity and cooperate in the subsequent investigation. 168 This program is the Division's **most effective criminal enforcement tool** and it should operate **equally well in prosecuting blockchain cartels** as it does in more traditional industries. 169

[\*540] Denial of access to nodes on a clearinghouse blockchain would also represent an **old story in a new technological setting**. Indeed, accusations against big banks of anticompetitive access denial to clearing services pre-date the transition to blockchain. Plaintiffs in In re Credit Default Swaps Antitrust Litigation settled, for $ 2 billion, their claims that big banks used their positions on clearinghouse risk committees to refuse access to dealer rivals in a fashion that harmed competition. 170 These types of "essential facilities" or refusal-to-deal cases can be difficult for plaintiffs to win, but the **theory of harm is familiar, regardless of the technological context**. 171

The same enhanced information-sharing and immutable record-keeping that might appeal to price-fixing cartels also could make blockchain-related antitrust enforcement **more** effective. A leniency applicant may give enforcers access to a permissioned blockchain, allowing them to observe the entire history and ongoing operation of a price-fixing cartel, an advantage difficult to duplicate without the blockchain. 172 Blockchains' ability to accurately preserve and offer easy access to data could reduce the burden of data collection and analysis in both merger and civil non-merger investigations. 173 [\*541] Regulatory nodes on blockchains might allow agencies to **detect anticompetitive conduct in real time**.

**Anonymity and pseudonymity don’t complicate enforcement**

Samuel N. **Weinstein 21**, Associate Professor of Law, Benjamin N. Cardozo School of Law, Winter 2021, “Blockchain Neutrality,” Georgia Law Review, 55 Ga. L. Rev. 499

Blockchain technology does present certain **non-antitrust-specific challenges** to the legal system that antitrust enforcers and plaintiffs may have to contend with. Blockchain users sometimes protect their identities using pseudonyms, which may make identifying them for purposes of legal sanctions difficult. So far, this issue is **more theoretical than practical**, as researchers have demonstrated that most blockchain users' identities can be uncovered, 174 and prosecutors have successfully linked individual defendants to blockchain transactions. A high-profile example of law enforcement's ability to pierce blockchain pseudonymity took place in the trial of Ross Ulbricht, who was accused of controlling Silk Road, an online bazaar offering drugs and various illegal services. 175 Prosecutors produced evidence of transactions between bitcoin addresses in Silk Road's digital wallet and Ross Ulbricht's digital wallet, which the FBI found on his seized laptop. 176 Ulbricht was convicted and sentenced to life in prison for operating Silk Road. 177 Further, in what appears to be among the earliest antitrust cases filed in the blockchain space, a plaintiff was able to identify the defendants, who are individuals and business entities. 178 Undoubtedly, blockchain designers will continue to strive toward [\*542] true anonymity for users, but to date **this threat appears overblown**. 179

**2NC---AT: Blockchain Good !**

**Blockchains a joke---reject their devries and mcshane ev---one is a blockchain consultant and the other is a bitcoin journalist---Krugman says it’s just technobabble and it won’t be any more impactful than other new tech inventions.**

**No blockchain extinction impact**

**Red Herring 18**, Red Herring is a global media company which unites the world’s best high technology innovators, venture investors and business decision makers in a variety of forums, 11/3/18, “Blockchain Won’t Save the World – But it Might Help Us Be Better,” https://www.redherring.com/opinions/blockchain-wont-save-the-world-but-it-might-help-us-be-better/

Ever noticed how everybody telling us how **blockchain is going to save the world**, is the **head of a blockchain company**? It’s almost as if they’ve got something to gain personally by announcing that the technology will rid us of corruption, revolutionize global banking – and **even protect the Amazon Rainforest** from oblivion.

Like much of the evangelism riding tech’s cutting-edge – AI, self-driven cars, cryptocurrency – there is a distinct anarcho-utopian spirit that pulses through speeches and presentations about blockchain-related solutions. Government stealing your land? Blockchain can solve that. Want faster, safer public transport? Turn to the blockchain.

Undoubtedly, blockchain can help sure up these issues. Sweden is implementing a blockchain-powered land registry, as are Kenya and Ghana. Tiny Malta, a petri dish for many European tech rollouts, launched a project with British firm Omnitude to improve its buses (the EU member, in its latest of many image campaigns, wants to become the Blockchain Island: more on that at Red Herring soon).

The biggest problem with blockchain, as with most technologies, is **not the tech at all but the people using them**. First, who will convince politicians to go fully transparent with their meetings? Canada has experimented with Ethereum as a way to track a state committee’s spending habits. But the silence of leaders in Nigeria, for example, Africa’s largest economy, is deafening when questions turn to blockchain.

Blockchain might seem an obvious opportunity for US President Donald Trump, who wants to streamline the state and “drain the swamp” of “special interests” (which is a curiously partisan clique). But as in the music industry, middlemen and those peddling dark money want nothing that reveals their role greasing the wheels of American democracy. If the President’s taxes are a black hole, **don’t expect blockchain any time soon**.

There are additional questions about privacy where the regular public is concerned. Must a citizen really make all their transactions and movements within a certain context available to view and track publicly, by anyone?

Oddly enough, despite its growing crusade against privacy violations, the European Union published what may be the most optimistic piece of blockchain-related information from a public body, “How Blockchain Technology Could Change Our Lives”, a 24-page evaluation of the platform.

“For each transaction that uses a distributed ledger instead of a traditional centralized system, the intermediaries and mediators are displaced, missing out on their usual source of power and income,” concluded the paper, highlighting both the advantage of blockchain – and why it will be so difficult to implement.

Blockchain is a potentially wonderful invention, with the possibility to ease many of society’s greatest ills. But it **will not neutralize them** – and, like all new things, whether it is a utopian seachange **depends very much on who controls it**. Expect that power struggle to be the key component of the blockchain story heading into 2019.

**2NC---AT: Bitcoin !**

**Bitcoin collapse inevitable---takes the blockchain with it**

Baruch **Silvermann 21**, Founder of The Smart Investor, 7/19/21, “The Inevitable End of the Bitcoin,” https://www.fxstreet.com/education/the-inevitable-end-of-the-bitcoin-202107191452

Those currently investing in Bitcoin believe that the inflation rate in the US will continue to rise for the next few years. This will cause the Dollar to weaken, and thus holding USD is not optimal right now.

Bitcoin, on the other hand, has a limited supply. Furthermore, the rate at which more Bitcoins are added to the blockchain automatically reduces itself after a certain amount of time. This process is known as halving.

The fact is that it is extremely easy to predict the total number of Bitcoins that will be a part of the blockchain at any point in time. This makes Bitcoin akin to gold in some ways. However, Bitcoin and gold are actually quite different, and must not be confused as a substitute for each other.

Based simply on the belief that the Dollar will weaken as time goes by, Bitcoin’s price has been driven up by investors over the last few months. However, that synopsis may not be correct. In my opinion, **two main scenarios are likely to happen**, both of which will eventually cause the downfall of Bitcoin.

**Scenario 1: The FED Fights Back**

In the first scenario, the US FED may try to fight back against the decline in the Dollar. In this case, the FED will not only reduce the amount of money they print but also increase the interest rates.

An increase in the interest rates makes the cost of debt go up, meaning businesses will require a higher rate of return on their earnings to compensate for the increase in interest payments. This causes the stock market and the real estate market to decline, as many businesses (especially those that are highly leveraged) will face trouble paying back their debt.

Considering the massive increase in both of these markets in the last year, it is more than likely that this approach will cause the markets to crash. People will pull out their investments, opting to save their money at the bank instead.

What Will Happen to Bitcoin?

The stock market and precious metals is considered by many to be a good hedge against inflation. This is because as the prices of goods rise, so do the profits of businesses.

As such, it comes as no surprise that stocks and Bitcoin are closely correlated. During times when the FED is going off the rails with its printer, both stocks and Bitcoin see a massive rise. It makes perfect sense that once the FED tightens the monetary policy, both Bitcoin and stocks will suffer as a result.

However, one thing that you must remember is that Bitcoin is driven **a lot more by market sentiment as compared to stocks**. As an asset, this is much more volatile, and a single major event can drive its price downward significantly. This is evident by the fact that Bitcoin has experienced numerous market crashes despite its relatively short-lived existence.

Due to this, Bitcoin will probably **fall by a huge amount**. While it will probably not go to zero, it will still suffer huge setbacks.

Scenario 2: The FED Caves in

In the second scenario, it is possible that the FED does not try to fight back against the inflationary pressures that have been levied as a result of the printing. Instead, it decides to cave in and reduce the value of the Dollar.

A Dollar devaluation will have a lot of benefits for the government. For one, it will make debt payments easier, as the intrinsic value of the dollar will now be much less while the debt payments will remain the same.

Secondly, it will not require the FED to reduce growth by increasing the interest rate. Businesses will still be able to acquire debt at comparatively low-interest rates and will be able to achieve their growth targets (for the most part).

What Happens in the Short Run?

In the short run, we will see both the stock market and the Bitcoin rise even more. If history is anything to go by, then the price of Bitcoin will skyrocket, hitting new all-time highs, whereas stocks will experience a gradual rise.

The price of Bitcoin will not only increase because of the investment thesis that Bitcoin excels where the US Dollar fails, but also because of the market sentiment. Amateur investors with no knowledge and no way to gauge the intrinsic value of the coin will pile their money into it, pushing the price even further.

The Major Problem

Just because Bitcoin will rise in the short run, doesn’t mean it will continue to rise.

The main reason for this is simple: No government will allow the public to have a currency over which it has no control. If the major way that people exchange value is a decentralized currency, the government will have no choice but to use that currency to fund its projects. As we know, with the amount of money printing that governments around the world do to fund their expenses, **this will be impossible**.

As such, the governments will have one of two choices. The first one will be to do nothing and accept that crypto is here to stay. This would require most governments around the world to significantly reduce their expenses. There will be huge levels of unrest as governments will be unable to fund most of their social programs including education, healthcare, and public works.

This will **force** the **governments** to follow the second approach: **Ban**ning **cryptocurrency** and force people to use a different coin. We have already seen governments exercise this step, as cryptocurrency is banned in numerous countries at the moment.

So, What’s the Future of Bitcoin in This Scenario?

If Bitcoin is banned in the US, it is more than likely that **other countries will follow suit**. Right now, there are two major reasons why the price of Bitcoin is continuing to rise. The first is the bullish sentiment of the public, and the second is the increased number of institutions that are investing in the coin.

If the currency is banned, the institutions will have no choice but to pull out of the currency, causing major selloffs across the board. This will also cause the bullish view of the individual investors to change, further causing the price to plummet.

In all likelihood, an outright ban of the currency will cause Bitcoin to crash. Chances are that within a few months after the announcement, the price of the coin will be something close to zero.

It is also possible that the US government issues its own **crypto**currency. Many people believe that this is the next major step in the evolution of blockchain technology. Nobody can deny that cryptocurrency has inherent benefits over fiat currency. However, the major problem of the governments is that they do not have any control over it.

The US issuing its cryptocurrency will solve such problems and cause other countries to follow suit. What the specifics of that currency will be, we do not know. In all probability, **it will not be a decentralized currency like Bitcoin**. However, the US will probably have to restrict some of the freedoms that they have when it comes to printing if they do switch to a crypto-based Dollar.

Conclusion

The end result for Bitcoin, however, will still be the same. No matter which route the government ends up going, the **long-term future of Bitcoin looks bleak**.

**2NC---AT: Leadership !**

**2. Infrastructure provisions and SEC regulations thump. MSU reads** (go) **green.**

Matt **1AC** **Sandgren 21**, Former Staff Director of the Senate Republican High-Tech Task Force, Former Senior Counsel on the Senate Judiciary Committee, Final Chief of Staff to Senator Orrin G. Hatch, Executive Director of the Orrin G. Hatch Foundation, “How New Regulations from Washington Could Lead to a Blockchain Brain Drain”, The Hill, 10/27/2021, https://thehill.com/blogs/congress-blog/technology/578834-how-new-regulations-from-washington-could-lead-to-a-blockchain

The internet is what it is today—with its ability to connect people across countries, time zones, and cultures—thanks to the **friendly regulatory climate** it was born into. Sadly, the regulatory climate of 20**21** is **far less welcoming** to disruptive technologies. This is **bad news** for the future of **U.S. innovation** and the emerging **blockchain** industry.

Whether **Washington** takes a **heavy-handed** or a **light-touch** approach to crypto regulation over the **next few months** could make a **multitrillion-dollar difference** over the next few years. To understand how much we stand to lose as a result of bad blockchain policy, it’s first important to understand just how much we have gained as a result of good internet policy in the ’90s.

It’s easy to forget that the success of today’s internet behemoths was anything but certain in the early years of the tech boom. During the Dotcom Bubble of the late '90s, for example, many companies were dismissed as scams (and some of them were). But even the most promising companies were still seen as speculative bets, and their stock prices were subject to extreme volatility.

It’s also easy to forget that the very concept of the internet was foreign to most people in its early years. By today’s standards, it was slow, overly complex, and difficult to use by anyone without a strong technical background. Many dismissed the internet as a fad, including Nobel Prize-winning economist Paul Krugman, who made this prediction in 1998: “By 2005 or so, it will become clear that the internet’s impact on the economy has been no greater than the fax machine’s.”

Noted.

“A scam,” “a fad,” “a bubble,” “overly complex,” “too volatile.” Does any of this sound familiar? History doesn’t rhyme so much as it plagiarizes. And it’s impossible to ignore that the crypto skeptics of today use the same vocabulary as the internet naysayers of yesteryear.

Now imagine if U.S. policymakers had heeded the words of the internet’s critics in the mid-to-late ’90s. Imagine if they had **cracked down** on e-commerce, digital publishing, and fledgling social media platforms to preserve the old way of doing things. Imagine if they had shaped regulations to stem the free flow of physical goods, ideas, and information made possible by the internet.

The **America**n people would have missed out on **trillions of dollars** in economic opportunity—and the **bounties** of the digital age would have gone to **countries** with more **tech-friendly policies**.

This is the **risk** we face **today**.

We find ourselves at the **dawn** of a **new age** of American innovation. Like the internet before it, **crypto** has the potential to **redefine everything** we know about how business, politics, media, finance, and even relationships work. But if legislators **give in** to crypto’s critics by taking a **draconian approach** to regulation, the U.S. will fail to reap the economic rewards of this world-changing technology—and **entrepreneurs** will **flee** to friendlier shores.

Even now, the stage is being set for a blockchain **brain drain**. Take the Senate-passed infrastructure bill, which includes a provision that would define crypto miners, validators, and even software developers as “brokers,” requiring them to report information to the IRS about anonymous blockchain participants that they would have no way of obtaining. In effect, this provision would kill the nascent DeFi (decentralized finance) industry and make it almost impossible for everyday Americans to invest in new cryptocurrencies. In other words, this latest move sends a **hostile message** to blockchain advocates: “We don’t want you here.”

At best, the Senate proposal belies a gross misunderstanding of how cryptocurrencies work; at worst, it exposes regulatory capture and the willingness of legislators to give in to special interests.

Sadly, the threat of bad regulation doesn’t end there. SEC Chair Gary Gensler has expressed his belief that many digital assets are not commodities but securities and should be regulated as such. Following this same logic, he’s signaled his intent to crack down on the use of stable coins—cryptocurrencies pegged to the value of the U.S. dollar. Americans are using stable coins to earn 4 to 8 percent APY on their savings through various lending programs. But the SEC wants to put a stop to these lending programs, ostensibly “to protect investors.” (What’s unclear is which government agency will protect investors from the unlimited money printing that is devaluing their dollar savings at a rate of 5.3 percent per year.)

Washington has **gotten off on the wrong foot** when it comes to crypto. But it’s **not too late** to **correct course**.

**Regulation** of crypto is **not necessarily** a **bad** thing. In fact, it’s a **key** step on the path to **mainstream adoption**. It’s **critical**, however, that policymakers **shape** regulation in a way that **minimizes the risks** of this new technology **without eliminating its benefits**. Congress found a way to do this with the internet in the ’90s. Section 230—while far from perfect and in need of reform today—paved the way for a flexible regulatory environment that allowed for many online companies to thrive. In the famous words of Jeff Kosseff, Section 230 contains “the 26 words that created the internet” (and, it’s worth adding, “trillions of dollars in economic wealth”).

Indeed, **regulatory clarity** is **key** to **extracting maximum value** from the emerging crypto economy, whether that value comes from DeFi protocols, decentralized forms of social media, tokenized assets, NFTs, or some other application of blockchain technology that we can’t even imagine today.

As policymakers seek to find the right balance on regulation, they should remember that the U.S. didn’t become the tech capital of the world by choking innovators with red tape. The U.S. became what it is today by taking a **prudential** approach to regulation—one that enabled the entrepreneurial spirit.

This is the same entrepreneurial spirit that inspired the private sector technological advances that made the Apollo moon landing possible. It’s the same spirit that brought about smartphones millions of times more powerful than the Apollo 11 guidance computers. And it’s the same spirit that has motivated a group of visionaries to push the boundaries of the digital frontier through blockchain technology.

Will **Washington**’s leaders **stifle** that spirit to the detriment of our economy and our **reputation** as a **global leader** in innovation? Or will they nourish that spirit to usher in the next chapter of the digital revolution?

Let’s hope they choose the latter.

**2NC---AT: Bees !**

**No impact to bees**

**Palmer 15 –** Brian Palmer, Writer for OnEarth Magazine, “Would a World Without Bees Be a World Without Us?”, National Resources Defense Council, 5-18, <https://www.nrdc.org/onearth/would-world-without-bees-be-world-without-us> [language modified]

Albert Einstein is sometimes quoted as saying, “If the bee disappears from the surface of the earth, [hu]man[s] would have no more than four years to live.” It’s **highly unlikely** that Einstein said that. For one thing, there’s **no evidence** of him saying it. For another, the statement is **hyperbolic** and **wrong** (and Einstein was rarely wrong). But there is a kernel of truth in the famous misquote.

Bees and humans have been through a lot together. People began keeping bees as early as 20,000 BCE, according to the late and eminent melittologist Eva Crane. (Yes, someone who studies bees is a melittologist.) To put that length of time into perspective, the average global temperature 22,000 years ago was more than 35 degrees Fahrenheit cooler than today, and ice sheets covered large parts of North America. Beekeeping probably predates the dawn of agriculture, which occurred about 12,000 years ago, and likely made farming possible.

How important are bees to farming today? If you ask 10 reporters that question, you’ll get 11 answers. Some stories say that bees pollinate more than two-thirds of our most important crops, while others say it’s closer to one-third. A spread of that size indicates a lack of authoritative scholarship on the subject. My review of the literature suggests the same.

The **most thorough and informative study** came back in 2007, when an international team of agricultural scholars reviewed the importance of animal pollinators, including bees, to farming. Their results could encourage both the alarmists and the minimizers in the world of bee observation. The group found that 87 crops worldwide employ animal pollinators, compared to only 28 that can survive without such assistance. Since honeybees are by consensus the most important animal pollinators, those are scary numbers.

Look at the data differently, though, and it's clear why the misattributed Einstein quote is a **bit of an exaggeration**. Approximately 60 percent of the total volume of food grown worldwide **does not require animal pollination**. Many staple foods, such as wheat, rice, and corn, are among those 28 crops that require **no help from bees**. They either self-pollinate or get help from the wind. Those foods make up a **tremendous proportion** of human calorie intake worldwide.

Even among the 87 crops that use animal pollinators, there are **varying degrees** of how much the plants need them. Only 13 absolutely require animal pollination, while 30 more are “highly dependent” on it. **Production of the remaining crops would likely continue without bees with only slightly lower yields**.

So **if honeybees did disappear** for good, **humans would probably not go extinct** (at least not solely for that reason). But our diets would still suffer tremendously. The variety of foods available would diminish, and the cost of certain products would surge. The California Almond Board, for example, has been campaigning to save bees for years. Without bees and their ilk, the group says, almonds “simply wouldn’t exist.” We’d still have coffee without bees, but it would become expensive and rare. The coffee flower is only open for pollination for three or four days. If no insect happens by in that short window, the plant won’t be pollinated.

**Adv---FTC**

**AI---FTC Fails---2NC**

**Constrained by limited resources**

**Calo 21** [Ryan Calo, Professor of Law, University of Washington, 4-27-2021 https://theconversation.com/ftc-warns-the-ai-industry-dont-discriminate-or-else-159622]

How much should industry or the public read into a **blog post** by **one government attorney?** In my experience, FTC staff generally don’t go rogue. If anything, that a staff attorney apparently felt empowered to use such strong rhetoric on behalf of the commission confirms a broader basis of support within the agency for policing AI.

Can a federal agency, or anyone, define what makes AI fair or equitable? Not easily. But that’s not the FTC’s charge. The agency only has to determine whether the AI industry’s business practices are unfair or deceptive – a standard the agency has almost a century of experience enforcing – or otherwise in violation of laws that Congress has asked the agency to enforce.

Shifting winds on regulating AI

There are reasons to be **skeptical of a sea change**. The FTC is **chronically understaffed**, especially with respect to technologists. The Supreme Court recently dealt the agency a **setback** by requiring **additional hurdles** before the FTC can seek monetary restitution from violators of the FTC Act.

**Regulation is vital – FTC alone fails** because it’s constrained and can’t provide prescriptive regulations

**Ajo 21** [Esther Ajao, News Writer - TechTarget , 10-19-2021 https://searchenterpriseai.techtarget.com/feature/FTC-pursues-AI-regulation-bans-biased-algorithms]

While the RealPage case involved the FTC regulating how companies use data, if not algorithms specifically, the FTC is **constrained** by the limits of its own authority.

"The FTC is a law enforcement agency," Schildkraut said, noting that it can **only act** on complaints or discoveries of violations. "It's **not providing prescriptive regulation** saying you need to do 'X, Y, Z' in order to comply with the law because the United States doesn't have a generally applicable statute saying that if you're using artificial intelligence, you've got to have a bias impact statement or any other particular feature."

However, Schildkraut added that this approach fits with what the FTC has done in the past to enforce other provisions of the law -- responding to complaints about alleged violations such as misleading consumers or failing to provide disclosures and harming consumers.

"The FCRA is definitely not a comprehensive AI regulatory framework," said John Davisson, senior counsel at the Electronic Privacy Information Center. "It's not imposing clear fairness obligations or requiring companies that use AI to validate the tools that they're using or even imposing nondiscrimination requirements."

Kashyap Kompella, analyst at RPA2AI research, said in a previous interview with SearchEnterpriseAI that in the absence of regulation, many organizations fail to meet the core principles of AI ethics: safe, accountable, transparent and trustworthy.

"The current stage in the industry is that these are **self-regulatory**," Kompella said in the interview.

Because oversight is currently self-regulatory, many companies turn to AI as a "cheap and easy solution to all their problems," Davisson said. "There may be lots of situations where AI is not appropriate and shouldn't be used at all."

The **most effective** way for consumers to be protected against harmful AI-based determinations about them is comprehensive **regulation**, Davisson said. Without meaningful **regulation**, companies do not feel the pressure to ensure that the tools they're using are free from bias.

# 1NR

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**Specifically, unregulated nuclear waste is a bioaccumulate---it’s an existential risk**

**Morris 16** [Margaret Morris. Inventor of the GEO-DMF System for robotically building virtually permanent automated solid rock outer space facilities, worked for decades as an assistant to Dr. Joseph Davidovits, the award-winning founder of the chemistry of geopolymerization, worked with the late Dr. Edward J. Zeller, Head of the former NASA-funded Radiation Physics Laboratory, at the Space Technology Center of the University of Kansas. 04-05-16. “Nuclear Waste Pollution is an Existential Risk that Threatens Global Health.” Institute for Ethics and Emerging Technologies. https://ieet.org/index.php/IEET2/more/morris20160405]

Deadly **environmental pollution** has become an **existential risk** that threatens the prospect for the **long-term survival of our species and a great many others**. Here we will focus on the **nuclear waste aspect** of the problem and ways to mitigate it before there is a critical **tipping point** in our global ecosystem. As philosopher Nick Bostrom said in his 2001 paper titled “Existential Risks,” published in the Journal of Evolution and Technology, “Our future, and **whether we** will **have a future at all**, may well be **determined** by how we **deal with** **these challenges**.”1 Unlike many **radioactive** material**s** that degrade fairly rapidly, some will remain intensely **poisonous** for **incredibly long** periods. **Plutonium**-240 (Pu-240) has a half-life of **6,560 years**. The half-life is the time it takes for radioactive decay to decrease by half. But decay does not occur at an even pace, and radioactive isotopes are dangerous for much longer – typically 10 to 20 times the length of their half-life. Pu-238 has an 88-year half-life, and is used for space vehicles despite the frequency of rocket failures. Any exploding rocket including such cargo spreads pollution far and wide. Pu-239 has a half-life of over 24,000 years, and will remain radioactive for about a half a million years. But the situation is more complicated because as Pu-239 decays it transforms to uranium-235 (U- 235), which has a half life of 600 to 700 million years. Iodine-129 has a half-life of 16 million years. Pu-244 has a half-life of 80.8 million years. U-238 has a half- life of 4.5 billion years.2 Plutonium When taken **in**to the **body**, isotopes of radioactive **plutonium** are **not** fully **eliminated** and tend to **accumulate**. They are **deadly** when **sufficiently accumulated**. Pu-239 was described by its co-discoverer, chemist Glenn Seaborg, as “fiendishly toxic.” In addition to terrible chemical toxicity, plutonium emits ionizing radiation. Pu-239 emits alpha, beta and gamma particles. Gamma radiation can penetrate the entire body and kill cells. Pu-239 has a robust resonance energy of 0.2 96 electron-volts that can badly damage DNA and produce birth defects that carry over generations.3 The body repairs tissues and DNA, but becomes overwhelmed when plutonium concentrates too heavily. According to a 1975 article in New Scientist Magazine, “But if it is inhaled, **10 micrograms** of plutonium-239 is **likely** to cause **fatal lung cancer.”**4 Experts estimate that Pu-239 is so noxious that only **one pound** would be enough to **kill everyone on our planet** if it were so evenly dispersed in the air that everyone inhaled it.5 Although it occurs in nature in exploding stars, almost **all** plutonium on Earth is man-made – the product of **manufacturing nuc**lear weapon**s** and energy in nuclear power plants. Of the different forms of nuclear products, deadly Pu-239 is very abundant because it is used to make nuclear weapons and is a by-product of energy production in nuclear reactors. As part of the U.S. weapons program (between 1944 and 1988), 114 tons of Pu-239 was produced in nuclear reactors at the Hanford Works facility, in Washington state, and at the Savannah River Site in South Carolina.6 Large quantities of this Pu-239 **remain**s at **temporary storage facilities at these locations**. Hanford stores about 50 million gallons of high-level radioactive nuclear and chemically hazardous wastes in underground storage tanks that were not designed for long-term storage. Roughly a **third** of these tanks have **leaked**, so that at least a **million gallons of radioactive waste** has reached the natural environment. Hanford is the most toxic site in the U.S., and among the **most toxic places on Earth**. Over 1,000 contaminated sites at Hanford have been identified. Groundwater aquifers are polluted for over 200 square miles beyond Hanford. No less than nine pounds of Pu-239 is used to make a working nuclear bomb. As of 2015, a total of 15,695 nuclear weapons are stockpiled by nine countries.7 Some of these weapons are 35 years old, but have a shelf-life of only 25 years.8 These aging weapons are undergoing corrosion. oxidation and other detrimental changes, and they must constantly be maintained and upgraded to prevent them from becoming an immanent threat to life on Earth. They are primary war targets. The situation emphasizes the need for absolute global peace. As of 2014, about 435 nuclear power plants have been built in 31 countries around the world.9 A great number of radioactive products, including Pu-239, are byproducts of U-235 fission occurring in the fuel rods of those plants with uranium reactors. In addition to being susceptible to natural disasters and accidents, these nuclear plants are all vulnerable to acts of war. They, too, emphasize the need for absolute global peace. Many nuclear power plants are operating beyond their established service lives, and storing their nuclear wastes remains highly problematic. No method for the long-term storage of high-level nuclear products was available when industries began producing them to make commercial energy and weapons. Storage remains very precarious, and there is no realistic way to safeguard those that are long-lived. There are 93 different long-lived radioactive elements that are toxic for a minimum of 17,000 years, and the time scale extends for many billions of years of total decay time for some.10 The U.S. alone stores tens of thousands of tons of spent fuel containing Pu-239 and other highly radioactive materials from the various reactor cores. The quantity continues to increase worldwide as long as the nuclear plants continue to operate. About 1% of spent nuclear fuel is plutonium, and nuclear power provides about 10 percent of the world’s electricity. A uranium reactor will contain about a ton of plutonium. These figures provide a rough idea of the enormity of continual global radioactive waste accumulation. Aside from accidents like the Chernobyl disaster (which contaminated 40% of Europe), dangers include the potential for spontaneous fuel combustion and nuclear meltdown at pools containing spent fuel. The following quote from a National Research Council Panel report provides a rough idea of the growing tonnage build-up of plutonium from commercial nuclear reactors: “New production of commercial reactor plutonium during the first half of the 1990s was about 70 MT [metric tons] per year.”11 At least four to five tons of Pu-239 are known to have been released into the environment during nuclear weapons testing.12 Much of the Pu-239 remains buried underground at the test sites. But some was released into the air during atmospheric tests, and some traveled for many miles by way of groundwater after underground tests. About two-thirds of the plutonium in the atmosphere winds up in the oceans, where it tends to sink to their bottoms and challenges sea life. The polluted sediment is disturbed and redistributed by underwater tsunamis, earthquakes, volcanoes and enormous landslides. According to the U.S. Environmental Protection Agency (EPA): “Residual plutonium from atmospheric nuclear weapons testing is dispersed widely in the environment. As a result, virtually everyone comes into contact with extremely small amounts of plutonium.”13 The EPA adds: “People may inhale plutonium as a contaminant in dust. It can also be ingested with food or water. Most people have extremely low ingestion and inhalation of plutonium.” Given that humans retain plutonium, the longer we live the more of it our bodies can **accumulate**. Although exposure can vary widely because of the way plutonium becomes **distributed** in the environment, it is has already reached **high enough levels globally to cause serious concern**: According to a report from the Proceedings of the NATO Advanced Research Workshop of the year 2000, titled High-Sensitive Determinations of Pu and Am Content in Human Tissues: “Now plutonium of both industrial and weapon origin is widely spread all over the world and included in the soil cycle, water cycle and the food chain, the **end point** of which is a **human body**….Now we warn about the serious hazard of dangerous **accumulation** of plutonium and americium in human body, especially in liver and bones….As it has been established recently, plutonium in its tetravalent state (TV+) is accumulated in human body during the whole life…”14

**Climate change causes extinction**

**Beard 21** --- S.J.Beard et al, Centre for the Study of Existential Risk, University of Cambridge, United Kingdom, “Assessing climate change’s contribution to global catastrophic risk”, Futures Volume 127, March 2021, https://www.sciencedirect.com/science/article/pii/S0016328720301646?casa\_token=by8gGKumaf0AAAAA:xT\_EyVIl562OPSIjbbfew8mdQsUCUq7tOJ7mF9HGjwOsZ8M4mfRkXkVIU1r7xYpO1ghAEKK2

While most of the impacts of climate change so far have fallen within the range of what was experienced during the Holocene, the rate of change is faster than in the Holocene and we are now beginning to see climate change push **beyond these boundaries**. In the latest edition of the planetary boundaries’ framework, climate change is placed in the zone of increasing risk, implying that while this boundary has been breached, there remains **some potential** for normal functioning and recovery (Steffen et al., 2015). It thus lies between what the authors identify as the ‘**safe zone’** and other ‘**high risk’ transgressions,** such as disruption to the biochemical flows of nitrogen and phosphorus **and loss of biosphere integrity.**

As part of their discussion of BRIHN Baum and Handoh (2014) note that climate change is the planetary boundary for which the risk to humanity has received most meaningful consideration and they suggest that this attention is deserved. Yet little research attention has been paid to climate change’s extreme or catastrophic effects. Kareiva and Carranza (2018) argue that, despite currently falling outside of the area of high risk, climate change has the clear potential to push humanity **across a threshold** of **irreversible loss** by “changing major ocean circulation patterns, causing massive sea-level rise, and increasing the frequency and severity of extreme events… that displace people, and ruin economies.” Even if humanity was resilient to each of these individual impacts, a **global catastrophe** could occur if these impacts were to occur rapidly and simultaneously.

**1nr – t/case**

**1) Takes out solvency- nondelegation would upend antitrust enforcement- the FTC would be powerless**

**Hall, 21** – appointed as an Administrative Law Judge to the District of Columbia Office of Administrative Hearings

[Johnathan, "The Gorsuch Test," Administrative & Regulatory Law News, 46.2, Winter 2021, Proquest, accessed 11-11-21]

Given the split on the issue, the importance of understanding Justice Gorsuch's Gundy dissent is paramount. At the very least, the dissent showcases a willingness to reinvigorate the nondelegation doctrine. Quite possibly, it provides the method the Court will use to do so. In my Note, The Gorsuch Test: Gundy v. United States, Limiting the Administrative State, and the Future of Nondelegation, 70 Duke L.J. 175 (2020), I argue that the Gorsuch test is likely stricter than any prior nondelegation test. If the new Supreme Court adopts Justice Gorsuch's formulation of the test for permissible delegations, the Court would **severely curtail** Congress's ability to give agencies power, thus limiting **the administrative state**.

The Opinion in Gundy

The statute at issue in Gundy was the Sex Offender Registration and Notification Act ("SORNA"). Under SORNA, sex offenders must register in every state where they live, go to school, or work. The registration system has two main provisions.

Subsection (b) affects only offenders sentenced after the passage of SORNA-the "post-Act offenders." Subsection (d) catches all those not included above. It states:

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).

Subsection (d) was intended to cover the roughly half-a-million "pre-Act offenders" who had been convicted prior to SORNA's passage. Pursuant to SORNA, the Attorney General established a rule to apply the registration requirements to the pre-Act offenders. After being convicted for failing to register as a sex offender, Herman Gundy challenged the constitutionality of subsection (d), arguing that it violates the nondelegation doctrine because it leaves the Attorney General with unconstrained discretion to choose whether SORNA will apply to pre-Act Offenders.

Though five justices rejected this argument, only four Justices adhered to the traditional approach to nondelegation cases without reservation. Justice Kagan wrote for the plurality, joined by Justices Stephen Breyer, Ruth Bader Ginsburg, and Sonia Sotomayor. The Court faced two different readings of the statute: one version gave complete discretion to the Attorney General over when-or if-to apply the SORNA requirements to pre-Act offenders, and the other required that the Attorney General apply the SORNA requirements as soon as possible, to the extent feasible. The text, structure, purpose, and legislative history of the law demonstrated that the Attorney General only had the power to adjust the registration requirements for pre-Act offenders as needed for feasibility. In light of the numerous delegations with even broader standards the Court had sustained over the years, the plurality easily determined that SORNA passed constitutional muster.

Justice Alito cast the deciding vote in Gundy, concurring with the judgment without joining the plurality's opinion. He reasoned that the statute did have an intelligible principle based on current doctrine, and "it would be freakish to single out the provision here for special treatment." Gundy, 139 S. Ct. at 2131 (Alito, J., concurring). However, he was amenable to changing the Court's approach to nondelegation, which has been untouched for eighty-four years, provided that a majority of the Court could support a single approach.

Justice Gorsuch dissented, joined by Justice Thomas and Chiefjustice Roberts, proposing a test that he hoped would revitalize the nondelegation doctrine. Gorsuch argued that a Court should only uphold a statute if: (1) the agency's task is to "fill up the details"; (2) the application of the statute turns on executive fact-finding; or (3) the grant of power involves certain nonleg-islative responsibilities. First, filling up the details requires that Congress itself make the policy decision. Second, executive fact-finding involves the gathering of factual information by either the president or one of his subordinates to decide if a statute should apply. Finally, nonlegislative responsibilities include tasks already within the scope of the executive power, such as certain foreign affairs powers entrusted to the president by the Constitution. Applying this three-part test to his reading of subsection (d), Justice Gorsuch found that the statute unconstitutionally delegated legislative power to the Attorney General.

Implications: The "Three Hundred Thousand" Problem

There is a looming question for the nondelegation doctrine: How would the nondelegation reasoning of Justice Gorsuch's dissent affect the countless other statutes with similar phrasing to SORNA were it to replace the governing intelligible principle test? At oral argument, Justice Breyer estimated that the number of rules made under laws as broad as SORNA could be three hundred thousand. Whether this estimate is accurate or not, there can be no dispute that Congress has relied on the intelligible principle understanding of the nondelegation doctrine for almost a hundred years to enact many broad statutes that have shaped American lives in large and small ways.

For instance, the Securities and Exchange Commission can promulgate rules controlling the means of a short sale "as necessary or appropriate in the public interest or for the protection of investors." But the Commission's authority extends even further to overseeing securities and enforcing any violation of its rules with steep criminal penalties. A strict application of the Gorsuch test might render one of the most influential bodies in American government **powerless**. Correspondingly, it could leave consumers without certain protections and **rob** the **markets of structures deriving from these regulations**. The power of the Commission does not amount to merely filling up details. It constantly evaluates policy considerations in the interests of the statute that guide its rulemaking discretion.

There are countless other examples. The **F**ederal **T**rade **C**ommission operates to prevent "unfair methods of competition." The Secretary of Transportation, acting through the National Highway Transportation and Safety Administration, sets standards as "practicable" to "meet the need for motor vehicle safety." In times of economic depression, Congress has given emergency power to the president to "issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries." Ultimately, using Justice Gorsuch's test, **these statutes may be difficult to defend against nondelegation challenges**.

Uneasy Application

The confusing nature of the Gorsuch test becomes more apparent when used to decide, counterfactually, a sample nondelegation challenge from a lower court. In United States v. Komatsu, No. 18-cr-651, 2019 WL 2358020, at \*1 (E.D.N.Y.June 4, 2019), Towaki Komatsu shouted at, and then attacked, a Court Security Officer outside of a courthouse building in New York City. After the incident was reported, Komatsu was charged with violating 40 U.S.C. § 1315 and the accompanying federal rule. Section 1315 provides that the Department of Homeland Security "may prescribe regulations necessary for the protection and administration of propertyowned or occupied by the Federal Government." The Department then promulgated a rule banning noisy and disruptive behavior. Komatsu raised numerous constitutional objections, including a nondelegation challenge to § 1315. Magistrate Judge Tiscione decided Komatsu only a couple of weeks before the Gundy opinion was released, disposing of the challenge in one page. Under current doctrine, § 1315 has an intelligible principle-"the protection and administration of property owned or occupied by the Federal Government"-and therefore is constitutionally sound.

Under the Gorsuch framework, the constitutional challenge to § 1315 would have been much stronger. The first prong says that an agency can only "fill up the details," with the policy decision residing with Congress. Here, the attorney for the defendant could easily argue that "protection and administration" of government property gives too much leeway to the Department of Homeland Security to make important policy decisions, thus doing more than "filling up the details." The operative word in the statute is "may," which is permissive, unlike the "shall" in SORNA, which is mandatory. The Department could establish hundreds of rules, tens of rules, or no rules at all. It possesses the complete power to prohibit virtually any activity in federal government buildings. If the secretary chooses, she could allow people to run freely, shout with microphones, hold rallies, or harass potential litigants on the way to the courtroom.

Alternatively, the secretary could impose very stringent requirements up to any other constitutional bar. She could ban any communication devices, limit the number of times a person can enter a building, or decide to impose a fee. The text of the statute is not constraining. Like in Gundy, this power also carries the criminal penalty of imprisonment. And the secretary's choice would affect millions of visitors to public buildings, many times the number of sexual offenders affected by SORNA. Consequently, the secretary is arguably making major policy decisions, not filling up details, and her choices will be the ones visible to the public. If the Gorsuch test prioritizes political accountability, then § 1315 allows legislators to circumvent the task of setting potentially unpleasant rules in the public sphere. This abdication of legislative responsibility would be an unconstitutional delegation of power under Justice Gorsuch's test.

Nor can it be argued that § 1315 involves executive fact-finding or nonlegislative responsibilities. The statute does not ask the agency to make any factual determinations, such as whether a warring power has blocked trading or if a bridge might interfere with commerce. Further, rules regulating conduct in government buildings have never been the traditional domain of the executive. They do not fall under the president's national-security or foreign-affairs-related powers. Therefore, neither the second nor third prongs of the Gorsuch test would save this delegation of power from its alleged constitutional deficiency.

Conclusion

Against the backdrop of two hundred years of congressional reliance and the still-ubiquitous need for Congress to delegate efficiently, the choice to even consider revitalizing the nondelegation principle raises questions. The problem, however, is not just the choice to revisit this topic but also the method Justice Gorsuch has suggested. The Gorsuch test provides minimal doctrinal clarity. Problems would abound if a litigator tried to apply the Gorsuch test to the potentially hundreds of thousands of laws that resemble the standard in SORNA. Moreover, the very structure of power sharing between the legislative and executive branches could be **upended**. If the Supreme Court decides to revisit nondelegation, it should be cognizant of the various problems that will accompany a change in jurisprudence. Better yet, the Court should retain the intelligible principle test to ensure stability in the law, the government, and the court system.

**2) Warming collapses hegemony**

**Magnuson 8** – Stew Magnuson, Managing Editor at the National Defense Magazine, “Climate Change Fears Spill Over To The Defense Community”, National Defense, August, http://www.nationaldefensemagazine.org/issues/2008/August/Climate.htm

Shifting weather patterns may cause severe droughts, devastating storms, coastal flooding and erosion. Nations may wage war over water as rivers dry up.¶ Tropical diseases may spread to temperate climates. Widespread population displacements due to these factors may make for an increasingly volatile world, the thinking goes.¶ Developed nations such as the United States and those in Europe may be able to withstand these calamities. But less stable, underdeveloped countries would have a more difficult time coping.¶ The Departments of Defense and Homeland Security may be forced to deal with the climate change’s indirect consequences, the reports said. Droughts, famine and displaced populations may put pressure on the domestic front. The Coast Guard and Customs and Border Protection may face a wave of so-called “climate migrants” coming from stricken nations.¶ The Defense Department may be called to provide disaster relief following extreme weather events such as hurricanes. Societies in turmoil are also fertile breeding grounds for extremist or separatists groups. Ground forces may be ordered to resolve conflicts, the reports noted. ¶ The Defense Department “needs to integrate the national security consequences of climate change into national security and national defense strategies,” said Sherri Goodman, the former deputy undersecretary of defense for environmental security and an analyst who spearheaded a CNA Corp. report, “National Security and the Threat of Climate Change.”¶ The Office of the Director of National Intelligence recently chimed in on the debate when it summarized a national intelligence assessment addressing the security implications of global climate change out to the year 2030.¶ “We judge global climate change will have wide-ranging implications for U.S. national security interests over the next 20 years,” said Thomas Fingar, the DNI’s deputy director and chairman of the national intelligence council.¶ There will be winners and losers as the planet’s climate evolves, Fingar noted. There may be unintended benefits such as longer growing seasons in the north and new shipping routes in the Arctic. “Nevertheless, many regional states important to the United States will be negatively impacted,” he said. Fingar would not name specific countries, although the classified version of the report did drill down into individual nations, he said.¶ R. James Woolsey, a former CIA director, is among those who believe that the climate is changing, and that there may be short- or long-term consequences for the defense community. “We may find that our armed forces are being called up increasingly to a fair number of missions,” he told National Defense.¶ Woolsey contributed a chapter to the “Age of Consequences: The Foreign Policy and National Security Implications of Global Climate Change,” a joint report by the Center for Strategic and International Studies and the Center for a New American Security. ¶ Woolsey’s predictions about the possible effects of global warming are more conservative than some of those put forth in the contentious debate.¶ He likens the placement of greenhouse gases in the atmosphere to that of a two-pack-a-day smoker. No one can say for certain that he will get cancer by age 55, but there is a risk. “I think we’re increasing the risk of things like ice sheet melting by putting so much carbon into the atmosphere,” he said. Some climate change phenomena could be attributable to natural cycles, he said. And no one will ever be able to prove that one particular hurricane is the direct result of a warming planet, he added.¶ Woolsey is as concerned about energy security as he is about climate change. For him, and many others, the two topics go hand in hand. The United States is overly dependant on foreign oil from unstable regions such as the Persian Gulf.¶ “Oil presents a panoply of opportunities for and encouragement of mass terrorism,” he wrote in the report.¶ He recalled sparring with a skeptical Republican congressman in a Capitol Hill hearing, who believed that global warming is a myth. After explaining that many of the actions the nation should take to reduce its dependence on foreign oil would also reduce greenhouse gases, the lawmaker conceded the point. ¶ “Do them for that reason, you don’t need to do them for reasons of climate change,” he said.¶ Too often in Congress, Woolsey said, lawmakers are not looking at the bigger picture and are just trying to score “debating points.”¶ Woolsey’s assertion seemed to be proven at a joint House hearing. Fingar presented the summary of the national intelligence estimate on climate change, but had little time to discuss the report’s salient points.¶ The debate quickly split down party lines with Republicans attacking the methodology of the report, and mocking climate scientists in the 1970s who were predicting “global cooling.” Democrats praised the report and repeated predictions that a changing planet may indeed bring on unrest, mass migration, and wipe out coastal communities. They were more interested in using the predictions to back-up their calls for reductions in greenhouse gases. ¶ Republicans and Democrats could only agree on one point: that the report should be declassified; Democrats, because it would give more details on specific countries at risk, and Republicans, because they believed the full report would expose weaknesses in its arguments.¶ Although the estimate was the result of a congressional mandate, DNI leadership felt it was appropriate to study the possible consequences of climate change, Fingar noted.¶ The DNI, despite one Republican lawmaker’s assertion that the study distracted the agency from immediate threats such as terrorism, will do three follow-on national intelligence estimates. One will be an analysis of the possible consequences of “mitigation” strategies that could be implemented to reduce greenhouse gasses, Fingar said. Misguided energy policies may also weaken national security, climate change skeptics have pointed out.¶ “An economically weakened America would be less able to sustain its defense commitments, keep the peace and remain vigorously engaged in the world,” said Marlo Lewis, senior fellow at the Competitive Enterprise Institute at the House hearing.

**UQ – 2NC**

**A worst-case ruling in West Virginia v. EPA is the less likely outcome – they may limit some EPA flexibility but will avoid rulings that revive non-delegation or completely hamstring the EPA – Farah**

**Court will punt now but its close – case provides the chance to challenge EPA authority on the CAA**

**Hale 12/10** Zack Hale Federal energy policy reporter for @SPGMI\_Energy “Supreme Court's review of EPA authority carries far-reaching implication.” 10 Dec, 2021. https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/supreme-court-s-review-of-epa-authority-carries-far-reaching-implication-67698325 {DK}

President Joe Biden's EPA has since begun to develop a replacement for both the ACE rule and Clean Power Plan. And while the Supreme Court's decision to review the D.C. Circuit ruling has sparked concern throughout the environmental law community, EPA Administrator Michael Regan has pledged that the agency will "continue to move forward" through its statutory authority under the Clean Air Act. The powers at stake Multiple sitting Supreme Court justices have warned about executive overreach and the danger posed by the growing power of the administrative state. In the current case, West Virginia v. EPA (No. 20-1530), the judges may examine how much power federal agencies have under the so-called nondelegation doctrine. In the U.S. Constitution, nondelegation says that Congress cannot transfer its lawmaking powers to another authority. But in practice, Congress often writes laws that ask federal agencies to fill in the specifics of how to regulate a given issue, in part because the agencies typically have the expertise needed to work out the relevant technical details. And courts have allowed that practice. Falling in line with a 1984 Supreme Court decision — Chevron v. Natural Resources Defense Council — the court system has granted what is known as Chevron deference to agencies' "reasonable" interpretations of vague laws. Westmoreland Mining Holdings LLC, in the current case, asked the court to address whether the Clean Air Act gives the EPA authority to "decide matters of vast economic and political significance as to whether and how to restructure the nation's energy system." Kavanaugh — during his 12-year stint as a judge on the D.C. Circuit — insisted that an agency may not issue a rule that has great political and economic significance **unless Congress clearly authorizes** it to do so. Kavanaugh argued that a major rule is unlawful unless the statute explicitly authorizes it. If the court decides to reinforce the nondelegation doctrine, federal agencies' abilities to write crucial rules that have historically produced important benefits may be hamstrung, said Nathan Richardson, a university fellow at Resources for the Future. Possible ramifications The first written briefs in the case are due Dec. 13, and Richardson suggested that they may offer some clues on whether the court will choose to address some of the broader issues. "I'm not sure how much the briefing is going to tell us, but if there is one signal it's how much time is spent on in the weeds Clean Air Act stuff versus how much is spent on administrative and constitutional law issues," Richardson said. The court may also be forced to reckon with previous rulings affirming the EPA's authority to regulate carbon dioxide following its 2007 Massachusetts v. EPA decision, which held that the EPA can regulate carbon dioxide and other greenhouse gas emissions **under the Clean Air Act.** A 2014 opinion written by the late conservative Justice Antonin Scalia, for example, slapped the EPA for overreach under the Clean Air Act but still affirmed the agency's authority to regulate power plants through the statute. "Justice Scalia recognized that every time the court looks at an old statute, it's got to ask policy questions like, 'Is this too much of a delegation to an agency?'" Richardson said. "But a lot of people on the current court don't buy that, so they're wading into some deep waters if they do this, politically, and really putting their credibility on the line." The Supreme Court might still punt Since the Clean Power Plan never went into effect and the EPA has abandoned the ACE rule, a majority of justices on the court could still decide that the case West Virginia v. EPA is not yet ripe for review, Gerrard said. "Since there's not really a regulation on the table right now to review, they should just wait until there is one," Gerrard opined. A more likely outcome would be for the high court to only address the question of the EPA's climate **authority over existing power plants**, Gerrard said. Still, the court's decision to grant review in the midst of an ongoing EPA rulemaking shows that the **court has taken a sharp interest** in the scope of the agency's Clean Air Act authority, Megan Houdeshel of the law firm Dorsey & Whitney, said in an email. Oral arguments in the case, brought by the coal-producing states of West Virginia and North Dakota, as well as two coal producers, The North American Coal Corp. and Westmoreland, are expected sometime in late February or early March of 2022.

**Thumpers – 2NC**

**Thumpers misunderstand our argument – the Court has already set their docket to balance institutional capital – their thumpers are priced in – the plan is an unplanned addition to the docket on a huge case**

**And – our spillover arg is specific – they balance the plan’s regulation by making a more conservative pro-business ruling in AHA – their thumpers aren’t about business or perceived as pro-regulation – their evidence doesn’t access our internal link**

**A2: Vaccine Mandate Thumper**

**It’s priced in and in the direction of the link --- Supreme Court will strike down BECAUSE they don’t want to expand regulatory authority**

**Liptak 12-21** --- Adam Liptak , “Supreme Court to Hold Special Hearing on Biden Vaccine Mandates” NYT, Dec. 22, 2021, https://www.nytimes.com/2021/12/22/us/politics/osha-vaccine-mandate-supreme-court.html

The Supreme Court has repeatedly upheld state vaccine mandates in a variety of settings against constitutional challenges. But the new cases are different, because they primarily present the question of whether **Congress has authorized the executive branch** to institute the requirements.

The answer will mostly turn on the language of the relevant statutes, but there is reason to think that the court’s six-justice conservative majority **will be skeptical of** broad assertions of **executive power.**

The last time the Supreme Court considered a Biden administration program addressing the pandemic — a moratorium on evictions — **the justices shut it down.**

“**Our system does not permit agencies to act unlawfully even in pursuit of desirable ends**,” the court said in August in an unsigned opinion, over the dissents of the three liberal justices.

**Vaccine mandate is neg uniqueness because the court will reign in administrative power**

**Breuninger 21** --- Kevin Breuninger, CNBC, “Biden's Covid vaccine mandate will likely go to the Supreme Court. Here's how the courts have ruled before”, 11-18-2021, https://www.cnbc.com/2021/11/18/bidens-vaccine-mandate-will-likely-go-to-the-supreme-court-heres-how-the-courts-have-ruled-before.html

David Vladeck, a professor of law at Georgetown University, said there's a "**high probability**" the case will end up before the Supreme Court, which has grown **significantly more conservative** after former President Donald Trump nominated three justices to the nine-seat bench.

"There are justices on the court who want to **rein in the administrative state** and this is a case in which those concerns are likely to **come to the fore**," Vladeck told CNBC.

**A2: No Link – We’re the Lower Courts**

**Our interp is that the aff is a SCOTUS ruling ---**

**USFG is central government in DC with national jurisdiction**

**Thomson 7** Alex Thomson, A Glossary of US Politics and Government 2007 p 72

federal government The term used to refer to the central, national government of the United States, based primarily in Washington DC. The federal government differs from the fifty state governments in that it has a **national jurisdiction,** and it governs in separate policy areas from those of the states.

**“Should” means requires immediate legal effect**

**Summers 94** (Justice – Oklahoma Supreme Court, “Kelsey v. Dollarsaver Food Warehouse of Durant”, 1994 OK 123, 11-8, http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker3fn13)

¶4 The legal question to be resolved by the court is whether the word "should"[13](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287" \l "marker3fn13) in the May 18 order connotes futurity or may be deemed a ruling *in praesenti*.[14](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287" \l "marker3fn14) The answer to this query is not to be divined from rules of grammar;[15](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287" \l "marker3fn15) it must be governed by the age-old practice culture of legal professionals and its immemorial language usage. To determine if the omission (from the critical May 18 entry) of the turgid phrase, "and the same hereby is", (1) makes it an in futuro ruling - i.e., an expression of what the judge will or would do at a later stage - or (2) constitutes an in in praesenti resolution of a disputed law issue, the trial judge's intent must be garnered from the four corners of the entire record.[16](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287" \l "marker3fn16)

[CONTINUES – TO FOOTNOTE]

[13](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker2fn13) "*Should*" not only is used as a "present indicative" synonymous with *ought* but also is the past tense of "shall" with various shades of meaning not always easy to analyze. See 57 C.J. Shall § 9, Judgments § 121 (1932). O. JESPERSEN, GROWTH AND STRUCTURE OF THE ENGLISH LANGUAGE (1984); St. Louis & S.F.R. Co. v. Brown, 45 Okl. 143, 144 P. 1075, 1080-81 (1914). For a more detailed explanation, see the Partridge quotation infra note 15. Certain contexts mandate a construction of the term "should" as **more** than merely indicating preference or desirability. Brown, supra at 1080-81 (jury instructions stating that jurors "should" reduce the amount of damages in proportion to the amount of contributory negligence of the plaintiff was held to imply an *obligation* *and to be more than advisory*); Carrigan v. California Horse Racing Board, 60 Wash. App. 79, [802 P.2d 813](http://www.oscn.net/applications/oscn/deliverdocument.asp?box1=802&box2=P.2D&box3=813) (1990) (one of the Rules of Appellate Procedure requiring that a party "should devote a section of the brief to the request for the fee or expenses" was interpreted to mean that a party is under an *obligation* to include the requested segment); State v. Rack, 318 S.W.2d 211, 215 (Mo. 1958) ("should" would mean the same as "shall" or "must" when used in an instruction to the jury which tells the triers they "should disregard false testimony"). [14](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker2fn14) *In praesenti*means literally "at the present time." BLACK'S LAW DICTIONARY 792 (6th Ed. 1990). In legal parlance the phrase denotes that which in law is *presently* or ***immediately effective***, as opposed to something that *will* or *would* become effective ***in the future*** *[in futurol*]. See Van Wyck v. Knevals, [106 U.S. 360](http://www.oscn.net/applications/oscn/deliverdocument.asp?box1=106&box2=U.S.&box3=360), 365, 1 S.Ct. 336, 337, 27 L.Ed. 201 (1882).

**Substantial is large amount**

**Merraim-Webster 21** [https://www.merriam-webster.com/dictionary/substantial]

Essential Meaning of **substantial**

1: large in amount, size, or number

A substantial number of people commute to work each day.

This will save us a substantial [=considerable] amount of money/time.

**“Increase” refers to a mandate, not a result**

**HEFC 4** (Higher Education Funding Council, <http://www.publications.parliament.uk/pa/jt200304/jtselect/jtchar/1> 67/167we98.htm# n43)

9.1 The Draft Bill creates an obligation on the principal regulator to do all that it "reasonably can to meet the compliance objective in relation to the charity".[ 45] The Draft Bill defines the compliance objective as "to increase compliance by the charity trustees with their legal obligations in exercising control and management of the administration of the charity".[ 46] 9.2 Although the word "increase" is used in relation to the functions of a number of statutory bodies,[47] such examples demonstrate that "increase" is used in relation to considerations to be taken into account in the exercise of a function, rather than an objective in itself. 9.3 HEFCE is concerned that an obligation on principal regulators to "increase" compliance per se is unworkable, in so far as it does not adequately define the limits or nature of the statutory duty. Indeed, the obligation could be considered to be ever-increasing.

**Prefer it --- lower courts can be reversed and don’t have immediate national effect**

**Henkin 2** (Louis, University Professor Emeritus and Special Service Professor – Columbia University, “Two Hundred Years of Constitutional Confrontations in the D.C. Courts”, Georgetown Law Journal, March, 90 Geo. L.J. 725, Lexis)  
First, though, let me ask why we--students of history or jurisprudence--may be interested in constitutional confrontations in the D.C. courts. The Court of Appeals for the District of Columbia Circuit has been acclaimed as the second most important court in the country, but whereas the importance of the U.S. Supreme Court is based largely on its constitutional role and on its **supremacy** in that role, the D.C. courts--inferior courts, by constitutional fiat--have **not loomed large** in U.S. constitutional jurisprudence generally. [2](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=48c2a02c9dbe5510a10cdc2a5c339de1&docnum=8&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzz-zSkAW&_md5=c61e667abc6aa97e0931f7dfc5904d9e&focBudTerms=supreme+court+w%2F35+overturn+or+overrul%21+w%2F30+D.C.+Circuit+or+D.C.+federal+court+or+d.c.+court+of+appeal+w%2F25+frequen%21+or+common+or+often&focBudSel=all#n2) As Justice Jackson famously wrote, the Supreme  [\*726]  Court is infallible only because it is **final**, [3](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=48c2a02c9dbe5510a10cdc2a5c339de1&docnum=8&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzz-zSkAW&_md5=c61e667abc6aa97e0931f7dfc5904d9e&focBudTerms=supreme+court+w%2F35+overturn+or+overrul%21+w%2F30+D.C.+Circuit+or+D.C.+federal+court+or+d.c.+court+of+appeal+w%2F25+frequen%21+or+common+or+often&focBudSel=all#n3) whereas constitutional decisions by inferior courts are **rarely infallible**, or at least **not for very long**.

**Key to neg ground and topic DAs since they all assume the squo**

**They’re a limits nightmare – the single circuit aff is impossible to prep for**

**If they win this arg, vote aff – the gradual incorporation of the aff’s precedent is too long-term to solve their impacts and uncertainty turns innovation**

**Danello 9** (Chris, “A Small Court in D.C.”, Harvard Political Review, 3-3, http://hpronline.org/uncategorized/a-small-court-in-d-c/)

We have assumed, as we must, that the allegations made in the Government’s charge against Hamdan are true…But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.” So concluded Justice John Paul Stevens in the 2006 case Hamdan v. Rumsfeld. Legal commentators hailed the decision proscribing trial by military commissions at Guantanamo Bay, yet two years before in the E. Barrett Prettyman Courthouse, Judge James Robertson had reached a similar verdict. “It is now clear, by virtue of the Supreme Court’s decision in Hamdi [sic], that…unless and until the Military Commission’s rule…is amended, Hamdan’s trial before the Military Commission would be unlawful.” The similarity was more than coincidental. For the past seven years, Robertson’s tribunal, the D.C. District Court and its appellate counterpart, the U.S. Court of Appeals for the D.C. Circuit, have served as legal battlefronts in the war on terror. However, the courts’ turn in the legal spotlight has proved controversial and uncertain, and in the end the tenuous relationship between the district and appellate court forced Supreme intervention from One First Street. D.C.’s unitary influence over executive oversight may soon end, but its experience suggests that elevating one circuit to form wide doctrine can ultimately prove more inefficient than expedient.

*The Second Highest Court in the Land*

Though of the smallest geographic jurisdiction, the **D**istrict of **C**olumbia courts wield disproportionate power. They are the primary oversight for federal agencies, the most proximate to the federal government, and the junior varsity Supreme Court bench. Yet terror cases arrived relatively late to the capital. While a few were filed as early as 2002, it was not until 2004 that D.C. emerged as primus inter partes. In Rumsfeld v. Padilla, the Supreme Court imposed certain restrictions as to where detained prisoners could bring suit. As Harvard Law School professor Gerald Neuman explained to the HPR, “Padilla said habeas corpus cases should have limited jurisdiction. For Guantanamo cases, you have the choice to sue in the Fourth Circuit [where the Pentagon sits] or in D.C., but the Fourth Circuit has been conservative, so a combination of lawyers, courts, and congressional action explains the prominence of the D.C. Circuit.” As Neuman elaborated, all Guantanamo detainee cases since Padilla have been transferred and decided before D.C. District Court judges, then appealed to the Court of Appeals and from there to the Supreme Court.

Such uniform procedure has not yielded smooth outcomes; instead, the courts have issued significantly varied precedent. Early years of the war on terror saw many governmental victories at the district and circuit level. In 2004’s Hamdan v. Rumsfeld however, district court Judge Robertson found military commissions without prisoner of war hearings unconstitutional. The D.C. Circuit Court reversed Robertson, only to be itself **reversed and remanded by the Supreme Court** in 20**06**. Hamdan’s wake split the district court; Judge Richard Leon ruled that detainees could not appeal for writs of habeas corpus, while Judge Hens Green affirmed detainees’ rights to file suit. The appellate court agreed with Leon, but the Supreme Court’s Boumediene v. Bush decision in 2008 ultimately overruled the circuit.

*Confusion all around*

Experts emphasize that the pattern of **split decision** and **reversal** springs from several causes. First is the opacity of past jurisprudence. Charles Swift, lawyer for the plaintiff in Hamdan v. Rumsfeld, told the HPR that while differences existed between Leon and Green’s 2006 rulings, “The opinions are not night and day apart. The problem is the war on terror is unprecedented.” Most cases prior to Boumediene argued around the World War II case of Johnson v. Eisentrager, and according to Professor Neuman, the circuit court’s dogmatic approach exacerbated the uncertainty. “The problem is, the Supreme Court caselaw is unsettled, and the D.C. Circuit took a very rigid view of what those rulings meant.” Such opinions squeezed the district court judges’ power to draw acceptable opinions, and this **muddled precedent** often led to the D.C. and Supreme Courts **answering different questions**. Although Boumediene encompassed both Leon and Green’s cases, Neuman said, the “case appears to go out of its way to be broader and not Guantanamo specific. From that perspective, Judge Leon and Judge Green’s differences don’t matter.” Though **the Supreme Court was able to resolve this divisive issue through its authority**, the wide disparity between it and the appellate courts vastly exceeded ordinary parameters.

**Intrinsicness**

**Do better**

**At: popular**

**Congressional support doesn’t matter – our link argument isn’t about the reality of congressional backlash – our links say SCOTUS anticipates politicized decisions and balances their rulings**

**at: antitrust doesn’t matter – link!!**

**The plan causes institutional balancing – SCOTUS couples the plan’s expansion of agency enforcement with an equal and opposite ruling in West Virginia constraining agencies – prefer HLR – it’s specific to balancing when reviewing government actions**

**1) Antitrust – That’s true in the antitrust context – there is a perceived ideology of enforcement that it’s liberal – justices make decisions factoring in those external variables**

**Ventoruzzo 15** – [Marco Ventoruzzo - Full Professor of Business Law at Bocconi University in Milan and Full Professor of Law at Penn State Law School, 2015, “Do Conservative Justices Favor Wall Street: Ideology and the Supreme Court's Securities Regulation Decisions”, <https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1277&context=fac_works>, eph]

C. Ideology in the Supreme Court's Securities Regulation Decisions

Probably the best evidence that political ideology can play a role in the area of securities regulation is the set of rules concerning the composition of the Securities and Exchange Commission (SEC). Section 4(a) of the 1934 Exchange Act sets forth that the SEC should be composed of five members appointed by the President with the "advice and consent" of the Senate, but also requires that "[n]ot more than three of such commissioners shall be members of the same political party, and in making appointments members of different political parties shall be appointed alternately as may be practicable."8 ° The statutory call for a bipartisan SEC indicates that regulation and enforcement activities concerning the financial markets can be subject to **diverging philosophies along political lines**.8 1 It is obviously impossible here to fully discuss the general economic tenets of conservative and liberal policies with respect to the regulation of financial markets. General intuition, noted above, is that ''conservative" views of economic policy emphasize the efficacy of markets over government intervention and regulation, while for liberals the position is reversed. The consequence is that conservatives tend toward deregulation based on the conviction that market failures rarely justify protections for perceived weaker parties in a private transaction. Liberals, on the other hand, are more skeptical about the virtues of free markets and believe that regulation should curb the possible inefficient and inequitable outcomes of laissez-faire market operation.8 2 In short, the former tend to be more "pro-business," the latter more "pro-investor." 83 An illustration of this possible political divide is the legislative history of the so-called Private Securities Litigation Reform Act of 1995.84 In the 1990s, there was a growing concern that frivolous securities lawsuits could arise as attorney-driven class actions, in particular invoking section 10(b) and Rule lOb-5 of the Exchange Act, forcing defendants to settle in light of the potential costs of discovery.8 5 Congress created this piece of legislation to curb such a phenomenon through different measures like raising the pleading standards.86 In order to survive a motion to dismiss, a plaintiff had to plead false statements "with particularity," and that pleading had to create a "strong inference" of scienter, one of the elements of a Rule lOb-5 cause of action; in addition, the court granted a "stay of discovery" before the decision on the motion to dismiss. 87 Congress enacted the bill into law over a veto by President Bill Clinton.88 Numerous Democratic representatives voted in favor of the law,89 but the diverging views of President Clinton and Congress evoke the traditional dividing line between liberals and conservatives in this area. This Section briefly addresses the room for policy consideration- politics-in the enforcement of the securities laws. The intent is not to offer a comprehensive account of the degree of freedom that courts have in the interpretation of all the provisions of the securities laws, but more simply to give a flavor of the possible different interpretations of the relevant statutes that a particular set of beliefs concerning the proper scope of the regulation might influence. To begin, note that the U.S. securities laws enacted in the 1930s were among the first modem regulations of the financial industry, and they have served as a model for several foreign jurisdictions.90 These laws, however, apply to one of the most dynamic and innovative industries. Inevitably, enforcing the existing rules to the ever-evolving factual circumstances that characterize this sector leaves wiggle room for different policy considerations. A good starting point is the scope of the securities laws. The definition of "security" that triggers the obligation to register and disclose information, as well as the availability of specific private causes of action designed to protect investors, is broad but also vague. For example, consider the notion of what constitutes an "investment contract" set forth in section 2 of the Securities Act (and section 3 of the Exchange Act) that the Supreme Court had to define on various occasions. 91 Another crucial area concerns the availability of private causes of action to plaintiff-investors allegedly harmed by false, misleading, or incomplete statements in the purchase or sale of securities and the burden of proof that they must satisfy to prevail.92 Furthermore, in several cases, the remedies granted to plaintiffs are based on private causes of action implied by the courts and not explicitly regulated by the legislature, most notably section 10(b) and Rule lOb-5 of the Exchange Act. In these instances, significant interpretative latitude exists. Consider, for example, problems such as the need to prove reliance vis-h-vis the fraud-on-the- market theory, the scienter requirement, or the extension of liability to aiders and abettors.93 The extension of the insider-trading prohibition, a rule largely created by courts, is another area in which different ideological perspectives might affect the decision-making process.94 Conservatives and liberals also often have divergent views about the powers of the government (i.e., the SEC) to enforce the law, particularly the securities laws. For example, some interesting cases in this respect deal with the burden of proof that the SEC must satisfy to establish a violation of the securities laws.95 Rulings on takeover regulation also might indicate different policy preferences of the Justices. These cases, however, show the difficulty of properly coding certain decisions as pro-business or pro-investor, a problem that more generally affects the analysis undertaken later in this Article.96 On one hand, it is possible to argue that takeovers, and more specifically hostile tender offers, favor investors by allowing them to sell their shares at a premium over market prices. On the other hand, some tender offers may not be value-maximizing, and in this case to allow the target corporation, as well as its controlling shareholders and managers, to resist an inadequate or coercive offer could be in the best interest of shareholders. In any case, the proper role of the market for corporate control and how to create a level playing field for bidders and targets in the takeover context are also areas where there is room for competing policy considerations. 97 In addition, litigation concerning the constitutionality of state antitakeover statutes is instructive as to the position of the Supreme Court on issues relating to the relative powers of the federal government and the states in regulating commerce, an area that implicates the politically charged question of the role of the federal government.9" The legislature resolved some of the controversies mentioned above, and the Court unanimously finds this, easy solution. Even assuming that ideological preference might be embedded in their decision-making, judges and, to a lesser but not unsubstantial extent, Supreme Court Justices face several constraints while speaking from the bench: Sometimes statutes and regulations are fairly straightforward and do not leave room for policy considerations; Lower judges might desire not to be reversed on appeal; 99 Fear of "government retaliation" might play a role (in the sense, for example, that striking down a statute might lead the legislature to introduce other measures that the Justice opposes); And public opinion might unconsciously influence them. There are, however, several "hard cases" where the solution does not seem to appear in either the Constitution or in statutory or case law. These hard cases leave room for the different policy approaches of the decision maker, as also indicated by the practice of dissenting opinions. This Article proposes that by examining a significant number of cases, it is possible to detect economic policies preferred by the Justices. In short, there are problems in the area of securities regulation in which ideology can play a role, considering the indeterminacy of the applicable laws.

II. AN OVERVIEW OF EXISTING LITERATURE ON THE ROLE OF IDEOLOGY IN JUDICIAL DECISION-MAKING

This Part begins by discussing the different ways to measure the elusive concept of ideology. Then, after considering the ideology of the Justices, this Part explores the correlation between that Justices' ideology and the way they vote on different decisions. A. Measures of Justices' Ideology One of the interesting and challenging problems of any study that investigates the correlation between the "ideology" of Supreme Court Justices and their voting patterns is how to precisely code such an ambiguous and elusive concept as the ideology of each Justice. There are three major techniques used in the political and legal literature to attribute a position to Justices (and lower court judges) on the political spectrum: (1) the party of the appointing president; (2) the Segal-Cover scores; and the (3) Martin-Quinn scores. The first two are "ex ante" measures because they classify the Justices based on proxies for their ideology measured before their tenure on the bench, and they remain static for the entire period the Justices work on the Court. The last one is an "ex post" measure, ranking Justices from liberal to conservative based on their actual voting in published opinions. The party of the appointing president is probably the most common measure used to code the political affiliation of Justices. This measure is based on the assumption that Republican presidents will appoint conservative Justices and Democratic ones will appoint liberal Justices. It has several advantages: "it is unambiguous, . . . easy to [apply and] understand."' 00 It also raises a separate issue: to what extent presidents are able to effectively influence the activity of the Court. This measure, however, also has some clear drawbacks. The first drawback is that, as with all ex ante measures, the measure is static and does not take into account the possibility (indeed, the likelihood) that some Justices might change their ideological position during their often long tenure, as mentioned above.' 01 In fact, empirical literature suggests that most Justices "drift" in their position on the ideological spectrum throughout their years on the bench.10 2 This variable is also problematic because it assumes that all Republican presidents are conservative and that all Democratic ones are liberal, or at least that they are all conservative or liberal in the same way, which is clearly not true. An interesting study ranked the U.S. presidents from Franklin Roosevelt to Bill Clinton based on their social and economic liberalism.' 0 3 The ranking is based on a 1995 survey of a random group of political scientists, and the results-used in this Article's empirical analysis-are as follows (100 being extremely liberal and 0 extremely conservative): In addition, not all presidents want or can appoint a Justice who precisely mirrors their views. 10 4 Other considerations might affect the decision, such as the need to take into account the geographical origins of the candidate and-especially in more recent years-the need to create a diverse Court in terms of gender and race to appeal to part of the electorate (consider President Ronald Reagan's appointment of Justice Sandra Day O'Connor or President Barack Obama's appointment of Justice Sonia Sotomayor). Political and party necessities can influence the President: for example, senators can play a role in the selection, especially the senator of the same party as the President from the state of the nominee, though this is more likely to occur in the selection process for the lower federal courts and is probably less relevant in Supreme Court nominations. Finally, the President can make a mistake in assessing the position of the appointee on the political spectrum,' 0 5 or simply may not care so much. Notwithstanding these caveats, this Article uses the party of the appointing president as one proxy for the ideology of the Justices, for the reasons indicated above. A second very common measure for the ideology of Supreme Court Justices is the so-called Segal-Cover index.' 0 6 This is also an ex ante measure that ranks Justices on a conservative-to-liberal spectrum based on a content analysis of editorials published in two liberal and two conservative newspapers about the nominees in the period from their nomination to their confirmation.'0 7 In its original formulation, to determine the Segal-Cover index, each paragraph of an article receives a score: +1 if it indicates a liberal attitude of the candidate, 0 if a moderate one, or -1 if a conservative one. The position of the Justice is measured according to the following formula: In the above formula, "1" is the number of paragraphs indicating a liberal ideology, "c" is the number of paragraphs indicating a conservative ideology, and "total" is the total number of paragraphs. Results can vary between -1 (extremely conservative) and +1 (extremely liberal). In line with other studies, this Article has renormalized the score from 0 (conservative) to 1 (liberal). 10 8 However, the Segal-Cover index is not devoid of shortcomings. Like the Republican/Democratic appointing president variable, the SegalCover index is static and does not consider changes in the Justice's attitudes. A specific bias of this index is that the policies and preferences of the newspaper influence op-ed pieces on prospective Justices. For example, there are certain issues that might receive more emphasis than others, e.g., social issues versus economic ones. In addition, the newspaper can influence the length of the article and therefore affect the balance between paragraphs emphasizing a conservative or a liberal inclination.109 This methodology does not take into account other possible important sources that indicate the ideology of a Justice, from scholarly articles to books published before the nomination. 110 Professors Lee Epstein, William Landes, and Richard Posner have created a more comprehensive index that also considers these elements, but this Article does not use it in this analysis. 11 Another possible bias of the Segal-Cover index is that, in the period between nomination and confirmation, the authors of the editorials might write "strategically"--trying to make a candidate appear more liberal and less self-restrained to enrage Republican Senators, for example. The Segal-Cover index is, however, popular in the literature, and it has the advantage of comporting with general scholarly evaluations of the Justices.112 In addition, unlike the party of the appointing president, the Segal-Cover index ranks the Justices on a continuous scale from -1 to + 1 (or from 0 to +1), offering a more nuanced measure of the position of the Justices and allowing for more precise correlations. The most important ex post proxy of the ideology of the Justices is the Martin-Quinn index. 113 It is based on a classification of the actual votes of the Justices during their terms, adjusted to take into account possible alignments among Justices, and it returns an "ideal point" representing a Justice's ideology in a space ranging from very liberal (-6.656) to very conservative (3.884).114 This proxy is useful because it accurately positions the Justices' ideology in different terms and therefore does not suffer from the static nature of ex ante measures. The major problem with this approach is its circularity or endogeneity. Arguably, this measure only shows that a Justice who usually votes conservative is more likely to vote conservative; it does not provide any information on the cases in which a Justice, perceived as liberal at the time of her appointment, voted more conservatively than expected.115 Removing cases on the particular issue researched and evaluating the correlation between the votes cast in other cases and those the research focuses on can partially mitigate this problem. For example, if one intends to test how Justices vote on First Amendment issues, one can factor in the votes cast in cases not dealing with First Amendment claims and verify if these votes predict how Justices will vote on First Amendment controversies. This Article's analysis of securities regulation decisions uses all these variables (the party of the appointing president, economic liberalism of the appointing president, Segal-Cover scores, and Martin-Quinn scores) to test the existence of a correlation between Justices' ideologies and their voting behavior. Combining the most commonly used measures will offer important and interesting insights on this Article's query. 11 6

B. Studies on the Correlation Between Ideology (and Other Factors) and Decisions

As examined above, the empirical literature of judicial behavior is vast.1 17 It would be difficult to provide here a complete account of the numerous studies published by political scientists and legal scholars in this broad area. This Article therefore limits its overview to some select works, pointing out in particular how the studies generally indicate a correlation between the ideology of Justices and judges and the way they vote. 118 One of the forerunners of empirical legal studies in this area was Professor C. Herman Pritchett, who in the 1940s started to keep track of the votes of the Supreme Court Justices, noting in particular the number of dissents and the allegiances among Justices sharing a political view. 19 The work of Professor Pritchett attracted a lot of interest as well as criticism, while several studies have confirmed his intuition that ideology plays a role in judicial behavior. The work of Professors Jeffrey Segal and Albert Cover offers a good illustration of the major results of this line of research. In their study, they find that ideology explains in a robust way (the correlation coefficient is 0.80) the aggregate voting behavior of the Justices. 120 Many other studies indicate a relationship between the policy preferences of the Justices and their voting. Ideology might play a role in the very selection of cases that the Supreme Court will hear. Studies have found that liberal Justices tend to grant certiorari more often when the lower court rendered a conservative opinion, and vice versa for conservative Justices. 121 This is particularly interesting considering that according to other studies, Justices want to hear cases they intend to reverse, and in fact empirical evidence indicates that between 1953 and 1994 the Supreme Court reversed the majority of the decisions it reviewed (61.3 %).122 Especially since the 1960s, conservative Justices have been proportionately voting to overturn more liberal precedents and strike down more liberal statutes, and the opposite is true for liberal Justices. 1 23 Other studies have shown an inclination of some Justices to vote for the defendants in criminal law cases if the litigation involves either statutory interpretation or Constitutional issues, which suggests coherence with a particular ideological view.124 At least one empirical study has also examined the interpretative techniques employed by the Justices-in particular their use of legislative history. According to its authors, not only are liberal Justices more likely than conservative ones to use this interpretative technique, but Justices are more inclined to refer to legislative history "when it favors their ideologically preferred outcomes.' 125 Another line of research investigates the sensitivity of the Supreme Court to external pressures, whether real or perceived. While these studies do not examine the role of ideology in the Supreme Court's decisions, they are relevant because they seem to confirm that Justices pay attention to extra-legal considerations, which might be a way that politics influence them. For example, one research study shows that when there is an ideological difference between the Court and Congress, the Court is less likely to invalidate a federal statute, which might be a concern for possible "retaliations" from Congress-either enacting a new statute with similar effects or other possible actions such as a reduction of the Court's budget. 126 More generally, other works find that the Justices are responsive to changes in the public opinion.' 27 Even more central to the topic of this Article is the finding that the Supreme Court reacts to the business cycle, for example by siding with the government in times of economic growth and tending to rule against it during economic downturns, but deferring to government efforts in times of crisis. 128 The instant empirical analysis has tested the hypothesis that Court decisions in securities regulation cases have some correlation with economic conditions.129 Scholars have conducted extensive research on lower court decisions, focusing on decisions of the federal courts of appeals. Of course, the institutional context is different in such cases. Federal judges can face more constraints than Supreme Court Justices in their decision-making for reasons that this Article has already mentioned (fear of reversal, hopes of elevation to a higher court, etc.). It is important to note, however, that even with respect to lower federal judges, there are strong indicia that ideology affects judicial decision-making. For example, judges close to the Democratic Party vote more consistently against corporations in **antitrust** cases and for unions in labor disputes.' 3 ° An article on the Chevron doctrine claims that "panels controlled by Republicans were more likely to defer to conservative agency decisions (that is, to follow the Chevron doctrine) than were the panels controlled by Democrats." ' 31 Similarly, "Democrat-controlled panels were more likely to defer to liberal agency decisions than were those controlled by Republicans."' 3 2 In addition, according to a study of the U.S. Court of Appeals for the Second Circuit, conservative Justices tend to align their votes with conservative judges, and liberal Justices and judges similarly align. 1 There is also evidence of constraints on judicial behavior and of **strategic voting.** District court judges are adverse to reversal, or at least to a high frequency of reversals, and in their voting they seem to take into account the policy preferences of the court that will hear an appeal. On average, judges appointed by a Democratic president tend to impose lower prison sentences if a mostly liberal court of appeals reviews them and longer ones if the appellate judges are mostly Republican. 134 Also, researchers have tested "panel effects": male judges seem more likely to vote for women in employment discrimination disputes if a woman is on the panel, 135 while white judges more frequently vote in favor of voting rights if a black judge sits on the panel.13 Researchers have also conducted important studies on state judges, especially to investigate the behavior of elected judges. Elected judges rule more frequently in favor of in-state plaintiffs and against out-of-state businesses than appointed judges, especially when the decision transfers wealth to the state. 137 Additionally, sentences in violent criminal cases are more severe if the judge is approaching reelection.' 38 Statistically, state supreme court justices are more likely to confirm death sentences when the electorate supports them. 139 This brief overview of some contributions indicates evidence that ideology informs judicial decisions **and** that judges take into account **external variables** like the panel composition, public opinion, Congress's political composition, fear of reversal, and economic cycles. The results of previous research make interesting and relevant the questions that this empirical analysis investigates in the next Part, in particular whether the ideology of the Justices plays a role in securities regulation disputes.

**2) Timing – Abrupt nature of the plan guarantees the link.**

**Marshall 2** (William Marshall, prof of law @ UNC, Fall 2002, 73 U. Colo. L. Rev. 1217)

It might also be argued that the judicial activism question is misguided because judicial activism is not inherently wrong. Rather, the proper inquiry should simply be whether a case was correctly decided - not whether it was activist. Although I agree that a determination of activism is not the same as a determination of merit (an activist decision is not necessarily wrong, a non-activist decision is not necessarily correct), the activism inquiry can shed light on the merits issue. A decision that overturns a federal law while ignoring precedent, text, history, and jurisdictional limitations would appropriately be subject to an activist critique regardless of result. In addition, one need not be completely in the camps of Alexander Bickel, Robert Nagel, Mark Tushnet, and others to recognize that there is value in judicial restraint. Court overreaching may negatively affect the political capital of the judiciary. Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962). **Abrupt judicial action** invalidating politically achieved results may undermine long-term support for the principles the decision was designed to achieve. Robert F. Nagel, Constitutional Cultures: The Mentality and Consequences of Judicial Review (1989). Courts may well be less receptive to progressive social and economic action than are the political branches. Mark Tushnet, Taking the Constitution Away from the Courts (1999). Finally, the activism critique is important in that it sets rhetorical constraints on actions that might otherwise appear unbounded. The legitimacy of a particular decision cannot be completely appraised without evaluating the deciding court's methodology. Activism is a part of that inquiry.

**They’ll pair decisions to preserve PC**

**Bazelon 15** (Emily Bazelon is a staff writer for the magazine and the Truman Capote Fellow at Yale Law School, Marriage of Convenience, 2-1, New York Times, l/n, y2k)

When Roberts was nominated to be chief justice 10 years ago by President George W. Bush, he exuded calm neutrality at his confirmation hearing, comparing judges to umpires who call balls and strikes. At the end of his first term, he emphasized the importance of the court's **''credibility** and **legitimacy** as an institution,'' in an interview with the George Washington University law professor Jeffrey Rosen.

But in 2010, Roberts supplied the fifth vote for the court's remarkably unpopular ruling in Citizens United. By striking limits that Congress set on campaign spending by corporations, the court was perceived as favoring the interests of the wealthy. The court's approval rating fell 10 percentage points, to barely break even, from 61 percent.

Since then, the court has fared better with the public when it pairs **conservative decisions** with **progressive** ones. And same-sex marriage is part of that equation. In 2013, the term ended with a **splashy ruling** in which five justices -- Roberts not among them -- struck down part of the Defense of Marriage Act, which restricted federal benefits for spouses to **male-female couples**. This decision came **one day** after the court gutted a central component of the **Voting Rights Act**, in a 5-to-4 decision written by Roberts.

**3) authority – Courts are jurisdiction hoarders – the plan’s agency enforcement produces judicial backlash to curb agency power**

**Crane 10** [Daniel A. Crane - Professor of Law, University of Michigan. “Reflections on Section 5 of the FTC Act and the FTC's Case Against Intel” - The CPI Antitrust Journal (Competition Policy International) – February, 2010, (2) - https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2369&context=articles]

In recent years, the Commission has frequently tied itself to the Sherman Act.11 Why would it choose to accept that baggage? Of late, the FTC has been **shell-shocked** by its treatment in the courts when it has invoked an independent Section 5. There is a wide gulf between the theoretical availability of an expansive Section 5 and actual judicial affirmation of FTC decisions to enjoin behavior that would not violate the Sherman Act. The courts have **frequently quashed the FTC’s efforts** to develop an independent Section 5, even while paying lip service to the independence principle.12 As Bill Kovacic remarked during his opening comments at the FTC’s October 2008 workshop on the meaning of Section 5, it is difficult to find even ten successfully litigated Section 5 antitrust cases over the Commission’s nearly hundred-year history.13

The reason is **institutional**. Courts tend to be **jealous of their jurisdiction**. To cite a venerable precedent to which we will return at end, courts are **loathe to abandon their prerogative** “to say what the law is.”14 In an early decision—subsequently overruled but never quite forgotten—the Supreme Court applied a Marbury v. Madison thematic to the FTC: “The words ‘unfair competition’ are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as a matter of law what they include.”15 Courts are **wary of agency assertions** that the agency should be accorded independent space **to develop legal norms**. As Bob Pitofsky has explained, a construction of Section 5 that would make the same behavior lawful at the Department of Justice and unlawful at the FTC is “untenable.”

**4) Link framing – err neg – Elite influence shifts internal court dynamics**

**Baum & Devins 10** Lawrence Baum Professor of Political Science, Ohio State University and Neal Devins Goodrich Professor of Law and Professor of Government, College of William and Mary. “Why the Supreme Court Cares About Elites, Not the American People.”(2010). *The Georgetown Law Journal*. 1116. <https://scholarship.law.wm.edu/facpubs/1116> {DK}

We have questioned both the salience of the general public to the Justices and the existence of substantial public influence on the Justices’ choices. We have also argued that—consistent with social psychology theory—elite audiences are likely to play a far more influential role than public opinion in shaping the Justices’ choices. In the balance of this section, we will consider evidence on the influence of elite groups in American society. We will make use of both anecdotal and systematic evidence in assessing the influence of elites. Like mass public opinion, the opinion of elite reference groups could affect the Justices in multiple ways. We will present evidence on several forms of influence. First, information that Justices receive about the views of specific groups might affect their positions in specific cases. Second, Justices might align themselves with the views of a broader elite group—the people who share the Justices’ high educational attainments. Finally, the Justices’ identifications with elite groups could have a more pervasive effect on their positions, moving them systematically in one direction or another. 1. Specific Knowledge of Elite Opinion Through Amicus Curiae Briefs The Justices can learn of the views of specific elite groups in several ways. Amicus curiae briefs are one important form of communication from elite groups to the Court. Amicus filings are a source of information for the Court in several respects.276 Our focus here is on one sort of information that they provide and the signals that they offer the Justices and their clerks about elite views.277 One indication of the relevance of those signals comes from a survey of seventy Supreme Court law clerks, which found that eighty-eight percent of clerks would be inclined to give “closer attention” to amicus briefs filed by academics—especially the prominent academics who teach at the nation’s leading law schools (the very schools law clerks come from).278 And while Supreme Court Justices may not follow their clerks’ leads, there is anecdotal evidence suggesting that the Justices are influenced by prevailing elite opinion as reflected in amicus briefs. Consider, for example, the possible role of amicus filings in Grutter v. Bollinger (approving some affirmative action programs at the University of Michigan law school)279 and in a string of 2004–2008 cases involving the rights of enemy combatants held at Guantanamo Bay.280 In Grutter, eighty-three of the one hundred two amicus briefs submitted backed the University of Michigan.281 More significant (for our purposes), elite opinion uniformly supported affirmative action. Briefs filed by Fortune 500 companies and other business interests spoke of the business community’s need for a racially diverse workforce in order to compete in the global economy.282 Ninety-one colleges as well as every major educational association backed preferences, arguing that racial diversity enhanced learning and prepared students for life in a multiracial world.283 States, federal lawmakers, and a crosssection of retired military officers also filed briefs in support of the University of Michigan.284 In sharp contrast, opponents of affirmative action were isolated— with no meaningful support from elites or political actors.285 Amicus briefs filed in the 2004, 2006, and 2008 enemy combatant cases are equally revealing.286 In particular, while elite audiences consistently opposed Bush administration claims about both presidential war-making and the rights of enemy combatants, elite opposition to the Bush administration intensified throughout this period. In 2004 filings, several prominent academics supported administration claims regarding executive branch control of the Guantanamo Bay detention facility; still, more than two out of three amicus briefs opposed the administration.287 In 2006 and 2008, no academics filed briefs supporting the administration.288 Combusting with uniform academic opposition to the administration, bar groups, retired federal court judges, and several hundred members of the European Union and United Kingdom parliaments filed briefs opposing the Bush administration.289 Elite opposition to the administration was also manifest in academic commentary and newspaper editorials—all major newspapers (except the Wall Street Journal) formally opposed the administra tion, as did the vast majority of academic commentary on these cases.290 As with other kinds of elite inputs, different Justices could be expected to respond to the amicus briefs in these enemy combatant and affirmative action cases in different ways. First, as discussed in Part II, Supreme Court Justices look both to their own reference groups and to their personal preferences when deciding cases. Justices predisposed to support the administration in the enemy combatant cases or to oppose the university in the affirmative action cases certainly would not change their position to curry favor with elite audiences that they do not identify with. For example, Justice Scalia has taken personal aim at lawyer elites291—so it is to be expected that he would resist these amicus filings (and that he would ally himself with elite audiences that would expect him to resist these filings). Second, for the median or swing Justice, amicus briefs are likely to hold special salience. These Justices have moderate legal policy preferences and they do not identify themselves with audiences that expect ideological conformity. These Justices, in other words, are likely to make situational judgments—and amicus briefs may prove especially useful to them in this regard.292 2. Evidence of Elite Opinion Contributing to Voting Shifts in Specific Cases The example of amicus groups also highlights how difficult it is to pinpoint how much elites and other personal reference groups affect a Justice’s decision making. After all, the Justices’ own inclinations and those of their reference groups undoubtedly coincide in many instances, in part because people are drawn to groups with which they share values.293 However, the difficulty of identifying this kind of influence is reduced somewhat when Justices change positions from one case to another, because something other than stable personal preferences must account for that change. Elite audiences are one potential source of such change. Two examples involve the possible influence of academics and especially the news media. The first example involves the media themselves. In Gannett v. DePasquale, the Court reached a complicated decision that held that the Sixth Amendment did not guarantee public access to pretrial proceedings in criminal cases; the Court’s logic seemed to extend to criminal trials as well.294 One year later, after a storm of criticism in the mass media,295 the Court held in Richmond Newspapers, Inc. v. Virginia that the First Amendment did protect public access to trials.296 The two decisions can be reconciled, but the quick and dramatic shift in some of the Justices’ positions on the underlying policy issue—whether the public (and thus the news media) should have access to trials—was striking.297 One commentator saw the media criticism as decisive in producing a 7–1 majority for public access in Richmond Newspapers, 298 with three Justices who had voted against the Sixth Amendment claim in Gannett voting for the First Amendment claims in Richmond Newspapers. 299 The other example involved a direct shift in the positions of three Justices. In Minersville School District v. Gobitis (1940),300 the Court ruled 8–1 that public school students could be required to salute the flag. These students—all Jehovah’s Witnesses—had refused to salute the flag on religious grounds.301 Three years later, in West Virginia State Board of Education v. Barnette, the Court directly overturned Gobitis.302 The earlier decision was heavily criticized by law journals, the press, and religious organizations. Thirty-one of thirty-nine law review pieces that discussed the decision did so critically.303 Newspapers and magazines accused the Court of violating constitutional rights and buckling under popular hysteria.304 This criticism may have influenced the three Justices— Hugo Black, William O. Douglas, and Frank Murphy—who shifted their positions in the Barnette case. According to Felix Frankfurter, Douglas reported that Black had changed his view of the issue because “he ha[d] been reading the papers.”305 These illustrations suggest the potential for elite groups—the Justices’ personal circles, the mass media, or others—to pull Justices away from certain positions. Of course, such illustrations have the same limitations as anecdotal evidence with respect to the impact of mass public opinion on the Justices. For one thing, the influence of elite groups cannot easily be isolated from other forces that shape the Justices’ positions. For example, the Court in Barnette may also have been moved by reports of hundreds of violent attacks against Jehovah’s Witnesses as well as signals sent by both Congress and the Executive.306 Furthermore, illustrative evidence does not tell us the frequency with which an influence operates. However, it seems highly plausible that the prospective and actual reactions of salient elite audiences to Justices’ positions create constraints on what the Justices do.

**IL – 2NC – A2: Abortion thumper**

**Misses the thesis of our da – our argument is about use of political capital inside of the court proceedings – their ev proves that there are already 5 justices locked into overturning Roe – however we are the only ones with evidence that speaks to individual justices’ feelings on antitrust**

**As long as the court sticks to constitutional principles legitimacy will remain**

**Liptak 21** Adam Liptak Pulitzer Prize finalist reporter covering the United States Supreme Court and writes Sidebar, a column on legal developments. A graduate of Yale Law School, he practiced law for 14 years before joining The New York Times's news staff in 2002. Published Dec. 4, 2021 Updated Dec. 6, 2021. “Critical Moment for Roe, and the Supreme Court’s Legitimacy.” <https://www.nytimes.com/2021/12/04/us/politics/mississippi-supreme-court-abortion-roe-v-wade.html> {DK}

The case illuminates competing and shifting conceptions of the role of the court. For decades, conservatives have argued that Roe amounted to judicial activism, announcing a right not found in the Constitution and overriding the political process to achieve an outcome that politicians would not. Now, after nearly half a century in which that right has been woven into the societal fabric, the argument may have come full circle, with many liberals saying that a decision by the court to eliminate the right to abortion would amount to flagrant political activism. Both arguments are grounded in concerns about the court’s legitimacy, which were brought into sharper focus by Wednesday’s proceedings. “Questions about the court’s legitimacy are more pitched than they ever have been,” said Melissa Murray, a law professor at New York University. Should the court overrule Roe, she added, it will represent a turning point signaling that “the court has been weaponized for political purposes.” But Nicole Garnett, a law professor at Notre Dame, said there was just one sound way to assess the status and stature of the court. “The only real measure of the court’s legitimacy is whether the justices are following their oath to **uphold the Constitution and the rule of law**,” she said. Overturning Roe, she added, would let states decide whether and when to allow abortions. “The court would enhance its credibility and legitimacy as a judicial rather than a political body,” she said, “if it returned the question of abortion regulation to the people.” As those dueling perspectives reflect, there is no consensus about what legitimacy means. Richard H. Fallon Jr., a law professor at Harvard and the author of “Law and Legitimacy in the Supreme Court,” said there were two primary definitions. One is moral, expressing a judgment about whether the court deserves to be respected. The second is sociological, based on whether people trust the court to make fair and unbiased judgments. Only that second sense, he said, can be captured in public opinion polls. Recent polls — taken after the court allowed a Texas law that bans abortions after six weeks to take effect in September, but before Wednesday’s arguments — suggest that Justices Sotomayor and Breyer were right to worry about the court’s standing. A Quinnipiac University poll last month found that 61 percent of Americans said the Supreme Court was mainly motivated by politics, while 32 percent said it was mainly motivated by the law. Three years ago, the corresponding numbers were 50 and 42 percent. A Gallup poll in September found that only 40 percent of Americans approved of the job the court was doing, the lowest rate since 2000, when Gallup first posed the question. A Marquette Law School poll found a 12-point drop in public approval of the Supreme Court, from 66 to 54 percent, in a little more than a year. Sign Up for On Politics A guide to the political news cycle, cutting through the spin and delivering clarity from the chaos. Get it sent to your inbox. Charles Franklin, a law professor and political scientist at Marquette who oversaw the poll, said the plummeting numbers were a threat to the court’s authority. “Anytime the court is ruling on highly controversial measures, it needs that sense of legitimacy and compliance, especially from other political actors,” he said. “Look at the resistance to Brown v. Board of Education, for instance, as an example of when compliance is not automatic.” Southern states for years refused to follow the Brown decision, which banned segregation in public schools, as they engaged in what came to be known as “massive resistance.” Billboards calling for the impeachment of Chief Justice Earl Warren, who wrote the court’s unanimous decision, were commonplace. The Brown decision is now almost universally viewed as a towering achievement. But its enforcement required President Dwight D. Eisenhower to decide to send members of the 101st Airborne Division to Little Rock, Ark., to escort Black students through an angry white mob. Not all presidents gave the court’s rulings the same respect. In 1832, President Andrew Jackson refused to enforce a Supreme Court decision arising from a clash between Georgia and the Cherokee Nation. A probably apocryphal but nonetheless potent comment is often attributed to Jackson about Chief Justice John Marshall: “John Marshall has made his decision; now let him enforce it.” President Biden has appointed a commission to study potential changes to the court, and it is expected to issue a report this month assessing options like expanding its size or imposing term limits on the justices. Such changes could gain more support among Democrats if the court overturns Roe, though they would require congressional action or a constitutional amendment. Professor Franklin said the court’s current authority was fragile. “What does the court do with neither the sword nor the purse?” he asked, paraphrasing Alexander Hamilton. “What would happen if there were widespread unwillingness to abide by the court’s decisions?” The last time a majority of justices on the Supreme Court were appointed by Democratic presidents was in 1969, three years before the birth of its newest member, Justice Amy Coney Barrett. The State of Abortion in the U.S. Abortion at the Supreme Court. The justices' upcoming ruling on a Mississippi law could dramatically change abortion access in the U.S., including possibly overturning the landmark Roe v. Wade decision, which established a constitutional right to abortion. If Roe v. Wade is overturned. Abortion would remain legal in more than half of states, but not in a wide swath of the Midwest and the South. Legislatures in 22 states would almost certainly move to ban or substantially restrict access to abortion. Who gets abortions in America? The portrait of abortion has changed with society. Today, teenagers are having far fewer abortions. The typical patient is most likely already a mother, poor, unmarried, in her late 20s, has some college education and is very early in pregnancy. The politics are complicated. Americans are not as neatly divided on abortion as politicians and activists. Overall, 26 percent of voters hold a different view on abortion than the presidential candidate they supported in 2020, one poll found. Abortion pills. The F.D.A. will permanently allow patients to receive abortion pills by mail, broadening access to medication abortion, but many conservative states are likely to mobilize against the decision. In 19 states, telemedicine visits for the pills are already banned. That lasting dominance by Republican-appointed justices was a consequence of happenstance and hardball. The last two Democratic presidents before Mr. Biden, for instance, served two terms and appointed two justices each, or one per term. Mr. Trump appointed three in his single term, creating a conservative 6-to-3 supermajority. Mr. Trump was aided by a Republican Senate that blocked President Barack Obama’s third nominee, Merrick B. Garland, and rushed the confirmation of Mr. Trump’s own third pick, Justice Barrett, in the waning days of his presidency. Still, complete partisan polarization at the Supreme Court, mapping onto similarly deep divisions in Congress and the electorate, is a relatively recent phenomenon. Before 2010, the political parties of the presidents who appointed Supreme Court justices did not reliably predict how the justices would vote. Republican presidents have often appointed justices who were or would turn out to be liberals. Among them were Chief Justice Warren and Justices William J. Brennan Jr. and Harry A. Blackmun, the author of the majority opinion in Roe. But it has been more than 30 years since the last such appointment, of Justice David H. Souter in 1990. And it has been almost 60 years since a Democratic president last appointed a justice who often voted with the court’s conservatives: Justice Byron R. White, who was nominated by President John F. Kennedy in 1962. In 2010, Justice John Paul Stevens, a liberal appointed by President Gerald R. Ford, a Republican, retired. He was replaced by Justice Elena Kagan, a liberal appointed by Mr. Obama, completing the partisan polarization at the court. Every Republican appointee was now more conservative than every Democratic one. But the effect was moderated by the presence of a swing justice. Until his retirement in 2018, Justice Anthony M. Kennedy, who was appointed by President Ronald Reagan, a Republican, occasionally joined the court’s liberal wing in decisions on gay rights, abortion, affirmative action and the death penalty. Chief Justice John G. Roberts Jr., appointed by President George W. Bush, a Republican, briefly seemed poised to take on that moderating role. But then Justice Ruth Bader Ginsburg died last year and was replaced by Justice Barrett, giving Republican appointees a lopsided majority. A decision in the case argued on Wednesday, Dobbs v. Jackson Women’s Health Organization, No. 19-1392, concerning a Mississippi law that bans most abortions after 15 weeks of pregnancy, is not expected until late June. Professor Fallon said it was hard to think of an apt comparison to a decision overruling Roe. “I am not sure there is a good historical analogy to Dobbs and the worries about Supreme Court legitimacy that it has inspired,” Professor Fallon said. “But if there is, it would need to involve an issue that was simultaneously politically and morally divisive and that involved very high stakes.” “A possible comparison,” he said, “would be to Dred Scott v. Sandford, presenting the question whether Congress had the power under the Constitution to ban slavery in the territories. The underlying dispute in that case ultimately led to the Civil War.” Professor Murray said that neither the notorious Dred Scott decision, with a majority opinion written by Chief Justice Roger B. Taney, nor decisions striking down President Franklin D. Roosevelt’s New Deal programs were quite apt. “This moment strikes me as really different from the Taney court, really different from the New Deal court, really different from the Warren court and Brown,” she said. “In those moments, it felt like the court was acting for itself and not in the service of some other project in which it was only a vessel or a pawn.” Professor Garnett said the court should act for itself in the Mississippi case — by overruling Roe. “When the court straightforwardly upholds the Constitution and stays within its proper role, despite the possibility of negative publicity, as it did in Brown v. Board of Education, its legitimacy is reinforced,” she said. “A negative reaction does not mean that the court has done something illegitimate. It may mean the opposite.”

**at: compartment**

**Doesn’t apply – Reddish says no spillover between issues –** our disad is about transferring one pro-agency rule for another **– BUT Reddish *confirms* that capital matters intra-issue**

**At: announced in june**

**Yeah we know**

**IL---Nondelegation Key**

**Reviving the non-delegation doctrine decimates the EPA’s climate policies**

**Benesh 20** adjunct professor at Georgetown University Law Center, “The End of Environmental Law as We Know It,” Environmental Working Group, October 21, 2020, <https://www.ewg.org/news-insights/news/end-environmental-law-we-know-it>

Perhaps **the most significant threat is the potential expansion of the “nondelegation” doctrine**, which two University of Michigan law professors call “one of the most dangerous ideas in American law.” This is the theory that the Constitution forbids Congress from delegating important policy decisions to any other person or institution – including agencies like the EPA or the Food and Drug Administration.

**Aggressive application of this doctrine would fundamentally change how most law-making happens.** The Clean Air Act, Clean Water Act and other laws grant the EPA general authority and allow agency experts to determine how to regulate individual pollutants. **Reversing this longstanding practice would shift that responsibility back to Congress, which lacks the necessary expertise**.

State courts have already shown how the nondelegation doctrine can be weaponized to derail democratically passed laws and regulations. The Republican majority of the Michigan Supreme Court recently applied the nondelegation doctrine to strike down emergency actions to slow the spread of COVID-19.

Neither the Constitution nor texts of original constitutional debates describe any principle of nondelegation. The Supreme Court has not used the nondelegation doctrine to overturn a law since 1935. But there is a real threat that an anti-regulation majority could invoke the doctrine to handicap agencies like the EPA.

Last year, Justice Neil Gorsuch wrote a dissent advocating that the court revisit the doctrine and was joined by Justice Clarence Thomas and Chief Justice John Roberts. A recent analysis by Georgetown Law professor Lisa Heinzerling found that five current justices – Gorsuch, Thomas, Samuel Alito, Roberts and Brett Kavanaugh – have all voiced support for reviving the nondelegation doctrine to scrutinize regulations on industry behavior. Those justices would almost certainly find an ally in Coney Barrett.

An expanded nondelegation doctrine would be a disaster for environmental law. **Whole portions of environmental laws could be invalidated** if the court were to determine that Congress gave EPA too much power.

Nondelegation could overturn agency actions implementing the Toxic Substances Control Act, or TSCA, which Congress overhauled in 2016. For example, the EPA will soon propose its first restrictions on 10 chemicals under the new law. The law also gave the EPA expanded authority to require industry to conduct more health and safety studies on chemicals.

**Nondelegation could be used to strike down forthcoming regulations.** If future EPA regulations to limit industrial discharges of toxic PFAS chemicals were determined to be unlawful delegation, those regulations could be struck down. **Nondelegation could also be used to strike down new rules limiting methane pollution or greenhouse gas emissions from vehicles de**

# 2NR

**Key justices think that way---plan forces trade-offs**

**Young 99 –** Ernest Young, Assistant Professor at the University of Texas School of Law, “State Sovereign Immunity and the Future of Federalism”, The Supreme Court Review, 1999 Sup. Ct. Rev. 1, Lexis

1. The **opportunity cost** of immunity rulings. The first reason, and the simplest, is that **the Court has limited political capital**. [261](http://www.lexis.com/research/retrieve?_m=8aa357d8dffaa93537121f2e8b217085&csvc=le&cform=&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzz-zSkAA&_md5=eae359ed2bb6e88cba976c7d466b3db7#n261%23n261) As Dean Choper has argued, "the federal judiciary's ability to persuade the populace and public leaders that it is right and they are wrong is determined by the **number** and **frequency** of its attempts  [\*59]  to do so, the felt importance of the policies it disapproves, and the perceived substantive correctness of its decisions." [262](http://www.lexis.com/research/retrieve?_m=8aa357d8dffaa93537121f2e8b217085&csvc=le&cform=&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzz-zSkAA&_md5=eae359ed2bb6e88cba976c7d466b3db7#n262%23n262) There is thus likely to be, at some point, a **limit** on the Court's ability to continue striking down federal statutes in the name of states' rights. [263](http://www.lexis.com/research/retrieve?_m=8aa357d8dffaa93537121f2e8b217085&csvc=le&cform=&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzz-zSkAA&_md5=eae359ed2bb6e88cba976c7d466b3db7#n263%23n263) To the extent that this limit exists, then the Court's extended adventure in aggressive enforcement of state sovereign immunity will trade off with its ability to develop a meaningful jurisprudence of process or power federalism. If protecting state authority to regulate private conduct is the key to a viable state/federal balance, then a considered reaffirmation, explanation, or extension of Lopez may do more good than another expansion of Seminole Tribe. "Political capital," of course, is a pretty vague concept. It might be that the Court's ability to enforce federalism limits is more like muscles than money: it atrophies unless it is exercised regularly. [264](http://www.lexis.com/research/retrieve?_m=8aa357d8dffaa93537121f2e8b217085&csvc=le&cform=&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzz-zSkAA&_md5=eae359ed2bb6e88cba976c7d466b3db7#n264%23n264) The National League of Cities story arguably illustrates this phenomenon, in that the Court's failure to apply the doctrine to check federal power in a series of subsequent cases may have helped lead to the outright rejection of the doctrine in Garcia. [265](http://www.lexis.com/research/retrieve?_m=8aa357d8dffaa93537121f2e8b217085&csvc=le&cform=&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzz-zSkAA&_md5=eae359ed2bb6e88cba976c7d466b3db7#n265%23n265) The important point, however, is that the **Justices** who **matter most** on these issues tend to **think in terms of limited capital** and worry about judicial actions that may draw down the reserves. [266](http://www.lexis.com/research/retrieve?_m=8aa357d8dffaa93537121f2e8b217085&csvc=le&cform=&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzz-zSkAA&_md5=eae359ed2bb6e88cba976c7d466b3db7#n266%23n266) Political capital  [\*60]  is thus likely to **function as an internal constraint** on the Court's **willingness repeatedly to confront** Congress.