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**SCOTUS will narrow Chevron in AHA v. Becerra but they will decline to overrule Chevron in its entirety**

**Nachmany 21** [Eli Nachmany is a third-year law student at Harvard Law School, where he serves as Editor-in-Chief of the Harvard Journal of Law & Public Policy. Prior to law school, Nachmany worked in the White House Office of American Innovation as a domestic policy aide and as the Speechwriter to the U.S. Secretary of the Interior. 8-9-2021 https://www.yalejreg.com/nc/scotus-faces-a-chevron-decision-tree-in-american-hospital-association-v-becerra-by-eli-nachmany/]

The Supreme Court recently granted certiorari in American Hospital Association v. Becerra, a case that presents a question relating to so-called **Chevron deference**. Chevron USA v. NRDC was a 1984 case in which the Court held that an administrative agency’s interpretation of an ambiguous statute was entitled to judicial deference. But this controversial precedent has come under attack in recent years, with some Justices suggesting that the Court scrap Chevron.

Plenty of good arguments exist for overturning Chevron, but to do so in American Hospital Association, the Court will need to clear a few hurdles. American Hospital Association concerns the Department of Health and Human Services’ (HHS) interpretation of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003. The law sets forth certain formulas for drug reimbursement rates; in 2018, HHS cut reimbursement rates to hospitals that participate in the 340B program based on an interpretation of the statute. The American Hospital Association has challenged the interpretation, while HHS claims that its interpretation is entitled to judicial deference under Chevron.

Chevron has become the target of intense criticism over the years. Some argue that deferring to an agency’s interpretation of a statute that it is charged with administering scrambles the separation of powers. Others point out that Chevron runs counter to the Administrative Procedure Act, which instructs courts to “decide all relevant questions of law” and “interpret constitutional and statutory provisions.” And still others urge that Chevron offends due process, given the systemic advantage it confers upon the government in regulatory litigation.

But is **A**merican **H**ospital **A**ssociation the proper vehicle for overturning Chevron? Three main obstacles block the way toward the overturning of Chevron in the case. The first is the Court’s resolution of an additional question that it asked the parties to brief, concerning the reviewability of HHS’s interpretation. The second is the Court’s potential interest in a sort of **Chevron exceptionalism** for interpretations about appropriations provisions. And the third is the possibility that the Court itself **is just not ready to overturn Chevron**, instead preferring an alternate path even if it reaches the question.

For starters, the Court could stop short of the Chevron question altogether if it finds that the agency action at issue in the case is unreviewable. The Court has long held that administrative action embodies a presumption of reviewability. Essentially, the Court assumes that a given agency action is reviewable unless a statute precludes judicial review or the court has “no law to apply” in evaluating the agency’s action. The presumption of reviewability may also be a check against broad agency discretion; some judges find such discretion—as the recent revival of interest in the nondelegation doctrine evinces—constitutionally dubious.

But Professor Nicholas Bagley has called the presumption of reviewability itself into question. In a recent Harvard Law Review article, Professor Bagley argued that the presumption has no basis in history, positive law, the Constitution, or sound policy considerations. Professor Chris Walker has made the point that because of the longstanding nature of the presumption, the Court is unlikely to shift gears in American Hospital Association. Still, the Court has asked the parties for briefing on the question whether HHS’s action is reviewable. This presents the Court with the opportunity to (1) find that the statute at issue in this case falls into one of the clearly established exceptions to the presumption of reviewability, (2) cabin the presumption somewhat, or (3) draw on Professor Bagley’s work to eschew the presumption altogether. Any of these three options would allow the Court to resolve the case on non-Chevron grounds.

Next, the Court might decline to apply Chevron deference for a reason that is particular to the facts of this case. While jurists and commentators often speak of Chevron in general terms, some have posited that certain areas of public administration should obtain a sort of Chevron exceptionalism. As it pertains to American Hospital Association, Professor Matthew Lawrence has written that “[c]ourts should adopt a bifurcated approach to the application of Chevron for appropriations that disfavors deference for permanent appropriations provisions, but not for annual appropriations provisions.” Because Medicare payment flows from a permanent appropriation of federal money, the argument goes, Chevron deference would be especially inappropriate for HHS’s interpretation of a Medicare appropriations provision. This is because, according to Professor Lawrence, deferring to agency interpretations of permanent appropriations provisions may do significant violence to the separation of powers and seriously encroach on Congress’s domain. The Court could resolve the case on these grounds, or even take a slightly broader view and find that Chevron is inapplicable in the appropriations realm as a general matter. Either way, such a result would likely produce a narrow holding applicable only to a subset of administrative action.

Finally, the Court could squarely answer the Chevron question and still refuse to overrule its precedent. The Court might (1) declare that the statute is clear and, therefore, Chevron deference does not apply; (2) issue a Kisor-esque decision that cabins Chevron’s general applicability but keeps the precedent on life support; or (3) simply reaffirm Chevron on stare decisis grounds and apply it to the present case. There is some overlap among these three doctrinal paths.

Beginning with the first option, Chevron itself set forth a two-step approach. At the first step, if Congress’s intent is clear, the Court must give effect to the clear statutory text. This part of Chevron is uncontroversial—if, for example, a statute commands that an agency “shall” do something, that agency’s interpretation that it “may” (and, by corollary, may not) do the thing would not be entitled to deference, because it conflicts with the clear language of the law. As such, if the Court finds the provision at issue unambiguous, it could answer the question presented in the negative without wading into the deference debate.

The second option laid out above uses the term “Kisor-esque” to refer to the Court’s recent decision in Kisor v. Wilkie. There, the Court was faced with the question whether to overturn Auer v. Robbins, which stands for the principle that courts must defer to agencies’ interpretations of their own ambiguous regulations. In Kisor, the Court upheld Auer, but significantly cabined its application. Writing for the Court, Justice Kagan explained that Auer deference is only proper when a regulation is “genuinely ambiguous,” determined after rigorous deployment of the full set of the canons of statutory interpretation. Moreover, the Court delineated a set of situations in which Auer deference would not come into play, even if the regulation was genuinely ambiguous—these include interpretations that create unfair surprise to regulated parties, interpretations that do not implicate the agency’s substantive expertise, and interpretations that do not reflect fair and considered agency judgment.

In a concurrence, Chief Justice Roberts supplied the key fifth vote for the Kisor majority. To be sure, he wrote that “[i]ssues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress,” citing Chevron. But in recent years, the Court has **narrowed** the set of situations in which **Chevron** applies, establishing what Professor Cass Sunstein once termed a “Chevron step zero.” Given what the Court did in Kisor, it would not be unheard of for the Court to come out a similar way in **A**merican **H**ospital **A**ssociation, summarizing the step zero doctrine and declining to apply Chevron deference for any one of a host of reasons (perhaps because of the permanent appropriations issue, as described above), while **leaving Chevron on the books**.

**The plan causes institutional balancing – SCOTUS couple’s the plan’s regulation with an equal and opposite pro-business ruling in AHA**

**Masters 20** (Brooke Masters, FT’s Chief Business Commentator and an Associate Editor, US Supreme Court adjusts to new tilt to the right, 12-10, <https://www.ft.com/content/16489a50-e828-4cc6-8d0d-a261c1f1f9d8>)

The US Supreme Court is having **adjustment** problems. The addition of three **conservative** appointees by President Donald Trump in four years has **disturbed** the balance and possibly destroyed the comity of America’s highest court. The arrival of Amy Coney Barrett in October, replacing the late Ruth Bader Ginsburg, gives the court a 6-3 conservative majority after decades of a 5-4 split or control by a moderate block.

A court that has been **reliably pro-business** for years will stay that way at a time when incoming president Joe Biden is expected to favour stricter **regulation** and labour rights. The court also appears poised to invalidate or sharply narrow social reforms and government programmes that are popular with the majority of Americans, including abortion rights, gay marriage and Obamacare.

Some of the justices cannot wait. Samuel Alito, long one of the most conservative, recently complained in a speech that the court’s landmark 2015 gay rights decision in Obergefell vs Hodges had made traditional views unacceptable. “You can’t say marriage is a union between one man and one woman,” he said. “Until very recently, that’s what the vast majority of Americans thought. Now it’s considered bigotry.”

The significance of Ms Barrett’s arrival was underscored last month when the court blocked New York’s Covid-19 related restrictions on public religious services, saying they violated the freedom to worship. Before Ginsburg’s death, the court had upheld similar rules in California and Nevada, holding that they were necessary to control the pandemic and did not treat religious gatherings differently from secular ones.

The New York ruling was also notable for its many sharply worded opinions. Trump appointee Neil Gorsuch declared bitterly it was “past time” to strike down such restrictions, writing: “Even if the constitution has taken a holiday during this pandemic, it cannot become a sabbatical.”

The question **now** is **not** whether the court will move to the right, **but how far**. History shows that even though the justices are required to base their decisions on the constitution and legal precedent, popular **opinion plays a role**. After all, the court has no enforcement mechanism — it de­pends on the rest of government and the respect accorded to its rulings.

In the past, when Supreme Court rulings departed **too far** from public consensus, it has ended up **adjusting**. The best known instance is often described as the “**switch in time that saved nine”.**

In the 1935-36 terms, the justices capped a 40-year period of conservative rulings by striking down several **New Deal** statutes by 5-4 votes, drawing **public opprobrium** and a threat from then president Franklin Roosevelt to **pack the court** with additional liberals. While the bill was still pending, Owen Roberts changed sides — “**switched**” — and voted to uphold a Washington state minimum wage bill and continued to support **regulation of business**.

But liberals have seen the court shy away from confrontation as well. In 1954, in Brown vs Board of Education, the court invalidated segregated schools but put off immediate implementation, saying in Brown II a year later that states and school boards merely needed to act with “all deliberate speed”.

Chief Justice John Roberts has already shown he is deeply concerned with maintaining the Supreme Court’s institutional strength. For years, he has sometimes provided the liberals with a fifth vote on questions where he felt the court’s credibility could be at stake, including a 2012 ruling that turned back the first major challenge to the Affordable Care Act (ACA) that established Obamacare, and on cases regarding abortion rights and young immigrants last spring.

Supreme Court watchers observe that its history can place a **powerful weight** on members

**Overruling Chevron wrecks emerging-tech regulation**

**Masur 7 –** Jonathan Masur, Bigelow Fellow and Lecturer in Law, University of Chicago Law School, “Judicial Deference and the Credibility of Agency Commitments”, Vanderbilt Law Review, May, 60 Vand. L. Rev. 1021, Lexis

I. Administrative Flexibility: Temporal Adjustments and Judicial Entrenchment

Administrative agencies **cannot function effectively** if they do not possess substantial discretion to set agency policy. Agencies exist in large degree as **institutional mechanisms for solving policy questions** whose intricacies and difficulties exceeded the capacities of Congress itself. An agency that lacked the freedom to choose between competing policy solutions or the flexibility to adjust its regulations **in the face of scientific or economic progress** would be little more than a rigid executor of Congress's will, stripped of the expertise that made it an attractive repository of policy-making authority in the first instance. Consequently, a growing consensus of administrative law scholars has long favored granting agencies ever-greater authority to enact policy changes **in concert with developments in the relevant markets and technologies**. n8

Pursuant to this rationale, the Supreme Court has **afforded agencies broad authority** to alter extant regulations or select new policy courses. Under well-established law, an agency may discard a long-standing policy in favor of a novel one, provided that it offers a coherent rationale for its decision. n9 And if an agency's current interpretation of its empowering statute is not sufficiently capacious to permit the agency to pursue this new policy, the agency may adopt a reasonable new interpretation of an old statute without relinquishing the deference that it is due under **Chevron's** famous two-step formulation. n10

Yet, in the two decades after Chevron, one significant obstacle remained to an agency's ability to re-interpret ambiguous statutes and adapt to changing circumstances. Until 2005, the Supreme Court treated its statutory interpretation precedents - no matter the context and regardless of whether they had involved an agency interpretation and a judicial grant of Chevron deference - as absolute and decisive. Once a court had interpreted a statute, regardless of whether the agency had already had the opportunity to proffer its own interpretation, stare decisis controlled. An agency could only re-interpret if a court had never passed on the original interpretation, or if the agency could convince the court that the court had erred in its original interpretation, without reference to Chevron.

In 2005, the Supreme Court eliminated this final impediment. While deciding an otherwise mundane issue of statutory [\*1027] interpretation in National Cable & Telecommunications Ass'n v. Brand X Internet Services, the Court announced that Chevron henceforth would trump stare decisis: an interpretation of an ambiguous statute that ordinarily would be entitled to deference under Chevron would still receive that deference - and an agency would be permitted to revise a prior statutory interpretation - irrespective of anything that a court had ever said on the subject. Ambiguous statutes had become forever ambiguous; no court could settle their meaning. n11

A. Temporal Flexibility

Congress delegates power to agencies for a wide variety of reasons. Congress may find it politically infeasible to make some necessary decision because of significant negative political ramifications, and as a result it might seek to foist responsibility off on some other actor. Alternatively, there may be a faction within Congress that hopes to accomplish via the executive branch what it cannot achieve legislatively. n12

But Congress may also delegate power in order to harness the **superior expertise** of an agency actor and to bring to bear on a problem a **set of scientific and technological knowledge** and a **breadth of experience** that Congress does not possess. n13 In order for this delegation to be successful - indeed, in order for it to be meaningfully a "delegation" - it must afford the recipient agency some degree of **"substantive flexibility"**: the agency must have the freedom, when analyzing the subject matter at the heart of the delegation, to choose from among a range of acceptable policies the one that it believes is best. Accordingly, the Supreme Court has granted administrative agencies wide substantive leeway to select among competing statutory interpretations - and thus among competing policies - via the familiar two-step process set forth in Chevron, pursuant to which courts must defer to reasonable agency interpretations of ambiguous statutes. n14

Moreover, courts and commentators have long realized that agencies possess comparative institutional advantages over Congress that surpass the mere application of expertise. By shifting policymaking responsibility outside of the legislative branch, Congress is also able to avail itself of the **greater agility** of administrative agencies in responding to changed circumstances or adapting to new [\*1028] policy concerns. Legislation is costly and time-consuming to enact, and Congress cannot always rapidly change course when confronted with novel problems or the imminent obsolescence of old solutions. n15 Agencies are more willing and able than Congress to tweak their policy agendas. Especially in the **high-technology areas**, this **alacrity is invaluable** to agencies' ability to act in the public interest.

In order to act effectively, then, agencies must possess flexibility not only in the substantive sense described above, but also in the "temporal" sense: They must be free to alter policies over time and adapt to changes in relevant technologies and markets. n16 Much like substantive flexibility (deference, really), **temporal flexibility** (which I will refer to simply as "flexibility") **is the lifeblood of successful agency operation**. Even **minor changes** in technology or markets can **obsolete** pre-existing regulatory regimes, and it likely would be prohibitively costly for Congress to respond to every minor circumstance by amending an agency's authorizing legislation. n17 Agencies need the authority to adjust policies in order to maintain their currency and efficacy, n18 and **unwise judicial doctrines that deny agencies all significant policy flexibility would undoubtedly lead to regulatory stagnation**. n19

**Extinction**

**Tate 15** – Jitendra S. Tate, Associate Professor of Manufacturing Engineering at the Ingram School of Engineering, Texas State University, et al., “Military And National Security Implications Of Nanotechnology”, The Journal of Technology Studies, Volume 41, Number 1, Spring, https://scholar.lib.vt.edu/ejournals/JOTS/v41/v41n1/tate.html

All branches of the U.S. military are currently conducting nanotechnology research, including the Defense Advanced Research Projects Agency (DARPA), Office of Naval Research (ONR), Army Research Office (ARO), and Air Force Office of Scientific Research (AFOSR). The **U**nited **S**tates is **currently the leader** of the development of nanotechnologybased applications for military and national defense. Advancements in nanotechnology are intended to revolutionize modern warfare with the development of applications such as nano-sensors, artificial intelligence, nanomanufacturing, and nanorobotics. Capabilities of this technology include providing soldiers with stronger and lighter battle suits, using nano-enabled medicines for curing field wounds, and producing silver-packed foods with decreased spoiling rate ( Tiwari, A., Military Nanotechnology, 2004 ). Although the improvements in nanotechnology hold great promise, this technology has the potential to pose some risks. This article addresses a few of the more recent, rapidly evolving, and cutting edge developments for defense purposes. To prevent irreversible damages, **regulatory measures** must be taken in the advancement of dangerous technological developments implementing nanotechnology. The article introduces recent efforts in awareness of the societal implications of military and national security nanotechnology as well as recommendations for national leaders.

Keywords: Nanotechnology, Implications, modern warfare

INTRODUCTION

Advances in nano-science and nanotechnology promise to have major implications for advances in the scientific field as well as peace for the upcoming decades. This will lead to dramatic changes in the way that material, medicine, surveillance, and sustainable energy technology are understood and created. **Significant breakthroughs are expected** in human organ engineering, assembly of atoms and molecules, and the emergence of a new era of physics and chemistry. Tomorrow’s soldiers will have many challenges such as carrying self-guided missiles, jumping over large obstacles, monitoring vital signs, and working longer periods with sleep deprivation. ( Altmann & Gubrud, Anticipating military nanotechnology, 2004 ). This will be achieved by controlling matter at the nanoscale (1-100nm). A nanometer is one-billionth of a meter. This article considers the social impact of nanotechnology (NT) from the point of view of the possible military applications and their implications for national defense and arms control. This technological evolution may become disruptive; meaning that it will come out of mainstream. Ideas that are coming forth through nanotechnology are becoming very popular and the possibilities will in practice have profound implications for military affairs as well as relations between nations and thinking about war and national security ( Altmann J. , Military Uses of Nanotechnology: Perspectives and Concerns, 2004 ). In this article some of the potential applicability uses of recent nanotechnology driven applications within the military are introduced. This article also discusses how the impact of a rapid technological evolution in the military will have implications on society.

POTENTIAL MILITARY TECHNOLOGIES

Magneto rheological Fluid (MR Fluid)

A magneto-rheological-fluid is a fluid where colloidal ferrofluids experience a body force on the entire material that is proportional to the magnetic field strength ( Ashour, Rogers, & Kordonsky, 1996 ). This allows the status of the fluid to change reversibly from a liquid to solid state. Thus, the fluid becomes intelligently controllable using the magnetic field. MR fluid consists of a basic fluid, ferromagnetic particles, and stabilizing additives ( Olabi & Grunwald, 2007 ). The ferromagnetic particles are typically 20-50μm in diameter whereas in the presence of the magnetic field, the particles align and form linear chains parallel to the field ( Ahmadian & Norris, 2008 ). Response times 21 that require impressively low voltages are being developed. Recently, ( Ahmadian & Norris, 2008 ) has shown the ability of MR fluids to handle impulse loads and an adaptable fixing for blast resistant and structural membranes. For military applications, the strength of the armor will depend on the composition of the fluid. Researchers propose wiring the armor with tiny circuits. While current is applied through the wires, the armor would stiffen, and while the current is turned off, the armor would revert to its liquid, flexible state. Depending on the type of particles used, a variety of armor technology can be developed to adapt for soldiers in different types of battle conditions. Nanotechnology could increase the agility of soldiers. This could be accomplished by increasing mechanical properties as well as the flexibility for battle suit technology.

Nano Robotics

Nanorobotics is a new emerging field in which machines and robotic components are created at a scale at or close to that of a nanometer. The term has been heavily publicized through science fiction movies, especially the film industry, and has been growing in popularity. In the movie Spiderman , Peter Parker and Norman Osborn briefly talk about Norman’s research which involves nanotechnology that is later used in the Green Goblin suit. Nanorobotics specifically refers to the nanotechnology engineering discipline or designing and building nano robots that are expected to be used in a military and space applications. The terms nanobots, nanoids, nanites, nanomachines or nanomites have been used to describe these devices but do not accurately represent the discipline. Nanorobotics includes a system at or below the micrometer range and is made of assemblies of nanoscale components with dimensions ranging from 1 to 100nm ( Weir, Sierra, & Jones, 2005 ). Nanorobotics can generally be divided into two fields. The first area deals with the overall design and control of the robots at the nanoscale. Much of the research in this area is theoretical. The second area deals with the manipulation and/or assembly of nanoscale components with macroscale manipulators ( Weir, Sierra, & Jones, 2005 ). Nanomanipulation and nanoassembly may play a critical role in the development and deployment of artificial robots that could be used for combat.

According to Mavroidis et al. ( 2013 ), nanorobots should have the following three characteristic abilities at the nano scale and in presence of a large number in a remote environment. First they should have swarm intelligence. Second the ability to self-assemble and replicate at the nanoscale. Third is the ability to have a nano to macro world interface architecture enabling instant access to the nanorobots with control and maintenance. ( Mavroidis & Ferreira, 2013 ) also states that collaborative efforts between a variety of educational backgrounds will need to work together to achieve this common objective. Autonomous nanorobots for the battlefield will be able to move in all media such as water, air, and ground using propulsion principles known for larger systems. These systems include wheels, tracks, rotor blades, wings, and jets ( Altmann & Gubrud, Military, arms control, and security aspects of nanotechnology, 2004 ). These robots will also be designed for specific military tasks such as reconnaissance, communication, target destination, and sensing capabilities. Self-assembling nanorobots could possibly act together in high numbers, blocking windows, putting abrasives into motors and other machines, and other unique tasks.

Artificial Intelligence

**Artificial intelligence (AI) is a vast emerging field** that can be very thought provoking. AI has been seen recently in a number of movies and television shows that have predicted what the possibility of an advanced intelligence could do to our society. This intellect could possibly outperform human capabilities in practically every field from scientific research to social interactions. Aspirations to surpass human capabilities include tennis, baseball, and other daily tasks demanding motion and common sense reasoning (Kurzweil, 2005). Examples where AI could be seen include chess playing, theorem proving, face and speech recognition, and natural language understanding. AI has been an **active and dynamic field** of **r**esearch and **d**evelopment since its establishment in 1956 at the Dartmouth Conference in the United States ( Cantu-Ortiz, 2014 ). In past decades, this has **led to the development** of smart systems, including phones, laptops, medical instruments, and navigation software.

One problem with AI is that people are coming to a conclusion about its capabilities too soon. Thus, people are becoming afraid of the probability that an artificial intelligent system could possibly expand and turn on the human race. True artificial intelligence is still very far from becoming “alive” due to our current technology. Nanotechnology might advance AI research and development. In nanotechnology, there is a combination of physics, chemistry and engineering. AI relies most heavily on biological influence as seen genetic algorithm mutations, rather than chemistry or engineering. **Bringing together** nanosciences and AI can boost a whole new generation of information and communication technologies that will impact our society. This could be accomplished by successful **convergences** between technology and biology ( Sacha & P., 2013 ). Computational power could be exponentially increased in current successful AI based military decision behavior models as seen in the following examples.

Expert Systems

Artificial intelligence is currently being used and evolving in expert systems (ES). An ES is an “intelligent computer program that uses knowledge and interference procedures to solve problems that are difficult enough to require significant human expertize to their solution” ( Mellit & Kalogirou, 2008 ). Results early on in its development have shown that this technology can play a significant impact in military applications. Weapon systems, surveillance, and complex information have created numerous complications for military personnel. AI and ES can aid commanders in making decisions faster than before in spite of limitations on manpower and training. The field of expert systems in the military is still a long way from solving the most persistent problems, but early on research demonstrated that this technology could offer great hope and promise ( Franklin, Carmody, Keller, Levitt, & Buteau, 1988 ). Mellit et al. argues that an ES is not a program but a system. This is because the program contains a variety of different components such as a knowledge base, interference mechanisms, and explanation facilities. Therefore they have been built to solve a range of problems that can be beneficial to military applications. This includes the prediction of a given situation, planning which can aid in devising a sequence of actions that will achieve a set goal, and debugging and repair-prescribing remedies for malfunctions.

Genetic Algorithms

Artificial intelligence with genetic algorithms (GA) can tackle complex problems through the process of initialization, selection, crossover, and mutation. A GA repeatedly modifies a population of artificial structures in order to adjust for a specific problem (Prelipcean et al., 2010). In this population, chromosomes evolve over a number of generations through the application of genetic operations. This evolution process of the GA allows for the most elite chromosomes to survive and mate from one generation to the next. Generally, the GA will include three genetic operations of selection, crossover, and mutation. This is currently being applied to solving problems in military vehicle scheduling at logistic distribution centers.

Nanomanufacturing

Nanomanufacturing is the production of materials and components with nanoscale features that can span a wide range of unique capabilities. At the nanoscale, matter is manufactured at lengthscales of 1-100nm with precise size and control. The manufacturing of parts can be done with the “bottom up” from nano sized materials or “top down” process for high precision. Manufacturing at the nanoscale could produce new features, functional capabilities, and multi-functional properties. Nanomanufacturing is distinguished from nanoprocessing, and nanofabrication, whereas nanomanufacturing must address scalability, reliability and cost effectiveness ( Cooper & Ralph, 2011 ). Military applications will need to be very tough and sturdy but at the same time very reliable for use in harsh environments with the extreme temperatures, pressure, humidity, radiation, etc. The use of nano enabled materials and components increase the military’s in-mission success. Eventually, these new nanotechnologies will be transferred for commercial and public use. Cooper et al. makes known how nanomanufacuring is a multi-disciplinary effort that involves synthesis, processing and fabrication. There are however a great number of challenges that as well as opportunities in nanomanufacturing R&D such as;

Predictions from first principles of the progress and kinetics of nanosynthesis and nano-assembly processes.

23 Understand and control the nucleation and growth of nanomaterial and nanostructures and asses the effects of catalysts, crystal orientation, chemistry, etc. on growth rates and morphologies.

R&D IN THE USA

The USA is proving to **have a lead** in military research and development in nanotechnology. Research spans under umbrella of applications related to defense capabilities. NNI has provided funds in which one quarter to one third goes to the department of defense – in 2003, $ 243 million of $774 million. This is **far more than any country** and the US expenditure would be **five times the sum of all the rest of the world** ( Altmann & Gubrud, Military, arms control, and security aspects of nanotechnology, 2004 ).

INITIATIVES

The National Nanotechnology Initiative

The National Nanotechnology Initiative (NNI) was unveiled by President Clinton in a speech that he gave on science and technology policy in January of 2000 where he called for an initiative with funding levels around 500 million dollars ( Roco & Bainbridge, 2001 ). The initiative had five elements. The first was to increase support for fundamental research. The second was to pursue a set of grand challenges. The third was to support a series of centers of excellence. The fourth was to increase support for research infrastructure. The fifth is to think about the ethical, economic, legal and social implications and to address the education and training of nanotechnology workforce ( Roco & Bainbridge, 2001 ). NNI brings together the expertise needed to advance the potential of nanotechnology across the nation.

ISN at MIT

The Institute for Soldier Nanotechnologies (ISN) initiated at the Massachusetts Institute of Technology in 2002 ( Bennet-Woods, 2008 ). The mission of ISN is to develop battlesuit technology that will increase soldier survivability, protection, and create new methods of detecting toxic agents, enhancing situational awareness, while decreasing battle suit weight and increasing flexibility.

ISN research is organized into five strategic areas (SRA) designed to address broad strategic challenges facing soldiers. The first is developing lightweight, multifunctional nanostructured materials. Here nanotechnology is being used to develop soldier protective capabilities such as sensing, night vision, communication, and visible management. Second is soldier medicine – prevention, diagnostics, and far-forward care. This SRA will focus on research that would enable devices to aid casualty care for soldiers on the battle field. Devices would be activated by qualified personnel, the soldier, or autonomous. Eventually, these devices will find applications in medical hospitals as well. Third is blast and ballistic threats – materials damage, injury mechanisms, and lightweight protection. This research will focus on the development of materials that will provide for better protection against many forms of mechanical energy in the battle field. New protective material design will decrease the soldier’s risk of trauma, casualty, and other related injuries. The fourth SRA is hazardous substances sensing. This research will focus on exploring advanced methods of molecularly complicated hazardous substances that could be dangerous to soldiers. This would include food-borne pathogens, explosives, viruses and bacteria. The fifth and final is nanosystems integration –flexible capabilities in complex environments. This research focuses on the integration of nano-enabled materials and devices into systems that will give the soldier agility to operate in different environments. This will be through capabilities to sense toxic chemicals, pressure, and temperature, and allow groups of soldiers to communicate undetected (Institute for Soldier Nanotechnologies).

SOCIAL IMPLICATIONS

The purpose of country’s armed forces is to provide protection from foreign threats and from internal conflict. On the other hand, they may also harm a society by engaging in counter- productive warfare or serving as an economic burden. Expenditures on science and technology to develop weapons and systems sometimes produces side benefits, such as new medicines, technologies, or materials. Being ahead in military technology provides an important advantage in armed conflict. Thus, all potential opponents have a strong motive for military research and development. From the perspective of international security and arms control it appears that in depth studies of the social science of these implications has hardly begun. Warnings about this emerging technology have been sounded against excessive promises made too soon. The public may be too caught up with a “nanohype” ( Gubrud & Altmann, 2002 ). It is essential to address questions of possible dangers arising from military use of nanotechnology and its impacts on national security. Their consequences need to be analyzed.

NT and Preventative Arms Control

Background

The goal of preventive arms control is to limit how the development of future weapons could create **horrific situations**, as seen in the past **world wars**. A qualitative method here is to design boundaries which could **limit the creation of new military technologies** before they are ever deployed or even thought of. One criterion regards arms control and how the development of military and surveillance technologies could go beyond the limits of international law warfare and control agreements. This could include autonomous fighting war machines failing to define combatants of either side and Biological weapons could possibly give terrorist circumvention over existing treaties ( Altmann & Gubrud, Military, arms control, and security aspects of nanotechnology, 2004 ). The second criterion is to prevent destabilization of the military situation which emerging technologies could make response times in battle much faster. Who will strike first? The third criterion, according to Altman & Gubrud, is how to consider unintended hazards to humans, the environment, and society. Nanoscience is paving the way for smaller more efficient systems which could leak into civilian sectors that could bring risks to human health and personal data. Concrete data on how this will affect humans or the environment is still uncertain.

Arms Control Agreements

The development of smaller chemical or biological weapons that may contain less to no metal could potentially violate existing international laws of warfare by becoming virtually undetectable. Smaller weapons could fall into categories that would undermine peace treaties. The manipulation of these weapons by terrorist could give a better opportunity to select specific targets for assassination. Anti- satellite attacks by smaller more autonomous satellites could potentially destabilize the space situation. Therefore a comprehensive ban on space weapons should be established ( Altmann & Gubrud, 2002 ). Autonomous robots with a degree of artificial intelligence will potentially bring great problems. The ability to identify a soldiers current situation such as a plea for surrender, a call for medical attention, or illness is a a very complicated tasks that to an extent requires human intelligence. This could potentially violate humanitarian law.

Stability

New weapons could pressure the military to prevent attacks by pursuing the development of new technologies faster. This could lead to an **arms race** with other nations trying to attain the same goal. **Destabilization may occur** through faster action, and more available nano systems. Vehicles will become much lighter and will be used for surveillance. This will significantly reduce time to acquire a targets location. Medical devices implanted in soldiers’ bodies will enable the release of drugs that influence mood and response times. For example, an implant that attaches to the brains nervous system could give the possibility to reduce reaction time by processing information much faster than usual ( Altmann & Gubrud, Anticipating military nanotechnology, 2004 ). [AI] Artificial intelligence based genetic algorithms could make tactical decisions much faster through computational power by adapting to a situations decision. Nano robots could eavesdrop, manipulate or even destroy targets while at the same time being undetected ( Altmann J. , Military Uses of Nanotechnology: Perspectives and Concerns, 2004 ).

Environment Society & Humans

Human beings have always been exposed to natural reoccurring nanomaterials in nature. These particles may enter the human body through respiration, and ingestion ( Bennet- Woods, 2008 ). Little been known about how manufactured nanoscale materials will have an impact to the environment. Jerome (2005) argues that nanomaterials used for military uniforms could break of and enter the body and environment. New materials could destroy species of plants and animal. Fumes from fuel additives could be inhaled by military personnel. Contaminant due to weapon blasts could lead to diseases such as cancer or leukemia due to absorption through the skin or inhalation. Improper disposal of batteries using nano particles could also affect a wide variety of species. An increase in nanoparticle release into the environment could be aided by waste streams from military research facilities. Advanced nuclear weapons that are miniaturized may leave large areas of soil contaminated with radioactive materials. There is an increase in toxicity as the particle size decrease which could cause unknown environmental changes. Bennet-woods ( 2008 ) argues that there is great uncertainty in which the way nano materials will degrade under natural conditions and interact with local organisms in the environment.

Danger to society could greatly be affected due to **self-replicating**, mutating, mechanical or biological **plagues**. In the event that these intelligent nano systems were to be unleashed, they could potentially attack the physical world. There are a number of applications that will be developed with nanotechnology that could potentially crossover from the military to national security that can harm the civilian sector ( Bennet-Woods, 2008 ). There is a heightened awareness that new technologies will allow for a more efficient access to personal privacy and autonomy ( Roco & Bainbridge, 2005 ). Concerns regarding artificial intelligence acquiring a vast amount of personal data, voice recognition, and financial data will also arise. Implantable brain devices, intended for communication, raise concerns for actually observing and manipulating thoughts. Some of the most feared risks due to nanotechnology in the society are the loss of privacy ( Flagg, 2005 ). Nano sensors developed for the battlefield could be used for eavesdropping and tracking of citizens by state agencies. This could lead to improvised warfare or terrorism. Bennet-Woods ( 2008 ) argues that there should be an outright ban on nanoenabled tracking and surveillance devices for any purpose.

Nanotechnology in combination with biotechnology and medicine raise concerns regarding human safety. This includes nanoscale drugs that may allow for improvements in terrorism alongside more efficient soldiers for combat. Bioterrorism could greatly be improved through nano-engineered drugs and chemicals ( Milleson, 2013 ). Body implants could be used by soldiers to provide for better fighting efficiency but in the society, the extent in which the availability of body manipulation will have to be debated at large ( Altmann J. , Nanotechnology and preventive arms control, 2005 ). Brain implanted stimulates could become addictive and lead to health defects. The availability of body and brain implants could have negative effects during peace time. Milleson ( 2013 ) argues that there is fear that this technology could destabilize the human race, society, and family. Thus, the use in society should be delayed for at least a decade.

CONCLUSIONS

Nanoscience will lead to a revolutionary development of new materials, medicine, surveillance, and sustainable energy. Many applications could arrive in the next decade. The US is currently in the lead in nanoscience research and development. This equates to roughly five times the sum of all the rest of world. It is essential to address the potential risks that cutting edge military applications will have on warfare and civilian sector. There is a potential for mistrust in areas where revolutionary changes are expected. There are many initiatives by federal agencies, industry, and academic institutions pertaining to nanotechnology applications in military and national security. Preventive measures should be **coordinated early** on among national leaders. Scientists propose for national leaders to follow general guidelines. There shall be no circumvention of existing treaties as well as a ban on space weapons. Autonomous robots should be greatly restricted. Due to rapidly advancing capabilities, a **technological arms race should be prevented** at all costs. Nanomaterials could greatly harm humans and their environment therefore nations should work together to address safety protocols. The national nanotechnology of different nations should **build confidence** in addressing the social implications and preventive arms control from this technological revolution.

**2**

**Scope is when the law applies**

**Dernbach 21** --- John C. Dernbach et al, Professor of Law at Widener's Harrisburg campus, teaching administrative law, environmental law, property, international law, international environmental law, sustainability and the law, and climate change, “A Practical Guide to Legal Writing and Legal Method”, In “Chapter 5: Reading and Understanding Statutes”, Feb 25th 2021,

Understanding the scope of a statute is the second step. A statute’s “scope” defines the persons to whom and the circumstances to which the statute **applies**. Some statutes, such as criminal statutes, apply to almost everyone with only minor exceptions (e.g., young children). Other statutes, however, apply only to certain classes of people, and/or only when certain factual circumstances exist. If the person or organization that you represent is not subject to the statute’s requirements, then the statute is not applicable to your client. Similarly, if your client’s conduct or desired course of action **is not addressed in the statute, the statute is not applicable**. Thus, efficient research and effective representation depend on a lawyer’s ability to determine whether and when a given statute applies to a client’s situation.

**Expanding requires a reversal of legislative intent**

**Garubo 84** --- Angelo G. Garubo, Senior Vice President and Corporate Secretary, Commercial Credit Group, Juris Doctor, magna cum laude, from California Western School of Law, “Severing the Legislativ ering the Legislative Veto Provision: The Aftermath of Chada vision: The Aftermath of Chada”, California Western law Review, Vol 21 No 1, 1984, https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1559&context=cwlr

Since a veto provision can qualify as a proviso, the rule in Davis v. Wallace 147 and Frost v. Corporation Commission 148 can be applied to show that the legislative intent test is inadequate to determine if a veto provision should be severed. In Davis and Frost, the Supreme Court ruled that a proviso could not be severed if it was originally written into the statute. 149 The Court reasoned that severing such a provision would result in an extension of the scope of the statute.' 50 Such an extension would be contrary to the legislative intent of a statute by **including subject matter** which the **legislature expressly chose to exclude**.151 The Davis and Frost analysis can be applied to the "congressional veto" because (1) the veto provision can be considered a proviso 152 and (2) severing a veto provision will **expand the scope** of the statute **contrary to legislative intent**. 5 3 By severing a veto provision the executive branch would be free to expand or limit the scope of a statute through its implementation. Such an expansion or limitation **would constitute a defacto contradiction of legislative intent** by **altering the purview of the statute**.' 54 A veto provision is a control mechanism.' 55 Its mere presence in a statute indicates the legislature's desire to restrict the scope of that statute. 5 6 **By removing it, the court would affect a fundamental change in the** nature of the **statute**, which was not accounted for when the legislature enacted the law. 157 Because a veto provision is a proviso, its excise from a statute would contradict legislative intent. A test which uses legislative intent to determine if a veto provision is severable could only find that the provision is not severable. Thus, when literally applied, the legislative intent test is not adequate to determine if a veto provision should be severed from its statutory framework.

**Violation --- Removing judicial immunity doesn’t expand the scope --- vote neg for limits and ground --- allows affirmatives to defend the status quo and circumvents core neg links**

**ARENA 11** --- AMEDEO ARENA, Associate Professor of European Union Law at the School of Law of the University of Naples, “Institute for International Law and Justice Emerging Scholars Papers”, IILJ Emerging Scholars Paper 19 (2011) (A Sub series of IILJ Working Papers) Finalized 01/18/2011, https://iilj.org/wp-content/uploads/2016/08/Arena-The-Relationship-Between-Antitrust-and-Regulation-in-the-US-and-in-the-EU-2011.pdf

According to a recent survey, approximately **20 percent** of the US economic activities are to some degree **exempted from antitrust law.**22 Federal statutory antitrust exemptions can be divided into **proper “exemptions**”, which entail immunity from antitrust rules, and “**pseudo-exemptions”,** which merely imply a differential application of antitrust law. The “exemptions” category’ can be split up into two sub-categories: “**full exemptions**”, which exempt a given activity from all antitrust rules, and “**partial exemptions**”, which grant exemption only from certain antitrust rules.

Full exemptions are, for the most part, a creature of their time, a period ranging from the 1907 Bankers’ Panic to the mid-1940s. Indeed, only five of them are still in force.2’ In view of the broad scope of those immunities, in all five instances the legislature provided for oversight of the exempted sectors through a regulatory scheme enforced by a governmental agency, commission, or board.24 In some cases, however, the scope of regulation turned out to be narrower than that of antitrust immunity. For example, the Secretary of Commerce is supposed to police fishermen’s agreements against excessive pricing, yet apparendy it has never engaged in any real regulatory oversight.23

Turning to the **nineteen partial exemptions currently in force**,26 the discrepancy between the scope of the exemption and that of regulator}\* oversight is even greater, possibly because those exemptions authorize only specific conducts otherwise prohibited by antitrust law, thus mitigating the need for comprehensive regulatory oversight. The typical regulator}- scheme set out in those statutes consists in an obligation to submit the agreements eligible for exemption to a regulatory authority. The intensity of the assessment carried out by the relevant authority, however, varies considerably. As per the Need-Based Educational Aid Act, coordination on need-based financial aid programs, for instance, is not subject to regulator}- review at all.2 Under the Defense Production Act, the allocation of markets for military materials in time of national emergency is subject to approval by the Secretary of Defense, which must withdraw the immunity if it establishes that the “action was taken for the purpose of violating antitrust law”.28 Between those extremes, the ICC Termination Act provides for that the Surface Transportation Board must approve price-fixing agreements concerning the rates of household moves under a “public interest” standard;29 in addition, the Board can require compliance with “reasonable conditions” to ensure that the agreement furthers transportation policy.30

Unlike **full and partial exemptions**, the eight **pseudo-exemptions** in force **do not** bring economic activities **outside the scope of antitrust provisions** to subject them to sector-specific regulation, but rather modify the substantive standards, the remedies, or the forum of “general” antitrust law, thus creating “special” antitrust rules.3’ While pseudo-exemptions are generally not accompanied by regulatory schemes, in some cases the “special” antitrust rules themselves can be regarded as regulatory lato sensu.

ii) Judge-made Implied Antitrust Immunities and Regulation-Related Defenses

**3**

**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 petitioning by the private sector. The FTC should release a policy statement and data sets that reflects this and enforce accordingly. The FTC should indicate that it is engaging in Administrative Constitutionalism and that they believe the immediate issue is grounded in the need for a broader protection of procompetitive petitioning. Federal and Appellate Courts will not grant cert to cases challenging the legitimacy of the FTC’s authority to make this determination.**

**The counterplan solves and competes---the FTC interprets current authority without creating new prohibitions.**

**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.

**Our planks about *clear 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.

**Independently, the CP engages in “Administrative Constitutionalism”. This *solves FTC independence* because the agency’s perceived as leading, not reacting. It also *solves the Aff precedent* and *avoids rollback*.**

* Creates same legal/Constitutional norms – but has the FTC be in the lead;
* No rollback – the Federal Courts may have Originalists, but the actually history of Administrative Constitutionalism would fare-well if appealed.

**Lee ‘19**

Sophia Z. Lee - Professor of Law, University of Pennsylvania Carey Law School – “OUR ADMINISTERED CONSTITUTION: ADMINISTRATIVE CONSTITUTIONALISM FROM THE FOUNDING TO THE PRESENT” - University of Pennsylvania Law Review - Vol. 167: 1699 – June - #E&F – continues to footnote #19 - https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3086&context=faculty\_scholarship

I found my way to the term **"administrative constitutionalism"** through **historical research**. I was encountering mid-twentieth-century agency interpretations of the Constitution that differed notably from those of the Supreme Court and did not know what to make of them.16 Legal scholarship on the role Congress plays in making constitutional law gave me a way to make sense of that historical record. It also gave me a nomenclature: if Congress's engagement with the Constitution was "legislative constitutionalism," what I was finding was "**administrative constitutionalism."**17 In 2010,1 first used the term to describe agencies' **interpretation** and **implementation** of the United States Constitution.18 Since then, historians who encountered the Constitution in agency archives have built a burgeoning literature on how agencies have interpreted and implemented the Constitution.**19**

Using this history, scholars of constitutional and administrative law have developed a rich literature on the theoretical and normative questions administrative constitutionalism raises. These include how public, self-conscious, or determinative constitutional considerations have to be to count as administrative constitutionalism; what institutional factors foster, deter, and shape administrators' engagement with the Constitution; when, if ever, agencies can interpret the Constitution differently than the courts; and whether courts should defer to agencies' constitutional interpretations.20

Administrative constitutionalism can be defined broadly or narrowly. Defined most broadly, it refers to agencies' role **in constructing constitutional norms** such as adequate due process, the bounds of free speech, or the scope of executive power, whether or not agencies consider themselves to be doing so. More narrowly, it includes only instances in which agencies selfconsciously consider the meaning of the Constitution in designing policies and issuing decisions.21

Broadly defined, it includes all instances in which agencies implement the Constitution, even if they do so **merely as a precursor to determination of the constitutional question by** Congress or **the courts.** More narrowly defined, administrative constitutionalism encompasses only those instances in which an agency has the final say or interprets the Constitution in a way that sets it against the courts or Congress.22

**However defined,** this Article argues that historians' case studies of administrative constitutionalism suggest that **administrative agencies** have been **the primary interpreters** and **implementers** of the federal Constitution throughout the history of the United States, although the scale and scope of administrative constitutionalism has changed significantly over time as the balance of opportunities and constraints has shifted.23 That said, the Article also contends that over the twentieth century, and especially since the New Deal, courts have cast an increasingly long shadow over the administered Constitution. In part, this is because of the well-known expansion of judicial review during this period. But the shift has as much to do with changes in the legal profession, legal theory, and lawyers' roles in agency administration. The result is that administrative constitutionalism may still be the most frequent form of constitutional governance, but it has grown, paradoxically, more suspect even as it has also become far more dependent on and deferential to judicial interpretations.24

The history of administrative constitutionalism offered here is likely to trouble those who seek to restore administrative law to its nineteenth-century foundations (whom I will call "foundationals").25 They are unlikely to find appealing a nineteenth century in which agencies took the lead in deciding constitutional questions, subject to some oversight by Congress and the President, but virtually none by the courts. These critics hold out constitutional law as uniquely important: that law is what powers their arguments that the United States should turn back the clock. And they prefer nineteenth-century agencies because they depict them as exercising little consequential legal power.26 But this history suggests that those agencies had **the first** and often final **word** on the Constitution's meaning. Foundationalists also assume that reinstating the nineteenth-century constitutional order would empower courts to more closely scrutinize agency action.27 The history presented here instead suggests that **it would all but eliminate judicial review** **of those actions'** constitutionality. Indeed, the burgeoning history of administrative constitutionalism indicates that anyone who wants to ensure that courts review the constitutionality of agency action has to appeal to theories that are rooted in constitutional evolution, not origins, and in twentieth—not nineteenth—century administrative law and judicial practice.

**19** See Gregory Ablavsky, Beyond the Indian Commerce Clause, 124 YALE LJ. 1012,1018-19 (2015) [hereinafter Ablavsky, Beyond] (arguing that early American executive branch actors "gave concrete meaning to the Constitution s sparse framework ," thereby establishing "federal authority over Indian affairs"); Kristin A. Collins, Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation^ 123 YALE LJ. 2134, 2141-42 (2014) [hereinafter Collins, Illegitimate Borders] (arguing that administrators played a key role in encoding "nativist policies" into the definition of citizenship); Sam Erman, Citizens of Empire: Puerto Rico, Status, and Constitutional Change, 102 CALIF. L. REV. 1181, 1183 (2014) (arguing that administrators, **not only courts**, played a **key role** in **shifting "the constitutional order** . . . from according U.S. citizenship and robust rights to all nontribal U.S. people and toward acceptance of U.S. colonialism"); Jeremy Kessler, The Administrative Origins of Modern Civil Liberties Law, 114 COLUM. L. REV. 1083, 1085 (2014) (arguing that executive branch officials "**took the lead** in forging" the modern understanding of civil liberties); Karen M. Tani, Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor, 100 CORNELL L. REV. 825, 828-29 (2015) [hereinafter Tani, Administrative Equal Protection] (arguing that welfare officials developed and implemented a novel interpretation of how equal protection governed income assistance programs during the mid-twentieth century); see generally KAREN M. Tani, States of Dependency: Welfare, Rights, and American Governance, 1935-1972 (2016) [hereinafter TANI, STATES OF DEPENDENCY] (recounting **multiple** examples of agency officials interpreting and implementing the Constitution).

**4**

**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**

Steven S. Nam - Distinguished Practitioner, Center for East Asian Studies, Stanford University. Steven is also a Commission member of the Model International Mobility Treaty Commission under Columbia University's Global Policy Initiative. He is a member of the Antitrust Section of the American Bar Association and earned his B.A. at Yale and his J.D. and M.A. degrees at Columbia – “OUR COUNTRY, RIGHT OR WRONG: THE FTC ACT’S INFLUENCE ON NATIONAL SILOS IN ANTITRUST ENFORCEMENT” – University of Pennsylvania Journal of Business Law, Vol. 20, No. 1, 2018 - #E&F – No text omitted – but the Table of Contents – which comes after the Abstract - was not included – modified for language that may offend - https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1555&context=jbl

ABSTRACT:

The Federal Trade Commission Act of 1914 (“**FTC A**ct”), **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 coop**erate 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 A**ct.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**

Steven S. Nam - Distinguished Practitioner, Center for East Asian Studies, Stanford University. Steven is also a Commission member of the Model International Mobility Treaty Commission under Columbia University's Global Policy Initiative. He is a member of the Antitrust Section of the American Bar Association and earned his B.A. at Yale and his J.D. and M.A. degrees at Columbia – “OUR COUNTRY, RIGHT OR WRONG: THE FTC ACT’S INFLUENCE ON NATIONAL SILOS IN ANTITRUST ENFORCEMENT” – University of Pennsylvania Journal of Business Law, Vol. 20, No. 1, 2018 - #E&F – https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1555&context=jbl

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 peace**156 **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.

**oppenheimer**

**5**

**The United States Federal Government should substantially increase funding for scientific research and development including funding for artificial intelligence, quantum computing, 5G, and cyber-defense.**

**Only the CP solves – investment is vital**

**McPherson 19** [Peter McPherson, president of the Association of Public and Land-grant Universities, served as deputy Treasury secretary from 1987 to 1989. 5-20-2019 https://www.usatoday.com/story/opinion/2019/05/20/china-us-scientific-research-technology-innovation-column/3685672002/]

U.S. and Chinese trade talks hit a snag this month, imperiling hopes for a deal that the two sides have been pursuing for over a year. The negotiators are working to resolve a broad array of issues rooted in legitimate concern about fairness for U.S. businesses.

But even if all trade issues were resolved tomorrow, China has been racing ahead in scientific investment and progress. That poses an increasingly urgent challenge to U.S. scientific supremacy. China’s objective, President Xi Jinping said in a speech last year, is to achieve global dominance in science and technology for the 21st century.

And it is well on its way to achieving that goal in several areas. China’s top university now leads the world with the most citations in math and computing research and is making similar gains with other highly cited STEM research. China became the first country to land on the far side of the moon this year. It is already the world’s leading producer of supercomputers. And it has taken the lead in next-generation green energy.

Long seen as the world’s factory floor, China has developed a sophisticated strategy for achieving supremacy in the industries of the future. The country’s Made in China 2025 initiative outlines its intent to become the global leader in frontier sectors such as advanced robotics, aerospace and biotechnology. Made in China 2025 presents “a real existential threat to U.S. technological leadership,” China expert Lorand Laskai wrote last year when he was a research associate at the Council on Foreign Relations. The Chamber of Commerce echoed that concern in a recent report.

We must invest in scientific research

But if the **U**nited **S**tates cedes its role as the global leader in technology and innovation, it is far more likely to result from our own dithering than deft Chinese leadership. The Business Roundtable issued a clarion call for a U.S. whole-of-government research and development strategy that redoubles **federal investment in research**. For decades, robust **fed**eral investment in scientific research enabled great surges in our understanding of the world while fueling economic growth. The internet, GPS and life-saving immunotherapies all grew out of discoveries supported by federal research dollars.

Despite these great strides, however, federal investment in scientific research as a share of the economy has not just languished but significantly diminished over the past few decades. Today, the U.S. government’s investment in research and development is roughly half what it was in the mid-1970s as a percent of GDP. With congressional leadership, the United States recently approved funding increases to several federal research agencies after many years of cuts or essentially flat funding.

But sporadic, short-lived increases are **woefully inadequate** for what’s required to maintain our competitive edge. As Massachusetts Institute of Technology President Rafael Reif has argued, **America needs to make significant increased investments** in areas like **a**rtificial **i**ntelligence and quantum computing. These efforts **must** add to federal research funding or we risk falling critically behind in other vital fields. And crucially, this increased support must continue into the future to ensure our sustained global leadership.

**6**

**Prohibitions must forbid --- Governing standards are distinct**

**Chanell 90** --- William Chanell, Associate Justice, California Court of Appeals, “CITY OF REDWOOD CITY v. DALTON CONSTRUCTION COMPANY”, Dec 1990, https://caselaw.findlaw.com/ca-court-of-appeal/1769184.html

We agree with the trial court's conclusion. By its plain language, section 35704 **exempts certain contractors from the application of an ordinance** [221 Cal. App. 3d 1573] adopted pursuant to section 35701. Section 35701 permits cities to **prohibit** the use of city streets by heavy trucks. (See § 35701, subd. (a).) **However**, the portion of the city's hauling ordinance at issue in this case **does not prohibit street use**; it **regulates users** by requiring them to obtain a permit and pay a fee in order to lawfully drive their heavy trucks over city streets. (See Redwood City Code, §§ 20.62-20.74.) To determine the legislative intent behind a statute, courts look first to the words of the statute themselves. In so doing, we must give effect to the statute according to the usual, ordinary import of its language. (Moyer v. Workmen's Comp. Appeals Bd. (1973) 10 Cal. 3d 222, 230 [110 Cal. Rptr. 144, 514 P.2d 1224].)

To construe section 35704, which specifically creates an exemption from prohibition of use, to exempt the regulation of that use would violate these cardinal rules of statutory construction. [2] The distinction between a **regulation** and a **prohibition** is **well understood** in municipal law. (See San Diego T. Assn. v. East San Diego (1921) 186 Cal. 252, 254 [200 P. 393, 17 A.L.R. 513].) The term "prohibit" means "[t]o **forbid by law**; to prevent;-**not synonymous with 'regulate**.' " (Black's Law Dict. (5th ed. 1979) p. 1091, col. 1.) The term "regulate" means "**to adjust by rule, method, or established mode**; **to direct by rule** or restriction; **to subject something to governing principles of law**. It does not include a power to suppress or prohibit [citation]." (In re McCoy (1909) 10 Cal. App. 116, 137 [101 P. 419].) [1b] Therefore, we are satisfied that section 35704 was not intended to apply to ordinances regulating street use, but only to those prohibiting such use.

**Business practices are ongoing conduct of many market participants**

**Macintosh 97** --- Kerry Lynn Macintosh, Associate Professor of Law, Santa Clara University School of Law, “Liberty, Trade, and the Uniform Commercial Code: When Should Default Rules Be Based On Business Practices?,” 38 Wm. & Mary L. Rev. 1465, [Vol. 38:1465 1997], https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1691&context=wmlr

**\*\*Footnote 5\*\***

5. In this Article, the term "business practices" is used to refer to practices that emerge **over time** as **countless** market participants exercise their freedom to engage in profitable transactions. For an account of the evolution of business practices, see infra Part II. As used here, "business practices" is broader and less technical than "trade usage," which the Code narrowly defines as "any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question." U.C.C. § 1-205(2).

**Only per se rules bans a PRACTICE --- rule of reason regulate anticompetitive effects for individual acts**

**Stucke 09** --- Maurice E. Stucke, Associate Professor, University of Tennessee College of Law, “Does the Rule of Reason Violate the Rule of Law?”, University of California, Davis [Vol. 42:1375 2009], https://lawreview.law.ucdavis.edu/issues/42/5/articles/42-5\_Stucke.pdf

But who has created this predicament? The Supreme Court. Over the past ninety years, the Court has supplied the Sherman Antitrust Act’s legal standards. In determining the legality of restraints of trade, the Supreme Court generally employs either a per se or rule-of-reason standard.10 Under the Court’s per se illegal rule, certain restraints of trade are deemed illegal without consideration of any defenses. These restraints are so likely to harm competition and to lack significant procompetitive benefits that, in the Court’s estimation, “they do not warrant the time and expense required for particularized inquiry into their effects.”11 Under the per se rule, once a plaintiff proves an agreement among competitors to engage in the prohibited conduct, the plaintiff wins.12 But the Court evaluates all other restraints under the rule of reason. This standard involves a **flexible** factual **inquiry** into a restraint’s overall competitive effect and “the facts **peculiar to the business**, the history of the restraint, and the reasons why it was imposed.”13 The rule of reason also “**varies in focus and detail** depending on the nature of the agreement and market circumstances.”14 “Under this rule the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.”15 Despite its label, the rule of reason is not a **directive defined ex ante (such as a speeding limit).**16 Instead, the term embraces antitrust’s most **vague and open-ended principles**, making prospective compliance with its requirements exceedingly difficult.

**Vote neg for GROUND and LIMITS --- Other standards dodge topic uniqueness and links and they can pick something that’s broader but more permissive --- creating a bidirectional topic. Standard prolif makes the topic unmanageable**

**7**

**Congress ought to pass a law that mandates an expansion of the Supreme Court from 8 to 14 associate justices if the United States federal government does not increase its prohibitions on anticompetitive petitioning by the private sector. The President ought to nominate, and the Senate ought to confirm, persons to fill any vacancies on the Supreme Court.**

**Court packing solves extinction**

**Cooper 16** --- Ryan Cooper is a national correspondent at TheWeek.com. His work has appeared in the Washington Monthly, The New Republic, and the Washington Post, “How to save the world from the Supreme Court”, The Week, Feb 12th 2016, https://theweek.com/articles/605314/how-save-world-from-supreme-court

The pressing need for court-packing is **all about climate change**. The most serious U.S. policy effort against this **humanity-threatening problem** is President Obama's Clean Power Plan, a complex EPA initiative to begin reducing the carbon emissions from America's power generation. It's also a keystone in the far-reaching international accord to tackle climate change, reached in Paris in December. The world is finally mounting a fairly aggressive attack on carbon pollution, and U.S. leadership is an indispensable part of the whole system.

But in an extremely unusual step, the Supreme Court recently halted the enforcement of Obama's EPA rule until various legal challenges have been worked out — which could take years. This severely threatens the entire structure of the Paris agreement, which depends critically on every nation, especially the United States, doing their fair share to reduce emissions.

As Coral Davenport reports, other nations are alarmed:

"If the U.S. Supreme Court actually declares the coal power plant rules stillborn, the chances of nurturing trust between countries would all but vanish," said Navroz K. Dubash, a senior fellow at the Center for Policy Research in New Delhi. "This could be the proverbial string which causes Paris to unravel." [The New York Times]

This is potentially **as big as big deals get.** Why shouldn't America's president flood the Supreme Court with his cronies if that's what it takes to ensure that the world aggressively fights climate change?

Climate change is **the most serious problem** in the world by a considerable margin, and time is **very short**. The world is already not moving nearly fast enough. A delay of the Clean Power Plan by some years is inexcusable — and an overthrow, which this decision may signal, would be an emergency. It is quite literally **not an exaggeration** to say that the Supreme Court is **threatening human civilization as it now exists**. Moreover, their reasoning is virtually certain to be some bogus technicality — Chief Justice John Roberts' recent attack on USDA price support programs, for example, was blatantly self-contradictory.

Furthermore, it's completely constitutional to add more justices to the Supreme Court. Nowhere in the Constitution does it stipulate there should be a specific number of Supreme Court justices. We began with six, and that figure has shifted several times between seven and 10. The current number (nine) is the result of the Judiciary Act of 1869, and mere convention has kept it there.

The next president, if he or she is a Democrat, ought to be prepared to load up the Supreme Court with climate-fighting cronies who will work hard to save the world from John Roberts and Co. If America's next president is a Republican, then climate policy is hosed anyway, so he wouldn't have to bother. And yes, I know that advocating this idea means a Republican president could theoretically engage in the same court-packing to advance his or her own favored cause. **But that is already true** — the current system is just one more wobbly convention, which a President-for-life Trump is unlikely to respect should it become inconvenient. In any case, saving the world from climate change is **worth that price.**

**case**

**innovation**

**Squo solves sham litigation.**

**Wenger 20** [Katheryn; Summer 2020; “You Don’t Have to Pay the Troll Toll: Antitrust Violations of Patent Assertion Entities and the Noerr-Pennington Doctrine; Hastings Constitutional Law Quarterly; “Sham Litigation” Exception,” vol. 47, <https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2121&context=hastings_constitutional_law_quaterly>]

The Supreme Court held it is “axiomatic that a complaint should not be dismissed unless ‘it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’”169 Additionally, the Supreme Court held that in antitrust cases “dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.”170 However, the **Noerr-Pennington** doctrine may be raised as an **affirmative defense** to **antitrust counterclaims.**

The Supreme Court first established this doctrine in two decisions dealing with antitrust claims, E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc. and United Mine Workers of America v. Pennington. 171 The Noerr-Pennington doctrine holds that “private actors are immune from antitrust liability for petitioning the government, even when private actors’ motives are anticompetitive.”172 Under this doctrine, the Court recognized a defense to antitrust laws that is derived from concerns regarding federalism and the First Amendment right to petition the government for relief.173 The Supreme Court interprets “petitions” to involve governmental relief activities other than legislative lobbying.”174

The rationale behind Noerr-Pennington immunity from antitrust liability is two-fold. First, the Court held that allowing such liability would “substantially impair the power of [state] government to take actions through its legislature and executive that operate to restrain trade.”175 Second, “[t]he right of petition is one of the freedoms protected by the Bill of Rights” and the Sherman Act lacks congressional intent to infringe on such freedom.176

However, the Court narrowed the scope of Noerr-Pennington when it established the “**sham litigation**” **exception**.177 The sham litigation exception holds that activity “ostensibly directed toward influencing governmental action” does not qualify for Noerr-Pennington antitrust liability immunity if it “is a mere sham to cover . . . an attempt to interfere directly with the business relationship of a competitor.”178 This Note posits that the **sham litigation exception** **applies** to **PAEs** because they engage in **serial litigation** **not based on the merits** of their **patent rights**, but solely for **monetary gain** and **stifling competition**.

A. The California Motor Standard is Appropriate because PAE Serial Litigation is Anticompetitive Conduct

**PAE serial enforcement** actions **fail** the **California Motor standard** by utilizing the court system as a weapon to shake down their technology competitors notwithstanding the merits. In California Motor Transport Co. v. Trucking Unlimited, the Court dealt with a defendant accused of instituting serial litigation for anticompetitive purposes.179 The Court observed that litigation is unequivocally expensive and time-consuming.180 Further, litigating a series of matters “can inflict a crushing burden on business.”181 Thus, the California Motor Transport Court recognized that litigating a series of suits and other legal actions “without regard to the merits has far more serious implications than filing a single action, and can serve as a restraint on trade.”182

In such instances of PAE serial litigation, **under California Motor** authority, the first prong of the PREI “**sham litigation**” exception test should **not be based on** whether **any** of the proceedings have **merit** but, rather, “whether they are brought **pursuant** to a **policy** of **starting legal proceedings** **without** regard to the **merits** and for the **purpose** of **injuring a market rival**.”183 Courts determine this alternative factor by determining whether “the legal filings [were] made, not out of genuine interest in redressing grievances, but as part of a pattern of practice of successive filings undertaken essentially for the purpose of harassment.”184

For example, in the Maryland action,185 Judge Grimm inappropriately applied the PREI standard and failed to apply the California Motor standard to the first prong, even though IV has filed numerous enforcement actions against Capital One and dozens of other banks. As discussed earlier, IV filed suit in Maryland while the Virginia action was still pending. But also, aside from the Virginia and Maryland cases, IV also filed lawsuits against Capital One in district courts across the country, including the Southern District of Ohio and the Northern District of California.186 Therefore, this action and similarly situated suits should be evaluated under the California Motors Transport objective merit exception.

The FTC Report found that typical PAE negotiated licenses, valued at millions of dollars, cover large portfolios (containing hundreds or thousands of patents) without first suing the alleged infringer.187 These licenses generate eighty percent of reported PAE revenue, or approximately $3.2 billion.188 However, under the litigation business model that is invoked after an alleged infringer refuses to license these massive portfolios, PAEs initiate costly litigation that is often settled shortly after, by entering into a licensing agreement covering a smaller portfolio (approximately ten patents).189 But, the early stage of litigation is estimated at $300,000.190 Meanwhile, the license of these smaller portfolios yields royalties of less than $300,000.191 Moreover, PAEs engaging in the Litigation model characteristically create new affiliate entities for each separate patent portfolio (typically ten patents or less) that they acquired.192 These entities operate with little or no working capital and enter into agreements with patent sellers to fund their business.193

Therefore, when building their portfolios, PAEs typically conduct business as follows. First, they acquire massive patent portfolios from patent sellers, frequently from manufacturing firms, by making large up-front payments. Individual transactions may contain hundreds or thousands of patents.194 Or, smaller portfolio transactions are often aggregated into larger portfolios.195 Regardless of one lump transaction or small transaction aggregation, PAEs then organize acquired patents into one or more large portfolios and offered for licensing.196 The FTC Report found that seventyone percent of licenses were executed without litigation.197 Thus, it’s assumed that PAEs likely threatened litigation to coerce alleged infringers into entering an expensive license in order to avoid costly litigation.198 And, when PAEs did file suit, “76% of their cases involved five to ten patents and 74% of their cases lasted more than a year.”199

When the **California Motor standard** is applied to this data, it is **clear** that **PAEs initiate litigation** for the purpose of **executing** an **expensive licensing agreement** and **not** for **legitimate enforcement** of their patent rights. It is not merely a coincidence that the **large portfolios** are first offered to **potential infringers to license**, often through a single written demand, but the **smaller portfolios** are those that **make it to court** when disputes reach that stage. Additionally, the PAEs **Portfolio and Litigation business models** are **prima facie evidence** that PAEs are **not concerned** with the actual **enforcement** of their **patent rights**. Rather, PAEs are concerned about **monetary gain** through **licensing and settlements** because they **do not produce products** that depend on **patent exclusivity**. Afterall, their entire business model depends on the enforcement of these patent rights in itself through licensing agreements.201

Moreover, the discovery in the Capital One Virginia case underscores this PAE intentional disregard of the merits when they invoke the Litigation business model once the Portfolio model fails. It should be noted that this intentional disregard is likely discernible with similar PAEs when they are individually assessed. In the Capital One Virginia case, documents produced captured IV testimony confirming that the suits were brought without regard to the merits—but in order to harm Capital One and other banks. One of IV’s executives responsible for licensing to banks testified that their list of certain patents demanded for license was “laughable” because “[t]hey have nothing to do with banking.”202 And a spreadsheet of portfolio catalogs reveals that many of the patents IV claimed were relevant actually had nothing to do with banking, but included patents for “metal treatments, aeronautics, and land vehicles.”203

Moreover, there is expert testimony that **the PAE Portfolio model** holds such a **monopoly** over the **relevant market** through **massive patent acquisitions** where **no non-infringing substitutes** **exist** nor is a design around a viable option. In the Maryland case, Capital One’s expert economist Fiona Scott Morton testified that IV had a monopoly in the financial-services technology market, and Capital One could not “realistically ‘design around’ the patents.”204 Scott Morton determined that IV’s financial-services portfolio was analogous to a “cluster market” promoted as a single product where no close substitutes exist at a supracompetitive price.205 Thus, no substitutes available to IV’s portfolio and they do, indeed, hold an unlawful monopoly on the financial-services technology market. It logically follows, that similarly situated PAEs ensure that no viable substitutes exist in order to capitalize on the PAE Portfolio model, just like IV demonstrates.

B. PAE’s Portfolio Enforcement Suits Still Fail the PREI Non-Serial Litigation

1. **PAE Claims** are **so Objectively Baseless** **No Reasonable Litigant** Could **Realistically Expect Success** on the **Merits**

**Even if the PREI standard** was the **appropriate** standard, PAE’s conduct would still qualify as **“sham litigation”** and, thus, should **not be afforded** **Noerr-Pennington doctrine immunity**. The Court held that “[non-serial] litigation cannot be deprived of immunity as a sham unless the litigation is objectively baseless” and affirmed the Ninth Circuit’s refusal to characterize a lawsuit as a sham that the antitrust defendant “admittedly had probable cause to institute.”206 The PREI Court resolved whether litigation may be sham merely because a subjective expectation of success does not motivate the litigant, holding that “an objectively reasonable effort to litigate cannot be sham regardless of intent.”207 In sum, for a non-serial lawsuit to qualify as a sham litigation, the suit: (1) “must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits”; and (2) must be subjectively baseless and an attempt to interest with competitors.”208 Under the **first prong** of the two-prong sham litigation exception test, a claimant must prove that the lawsuit is “**objectively baseless** in the sense that no reasonable litigant could realistically expect success on the merits.”209 Additionally, if the suit contains objective merit, the claimant cannot proceed to the subjective purposes prong and the action does not constitute sham litigation .210 Thus, this prong is determined by whether “no reasonable litigant could realistically expect success on the merits” by filing the lawsuit in question.211

**PAE enforcement claims** are **objectively baseless** and, thus, **fail** the first prong of the **PREI standard**. In re Cardizem CD Antitrust Litigation concerns plaintiff indirect purchasers of a brand name heart medication manufactured by the defendants. The defendants asserted that plaintiffs failed to sufficiently show that the suit was not objectively baseless and brought for anticompetitive purposes.212 Plaintiffs argued but for the patent infringement litigation the Hatch-Waxman 30-month period would not have gone into effect, resulting in generic versions entering the market sooner.213 The plaintiffs supported their objectively baseless allegations with damning communications.214 The court found that the plaintiffs alleged sufficient facts to satisfy the objective prong because allegations in the plaintiffs’ complaint are construed in light most favorable to the plaintiffs.215

Similar to In re Cardizem CD Antitrust Litigation, when viewed in the light most favorable to the party alleging counterclaims, facts alleged by Capital One reasonably showed that IV initiated its suits asserting only five patents out of the demanded 3,500-patent portfolio, many of which are invalid or expired, and only two of the five remained viable, for objectively baseless purposes.216 IV cofounder Edward Jung even described how IV acquires patents only for the enforcement of market power once aggregated and not the merits of the patent themselves. Jung stated, “[IV] buy[s] a bunch of low-cost asset[s], which gives us market power” and “[i]t just feels like we are on a diet of filler . . . . [W]e already have two funds with plenty of fluff . . . . We didn’t kill as many deals [as] we should have, we just tried to get them cheap and in most cases it was clear there was no future bet, the patents just weren’t monetizeable or practiced.”217 Moreover, one of IV’s outside inventors, hired to evaluate its patents, described the portfolio as “poor quality financial-services related patents.”218

Furthermore, the Virginia district court determined that the remaining asserted patents were ineligible subject matter under Alice Corp. v. CLS Bank International. 219 In Maryland, Capital One successfully sought a declaratory judgment that the asserted patents were invalid, with one patent invalid due to inequitable conduct.220 IV thus filed these suits against Capital One in retaliation for Capital One’s refusal to expensively license. Through IV’s own testimony and the asserted patents invalidation, no reasonable litigant could have expected to win on the merits, making these suits objectively baseless.221

The FTC also advises that “should the [asserted] patent be invalidated in one case . . . it would make further litigation in the other cases unnecessary.”222 And, the FTC since observed that PAEs may avoid asserting patents, such as those in the Capital One cases, “if they expect that: (1) the patents likely would be found invalid under Alice analysis, or (2) that courts may dispose of the case in the early stages of litigation, under Alice analysis.”223 Therefore, it follows that any **PAE suits** that are likely to be **invalid under Alice**, and **projected to settle** in the early stages of litigation, **are objectively baseless** under the **PREI standard.**

Between January 1, 2009, and September 15, 2014, **PAEs** participating in The FTC Report study **filed** 2,452 patent infringement lawsuits, or **8.8%,** of the **total** 27,932 **patent lawsuits filed** during the study period.224 Of these lawsuits, **66% settled within a year** and **87% of cases terminated** within the study period.225 The FTC found that PAEs typically sued potential licensees and settled shortly after entering into a license agreement covering a small portfolio, as opposed to the large portfolios that are typically demanded under the portfolio business model.226 Because the licenses are for relatively low amounts in royalties (less than $300,000) and early stage litigation is estimated to cost $300,000, the **FTC** determined this **PAE behavior** to be “**consistent** with **nuisance litigation**.”227 Moreover, the FTC estimated that **PAEs** in their study held more than **75% of all U.S. patents**, and “any change in PAE behavior with respect to software patents that results from Alice will likely have a significant impact on both overall volume of PAE assertion and the types of technologies that PAEs assert.”228

During its study, the FTC found that for all patents reported relating to Information and Communication Technologies (“ICT”), 88% related to Computers & Communications or Other Electrical & Electronic patent technology categories and more than 75% were software-related patents.229 These figures are consistent with the generally held view that PAEs disproportionately acquire and assert ICT and software patents. And though the FTC study does not contain a census of all PAE patents, the sample included a substantial fraction of all patents held by all PAEs during the study period.230 Moreover, the Alice holding suggests that many software patents may be invalid due to ineligible subject matter.231

When the FTC Report data is assessed in conjunction with the FTC’s Alice ineligibility expectation advisory rule, it is reasonably inferred that **PAEs** are **aware of ineligibility** under Alice and **file** enforcement actions **regardless**. This inference is supported by PAE business models where they demand a license on entire portfolios as a single product, containing hundreds or thousands of patents. It is, thus, statistically certain that **PAEs** initiate litigation **knowing** that these **asserted patents** are likely **invalid** under Alice but still use the **court system** as a **weapon** to pressure alleged infringers into a quick licensing agreement in the early litigation stage, settling the suit. **PAE enforcement suits** are, therefore, **objectively baseless**.

**Antitrust fails to stop trolling.**

**Sipe ’16** [Matthew; 2016; J.D. at Yale Law School; Michigan Telecommunications and Technology Law Review, “Patent Privateers and Antitrust Fears,” Vol. 2, No. 1, http://repository.law.umich.edu/mttlr/vol22/iss2/1]

At first glance, the nexus between antitrust law and patent trolls seems clear: if litigious patent trolls are unfairly deteriorating the markets for various patented goods, antitrust law can step in and reassert the proper rules for efficient competition. Thus far, however, the popular and scholarly literature surrounding antitrust law’s proposed role in policing patent trolls has suffered from two key failures.

First, antitrust scholars have largely **failed to distinguish** between different types of patent trolls and patent troll activities.9 Whether antitrust law can provide a solution—if a problem indeed exists—**may vary greatly** depending on, among other things: the particular patent owner’s conduct; its “relationships or connections to operating entities;” the nature of “downstream product” markets; and potential “upstream technology markets.”10 In this way, patent troll behavior **varies too much** to allow for a **single conclusory answer**:

Along one continuum, **unilateral [patent troll] conduct** may vary from acquiring a **single patent** or unrelated patents to amassing a **thicket of closely related patents** covering **multiple facets of a single product** or industry. The [assertion] strategy may vary as well, from blanketing an industry with demands for royalty payments . . . to engaging in more targeted demands, accompanied by claim charts. . . . Along another continuum, [patent trolls] may **cooperate** with one or more operating entities when asserting patents, ranging from **unspoken agreements** to explicit royalty- or revenue-sharing provisions.11

Footnote 9 begins:

9. Many pieces draw **no distinctions** or **make no acknowledgement** of the **different potential types of patent trolls** and their **divergent activities at all**. See, e.g., Michael A. Carrier, Patent Assertion Entities: Six Actions the Antitrust Agencies Can Take, 2013 CPI ANTITRUST CHRON. 1 (2013); Collin A. Rose, A Match Made for Court: Patent Assertion Entities and the Federal Trade Commission, 48 COLUM. J.L. & SOC. PROBS. 95 (2014); NAT’L ECON. COUNCIL ET AL., PATENT ASSERTION AND U.S. INNOVATION (June 2013), https://www.whitehouse.gov/ sites/default/files/docs/patent\_report.pdf; Bert Foer & Sandeep Vaheesan, Patent Trolls in the Cross Hairs, AM. ANTITRUST INST. (Jan. 16, 2014), http://www.antitrustinstitute.org/content/ patent-trolls-cross-hairs.

**regulation against trolling backfires --- stifles innovation**

**Mossoff 18** --- Adam Mossoff et al, Professor of Law Antonin Scalia Law School, George Mason University, “Will Overzealous Regulators Make Your Smartphone Stupid?”, Regulatory Transparency Project, December 10, 2018, https://regproject.org/paper/will-overzealous-regulators-make-smartphone-stupid/

Even when patents covering technological standards are not implicated, antitrust regulators have been taking aim at patent licensing more generally. This time, the threat is not “patent hold up,” but so-called “**patent trolls**.” A “patent troll” is a euphemism that has come to embrace virtually any person or company that profits from its patents other than by directly manufacturing a product. This includes companies that license their patented technology to other companies, such as IBM, Nokia, Dolby, 3M and others that follow in the footsteps of Thomas Edison, Nikola Tesla, and Charles Goodyear. Some do not manufacture anything, while others do. Some invented the technology they now own, while others purchased their patents from individual inventors, other companies, or even failing or failed businesses. Indeed, advocates of the patent troll myth have gone so far as to suggest that America’s universities, wellsprings of innovation in both groundbreaking technologies and medical care,18 are patent trolls simply because they invent, they patent, they license, and they sue infringers, but they don’t actually manufacture products in factories.19

In a speech on October 18, 2018, Andrei Iancu, Director of the U.S. Patent and Trademark Office, criticized the “patent troll” rhetoric as both a myth and as a message that **undermines innovation**:

The goal of this narrative is the same as that of stories such as Little Red Riding Hood: **don’t leave the village. Don’t take risks**. Stay in your lane! Because if you do take risks, if you do have the gall to get out of your lane, you may encounter big bad wolves or other scary monsters. And horror of horrors, you may encounter “patent trolls!”

**What an odd message** to deliver in the 21st century. What an odd message to deliver in America in particular, a country of risk-takers, entrepreneurs and inventors. An odd message indeed, especially given the incredible success of the American patent system over time.20

Director Iancu is right. Regardless of their business model or mode of operation, any person or commercial enterprise that licenses its patents serves a **valuable economic function**—they are the “economic intermediaries” that connect owners with buyers, just as car dealerships, stock brokers, eBay, and Amazon do for other goods and services.

There is **nothing wrong with profiting from innovation by licensing patents** to others. As noted, this is a **key feature of a flourishing free market**, it promotes economic efficiencies through specialization, and it has been an economically significant feature of the U.S. patent system from its inception in 1790. The Supreme Court has recognized that many people and organizations, including inventors and universities, have legitimate economic reasons for licensing their patented innovations.21 Patent licensing allows companies to focus on their areas of expertise, whether it be invention, manufacturing, sales, or otherwise; and it allows innovative firms to recoup R&D expenditures to continue their inventive activities.

Yet, according to antitrust regulators, if a company that licenses its patents is forced to sue an infringer, or merely threatens to sue a recalcitrant company that is holding out in negotiations and refusing a license while infringing a patent, this could constitute anti-competitive behavior and thus violate antitrust laws. The concern is a generalized claim that consumers are harmed somehow when a patent owner asserts its rights against the unauthorized use of its property by another company for its own profit. What economic evidence is driving these investigations and threats by antitrust regulators? Just as with the unproven theories and anecdotes about standard-essential patents (SEPs), **there is none**. Even worse, and indicative of the Kafkaesque nature of this regulatory overreach, when manufacturers do the exact same thing in suing to protect their property rights in their patents, this is barely worthy of comment by antitrust regulators. **What is the difference between the two**? One patent owner licenses its property, and the other uses its property to manufacture or sell goods to consumers. **There is no economic study that justifies this different legal treatment by antitrust regulators, nor is there any antitrust law or regulation that explains it either.**

**Innovation is high across all metrics.**

Asutosh **Padhi 11-8**, Managing Partner for McKinsey in North America, et al., 11/8/21, “A sustainable, inclusive, and growing future for the United States,” https://www.mckinsey.com/featured-insights/sustainable-inclusive-growth/a-sustainable-inclusive-and-growing-future-for-the-united-states

For all the **U**nited **S**tate**s’** economic frailties, vulnerable populations, and left-behind places, it can count on **major strengths**, including the resilience of its economy, the strength of its private sector, and a long tradition of innovation. On their own, the following assets will not be enough to generate sustainable and inclusive growth, but they are the essential tools needed to help the country do so:

A dynamic and resilient economy. Over the past two decades, the US economy has demonstrated **remarkable resilience and dynamism**. The **U**nited **S**tates rebounded from the 20**08** financial crisis with robust aggregate employment growth, low inflation, and **tech**nological innovation that boosted entrepreneurship and sharply reduced prices for many consumer goods and services. Further, its economy is showing strong signs of recovery from the COVID-19 pandemic.

A robust market economy and private sector with a record of delivering. Despite the recent slowdown, US GDP per capita has more than doubled over the past 50 years, and its personal-consumption expenditure has almost tripled during that period. The domestic-business contribution to US GDP per capita has risen fourfold. Businesses account for 83 percent of US technology investment, 76 percent of US R&D investment, and 81 percent of US labor-productivity growth in the 21st century. And Americans are living longer and have more leisure time.

An unparalleled innovation engine. The **U**nited **S**tates is **at the forefront of advanced technologies**, from biotechnology to AI, with contributions from companies, universities, and government agencies. These technologies could be critical new sources of growth and potentially help **further both inclusion and sustainability**—with advances in climate science especially relevant for the latter. Innovation is not just taking place in **lab**oratorie**s**: the COVID-19 crisis accelerated the adoption of new technologies. A McKinsey survey conducted in October 2020 found that that roughly half of the respondents reported increasing digitization of customer channels (such as through e-commerce, mobile apps, and chatbots), and two-thirds reported accelerating adoption of automation and AI.

Promising prospects for productivity growth. Evidence from some companies and sectors suggests that the **U**nited **S**tates can rebound from the COVID-19 pandemic with renewed vigor. Indeed, the pandemic accelerated trends that will likely have **persistent effects** with profound economic implications, **hastening the potential for productivity gains**—even in the sectors that have historically been slow to change. For example, in retail, with the exception of e-commerce players, companies had been slow to adopt digital sale strategies, doing so mostly as a way to complement Main Street retailing. That changed abruptly during the pandemic. It will take more companies and more sectors contributing to productivity to drive national-level productivity. If all US companies and key large sectors adopt the range of digital and productivity acceleration already seen during the pandemic, the nation could see around 1–1.5 percent higher growth across sectors over the next three years (Exhibit 5).

Prospect of robust demand in the near term, although it would need to be sustained. Stimulus programs related to the pandemic have boosted personal incomes and represent considerable savings ready to be spent. From March to April 2020 alone, the personal savings rate in the United States has shot up to nearly 34 percent, from 13 percent, and remained above 15 percent for most of the pandemic as households cut spending in the face of uncertainty. This large cache of accumulated savings and pent-up demand could drive growth momentum as people start to spend at prepandemic levels, assuming widespread vaccinations and a benign “COVID-19 exit” scenario.

Growing commitments to carbon and net zero. Looking ahead, the urgency of climate mitigation and adaptation is now more widely acknowledged in the United States and elsewhere, the resetting of government and corporate agendas is under way, green-tech costs are favorable and declining, and climate- and infrastructure-related investments can boost jobs. Many US companies are making net-zero commitments and beginning to develop plans to achieve them. Consumers may be more open to demanding more sustainable goods and services. According to a McKinsey survey in October 2020, for example, more than half of the consumers surveyed said they would buy more products with sustainable packaging if their pricing matched that of conventionally packaged ones.

Coming together on an inclusive economic agenda. Already before the COVID-19 pandemic, organizations were examining their stances regarding inclusion. For example, the US Business Roundtable revisited its purpose statement to put new emphasis on “an economy that serves all Americans,” broadening the scope from shareholders to a wider range of stakeholders.4 During the pandemic, the US social contract has been strengthened with massive state support to individuals, although it remains to be seen whether this will be a sustained change. Going forward, it will be important to harness the economic dynamism that already exists in minority communities.5 Public–private cooperation has been successful in many geographies, and technological adoption spurred by the pandemic offers new solutions—not just hybrid work but also digital finance and large-scale retraining programs.

**The plan body blows innovation, sowing mass uncertainty in patents.**

**Waxman ’20** [Seth Paul Waxman; 2020; an American lawyer who served as the 41st Solicitor General of the United States from 1997 to 2001; Petition to the Supreme Court of the United States, “Abbvie Inc. v. F.T.C.,” https://www.docketalarm.com/cases/Supreme\_Court/20-1293/AbbVie\_Inc.\_et\_al.\_Petitioners\_v.\_Federal\_Trade\_Commission/03-18-2021-Petition\_for\_a\_writ\_of\_certiorari\_filed/0316180937477-Petition/]

A. This Court has “carved out only a narrow exception for ‘sham’ litigation” to “avoid chilling the exercise of the First Amendment right to petition.” Octane Fitness, 572 U.S. at 556; see BE&K, 536 U.S. at 528. A **rigorous subjective element** is critical to cabining that **narrow exception** and to protecting the First Amendment rights embodied in the Noerr-Pennington doctrine. Indeed, this Court has “never held that the entire class of objectively baseless litigation may be enjoined or declared unlawful even though such suits may advance no First Amendment interests of their own,” but instead has required an independent showing of bad faith to ensure the necessary “‘breathing space,’” consistent with broader First Amendment principles. BE&K, 536 U.S. at 531.

The decision below, however, deprives the subjective element of an independent role in the sham inquiry, allowing it to be satisfied by a commonplace intent to thwart competition inferred from a finding of objective baselessness. As a result, litigants exercising their First Amendment right to assert claims with uncertain prospects of success will do so at their peril.

That chilling effect will reach beyond litigation. As this Court has explained, the same sham exception “governs the approach of citizens or groups of them to administrative agencies” as to courts. California Motor Transp., 404 U.S. at 510. Thus, courts have applied PRE’s sham exception to citizen petitions submitted to the FDA to oppose entry of generic products, see Tyco, 762 F.3d at 1347 (citing cases), and to petitioning conduct before state or local agencies, see Kottle v. Northwest Kidney Centers, 146 F.3d 1056, 1059, 1062 (9th Cir. 1998); CSMN Investments, LLC v. Cordillera Metropolitan District, 956 F.3d 1276, 1282 n.8, 1286 n.13 (10th Cir. 2020); see also PRE, 508 U.S. at 59 (discussing sham exception “[w]hether applying Noerr as an antitrust doctrine or invoking it in other contexts”). The decision below thus jeopardizes a broad range of First Amendment petitioning activity.

B. The chilling effect will be **especially pernicious** in **patent cases**—and, in particular, in the important context of Hatch-Waxman litigation, thwarting Congress’s purposes in enacting that statute.

Congress designed the Hatch-Waxman Act to balance **patent rights** against the **benefits of increased competition** in the **market for medicines**. At the same time that it allowed **generic manufacturers** to **take advantage** of brand manufacturers’ **research and development** through **streamlined approval pathways**, Congress also incentivized “increased expenditures for research and development” by lengthening patent protection to compensate for time lost on patent life to the FDA approval process. H.R. Rep. No. 98-857, pt. 1, at 15 (1984). In addition, Congress sought to ensure that patent disputes could be resolved early—before the generic product goes to market—by providing for the statutory stay of FDA approval to reward patent owners that file infringement suits promptly. See Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S, 566 U.S. 399, 407-408 (2012). Yet the court of appeals treated the fact that AbbVie followed and benefited from that congressional design as “[e]specially” supportive of an inference of bad faith. App. 70a. Indeed, the court went so far as to disparage the congressional design as giving rise to “a collateral injury” that a patent owner’s “mere use of legal process **invariably inflicts**” as “an anticompetitive weapon.” App. 50a; see App. 70a.

That is a **perverse outcome**—one that will affect **nearly every litigant filing** an **infringement suit** under the Hatch-Waxman Act. All litigants that promptly file infringement suits under the Hatch-Waxman Act benefit from the automatic stay, as Congress intended, and they invariably do so on the advice of experienced lawyers with the aim of securing a financial benefit by preventing or delaying competition from a potentially infringing product. Imputing bad faith to litigants’ mere participation in that statutory scheme is particularly unfair and destructive to incentives to innovate because a patentee is presumed to assert a “duly granted patent … in good faith.” C.R. Bard, 157 F.3d at 1369 (citing Virtue v. Creamery Package Mfg. Co., 227 U.S. 8, 37-38 (1913)). The court of appeals’ decision penalizes a patentee that enforces its patent against a potentially infringing competitor despite that presumption, even though such a suit may be entirely compatible with a “genuine[]” invocation of the Hatch-Waxman Act’s protections. Omni, 499 U.S. at 382.

That expansion of the **sham exception** would have **significant practical impact**. **Ten percent** of **all patent-infringement suits** filed in the United States are triggered by paragraph IV certifications under the HatchWaxman Act, and the number of such suits has **been increasing**. Brachmann, Hatch-Waxman Litigation: 60 Percent Increase in ANDA Lawsuits from 2016 to 2017, IPWatchdog (May 16, 2018). The court of appeals’ decision will **deter patentees** from availing themselves of **their Hatch-Waxman remedy**—and enforcing their patent rights more generally—for fear that they might be subject to **antitrust liability** and **treble damages** if the suit is **subsequently adjudicated** to be **objectively baseless** notwithstanding their subjective expectation of success. And, of course, where patent-holders face **uncertainty** about their ability to **enforce their patent rights** in court, their **incentive to innovate** in the first place is **correspondingly diminished**.

It is no answer to suggest that the requirement of objective baselessness adequately protects against an undue chilling effect. As explained above, objective baselessness is only one half of the sham-litigation test—and that is so for important reasons. Supra pp. 7- 9, 18-19. In addition, reasonable jurists can, and do, make errors in assessing objective baselessness or disagree about what constitutes such baselessness. That problem is highlighted by this very case: the district court ruled that AbbVie’s patent-infringement suit against Teva was objectively baseless, but the court of appeals reached the opposite conclusion (even while agreeing that the similar suit against Perrigo was objectively baseless).

That is not surprising, given that patent law is **notoriously technical** and **subject to change**. See Teva Pharm. USA, Inc. v. Sandoz, Inc., 574 U.S. 318, 327 (2015); see also, e.g., KSR Int’l Co. v. Teleflex Inc., 550 U.S. 398, 419 (2007) (invalidating Federal Circuit’s test for obviousness); Festo, 535 U.S. at 737-738 (rejecting Federal Circuit’s “per se rule” for prosecution-history estoppel); cf. Athena Diagnostics, Inc. v. Mayo Collaborative Servs., LLC, 927 F.3d 1333, 1335-1373 (Fed. Cir. 2019) (per curiam) (eight opinions concurring in or dissenting from denial of rehearing, articulating different standards for subject-matter eligibility). Especially where, as here, the objective baselessness inquiry turns on **issues of patent law**, rather than **disputed issues** of **underlying fact**, it is **dangerous** to subject a patent litigant to **antitrust liability** based only on a decisionmaker’s **later determination** that the litigant got the law wrong—without any consideration of that litigant’s actual expectations in bringing suit.

**5G development is not zero-sum and China innovation is commercial**

**ANG 20** --- YUEN YUEN ANG, Associate Professor of Political Science at the University of Michigan, Ann Arbor, “The Myth of the Tech Race”, Project Syndicate, April 28th 2020, https://www.project-syndicate.org/onpoint/us-china-tech-race-unnecessary-by-yuen-yuen-ang-2020-04

Yet for all the Western paranoia over Chinese ambitions, most analysts have missed an important fact: China’s comparative advantage in technology is **different from that of the US**. Whereas China excels in applying technology to improve business models – for example, in e-commerce and fintech – the US remains the unparalleled world leader in basic scientific research, the foundation of advanced technologies. This fundamental difference **challenges the zero-sum mentality of**ten underlying the **Sino-American tech race.**

Back to Basics

In the West, the term “technology” evokes images of super-intelligent, dazzling inventions like flying cars and thinking robots. During the Cold War, the most vivid sign of technological prowess was the Soviet Union’s launch of satellites into space – the so-called Sputnik moment. But in emerging markets, which have lower average income levels and a lack of basic infrastructure, “technology” is regarded not in utopian terms, but as a pragmatic tool.

Consider the ubiquitous example of mobile phones, a relatively simple device that even the poor can afford to buy. With a phone, one can make calls, access information, borrow micro-funds, and hawk merchandise. The diffusion of this modest technology can subsequently spawn waves of startups in novel domains: fintech, ed-tech, health-tech, and so forth. Beyond the fancy labels, these are all examples of entrepreneurs applying off-the-shelf, widely accessible technologies to enhance the delivery of goods and services. By doing so, they facilitate transactions that spur growth across the economy.

Some of China’s largest and most iconic tech titans – for example, Alibaba, Xiaomi, and Meituan – followed this basic trajectory. Contrary to received wisdom in the West, Alibaba was not a “national champion” handpicked by the Chinese government to succeed. As a private company in a novel industry (e-commerce), it actually faced significant resistance from Chinese authorities. For example, in 2014, state banks tried to block the company’s Yu’e Bao system – which allows users to invest money left over from online payments – by imposing limits on fund transfers into online accounts. According to one senior state media analyst at the time, Yu’e Bao was a “blood-sucking vampire” that must be stopped.

Tech startups like Alibaba thrived not because the state propped them up, but because they tailored their services flexibly to Chinese consumer needs. By contrast, Alibaba’s American counterpart, eBay, insisted on a one-size-fits-all business model and eventually lost the market. As my interviews with Chinese private-sector entrepreneurs have found, the government endorses so-called champions only after they succeeded on their own. Their strength comes from creating value through competition, not state protection.

These examples also show why it is important to distinguish between **seminal and applied innovation**. America is strong in both. And it especially dominates in basic research: its universities lead the world across all scientific fields; its corporate giants invest heavily in research and development for advanced products; and both sectors attract the best global talent. Moreover, US academia and business enjoy a symbiotic relationship, as epitomized by Stanford University’s seeding of the technologies that would later define Silicon Valley.

Chinese state planners know that America’s overwhelming strength in basic research has allowed it to dominate the upstream of the technology supply chain, a position that the US government guards fiercely. In an effort to catch up, China intervened with a bevy of top-down policies to support state-selected high-tech sectors. But this top-level battle for world dominance has obscured China’s real competitive edge: **commercialization**.

New Faces of Innovation

Consider the composition of each country’s tech “unicorns” (private startups with a valuation of at least $1 billion). According to a 2018 Credit Suisse report, only the US has produced more unicorns than China. But the largest share of Chinese unicorns (58%) operate in the e-commerce and gaming sectors, whereas US unicorns are more highly concentrated in AI, big data, robotics, and software. Moreover, while China’s overall spending on R&D is quickly catching up to that of the US, its spending on basic research as a share of GDP has increased only slightly, and remained at less than one-quarter of the US level from 2010 to 2017.

Another telling distinction is the bottom-up emergence of what I would describe as “modular manufacturing” in Shenzhen, a city of 13 million people in Guangdong Province. Once a hub for counterfeiting foreign consumer and luxury goods, Shenzhen has morphed into the “Silicon Valley of hardware,” as one documentary calls it. At Huaqiangbei, a massive marketplace of small vendors, shoppers can buy any electronic part imaginable. And, owing to the emergence of such markets, inventors and entrepreneurs from around the world can create prototypes more cheaply and quickly than anywhere else.

The rise of Shenzhen’s hardware ecosystem has had a global impact. Startups in any country can now create their own brands, produce them in small batches in the city, and then sell to niche markets. One example is Wiko, a smartphone company founded and based in France, whose products are made in Shenzhen. Within two years, reports David Li of the think tank Hacked Matter, the startup captured 18% of the French market, making it the third-most popular smartphone in France (after Apple and Samsung).

In other words, the system of modular manufacturing that sprang up in Shenzhen in recent years is upending the traditional model of global mass manufacturing, which was previously dominated by large multinational companies presiding over a passive chain of suppliers. The ability to launch, brand, and produce a new product is quietly being “democratized” at the global level from a single Chinese city. This creative movement emerged with scant attention, let alone support, from grand strategists in Beijing.

Similarly, the realities of bottom-up Chinese innovation rarely reach the halls of power in Washington, nor do they feature much in mainstream Western media. Instead, analysts continue to describe China’s technological ascent in Cold War terms. A recent commentary in Forbes is a case in point: “This is indeed a Sputnik moment for the US, a wake-up call for the US just as it was when the Soviet Union launched its first satellite, the Sputnik I, and beat the USA into space.”

Stepping Back from the Brink

But the China of 2020 is nothing like the Soviet Union of the post-World War II era. Nor is technology a zero-sum game, where only one county can hit a given target first and “win.” A more balanced assessment of Chinese and US strengths and weaknesses would go a long way toward mitigating an unnecessarily acrimonious and costly rivalry.

Leaders on both sides should understand that countries can and do have different comparative advantages in technology. China excels in **commercialization** and **applied innovation** because it has a massive domestic market and few or no established players in emerging industries. These conditions provide fertile ground for decentralized experimentation. Moreover, as is true in many fast-growing emerging economies, the Chinese private sector is driven by “a culture of hyper-competition,” as one tech businessman put it to me. China today is a place where entrepreneurs aspire to make big money fast.

Unparalleled US leadership in basic scientific research, on the other hand, rests on a longstanding institutional foundation that is reinforced by a culture of freedom to pursue original ideas. Moreover, the US tech sector continues to reap the benefits of the government’s deliberate investments in basic science during the post-war era. According to Vannevar Bush, the director of the Office of Scientific Research and Development under President Franklin D. Roosevelt, US science policy during that period was premised on the belief that “basic research is the pacemaker of technological progress,” and that it should be “performed without thought of practical action.”

**Deterrence not key to prevent Taiwan war**

**Lungu 21** --- Andrei Lungu is president of The Romanian Institute for the Study of the Asia-Pacific (RISAP), “Taiwan invasion doesn’t hang in the military balance”, East Asia Forum, Aug 19th 2021, https://www.eastasiaforum.org/2021/08/19/taiwan-invasion-doesnt-hang-in-the-military-balance/

There is growing speculation and alarm about a possible Chinese invasion of Taiwan after Beijing sharpened its rhetoric towards the Taiwanese government and increased its military manoeuvres around the territory. The Biden administration is worried that if Chinese leaders are overconfident in China’s growing power and assume Washington’s decline, they might decide to invade Taiwan.

The US government has taken numerous actions to clearly signal its capacity and commitment to defend Taiwan. Growing diplomatic engagement with Taiwan, increased military manoeuvres, joint statements alongside Japan, South Korea and the G7, as well as developing a common response to a war over Taiwan with Japan and Australia are all part of this new framework.

Although these actions intend to decrease the risk of military conflict by strengthening military deterrence, they **are unlikely** to achieve it. This is because Beijing’s Taiwan calculus — which **has always been more complex** than simply focussing on the conventional military balance — involves three **distinct factors** that have dissuaded a Chinese invasion.

The first is military power. Chinese leaders still doubt whether China could defeat and then conquer Taiwan, let alone successfully fight the United States.

Secondly, there is an understanding that war over Taiwan would portend disastrous consequences for China’s economy, foreign relations and global image. Worse still, a conflict could pose an existential risk to the **C**hinese **C**ommunist **P**arty: a war would mean fighting and killing ‘brothers and sisters’, while defeat would bring echos of 1895. A war would also undermine economic development — a pressing goal that is closely linked to the ‘great rejuvenation of the Chinese nation’.

The third factor is **time**. Chinese leaders wait based on the hope that ‘peaceful reunification’ is still possible and that **time is on their side**, as China’s power is growing. Their historical goal has been to **prevent independence** or a change of the status quo. Waiting still **makes sense**, as China is pursuing its decades-long military modernisation process.

By ignoring these last two factors, Washington risks focussing too much on the assumption that Chinese leaders have become overconfident about the **erosion of military deterrence.** Fear of the United States was **never the sole factor** preventing a Chinese invasion in the first place.

Hong Kong illustrates this thinking well. Without having to contend with the possibility of an opposing military, Beijing remained acutely aware of the economic and diplomatic consequences of sending military or paramilitary troops to directly suppress protests. It instead adopted a slower strategy of tightening control to reduce the political costs of its actions.

Beijing only imposed national security legislation on Hong Kong when the problem had gotten ‘out of hand’ — not as a proactive measure. The Chinese leadership tried to gradually build control over the territory for years, believing time was on its side. It only implemented radical measures when it believed the status quo was changing to its detriment.

Chinese leaders haven’t yet decided that an invasion of Taiwan is unavoidable because they still hope that ‘peaceful reunification’ is achievable, but they worry about Taiwan’s steady drift towards the United States. Beijing sees Washington’s growing ties with Taiwan as undermining the status quo and diminishing the prospects for ‘peaceful reunification’.

**Zero risk of escalatory cyber-attacks --- Defenders advantage nullifies any ROI ---** assumes NC3 and Infrastructure

**Borghard & Saltzman 19** --- Erica D. Borghard, Adjunct Research Scholar in the Saltzman Institute of War and Peace Studies and an Adjunct Associate Professor in the School of International and Public Affairs, and Shawn W. Lonergan, Senior Advisor to the U.S. Cyberspace Solarium Commission, Strategic Studies Quarterly , Vol. 13, No. 3 (FALL 2019), pp. 122-145, https://www.jstor.org/stable/26760131?seq=1#metadata\_info\_tab\_contents

Therefore, the time and resource requirements to gain access and develop specific offensive capabilities may render important escalatory response options **infeasible or impractical** at the desired time. Operational planning and execution must consider that a given capability **may not** be usable or **even exist** at a chosen time of employment.29 As the above discussion illustrates, many of the target sets that would represent strategic (and therefore escalatory) targets, such as a state’s critical infrastructure or nuclear command and control, **demand extensive planning, pre-positioning, and capability development** in advance of employing offensive capabilities. Therefore, the timing of a crisis plays a crucial role in decisions about cyber escalation responses. Specifically, the time required to develop access to hold strategic targets at risk means that, even if a state seeks to escalate against an adversary using cyber means, it may find itself limited by the accesses and capabilities it possesses **at the moment** a crisis occurs. Cyber response options may be limited to **less decisive** or more vulnerable **target sets**, rather than those that are more strategically significant.

Third, these limitations become even more salient when we consider how strategic interactions are likely to play out over time during repeated crisis interactions. Because the virtual domain is changeable in a way that the physical world is not, actions taken by defenders in the context of a crisis can **radically and unpredictably** alter an attacker’s ability to deliver and sustain effects against a target over time.30 Access and capabilities are **neither guaranteed nor indefinite**—they have a shelf life.31 Footholds into a target’s network that were time intensive to develop **can unexpectedly disappear** as vulnerabilities in a network are patched. Exploits may have a short shelf life as revealing information about them enables targets to identify indicators of compromise (IOCs) and use these to prevent further damage from specific malware strains or quarantine malicious traffic using known malware signatures. An example of the latter is the US Cyber Command initiative, beginning in 2018, to share information about adversary malware by uploading samples to VirusTotal.32 Therefore, a target can “transition from vulnerability (to a particular attack) to invulnerability in, **literally, minutes**.”33 Third-party disclosure about software vulnerabilities by governments or private actors can also unintentionally precipitate the loss of access as exposure about vulnerability information enables network defenders to take measures to remedy them.34 For instance, the disclosures that began in 2016 by the group Shadow Brokers of purportedly pilfered US National Security Agency exploits and zero days ostensibly put US government accesses at risk.35 Put simply, a vulnerability upon which an access relies may in theory be only one update or disclosure away from being patched.

Thus, in the context of an ongoing crisis interaction between an attacker and defender, the former’s operational tempo is likely to be interrupted by the latter’s behavior, forcing the attacker to devote additional time to find or acquire new vulnerabilities and exploits in the midst of an offensive operation or campaign. As Inglis notes, to succeed in an offensive cyber campaign that unfolds over time, attackers must be able to sustain “the efficacy of tools under varying conditions caused by the defender’s response and the natural variability and dynamism of cyberspace.”36 The ability to build or acquire new accesses and capabilities “in real time” during a crisis is highly limited.37 Indeed, General Paul Nakasone remarked in a January 2019 interview on the radical difference in shelf life between conventional and cyber capabilities:

Compare the air and cyberspace domains. Weapons like JDAMs [ Joint Direct Attack Munitions] are an important armament for air operations. How long are those JDAMs good for? Perhaps 5, 10, or 15 years, sometimes longer given the adversary. When we buy a capability or tool for cyberspace . . . we rarely get a prolonged use we can measure in years. Our capabilities rarely last 6 months, let alone 6 years. This is a big difference in two important domains of future conflict.38

Therefore, as a 2013 Defense Science Board report notes, “offensive cyber will always be a **fragile capability**” when pitted against network defenders who are “**continuously improving** network defensive tools and techniques.”39

Each side can take defensive measures to blunt the impact and effectiveness of the other’s access and capabilities—particularly as information about them is revealed. Consequently, strategic accesses and capabilities are likely to become more vulnerable and less reliable over time, shrinking the set of cyber escalatory response options for all parties. This cycle is likely to generate temporal breaks in the pace of adversarial engagements in cyberspace, where states must regroup and develop or rebuild accesses and capabilities during an ongoing interaction. These pauses are likely to diffuse the pressure that typically accompanies—even defines—crisis situations, creating breathing space and, by extension, room for decisionmakers to deliberate alternative courses of action, for domestic political tensions to cool down, for intent to be communicated to adversaries, and for **de-escalation pathways to be determined.**

**petitions**

**Lobbying inevitable due to other doctrines.**

Adam **Winkler 21**, Connell Professor of law at the UCLA School of Law, “How American Corporations Used Courts and the Constitution to Avoid Government Regulation,” 2/12/21, ProMarket, https://promarket.org/2021/02/12/corporations-supereme-court-constitution-avoid-regulation/

Since the early days of the Republic, corporations have turned the Constitution itself into a shield against unwanted regulation of the economy. So long as the Supreme Court adheres to the view that corporate speech is no different than any other speech, any reform designed to limit the **influence of corporations** on the electoral process **is vulnerable**.

Editor’s note: This piece is part of our series on Corporations and Democracy, designed to continue the conversation initiated at a December 2020 conference by the same name sponsored by the Corporations and Society Initiative at Stanford GSB, and eight other schools and centers, including the Stigler Center at the University of Chicago Booth School of Business. See the conference’s website for a summary of the event, the program, full videos, and other links.

American politics and elections received a shock in 2010 when the US Supreme Court handed down its landmark decision in Citizens United, which said that corporations have the same First Amendment right as individuals to spend money on election advertisements. The decision triggered a new era of “**dark money**”—hidden, anonymous funds used to support candidates and skirt campaign disclosure laws—and has become a symbol of the outsized influence of business corporations on American democracy.

One reason for the power of American business that has often been overlooked is the long history of Supreme Court decisions, like Citizens United, extending the Constitution’s most **fundamental rights to corporations**.

When Americans think of corporate power, they might conjure up an image of something like “Bosses of the Senate,” the famous late 19th century political cartoon by Joseph Keppler that shows a dozen colossal businessmen filing into the United States Senate through a doorway marked “Entrance for Monopolists.” The corpulent businessmen, labelled “Standard Oil Trust,” “Cooper Trust,” and “Sugar Trust,” tower over the Lilliputian senators, who are helpless against the corporate behemoths of the day. **The power of corporations was political**: they used their money and influence to dominate legislators and win favorable legislation.

Yet, throughout American history, **corporations** have also built and maintained their power through the **courts and the judiciary**. They have turned the **Constitution itself into a shield** against unwanted regulation of the economy.

It certainly did not begin with Citizens United. The first Supreme Court case on whether business corporations had rights under the Constitution was decided all the way back in 1809. To put that in perspective, the first Supreme Court cases on the rights of African Americans and women weren’t decided for another half-century (1857 and 1873, respectively). Americans are taught the Supreme Court is a bulwark for the protection of vulnerable minorities but African Americans and women lost most of their Supreme Court cases until the mid-20th century. In contrast, the corporation involved in the first corporate rights case, the Bank of the United States, won. And corporations have been winning an **ever-expanding** number of constitutional rights since—rights they use to **challenge laws**, enacted in the public interest, that regulate business. If the Bosses of the Senate fail to control the legislatures, there is always the Constitution and the courts to save them.

In the early 1800s, the Bank of the United States was the richest and most powerful corporation in the country. Nearly all American businesses were local concerns at the time, but the Bank of the United States was a truly national corporation, with branches from Boston to New Orleans. Due to its size and influence over the economy, the Bank of the United States spurred passionate opposition. In Georgia, opponents of the bank imposed a special tax on bank in an effort to force it to leave the state, and the bank sought refuge in the federal courts.

The Bank of the United States’ case presented a familiar question to critics of Citizens United: Are corporations people? Or, more specifically, are corporations “Citizens” under Article III of the Constitution? That provision effectively provides citizens a right to sue in federal court when they sue citizens of other states. This provision reflected the Framers’ fear that a state court might favor that state’s own residents over litigants from other states. The Bank of the United States, headquartered in Philadelphia, argued that it too would be prejudiced if forced to litigate the lawfulness of Georgia’s popular tax in Georgia’s state courts.

There was no evidence the Framers intended the Constitution to protect business corporations. The rights of corporations were never discussed at the Constitutional Convention or in the state ratifying conventions. Nonetheless, the Supreme Court, in an opinion by legendary Chief Justice John Marshall, ruled that the Bank of the United States did have the right to sue in federal court. Although corporations were not “citizens” as required by Article III, Marshall explained that the Constitution should be read expansively: “A Constitution, from its nature, deals in generals, not in detail. Its framers cannot perceive minute distinctions which arise in the progress of the nation, and therefore confine it to the establishment of broad and general principles.” The bank, and the people behind it, were entitled to the protection against parochial state courts. The Bank of the United States case was an early example of living constitutionalism and big, wealthy corporations—not vulnerable minorities—were the beneficiaries.

“SO LONG AS THE SUPREME COURT ADHERES TO THE VIEW THAT **CORPORATE SPEECH IS NO DIFFERENT THAN ANY OTHER SPEECH**, **ANY REFORM** DESIGNED TO LIMIT THE VOICE OF CORPORATIONS IN THE ELECTORAL PROCESS **IS VULNERABLE**.”

In the two centuries since that first corporate rights case, business corporations have won nearly every other **constitutional protection** a corporation could want: freedom of **speech**, freedom of the **press**, freedom of **religion**, **due process** of law, the right to **compensation for property taken by the government**, the right against **double jeopardy**, and the **right to be free from unreasonable searches and seizures**, among others. The most controversial is the right to political speech recognized by the Supreme Court in Citizens United.

Business corporations first sought to establish that right nearly a century before Citizens United. Among the very first campaign finance laws were prohibitions on corporate spending on elections, enacted at the federal level in 1907 and in numerous states in the surrounding years. In the 1910s, when states were voting on whether to go “dry” in the runup to Prohibition, beer companies contributed to the opposition campaigns. When charged with violating campaign finance laws, the companies and their executives argued that the restrictions on corporate spending were unconstitutional. The courts, however, uniformly upheld the laws, with one explaining that corporations “must at all times be held subservient to the government and the citizenship of which it is composed.” To promote democratic self-government, government could limit corporate influence in elections.

Courts were willing to extend some rights to corporations but not all. The line they hewed to a century ago was that corporations were entitled to property rights but not liberty rights. Corporations were allowed to own property and the government could not take it without paying just compensation. They had basic due process and access to court rights that were essential to protecting their property. But corporations did not have liberty rights—i.e., rights of bodily autonomy, personal conscience, or political speech.

The boundary between property rights and liberty rights for corporations did not hold for long. In the 1930s, the Supreme Court ruled that newspaper companies were covered by the First Amendment’s freedom of the press even though they were corporations – and even though their publications were often political. In the 1960s, in the landmark case of New York Times v. Sullivan, the justices established the right to criticize public figures, and corporations like the New York Times Company enjoyed that right too. Then, in the 1978, in First National Bank of Boston v. Bellotti, the Supreme Court for the first time ruled explicitly that corporations had a right to spend money on at least some political campaigns.

The justice leading the charge in the 1978 case was Lewis Powell Jr. Just prior to joining the high court in 1971, Powell, then a board member of tobacco giant Philip Morris, had written a memorandum to the Chamber of Commerce outlining a program for the political mobilization of business. It was the era of Ralph Nader, and Congress had recently enacted groundbreaking legislation to protect the environment, consumer products, and highway safety. Powell thought reformers were unfairly targeting American business and his memorandum was a call to arms for business leaders to fight back to preserve the free market. The Powell Memorandum was widely shared, and today historians often credit it with inspiring the resurgence of politically active businesses in the 1980s and beyond.

In the Bellotti case, Powell transformed his memorandum into constitutional doctrine. The issue was whether corporations could make political expenditures to promote or oppose ballot measure campaigns. Writing for the Court, Powell rejected the dissenting justices’ complaint that the Court was extending to corporations broad free speech rights. Powell wrote that the issue was not whether corporations had free speech rights but whether the content of the corporations’ speech was political. If so, Powell explained, then the speech was protected regardless of who the speaker was.

The Bellotti ruling was limited; it only applied to ballot measure campaigns and, in a footnote, Powell suggested that campaigns for candidates were different. As a result, campaign finance laws restricting corporations from spending to elect officials remained good law. But Powell’s underlying approach to the First Amendment—that it protected the content of speech regardless of the speaker’s identity—would eventually overwhelm Bellotti’s limitations.

Perhaps surprising in light of the rhetoric of Citizens United’s critics, the Court in that case never said that corporations are people. Instead, the Court’s opinion echoed Powell’s principle that the identity of the speaker is irrelevant under the First Amendment. “Political speech is indispensable to decision-making in a democracy and this is no less true because the speech comes from a corporation rather than an individual.” It was a far cry from the courts of a century ago. To promote democratic self-government, government could not limit corporate influence in elections.

So long as the Supreme Court adheres to the view that **corporate speech is no different than any other speech**, **any reform** designed to limit the voice of corporations in the electoral process **is vulnerable**. There is every reason to suspect that each of the three Trump justices would affirm— if not expand—Citizens United. As a result, new campaign finance restrictions on corporations are likely to be **struck down**. **Special rules** for corporate political spending (such as shareholder consent requirements) may not be sufficiently **neutral** if only political speech is burdened. A constitutional amendment, of course, avoids the Supreme Court but faces daunting hurdles to ratification.

Mobilizing for a constitutional amendment or other legislation can, nonetheless, be useful for building political momentum for the cause of reform. The Supreme Court is not destined to be pro-corporate forever, so the job of reformers now is to formulate the arguments, do the research, and create a broader understanding of what they view as the proper role of corporations in society. And reformers should take a lesson from the corporations: constitutional revolutions are possible but may take centuries of persistent effort.

**Lobbying inevitable even with Noerr restrictions**

Robert **Atkinson &** Michael **Lind 18**, Mr. Atkinson is the president of the Information Technology and Innovation Foundation. Mr. Lind is a visiting professor at the University of Texas Johnson School of Public Affairs, “A Republic, If You Can Keep It: Big Business and Democracy,” Big Is Beautiful: Debunking the Myth of Small Business, MIT Press, 2018, pp 177-196

The Market Fundamentalist Tradition

While producer republicans fear that big business will turn formerly self-reliant republican citizens into wage slaves at the mercy of employers, market fundamentalists are more concerned that big businesses will enter into an **unholy alliance with big government** and in the process succeed in enriching themselves at the cost of the freedom of citizens and the pocketbooks of taxpayers.

The claim that “the corporations” control government at all levels is **commonly made** in the United States. The case would seem to be undeniable, if corporate spending on lobbying and campaign donations is considered in isolation from other political spending and if it is assumed that lobbyists and donors usually get their way. But **these assumptions are unrealistic**. When **all sources** of financial influence on politics are considered, it is clear that **big business competes for influence** with individual wealthy donors, nonprofit organizations, and trade associations representing small business. Nor is it the case that big business **always gets its way**. Indeed, on many issues, from **corporate tax reform** to **infrastructure** investment and **immigration reform**, the corporate sector has **experienced repeated defeat in American politics.**

Let us begin with campaign finance and lobbying. In 1907 Congress banned corporations from donating to federal political campaigns. In 1947 Congress then prohibited both unions and corporations from making independent political expenditures to help federal political candidates indirectly. But in 2010, in Citizens United v. Federal Election Commission, the Supreme Court ruled that both unions and corporations could spend unlimited amounts to help candidates as long as their expenditures were “independent” of parties and candidates.

The biggest winners of the campaign spending arms race begun by Citizens United have been **not corporations** but **rich individuals**. By February 2016, nearly **half of the money** that went into Super PACs—41 percent—came from **only fifty “megadonors”** and their relatives, led by Tom Steyer, a former hedge fund manager who contributes to environmentalist organizations and Democrats.20

Megadonors are an **elite within an elite**. According to Open Secrets, in the 2016 election only 0.52 percent of the US population made political contributions large enough to be itemized—$200 or over. This one-half of 1 percent of the population was responsible for 70.4 percent of all individual contributions to federal candidates, parties, and PACs.21 Some of these megadonors made their money in the corporate sector, as founders of startups or in some cases as CEOs; others come from finance or real estate; a substantial number inherited their money. It is hard to make a case that their motive for massive political spending is to win benefits for particular industries, much less particular companies or banks. On the contrary, studies show that many of them are motivated by ideology and partisanship, and in most cases they are motived by a desire to improve society.

The partisan preferences of individual megadonors are not typical of the US population. The politics of the American donor class skews in a libertarian direction—liberal on social issues, libertarian in economics. The average megadonor is far more likely than the average American voter to oppose higher taxes on the rich, support high levels of immigration, and favor cutting middle- class entitlements including Social Security and Medicare.22 But the self-interest of the rich, as a class, in policies like abolishing estate taxes and lowering capital gains and income tax rates is different from the particular objectives of particular corporations and particular industries, which typically involve matters of industry-specific regulation and business-related tax breaks.

What about lobbying by **corporations** and other **economic interest groups**, rather than **individuals?** According to Maplight, most of the top ten **spenders on lobbying** from 2008 to 2016 were **not individual corporations at all but trade associations**, with the US Chamber of Commerce at the top, followed by the National Association of Realtors, the US Chamber of Commerce Institute for Legal Reform, and Apparel for All. Two corporations—General Electric and Boeing—came in fourth and ninth place, respectively. But the rest are trade or professional associations, including the Pharmaceutical Research & Manufacturers of America, the American Medical Association, the American Hospitals Association, and the National Cable & Telecommunications Association.23 Of the top sixteen business PACs, five represent small business (National Association of Realtors, National Beer Wholesalers, National Auto Dealers Association, National Association of Insurance and Financial Advisors, and Credit Union National Association).24

Some of the industries represented by trade associations with deep pockets are dominated by large firms because they are increasing-returns industries, like pharmaceuticals and cable and broadband. But the top spender, the US Chamber of Commerce, represents **many small firms**, and the number two lobbying of Commerce, represents many small firms, and the number two lobbying spender, the National Association of **Realtors**, represents a highly **fragmented** industry in which the typical realtor’s office is local and employs only a **few people**. For its part, the American Medical Association has long represented the interests of physicians working alone or in small partnerships, who until recently accounted for most doctors.

Lobbying expenditures, like campaign donations, probably **exaggerate** the influence of large companies and minimize the **actual influence** of small businesses. Much of the influence of small business arises from **geography**. In every congressional district and every state there are family farmers, franchise owners, automobile dealers, realtors, and others whose support politicians cannot ignore. In contrast, the headquarters and production facilities of major national and global corporations are found in a relatively small number of places. Every American state has family farmers and realtors; far fewer have automobile or aerospace manufacturers. Local businesses and their employees and suppliers provide the small business lobby with an unpaid auxiliary army whose influence is exercised through the ballot box rather than by means of campaign contributions. As Charles Brown, James Hamilton, and James Medoff write, “As a lobbyist for the National Federation of Independent Business (NFIB) put it in assessing the impact of these political resources: ‘Small business is a terrifically effective lobbying force. There are more of us. Our members are personally involved in their businesses; they aren’t managers. Our people make up the vast majority of the moderate-to-conservative, politically active people back home.’”25

Moreover, while large firms sometimes lobby for what economists call rent- seeking activities, which **divide** the economic pie rather than grow it, **so too do small firms**. For example, the National Federation of Independent Business’s lobbying agenda features three main rent-seeking issues: cutting the tax rates of the wealthy (e.g., cutting the top marginal tax rate and repealing the estate tax), repealing the Affordable Care Act, and eliminating regulations.26

To imagine that if the economy was made up just of small “yeoman” businesses, they **would not lobby** for programs to protect their economic interests, is to **ignore political realty**. Small car dealers would still lobby to prohibit large car manufacturers from selling directly to consumers. Small dairy farmers would still lobby for subsidies and trade protection. Organic food growers would still lobby to raise food prices by limiting the use of biotechnology-based crops.

**Growth skyrocketing**

**Clinkard 11/11** (John, 35 years’ experience as an economist in international, national and regional research and analysis with leading financial institutions, “Economic horizon brighter, except for inflation cloud,” Nov 11, 2021, <https://canada.constructconnect.com/canadata/forecaster/economic/2021/11/economic-horizon-brighter-except-for-inflation-cloud)//NRG>

$1.2 trillion **Infrastructure** Bill **adds fuel to already hot fire**

The combination of measures to limit an upsurge in cases of the COVID-19 Delta variant, unprecedented supply chain issues, and an acute shortage of skilled and unskilled labour caused the U.S. economy to slow from +6.7% q/q in Q2/21 to +2.0% in Q3. While growth slowed in Q3, inflation ticked higher from +5.3% y/y to +5.4% y/y.

Looking ahead, the recent passage of a **$1.2 trillion infrastructure bill materially improves the outlook for capital spending on roads and bridges in the U.S.**, as well as on **broadband internet** and on an **overhaul of the electrical grid**. However, with inflation moving to levels last seen in 2006, we expect the Federal Reserve to begin hiking interest rates sooner than originally intended, thereby putting a damper on consumer spending and housing demand.

Having said this, **rising vaccination rates** across the US will reduce the drag on growth due to COVID-19 and give a boost to the **travel** and **hospitality** industry. Supply chain issues have contributed to a growing backlog of new orders and total **private employment is up by 5.3 million** jobs since the beginning of 2021. With both the Conference Board’s Help-wanted Online Index and the **Job Openings** and **Labour Turnover** (JOLTS) **indices at record highs**, the **outlook for hiring remains positive**.

Strong year-to-date job gains, persisting (for now) **low-interest rates and a rebound in consumer confidence** should cause **consumer spending** and residential **construction** to underpin growth heading into 2022. Nevertheless, we expect the impact of a gradual tightening of monetary policy aimed at reining in inflation, persisting shortages of critical materials, and ongoing hiring problems will limit growth to +3.2% to +3.7% next year following an estimated gain of +5.4% in 2021.

**Slow growth doesn’t cause populist support**

**Mutz 18** --- Diana C. Mutz, Professor of Political Science and Communication Director, Institute for the Study of Citizens and Politics, “Status threat, not economic hardship, explains the 2016 presidential vote”, PNAS, May 8, 2018 115 (19), https://www.pnas.org/content/115/19/E4330

There are two reasons for skepticism regarding the assumption that personal **economic hardship** drove Trump support. **First and foremost**, over **many decades** of scholarship, evidence of voters **politicizing** personal **economic hardship** has been **exceedingly rare** (8). Although aggregate-level evidence has been suggestive of a public that blames incumbents for general economic downturns and rewards incumbents for economic gains, these relationships **seldom hold up at the level of individual economic hardship**. For example, those who recently lost jobs **are unlikely to blame government policy** for their personal circumstances (9), and those who have personally suffered financially under a given administration **are no more likely to vote against the incumbent** (10, 11). Across a wide **range** of issues, scholars have found that citizens **seldom form policy or candidate preferences** on the basis of their **family’s personal economic self-interest**. This is not to suggest that citizens never do so, but the conditions under which this occurs are **very rare** (12, 13). Even membership in groups with economic interests that have been helped or hurt **seldom changes political preferences** (14).

A second reason for skepticism regarding the left behind thesis involves **timing**. Trump’s victory took place in the context of an **economic recovery.** Throughout the year preceding the election, **unemployment was falling**, and economic indicators were **on the upswing**. Likewise, the dramatic drop in US manufacturing jobs took place during the first decade of the 21st century; since 2010, manufacturing employment in the United States has **actually increased** somewhat (15). Research on economic voting suggests that recent economic events are most influential for voting (16, 17). Given all of the **positive economic indicators**, why would 2016 be ripe for an economic backlash? The most common explanation is that it is precisely those who did not recover from the Great Recession of 2008 who elected Trump, those who were left behind by virtue of ongoing joblessness and/or stagnant wages.

**Liberal order is resilient and inevitable**

**DEUDNEY & IKENBERRY 18** --- DANIEL DEUDNEY is Associate Professor of Political Science at Johns Hopkins University., G. JOHN IKENBERRY is Albert G. Milbank Professor of Politics and International Affairs at Princeton University, “Liberal World The Resilient Order”, Foreign Affairs, July/August 2018, https://scholar.princeton.edu/sites/default/files/gji3/files/05\_deudney\_ikenberry.pdf

**THE RESILIENT ORDER**

After World War II, liberal democracies joined together to create an international order that reflected their shared interests. And as is the case with liberal democracy itself, the order that emerged to accompany it **cannot be easily undone**. For one thing, **it is deeply embedded**. Hundreds of millions, if not **billions**, of people have geared their activities and expectations to the order’s institutions and incentives, from farmers to microchip makers. However unappealing aspects of it may be, replacing the liberal order with something significantly different **would be extremely difficult**. Despite the high expectations they generate, revolutionary moments **often fail** to make enduring changes. It is unrealistic today to think that a few years of nationalist demagoguery will dramatically undo liberalism.

Growing interdependence makes the order **especially difficult to overturn**. Ever since its inception in the eighteenth century, liberalism has been **deeply committed** to the progressive improvement of the human condition through scientific discovery and technological advancements. This Enlightenment project began to bear practical fruits on a large scale in the nineteenth century, transforming virtually every aspect of human life. New techniques for production, communication, transportation, and destruction poured forth. The liberal system has been at the forefront not just of stoking those fires of innovation but also of addressing the negative consequences. Adam Smiths case for free trade, for example, was strengthened when it became easier to establish supply chains across global distances. And the age-old case for peace was vastly strengthened when weapons evolved from being simple and limited in their destruction to the city-busting missiles of the nuclear era. Liberal democratic capitalist societies have thrived and expanded because they have been particularly adept at stimulating and exploiting innovation and at coping with their spillover effects and negative externalities. In short, liberal modernity excels at both harvesting the fruits of modem advance and guarding against its dangers.

This dynamic of constant change and ever-increasing interdependence is **only accelerating.** Human progress has caused grave harm to the planet and its atmosphere, yet climate change will also require unprecedented levels of international cooperation. With the rise of bioweapons and cyberwarfare, the capabilities to wreak mass destruction are getting cheaper and ever more accessible, making the international regulation of these technologies a vital national security imperative for all countries. At the same time, global capitalism has drawn more people and countries into cross-border webs of exchange, thus making virtually everyone dependent on the competent management of international finance and trade. In the age of global interdependence, **even a realist must be an internationalist.**

The international order is also likely to persist because its survival **does not depend on** all of its **members being liberal democracies**. The return of isolationism, the rise of illiberal regimes such as China and Russia, and the general recession of liberal democracy in many parts of the world appear to bode ill for the liberal international order. But contrary to the conventional wisdom, **many of its institutions are not uniquely liberal in character**. Rather, **they are Westphalian**, in that they are designed merely to solve problems of sovereign states, whether they be democratic or authoritarian. And many of the key participants in these institutions are anything but liberal or democratic.

Consider the Soviet Unions cooperative efforts during the Cold War. Back then, the liberal world order was primarily an arrangement among liberal democracies in Europe, North America, and East Asia. Even so, the Soviet Union often worked with the democracies to help build international institutions. Moscow’s committed antiliberal stance did not stop it from partnering with Washington to create a raft of arms control agreements. Nor did it stop it from cooperating with Washington through the World Health Organization to spearhead a global campaign to eradicate smallpox, which succeeded in completely eliminating the disease by 1979.

More recently, countries of all stripes have crafted global rules to guard against environmental destruction. The signatories to the Paris climate agreement, for example, include such autocracies as China, Iran, and Russia. Westphalian approaches have also thrived when it comes to governing the commons, such as the ocean, the atmosphere, outer space, and Antarctica. To name just one example, the 1987 Montreal Protocol, which has thwarted the destruction of the ozone layer, has been actively supported by **democracies and dictatorships** alike. Such agreements are not challenges to the sovereignty of the states that create them but collective measures to solve problems they cannot address on their own.

Most institutions in the liberal order do not demand that their backers be liberal democracies; they only require that they be status quo powers and capable of fulfilling their commitments. They do not challenge the Westphalian system; they codify it. The UN, for example, enshrines the principle of state sovereignty and, through the permanent members of the Security Council, the notion of great-power decision-making. **All of this makes the order more durable**. Because **much of international cooperation** has **nothing at all to do with liberalism or democracy**, when politicians who are hostile to all things liberal are in power, **they** can still **retain their international agendas and keep the order alive.** The persistence of Westphalian institutions provides a lasting foundation on which distinctively liberal and democratic institutions can be erected in the future.

Another reason to believe that the liberal order will endure involves the return of ideological rivalry. The last two and a half decades have been profoundly anomalous in that liberalism **has had no credible competitor**. During the rest of its existence, it faced competition that made it stronger. Throughout the nineteenth century, liberal democracies sought to outperform monarchical, hereditary, and aristocratic regimes. During the first half of the twentieth century, autocratic and fascist competitors created strong incentives for the liberal democracies to get their own houses in order and band together. And after World War II, they built the liberal order in part to contain the threat of the Soviet Union and international communism.

The Chinese Communist Party appears increasingly likely to seek to offer an alternative to the components of the existing order that have to do with economic liberalism and human rights. If it ends up competing with the liberal democracies, they will again face pressure to champion their values. As during the Cold War, they will have incentives to undertake domestic reforms and strengthen their international alliances. The collapse of the Soviet Union, although a great milestone in the annals of the advance of liberal democracy, had the ironic effect of eliminating one of its main drivers of solidarity. The bad news of renewed ideological rivalry could be good news for the liberal international order.

CORE MELTDOWN

In challenging the U.S. commitment to NATO and the trading rules of the North American Free Trade Agreement (nafta) and the World Trade Organization, Trump has called into question the United States’ traditional role as the leader of the liberal order. And with the vote to leave the EU, the United Kingdom has launched itself into the uncharted seas of a full withdrawal from Europe’s most prized postwar institution. In an unprecedented move, the Anglo-American core of the liberal order **appears to have fully reversed course.**

Despite what the backers of Trump and Brexit promise, actually effecting a real withdrawal from these long-standing commitments **will be difficult to accomplish**. That’s because the institutions of the liberal international order, although often treated as ephemeral and fragile, **are actually quite resilient**. They did not emerge by accident; they were the product of deeply held interests. Over the decades, the activities and interests of **countless actors**—corporations, civic groups, and government bureaucracies—**have become intricately entangled in these institutions**. Severing those institutional ties sounds simple, but in practice, **it is devilishly complicated.**

The difficulties have already become abundantly dear with Brexit. It is not so easy, it turns out, to undo in one fell swoop a set of institutional arrangements that were developed over five decades and that touch on virtually every aspect of British life and government. Divorcing the EU means scrapping solutions to real problems, problems that haven’t gone away. In Northern Ireland, for example, negotiators in the 1990s found an elegant solution to the long-running conflict there by allowing the region to part of the United Kingdom but insisting that there be no border controls between it and the Republic of Ireland—a bargain that leaving the EU s single market and customs union would undo. If officials do manage to fully implement Brexit, it seems an inescapable conclusion that the United Kingdoms economic output and influence in the world will fall.

Likewise, the initial efforts by the Trump administration to unilaterally alter the terms of trade with China and renegotiate NAFTA with Canada and Mexico have revealed how intertwined these countries’ economies are with the U.S. economy. New international linkages of production and trade have clearly produced losers, but they have also produced many winners who have a vested interest in maintaining the status quo. Farmers and manufacturers, for instance, have reaped massive gains from NAFTA and have lobbied hard for Trump to keep the agreement intact, making it politically difficult for him to pull off an outright withdrawal.

The incentives for Washington to stay in international security institutions are even greater. Abandoning NATO, as candidate Trump suggested the United States should do, would massively disrupt a security order that has provided seven decades of peace on a historically wartorn continent—and doing so at a time when Russia is resurgent would be all the more dangerous. The interests of the United States are so obviously well served by the existing security order that any American administration would be compelled to sustain them. Indeed, in lieu of withdrawing from NATO, Trump, as president, has shifted his focus to the time-honored American tradition of trying to get the Europeans to increase their defense spending to bear more o the burden. Similarly, major pieces of the nuclear arms control architecture from the end of the Cold War are unraveling and expiring. Unless American diplomatic leadership is forthcoming, the world may find itself thrown back into a largely unregulated nuclear arms race.

The Trump administrations initiatives on trade and alliance politics have generated a great deal of anxiety and uncertainty, but their actual effect is **less threatening**—more a revisiting of bargains than a pulling down of the order itself. Setting aside Trumps threats of complete withdrawal and his chaotic and impulsive style, his renegotiations of trade deals and security alliances can be seen as part an ongoing and necessary, if sometimes ugly, equilibration of the arrangements underlying the institutions of the liberal world order.

Moreover, despite Trumps relentless demeaning of the international order, **he has** sometimes **acted in ways that fulfill**, rather than challenge, **the traditional American role in it.** His most remarkable use of force so far has been to bomb Syria for its egregious violations of international norms against the use of chemical weapons on civilians. His policy toward Russia, while convoluted and compromised, has essentially been a continuation of that pursued by the George W. Bush and Obama administrations: sanctioning Russia for its revisionism in eastern Europe and cyberspace. Perhaps most important, Trumps focus on China as a great-power rival will compel him or some future administration to refurbish and expand U.S. alliances rather than withdraw from them. On the issues that matter most, Trumps foreign policy, despite its “America first” rhetoric and chaotic implementation, continues to move along the tracks of the American-built order.

In other areas, of course, Trump really is undermining the liberal order. But as the United States has stepped back, **others have stepped forward to sustain the project**. In a speech before the U.S. Congress in April, French President Emmanuel Macron spoke for many U.S. allies when he called on the international community to “step up our game and build the twenty-first-century world order, based on the perennial principles we established together after World War II.” Many allies are already doing just that. Even though Trump withdrew the United States from the Trans-Pacific Partnership, the trade deal **lives on,** with the 11 other member states implementing their own version of the pact. Similarly, Trumps withdrawal from the Paris agreement has not stopped dozens of other countries from working to implement its ambitious goals. Nor is it preventing many U.S. states, cities, companies, and individuals from undertaking their own efforts. The liberal order may be losing its chief patron, but it rests on much more than leadership from the Oval Office.

It is easy to view developments over the last few years as a rebuke to the theory of liberalism and as a sign of the eclipse of liberal democracies and their international order. But **that would be a mistake**. Although the recent challenges should not be underestimated, it is important to recognize that they are closer to the **rule** than the **exception**. Against the baseline of the 1990s, when the end of the Cold War seemed to signal the permanent triumph of liberal democracy and the “end of history,” the recent setbacks and uncertainties look insurmountable. In the larger sweep of history, however, Brexit, Trump, and the new nationalism **do not seem so unprecedented or perilous**. The liberal democracies have **survived and flourished** in the face of far greater challenges—**the Great Depression**, the Axis powers, and the international communist movement. There is **every reason** to believe they can outlive this one.

## Section 5

### 2NC v PDCP

#### We compete on three 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”)

#### 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 regulations 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 regulations 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 regulations 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 Homeland Security Act 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 regulations, 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 regulations.

#### 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 Federal Trade Commission Act 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 Federal Trade Commission Act 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 Act, 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.

**A2: Rule of law**

**We turn it – the Cplan is better for legal and business predictability**

**Khan ‘20**

et al; At the time of this writing, Lina Khan was an Academic Fellow, Columbia Law School; Counsel, Subcommittee on Antitrust, Commercial, and Administrative Law, US House Committee on the Judiciary; and former Legal Fellow, Federal Trade Commission. Now, Lina Khan serves as the head of the FTC. The co-author for this piece is Rohit Chopra, who was previously The Assistant Director of the Consumer Financial Protection Bureau and currently sits on the FTC. “The Case for “Unfair Methods of Competition” Rulemaking”, 87 U. CHI. L. REV. 357, 359-63 - #E&F – 2020 - https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/ChopraKhan\_Rulemaking\_87UCLR357.pdf

Antitrust law today is developed exclusively through adjudication. In theory, this case-by-case approach facilitates nuanced and fact-specific analysis of liability and well-tailored remedies. But in practice, the reliance on case-by-case adjudication yields a system of enforcement that generates ambiguity, unduly drains resources from enforcers, and deprives individuals and firms of any real opportunity to democratically participate in the process.

One reason that antitrust adjudication suffers from these shortcomings is that courts analyze most forms of conduct under the “rule of reason” standard. The “rule of reason” involves a broad and open-ended inquiry into the overall competitive effects of particular conduct and asks judges to weigh the circumstances to decide whether the practice at issue violates the antitrust laws. Balancing short-term losses against future predicted gains calls for “speculative, possibly labyrinthine, and unnecessary” analysis and appears to exceed the abilities of **even the most capable institutional** actors.1 Generalist judges struggle to identify anticompetitive behavior2 and to apply complex economic criteria in consistent ways.3 Indeed, judges themselves have criticized antitrust standards for being highly difficult to administer.4 And if a standard isn’t administrable, **it won’t yield predictable results.** The dearth of clear standards and rules in antitrust means that market actors face uncertainty and cannot internalize legal norms into their business decisions.5 Moreover, ambiguity deprives market participants and the public of notice about what the law is, thereby undermining due process—a fundamental principle in our legal system.6

Decades ago, former Commissioner Philip Elman observed that case-by-case adjudication “may simply be too slow and cumbersome to produce specific and clear standards adequate to the needs of businessmen, the private bar, and the government agencies.”7 Relying solely on case-by-case adjudication means that businesses and the public must attempt to extract legal rules from a patchwork of individual court opinions. Because antitrust plaintiffs bring cases in **dozens of different courts** with **hundreds of different generalist judges and juries,** simply understanding what the law is can involve piecing together disparate rulings founded on unique sets of facts. All too often, the resulting picture is unclear. This ambiguity is compounded when the Supreme Court assigns to lower courts the task of fleshing out how to structure and apply a standard, potentially delaying clarity and certainty for years or even decades.8

**2NC – A2: Okuliar/Uncertainty and delay**

**The FTC rescinded its prior framework – but hasn’t followed-through with action. New guidance key**

**Okuliar ‘21**

et al; Alexander Paul Okuliar, Co-chair of Morrison & Foerster’s Global Antitrust Law Practice Group. A seasoned litigator, and former senior Department of Justice (DOJ) and Federal Trade Commission (FTC) official, Alex draws upon two decades of mergers and enforcement experience – “FTC Meeting Signals Aggressive and Novel Enforcement to Come” - Morrison & Foerster - 12 Jul 2021 - #E&F - <https://www.mofo.com/resources/insights/210712-ftc-meeting-signals-aggressive.html>

The Commission rescinded a bipartisan 2015 UMC Policy Statement that laid out the framework for enforcing Section 5 **of the Federal Trade Commission Act**. Section 5 makes “unfair methods of competition” unlawful and i**s the basis by which the FTC brings competition actions.**[6] Case law establishes that Section 5 sweeps in conduct condemned by the Sherman Act and Clayton Act, but there is longstanding ambiguity about how far Section 5’s prohibitions extend beyond the Sherman and Clayton Acts. The 2015 UMC Policy Statement contemplated case-by-case Section 5 enforcement “guided by the public policy underlying the antitrust laws, namely the promotion of the consumer welfare standard” using a framework “similar to the rule of reason” requiring evidence of “harm to competition or the competitive process,” including taking into account “cognizable efficiencies and business justifications.”[7] The 2015 UMC Policy Statement was intended to place reasonable **bounds on the agency’s** ambiguous **Section 5 authority** and to harmonize its approach to antitrust with that of other government enforcers, private parties, and courts.

Although the 2015 UMC Policy Statement explicitly noted that Section 5 reaches conduct outside the letter of the Sherman Act, [8] Chair Khan criticized it as artificially limiting the scope of the FTC’s authority **by tying it to existing antitrust jurisprudence**. According to Chair Khan, “coupling Section 5 to the Sherman Act has led courts **to bind the FTC to liability standards** created by generalist judges in private treble-damages actions under the Sherman Act.”[9] Further, she said, “in practice, the 2015 statement has doubled down on the agency’s longstanding failure to investigate and pursue unfair methods of competition.”[10]

Neither Chair Khan nor any other commissioner supporting rescission has **advanced a framework** to replace the old 2015 policy. But Chair Khan intimated that the FTC may engage in substantive rulemaking on the matter,[11] stating that “in the coming months, the Commission will consider whether to issue new guidance or to propose rules that will **further clarify the types of practices that warrant scrutiny under this provision**. ***In the meantime,*** the Commission will exercise responsibly its prosecutorial discretion in determining which cases are appropriate under Section 5, **consistent with legal precedent.”**[12]

**A2: Rollback**

**YES, they’ll be legal *challengers* – NO, they won’t win.**

**AND, when FTC wins in court, the CP de facto establishes the same legal norm as the Aff.**

**Parra ’17**

Daniel Alejandro Castano Parra. Currently is a Teaching Master in Economic Law with emphasis in Banking and Stock Market Law, Specialization in Financial and Stock Market Law and Specialization in Fintech Law at Externado de Colombia University. Wrote this paper as part of obtaining a JD from California, Berkeley – “A Contribution to the Study of Administrative Power in a Philosophical Perspective” - A dissertation submitted in partial satisfaction of the requirements for the degree of Doctor of Juridical Science – Scientiae Juridicae Doctor (JSD) in The School of Law of the University of California, Berkeley – Summer 2017 - #E&F - https://digitalassets.lib.berkeley.edu/etd/ucb/text/CastanoParra\_berkeley\_0028E\_17330.pdf

**CHAPTER II**

**ADMINISTRATIVE REASONING & DISAGREEMENT ABOUT LAW**

"There is need also for a technique of appraising the work of administrative agencies, and of establishing the utility of such scientific **appraisals.** The generalizations, the philosophizing will gradually emerge from **specific studies**. Intensive studies of the administrative law of the States and the Nation **in practice** will furnish the necessary prerequisite to an understanding of what administrative law is really doing, so that we may have an adequate guide for what ought to be done. Here, as in other branches of public law, only here probably more so, we must travel outside the covers of lawbooks to understand law" - Felix Frankfurter

This Chapter focuses on the administrative power and disagreement about the law. It questions whether the **admin**istrative **power decides** hard **cases and gets away with it**. **My answer** is that it does **under certain circumstances**. I claim that, like the judiciary, legal institutions **endowed with administrative power** decide hard cases and that their administrative decisions sometimes **become final** when **courts endorse**d **them.** I suggest the administrative power decides complex moral and political philosophy conflicts about the planning and allocation of valuable resources in a democratic polity in the form of theoretical disagreement or meta-interpretive disagreement about law and that these **administrative** decisions may elicit **profound change**s **in the polity as a whole**. It is not my purpose, however, to deny that courts ***may*** **strike down** such administrative decisions or that empirical disagreement about the law may also lead to administrative hard cases. It does, **but** this dissertation focuses on hard cases that spring from theoretical or meta-interpretive disagreement about law, how administrative decision-makers decide them, and how such **administrative interpretations of what the law is** become final **when courts endorse them**.

To do so, I will present four real-world hard cases to portray the nature of the disagreement that gave them rise and to describe how the administrative power decides them. This Chapter proceeds as follows. First, based on the working definition of a hard case that I introduced in Chapter One, I will present four real-world hard cases to describe how legal institutions endowed with administrative power decide hard cases and the complex moral and political philosophy quandaries that give them rise.. Second, in light of the literature of jurisprudence, I will describe the empirical, theoretical, and meta-interpretive disagreements that may arise in legal practice**.** Then, drawing on such theoretical description, I will portray how the administrative power not only decides empirical disagreements, but also theoretical and meta-interpretive disagreements about law. On the account that legal institutions endowed with administrative power decide hard cases, I will describe how they decide complex moral and political philosophy quandaries whose solutions sometimes elicit **profound change**s in a polity.

In fact, the four administrative hard cases that I will present suggest that the parties do not disagree about whether the grounds of law have obtained or whether the administrative rule or adjudication was made by the administrative body in pursuance to the parent act enacted by the legislature. I argue that these hard cases reveal complex moral and political philosophy quandaries whose solution may elicit profound changes in the polity. For that reason, the solution the complex controversies that give rise to these cases **requires** **more than a judgment about** whether the **grounds of law** have obtained **in the particular case**. Put it differently, the answer to these disagreements **lies beyond** the decision about whether the administrative rule or adjudication was made by the administrative body in pursuance to the parent act enacted by the legislature and the constitution. It follows, therefore, that the real point of contention is a theoretical disagreement about what counts as grounds of the law or a meta-interpretive disagreement about the different interpretive methodologies that could be used to **construe a legal norm.**

I must enter two caveats. First, one is prone to be repetitive in describing in great detail four real-world cases drawn from two different legal systems to portray the different disagreements that gave them rise and how the administrative bodies decided them. Thus, most of the facts that I describe in this section will be recapped in the following Chapters with different purposes that I shall explain on due course. Second, the Colombian General Administrative Procedure Act does not require any particular standing to challenge the validity of an administrative rule. Thus, it is difficult to identify the reasons behind the petitions for judicial review of administrative rules insofar as plaintiffs are not obliged to disclose their policy or moral interests behind the litigation, but only to introduce legal arguments in support of their legal claims. Hence, although it is not possible to identify the interests that lead the plaintiff to challenge an administrative rule's validity, I will trace back the policy origins of the administrative decision to the best of my capacity.

Having explained what this Chapter is about, I must now explain what it is not. Although I will describe in detail the underlying facts and legal arguments of each case, I will not assess the wisdom of the policies as to their causes and consequences. Nor will I discuss whether the decisions rendered by legal institutions endowed with administrative power and later endorsed by courts are good or bad policy.

Four Real-World Administrative Hard Cases

I will start off by analyzing in detail four real-world administrative hard cases in light of the working definition of a hard case that I introduced in Chapter One. My aim is twofold. First, I shall put in practice my claim that hard cases spring from complex political and moral philosophy disagreements regardless of their source. Second, I shall show how legal institutions endowed with administrative power solve them. Such administrative decisions later became final when the higher courts of Colombia and the United States endorsed them.

These four examples, two administrative rulemaking procedures, and two administrative adjudications were chosen based on the following criteria: 1. The cases involve statutes and administrative normative provisions regulating competing interests in fields developing at a vertiginous rate; 2. Due to the complexity and the evolving nature of the field, Congress revisits the matter periodically to assess, amend statutes, and restate the law; 3. Although Congress revisits the field periodically to restate the law, vagueness in the statutes prevails as to certain questions that may arise in the given statutory schemes; 4. Legal institutions endowed with administrative power are called upon to resolve such questions relying on their experience and expertise; 5. To do so, administrative authorities engage in rulemaking, adjudicatory, and enforcement proceedings; 6. Courts review such administrative actions upon petition for judicial review; 7. Courts uphold such administrative actions by deferring to an agency's interpretation of the statutes they administer; 8. Congress revisits the matter and decides to endorse or override administrative interpretations of what the law is.

I call them administrative hard cases because, regardless of legal traditions, constitutional schemes, and institutional arrangements, administrative agencies where called upon to solve the controversies and their underlying **moral and political philosophy** quandaries, which entailed, **in turn**, **significant changes in** the **polities as a whole**. The Higher Courts of the United States of America and Colombia deferred to the administrative interpretations and decisions without any further inquiry into the substance of the questions at issue. The first objection that an administrative law expert would make to this approach is that these cases cannot be labeled as "hard" under the argument that they do not fall under the working definition of a "hard case" that I have described in Chapter One insofar as courts decided them in a relatively uncontroversial fashion. This objection does not hold true because, though they are easy cases for the courts to decide, they were hard for the administrative bodies to resolve. This Chapter focuses on the administrative debates.

**No rollback of Administrative Constitutionalism – too much Administrative & Legal momentum stemming from the New Deal.**

**Rodriguez ‘21**

et al; internally quoting Gillian E. Metzger - Vice Dean and Stanley H. Fuld Professor of Law, Columbia Law School. Daniel B. Rodriguez is a Professor at Northwestern University Pritzker School of Law - “Engineering the Modern Administrative State: Political Accommodation and Legal Strategy in the New Deal Era” - BYU Law Review - Volume 46 Issue 1 – Spring - Feb-15-2021 - #E&F – continues to footnote #2 . No text omitted – but does not include the table of contents – modified for language that may offend - Available at: https://digitalcommons.law.byu.edu/lawreview/vol46/iss111

Administrative constitutionalism in the United States has been characterized by **tension** and **accommodation**. The tension reflects the unsettled nature of our constitutional scheme, especially with regard to separation of powers, and also the concern with **agency discretion** and performance. **Still** and all, we have **accommodated administrative constitutionalism** in fundamental ways, through a constitutional jurisprudence that, **in the main,** accepts broad delegations of regulatory power to the bureaucracy and an administrative law that oversees agency actions under procedural and substantive guidelines. **This was not always the case**. In this Article , part one of a larger project, we revisit the critical New Deal period to look at the strategies the Congress and the Supreme Court used to resolve controversies over the emerging administrative state. We see the political and legal accommodation as a product of a (mostly) coherent interbranch dialogue, iterative and fueled by strategy. Having surmounted some **important roadblocks** in the first New Deal, this effort ultimately resulted in a scheme that enabled the federal government to accomplish their three critical objectives: to deploy national power to solve new economic problems, to create delegations appropriate to modern needs, and to craft novel administrative instruments to carry out legislative aims aims — all of which required a due amount of legal accommodation, given extant legal doctrine and the interests of the courts.

The long-standing issue of how the modern administrative state emerged from the Sturm und Drang of politics on the one hand and the complex architecture of traditional legal doctrine on the other remains a central question for public law scholarship.1 Many of our leading legal historians have turned their great talents to this question.**2** Standard wisdom notwithstanding, we revisit this perennial topic in part because no consensus exists as to how to answer this question.3

**2**. In addition to sources cited in supra note 1, see LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996); WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1995). Moreover, the primary and secondary questions in this vein appear with more or less prominence in books and articles that focus on contemporary legal doctrine. For example, Gillian Metzger’s recent Harvard Foreword recurs to the New Deal period to articulate anew the case for a **well-fortified** **consensus** ~~view~~ (perspective) of the **durability of administrative constitutionalism.** Gillian E. Metzger, 1930s Redux: The Administrative State Under Siege, 131 HARV. L. REV. 1 (2017). Calling the administrative state “constitutionally obligatory,” she notes that these legislative delegations of power to agencies “are here to stay.” Id. at 72. To be sure, the modern literature does not want for **full-throated** critiques of the administrative state, looking with particular ire at the world wrought by the New Deal’s accommodation to broad administrative power. See, e.g., PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); D.A. Candeub, Tyranny and Administrative Law, 59 ARIZ. L. REV. 49 (2017); Richard A. Epstein, The Perilous Position of the Rule of Law and the Administrative State, 36 HARV. J.L. & PUB. POL’Y 5 (2013). However, **the constitutional objections** have largely been resolved in **favor of administrative constitutionalism**, and there is little reason to believe that **even the most vigorous contemporary attacks** on the “dark state” will unwind this situation. See Adrian Vermeule, Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State, 130 HARV. L. REV. 2463, 2465 n.3 (2017) (comparing administrative state skepticism to “believing in UFOs or watching dystopian movies”); see also EDWARD L. RUBIN, BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE (2005); Cass R. Sunstein & Adrian Vermeule, The Morality of Administrative Law, 131 HARV. L. REV. 1924 (2018).

**Adv 1**

**5G**

**China 5G is terrible**

**Xie 20** --- John Xie, VOA, “Chinese 5G Not Living Up to Its Hype”, Oct 10th 2020, https://www.voanews.com/a/east-asia-pacific\_voa-news-china\_chinese-5g-not-living-its-hype/6196962.html

5G is one of the biggest technology investments in China's recent history. Touted as the next big leap forward in digital communication, the 5th generation mobile network technology is supposed to change the world and spur a new digital revolution.

China officially launched its commercial 5G networks in September 2019 with the promise of delivering unprecedented digital speed to support new applications from autonomous driving to virtual surgery. More than a year later, the biggest 5G market is now facing widespread complaints about network speed and skyrocketing costs of deployments.

**Signals are hitting walls**

To handle more data at higher speeds, 5G uses higher frequencies than current networks. However, the signals travel shorter distances and **encounter more interference**.

"5G uses ultra-high frequency signals, which are about two to three times higher than the existing 4G signal frequency, so the signal coverage will be limited," Wang Xiaofei, a communication expert at Tianjin University told Xinhua, the official state-run press agency, last year as the country's state telecoms started to make 5G networks available to the public.

Wang said since the coverage radius of its base station is only about 100 meters to 300 meters, China must build a station every 200 to 300 meters in urban areas. Because **the penetration of 5G signals is so weak,** even indoor stations will have to be built in densely distributed office buildings, residential areas, and commercial districts.

And to reach the same coverage that 4G currently has, the carriers eventually need to install as many as **10 million stations across the country**, according to a report by Xinhua.

"For the next three years starting this year, **1 million 5G base stations may need to be built every year,"** Xiang Ligang, director-general of the Information Consumption Alliance, a telecom industry association, told the state media last year.

In the first half of this year, China only built 257,000 new 5G base stations. The total number of the stations installed across China so far was only about 410,000 by the end of June, according to the Ministry of Industry and Information Technology (MIIT).

Big costs, small benefits?

The cost of the energy needed to power 5G has proved to be one of the **biggest headaches for Chinese telecommunication companies.**

"The 5G base station equipment consumes about **three times more energy** than 4G because of the way the technology works," Soumya Sen, associate professor of information and decision sciences at the University of Minnesota, told VOA in an email. "5G uses multiple antennas to make use of reflected signals from buildings to provide gains in channel robustness and throughput."

If 5G is to reach the same level of coverage as 4G networks, **the base station's annual electricity bill will approach $29 billion,** according to a report by the China Post and Telecommunications News, a media outlet directly under MIIT. That amount represents about 10 times the 2019 profit of China Telecom, one of the three state-owned telecommunication companies in China.

In the early days, there were efforts to make 5G more power-efficient than its predecessors, but the ambitions were quickly dashed as realities settled in.

Two months after the official rollout of 5G services, a top executive from a Chinese carrier admitted that operators had made little progress in reducing 5G power consumption and cost. Speaking at a GSMA (Groupe Speciale Mobile Association) seminar in Beijing last week, Li Zhengmao, executive vice president of China Mobile called on the government to subsidize electricity costs for telecoms.

"This might require government to support extended periods for subsidized monthly fees or subsidized handsets at the B2C [business to consumer] level, or tax breaks and other incentives," said Ross Feingold, a lawyer and political risk analyst.

The total investment could top $220 billion in the next few years, said Li Yizhong, former minister of Industry and Information Technology early this year during a forum.

Another former official warned in a recent speech that China’s 5G push could become a failed investment.

"The existing 5G technology is **very immature**, hundreds of billions of investment have been deployed, **and the operating cost is extremely high,** no application scenarios can be found, and it is difficult to digest the cost in the future," former finance minister Lou Jiwei reportedly warned in a recent speech last month.

**Adv 2**

**AT: Slow Growth U**

**Growth skyrocketing**

**Clinkard 11/11** (John, 35 years’ experience as an economist in international, national and regional research and analysis with leading financial institutions, “Economic horizon brighter, except for inflation cloud,” Nov 11, 2021, <https://canada.constructconnect.com/canadata/forecaster/economic/2021/11/economic-horizon-brighter-except-for-inflation-cloud)//NRG>

$1.2 trillion **Infrastructure** Bill **adds fuel to already hot fire**

The combination of measures to limit an upsurge in cases of the COVID-19 Delta variant, unprecedented supply chain issues, and an acute shortage of skilled and unskilled labour caused the U.S. economy to slow from +6.7% q/q in Q2/21 to +2.0% in Q3. While growth slowed in Q3, inflation ticked higher from +5.3% y/y to +5.4% y/y.

Looking ahead, the recent passage of a **$1.2 trillion infrastructure bill materially improves the outlook for capital spending on roads and bridges in the U.S.**, as well as on **broadband internet** and on an **overhaul of the electrical grid**. However, with inflation moving to levels last seen in 2006, we expect the Federal Reserve to begin hiking interest rates sooner than originally intended, thereby putting a damper on consumer spending and housing demand.

Having said this, **rising vaccination rates** across the US will reduce the drag on growth due to COVID-19 and give a boost to the **travel** and **hospitality** industry. Supply chain issues have contributed to a growing backlog of new orders and total **private employment is up by 5.3 million** jobs since the beginning of 2021. With both the Conference Board’s Help-wanted Online Index and the **Job Openings** and **Labour Turnover** (JOLTS) **indices at record highs**, the **outlook for hiring remains positive**.

Strong year-to-date job gains, persisting (for now) **low-interest rates and a rebound in consumer confidence** should cause **consumer spending** and residential **construction** to underpin growth heading into 2022. Nevertheless, we expect the impact of a gradual tightening of monetary policy aimed at reining in inflation, persisting shortages of critical materials, and ongoing hiring problems will limit growth to +3.2% to +3.7% next year following an estimated gain of +5.4% in 2021.

**1nr round 4**

**indep**

**1) it’s about rulemaking so doesn’t effect the CPs guidance and 2) this is about Kahn’s ongoing expansion of section 5, Rulemaking has not been overturned and switching lanes to guidance avoids this**

**Kerkhoff 11/1** “FTC tempts legal fate with power grab” JOHN KERKHOFF, OPINION CONTRIBUTOR — 11/01/21, https://thehill.com/opinion/judiciary/579130-ftc-tempts-legal-fate-with-power-grab?rl=1

Yet, the agency’s latest gambit may be its **most ambitious** to date: The FTC plans to limit (or ban) non-compete and exclusionary contract clauses.

On what authority? That’s unclear. The agency will rely on Section 5 of the Federal Trade Commission Act, which bans “unfair methods of competition.” The FTC has traditionally enforced Section 5 on a case-by-case basis through in-house adjudication. It’s never been used to issue rules like the current proposals — for good reason.

Legal precedent and principles pose potentially **insurmountable hurdles** for the FTC. After all, agencies can issue substantive rules only when Congress has conferred the power to do so. And on that score, scant evidence supports such authority. Commissioners point to an obscure provision buried in a section of the FTC Act addressing procedural issues, which says the agency can “make rules and regulations for the purpose of carrying out the provisions of this subchapter.” True, the D.C. Circuit ruled 40 years ago that the language gives the FTC substantive rulemaking power. But today many scholars think the statute extends only to internal procedural processes, **not legally binding rules**. Indeed, one scholar has called the D.C. Circuit decision “laughable.” (See page 296.)

Yet, that’s the sole source of legal support that Khan could muster in a law review article last year arguing for Section 5 rulemaking. She never grappled with longstanding federalism principles that require Congress to be crystal clear in giving an agency power over subjects usually left to states. As the Supreme Court explained in its August opinion striking down the Centers for Disease Control and Prevention’s (CDC) eviction moratorium, Congress must use “exceedingly clear language” to allow an agency to “intrude into an area that is the particular domain of state law.” Contract law is just so, and it’s hard to see how “unfair methods of competition” provide such clarity.

What’s more, the Supreme Court has held that nearly identical phrasing in the National Industrial Recovery Act — allowing the executive branch to issue “codes of fair competition” — unconstitutionally transferred the legislative power from Congress to the president, violating the so-called “nondelegation doctrine.” That sounds a lot like Section 5. And, in fact, **the court distinguished the FTC Act** precisely because FTC enforcement occurred through adjudication, not rules. Rulemaking today could thus revive the long-dormant nondelegation doctrine. That scenario is no fantasy. The high court has recently invited such challenges.

**Court ptx**

**Impact---2NC**

**Defense doesn’t assume interactions of multiple simultaneous threats**

**Pamlin, 15 --** Dennis Pamlin, Executive Project Manager of the Global Risks Global Challenges Foundation, and Stuart Armstrong, James Martin Research Fellow at the Future of Humanity Institute of the Oxford Martin School at University of Oxford, Global Challenges Foundation, February, http://globalchallenges.org/wp-content/uploads/12-Risks-with-infinite-impact.pdf

If a safe **a**rtificial **i**ntelligence is developed, this provides a **great resource for improving outcomes and mitigating all types of risk**.585 **A**rtificial **i**ntelligence risks **worsening nanotechnology risks**, by allowing nanomachines and weapons to be designed with intelligence and without centralised control, **overcoming the main potential weaknesses** of these machines586 by putting planning abilities on the other side. **Conversely, nanotechnology abilities worsen artificial intelligence risk**, by giving AI extra tools which it could use for developing its power base.587 Nanotechnology and synthetic biology could allow the efficient creation of vaccines and other tools to **combat global pandemics**.588 Nanotechnology’s increased industrial capacity could allow the creation of large amounts of efficient solar panels to **combat climate change**, or even potentially the efficient scrubbing of CO2 from the atmosphere.589 Nanotechnology and synthetic biology are sufficiently closely related 590 (both dealing with properties on an atomic scale) for methods developed in one to be ported over to the other, potentially **worsening the other risk.** They are sufficiently distinct though (a mainly technological versus a mainly biological approach) for countermeasures in one domain not necessarily to be of help in the other. Uncontrolled or malicious synthetic pathogens could **wreak great damage on the ecosystem**; conversely, controlled and benevolent synthetic creations could act to **improve and heal current ecological damage**.

**Strong risk reduction key to prevent AI-driven extinction---it’s uniquely likely, but success solves every impact**

**Pamlin, 15 --** Dennis Pamlin, Executive Project Manager of the Global Risks Global Challenges Foundation, and Stuart Armstrong, James Martin Research Fellow at the Future of Humanity Institute of the Oxford Martin School at University of Oxford, Global Challenges Foundation, February, http://globalchallenges.org/wp-content/uploads/12-Risks-with-infinite-impact.pdf

Despite the uncertainty of when and how AI could be developed, there are reasons to suspect that an AI with human-comparable skills would be a **major risk factor**. AIs would immediately benefit from improvements to computer speed and any computer research. They could be trained in specific professions and **copied at will, thus replacing most human capital in the world, causing potentially great economic disruption**. Through their **advantages in speed and performance**, and through their **better integration** with standard computer software, they could **quickly become extremely intelligent** in one or more domains (research, planning, social skills...). If they became skilled at computer research, the recursive self-improvement could generate what is sometime called a “singularity”, 482 but is perhaps better described as an “intelligence explosion”, 483 with the AI’s intelligence **increasing very rapidly.**484 Such extreme intelligences could **not easily be controlled** (either by the groups creating them, or by some international regulatory regime),485 and would probably act in a way to boost their own intelligence and **acquire maximal resources** for almost all initial AI motivations.486 And if these motivations do not detail 487 the survival and value of humanity in exhaustive detail, the intelligence will be **driven to construct a world without humans** or without meaningful features of human existence. This makes extremely intelligent AIs a **unique risk**,488 in that **extinction is more likely than lesser impacts**. An AI would only turn on humans if it foresaw a likely chance of winning; otherwise it would remain fully integrated into society. And if an AI had been able to successfully engineer a civilisation collapse, for instance, then it **could certainly drive the remaining humans to extinction**. On a more positive note, an intelligence of such power could **easily combat most other risks** in this report, making extremely intelligent AI into a **tool of great positive potential** as well.489 **Whether such an intelligence is developed safely depends on how much effort is invested in AI safety** (“Friendly AI”)490 **as opposed to simply building an AI**.49

**Chevron---Turns---Court**

**Jettisoning Chevron wrecks judicial review – overstretches the judiciary**

**Walke 16 –** John Walke, Clean Air Director and Senior Attorney for the Natural Resources Defense Council, HEARING ON H.R. 4768, THE “SEPARATION OF POWERS RESTORATION ACT OF 2016”, U.S. House Testimony, 5-17, https://www.nrdc.org/sites/default/files/testimony-separation-of-powers-restoration-act-20160517.pdf

NRDC has lost its fair share of lawsuits challenging federal agency rules that were deregulatory or that failed to fulfill statutory promises to protect public health and the environmental, when judges decided that the challenged agency interpretations were permissible under the Chevron test. By **jettisoning Chevron deference**, H.R. 4768 also **would incentivize more frequent and more wide-ranging lawsuits** challenging deregulatory actions by agencies under administrations committed to that agenda. It is true that starkly deregulatory rulemakings in prior administrations have **foundered more often at the first step of Chevron**, by contravening the plain language of statutes.18 That would continue to be the case were H.R. 4768 to become law. One suspects, therefore, that political and corporate opponents of regulation and proponents of deregulation have made a calculation that H.R. 4768 would have disproportionate adverse impacts on regulations protecting the public. That is almost certainly true, and it is the central reason why this irresponsible legislation has no business becoming law.

III. Federal Agencies and Judicial Review Doctrines

Well-established judicial review doctrines headlined by Chevron v. Natural Resources Defense Council establish that reviewing courts defer to a federal agency’s interpretation of a federal statute that is silent or ambiguous with respect to a particular issue, if that statutory construction is permissible or reasonable. Professor Richard J. Pierce, Jr. outlined these judicial review doctrines in his March 16 testimony before this Subcommittee.19 In short, for present purposes, the Chevron doctrine states:

First, always is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question is whether the agency's answer is based on a permissible construction of the statute.

Pierce Testimony at 5, quoting Chevron v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984). Professor Pierce correctly noted that by designing the doctrine thusly, the Supreme Court deferred to the relevant administrative agency on “issues of policy that should be resolved by the politically accountable Executive Branch rather than the politically unaccountable Judicial Branch when Congress has declined to resolve the issue.”20 Further, Professor Pierce notes that “[t]he Auer doctrine is similar in its effects to the Chevron doctrine but it applies not to agency interpretations of agency-administered statutes but to agency interpretations of agency rules.”21 Neither doctrine approaches the radical framework that de novo review would impose upon judicial review of agency regulations. As Professor Emily Hammond noted in her March 16 testimony before this Subcommittee, “[e]ven prior to the enactment of the Administrative Procedure Act (APA), courts afforded at least some deference to agencies’ legal interpretations in many circumstances.”22

Federal agencies today exercise their subject-matter expertise and understanding in promulgating regulations, utilizing the appropriate subject matter experts for a rulemaking—scientists, doctors, economists, engineers and other technical experts who supply valuable input into the regulatory process. Further, these administrative rulemakings can involve **lengthy public processes**, **large administrative records** with hundreds or thousands of technical documents and **comments**, including input from many stakeholders. Through these sometimes lengthy and highly technical processes, agencies finalize complex rulemakings over fairly long time horizons. **Saddling** the judicial branch with such **time-intensive**, **complex**, and **technical reviews** of each challenged rulemaking would **grind the judicial branch to a halt**. The judicial system is already **extremely resource-constrained**, and H.R. 4768 would compound those problems immeasurably. Professor Emily Hammond notes in greater depth the implications of a de novo review regime, as proposed in H.R. 4768. In particular, she notes that “there are [] important separation-of-powers principles at work relevant to the legislative branch. First, courts defer to agencies because Congress has assigned to them—not to the courts—the duties associated with our major statutory schemes.”23 Further, “Congress can craft substantive statutory language more tightly if it wants to cabin an agency’s discretion in carrying out its mandate.” Id. In contrast to de novo review, “Chevron is an exercise in **judicial self-restraint**: by deferring to agencies’ reasonable constructions rather than substituting their own judgment, the unelected courts avoid inserting their own policy preferences into administrative law.” Id.

It is well-documented that the federal judiciary is **overburdened** handling current litigation dockets. Chief Justice John Roberts, in his annual report on the state of the federal judiciary, notes that federal judges are “faced with **crushing dockets**.”24 Further, the Chief Justice notes that overburdened court dockets are **threatening the public’s interest** in speedy, fair, and efficient justice.25 The American Bar Association affirms that the federal judiciary is overtaxed, and that this problem is compounded by increasing numbers of vacancies on the federal bench.

Specifically, persistently high numbers of judicial vacancies deprive the nation of a federal court system that is equipped to serve the people. This has real consequences for the financial well−being of businesses and the personal lives of litigants whose cases may only be heard by the federal courts−e.g. cases involving challenges to the constitutionality of a law, unfair business practices under federal antitrust laws, patent infringement, police brutality, employment discrimination, and bankruptcy.26

Currently, there are over 87 judicial vacancies on the federal bench.27 The ABA notes that these **twin pressures** of increased vacancies and overtaxed dockets, if left unchecked, “inevitably will alter the delivery and quality of justice and **erode public confidence in our federal judicial system**.”28

**Link – 2NC OV**

**Capital is finite and spills over---the Court will seek to balance decisions within issues**

**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 **p**olitical **c**apital 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.

**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.

**Link – 2NC – noerr**

**Declining to take Abbvie proves SCOTUS has decided - plan forces a change**

**Brittain 21** Blake Brittain Washington-based correspondent and attorney. “U.S. Supreme Court rebuffs AbbVie appeal in patent fight involving AndroGel drug.” June 21, 2021. <https://www.reuters.com/business/healthcare-pharmaceuticals/us-supreme-court-rebuffs-abbvie-appeal-patent-fight-involving-androgel-drug-2021-06-21/> {DK}

WASHINGTON, June 21 (Reuters) - The U.S. Supreme Court on Monday declined to hear AbbVie Inc’s (ABBV.N) challenge to a lower court’s decision that it violated federal antitrust law by pursuing a “**sham**” patent complaint against rival Perrigo Co (PRGO.N) over AbbVie’s blockbuster testosterone replacement drug AndroGel. The justices turned away AbbVie's appeal and left intact the lower court's finding that its 2011 complaint against Perrigo was brought solely to delay Perrigo's proposed generic version of AndroGel. The Philadelphia-based 3rd U.S. Circuit Court of Appeals last year threw out a federal judge's order requiring AbbVie and partner Besins Pharmaceuticals to disgorge $448 million in profits to the Federal Trade Commission, but found that the judge had correctly determined that they had violated antitrust law. The dispute centered on an argument over the proper standard for determining when patent litigation against a competitor violates federal law against anti-competitive behavior. Abbott Laboratories, before it spun off AbbVie in 2013, and Besins sued Perrigo and Teva Pharmaceuticals Inc(TEVA.TA) in 2011, arguing that under the 1984 Drug Price Competition and Patent Term Restoration Act their proposed generic versions of AndroGel infringed the Abbott patent on the drug. That law, commonly called the Hatch-Waxman Act, automatically delays U.S. Food and Drug Administration approval for a generic drug for up to 30 months or until the case is resolved. The parties settled the litigation in December 2011. The FTC sued AbbVie and Besins in 2014, arguing that the 2011 litigation had been filed solely to keep the generics off the market. Philadelphia-based U.S. District Judge Harvey Bartle agreed with the FTC that the lawsuit against Perrigo was sham litigation, but ruled that the lawsuit against Teva was legitimate because it was not objectively baseless. North Chicago, Illinois-based AbbVie told the Supreme Court in March that the 3rd Circuit disregarded the requirement that a sham lawsuit must be subjectively filed in bad faith in addition to being objectively baseless. According to AbbVie, the 3rd Circuit incorrectly **inferred bad faith** solely from its finding that the **suit was objectively baseless** and lacked evidence that the company actually believed the lawsuit was meritless. Court complaints are normally protected from antitrust liability by the U.S. Constitution's First Amendment guarantee of free speech, and a plaintiff's "mere intent to thwart competition" does not signify bad faith without a belief that the complaint lacked merit, AbbVie said. The FTC told the Supreme Court in May that the 3rd Circuit decision was correct and urged the justices to reject the appeal.

**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.

**Link – 2NC – Constitutional Rulings**

**The Court perceives constitutional rulings as draining its PC**

**Holt 15 –** Jefferson A. Holt, JD from Georgia State University, “READING OUR WRITTEN CONSTITUTION”, Cumberland Law Review, 45 Cumb. L. Rev. 487, Lexis

Others go further with their criticism, n68 but the mainstream arguments against judicial review all fall along similar lines. n69 Most importantly, the legitimacy objection - also known as the "Countermajoritarian Objection" n70 - is not lost on the members of the Supreme Court. n71 **Aware of its limited institutional capital**, the Court may seek to avoid constitutional questions if at all possible. n72

[FOOTNOTE]

n72. See generally Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (2d ed. 1986) (1962) (advocating a **cautious** and **prudential** approach to judicial review).

[END FOOTNOTE]

The Court accomplishes this through an interpretive doctrine known as the avoidance canon. n73 Generally speaking, the avoidance canon allows the Court to **avoid answering constitutional questions** unless it absolutely must. n74

**Link – 2NC – individuals**

**Addition of Barrett solidifies court’s pursuit of moderation – plan disrupts**

**Robinson 21** Kimberly Strawbridge Robinson Reporter. “Barrett Channels Roberts’ ‘Go-Slow’ Approach in Landmark Cases.” June 18, 2021. <https://news.bloomberglaw.com/us-law-week/barrett-channels-roberts-go-slow-approach-in-landmark-cases> {DK}

The U.S. Supreme Court’s newest justice is showing signs that she’s more aligned with John Roberts and Brett Kavanaugh in the center than she is with her other conservative colleagues, refusing to support broad rulings that could shake the court’s credibility.

Amy Coney Barrett is “starting to show her stripes” as a moderate who **prefers small movements** in the law, not huge shifts, South Texas College of Law Houston professor Josh Blackman said.

The justices handed down victories to both liberals and conservatives on Thursday saving the Affordable Care Act again but siding with a religious group in the latest battle over LGBT protections.

Roberts, the chief justice, is viewed as an institutionalist who wants to conserve the public’s confidence in the court. So far, he favors incremental shifts in the law. “That’s been one of the Chief’s primary goals all along,” said Case Western Reserve law professor Jonathan Adler.

He recently gained an ally in Kavanaugh in this pursuit, and it appears Barrett may join their ranks.

The court as a whole has has largely agreed in cases this year. The unanimous decision in the LGBT case was the 25th time the justices were unanimous in 41 rulings so far this term. There are 15 to go in coming days.

But the big test for Barrett will be next term starting in October when the justices will tackle hot-button issues like guns, abortion, and possibly affirmative action.

“It is a very conservative Court, even if we will only get glimpses of it this year,” said UC Berkeley law school Dean Erwin Chemerinsky.

Kicking the Can

Both the Affordable Care Act and LGBT rulings were “very, very narrow,” Georgia State law professor EricSegall said.

In the Obamacare case, California v. Texas, the 7-2 majority handed down a procedural ruling to avoid undoing the landmark 2010 law. The justices said red states led by Texas didn’t have a legal basis—or standing—to challenge it.

Only Justices Samuel Alito and Neil Gorsuch would have voted to gut the act, long a priority of Republicans.

The LGBT ruling, while unanimous in its outcome, was splintered in its reasoning. Hiding under the 9-0 breakdown was a dispute about whether to overturn the court’s divisive ruling in Employment Division v. Smith, which sparked the passage of the bipartisan Religious Freedom Protection Act and mini state versions across the country.

The court in Smith refused to require an exception from Oregon’s prohibition on peyote, saying religious objectors don’t get a free pass on “generally applicable” laws.

On opposite ends in the court’s LGBT ruling were the liberal justices—Stephen Breyer, Sonia Sotomayor, and Elena Kagan—along with Roberts, who wanted to uphold the court’s precedent in Smith, and the court’s most conservative members—Clarence Thomas, Alito, and Gorsuch—who wanted it overruled once and for all.

In the middle was Barrett, joined by Kavanaugh, who acknowledged Smith‘s shortcomings but was concerned with the fallout should the court overrule it. “Yet what should replace Smith?” Barrett asked in a short concurrence.

Both cases were a punt, Blackman said, with the issues likely to return to the court at some point in the future.

End of the World

But the ACA and LGBT cases, along with the extraordinary agreement all term, suggests a **majority** of the justices don’t think it’s the right time to make **major changes in the law**.

“In the throes of everything"—the pandemic, Barrett’s first term, Kavanaugh’s biting confirmation, calls for Breyer to retire, and the caustic 2020 presidential election—"they didn’t want to shock the world this year,” Segall said.

“Preserving the **court’s own p**olitical **c**apital is incredibly important to the justices because they know their only capital is the confidence of the American people,” he added.

Adler said the court has developed a sort of **3-3-3 split**—that is, three liberals, three conservative justices willing to chuck precedents they don’t agree with, and three conservative justices **hesitant to overturn cases** they may disagree with. Roberts, Kavanaugh, and now, apparently, Barrett make up that last group.

**UQ – 2NC**

**They’ll decline to apply Chevron in this case but they will try to avoid explicitly overruling if possible**

**Wheeler 21** [Lydia Wheeler, Senior Reporter at Bloomberg Law, 5-21-2021 https://news.bloomberglaw.com/health-law-and-business/high-court-medicare-payments-case-challenges-agency-deference]

Jurisdiction Chevron deference comes from the Supreme Court’s 1984 holding in Chevron v. National Resources Defense Council, in which the justices said courts should defer to an agency in ambiguous situations as long as its interpretation of a law is reasonable. “Federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do,” Justice John Paul Stevens said in the court’s majority ruling. “The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones.” But the AHA argues “it is up to the federal courts, not administrative agencies, to determine” when they can and can’t hear a challenge to an agency action. The AHA’s case stems from cuts the Department of Health and Human Services made in 2019 to Medicare payments that hospitals get for providing services at off-site outpatient clinics. The HHS said its interpretation of a Medicare provision allowed it to reduce reimbursement rates to control an unnecessary increase in the volume of evaluation and management services provided at outpatient departments. The district court sided with the AHA, which argued this “method” of volume control wasn’t allowed under the Medicare statute and that Congress already expected these facilities to have higher rates. But the U.S. Court of Appeals for the District of Columbia Circuit reversed that ruling. The appeals court said it lacked jurisdiction to hear a challenge to the rate reductions. The D.C. Circuit said it can’t review the lawfulness of an agency action if a statute precludes judicial review unless that action is barred by the statute. Because the Medicare statute is ambiguous, the appeals court said it deferred to the agency and found that it reasonably interpreted the statute to allow for the reimbursement cut. “By deferring to HHS’s interpretation of that statute, the D.C. Circuit permitted the agency to set the boundary of the court’s power,” the AHA argues in its February petition. The Department of Justice, representing the HHS, counters that Congress never intended for courts to override provisions that limit judicial review. “It is very unlikely that Congress, in expressly precluding review of HHS’s adoption of volume-control measures under that provision, intended such an unstated, easily manipulated exception,” acting Solicitor General Elizabeth Prelogar and other DOJ attorneys said in a reply brief. Under Medicare’s outpatient prospective payment system, the DOJ said HHS sets annual payment rates and that the statute directs HHS to develop a method for controlling unnecessary increases in the the volume of services covered to manage costs. The “statute expressly precludes judicial review of specified agency actions,” including those methods of controlling costs, the agency argues. Whittle Down Not all statutes include provisions that limit judicial review like the Medicare Act. But the AHA says laws governing immigration, the Transportation Security Administration, the Federal Communications Commission, the Supplemental Nutrition Assistance Program, and state telecommunications commissions include provisions that do. If the court rules Chevron doesn’t apply to statutes with these preclusions, it could reduce the context in which Chevron doctrine would apply, law scholars say. “If the court wants to continue to whittle Chevron down, this is another way to do it,” said Jeffrey Lubbers, an administrative law professor at American University Washington College of Law. **While** the court may be **unlikely to want to say explicitly that Chevron is overruled**, “I do think that if you count up the justices there seems to be several who have suggested that in the past perhaps Chevron has been too readily applied,” said Jennifer Mascott, an assistant professor of law at the Antonin Scalia Law School at George Mason University. The AHA cited rulings in which Justices Neil Gorsuch and Clarence Thomas and Chief Justice John Roberts were critical of Chevron doctrine. In a dissenting opinion while on the U.S. Court of Appeals for the Tenth Circuit, Gorsuch said Chevron permits executive agencies “to swallow huge amounts of core judicial” power. “I’d be surprised if they didn’t grant cert.,” Lubbers, said, noting it only takes four justices to agree to hear a case. And some legal minds think the AHA has a strong case. “If it gets consideration, a majority of the court is likely to agree with the point that Chevron deference should not apply **here**,” Mascott said.

**AHA v Beccara provides the opportunity to overturn Chevron but court can still make a narrower decision – its on the brink**

**Bagley 11/29** Nicholas Bagley is a professor at the University of Michigan Law School. Nov 29, 2021. “Chevron deference at stake in fight over payments for hospital drugs.” <https://www.scotusblog.com/2021/11/chevron-deference-at-stake-in-fight-over-payments-for-hospital-drugs/> {DK}

As the plaintiffs see it, however, the government simply misreads the scope of the preclusion language. Though it generally precludes review of reimbursement decisions relating to outpatient care, it doesn’t cross-reference the subsection relating to outpatient drugs. Both the district court and the U.S. Court of Appeals for the District of Columbia Circuit agreed, invoking the strong presumption favoring judicial review of agency action. On the merits, the plaintiffs fared less well. Though they won in the district court, the D.C. Circuit held that Medicare reasonably read the 2003 law to allow it to align hospital reimbursement with hospital acquisition costs. Medicare’s interpretation — and the scope of its authority to “adjust” payment rates — was thus owed deference under Chevron U.S.A. Inc. v. Natural Resources Defense Council, a 1984 decision holding that courts generally should defer to agencies’ reasonable interpretations of ambiguous statutes. Judge Cornelia Pillard dissented, arguing that the statute unambiguously foreclosed Medicare’s interpretation. The plaintiffs asked the Supreme Court to review a single question: whether Medicare should receive Chevron deference for interpreting the 2003 law in the manner that it did. Tantalizingly, the plaintiffs noted that “[i]t is no secret that members of this Court have raised concerns about whether Chevron deference, particularly when applied as indiscriminately as it was in this case, violates the separation of powers.” The Supreme Court bit. In its order granting certiorari, however, the court instructed the parties to brief an additional question: whether the Medicare statute precludes the lawsuit. What that means is that — in addition to resolving whether hospitals are entitled to billions of taxpayer dollars — the court will have the chance to address two foundational doctrines of administrative law: the presumption of reviewability and Chevron deference. Arguably, AHA v. Becerra offers an unusually vivid example of the costs of a strong presumption of reviewability. If the plaintiffs win, what’s the remedy? Is Medicare supposed to reopen every outpatient payment decision that it’s made since 2018, given that paying more for 340B drugs means it should have paid less for other services? The plaintiffs say no, arguing that Medicare wouldn’t be required to make any retroactive adjustments. But the government fears otherwise and the answer is not at all clear. Isn’t that the kind of mess that preclusion is meant to avoid? I’ve called in my academic work for abandoning the presumption of reviewability precisely because it disrespects Congress’ reasonable desire to shield some administrative decisions from judicial review. In recent years, however, the Supreme Court has evinced no interest in doing so — the presumption of reviewability remains “strong.” We may soon find out just how strong it is. But the big question about the case is whether the court will use it as a **vehicle to reconsider** Chevron deference. In the plaintiffs’ view, it is galling — “an affront to the separation of powers” — that the courts would defer when Medicare has exploited a purported ambiguity to sidestep Congress’ clear instructions about how much to pay hospitals. Several of the conservative justices, including in particular Justices Clarence Thomas and Neil Gorsuch, may be receptive to the argument. If so, the right wing of the court could use the case to narrow or even overturn Chevron, with potentially dramatic implications for the scope of executive-branch power. Whether the court will do so is anyone’s guess. The **justices could easily resolve the case on narrower grounds**. Maybe the statute unambiguously forecloses Medicare’s interpretation of the law, as the plaintiffs argue. Or maybe, as the government claims, Medicare properly exercised its explicit authority to “adjust” prices for outpatient drugs.

**IL – 2NC – A2: No Vote Switching**

**Roberts is compromising by swaying Barrett and Kavanaugh to narrow their rulings and decline to overrule precedent---that creates a centrist bloc.**

**Economist ’21** [The Economist; June 26; International newspaper; The Economist, “America’s Supreme Court is less one-sided than liberals feared,” <https://www.economist.com/united-states/2021/06/24/americas-supreme-court-is-less-one-sided-than-liberals-feared>]

In the autumn, America’s Supreme Court seemed **destined** for a **momentous shift** when Republicans rushed to confirm **A**my **C**oney **B**arrett, a conservative judge, to succeed Ruth Bader Ginsburg, a liberal jurist who had died in September. In place of a **wavering** 5-4 **conservative tilt** that had held for decades, by the end of October the high court had a **6-3 majority** of Republican appointees—the most unbalanced array in a century. Yet as the **final rulings** of Justice Barrett’s first term arrive (including, on June 23rd, a win for students’ speech rights and a loss for union organisers), the **dynamics** of the newly constituted Supreme Court seem more **complex**, and **less extreme** in their results, than many expected.

Justices have life tenure and evolve on the job; a few dozen cases constitute a limited introduction to the kind of judge Justice Barrett will turn out to be or how her presence will reshape the court. But in her first eight months in robes, it seems her votes have **changed the result** from the one if Ginsburg had ruled **only three times**: on June 21st, in a case involving the status of administrative patent judges, and in November and April, when Justice Barrett voted in favour of churches challenging covid-19 public-health regulations. The latter votes reflected the newest justice’s tendency to defer to those who object to rules that burden their **religious lives**.

But when she had a chance to **extend** this principle—as **strongly demanded** by religious conservatives—she **demurred**. In Fulton v Philadelphia, decided on June 17th, the Supreme Court unanimously sided with a Catholic social-service agency that had cried foul when Philadelphia’s city government sidelined it because the organisation would not approve same-sex couples as foster parents. According to a 1990 precedent, Employment Division v Smith, neutral laws that apply generally do not offend the First Amendment even if they indirectly hamper religious practice. But since Philadelphia allowed exceptions in its anti-discrimination rule (even though the city had not granted any), Chief Justice John Roberts wrote for the court, its ordinance was not “general” and therefore, given the impact on the foster-care agency, violated the constitution.

Despite the **9-0 result**, Fulton was **far from a full win** for the Catholic plaintiffs. The foster-care agency had asked the justices to overrule Smith and clarify that all burdens on the exercise of religion potentially violate the constitution. Yet only **three justices**—led by Samuel Alito, who wrote an irate 77-page concurring opinion—were keen to abandon Smith. Chief Justice **Roberts**, Justice **Barrett** and Justice Brett **Kavanaugh** joined the three **liberal justices** to leave the three-decade-old **precedent intact** and resolve Fulton on **narrow grounds**. In fact, the majority opinion seemed to concede implicitly that anti-discrimination laws denting religious conscience do pass constitutional muster as long as they apply across the board.

A similar **rift** was on display in another **significant case** released on the same day: California v Texas, the third serious attack on the **A**ffordable **C**are **A**ct (aca) to reach the court since 2012. Each time the justices have taken up such a challenge, they have resolved it **in favour** of Barack **Obama’s** health-care law. And the margin has **steadily widened**, **even as** the court has grown more conservative—from 5-4 in 2012 to 6-3 in 2015 and 7-2 this month. During her Senate confirmation hearing last autumn, Democrats pointed to Justice Barrett’s criticism of the earlier decisions and **warned** that she may be **crucial** to **dismantling** the aca at last. This **doomsday** did **not come to pass**: with the exceptions of Justices Alito and Neil Gorsuch, the court again **refused** to strike down the aca and strip 31m Americans of health coverage.

In their counterintuitive challenge, Texas and 17 other Republican states claimed that the law had become unconstitutional when, in 2017, Congress eliminated the financial penalty attached to the “individual mandate”—the requirement that most Americans buy health insurance. In the end, the court did not touch that matter. Instead, the majority ruled that the plaintiffs had not been harmed and thus did not even have standing—ie, the legal right to bring the case.

Technical solutions helped the justices **flick away** other **charged controversies**. Late last year, when Donald Trump and his allies were litigating his electoral loss, the Supreme Court **shot down** two last-ditch lawsuits with deep **procedural flaws**. On December 8th a one-sentence order put a halt to a Pennsylvania state representative’s bid to stop his state from certifying Joe Biden’s win. And three days later, another terse order snuffed out Texas’s attempt to suspend Mr Biden’s victories in Georgia, Michigan, Pennsylvania and Wisconsin. For Stephen Vladeck, a law professor at the University of Texas and Supreme Court litigator, some of the court’s most **important decisions** of the term “may have been its decisions **not to get involved**”.

Yet in the run-up to the election, as emergency requests from Republicans to limit pandemic-inspired voting accommodations rolled in, the justices were active in policing election administration. The court blocked kerbside voting in Alabama, narrowed the window for absentee voting in the Wisconsin primary and reimposed witness requirements for mail-in ballots in South Carolina. These and other orders make up the so-called “shadow docket”—requests for quick relief, dealt with without oral argument or full briefing and often resolved without written opinions or even recorded votes. Mr Vladeck observes that two dozen significant cases have been handled this way since the autumn, compared with 58 cases on the regular docket.

Of the **50 cases** the justices had settled by June 23rd, there had been just **four 6-3 decisions** along **ideological lines** and **24 unanimous rulings**. Over the past three years, the court’s **unanimity rate** has hovered just below 40%, making **this term**, no matter what happens with the eight judgments that have yet to arrive, the **most consensual** since 2016.

But unanimity, as Fulton shows, does not always mean **speaking with one voice**. The three **liberal justices** (Stephen Breyer, Elena Kagan and Sonia Sotomayor) seem to have held their fire; **in return** Chief Justice Roberts crafted a **narrow decision** that gave the Catholic fostering agency a win **without setting a precedent** that would **undermine** gay equality. Justices Alito, Gorsuch and Thomas are **itching** to hasten a **conservative revolution** but, for now, the **liberals**, the **chief** and Justices **Barrett** and **Kavanaugh** are on a more **cautious path** paved with **narrow rulings**. Instead of **split 6-3**, the court is **more like 3-3-3**. Will these coalitions **hold** next year when the justices craft potentially **landmark decisions** on guns, abortion and maybe affirmative action? “We’ll know quite a lot more about the new conservative majority”, Mr Vladeck says, “this time next year.”

**IL – 2NC – A2: Compartmentalization**

**Their evidence indicts the theory, but doesn’t dispute its belief---justices think this way, even if false---prevents repeat conflicts with Congress**

**Yoo 4**

(John C. Yoo, Professor of Law at the University of Texas, Texas Law Review, November, 83 Tex. L. Rev. 1)

n443. This last point is quite controversial. Jesse Choper has argued, for example, that "the people's reverence and tolerance is not infinite and the Court's public prestige and institutional capital is **exhaustible**." The judiciary's ability to **strike down laws** without incurring severe institutional costs, therefore, "is determined by the number and **frequency** of its attempts to do so, the felt importance of the policies it disapproves, and the perceived substantive correctness of its decisions." Choper, supra note 35, at 139. Others, by contrast, have asserted that the Court may - at least in some circumstances - actually enhance its legitimacy by actively confronting the political branches. See, e.g., Peter M. Shane, Rights, Remedies and Restraint, [64 Chi.-Kent L. Rev. 531, 546 (1988)](http://www.lexis.com/research/buttonTFLink?_m=11cba94a2e0463ed82e517fc38fdbd65&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b83%20Tex.%20L.%20Rev.%201%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=1258&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b64%20Chi.-Kent.%20L.%20Rev.%20531%2cat%20546%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=68&_startdoc=51&wchp=dGLbVzb-zSkAl&_md5=0f60d59f3a3132dcd480986426f03eed) (suggesting that, in some cases, the Court may enhance its legitimacy through opposing the political branches). It would be exceptionally difficult to verify either proposition empirically; about all that can be said with confidence is that the Court sometimes seems to **behave** as if **it thinks** its "institutional capital" is **limited** in this way, and the notion may at least **constrain judicial behavior** in this sense. See Young, State Sovereign Immunity, supra note 92, at 58-60.

**IL – 2NC – A2: PC False**

**Interpretations require use of limited pc**

**Graber 17** MARK A. GRABER Regents Professor, University of Maryland Carey School of Law. (April, 2017). “JUDUCIAL SUPREMACY V. DEPARTMENTALISM SYMPOSIUM: JUDICIAL SUPREMACY REVISITED: INDEPENDENT CONSTITUTIONAL AUTHORITY IN AMERICAN CONSTITUTIONAL LAW AND PRACTICE.” William & Mary Law Review, 58, 1549. <https://advance-lexis-com.proxy2.cl.msu.edu/api/document?collection=analytical-materials&id=urn:contentItem:5P5N-7SJ0-00CW-G21Y-00000-00&context=1516831>. {DK}

Supreme Court Justices would face insuperable legal, institutional, and political barriers should they actually attempt to secure a "monopoly on constitutional interpretation." 26Link to the text of the note The constitutional text interpreted in light of long-standing precedents often mandates judicial decisions allocating constitutional authority elsewhere. The Justices have no legal power to punish jurors who disregard judicial statements of the law. Printz v. United States forbids the Supreme Court from correcting state governors who refuse to allow state police to implement federal laws they believe are unconstitutional. 27Link to the text of the note The Supreme Court is incapable of learning about the vast majority of constitutional decisions that are made every day in the United States. Police officers patrolling the streets make numerous constitutional decisions about when searches are appropriate that are rarely reviewed by their superiors, much less appellate judges. 28Link to the text of the note [\*1556] State and lower federal courts have various means for keeping constitutional decisions beneath the Supreme Court's radar. Furthermore, the **Justices have limited political capital**. 29Link to the text of the note The Supreme Court during the Civil War found various jurisdictional exercises for avoiding decisions on the constitutional status of legal tender and presidential suspensions of habeas corpus. 30Link to the text of the note The Justices of the Ellsworth and Marshall Courts made a strategic decision when ruling that the Supreme Court could exercise appellate jurisdiction only when doing so was consistent with both Article III and a federal statute. 31Link to the text of the note

**IL – 2NC – A2: Resiliency**

**Individual decisions impact overall legitimacy---it’s not durable**

**Nelson 15 –** Michael J. Nelson, Assistant Professor of Political Science at The Pennsylvania State University, and Steven S. Smith, Kate M. Gregg Distinguished Professor of Social Science at Washington University in St. Louis, “Change and Stability in the U.S. Supreme Court’s Legitimacy”, 8-30, p. 5-8

Policy Disagreement and Short-Term Change

**Until recently**, the most common view in the literature was that legitimacy is relatively immune to short-term changes in satisfaction with the Court’s decisions (Caldeira and Gibson 1992; Gibson and Caldeira 1992). Gibson and Caldeira (1992) argued instead that **basic political values**—particularly support for democratic institutions and processes—provide the foundation for the Court’s legitimacy. Because basic democratic values are a product of socialization and therefore lasting, Caldeira and Gibson (1992) argued that the Court’s legitimacy tends to remain stable over time.

This sanguine view of public support for the Supreme Court has been **challenged by recent studies** (Bartels and Johnston 2013; Christenson and Glick 2013; Nicholson and Hansford 2014) demonstrating that **short-term dissatisfaction** with the Court **translates directly into reduced legitimacy**. In essence, these studies suggest that the Court’s **reservoir of diffuse public support may be shallower than past studies have suggested** and the institution’s legitimacy is **more closely tied to individual decisions** than earlier studies had suggested. Indeed, even Gibson and Nelson (2015)—who disagree with some of the modeling decisions in these studies—present results demonstrating that overall evaluations of subjective ideological disagreement has a **statistically significant effect** on cross-sectional evaluations of the Court’s legitimacy. However, finding that the Court’s legitimacy has ideological correlates—in other words, that subjective ideological disagreement is related to the Court’s public support in a cross-section—is not direct evidence that agreement or disagreement with the Court on a specific issue affects the Court’s legitimacy. It may be that ideological disagreement with the Court’s policymaking is part of the process through which an individual forms her support for the Court but that subsequent decisions are unable to “move” individual-level evaluations of legitimacy. If true, this would explain the common finding that that Court’s support is basically unchanging across time (Gibson 2007).

Thus, the most obvious way to examine whether ideological disagreement serves only as a foundation for evaluations of the Court’s legitimacy or if it plays a dynamic role is to examine change in individual-level support for the Court before and after a decision. In perhaps the best-known study of the effects of a single decision on the Court’s public support, Gibson, Caldeira, and Spence (2003) compared cross-sectional surveys before and after the Bush v. Gore decision, concluding that the decision had no discernable effect on the Court’s public support. Others reached similar conclusions (e.g. Nicholson and Howard 2003; Kritzer 2001). These studies did not examine **individual-level** change in support for the Court.

Two experimental attempts to assess the effects of a single decision call the Gibson, et al., inferences into question. Bartels and Johnston (2013) present a survey experiment that queries respondents about a wiretapping case using specific indicators of agreement rather than a broad question about the ideological direction of the Court’s policymaking. Their results indicate that respondents who agree with the Court’s decision then have higher evaluations of the Court’s legitimacy. their results are strongly suggestive that, in some cases, **policy agreement with the outcomes of a decision can alter individual-level support** for the Court.

Christensen and Glick (2015) queried respondents about their evaluations of the Court’s legitimacy before and after the PPACA decision was announced and incorporated a pseudo-experiment on the effect of media coverage that suggested that Chief Justice Roberts changed his vote in the case for strategic reasons. Unfortunately, Christensen and Glick’s panel was drawn from the opt-in Mechanical Turk pool, and, more importantly for our purposes, their measure of subjective policy disagreement is not directly related to the Court’s decision in the case; rather, they assess the relationship between respondents’ beliefs about whether the Court’s policymaking became more liberal or more conservative and change in legitimacy. This leaves open the more direct question: whether agreement with the Court’s decision in the case is related to change in support for the Court.3 Still, these studies suggest a first hypothesis: **a single, salient decision is associated with a**n increase **(decrease) in legitimacy among individuals who** agree **(disagree) with the decision**.

Policy Disagreement and Longer-Term Change

While recent studies have suggested that the Court’s legitimacy may **change in the short-run**, one of the most enduring findings in the field has been the stability of the Court’s support over time (Gibson 2007). Scholars have developed two theories to explain this stability.