### 1NC

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

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

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

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

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

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

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

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

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

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

#### Voting issue---key to link uniqueness and preventing bidirectionality on an otherwise virtually unlimited topic. Failure to specify an agent is a voter – kills neg ground and decimates topic education.

### 1NC

**The USFG should**

#### ---increase scrutiny of Chinese investments and tech firms collaborating with China,

#### ---increase negotiations with China over common standards for emerging technology usage,

#### ---establish a National Emerging Technology Council,

#### ---significantly increase investments in science and technology, education, infrastructure, and reduce restrictions on global talent and companies,

#### ---threaten antitrust action against companies that do not make their data available in interoperable formats with other U.S. companies ---enter a transatlantic tech alliance coordinating a response to Chinese tech

#### ---stop pushing Buy American

**Planks 1-5 solves China tech supremacy.**

**Gewirtz 19** (Julian Baird Gewirtz, Academy Scholar @ Harvard’s Weatherhead Center for International Affairs, author of Unlikely Partners: Chinese Reformers, Western Economists, and the Making of Global China; “China’s Long March to Technological Supremacy;” 08-27-19, Foreign Affairs, <https://www.foreignaffairs.com/articles/china/2019-08-27/chinas-long-march-technological-supremacy>, TM)

A RACE AGAINST TIME

The goal of surpassing other countries technologically does not mean that China’s rulers seek global military supremacy. But even in best-case scenarios, China’s transition from catching up to surpassing will be destabilizing, as other countries confront Chinese ambitions for greater prosperity and security and feel their relative power decrease. And for China, building 5G networks for other countries and making AI breakthroughs clearly advance CCP aims far beyond narrowly construed self-reliance. Even if firms such as Huawei and ZTE are not incontrovertibly compromised by the state, their work clearly serves CCP interests.

Technology will remain at the heart of U.S.-Chinese tensions well beyond the end of the current trade war. Technology, to the CCP, is power in practice—it is historical change in material form. The roots of “catch up and surpass” demonstrates that the CCP’s approach to technology is far more deeply entrenched than many analysts realize. If China’s rulers feel their technological rise is under threat, they are likely to react more forcefully and uncompromisingly than policymakers may expect—as the Chinese response to Washington’s effort to block Huawei’s global 5G dominance has demonstrated.

An all-out rivalry between the world’s two technology leaders would be immensely costly, disruptive, and destructive. Instead, policymakers should focus on **establishing** and **enforcing new rules** for the race already underway, so that competition can occur fairly and be at least somewhat bounded. Within the **U**nited **S**tates, that will require **scrutinizing Chinese investments** and **acquisitions** of U.S. firms, well beyond the traditional purview of the **C**ommittee on **F**oreign **I**nvestment in the United States, as well as the **footprint** of **both Chinese firms** in the **U**nited **S**tates (such as Baidu’s AI lab in Silicon Valley) and **U.S. firms in China** (such as Google’s AI lab in Beijing). In addition, Washington should seek to **begin negotiations** with China as soon as possible to **explore common rules** for **emerging tech**nologies. Such agreements were possible with the Soviet Union during the Cold War. Today, they can be effective again if they are based on deep understanding of the technologies under discussion and the importance of tech to both countries’ conceptions of national power. For the U.S. government, that may require creating or **improve policymaking institutions**, such as **upgrading** the **O**ffice of **S**cience and **T**echnology **P**olicy (which currently runs the National Science and Technology Council) into a new National Emerging Technology Council. The National Emerging Technology Council would serve as a **consistent**, **high-level body**, overlapping the National Security Council and the National Economic Council, to **coordinate** more effectively across the whole of government and bring **empowered expertise** to bear on both domestic policymaking and international negotiations.

The U.S. government’s response should not be premised on the notion, evidently in vogue in both Washington and Beijing, that all scientific and technological activity is a zero-sum competition between states. The history of ganchao suggests that so-called technological decoupling between China and the United States will continue in areas where it is most difficult to distinguish between commercial and military applications. But unwinding interdependence carries significant costs, and so U.S. policymakers should attempt to **draw distinctions** between **sectors in China** that feature strong **private-sector leadership** and those **dominated by the state**—not all “Chinese” technology is the same. Research institutions and private companies will also need much more help evaluating potential research cooperation with Chinese counterparts, to guard against problematic partnerships while preserving the great value of international exchange to the progress of scientific research.

Above all, Washington must not view countering China’s technological advancement as a substitute for investing in a major effort at home. The Trump administration’s repeated attempts to cut budgets for the National Science Foundation and other government S & T funding are profoundly self-defeating at a time of intensified U.S.-Chinese tech competition. China’s technological advancement will challenge not only U.S. power but also the United States’ sense of itself as a global leader and innovator. This demands **significant U.S. domestic investment** in **S & T**—in government **research labs** and private **research institutions** for certain, and perhaps in **private companies** directly. It will also require mobilizing the American people behind making **significant improvements** to the **education**, **infrastructure**, and **immigration systems**, which are sources of the country’s enduring strength. If there is one thing that U.S. policymakers can learn from the history of ganchao, it is that the world still wants what the United States has.

#### Their ev supports planks 6&7 (MSU=green)

Cosmina Moghior 21, Denton Fellow with the Transatlantic Leadership program at the Center for European Policy Analysis, Protectionism Threatens To Torpedo The Transatlantic Technology Alliance, CEPA, <https://cepa.org/protectionism-threatens-to-torpedo-the-transatlantic-technology-alliance/>

On a broad level, the U.S. and Europe agree on the need for new regulations to limit dangers from the authoritarian digital model. They want to reign in tech monopolies. They want to protect privacy. They want to combat disinformation that threatens democracy.

On a practical level, both favors strengthened export controls of dangerous technology. A good example of cooperation concerns semiconductors. While the US is leading in most stages of the semiconductor supply chain, the Dutch company ASML dominates lithography equipment production. Even under President Trump, the Dutch government agreed to stop ASML from selling its most advanced machines to China.

Unfortunately, though, protectionism threatens to undermine future progress. The Biden Administration’s massive infrastructure plan and new “Supply Chain Disruptions Task Force” aim to keep innovation and production of leading-edge technology at home, making the U.S. a technological leader. Biden’s Buy America Executive Order (EO) encourages domestic procurement of “goods, products, materials, and services from sources that help the American businesses compete in strategic industries and help America’s workers thrive”. The Federal Acquisition Regulatory Council is developing recommendations to extend requirements to information technology.

The U.S. is pouring public money into strategic digital industries. In a rare bipartisan vote, Congress approved $52 billion in subsidies in June for chip research and manufacturing. States from Wisconsin, Texas, and Nevada are showering tax benefits on digital tech giants including Amazon, Apple, and Google to build factories and data centers.

Europe similarly is determined to build its own tech capacities. It promotes the concept of digital sovereignty aimed at providing the continent the capacity to make “autonomous technological choices.” Several projects promote domestic production of critical technologies ranging from next-generation mobile phone production to quantum computing. Public funds already are being spent on the

European cloud computing project GAIA-X aims to break the U.S. stranglehold on cloud computing. While Europe insists that its actions are not protectionist, designed instead to promote and safeguard European values, GAIA-X aims to ensure data protection and limit access of U.S. intelligence to European data. U.S. tech giants including Amazon, Google, and Microsoft have been invited to join, but are banned from joining the board.

The U.S. is home to the world’s largest Internet companies and fears that European regulatory measures will discriminate against them. Plans for a European “digital” tax – put on hold to secure a global corporate tax reform – would disproportionately impact American companies that provide digital services in Europe. A separate Digital Markets Act proposal under consideration at the European Parliament addresses unfair practices of the so-called “gatekeepers,” that operate “core platform services.” Most of the targeted companies will likely be American, beginning with giants Google, Apple, Facebook, and Amazon.

Europe and the U.S. need to step back from pursuing their protectionist instincts, which threatens to allow China’s increasing inroads into the digital market. Beijing is making investments on all continents on projects ranging from education to critical infrastructure. Many countries are turning to China for support and guidance on technological development while the U.S. and the EU focus on their domestic anxieties and ambitions.

A transatlantic tech alliance could provide the blueprint for offering a viable alternative to Chinese inroads in the developing world. Europe and the U.S. need to coordinate against the export of authoritarian practices on the Internet. They can only do this by dropping the push for Buy American and European Digital Sovereignty.

### 1NC

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Agency powers

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[FOOTNOTE]

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

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

#### Climate change causes extinction

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

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

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

One scenario that has received comparatively more attention is that of the global climate crossing a tipping point that would trigger environmental feedback loops (such as declining albedo from melting ice or the release of methane from clathrates) and cascading effects (such a shifting rainfall patterns that trigger desertification and soil erosion). After this point, anthropogenic activity may cease to be the main driver of climate change, making it accelerate and become harder to stop (King et al., 2015).

Other scenarios can be discerned from the numerous historical cases in which the modest, usually regional, climatic changes experienced during the Holocene have been implicated in the collapse of previous societies, including the Anasazi, the Tiwanaku, the Akkadians, the Western Roman Empire, the lowland Maya, and dozens of others (Diamond, 2005, Fagan, 2008). These provide a precedent for how a changing climate can trigger or contribute to societal breakdown. At present, our understanding of this phenomena is limited, and the IPCC has labelled its findings as “low confidence” due to a lack of understanding of cause and effect and restrictions in historical data (Klein et al., 2014). Further study and cooperation between archaeologists, historians, climate scientists and global catastrophic risk scholars could overcome some of these limitations by identifying how the impacts of climate change translate into social transformation and collapse, and hence what the impacts of more rapid and extreme climatic changes might be. There is also the potential for larger studies into how global climate variations have coincided with collapse and violence at the regional level (Zhang, Chiyung, Chusheng, Yuanqing, & Fung, 2005; Zhang et al., 2006). However, these need to be interpreted and generalized with care given the differences between pre-industrial and modern societies.

Societies also have a long history of adapting to, and recovering from, climate change induced collapses (McAnany and Yoffee, 2009). However, there are two reasons to be sceptical that such resilience can be easily extrapolated into the future. First, the relatively stable context of the Holocene, with well-functioning, resilient ecosystems, has greatly assisted recovery, while anthropogenic climate change is more rapid, pervasive, global, and severe. Large-scale states did not emerge until the onset of the Holocene (Richerson, Boyd, & Bettinger, 2001), and societies have since remained in a surprisingly narrow climatic niche of roughly 15 mean annual average temperature (Xu, Kohler, Lenton, Svenning, & Scheffer, 2020). A return to agrarian or hunter-gatherer lifestyles could thus have more devastating and long-lasting effects in a world of rapid climate change and ecological disruption (Gowdy, 2020).7 Second, modern human societies may have developed hidden fragilities that amplify the shocks posed by climate change (Mannheim 2020) and the complex, tightly-coupled and interdependent nature of our socio-economic systems makes it more likely that the failure of a few key states or industries due to climate change could cascade into a global collapse (Kemp, 2019).

A third set of plausible scenarios stem from climate change’s broader environmental impacts. Apart from being a planetary boundary of its own, Steffen et al. (2015) point out that climate change is intimately connected with other planetary boundaries (see Table 1). Climate change is thus identified by the authors as one of two ‘core' boundaries with the potential “to drive the Earth system into a new state should they be substantially and persistently transgressed.” This transformative potential was elaborated on in subsequent work exploring how the world could be pushed towards a ‘Hothouse Earth’ state, even with anthropogenic temperature rises as low as 2 °C (Steffen et al., 2018).

The connection between climate change and biosphere integrity (the survival of complex adaptive ecosystems supporting diverse forms of life) is particularly strong. The IPCC is highly confident that climate change is adversely impacting terrestrial ecosystems, contributing to desertification and land degradation in many areas and changing the range, abundance and seasonality of many plant and animal species (Arneth et al., 2019). Similarly, the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) has reported that climate change is restricting the range of nearly half the world’s threatened mammal species and a quarter of threatened birds, with marine, coastal, and arctic ecosystems worst affected (Diaz et al., 2019). According to one estimate, climate change could cause 15–37 % of all species to become ‘committed to extinction’ by mid-century (Thomas et al., 2004).

### 1NC

The FTC will issue enforcement guidance that the presently-existent phrase “unfair methods of competition” in Section 5 of the FTCA includes “*concentrated market power*”, “*distortions in the competitive process*,” “*buyer power**issues*”, and “*mergers that have profound effects on long-term competition*.”

The FTC should release an interpretive guidance doc, data sets and a policy statement that “*effective competition is a two-sided bargaining process*,” there are “*essential competition values*” excluded from the “*consumer welfare standard*,” they will look for “*distortions in the competitive process at any level*,” and that “*best practices*” are “*a two-way street*.” The FTC should enforce accordingly.

**The cplan solves. It also competes – the FTC interprets current authority, instead of 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.

### 1NC

#### Text: The United States federal government should create a domestic competition network over business practices that fail a balancing test and advocate for increased prohibitions with greater weight afforded to the competitive process in analysis of anticompetitive business practices.

#### Solves case – builds consensus

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

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

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

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

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

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

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

B. Engineering, Not Physics in Managing Federalism

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

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

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

**[FOOTNOTE 55]**

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

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

**[FOOTNOTE 55]**

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

**[FOOTNOTE 56]**

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

[FOOTNOTE 56]

### 1NC

#### Text: The 50 states and relevant territories should engage in multistate antitrust action and enforcement over business practices that fail a balancing test with greater weight afforded to the competitive process in analysis of anticompetitive business practices.

#### States solve best---multistate organizations, expanded jurisdiction, and can “fill the gap”

Rauch 20 Daniel E. Rauch J.D. Yale Law School. (2020 ). ARTICLE: SHERMAN'S MISSING "SUPPLEMENT": PROSECUTORIAL CAPACITY, AGENCY INCENTIVES, AND THE FALSE DAWN OF ANTITRUST FEDERALISM. *Cleveland State Law Review*, 68, 172. <https://advance-lexis-com.proxy2.cl.msu.edu/api/document?collection=analytical-materials&id=urn:contentItem:5YDM-6NS1-FCK4-G4MV-00000-00&context=1516831>. {DK}

In 2020, as in 1890, states attorneys general have much to offer antitrust enforcement. Illegal anticompetitive conduct is often concentrated locally, rather than nationally, making state-level enforcement especially appropriate. 202Link to the text of the noteMany states have antitrust statutes (or bodies of state law) that allow for prosecutions that the federal laws do not. 203Link to the text of the noteState governments often will have better knowledge of local economic conditions than distant agencies in Washington, making them natural choices for [\*210] antitrust enforcement. 204Link to the text of the noteAnd if the federal government fails to enforce the antitrust laws, state attorneys general often have the ability and political incentives "step up" to "fill the void." 205Link to the text of the note

Yet, if the early failure of antitrust federalism holds a single lesson, it is that even such compelling political, historical, and economic imperatives are, without more, insufficient to spur state antitrust action. Unless state prosecutors have the capacity and incentives to take on the antitrust challenge, they will not act.

What does this mean for today's state antitrust enforcers? On one hand, the years since 1890 have seen several innovations that substantially mitigate the problem of prosecutorial capacity. Multistate organizations like the National Association of Attorneys General (NAAG) have allowed for coordination and information sharing between attorneys general on antitrust matters, thus reducing the costs and burden of such cases. 206Link to the text of the noteLikewise, the rise of multistate antitrust suits brought jointly by dozens of states allows for cost-and-capacity-sharing. 207Link to the text of the noteChanges in federal law, like the Hart-Scott-Rodino Act of 1976, created an economic incentive for states to pursue antitrust cases by codifying the ability of state attorneys general to sue as parens patriae and by offering states treble damages when they prevail (a strong economic incentive if ever there was one). 208Link to the text of the note

Going further, the federal government has sometimes expressly subsidized state antitrust efforts, as with the supplemental funding offered in the Crime Control Act of 1976. 209Link to the text of the noteAnd in some states, the capacity of the attorney general's office has increased to levels inconceivable at the turn of the century: New York's Attorney General, for instance, supervises over 1,800 employees, 210Link to the text of the notewhile California employs a staggering [\*211] 4,500. 211Link to the text of the notePerhaps because of these shifts, it is unsurprising that in recent times at least some state attorneys general have heeded the call to enforce state and federal antitrust laws, from local investigations of healthcare consolidation 212Link to the text of the noteto multistate actions against Silicon Valley behemoths like Apple and Amazon. 213Link to the text of the note

## Case

### 1NC --- Market Power

**Plan creates CONFLICTING OBJECTIVES --- causes underenforcement, regulatory capture, and collapses innovation**

**MELAMED 20** --- A. DOUGLAS MELAMED, Professor of the Practice of Law, Stanford Law School, [FORTHCOMING IN 83 ANTITRUST L.J. (2020), https://lisboncouncil.net/wp-content/uploads/2020/11/MELAMED-Antitrust-Law-and-Its-Critics.pdf

Perhaps more important, the institutions of antitrust law are **not well suited to address multiple** and often **conflicting objectives**. Antitrust law is enforced on a case-by-case basis. Were antitrust law to serve **multiple objectives**, it would need criteria to guide decisions in the many instances when those objectives would conflict. There is, however, **no algorithm for weighting inequality** or political power, on the one hand, **against economic welfare**, on the other.86 There is not even a common metric for measuring them. Absent such a metric or algorithm, **antitrust decisions would necessarily be arbitrary** and perceived as arbitrary.

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

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

**The third** and perhaps most important cost is rooted in the general application and decentralized enforcement of antitrust law. 87 Antitrust law applies to almost all businesses, and it can be enforced by at least 52 government entities and any entity that has been harmed by an antitrust violation. Antitrust law thus has a widespread effect on business conduct throughout the economy. Its principal value is found, not in the big litigated cases, but in the multitude of anticompetitive actions that do not occur because they are deterred by the antitrust laws, and in the multitude of efficiencyenhancing actions that are not deterred by an overbroad or ambiguous antitrust law.

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

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

**Packard 6-22** --- Clark Packard, Trade Policy Counsel, Finance Insurance & Trade, R-Street, “Hamstringing America’s most innovative firms is no way to compete with China”, JUN 22, 2021, https://www.rstreet.org/2021/06/22/hamstringing-americas-most-innovative-firms-is-no-way-to-compete-with-china/

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

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

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

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

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

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

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

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

**Tons of alt causes – their card**

Jan **Eeckhout 21**, professor at Universitat Pompeu Fabra in Barcelona, “Epilogue,” The Profit Paradox, 06/01/2021, pp. 275–282

Often, stakeholder capitalism and corporate responsibility are hailed as the panacea. Unfortunately, they are no more than a drop in the ocean. Of course, it is beneficial if business o wners care about their workers and make sure that they earn a good living. A large firm that exerts monopsony power can make life better for its captive workers. The German model of nonconflictual worker repre sen ta tion is an ex- ample of making work work.1 Often, better treatment of workers raises productivity, which is in the interest of the shareholders, too.

Generally, though, corporate responsibility is high on good inten- tions but low on results; it simply d oesn’t work if we expect that the CEOs or the boards of companies take it upon themselves to reduce their market power, in the pro cess lowering profits and increasing wages. That would lead to perverse economic decisions and inefficiency. Moreover, the unilateral decision not to exert market power is to the benefit of the other competitors who do exert market power. Hence, only coordinated action, such as regulation, can resolve the negative effects of market power.

Most importantly, self- regulation does not work b ecause the prob- lem is economy-w ide: it is like asking the major o wners of fossil fuel– generating firms to self- regulate emissions and environmental stan- dards. BP and Shell bombard us with advertising that praises how much they do for the environment, but they also keep selling oil that increases CO2 emissions. What we need instead is policy that regulates the emis- sions, such as carbon taxes and cap and trade, for example. That regula- tion has to come from outside the industry. Once the regulation is in place, profit- maximizing firms will be as efficient as the market and the regulation demands to generate low emissions energy.

The same holds for the stakeholder capitalism that attempts to re- duce the adverse effects of market power that operate economy wide. The social responsibility of the firm should be to maximize profits through innovation and the use of new technologies. However, we should not allow firms to make profits from using those technologies that build moats around their castles. Institutions should ensure that there is healthy competition. If a firm makes excess profits, regulation should facilitate entry of competitors, which leads to lower prices and lower profits in the long run. This brings innovation and growth, and it leads to more employment and higher wages.

Rather than stakeholder capitalism, I therefore advocate for stronger and ind e pend ent institutions that attain the desired social goals. The mandate of a competition authority is to protect competition, not com- petitors or businesses. It should rein in market power and give power to the market. Most markets work well without much intervention or regulation, but when they d on’t, pro- competitive institutions that are in de pen dent of politics guarantee there is no market failure.

My proposal is therefore a **separation of powers** to achieve the social objectives: competition by firms **in** the market, and regulation **of** the market by the **competition authority**. On the level playing field of com- petition, firms should be allowed to make profits, as they should be prepared to go bankrupt without bailouts in bad times. The competition authority’s **visible** hand will **ensure** that the **market’s “invisible** hand,” where firms seek their own gain, will unintendedly produce the **greatest gain for all**.

Unfortunately, in the **absence** of such institutions, the rise of **market power** has **result**ed in widespread **discontent** against the backdrop of enormous technological advances and economic progress. Some of this discontent is simply the wrong perception. Many forget that only over half a century ago people died of pneumonia, for example, or that pov- erty and standards of living w ere much worse than they are now. But only part of the discontent is misperception; a large part of it is real. And that is why opinions get extremely polarized, why the gillets jaunes (yel- low vests) demonstrate in France, and why people lose faith in po liti cal and economic institutions.

And with the **COVID**-19 pandemic, society jumps **out of the frying pan into the fire**. Everything indicates that the fallout of the **2020** economic crisis is generating even **more pronounced inequality**. Those most negatively affected are the low skilled, the poor, minorities, the elderly, those in low-quality housing and in disadvantaged neighborhoods, the disabled, and the unhealthy. They are **all more likely to lose their jobs, their incomes, and their lives**. Of course, not everything is the fault of market power, so let’s not use the pandemic as an excuse to bash big business. But when, under the guise of a safety net for the unfortunate, a multitrillion-dollar rescue package disproportionately helps large companies, then the policy responses are making things worse in the long run. Eventually, workers have to pick up the tab in the form of taxes on labor (or high inflation).

The fact that in April 2020, in the middle of the crisis, US stocks had their best month since 1987 and that they reached new highs by the summer is bad news. Markets rally because of the multitrillion- dollar bailout with no strings attached and without a need to pay back the handouts, not because the economy is healthy. This **bailout** capitalism **tilts the scales even more** in favor of large companies with market power. In times of healthy capitalism, it is fine if an airline goes bust because it keeps investors in check to make the best decisions in the first place. When an investor makes the right decisions and times are good, they make money. And if things go wrong, companies make losses or even go bankrupt, and the investor loses money. That is what investors in healthy capitalism sign up for.

The argument increasingly is that, like with **banks**, those megafirms are **too big to fail**. In a massive downturn such as the COVID-19 recession, those large firms will drag with them hundreds of thousands of jobs if they go under. Moreover, the bankruptcy of one large firm will have a knock-on effect that leads to the contagion of bankruptcies among other, smaller firms. The contagion of a virus leads to the contagion of business failures. The problem with this argument is that those firms are **too big because they have market power**. Had there been more healthy **competition** with more **firms** in all markets, those firms would **not** have **been too big to fail in the first place**. In the theatre of a healthy competitive market, **failing** is **part of the scenario**. Now, only the **small** firms **without** market power fail.

This lopsided capitalism gets to the **heart of the dominance of large corporations** and the Profit Paradox. A number of **large, thriving firms that** make huge **profit**s **for prolonged periods** of time is **bad for the economy**. We have to stop equating a rising **stock market** with a **healthy economy**. And if at the **height of** an economic **recession**, with small businesses closing and unemployment claims at record highs, those stock markets **rally**, then we know that **market power** is **propping up some business**es at the **expense** of **labor**, t oday and in the future.

The greatest threat of market power is that its enormous concentration of wealth further entrenches that power. Market power generates huge profits that allow the few to buy po litic al f avors, which further cements that power. It is a vicious cycle that destroys democracy. In his grim description of exploitation in the Chicago meatpacking industry at the beginning of the twentieth c entury, Upton Sinclair writes in The Jungle: “[The businesses] own not merely the l abor of society, they have bought the governments; and everywhere they use their raped and stolen power to intrench themselves in their privileges, to dig wider and deeper the channels through which the river of profits flows to them.”2

This pro cess of market power reinforces po liti cal power, and vice versa; wealth creating wealth is not sustainable in the long run. In Ger- many, the Weimar Republic had tight relations with big business, which led to a rise in industrial cartels. And only a few de cades later the coal and steel conglomerates provided the defense apparatus for Nazi war- mongering. The ensuing wars, the economic depression, and high infla- tion decimated small business and the middle class. After the war the alienated small merchants and entrepreneurs ensured that this vicious cycle between politics and big business was broken. The postwar econ- omy was built around Mittelstand (small business), where procompeti- tive institutions made space for small and medium enterprises as the engine of growth for the recovering country.3

History has taught us that it is sufficient for a **spark** in one region to **ignite the dynamite everywhere else**. In 1914 the United States did not have the political problems that Germany had, and Teddy Roosevelt’s trust busting was an attempt to restore the balance toward more equality. But it was **not enough**, and the globalized **economy was brought down by World War I**. Following the war, the **U**nited **S**tates had major discontent during the **Great Depression**, and in World War II the United States was dragged into the **world conflict again**.

In his recent book The Great Leveler (2017), Walter Scheidel argues that **mass violence** and **catastrophes** are the only forces that can reduce in- equality.4 He goes back to the Stone Age and carefully documents how only wars, revolutions, **state collapse**, and **plagues** have managed to restore more equal socie ties. The thesis is that ine quality is so tenacious that only calamitous violence can dismantle it. Will it be any diff er ent now?

It appears that in our age of advanced medical technology and information, society has managed to avoid the **COVID**-19 virus becoming the next great leveler. Epidemiologists and scientists have educated us on how to use social distancing, face masks, and gloves to manage the spread of a disease that would in earlier times have been far more deadly. We may have managed to level the curve of contagion and death and avoided a n eedless social implosion. But COVID-19 has **not leveled** the **inequality** that has grown out of proportion in the past four decades— quite the contrary.

Inequality is as **high** as it was **before World War I**. **Discontent is everywhere**. Only very **draconian measures** will revert the course. It helps to look back: “ Those who cannot remember the past are condemned to repeat it.”5 Incidentally, four Viennese intellectuals in exile, Friedrich von Hayek, Karl Popper, Joseph Schumpeter, and Stefan Zweig, set the tone for a postwar economic and social order with the objective of avoiding the concentration of power and totalitarianism. They all experienced the dire consequences of a collapsing order firsthand and ded cated the remainder of their lives to making sure no one else would experience the same ever again.

We cannot ignore how rapid technological progress and tightly interconnected global economies created enormous market power at the turn of the last century, in the last so- called modern times. The result was a Gilded Age— one where the majority of the workforce saw no gains. Today, in the current modern times, the economy is edging in the direction of a **new Gilded Age**. In the first half of the **twentieth century** we were able to stop the slow-drifting ship of in equality in the global economy, but it took **two brutal wars** and the Great Depression.

Today, the **only way to avoid another calamity** and restore the economic order is to bet on **pro-market reforms** that break the power of mega- firms. We need to **put the trust back into antitrust**, which requires the ambition of a moonshot and the resources of a Manhattan Project. And if that is not complicated enough, market power, like climate change, is a global problem that requires international coordination.

We also need to break the link between market power and political power, which are dangerously feeding off each other. We need to keep money out of politics and politics out of the economy. That means we need to minimize the role of lobbying. In the United States, campaign finance holds politicians hostage, who suffer acutely from Stockholm syndrome. Campaign finance has a role in many social prob lems, from mass shootings to the opioid crisis.

But the political influence of big business is also at the heart of the ailments of the economic system. Firms with market power have the resources to lobby politicians, and they use the lobbying to build larger uncontested empires, which in turn frees up more resources to lobby even further. In this vicious cycle, mega- firms kidnap politicians on is- sues ranging from data protection (the big tech firms) to the absence of environmental regulation (the Koch family), and most of all, on the power of those dominant firms to further extend their dominance. Lob- bying is the main vehicle to create and perpetuate market power. It was like that for the East India Com pany, a master lobbyist, and it is nothing more than a legalized form of corruption.

Market power concentrates vast resources in the hands of a few, who use those resources and more to perpetuate market power. This poses a serious threat to democracy. To put it in the words that former US Su- preme Court Justice Louis Brandeis reputedly has spoken, “Americans might have democracy . . . , or wealth concentrated in a few hands, but they could not have both.” 6

It is easy to **blame** the **capitalis**t syste**m**. It is true that technology and markets inherently lead to **concentration** of wealth and inequality, but markets **do not operate in a vacuum**: even the most **rogue form** of capitalism needs **institutions** and **regulation**. It needs an army and a police force to guarantee that property rights are respected, and to foster **trust** between **trading partners** that encourages them to make long-t erm in- vestment decisions. But from this rogue form of laissez- faire capitalism much **more intervention and regulation is needed** to ensure that capital- ism is **also competitive**. The current institutions ensure that capitalism is pro-business. To safeguard democracy and a just division of what society produces, we need regulation and institutions that foster **pro-competitive cap**italism. We need that now, before it’s **too late**!

**LIO resilient.**

**Ikenberry ’18** [John; June 28; Professor of International Relations at Princeton University; Ethics & International Affairs, “Why the Liberal World Order Will Survive,” vol. 32, no. 1]

Self-Reinforcing Characteristics of Liberal International Order

The United States has **dominated** the post-war **international order**. It is an order built on **asymmetries of power**; it is hierarchical. But it is **not** an **imperial system**. It is a **complex** and **multilayered** political formation with **liberal characteristics**— openness and **rules-based** principles—that generate incentives and opportunities for other states to **join** and **operate within** it.

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

These aspects of the liberal international order create **incentives** and **opportunities** for states to **integrate** into its core economic and political realms. The order allows states to **share** in its economic spoils. Its **pluralistic** character creates possibilities for states to “**work the system**”—to join in, **negotiate**, and **maneuver** in ways that **advance their interests**. This, in turn, creates an order with **expanding constituencies** that **have a stake** in its continuation. Compared to imperial and colonial orders of the past, the existing order is **easy to join** and **hard to overturn**.

**No impact to technology monoculture theory---existing innovations solve cyber security**

### 1NC --- Convergence

**2-Status quo solves EU-US convergence.**

Daniel **Michaels** and Brent **Kendall** 7-15-**21**. Michaels is a Brussels Bureau Chief for The Wall Street Journal. Previously German Business Editor, also overseeing coverage of the European Central Bank. Journal’s Aerospace & Aviation Editor for Europe, covering airlines, aviation and aerospace industries in Europe, Africa and the Middle East. Legal affairs reporter in the Washington bureau of The Wall Street Journal, where he covers the Justice Department, the Federal Trade Commission and the federal courts, including the Supreme Court. "WSJ News Exclusive," WSJ, https://www.wsj.com/articles/u-s-competition-policy-is-aligning-with-europe-and-deeper-cooperation-could-follow-11626334844

The European Union’s top antitrust regulator **foresees greater alignment with the U.S.** on competition enforcement, **particularly in the tech sector**, amid a broader policy reorientation under the Biden administration. EU Executive Vice President Margrethe Vestager, the bloc’s competition commissioner, said she expects “much more intense work when it comes to technology and the digitized market” between her team and Washington. President Biden’s policy statements and appointments, plus legislative proposals from Congress, indicate the **U.S. is moving closer to positions long held in the EU** regarding internet giants, pharmaceutical firms and other industries with diminishing competition. As the world’s two most powerful antitrust regulators, the U.S. and the EU can shape global competition discourse and rein in many of the world’s largest companies, so greater cooperation could have significant impact. For supporters of aggressive enforcement, “it will certainly be a marriage made in heaven,” said Jeffrey Jacobovitz, a Washington-based antitrust lawyer with Arnall Golden Gregory LLP. “I think they’ll work hand in hand. Increased coordination makes enforcement stronger.” That alignment will make it even more incumbent on companies in the crosshairs to develop broad, cross-Atlantic strategies on how to respond to that scrutiny, Mr. Jacobovitz said. While tech companies say similar policies in multiple jurisdictions can simplify operations, some worry about the U.S. adopting some of Europe’s more aggressive positions. “The U.S. should be wary of copying EU-style experimental regulation,” said Christian Borggreen, vice president and head of the Brussels office at the Computer & Communications Industry Association, which represents companies including [Amazon.com](https://www.wsj.com/market-data/quotes/AMZN) Inc., [Facebook](https://www.wsj.com/market-data/quotes/FB) Inc. and Google. “As a leader in tech innovation, the U.S. would have much more to lose if they get it wrong.” Mr. Biden’s appointments of high-profile U.S. progressives who have criticized tech giants—[Lina Khan](https://www.wsj.com/articles/facebook-seeks-recusal-of-ftc-chairwoman-in-antitrust-case-11626267605?mod=article_inline) to run the Federal Trade Commission, and [Tim Wu](https://www.wsj.com/articles/the-man-behind-bidens-push-to-promote-business-competition-11625851555?mod=article_inline) to the White House Economic Council—have been **widely seen as indicating that Mr. Biden plans to turn up the heat on internet conglomerates.** Companies such as [Microsoft](https://www.wsj.com/market-data/quotes/MSFT) Corp. , [Apple](https://www.wsj.com/market-data/quotes/AAPL) Inc. and Google parent [Alphabet](https://www.wsj.com/market-data/quotes/GOOG) Inc. previously felt little pressure from Democrats, including former President Barack Obama, who criticized past EU efforts to restrain U.S. tech companies. Ms. Vestager held an initial meeting with Ms. Khan by videoconference on July 2. Mr. Biden has yet to appoint someone to lead antitrust enforcement at the Justice Department. That nomination could provide further clues to his administration’s approach. In parallel, House Democrats recently introduced a package of bills with bipartisan support that target big tech companies’ practices considered by critics as anticompetitive. The [proposed legislation](https://www.wsj.com/articles/amazon-other-tech-giants-could-be-forced-to-shed-assets-under-house-bill-11623423248/?mod=article_inline) could go as far as breaking up, or at least shrinking, Amazon and other top tech companies. New York state could go a step further with [proposed antitrust legislation](https://www.wsj.com/articles/new-york-senate-passes-antitrust-bill-targeting-tech-giants-11623098225?mod=article_inline) that would forbid companies from abusing a dominant market position—a prohibition central to EU competition regulation that is much stricter than U.S. federal antitrust rules. Mr. Biden last week [issued an executive order](https://www.wsj.com/articles/biden-takes-aim-at-corporate-consolidation-big-business-tactics-11625832017?mod=article_inline) seeking to curb the power of companies across the U.S. economy that dominate their markets. The jockeying for new policy approaches comes as officials on both continents have faced enforcement challenges in limiting digital giants’ activities. Ms. Vestager has imposed billions of dollars in penalties on U.S. tech companies but [had little impact](https://www.wsj.com/articles/europes-antitrust-push-against-google-hasnt-dented-its-heft-can-the-u-s-11603293443?mod=article_inline) on their ability to control markets, according to critics including consumer advocates and some smaller competitors. In the U.S., a federal judge last month [dismissed cases](https://www.wsj.com/articles/federal-judge-dismisses-government-antitrust-lawsuits-against-facebook-11624907747?mod=article_inline) brought by the FTC and most U.S. states against Facebook, though the FTC is expected to try again with an amended lawsuit. “I believe there is a greater consensus that competition enforcement has not always delivered on its promise,” said University of Oxford law professor Ariel Ezrachi, who is director of Oxford’s Centre for Competition Law and Policy. **He said the new U.S. approach is “a real tectonic shift.”** In a sign of the new alignment, the U.S. and EU during Mr. Biden’s trip to Brussels last month announced the **creation of a Joint Technology Competition Policy Dialog** alongside their [new EU-U.S. Trade and Technology Council](https://www.wsj.com/articles/u-s-eu-forge-closer-ties-on-emerging-technologies-to-counter-russia-and-china-11623922201?mod=article_inline). Coordinated enforcement plans **extend beyond tech**. The FTC in March announced the formation of an international working group to share best practices on pharmaceutical mergers that will include competition enforcers from the EU, U.K., Canada and several U.S. states. Ms. Vestager, who has voiced concerns about deals in the sector, welcomed the FTC’s initiative, which came before Ms. Khan took office. The FTC also recently **cited an EU antitrust review of life-sciences company** [Illumina](https://www.wsj.com/market-data/quotes/ILMN) Inc.’s planned acquisition of Grail Inc. in persuading a judge to [reject the companies’ bid](https://www.wsj.com/articles/illumina-battles-u-s-european-antitrust-enforcers-on-grail-deal-11622206801?mod=article_inline) for a quick U.S. court hearing. U.S. and European enforcers **won’t always align**, given their different markets and different laws. The proposed merger of insurance brokers Aon PLC and [Willis Towers Watson](https://www.wsj.com/market-data/quotes/WLTW) PLC, for example, last week won EU approval, even as it faces [a U.S. lawsuit](https://www.wsj.com/articles/aon-dealt-a-blow-in-bid-for-quick-trial-on-u-s-challenge-to-willis-towers-merger-11625607068?mod=article_inline) from the Justice Department. EU and European national competition regulators **already work closely** with the Justice Department, FTC and U.S. states, say officials on both sides of the Atlantic. Cooperation has **deepened over recent years**—**even amid broader U.S.-EU friction** under former President [Donald Trump](https://www.wsj.com/topics/person/donald-trump) —as U.S. authorities began suing the EU’s longtime targets such as Google and Facebook. Trans-Atlantic cooperation “becomes obviously even more intense when both the DOJ and the FTC have their own tech cases,” Ms. Vestager said in an interview. Some cases require targeted companies to grant waivers for authorities to cooperate. With waivers, case teams discuss their work in seminars or weekly calls, getting “really specific and concrete,” Ms. Vestager said. EU Competition Commission Director-General Olivier Guersent, the most senior antitrust regulator under Ms. Vestager, said their team advised U.S. state and federal counterparts on the cases they opened last year. “When DOJ decided to move, we explained the traps we fell into and the problems we had, so they would benefit from our learning curve and gain time,” Mr. Guersent said. The **narrowing gap in approaches** is transcending “some deeply embedded differences of philosophy,” said Mr. Guersent. The U.S., he said, has traditionally relied more on the power of markets—such as the rise of upstarts—to rein in companies that developed disproportionate competitive strength. “We’re less confident [so] we tend to be more interventionist,” he said, ascribing the difference to culture. “The question is how long you are prepared to suffer a loss of welfare to consumers due to excessive market power.” Mr. Guersent said, “In a way, the risk has become too big by American standards as well, and that’s why we’re converging, in my view.”

**3-US/EU divergences aren’t attributable to the CWS**

A. Douglas **Melamed &** Nicolas **Petit 19**. Professor of the Practice of Law at Stanford Law School & Joint Chair in Competition Law at the Department of Law and at the Robert Schuman Centre for Advanced Studies, European University Institute. “The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets.” Review of Industrial Organization volume 54, pages741–774 (2019). https://link.springer.com/article/10.1007/s11151-019-09688-4

A comparison of U.S. and EU competition enforcement illustrates how enforcers can reach different outcomes **even when they share a commitment** to the CW standard, over which there is **broad convergence** in merger and coordinated conduct cases (Kovacic 2008). In Microsoft/LinkedIn, for example, the European Commission was concerned about the risks of post-merger marginalization of competing professional social networks that offered “a greater degree of privacy protection to users than LinkedIn” and held that the merger would cause “harm to consumers” and “restrict consumer choice”. And in other cases involving digital platforms, European competition agencies have objected to MFN clauses that are used by online travel agents in contracts with hotels on the ground that they foreclose competitive entry and/or expansion and inflict net losses to consumers.

U.S. enforcers reached different conclusions in these matters because they made different assessments of the effect of the conduct on consumer welfare. The more cautious U.S. approach appears to reflect a greater aversion to the risk of Type 1 errors.

The differences are not **attributable to the CW standard** in U.S. antitrust law because the European agencies rely generally on the same standard. In fact, the EU statutory provision on anticompetitive unilateral conduct is almost entirely phrased in terms that are closely related to the CW standard (Joliet 1970). The differences between EU and US enforcement reflect **different factual judgments** within the CW standard about such matters as the likelihood of future harm and the likely efficiencies from the conduct at issue and different normative judgments about the relative importance of Type 1 and Type 2 errors or preference for total welfare or trading partner welfare (Blair and Sokol 2013).

Differences in decisional outcomes under the CW standard might also be attributable in part to institutional and procedural differences. In the EU, agency decisions are self-enforcing, presumptively lawful and subject to a Chevron-type judicial deference standard; and defendants are not permitted to take discovery from third parties or to cross-examine adverse witnesses. In the US, by contrast, most antitrust cases are litigated in independent tribunals; all are subject to review by courts that decide questions of law de novo; and defendants are permitted to take discovery from third parties and to cross-examine adverse witnesses. In these respects, US law is more defendant-friendly, and EU law is more likely to entail false positives. Again, however, **these differences have nothing to do with the CW standard**.

### Populism

**No impact to populism – their ev is hype.**

**Strobaek ’17** (Michael; 6/5/17; Chief Investment Officer, free-lance journalist, and political analyst for CNBC; CNBC, “From the cacophony of populism, is a stronger middle emerging?” <http://www.cnbc.com/2017/07/05/from-the-cacophony-of-populism-is-a-stronger-middle-emerging.html)>

One would presume that anger breeds irrationality, radicalism and political as well as economic instability. But it need not. Anger – or let us call it, less dramatically, dissatisfaction with current affairs – can also lead to **renewal and progress**. Indeed, this year's elections in **Europe** suggest that voters are rather heading in that direction, i.e. seeking greater stability as well as reform while rejecting angry populism which has no real solutions to offer for today's major issues. With this in mind, it should thus come as no surprise that the radical **right was soundly defeated** in **Austria**, the **Netherlands** and **France**, and that the AfD (Alternative for Germany) is in rapid decline in **Germany**. In Finland, the radical right has just split into two, pragmatists and "purists." In Italy, too, recent local elections suggest that populist promises alone do not convince the electorate. Similarly, the **setbacks for the Conservatives** in the U.K. election in part represented a rejection of simplistic chauvinistic slogans. Leftist populism in demise? Conversely, we see few signs that the radical left is benefiting from this trend. Those who believe that the gains of the Labour party in the U.K. – headed by a rather dogmatic old-style socialist – suggest that leftist populists stand a good chance to govern are likely to be disappointed. Quite to the contrary, even in countries that have suffered deep crises – Spain and Greece come to mind – voters have **become disillusioned** with their recipes. Bernie Sanders would not, we believe, have won the U.S. election had he been the Democratic opponent of Donald Trump. Returning to what looks like a detail of the U.K. election, the very strong performance of the Conservative leader in Scotland, Ruth Davidson, an avowed "(EU) remainer" and opponent of the Scottish National Party suggests that separatism, another form of "anger," may also be **on the way out**. The outcome of the Catalan vote in the fall, should it take place, will be a further test of this thesis. Finally, beyond Europe, recent **political shifts** in Argentina and the upheaval in Brazil also suggest that leftist populism is in demise. Let us hope that Venezuela will soon be able to rid itself of one of its more extreme forms. Return to the center Putting these observations together suggests to me that voters have in fact started to head away from the extremes back to the center. Emmanuel Macron won the French election on an **openly centrist** platform. The state elections in Germany recently boosted Angela Merkel's centrist CDU, but even if the SPD and Martin Schulz were to win in September, this would hardly signal a turn of the electorate in a radical direction. Voters seem to be seeking politicians who offer pragmatic solutions to the complex problems of the day rather than simplistic recipes. The next U.S. president, I dare predict, is quite likely to be an avowed centrist as well. Maybe the **disillusionment with radicalism** – in this case of a truly brutal nature – will even strengthen forces of compromise in the Middle East at some point in the not-too-distant future. All in all, fears of significant political destabilization and systemic disruptions thus seem **overdone**, which may be one reason why markets, equities in particular, have been so **stable and calm** until recently despite rather stretched valuations. Does this mean that we will, after all, experience the unabashed victory of economic and political liberalism that Francis Fukuyama proclaimed? This remains rather unlikely, in my view, for three reasons: First, our multipolar world suggests that national and regional interests will take precedence over those promoting free markets and unfettered globalization. Second, distrust of market solutions has not been overcome, not least due to the "misdeeds" during the financial crisis.

**Inequality inevitable --- that’s their internal link to antitrust solving populism**

Jonathan **Klick** **et al. 19**—University of Pennsylvania Law School, Erasmus School of Law; Elyse Dorsey, Adjunct Professor at Antonin Scalia Law School; Joshua D. Wright, Law professor at George Mason University, executive director of the Global Antitrust Institute, former member of the Federal Trade Commission; Jan Rybnicek, Freshfields Bruckhaus Deringer LLP. ("Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust," January 9, 2019, from George Mason Law & Economics Research Paper No. 18-29, Arizona State Law Journal, 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3249524)

On the whole, the relationship between the enforcement metrics and consumption is **comparable** for the households in both the **first and fifth income quintiles**. There is not much **empirical evidence** to substantiate the proposed correlation between antitrust enforcement activity and inequality. And certainly not evidence **significant enough** to justify the aggressive policy proposals recently injected into discussion of competition policy.

Stepping away from this aggregate analysis for a moment, it is interesting to note that the new(-old) focus on “big is bad” when it comes to inequality ignores an impressive literature on the effects of one of the biggest players in the US in recent decades – Walmart. Work by Jerry Hausman and Ephraim Leibtag shows that when Walmart Supercenters enter a market, food prices paid by consumers in the market drop by about 3 percent, and because they have detailed longitudinal data on household expenditures, they are able to estimate household welfare effects due to this price decrease. They find that the welfare effects are **substantial** and they are most pronounced for those at the lower end of the socio-economic spectrum.158 In addition to this price effect, David Matsa shows that Wal-Mart’s entry into a market induces competitor supermarkets to improve the quality of their service so as to avoid losing even more business to Wal-Mart and its lower prices.159 Thus, in the posterchild case for big is bad, the behemoth Wal-Mart would appear to improve inequality by its very existence.

Although we believe **consumption** is the most relevant measure for assessing the welfare effects (in absolute or, as here, in relative terms) of antitrust policy, we provide similar analyses of **income** and wealth. Using Census data,160 in Table 6, we again provide estimates from an AR(1) distributed lag model examining the effects of DOJ investigations, both merger specific and total, on the income shares received by those individuals in the first quintile and the fifth quintile, while also controlling for a background linear trend.

As with consumption measures, there is generally **no statistically significant effect** (individually or jointly) of current or past investigations (regardless of whether we focus on merger-specific or total investigations) on the **income** shares of those at the **bottom or the top** of the income distribution. Putting aside statistical significance, while past investigations are associated with increases in the income share received by those at the bottom of the distribution, current investigations have the **opposite effect**. Further, many of the investigation coefficients are **positive for the fifth quintile** income share as well. If we examine **combined ratios of the shares** as we did with the consumption data, we still find **no support** for the assumption that an increase in antitrust enforcement has **any systematic effect on inequality**.16

# 2NC---Fullertown Octas

## CP---DCN

### 2NC---O/V

### AT: PDB

### AT: PDCP

#### B – mutually exclusive – defer to topic experts – our advocate’s a former FTC Chair – whose opinion should carry more weight than their unwarranted assertions that it’s “basically the same thing” or “moots the 1AC”

--also Hyman 20 ev’s contrast between the CP and “sweeping” preemptive federal law makes the same arg

Hyman and Kovacic 18 (David A. Hyman, Chair in Law and Professor of Medicine, University of Illinois, former Special Counsel at the Federal Trade Commission; and William E. Kovacic, Global Competition Professor of Law and Policy, Professor of Law, and Director of the Competition Law Center, at George Washington University Law School, former General Counsel, Commissioner, and Chairman of the Federal Trade Commission; “Implementing Privacy Policy: Who Should Do What?” GWU Legal Studies Research Paper, February, 2018, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3123115>) MULCH

What about the states? Some commentators have argued that a full-scale renovation of the U.S. privacy framework should preempt the ability of states to pursue initiatives inconsistent with national policy.66 We think an alternative pathway holds greater promise. Federal and state privacy regulators currently cooperate in a variety of ways, but there is no systematic mechanism for policy coordination or convergence on shared norms. We propose the extension of existing cooperation and coordination efforts through the establishment of a domestic privacy network (DPN) – analogous to the International Competition Network for antitrust enforcers.67 A DPN will help encourage privacy regulators within the U.S. to converge on superior policy norms.

Among other tasks, the DPN could use the accumulated experience of state regulators to devise model laws – for example, a law dealing with data breaches – should provide focal points for convergence. Here the DPN would play a role akin to that performed by American Law Institute and the National Council of Commissioners on Uniform State Laws. 68

From a theoretical perspective, one can improve the institutional framework for U.S. privacy policy either by merger (i.e., by placing all relevant functions within a single institution), or by contract (i.e., by creating and strengthening the ties that allow existing entities to better coordinate their efforts). Our “integration-by-contract” approach involves greater costs of coordination, but it has several major benefits. Most importantly, it avoids the disruption that takes place when responsibilities and personnel are reallocated across agencies. We believe that reorganizations are difficult to justify unless the benefits are compelling. As a practical matter, reorganization proposals also face daunting political headwinds, since they disrupt settled practices and expectations (including the flow of campaign contributions to members of Congress).

#### A – “expand the scope” – DCN’s preemption waivers narrow it, which is mutually exclusive

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Specific Long Term Plans to Strengthen Committee

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

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

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

#### B – “its” – excludes state prototyping

W.C. Updegrave 91, “Explanation of ZIP Code Address Purpose”, 8-19, <http://www.supremelaw.org/ref/zipcode/updegrav.htm>

More specifically, looking at the map on page 11 of the National ZIP Code Directory, e.g. at a local post office, one will see that the first digit of a ZIP Code defines an area that includes more than one State. The first sentence of the explanatory paragraph begins: "A ZIP Code is a numerical code that identifies areas within the United States and its territories for purposes of ..." [cf. 26 CFR 1.1-1(c)]. Note the singular possessive pronoun "its", not "their", therefore carrying the implication that it relates to the "United States" as a corporation domiciled in the District of Columbia (in the singular sense), not in the sense of being the 50 States of the Union (in the plural sense). The map shows all the States of the Union, but it also shows D.C., Puerto Rico and the Virgin Islands, making the explanatory statement literally correct.

#### 3 – certainty, immediacy, and durability are topical burdens:

#### A – “Substantial”

Words and Phrases 64 (40 W&P 759) (this edition of W&P is out of print;  the page number no longer matches up to the current edition and I was unable to find the card in the new edition.  However, this card is also available on google books, Judicial and statutory definitions of words and phrases, Volume 8, p. 7329)

The words “outward, open, actual, visible, substantial, and exclusive,” in connection with a change of possession, mean substantially the same thing.  They meannot concealed; not hidden; exposed to view; free from concealment, dissimulation, reserve, or disguise; in full existence; denoting that which not merely can be, but is opposed to potential, apparent, constructive, and imaginary; veritable; genuine; certain; absolute; real at present time, as a matter of fact, not merely nominal; opposed to form; actually existing; true; not including admitting, or pertaining to any others; undivided; sole; opposed to inclusive. Bass v. Pease, 79 Ill. App. 308, 318.

#### B – “Increase”

HEFC 4 (Higher Education Funding Council for England, “Joint Committee on the Draft Charities Bill [Written Evidence](http://www.publications.parliament.uk/pa/jt200304/jtselect/jtchar/167/167we01.htm)”, June,<http://www.publications.parliament.uk/pa/jt200304/jtselect/jtchar/167/167we98.htm>)

9.1  The Draft Bill creates an obligation on the principal regulator to do all that it "reasonably can to meet the compliance objective in relation to the charity".[[45](http://www.publications.parliament.uk/pa/jt200304/jtselect/jtchar/167/167we98.htm" \l "note45)] The Draft Bill defines the compliance objective as "to increase compliance by the charity trustees with their legal obligations in exercising control and management of the administration of the charity".[[46](http://www.publications.parliament.uk/pa/jt200304/jtselect/jtchar/167/167we98.htm" \l "note46)] 9.2  Although the word "increase" is used in relation to the functions of a number of statutory bodies,[[47](http://www.publications.parliament.uk/pa/jt200304/jtselect/jtchar/167/167we98.htm" \l "note47)] such examples demonstrate that "increase" is used in relation to considerations to be taken into account in the exercise of a function, rather than an objective in itself. 9.3  HEFCE is concerned that an obligation on principal regulators to "increase" compliance per se is unworkable, in so far as it does not adequately define the limits or nature of the statutory duty. Indeed, the obligation could be considered to be ever-increasing.

#### C – “Should”

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

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

**[FOOTNOTES 13-15]**

13 "Should" not only is used as a "present indicative" synonymous with ought but also is the past tense of "shall" with various shades of meaning not always easy to analyze. See 57 C.J. Shall § 9, Judgments § 121 (1932). O. JESPERSEN, GROWTH AND STRUCTURE OF THE ENGLISH LANGUAGE (1984); St. Louis & S.F.R. Co. v. Brown, 45 Okl. 143, 144 P. 1075, 1080-81 (1914). For a more detailed explanation, see the Partridge quotation infra note 15.

Certain contexts mandate a construction of the term "should" as more than merely indicating preference or desirability. Brown, supra at 1080-81 (jury instructions stating that jurors "should" reduce the amount of damages in proportion to the amount of contributory negligence of the plaintiff was held to imply an obligation and to be more than advisory); Carrigan v. California Horse Racing Board, 60 Wash. App. 79, 802 P.2d 813 (1990) (one of the Rules of Appellate Procedure requiring that a party "should devote a section of the brief to the request for the fee or expenses" was interpreted to mean that a party is under an obligation to include the requested segment); State v. Rack, 318 S.W.2d 211, 215 (Mo. 1958) ("should" would mean the same as "shall" or "must" when used in an instruction to the jury which tells the triers they "should disregard false testimony").

14 In praesenti means literally "at the present time." BLACK'S LAW DICTIONARY 792 (6th Ed. 1990). In legal parlance the phrase denotes that which in law is presently or immediately effective, as opposed to something that will or would become effective in the future [in futurol]. See Van Wyck v. Knevals, 106 U.S. 360, 365, 1 S.Ct. 336, 337, 27 L.Ed. 201 (1882).

15 Nonetheless, modern English usage appears supportive of my conclusion that ". . . what the practice amounts to is this: the past subjunctive should is not only used in all persons, but it is employed as, virtually, a present indicative synonymous with ought." E. PARTRIDGE, USAGE AND ABUSAGE, p. 376 (1963).

**[/FOOTNOTES 13-15]**

¶5 Nisi prius orders should be so construed as to give effect to every words and every part of the text, with a view to carrying out the evident intent of the judge's direction.17 The order's language ought not to be considered abstractly. The actual meaning intended by the document's signatory should be derived from the context in which the phrase to be interpreted is used.18 When applied to the May 18 memorial, these told canons impel my conclusion that the judge doubtless intended his ruling as an in praesenti resolution of Dollarsaver's quest for judgment n.o.v. Approval of all counsel plainly appears on the face of the critical May 18 entry which is [885 P.2d 1358] signed by the judge.19 True minutes20 of a court neither call for nor bear the approval of the parties' counsel nor the judge's signature. To reject out of hand the view that in this context "should" is impliedly followed by the customary, "and the same hereby is", makes the court once again revert to medieval notions of ritualistic formalism now so thoroughly condemned in national jurisprudence and long abandoned by the statutory policy of this State.

#### D – “Resolved”

OED 89 (Oxford English Dictionary, “Resolved,” Volume 13, p. 725)

Of the mind, etc.: **Freed from doubt or uncertainty**, fixed, settled. Obs.

### AT: Theory

#### AND, a robust scholarly lit base ensures in-depth global institutional comparison – field experts think it’s a particularly valuable debate that their model actively suppresses

Kovacic and Hyman 12 (William E. Kovacic, Global Competition Professor of Law and Policy, Professor of Law, and Director of the Competition Law Center, at George Washington University Law School, former General Counsel, Commissioner, and Chairman of the Federal Trade Commission; and David A. Hyman, Chair in Law and Professor of Medicine, University of Illinois, former Special Counsel at the Federal Trade Commission; “Competition Agency Design: What's on the Menu?” European Competition Journal, 8(3), December 2012, pp.527-538, DOI:10.5235/ECJ.8.3.527)

The question of how to design or reform institutions for the implementation of competition laws is not merely a parochial concern of the UK. Recent years have featured major reforms around the world.4 France, Portugal and Spain have combined two existing competition agencies into one. Brazil recently folded its three competition bodies into a single new institution. The Netherlands is poised to combine its regulators responsible for competition law, consumer protection, and the postal and telecommunications sectors into a new body. Spain is considering a further step of unifying the competition agency with as many as six separate sectoral regulators. Other countries have experimented with various institutional reforms, including adding and subtracting policy functions, creating new quality control mechanisms and enhancing reliance on multinational enforcement networks. Finally, other countries have modified substantive competition law (eg adding criminal penalties and enhancing private rights of action), which will predictably affect the institutional dynamics in which competition agencies operate.

In this paper we step back from the details of these individual case studies and lay out the implicit “menu” that countries are choosing from in designing and/or reforming their competition agencies. Section B explains the logic of focusing on “engineering not physics”, then identifies nine major institutional design choices that influence the quality and effectiveness of competition agencies. We discuss the trade-offs associated with each choice and review the inter-relationships among individual choices. Section C briefly considers the implications of these dynamics for the future of agency design and competition policy.

B. AGENCY DESIGN: CHOICES AND CONSEQUENCES

1. The Logic of “Engineering Not Physics”

This essay focuses on the “engineering” of agency design and implementation, rather than the “physics” of substantive policy development. 5 Our topic does not attract much in the way of academic attention or interest; as Professor Peter Schuck has observed:

“It is the substantive merits and politics of policy proposals that almost always dominates public debates, not the often invisible, mundane processes of public administration. Even political scientists, who should know better, tend to relegate public administration to a relatively obscure corner of their profession. Whereas the substance of policy design is considered sexy, the process of policy administration is usually seen as, well, boring.”6

Even if our topic is, well, boring, we are convinced that it requires more attention than has historically been the case. Competition law assuredly presents fascinating questions of doctrine and high theory—but, as one of us noted in an earlier article,

“to affect policy, theory cannot be suspended in air. If theory is not grounded in the engineering of effective institutions, it will not work in practice. The engineering of policy making involves basic questions of implementation. It is one thing for the policymaking aerodynamicist to conceive a new variety of aircraft. It is another for the policy engineer to design and build it. To have elegant physics without excellent engineering is a formula for policy failure.”7

In another article, drawing from examples across the US government and over time, we provide a wide-ranging analysis of the impact of agency design on agency behaviour.8 This far shorter essay represents our first cut at the issues raised by the design of competition agencies. Although we use the BIS proposal as a springboard, our analysis goes well beyond the issues raised by the proposal on the table to fold the OFT and CC into the CMA.

### 2NC---Solvency---T/L

#### Empirics prove convergence in binding policy at all levels of government faster and more solvent than the plan!

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

Our chief suggestion is to expand the use of opt-in networks to join up federal and state regulators. For example, a “Domestic Competition Network” would engage federal and state agencies with a competition policy mandate in regular consultations about matters of common interest.57 For antitrust law and other areas of regulatory policy, the program of a network of regulators would have several dimensions, including the creation of working groups to address various commercial phenomena, identifying allocations of agency resources that would maximize the contributions of all network participants, engage in common research projects, establish interagency guidelines and protocols that clarify substantive standards and procedures, and convene events (e.g., hearings and conferences) on topics of common concern.

To be successful, the networks would need to encourage engagement at three levels of agency personnel: top leadership, senior division managers, and case-handlers. For the latter group, we can imagine a regular program of secondments by which agencies exchange personnel to work inside their counterpart institutions.58 This mechanism provides a means for sharing knowledge and building the personal relationships and trust that facilitate interagency cooperation. The sharing of knowledge is a vital objective of the networking initiatives we propose, since it accelerates learning and convergence on better practices far quicker than would be the case if each institution functioned in isolation. Networking can convert a collection of flatter learning curves into a single steeper learning curve that enables all participating institutions to make progress more quickly.

Enhanced networking also fits well into a decentralized policy environment and stimulates opting-in to better practices. Individual institutions would continue to conduct policy experiments, informed by the larger body of experience accumulated by all related institutions. Networking would encourage agencies to report to each other on the design and implementation of individual policy experiments and to devise techniques for measuring outcomes. The disclosure of experiment design and operations, and the evaluation of results would inform judgments by each policymaker about whether to emulate the policy technique in question.

Of course, creating and nurturing these networks involves answering a host of practical questions, virtually all of which lie beyond the scope of this paper. For those who are skeptical of the utility of opt-in networks to improve policymaking, we note that we are not writing on a blank slate. As part of the modernization of their competition regime in 2004, the European Union established a European Competition Network that joins up the EU Member State competition authorities in regular discussions, along with the Competition Directorate of the European Commission.59 Similarly, when the United Kingdom reformed its competition system in 2014, it formed a competition network that engages the Competition and Markets Authority (the national competition agency) in regular discussions with sectoral regulators (such as OFCOM, the telecommunications regulator) with a competition mandate.60 A third example is the Common Ground Conferences that the FTC and various state attorneys general have convened to address specific policy issues.61 All of these networks have proven valuable in improving the performance of the overall regulatory system while preserving opportunities for individual experimentation.

Of course, forming new institutional frameworks does not guarantee that the potential benefits (enhanced policy coordination) will be realized in practice, let alone maximized. For networks to work well, top agency leadership must visibly commit time and effort to building and maintaining relationships with their counterparts across regulatory entities. Effectiveness also depends on the willingness of senior leadership to operate collegially with their agency peers and to see value in the development of enhanced interagency collaboration. The success achieved by the three networks highlighted previously shows that networking initiatives can be done and done well.

Over time, soft convergence mechanisms embodied in networking can provide a basis for developing more formal binding policy instruments. The confidence and experience gained by networked cooperation can inform judgments about statutory reform regarding substantive standards and procedures, with convergence on better, if not necessarily best, practices. Stated differently, our modest proposal can be an important step toward bolder forms of policy convergence.

### AT: Signaling

#### 2. No perceived distinction – empirics

Blasé 3 Julie Melissa Blase, PhD in Government from the University of Texas, BA from the University of Texas at Austin, “Has Globalization Changed U.S. Federalism? The Increasing Role of U.S. States in Foreign Affairs: Texas-Mexico Relations”, Doctoral Dissertation, December 2003, https://repositories.lib.utexas.edu/bitstream/handle/2152/463/blasejm039.txt

Although what the states and cities are doing may not rise to the level of federal law, many of these policy initiatives are in harmony with domestic policy goals. Collectively, it can be argued, they serve to shape the foreign relations of the nation as a whole. Ivo Duchacek sees no difference in relations conducted by federal actors and by subnational actors. "If by diplomatic negotiation we mean processes by which governments relate their conflicting interest to the common ones, there is, conceptually, no real difference between the goals of paradiplomacy and traditional diplomacy: the aim is to negotiate and implement an agreement based on conditional mutuality."45 Brian Hocking objects to treating the foreign relations of subnational governments as if they were something distinct from the federal level. Hocking studies what happens in federal systems when foreign policy issues become local concerns. He sets his approach apart from the complex interdependence crowd, such as Duchacek, saying that ideas such as "paradiplomacy" places subnational activities outside of traditional diplomatic patterns. Hocking sees non-central governments as integrated into a dense web of diplomatic interactions, in which they serve more as "allies and agents" in pursuit of national objectives rather than as flies in the ointment. "The nature of contemporary public policy with its dual domestic- international features, creates a mutual dependency between the levels of government and an interest in devising cooperative mechanisms and strategies to promote the interests of each level."46 Rather than separating the activities of non-central governments from those of central governments, Hocking's goal is to "locate" subnational governments in the traditional diplomatic and foreign policy processes initiated and carried through by the federal government. But what Hocking does not look at as closely are the ways in which subnational governments initiate relations directly with foreign governments. Looking at why states initiate their own foreign relations is the way to determine to what degree the states, in pursuit of their own goals, can be "allies and agents" of the federal government. This dissertation addresses state- initiated relations with foreign governments to see whether the states are acting as de facto agents of the federal government, in pursuit of shared goals or distinct state interests. But one point to consider is that the development of state roles is not a matter of devolution. Many of the developments at the subnational level are state and local responsibilities to begin with. While the federal government is responsible for trade policy, states have the primary role in economic development, and criminal justice is a state and local concern, albeit state and local governments share responsibility with the federal government for public safety. But the states are active in the policy areas examined here not so much because the federal government has mandated they be so, but because globalization has changed the nature of governing at the subnational level. These developments signify not a transfer of power from the federal level to the states but an expansion of traditional state- level powers.

### 2NC---AT: Pre-Emption

## T

## CP---Sec 5

### 2NC---Condo

## Adv---Market Power

### 2NC---AT: Innovation !

#### Disease can’t cause extinction

Dr. Toby Ord 20, Senior Research Fellow in Philosophy at Oxford University, DPhil in Philosophy from the University of Oxford, The Precipice: Existential Risk and the Future of Humanity, Hachette Books, Kindle Edition, p. 124-126

Are we safe now from events like this? Or are we more vulnerable? Could a pandemic threaten humanity’s future?10

The Black Death was not the only biological disaster to scar human history. It was not even the only great bubonic plague. In 541 CE the Plague of Justinian struck the Byzantine Empire. Over three years it took the lives of roughly 3 percent of the world’s people.11

When Europeans reached the Americas in 1492, the two populations exposed each other to completely novel diseases. Over thousands of years each population had built up resistance to their own set of diseases, but were extremely susceptible to the others. The American peoples got by far the worse end of exchange, through diseases such as measles, influenza and especially smallpox.

During the next hundred years a combination of invasion and disease took an immense toll—one whose scale may never be known, due to great uncertainty about the size of the pre-existing population. We can’t rule out the loss of more than 90 percent of the population of the Americas during that century, though the number could also be much lower.12 And it is very difficult to tease out how much of this should be attributed to war and occupation, rather than disease. As a rough upper bound, the Columbian exchange may have killed as many as 10 percent of the world’s people.13

Centuries later, the world had become so interconnected that a truly global pandemic was possible. Near the end of the First World War, a devastating strain of influenza (known as the 1918 flu or Spanish Flu) spread to six continents, and even remote Pacific islands. At least a third of the world’s population were infected and 3 to 6 percent were killed.14 This death toll outstripped that of the First World War, and possibly both World Wars combined.

Yet even events like these fall short of being a threat to humanity’s longterm potential.15

[FOONOTE]

In addition to this historical evidence, there are some deeper biological observations and theories suggesting that pathogens are unlikely to lead to the extinction of their hosts. These include the empirical anti-correlation between infectiousness and lethality, the extreme rarity of diseases that kill more than 75% of those infected, the observed tendency of pandemics to become less virulent as they progress and the theory of optimal virulence. However, there is no watertight case against pathogens leading to the extinction of their hosts.

[END FOOTNOTE]

In the great bubonic plagues we saw civilization in the affected areas falter, but recover. The regional 25 to 50 percent death rate was not enough to precipitate a continent-wide collapse of civilization. It changed the relative fortunes of empires, and may have altered the course of history substantially, but if anything, it gives us reason to believe that human civilization is likely to make it through future events with similar death rates, even if they were global in scale.

The 1918 flu pandemic was remarkable in having very little apparent effect on the world’s development despite its global reach. It looks like it was lost in the wake of the First World War, which despite a smaller death toll, seems to have had a much larger effect on the course of history.16

It is less clear what lesson to draw from the Columbian exchange due to our lack of good records and its mix of causes. Pandemics were clearly a part of what led to a regional collapse of civilization, but we don’t know whether this would have occurred had it not been for the accompanying violence and imperial rule. The strongest case against existential risk from natural pandemics is the fossil record argument from Chapter 3. Extinction risk from natural causes above 0.1 percent per century is incompatible with the evidence of how long humanity and similar species have lasted. But this argument only works where the risk to humanity now is similar or lower than the longterm levels. For most risks this is clearly true, but not for pandemics. We have done many things to exacerbate the risk: some that could make pandemics more likely to occur, and some that could increase their damage. Thus even “natural” pandemics should be seen as a partly anthropogenic risk.

### 2NC---AT: I/L---Monoculture

**Single vendor inevitable --- too many alt causes**

**Shah 20** --- Rajiv Shah, PhD in quantum physics, has worked in the cyber, intelligence and security business for over 20 years, “Ensuring a trusted 5G ecosystem of vendors and technology”, Sept 2020, https://www.aspi.org.au/report/ensuring-trusted-5g-ecosystem-vendors-and-technology

The RAN equipment market presents particular challenges—it traditionally requires specialist hardware for antennas, radio signal generation and reception, and signal processing. Significant investment and time are needed to develop new hardware for the new frequencies, higher speeds and more devices that 5G will need to support. However, the 5G architecture does mean that, even for radio processing that’s traditionally done using specialised hardware at the antenna site, signals can be digitised and processed in software at remote sites.

In other network equipment classes, there will still be barriers to entry. The **established players** can be expected to compete strongly to maintain market dominance. They’ll also use the immaturity of standards to persuade service providers that it’s lower risk to use a **single end-to-end provider**. From discussions with providers for this report, **this could resonate**, especially given consumers’ focus on service quality. Telecoms companies nowadays **prefer to buy managed services** from vendors rather than build and integrate systems themselves. This means that when there are service outages they have a ‘single throat to choke’ (their vendor’s), rather than having to referee finger-pointing between vendors. A shortage of **systems engineering skills** has also been identified as a major barrier to enabling telecoms companies to consider developing multivendor environments, along with the challenge of needing to develop expensive interoperability testing facilities.

### 2NC---AT: Cyber !

**New grid tech solves resilience vs cyber**

**TULLY 21** --- SHAWN TULLY , “A new technology being used in Chicago could protect cities from blackouts and cyberattacks”, Fortune, Aug 31st 2021, https://fortune.com/2021/08/31/chicago-reg-resilient-electric-grid-system-preventing-blackouts-cyberattacks/

A new partnership between a pioneer in superconductor technology and the Chicago utility has hatched a new solution for keeping the heat pumping and factories chugging if anything were to knock out parts of the city’s grid. American Superconductor (AMSC), a Nasdaq-listed innovator in energy technology, is deploying its Resilient Electric Grid (REG) system at two substations operated by ComEd, the utility serving over 4 million homes and businesses in Chicago and northern Illinois. If this first installation performs as the city expects, Chicago could expand the technology to link many more of the nodes that distribute electricity directly to homes and businesses. “We’re planning this stage with the next stage of connecting multiple substations in mind,” says Terence Donnelly, president and COO of ComEd. Put simply, REG is a backup system that for the first time connects substations so that if a downtown facility is damaged by severe weather or a massive hack, a nearby station it’s linked to sends power to the offices and apartment buildings that would otherwise suffer a blackout.

The REG technology offers a second big advantage. It could create a fully integrated network where when one substation needs extra power, others that harbor additional capacity can fill the gap. Hence, utilities would no longer need to build each individual station so that it holds tons of excess capacity for times when AC units or heaters are running at full tilt, or when part of its equipment fails. “**REG changes the whole geography of the grid,”** says Daniel McGahn, AMSC’s chief executive. “The more you network the grid**, the less excess capacity you need.** The utilities no longer have to keep building new substations to meet higher usage, they can tap the ‘trapped’ capacity from the substations already there.”

The way the grid operates now, its nodes can’t back each other up in times of trouble

To grasp the potential impact of the REG system, it’s important to understand why the design of today’s grids prevents them from sharing electricity. The grid resembles the hub and spokes of a bicycle wheel. Huge power plants that run on natural gas, nuclear, wind, and solar—mostly located far from the cities they serve—send electricity via “long-haul” transmission lines to substations in urban neighborhoods. ComEd has several hundred substations in the city of Chicago alone. Some get their power from a single plant, others from a blend of, say, renewables and natural gas from multiple facilities.

The substations are equipped with transformers that collect all that high-voltage electricity, and step down the voltages to a level that’s safe for homes and stores. The stations’ circuit breakers cut off the power flowing from the big plants if too much voltage is arriving. By the way, you seldom see or recognize a substation while walking around a city. They’re often installed in a brownstone that just looks like a residence, or sheltered in the basements of apartment buildings. That’s a sketch of the transmission and distribution system as it stands today.

The spokes are the lines that run directly from the substations to the homes, apartment buildings, and businesses in their service areas. But the hubs or nodes in the system, the substations, aren’t connected to each other. Their function is strictly distribution, sending the electricity from power plants to their customers. They don’t form a network at all. They can’t back each other up by having substation A that has excess capacity channel electricity to substation B when B is short on power or has shut down during a heat wave, a cyber hack, or an equipment failure.

Because today’s substations operate as islands or silos, each one needs to be designed with far more capacity than it uses most of the time. The reason is twofold. First, the stations must contain transformers and other gear big enough to meet times of peak demand, such as 100-degree days when everyone’s running the AC to keep cool. Second, some of the equipment at a substation will occasionally malfunction. So they need even more backup so that the gear that remains working can compensate for the parts most likely to break down. “All told, most substations have built-in redundancy of 100%,” says McGahn, meaning they’re designed and constructed to generate twice as much juice as their customers consume on a typical day.

Obviously, connecting substations would be a **great solution**. Today, in case of a cyberattack on one substation, the other stations loaded with excess capacity can’t send their power to light and heat the homes suffering the blackout. Nor can a substation in the suburbs that has extra capacity on a hot day dispatch it to a maxed-out station in a city center.

But the stations couldn’t link up for two reasons. First, the traditional copper cables used to move power were too bulky to fit into the rights-of-way for the much smaller conduits running from the stations to homes and buildings. Second, if and when a substation sends power to another substation, that power starts in a big surge. That surge is powerful enough to knock out the transformers in the station receiving the electricity. Worse, if several substations are connected, the rush can cause a domino effect that disables a whole series of stations. The supposed solution would turn into a disaster on the scale of a cyber hack. That cascading effect is how many blackouts in the past have occurred.

**How the new REG technology would harden and expand the grid**

AMSC’s superconductor technology miniaturizes power transmission. Its Amperium wire is made from a copper oxide compound that, for the same weight, enables it to carry 200 times the voltage of the regular copper wire that’s the traditional foundation for transmission. When electricity travels one mile over copper cable, as much as one-third of the power is lost during that trip. By contrast, electricity can cover any distance over superconductor wire and suffer no electrical loss.

The U.S. Navy deploys the AMSC's Amperium superconductors to protect its ships from mines. The technology is calibrated to mask the magnetic field spread by the vessels so they don’t trigger the underwater explosives. But utilities were still reluctant to deploy superconductors for joining substations. They acknowledged that superconductors solved the space problem: They can fit inside six-inch–diameter conduits and pipes that run well within the rights-of-way going from the substations to customers. The rights-of-way for each substation overlap with those of other stations, making it possible to extend the wires from one substation to another in the next neighborhood, or even 50 miles away.

The obstacle: The superconductor technology hadn’t solved the “overcurrent” problem that could cause rolling blackouts. But AMSC’s Amperium was the breakthrough. It combined the ability to carry huge amounts of power over a small wire with an outer layer called a “super-resistor” that tames the surges, and also protects against lightning strikes that could cause cascading outages.

What the Chicago project could mean for cybersecurity and more

As McGahn puts it, the REG technology provides an extension cord between the now-vulnerable nodes in the nation’s urban power grids. If substations are linked, power from those still functioning **would automatically flow to the customers of the station that’s attacked** or hit by extreme weather. In addition, utilities will be getting far more of their power from renewable sources in the future, and that power shuts off when the wind’s not blowing or even when the sun goes behind a cloud. Grids will need a lot more backup capacity to compensate for that intermittent energy. Linking substations would provide that support without needing to continue the current strategy of building still more substations to ensure sufficient backup.

The Chicago project links just two substations. For McGahn and ComEd the ideal solution is joining many or even all the nodes in one giant network that operates in a kind of buddy system. McGahn wants to create a “super-grid” that allows for more renewables without adding lots of backup capacity, and hence at a much lower cost than would be required under the current system. His vision would make our grids much safer, and enable the grid to channel electricity where it’s needed, when it’s needed, in exactly the amounts it’s needed, with far less need for excess capacity.

It’s a big vision for an old, and some would say stodgy, industry. But it would unite aging infrastructure with new technology to make America’s most vulnerable pressure points, where terrorists and hackers are now taking aim, **far more secure.**

## Adv---Convergence

### 2NC---AT: I/L---Convergence

**Harmonization is impossible.**

Logan **Breed &** Falk **Schoning, 18**. Both authors are partners at the law firm Hogan Lovells. They handle antitrust reviews of mergers and acquisitions since as well as numerous nonmerger conduct investigations and antitrust litigation matters. “Exploring the contrasting views about antitrust and big data in the U.S. and EU.” September 27, 2018. <https://www.hoganlovells.com/en/publications/exploring-the-contrasting-views-about-antitrust-and-big-data-in-the-us-and-eu> Accessed: 9/28/21 3:00pm

What’s your perspective as to why Europe and the U.S. have such different approaches to big data and antitrust enforcement?

Schöning: I think some Europeans are more concerned with data in the hands of companies than in the hands of the State. This is very different from the understanding of freedom in the United States, which is more about ensuring that your data is not in the hands of the state. That’s very different, and it triggers why the EU has things like GDPR, which basically regulates how private companies can deal with your data, but not what the state can do with it.

### 2NC---AT: AI !

#### No impact---it’s way too far off.

König 19 (Ellen König, Head of Data Engineering @ WhereIsMyTransport; “Worry about present-day AI first, and far off AGI hypotheticals second,” 06-28-19, Skynet Today, <https://www.skynettoday.com/editorials/dont-worry-agi/>, TM)

How close are we to autonomous AI?

Those who want to alarm us all about existential dangers coming from autonomous AI assume that what is called “artificial general intelligence” or even “superintelligence” will be a reality very soon.

Wikipedia describes “Artificial general intelligence” (AGI as “the intelligence of a machine that could successfully perform any intellectual task that a human being can”. That includes elusive skills such as self-awareness and anything from conducting conversation to composing sophisticated music to teaching essay composition to other machines (or people!). While different machines can currently do some of these things, no single software is right now capable of all of these tasks.

“Superintelligence” goes beyond AGI in assuming that machines will one day “possess intelligence far surpassing that of the brightest and most gifted human minds”. By definition, what tasks and skills that results in is completely beyond our imagination.

In contrast, current AI systems are usually called “narrow” AI, because they are only capable of performing very narrowly scoped tasks. Examples include programs that are able to distinguish between cats and dogs in images or recognize words in English speech.

We are currently very far away from achieving artificial general or even superintelligence. In fact, we are not much closer than we were in the early stages of AI research in the 1950s. We are just developing better and better narrow AI.

One of the main reasons for that is that we don’t even know yet what “Human intelligence” really is, let alone how it works. This is not a useful starting point for engineering a machine capable of reproducing these skills. And we don’t know yet either whether we will be able to recreate human intelligence recreating human brains and bodies.

For the sake of argument, let us assume that we will one day build artificial general intelligence. Even AI researcher themselves, who, by profession, need to be optimistic on this matter, seem to agree that day is still far in the future — 80 years atleast. It is hard to imagine any research project reliably delivering on such a long timeline.

By that time, climate models suggest that the earth’s average temperature could be up to 5 degrees Celsius (8.6F) hotter than today. Which might give us more immediate things to worry about than the chance of AI taking over.

Most scenarios of existential threats coming from AI assume creative agency on the part of the AI. In other words, they assume that the AI is capable of evolving beyond the purpose it was designed for. Either by setting its own threatening goals. Or by using destructive means to achieve its goals that it was not supposed to use.

Yet current AI is not capable of setting its own goals or changing its means of achieving these. While current AI can tell you whether a photo shows you with the same friend that it saw in a different photo, it cannot decide whether to play beautiful violin music instead of classifying images. Those people who describe the risks of autonomous AI do not provide plausible explanations of how AI could get these abilities.

### 2NC---AT: Smart Cities !

#### Smart cities consume too much

John Gibbons 21. Environmental journalist and co-author of the Routledge International Handbook of Environmental Journalism. Resolving the paradox of satisfying the needs of all while using far less energy. Irish Times. 5-6-2021. https://www.irishtimes.com/news/science/resolving-the-paradox-of-satisfying-the-needs-of-all-while-using-far-less-energy-1.4542693

‘Drastic changes’ “Our intention is to imagine a world that is fundamentally transformed, where state-of-the-art technologies merge with drastic changes in demand to bring energy (and material) consumption as low as possible, while providing decent material conditions and basic services for all”, the authors state. Only through such a radical transformation, they add, can human needs be met within critical planetary boundaries. At present, those daring to suggest alternatives to our current model of constant economic growth or promoting steady state economics are likely to be dismissed as new age cultists or “degrowth fetishists” trying to make everyone poor. The new study, according to lead author, Joel Millward-Hopkins of the University of Leeds, “offers a response to the cliched populist objection that environmentalists are proposing that we return to living in caves”. The paper points out that “inequality and especially affluence, are now widely recognised as core drivers of environmental damage”. Consider that in the year since the Covid-19 pandemic began, the collective wealth of the world’s billionaires has ballooned by some $3.9 trillion (€3.2 trillion) while hundreds of millions of the world’s poorest people were plunged deeper into poverty and financial insecurity as a result of the pandemic. Trickle-down economics This further debunks the concept known as trickle-down economics, the notion that tax breaks for the wealthy would somehow flow towards wider society. Resources are instead being rapidly siphoned upwards towards the already wealthy and economically powerful. The paper points out that current levels of energy usage “underpin numerous existential crises, resource scarcity and the geopolitical instabilities these issues can catalyse, especially in a growth-dependent global economy”. While there have been significant improvements in energy efficiency, these have “largely served to boost productivity and enable further growth”. Crucially, beyond a certain point, increases in energy use in a given society deliver little or no additional benefits to that society. The study envisages, with the aid of technologies, radical demand-side transformations that largely eliminate excessive consumption and focuses available resources instead on providing the conditions required for flourishing. These include basic physical health and safety, access to clean air and safe water, good quality (largely plant-based) nutrition, and the opportunity for social and political participation. Resolving the paradox of how to satisfy the needs of all while using far less energy and fewer resources depends on sharp global reductions in meat-eating, down by some 85 per cent in rich countries. A massive expansion of public transport globally would greatly reduce energy and emissions while allowing people to meet their transport needs without the expense of owning and running resource-intensive private cars. Globally, much of the existing housing stock needs to be replaced over time with modern buildings with very low heating and cooling energy requirements. This would be another vital step in achieving decent living conditions with far less energy than at present.

## Adv---Populism

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

### 2NC---AT: Populism !

### 2NC---AT: Democracy !

**Democracy resilient but doesn’t solve**

**Doorenspleet 18** --- Renske Doorenspleet, associate professor at the Department of Politics and International Studies, Warwick University, in the United Kingdom, Chapter 7: CONCLUSION: RETHINKING THE VALUE OF DEMOCRACY”, First Online: 22 July 2018, Page 239-243, https://link.springer.com/chapter/10.1007/978-3-319-91656-9\_7

The value of democracy has been taken for granted until recently, but this assumption seems to be under threat now more than ever before. As was explained in Chapter 1, democracy’s claim to be valuable does not rest on just one particular merit, and scholars tend to distinguish three different types of values (Sen 1999). This book focused on the instrumental value of democracy (and hence not on the intrinsic and constructive value), and investigated the value of democracy for peace (Chapters 3 and 4), control of corruption (Chapter 5) and economic development (Chapter 6). This study was based on a search of an **enormous academic database**5 for certain keywords,6 then pruned the thousands of articles down to a few hundred articles (see Appendix) which statistically analysed the connection between the democracy and the four expected outcomes.

The first finding is that a **reverse wave** away from democracy **has not happened** (see Chapter 2). Not yet, at least. Democracy is not doing worse than before, at least not in comparative perspective. While it is true that there is a dramatic decline in democracy in some countries,7 a general trend downwards cannot yet be detected. It would be better to talk about ‘stagnation’, as not many dictatorships have democratized recently, while democracies have not yet collapsed.

Another finding is that the instrumental value of democracy is **very questionable**. The field has been deeply polarized between researchers who endorse a link between democracy and positive outcomes, and those who reject this optimistic idea and instead emphasize the negative effects of democracy. There has been ‘**no consensus’** in the quantitative literature on whether democracy has instrumental value which leads some beneficial general outcomes. Some scholars claim there is a consensus, but they only do so by ignoring a **huge amount** of literature which rejects their own point of view. After undertaking a **large-scale analysis** of carefully selected articles published on the topic (see Appendix), this book can conclude that the connections between democracy and expected benefits **are not** as **strong** as they seem. Hence, we should not overstate the links between the phenomena.

The overall evidence is **weak**. Take the expected impact of democracy on peace for example. As Chapter 3 showed, the study of democracy and interstate war has been a flourishing theme in political science, particularly since the 1970s. However, there are four reasons why democracy does not cause peace between countries, and why the empirical support for the popular idea of democratic peace is **quite weak**. Most statistical studies have not found a strong correlation between democracy and interstate war at the dyadic level. They show that there are other—more powerful—explanations for war and peace, and even that the impact of democracy is a **spurious one** (caveat 1). Moreover, the theoretical foundation of the democratic peace hypothesis is **weak**, and the causal mechanisms are unclear (caveat 2). In addition, democracies are not necessarily more peaceful in general, and the evidence for the democratic peace hypothesis at the monadic level is inconclusive (caveat 3). Finally, the process of democratization is dangerous. Living in a democratizing country means living in a less peaceful country (caveat 4). With regard to peace between countries, **we cannot defend the idea that democracy has instrumental value.**

Can the (instrumental) value of democracy be found in the prevention of civil war? Or is the evidence for the opposite idea more convincing, and does democracy have a ‘dark side’ which makes civil war more likely? The findings are **confusing**, which is exacerbated by the fact that different aspects of civil war (prevalence, onset, duration and severity) are mixed up in some civil war studies. Moreover, defining civil war is a delicate, politically sensitive issue. Determining whether there is a civil war in a particular country is incredibly difficult, while measurements suffer from many weaknesses (caveat 1). Moreover, there is no linear link: civil wars are just as unlikely in democracies as in dictatorships (caveat 2). Civil war is most likely in times of political change. Democratization is a very unpredictable, dangerous process, increasing the chance of civil war significantly. Hybrid systems are at risk as well: the chance of civil war is much higher compared to other political systems (caveat 3). More specifically, both the strength and type of political institutions matter when explaining civil war. However, the type of political system (e.g. democracy or dictatorship) is not the decisive factor at all (caveat 4). Finally, democracy has only limited explanatory power (caveat 5). Economic factors are far more significant than political factors (such as having a democratic system) when explaining the onset, duration and severity of civil war. To prevent civil war, it would make more sense to make poorer countries richer, instead of promoting democracy. Helping countries to democratize would even be a very dangerous idea, as countries with changing levels of democracy are most vulnerable, making civil wars most likely. It is true that there is evidence that the chance of civil war decreases when the extent of democracy increases considerably. The problem however is that most countries do not go through big political changes but through small changes instead; those small steps—away or towards more democracy—are dangerous. Not only is the onset of civil war likely under such circumstances, but civil wars also tend to be longer, and the conflict is more cruel leading to more victims, destruction and killings (see Chapter 4).

A more encouraging story can be told around the value for democracy to control corruption in a country (see Chapter 5). Fighting corruption has been high on the agenda of international organizations such as the World Bank and the IMF. Moreover, the theme of corruption has been studied thoroughly in many different academic disciplines—mainly in economics, but also in sociology, political science and law. Democracy has often been suggested as one of the remedies when fighting against high levels of continuous corruption. So far, the statistical evidence has strongly supported this idea. As Chapter 5 showed, dozens of studies with broad quantitative, cross-national and comparative research have found statistically significant associations between (less) democracy and (more) corruption. However, there are vast problems around conceptualization (caveat 1) and measurement (caveat 2) of ‘corruption’. Another caveat is that democratizing countries are the poorest performers with regard to controlling corruption (caveat 3). Moreover, it is not democracy in general, but particular political institutions which have an impact on the control of corruption; and a free press also helps a lot in order to limit corruptive practices in a country (caveat 4). In addition, democracies seem to be less affected by corruption than dictatorships, but at the same time, there is clear evidence that economic factors have more explanatory power (caveat 5). In conclusion, more democracy means less corruption, but we need to be modest (as other factors matter more) and cautious (as there are many caveats).

The perceived impact of democracy on development has been **highly contested** as well (see Chapter 6). Some scholars argue that democratic systems have a positive impact, while others argue that high levels of democracy actually reduce the levels of economic growth and development. Particularly since the 1990s, statistical studies have focused on this debate, and the empirical evidence is clear: there is no direct impact of democracy on development. Hence, both approaches cannot be supported (see caveat 1). The indirect impact via other factors is also questionable (caveat 2). Moreover, there is too much variation in levels of economic growth and development among the dictatorial systems, and there are huge regional differences (caveat 3). Adopting a one-size-fits all approach would not be wise at all. In addition, in order to increase development, it would be better to focus on alternative factors such as improving institutional quality and good governance (caveat 4). There is not sufficient evidence to state that democracy has instrumental value, at least not with regard to economic growth. However, future research needs to include broader concepts and measurements of development in their models, as so far studies have mainly focused on explaining cross-national differences in growth of GDP (caveat 5).

Overall, the instrumental value of democracy is—at best—**tentative**, or—if being less mild—**simply non-existent.** Democracy is not necessarily better than any alternative form of government. With regard to many of the expected benefits—such as less war, less corruption and more economic development—democracy does deliver, but so do nondemocratic systems. High or low levels of democracy **do not make a distinctive difference.** Mid-range democracy levels do matter though. Hybrid systems can be associated with many negative outcomes, while this is also the case for democratizing countries. Moreover, other explanations—typically certain favorable economic factors in a country—**are much more powerful to explain the expected benefits**, at least compared to the single fact that a country is a democracy or not. The impact of democracy **fades away** in the powerful shadows of the economic factors.8

# 1NR

## DCN

The United States Supreme Court should not grant cert to any challenges to the establishment of the domestic competition network.

### Overview

### Turns---Case\*

#### Takes out solvency- nondelegation would upend antitrust enforcement- the FTC would be powerless

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

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

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

The Opinion in Gundy

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

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

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

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

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

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

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

Implications: The "Three Hundred Thousand" Problem

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

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

There are countless other examples. The Federal Trade Commission operates to prevent "unfair methods of competition." The Secretary of Transportation, acting through the National Highway Transportation and Safety Administration, sets standards as "practicable" to "meet the need for motor vehicle safety." In times of economic depression, Congress has given emergency power to the president to "issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries." Ultimately, using Justice Gorsuch's test, these statutes may be difficult to defend against nondelegation challenges.

Uneasy Application

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

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

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

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

Conclusion

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

#### Nondelegation causes rollback

Millhiser 11-3 [Ian Millhiser is a senior correspondent at Vox, 11-3-2021 https://www.vox.com/2021/11/3/22758188/climate-change-epa-clean-power-plan-supreme-court]

Moreover, Gorsuch’s approach would effectively consolidate an enormous amount of power within the judiciary. When the Supreme Court hands down a vague and open-ended legal standard like the one Gorsuch articulated in his Gundy opinion, the Court is shifting power to itself. What does it mean for a statute to be “sufficiently definite and precise” that the public can “ascertain whether Congress’s guidance has been followed”?

The answer is that the courts — and, ultimately, the Supreme Court — will decide for themselves what this vague language means. The courts will gain a broad new power to strike down federal regulations, on the grounds that they exceed Congress’s power to delegate authority.

And Gorsuch would also apply this rule retroactively to statutes drafted long before the Court’s decision in Gundy — an approach with profound implications for the West Virginia case. The section of the Clean Air Act at issue in West Virginia was enacted in 1970.

Perhaps, if the Nixon-era Congress had known it needed to write that law with greater precision, it might have drafted it in a way that Gorsuch would deem acceptable (although it is unclear whether judges like Gorsuch would deem any meaningful environmental protection regime acceptable). But it’s simply unreasonable to expect lawmakers in 1970 to comply with a rule announced by a dissenting justice in 2019.

Gorsuch’s approach to nondelegation, in other words, wouldn’t simply strip Congress of much of its power to delegate authority to agencies. It would allow the most conservative panel of justices to sit on the Supreme Court since the early days of the Franklin Roosevelt administration to run roughshod through decades of federal statutes, invalidating or severely weakening hundreds of provisions drafted at a time when the nondelegation doctrine was widely viewed as a crankish notion that was correctly abandoned in the 1930s.

West Virginia contains the seeds of a constitutional revolution. It could, as Roosevelt warned in 1937, enable the Supreme Court to “make our democracy impotent.”

### Turns---Democracy

#### Nondelegation wrecks democracy

Millhiser 11-3 [Ian Millhiser is a senior correspondent at Vox, 11-3-2021 https://www.vox.com/2021/11/3/22758188/climate-change-epa-clean-power-plan-supreme-court]

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**IL – 2NC – Yes PC**

**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: PC False**

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

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

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

### 2AC 3 – EPA not Balancing

**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.

### A2: No Horsetrading

**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.”

### Link---2NC\*

#### 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 – CWS/Generic Term Change**

**Antitrust term change require pc**

**Orbach 13** Barak Orbach Professor of Law, the University of Arizona College of Law. (April, 2013). “SYMPOSIUM: THE GOALS OF ANTITRUST: HOW ANTITRUST LOST ITS GOAL.” *Fordham Law Review*, 81, 2253. https://advance-lexis-com.proxy2.cl.msu.edu/api/document?collection=analytical-materials&id=urn:contentItem:589V-VPY0-02BN-00M9-00000-00&context=1516831.{DK}

In 1890, Congress passed a competition law without meaningfully talking about competition. In 1979, the Supreme Court revised the standard of competition regulation without talking about competition or the implications of the revision. Both transitions involved the use of popular phrases that, at the time, had significant political capital. In 1890, the phrase was "anti-trust," and in 1979 it was "consumer welfare." In 1979, per Robert Bork's prescription, antitrust was reframed to resolve the confusion created by the word "competition" through the use of the phrase "consumer welfare." Alas, the prescription's underlying logic was circular, and its confusing consequences could have been anticipated.

**IL – 2NC – A2: Plan Announced in June**

**That’s now**

**Goldfarb 16 –** Ronald Goldfarb, Professor Emeritus at Middlesex County College, “Abortion Rights Questions are Back Before Supreme Court”, My Central Jersey, 8-23, http://www.mycentraljersey.com/story/money/business/ron-goldfarb/2016/08/23/abortion-rights-questions-back-before-supreme-court/89212944/

Balancing the possible benefits of the Texas law with the right to the services of a professional abortion provider, the court found the “virtual absence of any health benefit.” In his opinion, Breyer wrote that the statute “vastly increases the obstacles confronting women without providing any benefit to women’s health capable of withstanding any meaningful scrutiny.” One fact that certainly played a part in the decision is that if the law were given full effect, the number of women living more than 200 miles from a provider would have increased by more than 7,000 percent.

Next time, we will look at some of the cases that the Supreme Court already has agreed to decide in the new term that begins the **first Monday in October**.

**IL – 2NC – A2: Winners Win**

**Popular decisions don’t build capital**

**Gibson 15 –** James L. Gibson, Professor of Government at Washington University in St. Louis, and Michael J. Nelson, Professor in the Department of Political Science and Affiliate Law Faculty at Pennsylvania State University, “Is the U.S. Supreme Court's Legitimacy Grounded in Performance Satisfaction and Ideology?”, American Journal of Political Science, Volume 59, Issue 1, January, Wiley

An even broader question arising from the experiment is not addressed by the authors: What are the long-term effects of displeasing decisions on individual-level evaluations of the Supreme Court? Do “good” decisions balance out “bad” decisions in the mind of the public, or do the effects of displeasing decisions **overwhelm** those of pleasing decisions?20 We recognize that conventional wisdom on the **psychology of negativity** suggests that displeasing judicial decisions have a **stronger negative impact** than the positive impact of pleasing judicial decisions (Mondak and Smithey 1997). For example, Grosskopf and Mondak (1998), analyzing public response to two **highly publicized** Supreme Court decisions, found that confidence in the Court declined among individuals who disapproved of both decisions **as well as among individuals who approved** of one decision while disapproving of the other. Displeasing decisions seemed to have **greater consequences** than pleasing decisions.

### A2: No link – actor

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

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

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

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

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

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

[CONTINUES – TO FOOTNOTE]

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

**Link – 2NC – A2: Not Perceived**

**Antitrust is perceived---it’s in the spot, spot, spotlight**

**Waller 19** (SPENCER WEBER WALLER, John Paul Stevens Chair in Competition Law and Director, Institute for Consumer Antitrust Studies, Loyola University Chicago School of Law, ANTITRUST AND DEMOCRACY, 46 Fla. St. U.L. Rev. 807, y2k)

Another important aspect of an **engaged civil society** is the presence of a **robust** academic sector that teaches and studies **competition law**, economics, and policy. In the United States, the directory of the Association of American Law Schools lists approximately 200 accredited law schools with more than 260 professors who teach, or have taught in the past, antitrust law as full-time faculty members. 298This is in addition to numerous part-time adjunct members who teach antitrust courses in addition to their full-time jobs as practicing attorneys, judges, economists, or enforcers. U.S. law schools also offer masters level programs in antitrust and trade regulation both on [\*852] campus, and on line, for students who are currently working in field, hope to work in the field, and who plan to seek academic careers in this area. 299These subjects also are taught in varying degrees in business schools, economics departments, and public policy schools at both the graduate and undergraduate levels. There are numerous antitrust conferences held throughout the year exploring practice, policy, and theory issues. The result is a **robust debate** about the values, techniques, and results of competition law and policy that continues no matter which party is in office or who runs the enforcement agencies.

The government agencies also play a role in creating an engaged civil society in addition to operating in a transparent manner as discussed above. The agencies post a tremendous amount of material on their respective **web sites**, frequently speak to **legal** and **business groups**, publish guidelines for both professional and lay audiences, hold **press conferences** on high visibility cases, and other enforcement actions. The agencies also testify in front of Congress, hold workshops, post on social media, respond to freedom of information act requests, and maintain libraries and databases for the public. 300

Equally important, the agencies receive input from the public as well as send information out to the public. The Agencies receive complaints and white papers from interested parties and the public. 301They obtain testimony and comments from the public in workshops, review responses to draft guidelines, and communicate on an informal basis with members of the competition community on a daily basis. 302

The ways an agency receives input from the public are limited only by its imagination. The Competition and Consumer Commission of Singapore used to hold a contest for the best animated short submission on the evils of cartels. 303Other agencies have come up equally creative ways to receive feedback and input from the public, in addition to the material they make available to the public. 304

[\*853] The **general** and **business press** plays an equally important role in reporting on competition matters. Major publications such as the Wall Street Journal, New York Times, Washington Post, The Economist, and many business magazines **regularly** feature stories about criminal **cartel cases** and **investigations**, issues involving allegedly **dominant firms,** the flood of **mergers** and **acquisitions** in the United States and abroad, and major private damage cases. 305More analytical stories appear on such topics as the role of big data in antitrust, algorithmic competition, and the pros and cons of the EU's enforcement actions against Google and pending investigations of other high-tech firms. 306

**Social media** increasingly is both supplementing and partially substituting for traditional press coverage of competition law and policy matters. There is a **plethora of forums** for competition law topics and well as numerous individuals who post on **Twitter** and/or link to news stories published elsewhere as well as on other social media platforms. 307There is even a substantial number of twitter posts about the merits of so-called "#hipster" antitrust. 308

The result is a **vigorous debate** about most issues of importance in the competition law world and **very few issues of any kind** that **escape notice** and comment in the antitrust profession. The more important and salient of these issues also receive at least some **general public attention** and comment suggesting that **antitrust policy operates in the spotlight**, at least among lawyers and business people most directly affected by the decisions and policies at issue. While competition policy is an area of specialization, and competes with many other issues of more life and death importance for the time and attention of the public, it is heartening to see the number and resources of the actors in civil society who devote time and resources to the promotion of what they consider sound competition law and policy. 309

### UQ – 2NC

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

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

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

### A2: No Extinction --- Adaptation

#### No adaption without mitigation

ROMM 16 --- JOSEPH ROMM, PhD, A physicist who studied physical oceanography, He is a Senior Fellow at the Center for American Progress, “CLIMATE CHANGE WHAT EVERYONE NEEDS TO KNOW”, Oxford University Press, 2016, Pages 159-163

Can we adapt to human-caused climate change?

Adaptation is how we deal with whatever climate change we are unable to prevent. In the case of sea-level rise, for instance, adaptation could include putting in place stilts on houses, along with levees, sea walls, pumping systems, and other engineering solutions to keep the rising water out. Otherwise, adaptation might simply be abandonment—leaving the inundated area. Generally richer communities will endeavor to find engineering adaptations to stay in place, whereas poorer ones will simply leave any region where the climate will no longer sustain life or livelihoods.42

The more climate change we allow by failing to aggressively reduce (mitigate) greenhouse gas emissions, the harder it will be to adapt in the sense of simply muddling through in place. “We basically have three choices: mitigation, adaptation and suffering,” as Dr. John Holdren told the New York Times in 2007. The former president of the American Association for the Advancement of Science, whom President Obama appointed as national science advisor in 2009, said. “We’re going to do some of each. The question is what the mix is going to be. The more mitigation we do, the less adaptation will be required and the less suffering there will be.” The more global warming and climate change there is, the more limited the options become for adaptation. If sea levels were, say, 2 feet higher in 2100 and rising a few inches a decade, as was thought very possible until recently, one could envision many coastal communities adapting, albeit expensively. However, recent scientific findings suggest it will be more like, say, 6 feet higher in 2100 with sea level rising 1 foot a decade (or more) thereafter. Adapting to that is a considerably more expensive and difficult proposition. The New York Times story on the 2014 studies about the instability of the West Antarctic Ice sheet points out the risk posed by staying on our current GHG emissions path, given what we know: “The heat-trapping gases could destabilize other parts of Antarctica as well as the Greenland ice sheet, potentially causing enough sea-level rise that many of the world’s coastal cities would eventually have to be abandoned.”

It is extremely important to have as realistic an assessment of likely future impacts as possible in order to plan and prepare. In general, the risks of underestimating future impacts are considerably greater than the risks of overestimating them. That is because, as the Preface to Royal Society’s special theme issue on a 4°C world explains, “responses that might be most appropriate for a 2° C world may be maladaptive in a +4° C world; this is, particularly, an issue for decisions with a long lifetime, which have to be made before there is greater clarity on the amount of climate change that will be experienced.” The authors imagine a community building a reservoir to adapt to a moderate temperature increase, but that reservoir might simply go dry if the region gets very hot and dry. You might build a desalinization plant along your coast to provide water for a region that was drying out or losing a glacier-fueled river, but if you knew that rapid sea-level rise was coming, you would have to design an entirely different and probably much more expensive kind of facility to provide fresh water.

In the same way that an ounce of prevention is worth a pound of cure, mitigating future impacts through reductions in GHG emissions now is considerably cheaper than simply trying to adapt to high temperatures and rapid climate change in the future. A report on “Assessing the Costs of Adaptation to Climate Change” was published in 2009 by the International Institute for Environment and Development. It found that the mean “net present value of climate change impacts” in an emissions scenario similar to the one we are now on was $1240 trillion with no adaptation, but the value was only $890 trillion with adaptation. On the other hand, the authors report that in the “aggressive abatement” case (450 ppm), the mean “Net present value of climate change impacts” is only $410 trillion—or $275 trillion with adaptation. Stabilizing concentrations of CO2 at 450 ppm reduces the net present value of impacts by $615 trillion to $830 trillion. However, the net present value of the abatement cost is only $110 trillion, a 6-to-1 savings for every dollar spent on cutting emissions. Therefore, although adaptation is certainly needed to reduce future impacts, abatement (mitigation) can reduce them far more.

In addition, some changes are very likely beyond our ability to deal with. The Intergovernmental Panel on Climate Change November 2014 “synthesis” of the scientific literature said we are risking “severe, pervasive and irreversible impacts for people and ecosystems.” Scientists and governments have “high confidence” that these devastating impacts occur “even with adaptation,” if we warm 4°C or more:

In most scenarios without additional mitigation efforts … warming is more likely than not to exceed 4°C [7°F] above pre-industrial levels by 2100. The risks associated with temperatures at or above 4°C include substantial species extinction, global and regional food insecurity, consequential constraints on common human activities, and limited potential for adaptation in some cases (high confidence)

Perhaps the hardest thing to adapt to besides rapid sea-level rise is Dust-Bowlification. During the U.S. Dust-Bowl era in the 1930s, some 3.5 million people fled the region of the Great Plains. As I noted in "The Next Dust Bowl," a 2011 Nature article, "Human adaptation to prolonged, extreme drought is difficult or impossible," which is no doubt why the word "desert" comes from the Latin for "an abandoned place."

It is not just extended drought that can dislocate people, extreme heat with high humidity can also. In the business-as-usual case, the IPCC warns that by 2100, "the combination of high temperature and humidity in some areas for parts of the year is expected to compromise common human activities, including growing food and working outdoors (high confidence)." It is difficult to see how people, especially in the poorer countries, could stay in a place that had essentially become uninhabitable for parts of the year.

Here is one final example on "Agriculture and food systems in sub-Saharan Africa [SSA] in a 4 C+ world," from the 2010 Royal Society theme issue. That analysis concluded, "The prognosis for agriculture and food security in SSA in a 4C+ world is bleak." We already have nearly one billion people at risk from hunger. In a 2°C world, it is estimated that achieving food security would cost $40-660 billion per year. However, as we go past 2°C, the challenges go beyond simply money:

Croppers and livestock keepers in SSA have in the past shown themselves to be highly adaptable to short- and long-term variations in climate, but the kind of changes that would occur in a 4C+ world would be way beyond anything experienced in recent times. There are many options that could be effective in helping farmers adapt even to medium levels of warming, given substantial investments in technologies, institution building and infrastructural development, for example, but it is not difficult to envisage a situation where the adaptive capacity and resilience of hundreds of millions of people in SSA could simply be overwhelmed by events.

Adaptation is sometimes called "resilience," which means the ability to bounce back. The best-case scenario, in which we keep total warming stabilized below 2°C, is one where genuine resilience is at least imaginable in many places. As we approach a business-as-usual level of warming, resilience is increasingly replaced by other forms of adaptation, including abandonment.

The 2015 Pacific Northwest National Laboratory study in Nature Climate Change, "Near-Term Acceleration in the Rate of Temperature Change," finds that by 2020, human-caused warming will move the Earth's climate system "into a regime in terms of multi-decadal rates of change that are unprecedented for at least the past 1,000 years." The rate of warming post-2050 becomes so fast that it is likely to be beyond adaptation (1) for most species and (2) for humans in many parts of the world. The warming rate hits 1°F per decade—Arctic warming would presumably be at least 2°F per decade, and this warming goes on for decades. Moreover, 4°C is not the worst-case scenario. If we go beyond 4°C, we move into an unrecognizable world where we will need a different word entirely than "adaptation."

# 2NR

## DA---Court Ptx

### AT: A/C

#### US emission reductions solve

Beradelli 20 --- Jeff Beradelli, CBS News' meteorologist and climate specialist, “Q&A: What Joe Biden can do to "reverse the trajectory" of the U.S. on climate change,” CBS News, 11/17/20, <https://www.cbsnews.com/news/joe-biden-climate-change-trajectory/>

The U.S. was an **international leader** in the fight against climate change in the **lead-up** to the Paris agreement. **Trump's withdrawal** from the Paris climate agreement was a **drag on international action**. It allowed other countries to say, 'Well, **look**, the U.S. is historically the **largest greenhouse gas emitter** and the richest [and it] **isn't acting**, **why should we** poorer countries **do anything?'** This dynamic is going to completely change. The U.S. is going to become again a **leader**. China had taken up the mantle of climate leadership. The U.S. needs to get back in the game and I think that will have a **major effect** on **mobilizing global action**.

### IL

#### Law, ideology, and political constraints all matter---the result is our DA’s true

Friedman 5 – Barry Friedman, Jacob D. Fuchsberg Professor of Law and Affiliated Professor of Politics at New York University School of Law, “The Politics of Judicial Review,” Texas Law Review, 84 Tex. L. Rev. 257, December, Lexis

Positive scholarship calls into question critical elements of a story about judicial review that has been told for a long time. In most normative theory, law and politics are to be kept separate. This is accomplished by insisting on judicial independence from politics and by offering law as the constraint on judicial behavior. If positive scholarship is right, however, much of what is written in theory does not hold in reality. Instead, restraint works in much the opposite direction. Even though judges might take law seriously, it does not keep them from voting their own values, at least in some critical cases. When judges face constraint, it often comes in the form of pressure from other institutions. The decisions of courts are influenced by the institutional structure in which they are embedded. Law and politics are thus integrated, albeit often in complicated and as yet incompletely understood ways. The challenge that positive scholarship poses to normative theory is serious enough that its claims must be carefully qualified. To begin, positive theory is in many ways still in its infancy. The strategic "revolution" is less than a decade old. n404 The rough contours of positive theory likely are correct; the theory makes plain sense and empiricism - even rough empiricism - bears out much of what theory suggests. But later work likely will show great refinement of basic positive claims. Second, it is extremely important to emphasize that positive theory need not - and typically does not - deny the influence of law; it only raises questions about how much law serves to constrain judges in the strict sense demanded by some normative theory. To be sure, occasional positive theorists are cavalier about the role played by law, n405 but to the extent this is true, that is their failing. Many others recognize the prominence of doctrine and of legal discourse - the significant hand law takes in shaping decisions. n406 Legal commands undoubtedly influence the decision of cases. Law plays a role, even if it cannot play the particular constraining role that normative theory requires. Third, for this reason positive scholarship also need say nothing about how judges and lawyers should do their job on an everyday basis. It is perfectly appropriate that lawyers will and should continue to argue cases in legal terms, and judges should continue to resolve them the same way. If anything, positive theory invigorates debates about appropriate interpretive [\*331] methodology, if only because the debates need not be shaped by the untenable claim that any particular theory constrains judges from imposing their own values. Theories must now stand on some other bottom. Finally, and in part a function of the early state of the work, positive theory leaves unspecified the relative strength of the various influences on judges. Positive scholarship suggests that judges are not constrained in some ways normative theory believes essential and that judges are constrained in ways normative theory suggests they should not be. But positive theory is a long way from defining with precision the spheres of autonomy and constraint, particularly given how contextual - by case, by court, by judge - these are likely to be. Despite these caveats, positive scholarship poses a challenge to normative theory. There are three moving pieces here: law, attitudes, and politics. Unless law constrains judges sufficiently in all cases - and it appears pretty clear this cannot be - then judicial attitudes are deciding cases or judicial decisions are limited by the political and institutional forces described here. Yet there is very little normative theory about judicial review that builds attitudinal freedom or political constraint into the model. The challenge, then, is to develop an understanding of judicial review that builds upon and incorporates positive understandings of how judges behave. The old ways won't do anymore.

#### Short-term PC is finite---the Court gives make-up calls because they anticipate political branch backlash

Ferejohn 2

John A. Ferejohn, Professor of Political Science and Senior Fellow of the Hoover Institution, Stanford University; & Larry D. Kramer, Professor of Law and Politics, New York University School of Law, New York University Law Review, October, 2002, Lexis

Taken as a whole, the miscellaneous devices available to the political branches to obstruct the courts afford ample means to cow or even cripple [ruin] the federal judiciary. Life tenure and salary protection would count for little on a bench whose mandates were ignored, whose budget had been cut to the point where daily administration was impossible, or whose jurisdiction or procedures left judges with little authority or flexibility. Of course, none of these statements even remotely describes the actual state of our federal judiciary: Presidents can ignore the courts' orders, but they seldom do so. Congress can manipulate the budget, the jurisdiction, and the procedures of the federal courts, and, as recounted above, federal legislators have occasionally done so. But legislative oversight remains sporadic and its range modest, and it would be fatuous to maintain that Congress has significantly degraded or repressed the federal judiciary. The most one can say is that the political branches have formidable means by which to humble the courts and could significantly debase the institution of the judiciary, not that they have done so. Still, to say that Congress and the executive can stifle the federal courts is, in our view, to say quite a lot, particularly since the courts boast no comparable power to hit back. n131 Politics is not a static business. The institutional match-ups devised by the Constitution promote [\*995] a kind of perpetual tension in which the actions of each department or branch of the government are influenced by the actions or potential actions of other branches and departments. Any equilibrium achieved under these conditions is a dynamic one, in which slippages are possible and must be expected occasionally to occur. But if everything works properly - that is, if institutional actors respond rationally to the pressures they face - equilibrium may be restored just as quickly. If Congress and the executive have seldom exercised their power to impair the judiciary, in other words, this may be because the judiciary has acted in such a way that Congress and the executive have seldom felt the need to do so (and because, when they have felt this need, and acted upon it, the courts have responded in ways to avert a crisis). This model for understanding judicial independence leads to a number of tentative predictions. First, especially because the federal courts were unlike any that had existed under colonial rule or the Articles of Confederation, we should expect a period of initial uncertainty in their relations with the other branches, possibly leading to some sort of crisis followed by a political settlement. Assuming the success of this initial settlement, we should then expect to observe reasonably prolonged periods of relative stability in relations between the judiciary and the other branches, interrupted from time to time by conflicts of varying degrees of duration and intensity; the source, number, and magnitude of these conflicts is itself unpredictable, turning on highly contingent matters of personnel and events. Finally, given the judiciary's political weakness relative to the other branches, we nevertheless should expect it generally to conduct its business in such a way as to minimize the number and severity of any showdowns, conserving its capital to secure a margin of safety that maintains independence in its daily affairs as a practical and political matter. At a glance, the historical experience of the federal judiciary bears these predictions out. There was indeed considerable uncertainty about the proper role of federal judges during the early years of the Republic, and an overly politicized Federalist bench provoked a major crisis by 1800. n132 Lawyers have tended to fix their attention on Marbury v. Madison, n133 celebrating it as some sort of triumph for judicial supremacy, when in fact Marbury was a relatively inconsequential [\*996] rear-guard action by a Court in full flight after a ruthless political offensive. Much more important at the time were the impeachments of Pickering and Chase and the Judiciary Act of 1802, n134 in which Congress made clear its determination to put the federal bench in its place by abolishing a number of newly created judgeships and firing the judges, by delaying a Supreme Court sitting for over a year, and by restoring the despised ordeal of circuit-riding. n135 The actual resolution of the crisis was reflected not in Marbury, which passed by with little fanfare, n136 but rather in the Court's meek submission to this congressional mugging in Stuart v. Laird n137 and in the cessation of open politicking by Federalist judges. n138 The resulting settlement, which left the Supreme Court much more deferential to Congress (though not to the states), n139 endured for many decades. And while interbranch relations obviously have evolved since then, they have on the whole been relatively stable, subject as predicted to periodic, brief crises (of which 1857 and 1937 are the most famous, with another one possibly brewing right now). Documenting these claims obviously requires a much more detailed, nuanced account of the history. We believe that such an account would bear out our hypotheses, but that project is beyond the scope of this Article. We would like here to focus instead on our third prediction: that the judiciary will conduct its business in ways designed to stave off political confrontations. What is especially interesting in this regard is the manner in which it is accomplished. A judiciary staffed by hundreds of judges, each with life tenure and an irreducible salary, cannot trust its individual members always to act discreetly - cannot, that is, count on them all to avoid trouble by exercising Alexander Bickel's famous "passive virtues." n140 Safety requires [\*997] institutional and doctrinal barriers that reduce the need for judges to attend to such matters in each case. We divide the judiciary's self-policing devices into two main categories. On the one hand are mechanisms of internal discipline that operate to correct individual judges when they ignore or misapply established rules and practices; these are discussed in Part III.A. On the other, discussed in Part III.B, are principles of jurisdiction or justiciability that operate to remove altogether whole categories of cases from federal judicial cognizance. Rather than merely ensuring that law is applied properly, these principles withdraw potentially controversial issues from direction by the federal courts, leaving them to be addressed in other fora.