## Off

### 1NC – T

1. **NEG Interp: The private sector is distinct from the public sector, which is composed of federal, state, and local governmental agencies:**

Thomas **Brock**, 12/25/20**20** (Thomas Brock is a well-rounded financial professional, with over 20 years of experience in investments, corporate finance, and accounting, “Private Sector,” <https://www.investopedia.com/terms/p/private-sector.asp>, Retrieved 8/15/2021)

Private and Public Sector Differences **The private sector** employs workers through individual business owners, corporations or other non-government agencies. Jobs include those in manufacturing, financial services, professions, hospitality, or other non-government positions. Workers are paid with part of the company’s profits. Private sector workers tend to have more pay increases, more career choices, greater opportunities for promotions, less job security, and less comprehensive benefit plans than public sector workers. Working in a more competitive marketplace often means longer hours in a more demanding environment than working for the government. **The public sector** employs workers through the **federal, state or local government**. Typical civil service jobs are in healthcare, teaching, emergency services, armed forces, and various regulatory and administrative agencies. Workers are paid through a portion of the government’s tax dollars. Public sector workers tend to have more comprehensive benefit plans and more job security than private sector workers; once a probationary period concludes, many government positions become permanent appointments. Moving among public sector positions while retaining the same benefits, holiday entitlements, and sick pay is relatively easy while receiving pay increases and promotions is difficult. Working with a public agency provides a more stable work environment free of market pressures, unlike working in the private sector.

**Violation: The plan deals with private seed patents in addition to pubic. They’re extra T**

**Vote neg - They explode the topic to deal with individuals working for the federal government or any state and local government in the US. Permits infinite unpredictable AFF ground and destroys all generic disads.**

Or it’s a massive alt cause and public institutions would just buy up all the patents --- they have the legal authority and the history of doing it

CFS 01 --- Center for food safety, “DEVELOPMENT OF THE SEED PATENT SYSTEM” https://www.centerforfoodsafety.org/issues/303/seeds/development-of-the-seed-patent-system

With the view that government seed programs constrained potential profits, the nascent seed industry aimed to shift seed breeding and development away from government programs toward private, commercial entities. Through lobbying and other means of influence in the last several decades, industry has steadily established intellectual property rights (IPR) and patent regimes of exclusivity through legal and policy instruments. These include the following:

1930: The Plant Patent Act (PPA) allowed asexually reproduced plants, excluding tuber-propagated plants, to receive patent protection.

1970: The Plant Variety Protection Act (PVPA) gave plant breeders 25 years exclusive IPR via a Certificate for a newly developed plant variety, including sexually reproduced plants and tuber-propagated plant varieties. However, the PVPA granted exemptions to allow researchers and farmers to save seed.

1980: Diamond v. Chakrabartyawarded the first patent on life – a utility patent – for a genetically engineered (GE) bacterium.

1980: The Bayh-Dole Act allowed public institutions to obtain patents on publicly funded research and spurred the initiation of public-private partnerships, where industry funds public research to advance their own goals and often appropriates the resulting technology.

### 1NC – AT PIC

#### Text: The United States Supreme Court should hold that its decisions in *Myriad Genetics* and *Prometheus* apply to all patents on living organisms and that violations are illegal under criminal code because they violate the “product of nature” and “laws of nature” exceptions to Section 101 of the Patent Act. The Court will clarify that statutory language permitting “compositions of matter” does not apply to living organisms.

#### The CP solves and tests “antitrust key” -

Conley ‘19

John Conley, Author at The Privacy Report - “What’s Going On with Patentable Subject Matter?” – The Privacy Report -AUGUST 05, 2019 - #E&F - https://theprivacyreport.com/2019/08/05/whats-going-on-with-patentable-subject-matter/

Patentable subject matter (often called patent eligibility) is the first hurdle an invention must clear on the road to patentability. Section 101 of the Patent Act provides, “Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.” In other words, if an invention falls into one of the enumerated categories—processes (or methods), machines, manufactures or compositions of matter—it will be patent-eligible if it meets the other criteria specified by the Act. The most important of those are novelty, utility and nonobviousness; the inventor also has to meet demanding standards pertaining to the description of the invention and the drafting of claims.

For most of the history of patents in the United States, just about everything passed the subject matter test. The courts created three major exceptions: you couldn’t patent products of nature (sometimes called natural phenomena), such as minerals or naturally occurring plants; laws of nature, like the law of gravity; or abstract ideas, like simple methods of doing business. The courts have repeatedly emphasized that these exceptions are narrow. For example, whereas natural laws are patent-ineligible, inventions that apply natural laws may be patentable. Consequently, these exceptions were rarely invoked by the courts or the Patent Office (the USPTO) to invalidate patents. The work of winnowing out bad patents was usually left to the doctrines of novelty (section 102) and nonobviousness (103). (Section 101 also requires utility, but that’s easy to satisfy in almost all cases.)

This all began to change in 2012 when the Supreme Court decided the first of three subject matter cases, Mayo v. Prometheus. The Court held that Prometheus’ patent on a method for adjusting the dose of an autoimmune drug amounted to nothing more than a claim on the natural law correlating the drug’s metabolite level in the body with the proper dose. Next came AMP v. Myriad Genetics (2013), where the Court held that genes that are merely isolated from the body are not patentable subject matter because they’re products of nature. The third case in the trilogy was Alice Corp. v. CLS Bank, in which the Court invalidated a patent on a method for using a computer system as an intermediary to monitor the performance of the parties to a financial exchange transaction. The Court found that the concept of a third-party intermediary is an abstract idea and simply implementing that idea on a generic computer doesn’t elevate it to patentable subject matter.

Reaction in the Federal Circuit

The Myriad decision has proven to be the least controversial of the three. The case invalidated patents only on isolated gDNA (natural genomic DNA), and patents on synthesized cDNA and methods of using DNA for drug testing were left untouched. In any event, most single-gene patents, whether in gDNA or cDNA form, were already subject to obviousness attacks under a 2009 Federal Circuit decision called In re Kubin.

**Exclusive FTC means *they investigate* AND address t*hrough non-judicial Administrative proceedings*. Avoids risks from *private causes of action*.**

**Rosch ‘10**

Remarks of J. Thomas Rosch - Commissioner, Federal Trade Commission before the USC Gould School of Law 2010 Intellectual Property Institute Los Angeles, CA - March 23, 2010 - #E&F – modified for language that may offend - https://www.ftc.gov/sites/default/files/documents/public\_statements/promoting-innovation-just-how-dynamic-should-antitrust-law-be/100323uscremarks.pdf

More broadly, however, I want to suggest that Section 5 may supply **an optimal vehicle** for challenging conduct that weakens innovation. The common law that has grown up around Section 2 over the last several decades is deeply ingrained in price theory; that static framework, however good it may be for evaluating short-run harm and quantifiable conduct such as price and output restraints, does not easily lend itself to looking at (considering) whether a party’s conduct has or will dampen innovation or prevent product improvement. Compounding matters is the fact that the difficult line drawing and weighing involved in comparing the likelihood of innovation against the likelihood of quantifiable **anticompetitive harm** is not something that generalist **judges and** **lay juries** are well suited for. Indeed, even the metric for measuring innovation itself remains elusive.

If the Commission proceeds under Section 5, these concerns **largely fall away**. Judging harm to competition against a consumer choice standard not only follows from Section 5’s text and the FTC’s unique institutional architecture, but provides a ready**made** vehicle for evaluating anticompetitive harm from a dynamic perspective. Moreover, by proceeding under Section 5 and suing **in our** Part 3 **administrative process**, the FTC (**and only the FTC)** can have the **first crack** at the hard line drawing and balancing that must occur when one weighs price competition against other forms of more dynamic competition. Arguably by leaving this critical task **to the FTC** and its prosecutorial discretion **in the first instance**, Section 5 allows the Commission **to minimize the threat of false positives** and **shake down lawsuits** that have animated many of the Supreme Court’s more recent decisions. For all of these reasons, **I would not be surprised** if the Commission decided to pursue claims based on dynamic concerns under Section 5 in the coming years, provided we can provide clear guidance to parties about when their conduct will trigger Section 5 review.

**Error rates are *the worst of both worlds* – ffalse positives and false negatives crush econ AND kill compliance with the Aff**

* Resolves all Aff offense vs. the CP related to “underdeterrence” bc…
* …under-deterring doesn’t map onto a world with error rates in the investigation and enforcement stages. Those errors can invite “false positive” non-compliance for the Aff.

**Baker 15** Jonathan B. Baker - Professor of Law, American University Washington College of Law. “TAKING THE ERROR OUT OF “ERROR COST” ANALYSIS: WHAT’S WRONG WITH ANTITRUST’S RIGHT” - 80 Antitrust Law Journal No. 1 (2015) - #E&F – continues to footnotes #18 and #19 – no text removed. https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2333736

The error cost perspective evaluates antitrust rules—whether considered **individually** or as **a whole**—based on whether they minimize total social costs. The relevant costs include costs of “false positives” (**finding violations when the conduct did not harm competition),** costs of “false negatives” (**not finding violations when the conduct harmed competition**), and **transaction costs** associated with use of legal process.17 **False positives** and **false negatives** are harmful **to the economy as a whole** for reasons that **go beyond** the conduct **in the case under review**:18 **False positives** and **false negatives** may **chill** beneficial conduct by other economic actors (potentially in other industries) that must comply with the rule; these errors may also fail to deter harmful conduct by other economic actors to which the same rule would apply. **False positives** and **false negatives** do not neatly map to overdeterrence and underdeterrence, respectively, however, because the deterrence consequences of **legal errors** depend in part on the way that those errors affect the marginal costs and benefits of conduct undertaken in the shadow of the law19.

**FN18** - From an economic perspective, antitrust rules benefit society primarily by deterring harmful conduct. See generally Jonathan B. Baker, The Case for Antitrust Enforcement, J. ECON. PERSP., Autumn 2003, at 27; cf. Louis Kaplow, Burden of Proof, 121 YALE L.J. 738 (2012) (highlighting a tradeoff between the benefits of deterrence and costs of chilling beneficial conduct that arises when the burden of proof in adjudication is set to maximize social welfare). Accordingly, the evaluation of **error costs** must ~~look to~~ (consider) the consequences of the decision or legal rule for conduct **by other firms**, **not simply to the incidence** of the decision on the parties to the case. For example, restricting analysis to the parties before the court would yield the misimpression that draconian punishments for parking in front of a fire hydrant will eliminate error costs. The prospect of such punishments would lead to 100% compliance with the no-parking rule, so there would be no court cases, no possibility for a court erroneously to convict or acquit a defendant, and no litigation expenditures. Yet such punishments would also chill parking in front of a hydrant when its social benefits (**e.g., allowing a doctor to arrive in time to save a life**) would outweigh its social costs. Such punishments would also discourage socially beneficial parking near hydrants (by drivers who fear that an aggressive parking enforcer would wrongly conclude that the hydrant is blocked and that a court would uphold the ticket). Restricting analysis to the parties before the court would yield the same misimpression with respect to an enforcement policy taken to the opposite extreme: A complete absence of enforcement of the rule prohibiting parking in front of hydrants would also lead to no court cases, and so would generate no judicial errors and no transaction costs of litigation. Yet such a rule would not deter parking in front of hydrants when the social cost (**the cost of impeding fire department access in the event of a fire discounted by the probability that a need for access would arise**) would exceed the social benefit.

**FN19** See generally Warren F. Schwartz, Legal Error, in 1 ENCYCLOPEDIA OF LAW AND ECONOMICS 1029 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000). For example, a rule change that increases the frequency or cost (penalty) of **false positives** may increase deterrence, but it **could also do the reverse**. The latter may occur if more false positives mean that firms no longer obtain enough benefit from staying within the line separating legal and illegal behavior to justify being careful. **For this reason**, uncertainty about a **rule** or its **application** can **reduce compliance**. See generally Hendrik Lando, Does Wrongful Conviction Lower Deterrence?, 35 J. LEGAL STUD. 327, 329–30 (2006) (providing a simple technical example); Richard A. Posner, An Economic Approach to the Law of Evidence, 51 STAN. L. REV. 1477, 1483–84 (1999) (greater accuracy in judicial determinations increases the returns to compliance with legal rules); Steven C. Salop, Merger Settlements and Enforcement Policy for Optimal Deterrence and Maximum Welfare, 81 FORDHAM L. REV. 2647, 2668–69 & 2669 n.60 (2013) (a firm’s incentive to comply with a rule may fall **identically** when the probability of either type of error increases).

### 1NC – Criminalization PIC

#### Text: The United States should deny and revoke any patent-tying arrangements involving seeds.

**Prohibit has to criminalize the activity**

**US District Court ‘01** --- United States District Court, WD Texas, “Texas v. del Sur Pueblo”, NATIONAL INDIAN LAW LIBRARY, Sept 2001, https://narf.org/nill/bulletins/sct/documents/yselta.html

The Tribe insists that, under either IGRA or the Restoration Act, the analysis for determining whether the Tribe's proposed gaming activities are allowed is the same. Specifically, it insists that ? 107(a) of the Restoration Act does not operate as an independent bar to its proposed gaming activities because Texas does not “prohibit” the proposed gaming activities. The first sentence of ? 107(a) of the Restoration Act provides: “All gaming activities which are prohibited by the laws of the State of Texas are prohibited on the reservation and on lands of the tribe.” 25 U.S.C. ? 1300g-6. The Tribe maintains that the term “prohibit” has **special significance** in federal Indian law, which is derived from Cabazon Band, and whether a federal court is interpreting IGRA or the Restoration Act, it should apply the same analysis, i.e., the Cabazon Band criminal-prohibitory/civil-regulatory dichotomy. Thus, according to the Tribe, the critical question under either IGRA or \*683 the Restoration Act is whether Texas law and public policy “**prohibit**” (that **is, criminalize rather than regulate**) the proposed gaming activities.

**This would be enforced racially --- leading to increased imprisonment of black and brown workers**

**Kennedy 21** --- Brendan Kennedy, “Yes America, Antitrust Laws Do Perpetuate Structural Racism But They Don’t Have To”, New York State Bar Association, 1.27.2021, https://nysba.org/yes-america-antitrust-laws-do-perpetuate-structural-racism-but-they-dont-have-to/

The recently named acting commissioner of the U.S. Federal Trade Commission has been very public about her desire to have antitrust enforcement become antiracist. While on maternity leave this summer, Rebecca Kelly Slaughter made her personal opinion known in a public Twitter thread that sparked further discussion about equity within the antitrust community.

Slaughter, along with panelists, Eleanor M. Fox, Deona T. Kalala, Leslie C. Overton and Sandeep Vaheesen, dispelled the notion that antitrust policies were **neutral** during a session held Jan. 25 by the Antitrust Law Section at the New York State Bar Association’s Annual Meeting. They suggested ways that antitrust laws can stop perpetuating inequality on communities of color.

“There really isn’t such a thing as value-neutral enforcement,” Slaughter said. “**All of our enforcement** actions **have consequences** and I would rather have our system be ~~clear-eyed~~ about what these consequences are.”

When talking specifically about racism, Slaughter explained that antitrust laws and enforcement are **going to reinforce** the **structural inequities in our system**, specifically in the gig economy.

“We need to think **very carefully** in all of our cases about whether the actions we take or do not take will **reinforce the structural inequities** or break them down and make our markets more equitable,” Slaughter said.

According to Vaheesen, the legal director at the Open Markets Institute in Washington D.C., surveys have indicated that the work being done in the gig economy is **disproportionately done by people of color**. On a larger scale, he believes that antitrust laws have been used to the **detriment of Black and brown workers** in ways that make our society **more racist.**

The gig economy is made up of workers like Uber and Lyft drivers, Instacart shoppers and Doordash delivery drivers, whose businesses mainly run on apps. These tech companies have classified their workers as independent contractors, and this can lead to their workers losing some very basic rights.

“These platforms can control and dictate things like rate of pay and commissions and direct trips and routes drivers take,” Vaheesen said. “Due to antitrust laws, these companies have the power of employers without the duty of them, so they don’t have to pay a minimum wage, overtime, workers compensation or healthcare benefits.”

Vaheesen believes that this rise of the gig economy can be tied directly to changes in antitrust law that were enacted in the 1970s and 1980s under Republican administrations and left unchallenged by subsequent Democratic administrations in the 1990s and 2000s.

“Antitrust laws say that workers who are classified as independent contractors **cannot organize**,” Vaheesen said. “Workers **cannot come together** and build power through unions, collective bargaining, or striking. So this gives a **largely white group of business owners** and venture capitalists the ability to **control groups of Black and brown workers** and **prevent them from organizing**.”

**Expanding the scope of policing and prisons preservation requires a pedagogical participation in genocide management --- This tolerates and sustains land conquest, slavery, racial colonialism, and imperialist war — it turns case.**

**Rodríguez 10** — Dylan Rodríguez, Professor and Chair of the Department of Ethnic Studies at the University of California-Riverside, Founding Member of Critical Resistance—a grassroots organization that works to build a mass movement to dismantle the prison-industrial complex, holds a Ph.D. in Ethnic Studies from the University of California-Berkeley, 2010 (“The Disorientation of the Teaching Act: Abolition as Pedagogical Position,” *Radical Teacher*, Number 88, Summer, Available Online to Subscribing Institutions via JSTOR, p. 15-17)

Abolitionist Position and Praxis

Given the historical context I have briefly outlined, and the practical-theoretical need for situating an abolitionist praxis within a longer tradition of freedom struggle, I contend that there can be no liberatory teaching act, nor can there be an adequately critical pedagogical practice, that does not also attempt to become an abolitionist one. Provisionally, I am conceptualizing abolition as **a praxis of liberation** that is creative and experimental rather than formulaic and rigidly programmatic. Abolition is a “radical” political position, as well as a perpetually creative and experimental pedagogy, because formulaic approaches cannot adequately apprehend the biopolitics, dynamic statecraft, and internalized violence of genocidal and proto-genocidal systems of human domination.

As a productive and creative praxis, this conception of abolition posits the **material possibility** and **historical necessity** of a social capacity for human freedom based on a cultural-economic infrastructure that supports **the transformation of oppressive relations** that are the legacy of **genocidal conquest**, **settler colonialism**, **racial slavery/capitalism**,19 **compulsory hetero-patriarchies**, and **global white supremacy**. In this sense, abolitionist praxis does **not** singularly concern itself with the “abolition of the prison industrial complex,” although it fundamentally and **strategically prioritizes** the prison as a central site for catalyzing **broader, radical social transformations**. In significant part, this suggests envisioning and ultimately constructing “a constellation of alternative strategies and institutions, with the ultimate aim of removing the prison from the social and ideological landscape of our society.”20 In locating abolitionist praxis within a longer political genealogy that anticipates the task of **remaking the world under transformed material circumstances**, this position refracts the most radical and revolutionary dimensions of a historical Black freedom struggle that positioned the abolition of “slavery” as the condition of possibility for Black—hence “human”—freedom.

To situate contemporary abolitionism as such is also to recall the U.S. racist state’s (and its liberal allies’) displacement and effective political criminalization of Black radical abolitionism through the 13th Amendment’s 1865 recodification of the slave relation through the juridical re-invention of a racial-carceral relation:

Amendment XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.21 [emphasis added]

Given the institutional elaborations of racial criminalization, policing, and massive imprisonment that have prevailed on the 13th Amendment’s essential authorization to replace a regime of racist chattel slavery with racist carceral state violence, it is incumbent on the radical teacher to assess the density of her/his entanglement in this historically layered condition of [end page 15] violence, immobilization, and capture. **Prior** to the work of formulating an effective curriculum and teaching strategy for critically engaging the prison industrial complex, in other words, is the even more difficult work of examining the **assumptive limitations** of any “radical pedagogy” that does not attempt to displace an **epistemological and cultural common sense** in which the relative order and peace of the classroom is **perpetually reproduced** by the systemic disorder and deep violence of the prison regime.

In relation to the radical challenging of common sense discussed above, another critical analytical tool for building an abolitionist pedagogy entails the **rigorous, scholarly dismantling** of the **“presentist” and deeply ahistorical understanding** of policing and prisons. Students (and many teachers) frequently enter such dialogues with an utterly mystified conception of the policing and prison apparatus, and do not generally understand that 1) these apparatuses in their current form are very recent creations, and have not been around “forever”; and 2) the rise of these institutional forms of criminalization, domestic war, and mass-scale imprisonment forms **one link in a historical chain of genocidal and proto-genocidal mobilizations of the racist state** that regularly take place as part of the deadly global process of U.S. nation-building. In other words, not only is the prison regime a very recent invention of the state (and therefore is neither a “permanent” nor indestructible institutional assemblage), but it is **institutionally and historically inseparable** from the precedent and contemporaneous structures of **large-scale racist state violence**. Asserting the above as part of the core analytical framework of the pedagogical structure can greatly enable a discussion of abolitionist possibility that thinks of the critical dialogue as a **necessary continuation of long historical struggles** against **land conquest**, **slavery**, **racial colonialism**, and **imperialist war**. This also means that our discussions take place within a longer temporal community with those liberation struggles, such that we are neither “crazy” nor “isolated.” I have seen students and teachers speak radical truth to power under difficult and vulnerable circumstances based on this understanding that they are part of a historical record.

I have had little trouble “convincing” most students—across distinctions of race, class, gender, age, sexuality, and geography—of the gravity and emergency of our historical moment. It is the analytical, political, and practical move toward an abolitionist positionality that is (perhaps predictably) far more challenging. This is in part due to the **fraudulent and stubborn default position** of centrist-to-progressive liberalism/reformism (including assertions of “civil” and “human” rights) as the only feasible or legible response to reactionary, violent, racist forms of state power. Perhaps more troublesome, however, is that this resistance to engaging with abolitionist praxis seems to also derive from a deep and broad **epistemological and cultural disciplining of the political imagination** that makes liberationist dreams **unspeakable**. This disciplining is most overtly produced through **hegemonic state and cultural apparatuses and their representatives** (including elected officials, popular political pundits and public intellectuals, schools, family units, religious institutions, etc.), but is also compounded through the pragmatic imperatives of many liberal and progressive nonprofit organizations and social movements that **reproduce the political limitations of the** [end page 16] **nonprofit industrial complex**.22 In this context, the liberationist historical identifications hailed by an abolitionist social imagination also require that such repression of political-intellectual imagination be **fought**, **demystified**, and **displaced**.

Perhaps, then, there is **no viable or defensible pedagogical position** other than an abolitionist one. To live and work, learn and teach, and survive and thrive in a time defined by the capacity and political willingness to eliminate and neutralize populations through a culturally valorized, state sanctioned nexus of institutional violence, is to better understand why abolitionist praxis in this historical moment is **primarily pedagogical**, within and against the “system” in which it occurs. While it is conceivable that in future moments, abolitionist praxis can focus more centrally on matters of (creating and not simply opposing) public policy, infrastructure building, and economic reorganization, the present moment clearly demands a convening of **radical pedagogical energies** that can build the **collective human power, epistemic and knowledge apparatuses, and material sites of learning** that are the **precondition** of authentic and liberatory social transformations.

The prison regime is the institutionalization and systemic expansion of massive human misery. It is the production of bodily and psychic disarticulation on multiple scales, across different physiological capacities. The prison industrial complex is, in its logic of organization and its production of common sense, **at least proto-genocidal**. Finally, the prison regime is **inseparable** from—that is, present in—the schooling regime in which teachers are entangled. Prison is not simply a place to which one is displaced and where one’s physiological being is disarticulated, at the rule and whim of the state and its designated representatives (police, parole officers, school teachers). The prison regime is **the assumptive premise of classroom teaching generally**. While many of us must live in labored denial of this fact in order to teach as we must about “American democracy,” “freedom,” and “(civil) rights,” there are opportune moments in which it is useful to come clean: the vast majority of what occurs in U.S. classrooms—from preschool to graduate school—cannot accommodate the bare truth of the proto-genocidal prison regime as a violent ordering of the world, a primary component of civil society/school, and a material presence in our everyday teaching acts.

As teachers, we are **institutionally hailed to the service of genocide management**, in which our pedagogical labor is variously engaged in mitigating, valorizing, critiquing, redeeming, justifying, lamenting, and otherwise reproducing or tolerating the profound and systemic violence of the global-historical U.S. nation building project. As “radical” teachers, we are politically hailed to **betray genocide management** in order to embrace **the urgent challenge of genocide abolition**. The **short-term survival of those populations** rendered most immediately vulnerable to **the mundane and spectacular violence** of this system, and **the long-term survival of most of the planet’s human population** (particularly those descended from survivors of enslavement, colonization, conquest, and economic exploitation), is **significantly dependent** on our willingness to embrace this form of **pedagogical audacity**.

### 1NC – K

#### Attempts to achieve optimal competition necessitates dividing society into governable entities---the impact is violent dispossession---vote NEG to forefront an analysis of institutional power relations.

Vicencio 14 (Dr. Eduardo Rivera Vicencio, Professor of the Department of Business and Economics at the Autonomous University of Barcelona; “The Firm and Corporative Governmentality: From the Perspective of Foucault;” International Journal of Economics and Accounting, DOI: 10.1504/IJEA.2014.067421, TM) [language modified]

Foucault explains the change of liberal governmentality to neoliberal governmentality in the 20th century in a detailed description of German neo-liberalism and, in less detail, the North American anarchic capitalism and French neoliberalism. In the case of Germany, the implementation of neoliberalism in the post-war period occurs in 1948, in a non-existent state and within a framework of state reconstruction requirements imposed by the USA and England. However, the theoretical origins lie in the Freiburg School in the late 1930s.

What happens at this stage with the onset of neoliberalism, is the reversal of the analysis performed by ordoliberals, with a state which provides economic freedom, a free market as the organising principle of the state, “ … a state under the supervision of a market rather than a market under the supervision of the state”. Moreover, “For liberals, the exchange is not the essence ... the essence of the market is competition”. This takes on again the classical conception that competition can ensure economic rationality. For this reason, neoliberalism becomes the creator of public law, based on the support and legitimacy of the state governments [Foucault, (2007), p.149 and 151].

Using three examples, Foucault shows the style of a neoliberal government; the first of which is a monopoly. It is referred to as a result of competition of the capitalist system, the product of capital concentration but with the objective of ensuring free competition. The state should intervene but the market itself should also respond to monopoly prices and, facing this possibility, the firm itself should opt for competitive market prices. The second example conforms to economic action which represents ongoing monitoring and activity through regulatory actions and ordering actions. In regulatory actions, price stability (inflation control), tax burden (as a way to influence savings and/or investments) and ordinary actions within the economic political framework are found and referred to as population techniques, learning and education, legal system resource availability, etc. Foucault’s third and final example is social policy which means that the economy ensures that each individual has a sufficient income to live alone or in a group and can be insured against the risks of life, old age and death and, called by the Germans, individual social policy or ‘social market economy’. He comes to the conclusion that the true and essential social politics according to neoliberalism is economic growth [Foucault, (2007), p.163 and 178].

However, the application of this scheme of social policy is not possible in Germany due to the Bismarck Socialist State, the influence of Keynesian economics or security systems that are applied in Europe. From this rejection of the application of neoliberal social policy in Germany, the Chicago School developed the ‘American anarchic capitalism’ along with the privatisation of insurance systems, where each individual, either personally or as a group, could insure against risks. This practice of neoliberal politics, says Foucault (2007, p.179) is what we see today in France (February 14th 1979 class).

Governmentality in the field of economic neoliberal thinking is a company subject to the mechanisms of competition and competitive dynamics; a partnership firm building a social network where the basic units are the way of business, where the objective of neoliberal policies is to spread, multiply and differentiate between firms. “The homo economicus who attempts to reconstruct is not the man of the exchange or the consumer, rather he is the [person] ~~man~~ of the firm and the production man” [Foucault, (2007), pp.182–187].

This subjection of society is not only economic it is vital for competitive play between companies, “... an institutional legal framework guaranteed by the state ...”; in this context, the firm becomes the key operator [Foucault, (2007), pp.209–213].

In the American neoliberalism study, as called by Foucault, anarchic capitalism is a business form based on human capital theory, where income is a capital return and, therefore, a wage is a capital income, inseparable from its holder, where the worker is a business in itself. Homo economicus is an entrepreneur, an economic subject and a legal subject; an interface between the government and the individual, a governable entity, which possesses innate elements and acquired elements. The first is genetic and the latter is the product of investing. In this way, “… the life of the individual – including the relationship, for example, with his private property, his family, his partner, his relationship with his insurance, his retirement – making it a sort of permanent and multipurpose business” [Foucault, (2007), pp.262–277].

Finally, a key element of this analysis is the civil society and its origins in the way to judge this economic subject, which is also the legal subject. “Civil society is the particular set in which it is necessary to relocate these ideal points constituted by homo economicus to manage them conveniently”. This is where the civil society and homo economicus form part of the same set of liberal governmentality technology, bound by the legal and political link [Foucault, (2007), p.336].

What unites individuals in civil society are ‘disinterested interests’ not a whole set of selfish interests and not the maximum profit in the exchange. This civil society groups sets of individuals in a number of nuclei; civil society is communal. Being the link between individuals is itself the principle of decoupling, when the economic loop is installed in society. It also works in reverse, “… the more progress towards economic status ... the more the constitutive bond of civil society and the more [hu]man is isolated is because of the economic loop with one and with everyone” [Foucault, (2007), pp..342–345]. Civil society is the engine of history [Foucault, (2007), p.347].

This paper is developed with the firm as the centre of neoliberal governmentality through the study of power relations of the firm and its discursive developments in this ideology, with reference to Foucault’s (1994, p.238) own recommendation, when he says, “… it should analyse institutions from power relations and not vice versa”

### 1NC – Court Politics

#### 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 – Patents

**Expanding antitrust law in IP sends a chilling effect that crushes all patents**

**Sipe ’17** [Matthew; December of 2016, published in the 2017 edition; J.D. at Yale Law School; American University Law Review, “Patents v. Antitrust: Preempting Conflict,” Vol. 66]

IV. RISK OF CONFLICT

The previous two Parts examined the existing sources of regulatory authority in the patent context--the PTO, the ITC, and the Federal Circuit--to create a hierarchy of potentially anticompetitive patent activities, categorizing them based on the degree to which they are already under patent-specific supervision. Where that **alternative supervision** exists, as the Credit Suisse Court recognized, the benefits of **overlapping antitrust intervention** are **marginal**. Of equal--if not **greater**--**concern**, however, are **the costs** of **overlapping antitrust intervention**.

The bulk of the Court's analysis in Credit Suisse was dedicated to calculating those costs in the securities context. Due to the "fine, complex, detailed line" separating activity the SEC permits and activity the SEC forbids, the "contradictory inferences" that might arise from identical behavior, the "need for securities-related expertise" in adjudication, the "risk of inconsistent court results," and the danger of permitting plaintiffs to "dress what is essentially a securities complaint in antitrust clothing," the Credit Suisse Court determined that "**antitrust courts** are likely to make **unusually serious mistakes**" where they intervene with securities law. 193 As a result, the Court stated, permitting antitrust law and securities law to overlap would likely "produce **conflicting** guidance, **requirements**, duties, privileges, or standards of conduct." 194 This Part extends that analysis to the patent context where the costs are equally substantial. Each of the above concerns is just as pressing in the patent sphere--if not moreso.

[\*451] A. The Fine Lines of Patent Law

In Credit Suisse, the Court characterized the line separating permissible and impermissible securities activity as "fine, complex, [and] detailed." 195 Accordingly, allowing antitrust and securities law to apply simultaneously would be particularly likely to produce conflicting guidance and requirements. The Court illustrated this dilemma:

It will often be difficult for someone who is not familiar with accepted syndicate practices to determine with confidence whether an underwriter has insisted that an investor buy more shares in the immediate aftermarket (forbidden), or has simply allocated more shares to an investor willing to purchase additional shares of that issue in the long run (permitted). And who but a securities expert could say whether the present SEC rules set forth a virtually permanent line, unlikely to change in ways that would permit the sorts of . . . conduct that it now seems to forbid? 196

Patent law is similarly replete with **fine doctrinal lines** separating **the permissible** and the **forbidden**. To provide just a few key examples, the frameworks governing patent misuse, exhaustion, inequitable conduct, and contributory infringement are **highly complex** and continue to develop and evolve.

As explained in Part III, patent misuse and exhaustion are equitable defenses to infringement. 197 The former applies where a patentee "impermissibly broadened the 'physical or temporal scope' of the patent grant with anticompetitive effect." 198 The patent then becomes "unenforceable until the misuse is purged." 199 The latter applies where a patented item has been "lawfully made and sold," after which "there is no restriction on [its] use to be implied for the benefit of the patentee." 200 An infringement claim based on downstream use or sale will therefore be dismissed as a matter of law. 201 The Federal Circuit, reviewing these defenses, 202 is forced to thus grapple with complex, "murk[y]" questions. 203 In terms of patent misuse: What is outside [\*452] the scope of any given patent grant? Has this particular patent been "leveraged" as part of the alleged anticompetitive scheme? How should courts analyze and resolve portfolio--rather than individual patent--misuse? 204 In terms of exhaustion: Does the article sold sufficiently embody the "essential features" of the patent? 205 To what extent can parties contract around exhaustion? 206 As a result, there is already "foreseeable polymorphism" in the doctrines of patent misuse and exhaustion, and "unforeseeable strains of potential misbehaviors" are likely to emerge. 207 Allowing **generalist antitrust courts** to intervene would only produce **greater uncertainty** and, ultimately, **conflicting and inconsistent results**.

Inequitable conduct is another equitable defense to patent infringement. 208 To successfully assert a claim of inequitable conduct, the accused infringer must show that the patentee failed to disclose information, such as prior art, in its patent application. 209 The patentee must also have "specific intent to deceive the PTO," such that the "PTO would not have granted the patent but for [the] failure to disclose." 210 The remedy, as expressed by the Federal Circuit, is the "'atomic bomb' of patent law": "inequitable conduct regarding any single claim renders the entire patent unenforceable." 211 The result is **a fine line to adjudicate**. Because the Federal Circuit has determined that "intent and materiality are separate elements . . . that . . . should not be put on a sliding scale with one another," the crucial--and highly technical--question of whether or not the patentee's alleged deception was the "but for" cause of the PTO's grant must be addressed fully in every case. 212 Again, inconsistency and uncertainty would mar **this already complex doctrine** if antitrust courts were left to adjudicate these claims.

[\*453] As opposed to direct infringement, contributory infringement covers situations where a party does not sell the patented article or practice the patented process, but instead

offers to sell or sells . . . a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use . . . . 213

For a plaintiff's claim of contributory infringement to succeed, the plaintiff must demonstrate that the defendant "knew that the combination for which its components were especially made was both patented and infringing," and that the "components have 'no substantial noninfringing uses.'" 214 In practice, contributory infringement claims can be incredibly complex, not only in technical terms--understanding how components may be used together or separately in infringing or noninfringing ways--but doctrinally as well. For example, there is a delicate line between raising a successful contributory infringement claim and impermissibly trying to extend the scope of one's patent over unpatented devices--potentially triggering misuse. 215 With the risk of a finding of unenforceability on one side and the possibility of rampant third-party infringement on the other, the costs of antitrust courts generating conflicting guidance or contributing to uncertainty in this doctrine would be quite high.

Altogether, the degree of complexity associated with patent doctrines, such as misuse, exhaustion, inequitable conduct, and contributory infringement, weigh in favor of preemption under Credit Suisse's analysis. If permitted instead to overlap, there is a **significant risk** that patent law and antitrust law would produce **conflicting guidance and requirements**. Just as generalist antitrust courts would **struggle to distinguish** permissible and forbidden securities arrangements--and fail to accurately forecast potential changes in securities law 216--they would struggle with the equally **delicate** and **fine lines of patent doctrine**.

**Strong IP’s key to breakthrough solution to every impact.**

Mark **Esper 9**, Executive Vice President of the U.S. Chamber of Commerce’s Global IP Center, “Climate for Innovation: Technology and Intellectual Property in Global Climate Solutions”, Hearing Before the Select Committee on Energy Independence and Global Warming House of Representatives, 7/29/2009, https://www.gpo.gov/fdsys/pkg/CHRG-111hhrg62451/html/CHRG-111hhrg62451.htm

The Global IP Center and its members believe that strong **i**ntellectual **p**roperty rights are **integral** to driving the innovation and creativity necessary to create jobs, save lives, advance economic growth and development around the world, and generate **breakthrough solutions to global challenges** such as climate change.

Our Nation's Founders recognized the link between strong IP rights and innovation more than 200 years ago and explicitly gave Congress the power to protect IP rights in the constitution. As a result, America has led the world in innovation for generations.

Today, the **U**nited **S**tates IP is worth between $5 and $5.5 trillion. IP accounts for more than half of all U.S. exports, helping drive 40 percent of the **U**nited **S**tates economic growth; and, as of 2008, IP-intensive industries employed more than 18 million Americans. But beyond driving job creating and economic growth, strong IP rights have created a **secure framework for investment in research** that led to **solving some of the world's most difficult problems**, from **disease** and **famine** to **water scarcity** and **energy security**, just to name a few.

In addition to **protecting** and **incentivizing** inventors, strong IP rights are also **integral to promoting technology deployment and diffusion** by providing a **clear legal framework** by which companies can transact business.

## Case

### 1NC---A/C

#### Alt causes:

#### 1. Other countries---their Escober card is about seed patents in Columbia and their Shiva card is about global IP law

#### 2. Non-patent subjectivation of Natives---industrial ag, deforestation, pesticides, and other forms of environmental exploitation

### AT: Extinction Reps

#### Our reps identified a shared threat stemming from the settler present, the avoidance of which opens plural futures for the making---which is good

Joseph J. Z. **Weiss 15**. Ph.D. candidate, Anthropology, University of Chicago. December 2015. “Unsettling Futures: Haida Future-Making, Politics and Mobility in the Settler Colonial Present.” p.216-232, https://knowledge.uchicago.edu/bitstream/handle/11417/1121/Weiss\_uchicago\_0330D\_13139.pdf?sequence=1&isAllowed=y

Conclusion: “What’s next? Just guess.” Signs of the Future One of the more recent additions to the socio-landscape of Old Massett, which I noticed on a return visit in 2014, was a series of blue signs that had appeared in many of the lawns on reserve and a good few uptown. The sign was a good two feet high and emblazoned with capitalized text: UNITED AGAINST ENBRIDGE. Below the text was a picture of a salmon. The salmon and the first word, “UNITED,” were in stark, attention-grabbing white, while the other text was in black. The signs, I later discovered, were distributed for five dollars each by the “Friends of Wild Salmon,” a coalition of northern British Columbia residents – including both First Nations and non-First Nations members – working together to oppose the Enbridge Gateway Pipeline Project.1 Perhaps appropriately, then, I noticed the sign on the lawns of both Haida and non-Haida, in Old Massett, (New) Masset, and out by Towtown. The signs may have been new, but their message is one that should have become familiar to us at this point: The people of Haida Gwaii oppose “Enbridge;” that is, The Enbridge Northern Gateway Pipelines Project. The project, first proposed in the mid-2000s, seeks to construct two pipelines to transport crude oil and condensate from northern Alberta to Kitimat on the coast of British Columbia.2 The oil would then be transported via “super-tanker” from the coast, through the Hecate Straight that passes between the west coast and the islands of Haida Gwaii before being exported to other nations (particularly China). Enbridge has received heavy support for the project from Canada’s current Conservative government, headed by Prime Minister Stephen Harper, and in 2013 the Enbridge Joint-Review Panel – despite the words of hippies and Haida alike, alongside fierce opposition from all over the northwest coast - approved the pipelines, albeit with 209 required conditions.3 As a partnership between Canadian federal and corporate interests, the Enbridge Pipelines Project promises a future horizon of economic prosperity, one that unequivocally justifies any environmental risk in the present. On Haida Gwaii, Enbridge presages a rather different future, one in which the unpredictable waters of the Hecade Straight all but guarantee a tanker spill. Such a spill would devastate the waters and lands of the islands and the neighbouring coastline of British Columbia, destroying the fish and poisoning the plants that currently draw on ocean waters and the animals that feed thereon. Neither eagles nor ravens could survive, living as they do on a diet that consists primarily of marine life, a fact which all but guarantees the disappearance of Eagles and Ravens, the Haida people whose lifeways as such are so fundamentally tied to the islands of Haida Gwaii. Haida Gwaii could no longer be home. A song recorded in protest again Enbridge by Aboriginal artist Kinnie Starr and animated as a music video by Haidawood, a team of Haida and non-Haida stop-motion artists and animators, makes this threat explicit, asking in its opening lines “Who will save these waters, save them for our great granddaughters, save them for our great grand-daughter’s sons, […] save them before all is dead and gone?”4 This nightmare future, this future that is no future, is one that looms large over the whole of this dissertation. It is familiar because it is a reiteration of the horror of ecological cataclysm that the CHN formed itself in opposition against, that the “hippies” risk metonymically bringing about by taking from the lands and waters without respect. But it is also familiar because in a broader sense it is the future that settler colonialism attempted to give to Native peoples; indeed, to render as their already given destiny. This is the future of indigenous erasure, of ultimate disappearance, of a closed temporality which can only end in “all dead and gone.” As I have also hopefully shown in each of my chapters, however, the future of “no future” is never taken as inevitable or already determined by Haida people. The work of future-making instead always acts to ward off the nightmare future of Haida erasure, always puts in its place instead multiple possible futures in which Haida people continue. Take the blue signs on the lawns of the Masset(t)s, Old and New, implicitly answering Kinnie Starr’s question with the bold declaration that the islands (will) stand “UNITED” against Enbridge. But the social significances of these futures are never encompassed solely by the ways in which they respond to the threat of nightmare futures. As we saw in Chapter 3, for instance, the production of a future of Haida and non-Haida unity is considerably more complicated than the declaration of shared solidarity, speaking back to a particular history of Haida and settler relations and fantasy schemas, looking forward towards finding productive ways in which non-Haida can be integrated into Haida systems of sociality and responsibility. To speak of a future united against Enbridge is thus necessarily to speak of many other things, just as it is the case when speaking of a future of Haida return, a future of care-full leadership, or a future of traditional authority. Larger social worlds unfold out of the constitution of particular futures. This is why, more than anything, I want to make clear in the final, concluding chapter of this dissertation that the political (if not the existential) significance of Haida future-making does not lie simply in the specific ways in which individual futures respond to particular dilemmas of the settler colonial present. Rather, what is most crucial about future-making as a way of thinking out from within the temporal brackets of settler colonialism’s deferred erasure is simply the fact of future-making itself. What matters the most is the capacity to say, as Haida rapper Ja$e ElNino does in a guest appearance in Starr’s song, “Now expect the best from the northwest/ What’s next? Just guess.” ElNino asserts the openness of the future, challenging his listeners to even attempt to predict the field of possibilities still to come. This does not mean, though, that this openness is unmoored. Quite the opposite, ElNino asks us to “expect the best of the northwest,” in response to the threat of Enbridge and, I think, more generally. In this spirit, in what follows I highlight the significance of location to indigenous futurity, exploring how Old Massett, its neighbouring communities along Masset Inlet, and the lands and waters of Haida Gwaii act as locations around which the very openness of Haida futures can be articulated. My discussion will be largely synthetic, reading together my previous chapters to attempt to arrive at a few conclusions for this dissertation at a whole. I begin with a discussion of Haida Gwaii, once again, as “home,” asking what it means to consider the islands as a Haida homeland (and one that requires “care” as such) in the light of the futures I have sketched out. I then draw on this to pose a few suggestions for the political anthropology of indigenous peoples and its abiding contemporary concern with sovereign rights and territoriality. Finally, I conclude by drawing out the multiple meanings of my titular phrase, “unsettling futures,” in the context of Haida futuremaking. Homeland Haida Gwaii is in at least some sense at the center of each of the futures I have discussed in this dissertation. It is the home to which Haida are expected (and expect) to return, the “cornucopia” of off-the-grid fantasy, the ongoing historical space of complex social and material relations that these fantasies elide, the perpetually at risk ecological landscape which demands (and authorizes) the CHN’s care and respect. And, as we have seen, these various futures for the islands are not isolated from one another. Quite the opposite, futures proliferate in response to each other. The potential for non-Haida homing necessitates strategic forms of future-oriented social integration to bring these new arrivals into respectful relations with the Haida world, the nightmare non-future of ecological collapse is warded off by the attempt to constitute care-full futures under Haida control. What all these Haida futures have in common – at least as they relate to the islands - is that they work to preserve Haida Gwaii, and the community of Old Massett in particular, as spaces in which Haida futures remain possible. This fact, as I have already begun to suggest in Chapter 2, might help us to resolve some of James Clifford’s dilemmas in relation to indigenous mobility. As I pointed towards then, the notion that “place” is significant to indigenous peoples – politically, socially, affectively, culturally – has become one of the essential components of how “indigeneity” is understood as a global phenomenon and a strategic identity from which rights claims can be advanced. Take Article 25 of the Universal Declaration of the Rights of Indigenous Peoples: Indigenous peoples have the right to maintain and strengthen their *distinctive spiritual relationship* with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard (Assembly 2007:10, emphasis mine). But what precisely does it mean to have a “distinctive, spiritual relationship” to a place, and who determines what might constitute that relationship? Here one of the perils of Povinelli’s “cunning of recognition,” as indigenous rights to territory become conflated with - and evaluated against - essentialized settler notions of Native ecological spirituality and/or emplacedness (cf: Raibmon 2005; Nadasdy 2003). If indigeneity thereby takes on the significance of being “rooted” in a particular place, of having certain identifiably “distinctive” cultural relationships to that place that others might lack, then the fact of indigenous mobility would indeed pose a profound dilemma for the category of indigeneity on the one hand and the capacity to make claims to territorial rights *qua* one’s indigeneity on the other. But there is a remarkable temporal shallowness to all this. To give a representative example, the Australian state criteria for what constitutes “cultural rights to territory” that Povinelli interrogates function solely in the past and the present, mandating that Aboriginal people show continuity of occupation and of the cultural practices associated with “Aboriginal occupation” in the mind of the court in order to be recognized as possessing a rightful claim to their home territories (Povinelli 2002). Erased in this is the possibility that a territory could be the site of departure and return, that it could have a future horizon that is flexible, subject to transformation alongside the transformations of the people(s) who call it home, without thereby necessarily losing its integrity as a rightful space of indigenous occupation. Such a possibility is not controversial for my Haida interlocutors. Rather, it has the status of an already-given certainty, community common sense - though there is without doubt much social work that goes into the production of that certainty. What makes indigenous mobility fraught, then, might have rather more to do with the constitution of settler polities than it does with the actual practices of indigenous peoples. Consider the various ways in which we have already seen colonial authorities attempt to control Haida movement, from the forced expulsions of 19th century Victoria to the removal of Haida children from the islands for residential schools less than a century later. Consider too the manufacture of the reserves themselves, the fixing of two Haida “Bands” with their own federally determined territories, beyond which Haida people could claim no rights over land, waters, or resources (cf: Harris 2002). This is a logic of containment, of isolation. In leaving their assigned spaces, Native peoples were assumed by colonial authorities to be leaving the space of their Nativeness behind, assimilating into settler society on its terms. Indeed, this was the motivating logic of the residential schools program, which took as its premise the idea that “Indians” could always “backslide” into “savage customs” as long as they remained in their homes and with their families. Aboriginal children thus had to be brought somewhere else to learn how to join “civilized,” that is, white Christian, society (Miller 1996). Reserves could thus be rendered as the last bastions of a “weird and waning race,” to quote Scott, their inhabitants temporally foreclosed and spatially fixed. The notion that indigenous people could move without ceasing to be (or ceasing to fight for their rights to self-determination and Title to their lands) unsettles this narrative, just as does the intertwined possibility of indigenous futurity. The relationship to Haida Gwaii that we’ve seen sketched out by the Haida futures explored in this dissertation does not preclude the possibility of “distinctive spiritual relationships” between Haida and their home territories. Quite the opposite, the ineffable quality of homing alone suggests that many of my interlocutors feel a connection to their home that goes beyond the kinds of practices that are only possible on the islands, their beauty or their history. Indeed, when considered as home, when considered as a site that requires care, there is little doubt that Haida Gwaii can encompass a wide range of phenomenological, affective, social, and cultural ways of relating to its lands and waters by Haida people (and their neighbours, at times for good, at times for ill). But it is not these relations as such that encompass the totality of Haida Gwaii’s significance. Rather, what is of greatest concern to my interlocutors is the continuing future possibility that relations like that *could be* formed, that people *could continue* to be called home to Haida Gwaii once they’ve fully explored the world off-island, that the qualities that precisely *make* Haida Gwaii home *could* be preserved. This is what it means, I think, to “take care” of Haida Gwaii, to allow it to continue as a homeland for uncounted future generations. Though they certainly emphasize the need for Haida Gwaii to be maintained as a location for Haida futurity, this does not mean that the futures we have seen expend all the possible ways in which such future forms of Haida social, material, ecological, and relational life could be formed. Recall Ja$e ElNino’s challenge of a future so open that its possible contents can only be guessed at. What Haida future-making demonstrates is that there are a set of potentialities which are worth protecting so that Haida people can continue to access them, to come home to them, even as continuing forms of mobility and political processes can also shape and reshape Haida social and cultural life on and off the islands. Homeland is not a regimented place where Haida people *must* always live in order to be authentically Haida. Rather, it is a location where they should always be able to, in their own (necessarily multiple, often contested, sometimes even contradictory) terms. Sovereignty At the same time, there is an inescapably political dimension to the attempt to render Haida Gwaii as the homeland of a still open Haida future. The assertion of the (located) openness of the future does not necessarily make it so. As I noted in the first part of this dissertation, the flow of Haida departures and returns unfold in the broader context of the settler, capitalist state; indeed, they are made necessary in part by the current absence of economic opportunity on island, just as the arrival of potentially threatening strangers is a result of their privileged position in the very capitalist economy they seek to escape. Constituting futures in which Haida people have the freedom to engage with that economy (and settler society more generally) as they see fit while retaining the capacity to come home (complicated as that process might be) also reiterates the inescapability of some form of engagement with that socio-economy. Likewise, the notion of Haida Gwaii as Haida homeland cannot be separated from current Haida struggles to assert their rights to the lands and waters of Haida Gwaii, the resources found therein, and their sovereign capacity to govern themselves and the islands in the ways they find appropriate. This is, recall, the very crux of the CHN’s own commitment to the assurance of futurity, as it is only by positioning itself as the rightful, sovereign government of the Haida Nation and its homeland of Haida Gwaii that it can adequately care for the islands and protect them from external threat. And the continuing advance of the Enbridge project despite fierce opposition from CHN, the Old Massett Village Council, their Haida constituents, and the non-Haida actors with whom they are “united against Enbridge” (and this alongside protest all over the northwest coast) gives the nightmare futures of environmental collapse – pushed through by corporate interests and Canadian politicians - a frightening immanence. The assertion of the openness of the future is made, in short, in (and against) a context in which closures remain endemic. And yet, something has changed in this landscape from the initial erasures of Native futurity we drew out in the first chapter. In the narratives of colonial actors like Duncan Campbell Scott, it was absolutely clear that “Indians” were disappearing because their social worlds were being superseded by more “civilized” ways of living and being, ones that these Native subjects would also, inevitably, in the end, adopt (or failing that, perish outright). There was a future. It was simply a settler one. But the nightmare futures of that my Haida interlocutors ward against in their own future-making reach beyond Haida life alone. Environmental collapse, most dramatically, threatens the sustainability of all life; toxins in the land and the waters threaten human lives regardless of their relative indigeneity, race, or gender (e.g. Choy 2011; Crate 2011). Put another way, the impetus for non-Haida (and non-First Nations subjects more generally) to be “united against Enbridge” with their indigenous neighbours comes in no small part because an oil spill also profoundly threatens the lives and livelihoods of non-Aboriginal coastal residents, a fact which Masa Takei, among others, made clear in Chapter 3. Nor is the anxiety that young people might abandon their small town to pursue economic and educational advantage in an urban context limited to reserve communities. Instead, the compulsions of capitalist economic life compel such migrations throughout the globe. The nightmare futures that Haida people constitute alternative futures to ward against are not just future of indigenous erasure under settler colonialism. They are erasures of settler society itself. There is thus an extraordinary political claim embedded in Haida future-making, a claim which gains its power precisely *because* Haida future-making as we have seen it does not (perhaps cannot) escape from the larger field of settler-colonial determination. Instead, in Haida future-making we find the implicit assertion that Haida people can make futures that address the dilemmas of Haida *and* settler life alike, ones that can at least “navigate,” to borrow Appadurai’s phrasing, towards possible futures that do not end in absolute erasure. If Povinelli and Byrd are correct and settler liberal governance makes itself possible and legitimate through a perpetual deferral of the problems of the present, then part of the power of Haida future-making is to expose the threatening non-futures that might emerge out of this bracketed present, to expose as lie the liberal promise of a good life always yet to come and to attempt to constitute alternatives. It is no coincidence that we find this in the midst of a struggle over sovereignty. And this not just in the sense of the Council of the Haida Nation’s ongoing assertion of its sovereign right to govern the lands and waters of Haida Gwaii on behalf of all Haida people, as we saw in Chapter 5. Rather, as Joanne Barker has argued, over the course of the latter half of the twentieth century sovereignty has emerged as a: particularly valued term within indigenous scholarship and social movements and through the media of cultural production. It [is] a term around which analyses of indigenous histories and cultures were organized and whereby indigenous activists articulate their agendas for social change (Barker 2005:18). Through the assertion of sovereignty, indigenous political leaders, activists and scholars refute “the dominant notion that indigenous people [are] merely one among many ‘minority groups’ under the administration of state social service and welfare programs.” Instead, “sovereignty defines indigenous people with concrete rights to self-government, territorial integrity, and cultural autonomy under international law” (18). The trouble is, of course, that indigenous claims to sovereignty are always made within the context of colonial nation-states, ones whose own legitimacy is put at considerably risk both by the prospect of self-determining indigenous Nations (re)-emerging within their boundaries and the troubling of their own historical narratives of sovereign rights (cf: Comaroff and Comaroff 2003b). (One of these narratives, which reinterpreted indigenous lands as *terra nullius* and thus open to occupation, we’ve encountered already in Chapter 3). Thus, while sovereignty might indeed “define” indigenous peoples with concrete rights to territorial Title and self-determination, in theory equal under international law to the states who also lay claim to their territories, that definition does not in and of itself make possible the *practice* of this sovereignty. In this regard settler states such as Canada have shifted in their response to First Peoples’ sovereignty claims from outright rejection to a set of policies of selective recognition,5 but even the latter still positions Native nations as being subject to the authority and oversight (if not the structural forms) of the state. This means, as we have seen in Chapter 5, that indigenous governments such as the Council of the Haida Nation are in a precarious position, attempting to constitute their own sovereign authority without access to many of the conventional means of sovereignty in Western political thought – e.g., the monopoly on legitimate violence (Weber 1946), decisive authority to make and enact law (Schmitt 2005), or exclusive territorial control (Brown 2010; cf: Hobbes 1994). Alongside this precarity is the equally anxious question of whether or not sovereignty is even an appropriate analytical to center indigenous rights around precisely because it is historically a Western concept, one that had been drawn on to dispossess indigenous peoples over the course of settler colonial history (Barker 2005:18–19). (Indeed, the very next essay in Barker’s edited volume, by Mohawk scholar Taiake Alfred, categorically rejects sovereignty as an inappropriate tool for indigenous political assertions for these reasons and, also, because it draws attention away from developing and furthering “genuinely” Aboriginal political modes of thought (Alfred 2005; cf: Alfred 2009). The fact that sovereignty remains such a preeminent concept in the struggle for indigenous rights even though it is both epistemologically problematic and politically constrained has meant that there has been a recent push in both anthropology and indigenous studies to “widen” the definition of sovereignty, so that it might encompass multiple forms of indigenous social, political and legal practice outside of the conventional purview of “sovereign power” (e.g. Cattelino 2008; Richland 2011; Simpson 2000; Simpson 2014). Or, as Joanne Barker puts it: There is no fixed meaning for what *sovereignty* is – what it means by definition, what it implies in public debate, or how it has been conceptualized in international, nation, or indigenous law. Sovereignty – and its related histories, perspectives, and identities – is embedded within the specific social relations in which it is invoked and given meaning. How and when it emerges and functions are determined by the “located” political agendas and cultural perspectives of those who rearticulate it into public debate or political document to do a specific work of opposition, invitation, or accommodation. It is no more possible to stabilize what *sovereignty* means and how it matters to those who invoke it than it is to forget the historical and cultural embeddedness of indigenous peoples’ multiple and contradictory political perspectives and agendas for empowerment, decolonization, and social justice (Barker 2005:21, emphasis original). The opening up of sovereignty as flexible, multiple, and subject to all manner of diverse rearticulations carries particular weight (and, perhaps, ambiguity) since, as a historical concept in Western political theory, sovereignty was overwhelmingly concerned with closure. As Wendy Brown argues in her Walled States, Waning Sovereignty, the classic vision of sovereign power rests in the capacity to divide the inside from the outside, to make borders around a people – a “nation” – and separate that people from those outside it. Thus Schmitt’s “friend-enemy” distinction, for instance, or even John Locke’s consistent preoccupation with fences as a way of marking the existence of territory (Brown 2010; cf: Schmitt 1996; Locke 1988). The historical conditions of indigenous sovereignty claims in the context of settler colonialism make such absolute closures impossible for indigenous peoples. We might add, though, that their persistent presence also challenges the closure of the settler nation-state. Indeed, this is part of Brown’s point. The very fact that we see ever more spectacular performances of sovereign power on the part of contemporary nation-states – e.g., the titular “walls” that are being constructed along the borders of an increasing number of states - is a sign of the very insecurity of their political authority (Brown 2010).6 The conditions of settler colonial sovereignty, in other words, may be rather more “open,” and thus closer to those of indigenous “nation-within-nations,” then they may at first appear. If this means, in turn, that the future of settler political life is becoming as uncertain as the future for indigenous life has always been since the advent of settlement, then this means only what we have already begun to see: the dilemmas that Haida people confront in their future-making practices are also the dilemmas facing settler society. Take Chapter 4, in which the absence of any “one” definitive governing entity compels the constitution of an aspirational framework of accountability which could, were it realized, render navigable Haida relations to the many governments that claim their loyalties. As I hinted at there, such dilemmas are not restricted to the Haida sociopolitical world; rather, they may in fact be endemic to contemporary democratic societies and the multiple forms of governance (licit and otherwise) that emerge therein. In suggesting that there are Haida ways of refiguring a shared Haida-settler set of contemporary problematics, we might think of Haida future-making as simultaneously an instantiation of the multiple, flexible and always contingently located practices of sovereignty to which Barker points and a different way of thinking about indigenous political potentiality. In the former sense, Haida future-making is without doubt concerned with carving out spaces in which Haida existence can continue, expand, and change without losing the capacity to reproduce itself as, precisely, Haida existence. Thus the processes of homecoming we explored in Chapter 2, or Chapter 5’s explicitly political attempts to establish control over the islands for future generations. If the absence of indigenous sovereignty is the absence of the capacity of an indigenous people to (self)-determine their own futures, then the constitution of Haida futures can be seen exactly as sovereign work, whether in the overt sense of the Council of the Haida Nation’s assertions or the somewhat more implicit mode of Alice Stevens’ proposed mass adoptions. Significant here, though, is the fact that these acts of future-making carry meanings beyond their status as “responses” to the social and political dilemmas of contemporary Haida life. Thus Alice Stevens’ adoptions bring “hippie” children into the framework of Haida kinship relations, in one sense neutralizing their potential threat, but also constituting a complex new network of social relations between Haida and non-Haida whose potential significances go well beyond the protection of Haida territory and resources; thus the Council of the Haida Nation emerges as a “state-like” governing entity through its authorizing promise to “take care” of the islands, but in so doing takes on a series of new roles in Haida political life whose full consequences remain to be seen. If it is a sovereign action to envision an opening of possible futures for Haida people, then this very openness might also exceed the boundaries of sovereignty as a problematic for indigenous people even as it responds to them. Which is also, perhaps, why Haida futures seem so consistently to sketch out social, ecological, and political fields that encompass non-Haida; more, that are futures for Canada as well as for the Haida people living within the nation-state’s borders. Or, at least, futures that have the capacity to be so. What would it mean to figure an indigenous sovereignty that speaks beyond itself, one that promises to invert the order of settler domination through reconfiguring the shared futures of indigenous and settler peoples? This would not be a sovereignty premised on territorial closure, or even absolute political autonomy. It would, however, decisively overturn any settler colonial anticipations of the inevitable erasure of Native peoples. Quite the opposite, it would position indigenous practices of anticipation, aspiration, certainty, and anxiety at the forefront of contemporary modes of political imagination. Unsettling Futures A question remains, however. Could such a refiguring of the temporal and political horizon of settler and indigenous relationships remain possible even if the futures that indigenous people work to constitute remain unrealized in the settler colonial present? Or, put another way, we must always be careful not to conflate a capacity *to* form new futures for settler nation-states with the actual materializations of these futures. The Haida futures that I have discussed, even as they promise possible ways of navigating – of restructuring, even – the settler-Haida present, remain firmly bound by the colonial constraints of this present. But perhaps the stakes here have never been about overthrowing the Canadian colonial order outright. Rather, what I hope this dissertation has shown is that Haida future-making has the capacity to *unsettle* the settler colonial present, to challenge its received categories and demonstrate how, slowly, gradually, Haida people are reconfiguring its terms through the work of producing the future. Certainly, the sheer fact of Haida futurity should put to the lie any further notion that Haida people exist only to replicate their past or live only in the deferral of their eventual disappearance. The future is alive and well in Old Massett, although this does not meant that it is not also a site of profound anxieties. In working to ward off those anxieties through the juxtaposition of nightmare futures against their more desirable alternatives, then, Haida people unsettle the epistemological foundations of the forms of settler colonialism and liberalism against which Byrd and Povinelli write. At the same time (if you’ll pardon the pun), I think we can see the social work that futuremaking does iteratively, as a gradual reshaping of the actual conditions of Canadian society. Here I borrow Judith Butler’s suggestion, following Foucault, that the regulatory norms of society function only through their consistent and unstable reiteration (and materialization) in everyday social life.7 From this perspective, the ways in which Haida people work within and even reiterate the constraints and demands of Canadian settler mainstream society can also slowly and strategically *shift* those very constraints and demands, materializing a HaidaCanadian future that might in fact be quite different from the present even as it does not ever fully “escape” from its dilemmas. Perhaps the most unsettling potential of all here lies simply in the ways in which Haida people incorporate the conditions of the settler colonial present as being paths towards Haida futures. Not vanished, or vanquished. Ongoing.

#### Apocalyptic images challenges settler-colonialism by contesting the implausibility that inequitable structures can produce catastrophe

Hurley 17

Jessica Hurley 17, Assistant Professor in the Humanities at the University of Chicago, “Impossible Futures: Fictions of Risk in the Longue Durée”, Duke University Press, https://read.dukeupress.edu/american-literature/article/89/4/761/132823/Impossible-Futures-Fictions-of-Risk-in-the-Longue

If contemporary ecocriticism has a shared premise about environmental risk it is that genre is the key to both perceiving and, possibly, correcting ecological crisis. Frederick Buell’s 2003 From Apocalypse to Way of Life: Environmental Crisis in the American Century has established one of the most central oppositions of this paradigm. As his title suggests, Buell tells the story of a discourse that began in the apocalyptic mode in the 1960s and 70s, when discussions of “the immanent end of nature” most commonly took the form of “prophecy, revelation, climax, and extermination” before turning away from apocalypse when the prophesied ends failed to arrive (112, 78). Buell offers his suggestion for the appropriate literary mode for life lived within a crisis that is both unceasing and inescapable: new voices, “if wise enough….will abandon apocalypse for a sadder realism that looks closely at social and environmental changes in process and recognizes crisis as a place where people dwell” (202-3). In a world of threat, Buell demands a realism that might help us see risks more clearly and aid our survival.¶ Buell’s argument has become a broadly held view in contemporary risk theory and ecocriticism, overlapping fields in the social sciences and humanities that address the foundational question of second modernity: “how do you live when you are at such risk?” (Woodward 2009, 205).1 Such an assertion, however, assumes both that realism is a neutral descriptive practice and that apocalypse is not something that is happening now in places that we might not see, or cannot hear. This essay argues for the continuing importance of apocalyptic narrative forms in representations of environmental risk to disrupt conservative realisms that maintain the status quo. Taking the ecological disaster of nuclear waste as my case study, I examine two fictional treatments of nuclear waste dumps that create different temporal structures within which the colonial history of the United States plays out. The first, a set of Department of Energy documents that use statistical modeling and fictional description to predict a set of realistic futures for the site of the Waste Isolation Pilot Plant in New Mexico (1991), creates a present that is fully knowable and a future that is fully predictable. Such an approach, I suggest, perpetuates the state logics of implausibility that have long undergirded settler colonialism in the United States. In contrast, Leslie Marmon Silko’s contemporaneous novel Almanac of the Dead (1991) uses its apocalyptic form to deconstruct the claims to verisimilitude that undergird state realism, transforming nuclear waste into a prophecy of the end of the United States rather than a means for imagining its continuation. In Almanac of the Dead, the presence of nuclear waste introjects a deep-time perspective into contemporary America, transforming the present into a speculative space where environmental catastrophe produces not only unevenly distributed damage but also revolutionary forms of social justice that insist on a truth that probability modeling cannot contain: that the future will be unimaginably different from the present, while the present, too, might yet be utterly different from the real that we think we know.¶ Nuclear waste is rarely treated in ecocriticism or risk theory, for several reasons: it is too manmade to be ecological; its catastrophes are ongoing, intentionally produced situations rather than sudden disasters; and it does not support the narrative that subtends ecocritical accounts of risk perception in which the nuclear threat gives rise to an awareness of other kinds of threat before reaching the end of its relevance at the end of the Cold War.2 In what follows, I argue that the failure of nuclear waste to fit into the critical frames created by ecocriticism and risk theory to date offers an opportunity to expand those frames and overcome some of their limitations, especially the impulse towards a paranoid, totalizing realism that Peter van Wyck (2005) has described as central to ecocriticism in the risk society. Nuclear waste has durational forms that dwarf the human. It therefore dwells less in the economy of risk as it is currently conceptualized and more in the blown-out realm of deep time. Inhabiting the temporal scale that has recently been christened the Anthropocene, the geological era defined by the impact of human activities on the world’s geology and climate, nuclear waste unsettles any attempt at realist description, unveiling the limits of human imagination at every turn.3 By analyzing risk society through a heuristic of nuclear waste, this essay offers a critique of nuclear colonialism and environmental racism. At the same time, it shows how the apocalyptic mode in deep time allows narratives of environmental harm and danger to move beyond the paranoid logic of risk. In the world of deep time, all that might come to pass will come to pass, sooner or later. The endless maybes of risk become certainties. The impossibilities of our own deaths and the deaths of everything else will come. But so too will other impossibilities: talking macaws and alien visitors; the end of the colonial occupation of North America, perhaps, or a sudden human determination to let the world live. The end of capitalism may yet become more thinkable than the end of the world. Just wait long enough. Stranger things will happen.¶ Realism and Risk in the Longue Durée¶ The nature of risk, as Ulrich Beck notes in his foundational Risk Society (1986, 72), is fundamentally anti-realist; in the risk society, “dangerous, hostile substances lie concealed behind the harmless façades. Everything must be viewed with a double gaze, and can only be correctly understood and judged through this doubling. The world of the visible must be investigated, relativized and evaluated with respect to a second reality, only existent in thought and yet concealed in the world.” The traumatic nature of living in a world of risk, exemplified in the canonical toxic-world novels White Noise (Don DeLillo, 1985) and Gain (Richard Powers, 1998), lies in the way that the real world is no longer accessible to perception.4 Risks become perceptible only when they are already no longer threats but events, a condition that makes risk itself appear in a fundamentally literary mode; as Susan Mizruchi (2010, 119) writes, “when improbable risks are actualized in catastrophe, the familiar becomes the uncanny.” What Mizruchi calls the uncanny, Laurence Buell (2001) describes as the gothic; in both cases, Beck’s description of a second, real-er world beneath the phenomenological one finds a strong descriptor and a place in literary history as critics connect risk fiction to more established genres that account for what we cannot perceive and cannot understand. No longer haunted by falling helmets or animate dolls, the risk novel tries instead to theorize the connections between tumors and the factory that closed down two generations ago, between what we know of bioaccumulation and what we feel when we look at a carrot.¶ For many critics, as for F. Buell, the gothic terror of a world of risk produces apocalypticism as a symptom and realism as a solution. 5 Even when apocalypse is recognized as a potentially valuable tool for approaching risk, as in Ursula K. Heise’s insight that in a world of world-threatening danger “apocalyptic narrative….can appropriately be understood as a form of risk perception” (2008, 141), the potential benefit of apocalypse is as the most realistic genre for representing a scenario that is genuinely apocalyptic (as in the exponentially increasing flood of contemporary apocalypse novels depicting climate change, for example).6 As Peter van Wyck has argued, however, the realist commitment to describing the totality of the world’s relations produces its own set of epistemic anxieties in a world defined by risk: contemporary ecological threats can come to make ecological thought itself look like a particularly advanced form of cultural paranoia. I mean this in the sense that once we say that everything is connected in this fashion, we mean that everything is, if not already, then at least potentially integrated into a framework of understanding. And it isn’t. To make everything connected is to see the fissures and cracks rendered by ecological threats—whether the threats posed by wastes or the threats retroactively discovered through accidents— as a kind of recompense for a failure to have properly understood the connections. The real punishing the epistemic for its sins of omission. (ix) Realism, in van Wyck’s account, becomes visible as itself a symptom of the paranoid mindset that the risk society tends to produce, a mindset that insists, as Eve Sedgwick writes concurrently with van Wyck, that “there must be no bad surprises” (2003, 130). In such a mode, comfort comes not from ameliorating the danger that produced the original discomfort, but rather from constructing a model of the world that can give an illusion of totality (ibid. 133-6). A realist approach to representing risk thus has real-world consequences in second modernity, “blotting out any sense of the possibility of alternative ways of understanding or things to understand” (131). Such consequences can be seen nowhere more clearly than in the government experiment with realism that goes by the unglamorous name of the Waste Isolation Pilot Plant (WIPP), where the realism is that of the settler colonial state and the alternative ways of understanding are those of the Native nations who are most vulnerable to the site’s dangers.7

#### ( ) Must contextualize – reject sweeping framing arguments

They are K’s of incredibly specific claims. At best, you should question terminal impacts like “extinction” – but not the internal link that proceeds them, like disease or climate. Those impacts are meaningful and exact violent, disparate outcomes – even if they do not happen to kill all living organisms.

### AT: Olson

#### Evaluate consequences

Zanotti 17 – Laura Zanotti, Associate Professor Department of Political Science at Virginia Tech University, “Reorienting IR: Ontological Entanglement, Agency, and Ethics”, International Studies Review, 1-13

A quantum reconceptualization of our being in the world and our relation to matter calls for a profound sense of modesty, as well as for the central role of responsibility for taking political decisions. In an entangled world that is not governed by theoretically detectable, linear, and immutable laws of history, but instead by intra-agential processes, the conditions of possibility for political agency are rooted in the morphogenetic properties of practices. Taking responsibility for critically questioning what exists without the hubris of assuming our ability to ordain outcomes displays an affinity with Foucault’s methodological and political project. In this vein, ethical guidelines may not be grounded on abstractions stemming from the solitary ruminations of an individual’s mind. Prudence, responsibility, and practices of cultivation of the self offer pathways to overcome the limitations of the Kantian categorical imperative by which universal prescriptions are the main way of validating ethical choices. As Patomäki has shown, universalism may elicit exclusionary and violent practices. Moreover, as Connolly has argued, the nostalgia for a slowly moving world regulated by linear relations of causality and characterized by certainty and stability may be the root of fundamentalism.

Furthermore, if we accept Barad’s position that we are “of the world” and not above the world, theorizing looks more like a practice endowed with performative political effects than a quest for the discovery of the “true nature” of what exists. Therefore, intellectual undertakings are a form of political agency and come with great responsibility. Such responsibility requires the need for exercising prudence in making truth statements about what is universally good or naturally inevitable. Assumptions about linearity of causal relations, universal laws of history, or ontological properties of entities yield two problematic effects. On the one hand, they may stifle political imagination; on the other hand, they could encourage actions based upon abstract prescriptions rather than upon careful diagnosis of the forces that obtain in the situation at hand. In an entangled world, there are no externalities. Arguments that divert responsibility by basing political choices upon abstract principles or aspirations and, as a result, that treat what happens on the ground as “unintended consequences” or “collateral damage,” are ethically thin and politically dangerous.

In fact, unintended consequences may well be the result of irresponsible political decision-making that does not include a competent assessment of the practical configurations that constitute the context of action and the means necessary to achieve stated goals. Such attitudes, Amoureux and Steele (2014) have suggested, have led to disastrous initiatives, such as the Bush administration’s invasion of Iraq. Likewise, Kennedy (2006) has shown that the bland rhetoric of jus in bello that provides standardized criteria regarding the number of acceptable civilian casualties (conveniently called collateral damage) produces the effect of diverting responsibility from those who conduct war while assuaging their consciences concerning the injuries and deaths their choices are inflicting. Kennedy (2004) has also shown that as a result of the preference for universal normativity, the human rights profession (which he calls “the invisible college”) is more concerned with protecting abstract norms than with acting politically so as to devise viable solutions to specific problems.

#### Olson’s premise is wrong – calculating future threats can be accurate. Any other claim is a reason to reject the Aff – which “predicted” solvency.

Chernoff 9,

Fred, European Journal of International Relations 2009 15: 157, “Conventionalism as an Adequate Basis for Policy-Relevant IR Theory,” Chernoff is a current Professor of IR at Colgate University but previously taught at Wesleyan, Brown, and Yale. PhD from Johns Hopkins and Yale. Worked for Rand Corporation, International Institute for Strategic Studies in London, and Norwegian Institute of International Affairs

Rationalist scholars rarely note the problem that prediction–scepticism creates for the empirical value that IR theory might have. John Mearsheimer is one of the exceptions. He observes that reflexivists hope to improve the world by making it more cooperative and peaceful, which they hold will be advanced by eliminating the ‘hegemonic discourse’ of realism. But, as Mearsheimer points out, if the reflexivists were to eliminate the hegemonic discourse, then, since they do not have any way to predict what would follow in its place, the change may be a shift from realism to fascism.12 There is a related but somewhat more radical implication, which Mearsheimer does not mention, namely that without any ability to predict in the social world, it is possible that reflexivists may succeed in creating a more institutionally oriented discourse, but that discourse might not produce any change whatever in real-world politics. If they reject causal (probabilistic) connections projected into the future between events, states of affairs, or event-types, then there is no reason to believe that any specific change will lead to any effect at all.13 While it is clear that prediction-scepticism creates severe problems for the claim that the work of IR scholars might contribute to the needs of policymaking, the question remains, ‘are the arguments against predictiveness of social science theory well founded?’ On what are these rejections based? The trend in IR toward rejecting or downgrading ‘prediction’ is based on and reinforced by various developments in current philosophy of social science. IR scholars draw on three different sources of prediction – scepticism in the philosophy of social science: the indeterminacy of social theory (Weber, 1949, 1974; Habermas, 1971, 1987; Bohman, 1993; and Bernstein et al., 2000); the lack of governing regularities in the social sciences (Cartwright, 1983; Little, 1991) and the effects of nonlinearities (Doran, 1991, 1999). I have argued elsewhere that all three sorts of anti-predictive arguments are defective and that the latter two presuppose an unjustifiably narrow notion of ‘prediction’.14 A determined prediction sceptic may continue to hold that there is too great a degree of complexity of social relationships (which comprise ‘open systems’) to allow any prediction whatsoever. Two very simple examples may circumscribe and help to refute a radical variety of scepticism. First, we all make reliable social predictions and do so with great frequency. We can predict with high probability that a spouse, child or parent will react to certain well-known stimuli that we might supply, based on extensive past experience. More to the point of IR prediction – scepticism, we can imagine a young child in the UK who (perhaps at the cinema) (1) picks up a bit of 19th-century British imperial lore thus gaining a sense of the power of the crown, without knowing anything of current balances of power, (2) hears some stories about the US–UK invasion of Iraq in the context of the aim of advancing democracy, and (3) hears a bit about communist China and democratic Taiwan. Although the specific term ‘preventative strike’ might not enter into her lexicon, it is possible to imagine the child, whose knowledge is thus limited, thinking that if democratic Taiwan were threatened by China, the UK would (possibly or probably) launch a strike on China to protect it, much as the UK had done to help democracy in Iraq. In contrast to the child, readers of this journal and scholars who study the world more thoroughly have factual information (e.g. about the relative military and economic capabilities of the UK and China) and hold some cause-and-effect principles (such as that states do not usually initiate actions that leaders understand will have an extremely high probability of undercutting their power with almost no chances of success). Anyone who has adequate knowledge of world politics would predict that the UK will not launch a preventive attack against China. In the real world, China knows that for the next decade and well beyond the UK will not intervene militarily in its affairs. While Chinese leaders have to plan for many likely — and even a few somewhat unlikely — future possibilities, they do not have to plan for various implausible contingencies: they do not have to structure forces geared to defend against specifically UK forces and do not have to conduct diplomacy with the UK in a way that would be required if such an attack were a real possibility. Any rational decision-maker in China may use some cause-and-effect (probabilistic) principles along with knowledge of specific facts relating to the Sino-British relationship to predict (P2) that the UK will not land its forces on Chinese territory — even in the event of a war over Taiwan (that is, the probability is very close to zero). The statement P2 qualifies as a prediction based on DEF above and counts as knowledge for Chinese political and military decision-makers. A Chinese diplomat or military planner who would deny that theory-based prediction would have no basis to rule out extremely implausible predictions like P2 and would thus have to prepare for such unlikely contingencies as UK action against China. A reflexivist theorist sceptical of ‘prediction’ in IR might argue that the China example distorts the notion by using a trivial prediction and treating it as a meaningful one. But the critic’s temptation to dismiss its value stems precisely from the fact that it is so obviously true. The value to China of knowing that the UK is not a military threat is significant. The fact that, under current conditions, any plausible cause-and-effect understanding of IR that one might adopt would yield P2, that the ‘UK will not attack China’, does not diminish the value to China of knowing the UK does not pose a military threat. A critic might also argue that DEF and the China example allow non-scientific claims to count as predictions. But we note that while physics and chemistry offer precise ‘point predictions’, other natural sciences, such as seismology, genetics or meteorology, produce predictions that are often much less specific; that is, they describe the predicted ‘events’ in broader time frame and typically in probabilistic terms. We often find predictions about the probability, for example, of a seismic event in the form ‘some time in the next three years’ rather than ‘two years from next Monday at 11:17 am’. DEF includes approximate and probabilistic propositions as predictions and is thus able to catagorize as a prediction the former sort of statement, which is of a type that is often of great value to policy-makers. With the help of these ‘non-point predictions’ coming from the natural and the social sciences, leaders are able to choose the courses of action (e.g. more stringent earthquake-safety building codes, or procuring an additional carrier battle group) that are most likely to accomplish the leaders’ desired ends. So while ‘point predictions’ are not what political leaders require in most decision-making situations, critics of IR predictiveness often attack the predictive capacity of IR theory for its inability to deliver them. The critics thus commit the straw man fallacy by requiring a sort of prediction in IR (1) that few, if any, theorists claim to be able to offer, (2) that are not required by policy-makers for theory-based predictions to be valuable, and (3) that are not possible even in some natural sciences.15

# 2NC---Wake R4

### T

## PIC---Criminalization

### 2NC---O/V

### 2NC---!---Incarceration

**Criminal justice is purely arbitrary but culminates in social death, rights deprivation, and mass violence against its victims**

**Karakatsanis 19** (Alec Karakatsanis is an American civil rights lawyer, social justice advocate, co-founder of Equal Justice Under Law, and founder and Executive Director of Civil Rights Corps, 10/29/19, “Usual Cruelty: The Complicity of Lawyers in the Criminal Injustice System”, p.18)

What is a crime? The first step to understanding how we accomplish the imprisonment of millions of people’s bodies is understanding what laws authorize government agents to take away a person’s liberty.

A society makes choices about what acts or omissions to render worthy of different kinds of punishment. The decision to make something punishable by human caging authorizes the government to treat people in ways that otherwise would be abhorrent. For example, a person walking down the street smoking a cigarette cannot be searched by police. Even a police demand to stop walking or the probe of an officer’s hand along the person’s outer clothing would violate our Constitution’s Bill of Rights.15 But, in most of the country for the past fifty years, if that same person were smoking a cigarette containing a dried marijuana plant in addition to a dried tobacco plant, the person may be bound in metal chains, removed from the street, strip searched, placed in a cage, and held in solitary confinement with no human contact or natural light.16 The person can be kept in that cage for decades.17 The person can lose her right to vote, be removed from public housing and have her family removed from public housing, be kicked out of school, and be barred from employment.18 She can also be deprived of basic human needs, such as hugging her child or having a sexual relationship with her spouse.19 All of this treatment is allowed only because the person is a “criminal.”

### 2NC---AT: Only One Company

#### So called “progressive prosecution” of white collar crime is an attempt to reform the system and precludes meaningful abolition

**Karakatsanis 19** — Alec Karakatsanis, Founder of Civil Rights Corp—a nonprofit organization that uses innovative litigation, advocacy, and storytelling to challenge the systemic injustice of the criminal punishment bureaucracy, former Public Defender in Alabama and Washington, DC, Recipient of the 2018 Champion of Public Defense Award by the National Association of Criminal Defense Lawyers and the 2016 Trial Lawyer of the Year Award by Public Justice, holds a J.D. from Harvard Law School, 2019 (“The Punishment Bureaucracy: How to Think About ‘Criminal Justice Reform’,” *Usual Cruelty: The Complicity of Lawyers in the Criminal Injustice System*, Published by The New Press, ISBN 9781620975282, p. ebook)

﻿How Can We Tell the Difference?

﻿We must remember that liberty becomes a false ensign—a “solemn complement” of violence—as soon as it becomes only an idea and we begin to defend liberty instead of free [people].… It is the essence of liberty to exist only in the practice of liberty.

—Maurice Merleau Ponty343

A lot of attention is turning to local district attorneys. In some ways, the recent interest in “progressive prosecutors” and the growing sums spent on their election campaigns means that more people are acknowledging the myth of the “rule of law.” People donating to prosecutorial elections understand that the same “rule of law” will be enforced differently based on the policy choices of the prosecutor.

Perhaps most prominently, there is a wave of “progressive prosecutors” at the local level. Kim Ogg in Houston, Larry Krasner in Philadelphia, Kim Foxx in Chicago, Eric Gonzalez in Brooklyn, Aramis Ayala in Orlando, Kim Gardner in St. Louis, Cyrus Vance in Manhattan, and George Gascón in San Francisco are a few of the dozens of prosecutors embracing a new image as leaders who will “reform” the punishment bureaucracy. While it is wrong to use the same labels to describe each of these actors—Krasner’s rhetoric is different from the others, for example, and many would reject Vance’s or Gardner’s attempts to brand themselves “progressive”—I want to start with some general observations about the entire cohort.344

It is remarkable how little these prosecutors have tried to do so far considering that we would need eighty percent reductions in human caging to return to historical U.S. levels and to those of other comparable countries.345 None of them have reported reducing prosecutions by more than a few percentage points, and most of them have not reported any reductions at all. None of them are calling for smaller prosecutor offices or fewer police. None of them are seeking a massive shift in investigative resources away from investigating the crimes of the poor to investigating the crimes of the rich. None of them have prosecuted a single one of their own employees for withholding evidence or obstruction of justice. None of them have announced a policy of declining to prosecute all drug possession. None of them have stopped prosecuting children as adults. None of them have sought to eliminate fines and fees for the indigent. None of them have opened a systemic civil rights investigation into the brutality, neglect, and crimes against confined people that are rampant in their local jails. None of them have set up a truth and reconciliation commission to confront the past racism and barbarism of their offices and local police. None of them have taken serious steps to transition their approach to a restorative justice model.

All of them do essentially similar things as the offices of their predecessors and the offices of district attorneys around the country: they choose to prosecute a significant majority of low-level misdemeanors and drug crimes, they assume that the response to social problems including violence must be punishment, and they inflict brutal forms of punishment under torturous conditions on a cohort that is disproportionately poor, black, and brown. While a number of them have made initial attempts at less harsh policies in good faith, it is largely **business as usual** so far.

﻿Krasner, by consensus the most committed to change among this new group, has not made public any data showing that he has reduced the number of people going to prison or the length of sentences relative to other Pennsylvania prosecutors since he took office.346 In a misdiagnosis of the nature of the problem and of how to make change endure after he leaves office, Krasner worked to increase the overall budget for prosecution in Philadelphia.347

﻿Although Foxx replaced one of the most notoriously harsh prosecutors in any major American city, the total number of felony prosecutions under Foxx went up last year after years of decline, including before she took office.348 Each year that Foxx has been in office, she has also increased the number of cases in which her office chose to prosecute a person for a drug felony.349 Despite her rhetoric to the contrary, local court watchers have reported to me that Foxx’s line prosecutors have taken no action to prevent the use of cash bail in the vast majority of felony cases.

Ogg is sometimes called the least harsh prosecutor in Texas350—but her incarceration statistics would be extreme outliers for nearly the entirety of American history. Ogg is a master of the “rule of law” deception. After winning her election on a platform of bail reform because of the supposed injustice of cash bail, Ogg instructed her attorneys to ignore the law and to use cash bail to intentionally accomplish pretrial detention of the indigent in cases in which Texas law does not permit transparent pretrial detention.351 Moreover, Ogg demanded a $20 million budget increase, including for 102 new prosecutors.352 At the same time, other local officials and lower level prosecutors have told me that they cannot even get her office to stop criminally prosecuting and jailing people for, among other things, driving with a license that was suspended solely because they were too poor to pay court debts. In my experience, over and over again, Ogg appears to want to prosecute more people and to expand her office’s bureaucracy. I have watched as she has worked behind the scenes to thwart even modest reforms in Houston like reducing the harms of fines and fees on the indigent and not caging low-level drug possessors in jail cells solely because they cannot pay cash bail amounts requested by her office. As far as I am aware, she has never explained what evidence she possesses that more punishment is the way to solve any of the social problems that she has identified.

Gascón is less harsh than his predecessor, Kamala Harris. But his record of human caging is still alarming by historical and international standards. For years, at the same time that Gascón touted himself as a progressive reformer, attorneys from his office crushed impoverished people and their families every day with relentless use of cash-bail amounts that were five times the national average.353 Tellingly, after Gascón hyped for months his role in introducing an algorithmic “risk-assessment tool” to the bail process in San Francisco,354 I asked him and his senior management staff during a meeting to answer the most basic questions about how the tool worked. For example, to explain what the different numerical scores meant in terms of empirical risk prediction. But none of them seemed to have even the rudimentary knowledge about the tool that one could get from reading its instructions, let alone knowledge that public officials implementing the tool should have learned from studying the research and talking to the experts who designed it. This makes sense, because punishment bureaucrats are mostly not interested in using new methods to dramatically reduce pretrial detention—that would remove their ability to coerce guilty pleas through that detention.

And Gascón is not alone: every judge and prosecutor I have interviewed around the country has almost entirely misunderstood or otherwise improperly explained the science, empirical evidence, and function of the risk assessment algorithms that they have touted as their main “reform” of the cash bail system. As a result, Gascón’s “progressive” office, like every other jurisdiction I have studied, was misusing the algorithm framework in ways that violated the principles set forth by the researchers who created the tool and that promoted rampant pretrial incarceration of poor people of color. They were also improperly describing the risk-assessment tool to judges in court, including (but not limited to) misstating the purported risk and conflating the algorithm’s empirical predictions with their own political choices (but couching the latter in a façade of science without basis). And, again like many other local punishment bureaucracies, because they were not analyzing data and did not have the goal of serious reductions in detention, they neither knew nor cared that they were not using the algorithm properly or changing outcomes significantly. Since then, after we prevailed against Gascón’s office in challenging the use of cash bail to detain the poor in San Francisco, Gas-cón (along with California Attorney General Xavier Beccera) began a campaign to get judges to change the law to expand the ability of the government to detain people without bail,355 and lawyers at his office even argued in my cases that people should be presumed guilty at bail hearings.356

I have found Krasner and Gascón to be sincere and smart people. I have talked at length with numerous “progressive prosecutors,” and many of them are genuinely attempting to do less harm than other prosecutors. It is prudent to support that harm reduction and to push for more, because “progressive prosecutors” and their rhetoric can play a role in highlighting deeper structural flaws and in energizing a political base to attack them. Importantly, the recent rise of “progressive prosecutors” has already helped to change the overall narrative of punishment in many jurisdictions in which I work by making many more people aware of the injustice and senselessness of much of the punishment system. And I have seen a few of these prosecutors begin some incremental reforms, such as declining some prosecutions, reducing their requests for cash bail, and reducing marijuana possession prosecutions. Perhaps most encouraging, many local organizers are using prosecutor-related issues to engage and mobilize a base who can eventually demand more significant changes.

But we must also guard against the tendency to inflate the importance of existing “progressive prosecutors.” We must be clear about who they are; what they are proposing; the differences across the cohort and within each prosecutor office between genuinely transformative changes and minor tweaks; how a newer generation of “progressive prosecutors” can be even more bold than this current cohort; how specifically organizing around prosecutor issues can shift concentrations of local power; and what the theory is for how “progressive prosecutors” can be a stepping stone to much more significant structural change.

After all, as Paul Butler has extensively shown in his writings about a previous generation of what he called “progressive prosecutors” in 2009, these prosecutors are operating under enormous constraints: a powerful local “law enforcement” machine; multibillion-dollar punishment industries; an inherited culture and bureaucracy of line prosecutors and internal office supervisors who believe in mass incarceration; a lack of organized political power among and investment in directly impacted communities; and the broader cultural, racial, and economic forces that fostered our addiction to human caging.357

Prosecutors are political actors responding to incentives and, like most of the country, they have been socialized in mass human caging. If left on their own, they will largely preserve mass human caging, if only because none of them have the power to dismantle such a mammoth system even if they wanted to without a social movement articulating it clearly and demanding it. So, although electing different prosecutors and then pushing them to be better can be important in itself and as an organizing tool, anyone interested in significantly dismantling the punishment bureaucracy must have a strategy for creating a reality in which organized political power demands **big changes**.

**affirmative’s call for using the criminal justice system perpetuates and reinforces the systemic violence of the carceral state.**

**Rodríguez 19** — Dylan Rodríguez, Professor of Ethnic Studies and Chair of the Academic Senate at the University of California-Riverside, holds a Ph.D. in Ethnic Studies from the University of California-Berkeley, 2019 (“Abolition as Praxis of Human Being: A Foreword,” *Harvard Law Review*, Volume 132, April 10th, Available Online at <https://harvardlawreview.org/wp->content/uploads/2019/04/1575-1612\_Online.pdf, Accessed 03-23-2020, p. 1576-1577)

Contemporary reformist approaches to addressing the apparent overreach and scandalous excesses of the carceral state — characterized by calls to end “police brutality” and “mass incarceration” — fail to recognize that **the very logics** of the overlapping criminal justice and policing regimes **systemically perpetuate racial, sexual, gender, colonial, and class violence through carceral power**. Thus, in addition to being **ineffective** at achieving their generally stated goals of alleviating vulnerable peoples’ subjection to legitimated state violence, reformist approaches ultimately **reinforce a violent system** that is **fundamentally asymmetrical** [end page 1576] in its production and organization of **normalized misery**, **social surveillance**, **vulnerability to state terror**, and **incarceration**.6

It is within this irreconcilable reformist contradiction that an abolitionist historical mandate provides **a useful and necessary departure from the liberal assumption** that either the carceral state or carceral power is an **inevitable** and **permanent** feature of the social formation. This historical mandate animates abolition as a creative, imaginative, and speculative collective labor: while liberal-to-progressive reformism attempts to **protect and sustain the institutional and cultural-political coherence** of an **existing system** by **adjusting** and/or **refurbishing** it, abolitionism addresses **the historical roots of that system** in relations of oppressive, continuous, and asymmetrical violence and raises the **radical question** of whether those relations must be **uprooted** and **transformed** (rather than **reformed** or **“fixed”**) for the sake of particular peoples’ **existence and survival** as such.7

### 2NC---AT: Criminalization Key

**The logic of punitive necessity overvalues punishment, drawing on a long history of racial coercion and marginalization – coopts restorative movements**

Goshe 17 --- Assistant Professor at Wilmington College, 2017 (Sonya, “The lurking punitive threat: The philosophy of necessity and challenges for reform,” Theoretical Criminology, July 14, <https://doi.org/10.1177/1362480617719450>

Here, I argue that the stability of punishment and the difficulties of reform stem from an inflated philosophical commitment to punishment in the USA. What I call the philosophy of necessity is a deeply ingrained principle that **punishment is a necessary**, if not always sufficient, response to crime and social problems. It refers to the often taken for granted position of punishment as the starting point, the dominant, organizing principle of how we think about and respond to social harms, both real and perceived. The notion of necessity forms our philosophical backbone, a core structure on which alternatives hinge and success is gauged. The inflated philosophical weight afforded punishment crowds out and can overtake competing core principles, like care or restoration that could be more humane and effective. When other principles are invoked, they are typically described as ‘alternatives’ to the default standard of punishment, and risk being **co-opted by punitive practices** and norms to acquire legitimacy, coerce participation, or insure against failure. The foundational principle that punishment is necessary is accompanied by a widespread worldview that **overvalues** the capacity of **punishment** to create public safety, social stability, personal change, and justice. Accordingly, it manifests not just in criminal justice and political systems that create and enforce law and policy, but in our social institutions and popular culture. Expressions of punitive necessity can be found in education (Kim et al., 2010), public health (Rich, 2009), the family (Gershoff, 2008), and entertainment (Brown, 2009). I am not confusing the outsized philosophical weight afforded punishment with the sense that it is popular or well liked, although this can be the case (Bottoms, 1995). Nor does the core notion of punitive necessity contradict evidence that the public still supports rehabilitation as an important objective of punishment (Cullen et al., 2000), or that the public would support policies of penal moderation (Loader, 2010). Instead, it refers to a core obligation to punish if we are to be fair to victims, protect the public, or get someone to change for the better. It serves as a deeply powerful ideological baseline such that not punishing or not punishing enough causes more questioning and concern than punishing alone generates. For my purposes, I am using a broad definition of punishment that transcends the use of incarceration. While the reliance on specific punitive practices, such as imprisonment, have waxed and waned historically and geographically, the foundational role of punishment as central to social control has been more stable. Since the inception of the country, a well-entrenched system of punitive control for Native Americans, blacks, immigrants, women, children, and other groups ensured the stability of the social and economic order characterized by white supremacy, capitalism, patriarchy, and class inequality. Isolating the philosophy of necessity to the mass incarceration period of the last 40 years misses the significant historical importance of punishment and punitive ideology via other social and legal means, and underestimates the durability and pervasiveness of punitive norms. Accordingly, I use punishment to include both formal and informal practices that deprive liberty, impose suffering, coerce or control through fear, marginalization, separation, or surveillance. It includes disciplinary and social control measures up until and including arrest, confinement, community based corrections, and ‘alternatives’ that use the threat of punishment to coerce participation or handle program violations. This definition also encompasses practices beyond the criminal law that rely on punitive rationales such as desert, deterrence, or ‘accountability’ for legitimacy. Two notable policy examples that employ punitive logic and outcomes are immigration and welfare policy in the USA (Dowling and Inda, 2013; Hinton, 2016). This broader construction of punishment follows scholars who have argued that it allows for a more thorough understanding of the magnitude and scope of a state’s punitive practices (Bosworth, 2014; Hannah-Moffat and Lynch, 2012; Hannah-Moffat and Maurutto, 2012). In what follows, I will more fully develop what I mean, and do not mean, by the philosophy of necessity including its historical grounding in the USA and some of its contemporary effects on policy and practice. Then, I will focus on three key ways the USA nurtures this philosophy before concluding with thoughts on how global insecurities might encourage its growth and manifestation elsewhere. The idea that punishment is necessary draws on long historical (Allen, 1981; Blomberg and Lucken, 2000; Garland, 1985; Lynch, 2010), legal, cultural, and philosophical roots (Beccaria, 1963; Bentham, 1995; Foucault, 1977; Garland, 1990, 2001; Von Hirsch, 1976; Williams and Arrigo, 2012; Wilson, 1983). Dayan (2007) argues in her legal history of ‘cruel and unusual’ that the trashing of human rights in the face of perceived punitive necessity is ‘business as usual’ in the US story of punishment. While the birth of the prison itself was seen as a reform to the harsh, public, physical punishments (often torture and death), reformers retained the principle that punishment was necessary for rehabilitation and justice. Punishments in the form of isolation, hard labor, and the micromanagement of behavior were seen as essential to personal reformation. Furthermore, the cure for ineffective punishment and the failure of the prison to achieve reform was more, improved punishment (Foucault, 1977). The juvenile court, while theoretically formed in opposition to ‘punishment’ in the late 19th century, nonetheless adopted punitive norms and practices to correct wayward youth (Ferdinand, 1989; Platt, 1977).

## Case

### 2NC---A/C

### 2NC---AT: Extinction Reps K

### 2NC---AT: Olson

#### Olson’s premise is wrong – calculating future threats can be accurate. Any other claim is a reason to reject the Aff – which “predicted” solvency.

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We can predict with high probability that a spouse, child or parent will react to certain well-known stimuli that we might supply, based on extensive past experience. More to the point of IR prediction – scepticism, we can imagine a young child in the UK who (perhaps at the cinema) (1) picks up a bit of 19th-century British imperial lore thus gaining a sense of the power of the crown, without knowing anything of current balances of power, (2) hears some stories about the US–UK invasion of Iraq in the context of the aim of advancing democracy, and (3) hears a bit about communist China and democratic Taiwan. Although the specific term ‘preventative strike’ might not enter into her lexicon, it is possible to imagine the child, whose knowledge is thus limited, thinking that if democratic Taiwan were threatened by China, the UK would (possibly or probably) launch a strike on China to protect it, much as the UK had done to help democracy in Iraq. In contrast to the child, readers of this journal and scholars who study the world more thoroughly have factual information (e.g. about the relative military and economic capabilities of the UK and China) and hold some cause-and-effect principles (such as that states do not usually initiate actions that leaders understand will have an extremely high probability of undercutting their power with almost no chances of success). Anyone who has adequate knowledge of world politics would predict that the UK will not launch a preventive attack against China. In the real world, China knows that for the next decade and well beyond the UK will not intervene militarily in its affairs. While Chinese leaders have to plan for many likely — and even a few somewhat unlikely — future possibilities, they do not have to plan for various implausible contingencies: they do not have to structure forces geared to defend against specifically UK forces and do not have to conduct diplomacy with the UK in a way that would be required if such an attack were a real possibility. Any rational decision-maker in China may use some cause-and-effect (probabilistic) principles along with knowledge of specific facts relating to the Sino-British relationship to predict (P2) that the UK will not land its forces on Chinese territory — even in the event of a war over Taiwan (that is, the probability is very close to zero). The statement P2 qualifies as a prediction based on DEF above and counts as knowledge for Chinese political and military decision-makers. A Chinese diplomat or military planner who would deny that theory-based prediction would have no basis to rule out extremely implausible predictions like P2 and would thus have to prepare for such unlikely contingencies as UK action against China. A reflexivist theorist sceptical of ‘prediction’ in IR might argue that the China example distorts the notion by using a trivial prediction and treating it as a meaningful one. But the critic’s temptation to dismiss its value stems precisely from the fact that it is so obviously true. The value to China of knowing that the UK is not a military threat is significant. The fact that, under current conditions, any plausible cause-and-effect understanding of IR that one might adopt would yield P2, that the ‘UK will not attack China’, does not diminish the value to China of knowing the UK does not pose a military threat. A critic might also argue that DEF and the China example allow non-scientific claims to count as predictions. But we note that while physics and chemistry offer precise ‘point predictions’, other natural sciences, such as seismology, genetics or meteorology, produce predictions that are often much less specific; that is, they describe the predicted ‘events’ in broader time frame and typically in probabilistic terms. We often find predictions about the probability, for example, of a seismic event in the form ‘some time in the next three years’ rather than ‘two years from next Monday at 11:17 am’. DEF includes approximate and probabilistic propositions as predictions and is thus able to catagorize as a prediction the former sort of statement, which is of a type that is often of great value to policy-makers. With the help of these ‘non-point predictions’ coming from the natural and the social sciences, leaders are able to choose the courses of action (e.g. more stringent earthquake-safety building codes, or procuring an additional carrier battle group) that are most likely to accomplish the leaders’ desired ends. So while ‘point predictions’ are not what political leaders require in most decision-making situations, critics of IR predictiveness often attack the predictive capacity of IR theory for its inability to deliver them. The critics thus commit the straw man fallacy by requiring a sort of prediction in IR (1) that few, if any, theorists claim to be able to offer, (2) that are not required by policy-makers for theory-based predictions to be valuable, and (3) that are not possible even in some natural sciences.15

# 1NR

## AT PIC

### Kick

#### Combining patent law and antitrust law is prone to erroneous enforcement --- crushes predictability

**Manne 20** --- Geoffrey A. Manne, president and founder of the International Center for Law and Economics, “Error Costs in Digital Markets,” November 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3733662

**Legal decision-making** and **enforcement under uncertainty** are always **difficult** and always potentially **costly**. The **risk of error** is **always present** given the **limits of knowledge**, but it is **magnified** by the **precedential nature** of judicial decisions: an **erroneous outcome** affects not only the **parties** to a **particular case**, but also **all subsequent economic actors** operating **in “the shadow of the law**.”2 The **inherent uncertainty** in judicial decision-making is further **exacerbated** in the **antitrust context** where liability turns on the **difficult-to-discern economic effects** of challenged conduct. And this difficulty is still further magnified when **antitrust decisions** are made in **innovative**, **fastmoving**, **poorly-understood**, or **novel** market settings—attributes that aptly describe today’s **digital economy**.

Rational decision-makers will undertake enforcement and adjudication decisions with an eye toward maximizing social welfare (or, at the very least, ensuring that nominal benefits outweigh costs).3 But “[i]n many contexts, we simply **do not know** what the **consequences** of our choices will be. Smart people can make guesses based on the best science, data, and models, but they **cannot eliminate the uncertainty**.”4 Because uncertainty is pervasive, we have developed certain heuristics to help mitigate both the direct and indirect costs of decision-making under uncertainty, in order to increase the likelihood of reaching enforcement and judicial decisions that are on net beneficial for society. One of these is the error-cost framework.

In simple terms, the objective of the error-cost framework is to ensure that regulatory rules, enforcement decisions, and judicial outcomes minimize the expected cost of (1) erroneous condemnation and deterrence of beneficial conduct (“false positives,” or “Type I errors”); (2) erroneous allowance and under-deterrence of harmful conduct (“false negatives,” or “Type II errors”); and (3) the costs of administering the system (including the cost of making and enforcing rules and judicial decisions, the costs of obtaining and evaluating information and evidence relevant to decision-making, and the costs of compliance).

In the antitrust context, a further premise of the error-cost approach is commonly (although not uncontroversially5 ) identified: the assumption that, all else equal, Type I errors are relatively **more costly** than Type II errors. “Mistaken inferences and the resulting **false condemnations** ‘are **especially costly**, because they **chill** the **very conduct** the antitrust laws are **designed to protect**.’”6 Thus the error-cost approach in antitrust typically takes on a more **normative objective**: a **heightened concern** with **avoiding** the **over-deterrence** of **procompetitive activity** through the **erroneous condemnation** of **beneficial conduct** in **precedent-setting judicial decisions**. Various aspects of antitrust doctrine—ranging from antitrust pleading standards to the market definition exercise to the assignment of evidentiary burdens—have evolved in significant part to **constrain** the **discretion of judges** (and thus to limit the incentives of antitrust enforcers) to condemn uncertain, unfamiliar, or nonstandard conduct, **lest “uncertain” be erroneously identified as “anticompetitive.”**

The concern with avoiding Type I errors is even more significant in the enforcement of antitrust in the digital economy because the “twin **problems** of likelihood and **costs of erroneous antitrust enforcement** are **magnified** in the face of **innovation**.”7 Because **erroneous interventions against innovation** and the **business models** used to deploy it **threaten to deter subsequent innovation** and the deployment of innovation in **novel settings,** both the **likelihood** and **social cost** of **false positives** are **increased** in digital and other innovative markets. Thus the avoidance of error costs in these markets also raises the related question of the proper implementation of dynamic analysis in antitrust.8

#### Even if there’s permanent fiat for this narrow Aff, false positives cause SCOTUS latching. SCOTUS broadly whittles all anti-trust - hurting enforcement vs. all false negatives – turning case.

Kades ’18

Michael Kades - Director, Markets and Competition Policy - Washington Center for Equitable Growth - Comments of the Washington Center for Equitable Growth. Michael worked as Antitrust Counsel for Sen. Amy Klobuchar (D-MN), the ranking member on the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, where he led efforts to reform antitrust laws. Previously, he spent 20 years investigating and litigating some of the most significant antitrust actions as an attorney at the Federal Trade Commission. Topic 1: The State of Antitrust and Consumer Protection Law and Enforcement, and Their Development, since the Pitofsky Hearings - August 20, 2018 - #E&F - <https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0048-d-0051-155290.pdf>

But not all antitrust scholars agree that false positives are more costly than false negatives in antitrust law. In particular, recent economic theory and empirical work provide numerous objections that should be explored. For instance, the premise that markets correct more quickly than judicial error are empirical claims that have not been tested.21 The market may take longer to correct anticompetitive activity than is presumed. Entry may be difficult,22 and cartels can last a long time.23 Similarly, false negatives can be costly and long-lived. False negatives may occur more frequently than false positives.24 If the empirical evidence is showing these costs to be much higher than previously anticipated, then the relevant question should be how to balance enforcement to achieve the most competition and greatest benefit.

Despite the lack of systematic evidence, the judiciary has largely accepted that over-inclusive rules, which generate false positives, are costlier to consumers than under-inclusive rules, which generate false negatives. And, application of error-cost analysis has justified doctrine that is more lenient toward business conduct under the antitrust laws. The U.S. Supreme Court has restricted monopolization claims to avoid false positives.25 Initially, in antitrust challenges to pharmaceutical patent settlements, courts implicitly relied on concerns about false positives in justifying lenient rules allowing reverse payments.26 Even in merger cases, courts have warned about the dangers of false positives.27 They, however, very rarely discuss the dangers of underinclusive rules. Consequently, it would not be surprising if courts have over-emphasized false positives in designing antitrust rules, making these concerns an important line of inquiry during the hearings.

#### False Negatives snowball – they spill outside the permanent fiat of the Aff.

Kades ’18

Michael Kades - Director, Markets and Competition Policy - Washington Center for Equitable Growth - Comments of the Washington Center for Equitable Growth. Michael worked as Antitrust Counsel for Sen. Amy Klobuchar (D-MN), the ranking member on the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, where he led efforts to reform antitrust laws. Previously, he spent 20 years investigating and litigating some of the most significant antitrust actions as an attorney at the Federal Trade Commission. Topic 1: The State of Antitrust and Consumer Protection Law and Enforcement, and Their Development, since the Pitofsky Hearings - August 20, 2018 - #E&F - <https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0048-d-0051-155290.pdf>

A False negative occurs when a rule incorrectly allows an anticompetitive practice; for example, if a judicial rule allows mergers that substantially reduce competition, generating higher prices and deadweight loss. The rule is under-inclusive. An antitrust rule that generates too many false negatives—that fails to catch illegal behavior—will encourage anticompetitive activity. The cost is not simply the defendant in a specific case avoiding liability— firms will engage in more anticompetitive conduct because it is profitable.

## Patents

## DA---Court PTX

### Impact---2NC

### 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.”

#### Even with fiat, non-delegation revival destroys agency capacity to enforce effectively

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]

This appeals court opinion is now being reviewed by the justices in West Virginia, and the various parties that brought this case urge the Court to state definitively that the Clean Power Plan is not allowed. Such a decision is likely to fundamentally alter the EPA’s powers in ways that could make it very difficult for the Biden administration — or any future administration — to abandon Trump’s policies.

How federal agencies shape policy

The Clean Air Act relied on a type of governance that is ubiquitous in federal law. Congress lays out a broad policy — in this case, that power plants must use the “best system of emission reduction” — and then delegates to the EPA the task of implementing that policy through a series of binding regulations.

Countless federal statutes rely on a similar structure. The Affordable Care Act, for example, requires health insurers to provide certain preventive treatments — such as birth control, many vaccinations, and cancer screenings — at no additional cost to patients, and it delegates the task of determining which treatments belong on this list to experts at the Department of Health and Human Services. The Department of Labor may raise the salary threshold governing which workers are eligible for overtime pay, in part to keep up with inflation.

There are several reasons why this sort of governance, where a democratically elected legislature sets a broad policy and then delegates implementation to a federal agency, is desirable. For one thing, Congress is a dysfunctional mess. If a new act of Congress were required every time environmental regulators wanted power plants to install new technology, it’s likely that those plants would still be using devices that were on the cutting edge in 1993.

Delegating power to agencies also ensures that decisions are made by people who know what they are doing. Imagine, for example, if Congress had to pass a law every time the Food and Drug Administration wants to make a new drug available to the public. Even if Congress had time to vote on such a decision, most members of Congress know very little about biology, chemistry, or medicine.

Delegation also insulates important decisions from political horse-trading. The decision about whether to approve a new drug should be made by scientists in the FDA, not by lawmakers who might be concerned that the drug’s manufacturer is in Arizona, and that they need to butter up Sen. Kyrsten Sinema (D-AZ) to secure her vote for the Build Back Better Act.

#### FTC enforcment relies on the non-delegation doctrine staying dormant

Scalia 21 [Eugene Scalia, Gibson Dunn attorney, 7-9-2021 https://www.gibsondunn.com/wp-content/uploads/2021/07/president-signs-executive-order-directing-agencies-to-address-wide-range-of-businesses-competitive-practices-including-non-compete-agreements.pdf]

Expansive rulemaking could also expose the FTC to legal challenges under the constitutional “nondelegation doctrine,” which limits the extent to which Congress may delegate lawmaking power to administrative agencies. Although the nondelegation doctrine has seldom been invoked by the Supreme Court since the New Deal Era, in 2019 five Supreme Court justices expressed interest in reviving the doctrine.[7]

[Footnote 7] [7] Gundy v. United States, 139 S. Ct. 2116 (2019) (Gorsuch J., dissenting) (joined by Chief Justice Roberts and Justice Thomas); Id. at 2131 (Alito, J., concurring); Paul v. United States, 140 S. Ct. 342 (2019) (Kavanaugh, J., concurring in denial of certiorari).

Those five justices constitute a majority of the current Supreme Court. The FTC Act, which delegates to the FTC the authority to regulate “unfair” behavior, may be susceptible to a challenge on the grounds that Congress must provide concrete guidance to cabin the FTC’s exercise of its delegated power.

### A2: Aff Solve

#### 2. Courts control climate policy --- prevent US from meeting emission pledges, those are key to solve in the short term

Grandoni & Mufson 21 --- Dino Grandoni, reporter on the national desk of The Washington Post, focused on covering the Environmental Protection Agency, climate change and other environmental issues and Steven Mufson, covers the business of climate change for The Washington Post, “As Biden urges global warming action, courts shape climate policy at home”, Washington Post, Aug 19th 2021, https://www.washingtonpost.com/climate-environment/2021/08/19/biden-climate-drilling/

At a time when President Biden is urging international leaders to address global warming quickly, court actions this week make it clear that the U.S. judiciary is shaping the United States’ climate trajectory as much as the White House.

On Monday, the Interior Department said it would heed a Louisiana federal judge and resume federal oil and gas leasing, which will drive up carbon emissions. On Wednesday, however, another federal judge blocked a controversial oil project planned for Alaska’s North Slope, effectively keeping fossil fuels in the ground. And on Thursday, the administration said it would conduct a comprehensive review of coal leasing on federal lands — but keep holding auctions in the meantime.

With just weeks left before international negotiators meet in Glasgow to chart a meaningful climate deal, this lurching process has raised questions about the United States’ ability to deliver on its president’s bold environmental rhetoric. The raft of legal decisions arrive days after a body of United Nations scientists warned of worsening climate impacts without major global cuts in greenhouse gas pollution, and as wildfires rage throughout the American West.

“Because we’ve had such gridlock in Congress, the courts have been much more important in all matters of environmental law lately,” said Robert Percival, director of the environmental law program at the University of Maryland. “And that trend is likely to continue.”

For now, the drilling and mining on federal lands and waters — which account for nearly a quarter of U.S. carbon dioxide emissions — remain largely on course. If they continue, it will be nearly impossible for Biden to meet his pledge to cut U.S. greenhouse gas emissions at least in half by the end of the decade, compared with 2005 levels.

#### None of their impact framing contextualizes to a climate impacts

Slaughter ‘8

Dr. Richard Slaughter is the president of Foresight International, in Brisbane, Australia. He is a futurist of international standing with a PhD in Futures Studies. He is the author and/or editor of 16 books and has written numerous articles and papers on futures themes and methodologies. He has long-standing professional links with prominent international institutions, organizations and research bodies. Futures – Volume 40, Issue 10, Pages 853-926 (December 2008) – obtained via Science Direct

I take the view that the futures field is at an advanced stage of development internally with a broad suite of tools, methods, practitioners and an impressive literature. But its applications are very uneven, the bulk of its work remains doggedly conventional and its most advanced expressions have yet to make their mark. Apart from the pressing need for greater social legitimation, one of the most significant stumbling blocks probably has more to do with human nature than with futures and foresight per se. It can be seen in the way that the differences that exist between practitioners of different persuasions often seem to become more important and divisive than the pressing concerns for humanity’s future that supposedly underlie them. Perhaps this is inevitable in any field, the games and traps of the human ego being what they are. Yet, at the same time, the challenge has never been greater to transcend conflicts, disputes and divisions and to re-focus on the dynamics of the transitions ahead. Two works that achieve this with distinction are Andy Hines and Peter Bishop’s book on Thinking About the Future: Guidelines for Strategic Foresight, which should be read by everyone, and Will Steffan’s book Global Change and the Earth System: A Planet Under Pressure [10]. What is certain is that a succession of non-negotiable factors will test humanity as never before. It is headed for a perfect storm comprised global warming and sea level rise, peak oil and its aftermath, regional environmental collapse, economic and financial instability, and social upheavals and migrations on a scale never seen before. In this context what the world needs is not inter-tribal rivalry but a coherent, convincing and capable futures/foresight community to assist with two key tasks. The first task is the need to ‘wake up’ to humanity’s predicament; the second is to more consciously and effectively manage the multiple transitions from growth (which further inscribes the ‘overshoot and collapse’ trajectory) to sustainability (which requires very different values, assumptions and practices across the board). Quite possibly the most accurate and succinct statement about these prospects were penned a few years ago by biologist E.O. Wilson who wrote: We have entered the Century of the Environment, in which the immediate future is usefully conceived as a bottleneck. Science and technology, combined with a lack of self-understanding and a Paleolithic obstinacy, brought us to where we are today. Now science and technology, combined with foresight and moral courage, must see us through the bottleneck and out [11]. The futures/foresight profession, vocation or field stands at these very crossroads. Whatever the future actually holds, the journal Futures, and others like it, have a major hand in resourcing us for this exceptionally challenging journey into new territory.

## Uniqueness

### 2AC 1 – Thumpers

### Thumpers---2NC

### 2AC 2 – UQ

#### They’ll likely avoid overruling Mass v. EPA or reviving non-delegation but it’s not a given

Smith 11-7 [Lexi Smith is a third-year student at Yale Law School. She studied environmental science and public policy as an undergraduate at Harvard, and she worked as an advisor to the Mayor of Boston on climate policy before enrolling in law school. 11-7-2021 https://yaleclimateconnections.org/2021/11/supreme-court-to-weigh-epa-authority-to-regulate-greenhouse-pollutants/]

The Supreme Court agreed to hear a case, West Virginia v. EPA, challenging the Environmental Protection Agency’s authority to regulate greenhouse gases as pollutants.

The case presents an opportunity for the Court to overturn key climate precedents and potentially change the relationship between federal agencies and Congress. The decision could have far-reaching consequences for federal climate policy and perhaps even for federal agencies more broadly.

How did we get here, how far might the Court go, and what consequences might the case have for climate change regulation and executive branch authority?

EPA’s authority to regulate greenhouse gases: Massachusetts v. EPA

In a groundbreaking decision in 2007, the Supreme Court held 5-4 that EPA has authority to regulate greenhouse gases under the Clean Air Act. During the Bush administration, environmentalists petitioned the agency to issue a rule on the regulation of greenhouse gases. The Bush EPA denied the petition, and environmental groups, states, and local governments challenged that decision in court. The Supreme Court’s decision turned on whether greenhouse gases like carbon dioxide fall under the definition of “air pollutants,” which the Clean Air Act authorizes EPA to regulate.

The Court concluded that carbon dioxide and other greenhouse gases are air pollutants under the Clean Air Act’s definition, and also noted that the EPA cannot refuse to regulate greenhouse gases for policy reasons outside the Clean Air Act itself, as the Bush administration had done. The Court ordered EPA to either issue a finding that greenhouse gases are dangerous to the public health and welfare, the first step toward regulation, or to give a reasoned explanation for why greenhouse gases do not meet the threshold of endangerment outlined in the Clean Air Act. The agency ultimately found that greenhouse gases are dangerous to the public health and welfare, which formed the foundation for EPA’s regulation of greenhouse gases.

That Supreme Court’s ruling in Massachusetts v. EPA was a 5-4 decision, and environmental advocates leading up to it were not at all certain that they would win the case. In fact, the case was controversial at the time because many environmentalists worried that it would result in a harmful adverse ruling. The four liberals on the Court in 2007, Justices Souter, Ginsburg, Breyer, and Stevens, were joined by Justice Kennedy to form a majority. But Chief Justice Roberts and Justices Thomas, Scalia, and Alito dissented.

Chief Justice Roberts’s dissent (joined by Justices Scalia, Thomas, and Alito) argued that the states, local governments, and environmental groups challenging the EPA should not have been allowed to sue in the first place because they lacked standing: One requirement of standing is a “concrete and particularized” injury. Chief Justice Roberts argued that harms from climate change affect everyone, so the injury in question was not sufficiently individualized and personal to support a lawsuit.

Justice Scalia’s dissent (joined by Chief Justice Roberts and Justices Thomas and Alito) focused on the Clean Air Act and argued that the Act is meant to address conventional air pollutants that harm human health directly through exposure, such as inhalation. He maintained that the Act was not meant to address the broader issue of climate change, and that greenhouse gases therefore did not fall under the definition of “air pollutants.”

Of course, the Supreme Court’s composition has changed significantly since 2007. With a 6-3 conservative-liberal divide, the conservative dissenters’ objections to Massachusetts v. EPA may now represent the majority view.

The ‘worst case scenario’: What could West Virginia v. EPA bring?

There are reasons to expect that the Court will show restraint when it hears the upcoming challenge to EPA’s authority in the West Virginia v. EPA case. But first, let’s walk through the worst potential outcomes from the perspective of climate advocates.

As suggested above, the Court could overturn its decision in Massachusetts v. EPA and effectively take away EPA’s authority to regulate greenhouse gases. With such a ruling, EPA could no longer issue rules directly regulating greenhouse gas emissions, and past greenhouse gas rules issued under its Clean Air Act authority would be invalid.

Richard Lazarus, a Harvard Law School professor who recently wrote a book about Massachusetts v. EPA, called the Court’s decision to hear West Virginia v. EPA “the equivalent of an earthquake around the country for those who care deeply about the climate issue.”

The consequences of the case could even reach far beyond climate regulation. The case presents an opportunity for the Court to revive the “nondelegation doctrine,” a mostly defunct principle that purported to limit Congress’s authority to delegate legislative power to executive branch agencies. The doctrine comes from Article I of the Constitution, which says that “[a]ll legislative powers herein granted shall be vested in a Congress of the United States.” The Supreme Court has not used the nondelegation doctrine to strike down agency action in more than 80 years.

Implications of enforcing nondelegation doctrine

The practical consequences of enforcing the nondelegation doctrine would debilitate the current system of executive branch rulemaking and regulation, subject to judicial review and congressional oversight. If Congress were to do all the rulemaking currently done by EPA, for instance, environmental regulation would become virtually impossible to enact. Congress in that case would have to make thousands of granular and technical decisions about environmental policy, even though we know it can barely pass major legislation as it is.

More broadly, nondelegation could mean that much of the work done by all federal agencies would have to be done instead by a clearly ill-equipped Congress. Even without current gridlock on Capitol Hill, the sheer volume of policy decisions Congress would have to make would be completely unworkable.

While this outcome sounds unlikely and illogical to those who support federal agency regulation, several of the current Justices at various times have expressed interest in weakening the administrative state and deregulating industry. For them, the nondelegation doctrine may be an attractive principle.

#### SCOTUS will likely make a limited ruling on *how* the EPA regulates GHGs and avoid ruling on whether the EPA *can*

Teirstein 11-5 [Zoya Teirstein, Staff writer at Grist, 11-5-2021 https://grist.org/politics/the-supreme-court-review-that-could-change-the-epa/]

That brings us to option two. The court may opt to look at the case through the “nondelegation doctrine” lens. The nondelegation doctrine says that laws violate the separation of powers when they delegate authority that should belong to Congress to an administrative agency (in this case, the EPA) without adequate guidance. The idea is that Section 111(d) of the Clean Air Act itself fails to give enough direction to the EPA. In other words, the issue at hand in this scenario is not what kind of authority EPA has over power plant emissions, but whether the statute that gives EPA that authority in the first place is even valid. If the Supreme Court goes after Section 111(d) directly, then Biden’s EPA may not have statutory authority to enact its own Clean Power Plan or otherwise regulate emissions from power plants.

Michael Burger, executive director of the Sabin Center for Climate Change Law, said that the chances of the Supreme Court pursuing this course of action are slim, because it would set a legal precedent that could undermine the way Congress delegates power to federal agencies. “It is an outside chance,” he said. It’s far more likely that the court will require EPA to regulate in the fenceline instead of making rules that would force electric utilities to shift to greener sources of energy. Or the court could affirm the D.C. Circuit’s position, which was that Section 111(d) does not require the EPA to limit its authority to the fenceline. The first outcome would close the door on sweeping emissions regulations for U.S. power plants, while the other would illuminate a path forward for the Biden administration to introduce a Clean Power Plan 2.0.

“In my view, the question of how EPA can exert authority over greenhouse gas emissions is what’s at stake in the case,” Burger said. “The question of whether EPA can exert authority over greenhouse gas emissions may come up, but let’s hope it doesn’t.”

#### A desire to narrow precedent and balance decisions best explains the previous term

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 Amy Coney Barrett, 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 Affordable Care Act (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

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#### 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.

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

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

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

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

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

#### Independently, Courts are jurisdiction hoarders – the plan’s agency enforcement produces judicial backlash to curb agency power

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

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

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

### Link---Broad Rulings

#### The Court perceives broad rulings as more controversial and a unique drain of PC---narrowly distinguishing avoids the link

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, Lexis

The federal judiciary has responded to these changed circumstances by inventing a whole series of doctrinal constraints that significantly reduce the scope of its potential authority. Taken together, these require that cases assume a certain form and achieve a degree of particularity and focus before they can become proper subjects for adjudication. Certainly the range of justiciable claims is larger today than it was in Madison's time. As a result of these doctrines, though, it is also smaller than it might otherwise be. From a technical standpoint, the Supreme Court has grounded its doctrinal innovations in the language of Article III, specifically the words "cases" and "controversies" in the provisions conferring federal jurisdiction. n181 Hence, these limitations on justiciability are sometimes referred to as the "case or controversy requirement." But no one seriously believes that the Framers chose those words with anything like the Supreme Court's doctrinal framework in mind or that the Court's justiciability rulings are anything other than a judicially invented gloss on the Constitution. Certain aspects of the case or controversy requirement are quite old and also quite explicit in steering the bench away from political controversy. Take the prohibition on advisory opinions, which one leading commentator calls "the oldest and most consistent thread in the federal law of justiciability." n182 In July 1793, Secretary of State Thomas Jefferson wrote to the Justices of the Supreme Court on behalf of President Washington, requesting advice on a number of matters pertaining to America's obligations under the treaty of alliance [\*1005] with France and to her legal options were she to remain neutral in the war between France and England. n183 The President and his cabinet had no reason to doubt that the Court would respond. Judges had offered advice on legal matters throughout the eighteenth century, both in England and in the colonies, and courts in the United States had continued the practice after the Revolution. n184 Nor had judges forsaken their advisory role upon the adoption of the Constitution, performing a variety of extrajudicial tasks for and during the Washington Administration. n185 "The appropriateness of judicial advice," writes the leading historian of the question, "was a matter of established custom." n186 But the Court did refuse to answer Washington's request, explaining in a letter that separation of powers, together with text that seemed to authorize the President to call for opinions from the heads of executive departments only, "are considerations which afford strong arguments against the Propriety of our extrajudicially deciding the questions alluded to." n187 Against the background of contemporary practice, it is hard not to view the Jay Court's explanation for declining to opine with skepticism. Against the background of contemporary politics, however, the matter of neutrality was fraught with meaning. It symbolized how the United States would respond to the French Revolution, and few issues have matched the French Revolution as a divisive force in American politics. As Lance Banning once remarked, the bitterness of the split aroused by the revolution in France "has been exceeded only once in American history, and that resulted in a civil war." n188 Even George Washington's seemingly impregnable reputation could not withstand such passions, and the President's decision to steer America on a neutral course provoked the first open attacks on his previously untouchable character and judgment. n189 [\*1006] John Jay and his brethren were not stupid, and they had no desire to be drawn into this fray. The mere announcement that their opinion had been sought touched off negative commentary in Republican newspapers, which added to the furor already generated by the willingness of a federal circuit court to try Gideon Henfield for privateering on behalf of France n190 (not to mention the still-recent ruling in Chisholm v. Georgia that private citizens could sue states in federal court). n191 The Justices were seasoned politicians, acutely conscious of the political mood in the country. Plus, they had an agenda of their own, hoping to persuade Congress to eliminate the burdensome circuit-riding system that made life on the Supreme Court such a misery. n192 Recognizing, as John Jay wrote to Rufus King in December 1793, that "the federal Courts have Enemies in all who fear their Influence on State Objects," n193 the Justices were not about to squander political capital unnecessarily. So they refused to answer. Their refusal was not purely political, of course. Legitimate arguments pertaining to separation of powers were available, and offered, for adopting a position against advisory opinions. n194 But there is little doubt that the charged political atmosphere had much to do with the decision of Chief Justice Jay and his brethren to steer clear of this particular controversy. The precedent thus established has, with remarkably few exceptions, n195 guided federal courts ever since. For more than two centuries it has been established that federal judges will not render an opinion or decide a case unless there is an actual dispute between adverse litigants before the court. n196 So accustomed have we grown to this condition [\*1007] that we have ceased to appreciate its profound significance. Imagine how different things might have looked had federal courts maintained the tradition of rendering advice, thus putting the judiciary's credibility and reputation at risk in every important political or constitutional controversy. Instead, the Court has restricted its involvement to a much narrower set of circumstances, avoiding many controversies altogether while addressing others in more particularized, and so less contentious, forms.

### Link---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

#### Microsoft proves – Antitrust cases are politicized

Swanson 1 (Carol B. Swanson, Professor of Law, Hamline University School of Law. A.B., Bowdoin College; J.D., Vanderbilt Law School, ANTITRUST EXCITEMENT IN THE NEW MILLENNIUM: MICROSOFT, MERGERS, AND MORE, 54 Okla. L. Rev. 285, y2k)

The highly publicized battle between Microsoft and the Antitrust Division of the Department of Justice sharply focused public attention on antitrust law, a sleepy substantive area that had been dormant for years. In the 1980s, antitrust enforcement was uncontroversial because it largely disappeared; 11 some even speculated that competition no longer needed protection. In stark contrast, the past ten years witnessed antitrust's resuscitation. Regulators have begun looking upon antitrust targets with renewed interest; at the same time, innovative technologies in the so-called "new economy" 12 are arguably rendering traditional competition regulation obsolete. Microsoft's antitrust woes have personalized and heightened the arguments concerning the vitality of current antitrust regulations in the modern high-tech landscape. The protracted "big case" nature of the Microsoft litigation only underscores these regulatory concerns. Today, with a new President and new policies finally in place, 13 significant changes may be in the works. Antitrust law has taken [\*288] center stage, and its relevance and application demand serious review. 14

## Internal Link

### A2: PC False---2NC

#### 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.

#### 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.

### A2: Compartmentalization---2NC

#### 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.

#### There is evidence of vote switching that they deny publicly

Grove 19 [Tara Leigh Grove, William & Mary Law School Professor, 2019 https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2950&context=facpubs]

Building on Fallon’s work, this Book Review Essay examines the recent attacks on the Supreme Court and the proposed solutions. I argue that in politically charged moments like today, the Court may face a legitimacy dilemma — one that the Justices cannot easily remedy themselves. This dilemma is twofold. Consider, first, the assertion that one or more members of the Supreme Court should modify their jurisprudence in order to preserve the Court’s legitimacy. This argument underscores an important tension between the internal (legal) and external (sociological) legitimacy of the Supreme Court.22 On the one hand, there is some evidence that Justices do in fact “switch” their votes in response to public pressure — that is, to preserve the Court’s sociological legitimacy. The Justices may have done so in reaction to President Franklin Roosevelt’s Court-packing plan and in the wake of the “massive resistance” to Brown v. Board of Education. On the other hand, there is reason to doubt that such “switches” are legally legitimate.23 Assuming such changes occur (as political science and media accounts assure us they do24), the Justices do not have a consistent or principled approach, and they are most certainly not candid about “caving” to public pressure. To the contrary, the Justices (at least publicly) deny the influence of such external pressure. Thus, there is one legitimacy dilemma: in politically charged moments, the Justices may feel pressure to sacrifice the legal legitimacy of their judicial decisions in order to preserve the sociological legitimacy of the Court as a whole.

#### There’s an overall “zone of tolerance” for conflict that encompasses many individual issues

Davidov 10 – Guy Davidov, Faculty of Law, Hebrew University of Jerusalem, Amnon Reichman, Faculty of Law, University of Haifa, “Prolonged Armed Conflict and Diminished Deference to the Military: Lessons from Israel”, Law and Social Inquiry, 35 Law & Soc. Inquiry 919, Fall, Lexis

Managing Institutional Capital

The next three factors that could be viewed as determinants of the level of deference are external explanations rather than normative explicit justifications. The third determinant focuses on matters of institutional economy: deference can be seen as a tool used by the Court to manage its institutional capital vis-a-vis the agencies under its judicial oversight. Assuming the reviewed agencies would rather their decisions (and policies) not be overturned by the Court, these agencies are likely to develop a set of tools by which to exact a certain "price" from the Court when such overturning occurs. Such tools may include generating negative public campaigns regarding the Court's lack of understanding or the grave consequences of its interference, thereby seeking to depreciate the degree of public confidence and support enjoyed by the Court (Caldeira 1986); applying political pressure for the law to be redrafted in order to overturn the judicial decision; generating bureaucratic resistance within the enforcing agencies (that is, taking the time to implement the decisions or implementing them only partially, under a contrived interpretation thereof or under "lack of resources" claims); applying pressure for the choice of more favorable judicial nominees in the future; and [\*928] other forms of backlash, such as joining forces with other agencies in order to frustrate judicial policies in other areas (see Rosenberg 1992 for US legislative context). Fully aware of these risks, and mindful of the executive's "zone of tolerance" (Hamilton and Braden 1941, 1343), the Court may sometimes invoke deference with the aim of preserving its institutional capital for the cases in which it finds it most crucial to override the agencies (cf. Choper 1980, 129-70). Since the Court is not insulated from external pressures, it cannot ignore the institutional context, which informs the options available to judges (cf. Segal and Spaeth 1993).