# 1AC

## 1AC---Plan

#### The United States federal government should substantially increase its prohibitions on anticompetitive business practices by the private sector that prevent litigants from effectively vindicating their statutory causes of action in antitrust suits.

## 1AC---Class Action

Advantage One is Class Action.

#### Compulsory arbitration immunizes corporations from liability.

Newton ’20 [Dawn; October 26; Business attorney who focuses on franchise law, intellectual property, and data privacy, J.D. from the Hastings College of the Law at the University of California; Donahue Fitzgerald, “Avoid Class Action Suits by Using Arbitration Agreements,” <https://donahue.com/resources/publications/avoid-class-action-suits-using-arbitration-agreements-2/>]

The U.S. Supreme Court paved the way for businesses to avoid class actions by using arbitration agreements.

On April 27, 2011, the U.S. Supreme Court issued a ruling in AT&T Mobility LLC v. Vincent Concepcion that barred a consumer class action and overturned prior California law that prohibited class action waivers in arbitration agreements. In doing so, the Court created a mechanism by which savvy businesses can avoid class actions in a number of different contexts, which may, in turn, dramatically impact the way companies resolve disputes with their customers, employees and contractors.

Underlying Facts and Procedure

In 2002, in response to a promotional advertisement, the plaintiffs in the case, Vincent and Liza Concepcion, entered into a cell phone contract with AT&T (Cingular Wireless at the time) that entitled them to two “free” phones. After the Concepcions signed the company’s mobile service agreement, they discovered that although AT&T’s advertisement promised that they would receive the phones for free, they were charged $30.22 as tax on the phones’ retail value.

In March 2006, the Concepcions sued AT&T in the United States District Court in the Southern District of California, alleging that it engaged in false advertising and fraud. The District Court later consolidated the case into a class action lawsuit.

AT&T challenged the lawsuit, arguing that its standard mobile service contract, signed by the Concepcions and all other customers, precluded a class action because of two key provisions in the agreement: a mandatory arbitration clause and a class action waiver that required consumers to bring claims only in their individual capacity. AT&T asked the court to send the matter to arbitration in each plaintiff’s individual capacity as was required by the contracts.

The plaintiffs opposed AT&T’s request, arguing that a well-established decision by the California Supreme Court–Discover Bank v. Superior Court, 36 Cal.4th 148 (2005)–had already determined that class action waivers in consumer contracts were unreasonable, or “unconscionable,” and therefore unenforceable. The District Court agreed with the Concepcions and denied AT&T’s request to compel arbitration, and the Ninth Circuit Court of Appeals affirmed that decision. Critical to the decisions of both the District Court and the Ninth Circuit Court of Appeals was the determination that the Federal Arbitration Act (“FAA”), the purpose of which is to ensure the enforcement of arbitration agreements according to their terms, did not override, or “preempt,” the California Supreme Court’s decision in Discover Bank.

The Supreme Court Ruling

In a remarkably broad 5-4 ruling, divided along ideological lines, the Supreme Court reversed the Ninth Circuit, holding that the Discover Bank rule is inconsistent with the FAA and is therefore preempted.

Writing for the majority, Justice Antonin Scalia stated that the purpose of the FAA was twofold: to ensure the enforcement of private agreements to arbitrate and to make dispute resolution more efficient. By essentially allowing the parties to re-write arbitration agreements after the fact, Scalia explained, the rule in Discover Bank “stands as an obstacle to the accomplishment and execution” of Congress’s purpose and objective in enacting the FAA.

Specifically, the Court found that allowing class arbitration under the Discover Bank rule is inconsistent with the FAA for three reasons: 1) when compared with two-party arbitration, class arbitration makes the process slow, expensive and procedurally difficult; 2) class arbitration requires a formality that was not envisioned by Congress when the FAA was passed; and 3) class arbitration greatly increases the risk to defendants because a single mistake by the arbitrator, multiplied by thousands of class members, could result in a “devastating loss.” As a result, according to the Court, the rule in Discover Bank is likely to dissuade companies from using arbitration as a means of resolving disputes, thereby undermining the FAA.

Implications

The implications of the ruling in AT&T Mobility are significant. Indeed, the ruling comes only a year after the Supreme Court’s decision in Stolt-Neilsen S.A. v. Animalfeeds International, Corp., 130 S. Ct. 1758 (2010), in which the Court held that if parties to an arbitration agreement did not intend to allow class claims, arbitrators have no power to impose class-wide arbitrations under agreements that are merely “silent” on the issue. Both decisions further the Court’s clear directive that the FAA, and its liberal policy favoring arbitration, should be given full effect.

Given the ubiquity of arbitration clauses in everything from cell phone plans to franchise agreements to employment contracts, the potential ramifications of the Court’s decision in AT&T Mobility are sweeping.

Impact on Franchisors & Distributors

Many franchisors with arbitration provisions in their franchise agreements have felt insulated from the threat of class-action suits since last year’s Stolt-Nielsen decision. However, some lingering doubt remained, since some California courts had allowed franchisee attempts to either avoid arbitration or force a class certification since Discover Bank was decided, citing that case as authority. The AT&T Mobility decision puts an end to this argument.

Franchisors or distributors that draft consumer contracts for use by others in their distribution chain should also pay close attention to this decision. By incorporating arbitration clauses into those consumer agreements, they can eliminate the threat of class actions, provided that the terms for the individual arbitration are not unfair. The majority opinion noted that AT&T’s arbitration policy prevented AT&T from seeking its own attorney’s fees if it prevailed in arbitration, but provided for payment of twice the plaintiff’s attorney’s fees if AT&T lost. In addition AT&T’s policy agreed to pay an additional $7,500 to any plaintiff who obtained a better arbitration award than AT&T’s last settlement offer. While the opinion does not require a consumer arbitration clause to match these terms, the FAA would not require the enforcement of an obviously unfair arbitration provision.

Impact on Employers

The Supreme Court’s ruling is also certain to have far-reaching consequences for employers that use arbitration agreements with their employees. In particular, it could dramatically change wage and hour litigation, which often relies on class actions as a vehicle to redress relatively small individual losses. Without being able to consolidate these claims into a large class action, it will likely become increasingly difficult for individual employees to secure legal representation. Indeed, if an employer’s arbitration agreement is drafted correctly, because of the ruling in AT&T Mobility, it can potentially eliminate the risks to employers of facing a wage and hour class action (or any other employment-based class actions).

#### It's a shield against antitrust lawsuits AND increasing.

Rubinoff ’20 [Matt; May 1; J.D. Candidate at Pennsylvania State University, Managing Editor; Arbitration Law Review, “Too Big to Arbitrate? Class Action Waivers, Adhesive Arbitration, and Their Effects on Antitrust Litigation,” vol. 12]

I. Introduction

Access to arbitration provides a simple, expeditious, and “feasible form of fairness in adjudication.”1 In avoiding the typically tedious and strenuous litigation procedures, arbitration remains “a vital part of the litigation alternatives in the [United States] legal system.”2 However, what happens when one side, particularly the poorer and weaker party, unwillingly or unknowingly submits to an alternative legal path that hinders their chances of success, fairness, or justice?

Class action procedures allow courts to manage lawsuits that would otherwise be impossible or improbable if each class member were required to join as an individually named plaintiff.3 The process “enables vindication of claims that otherwise could never be litigated, no matter how meritorious.”4 Antitrust lawsuits, for example, typically provide access to class actions for consumers or employees, and represent the primary way to compensate victims who suffer a loss, while subsequently providing a strong deterrent to future illicit behavior.5 In the age of global marketing, communication, and access to information, “it is not uncommon for many individuals to be harmed in essentially identical ways by mass-produced products or standard corporate practices.”6 Class actions attempt to level the playing field for those groups otherwise economically disadvantaged or lacking access to the justice system.7

Over the years, however, large corporations have begun to routinely opt to use arbitration agreements to prevent class action lawsuits through class action “waivers” imbedded in their contractual agreements.8 These waivers too often remain hidden or unseen to the final user of the product or employee of the company until after they have already agreed to the contract. 9 Accordingly, parties seeking a cause of action are not only forced to arbitrate any dispute, but also are prevented from certifying the lawsuit in a class action proceeding.10

Footnote 8:

8 See Megan Leonhardt, Lawmakers want to give Americans back their right to sue companies, CNBC (Sept. 10, 2019, 5:32 PM), https://www.cnbc.com/2019/09/10/lawmakers-want-to-give-americans-backtheir-right-to-sue-companies.html (“A recent academic study found that 81 of the biggest 100 companies in America have put legal clauses in the fine print of their customer agreements that bar consumers from suing them in federal court…”).

End of footnote 8.

This article discusses class action waivers in mandatory arbitration agreements and examines their possible impact on access to antitrust violation claims. Part II introduces the recent history of class action waivers and the United State Supreme Court’s continued enforcement of such waivers. Part III addresses the impact of case law on antitrust laws and procedures. Finally, Part IV concludes with recent developments, and what the near future might look like for mandatory arbitration agreements and class action waivers.

II. The Supreme Court and Class Action Waivers

Arbitration settles legal disputes in a functional, flexible procedure, avoiding the unneeded expenses and delays of a common judiciary. 11 On a macro level, arbitration represents a justifiable avenue to not only avoid backing up the court system with claims, but also expediates the process for legitimate parties seeking relief.12 From this perspective, the goals of arbitration inherently seek to support litigants who do not have the time or money to compete with a powerful opposition. However, as the Supreme Court, as well as the legislature, increasingly relies on the enforcement of arbitration agreements, the bigger, stronger parties strategically use customized adhesive arbitration contracts and class-action waivers as a protective shield to further benefit themselves and effectively limit any future liabilities.13

#### Overwhelming empirical and statistical evidence verifies private, class action suits are necessary to deter cartelization.

Lande ’16 [Robert; Spring 2016; Venable Professor of Law at the University of Baltimore School of Law, Director of the American Antitrust Institute; Antitrust, “Class Warfare: Why Antitrust Class Actions Are Essential for Compensation and Deterrence,” vol. 30]

Our recent empirical studies demonstrate five reasons why antitrust class action cases are essential: (1) class actions are virtually the only way for most victims of antitrust violations to receive compensation; (2) most successful class actions involve collusion that was anticompetitive; (3) class victims’ compensation has been modest, generally less than their damages; (4) class actions deter significant amounts of collusion and other anticompetitive behavior; and (5) anticompetitive collusion is underdeterred, a problem that would be exacerbated without class actions.

Recent court decisions undermine class action cases, thus preventing much effective and important antitrust enforcement.1

Class Actions Are Virtually the Only Way for Most Victims of Federal Antitrust Violations to Receive Compensation

The antitrust statutes provide that violations result in automatic treble damages for the victims.2 The legislative history 3 and case law indicate that compensation of victims is a goal, perhaps the dominant goal, of antitrust law’s damages remedy.4 Class actions play an essential role in ensuring that the treble damages remedy serves its intended function of “protecting consumers from overcharges resulting from price fixing.”5 As the Supreme Court noted, “[C]lass actions . . . may enhance the efficacy of private [antitrust] actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture.”6 Accordingly, “courts have repeatedly found antitrust claims to be particularly well suited for class actions . . . .”7

Without class actions, cartels and other antitrust violators that inflict widespread economic harm would have little to fear from the treble damages remedy. This is because, as a practical matter, class action cases are virtually the only way for most victims of anticompetitive behavior to receive compensation.8 A 2013 study that Professor Joshua Davis and I conducted documents the benefits of private enforcement by analyzing 60 of the largest recent successful private U.S. antitrust cases (defined as suits resolved since 1990 that recovered at least $50 million in cash for the victims9 ). These actions returned a total of $33.8–$35.8 billion in cash to victims of anticompetitive behavior.10 These figures do not include products, discounts, coupons, or the value of injunctive relief or precedent—only cash.11 Consequently, these totals significantly understate the actual benefits of this litigation to the victims involved. And, of course, this study covered only 60 suits (albeit 60 of the largest private recoveries) out of the many hundreds of private cases filed in the United States during this period.

Of these 60 large private cases, 49 were class action suits.12 These cases recovered a total of $19.4–$21.0 billion—the majority of the amount analyzed in our study.13 Since these were among the largest private actions ever filed, specific conclusions based upon these results may not generalize perfectly to all class action cases. They do suggest, however, that without class action cases, effective and significant victim compensation would be reduced dramatically.

Most Successful Class Actions Involve Collusion that Was Anticompetitive

Almost every private antitrust case that results in a remedy does so through a settlement,14 so the underlying merits of the plaintiffs’ claims usually have not been definitively assessed by a court or jury. Critics sometimes use this fact to support assertions that class actions usually are meritless, that plaintiffs often receive huge sums from cases not involving anticompetitive conduct, and that private antitrust actions often amount to legalized blackmail or extortion.15

Antitrust class actions arise in widely varied market and factual settings, and views about the merits of specific cases and the litigation risks involved vary as well. This makes it extremely difficult to draw objective conclusions about the merits of settlements.

Nevertheless, there are good reasons to believe that the vast majority of class action cases in the Davis/Lande study involved legitimate claims. Forty-one of the 49 class actions involved allegations of collusion,16 and the same conduct supporting the settlements gave rise to criminal penalties in 20 cases; to civil relief by the FTC or DOJ in 8 cases; to civil relief by a state or other governmental unit in 9 cases; to a trial that the defendants lost and that was not overturned on appeal in 7 cases; to a class being certified in 22 cases; and to plaintiffs surviving or prevailing at summary judgment in 12 cases.17 Overall, 44 of the 49 class action suits (90 percent) exhibited at least one of these forms of legal validation as to their merits. (The 5 actions that did not have at least one of these indicia settled too early for a substantive evaluation of their merits).18

These results are broadly consistent with a finding that Professor John Connor derived from an analysis of 130 private recoveries worldwide in international cartel cases for which he could obtain the necessary data.19 He found that of the 50 largest worldwide settlements, measured by their monetary recoveries in constant dollars, 49 had been filed against international cartels.20 Of these, 51 percent were follow-ups to successful DOJ prosecutions, and another 8 percent were filed after fines by the EC or other non-U.S. antitrust authorities.21 Using a different data set, Connor and I found that 36 of 71 (also 51 percent) successful U.S. class action recoveries followed successful DOJ criminal cases.22

This data does not prove that these or any other specific class action cases involved anticompetitive conduct. But critics who assert that most antitrust class actions are little more than legalized blackmail rely only on anecdotes, hypotheticals, and opinions (often of defendants in the cases), without support from studies, and with no reliable empirical evidence that the actions lack merit or that settlement amounts are excessive compared to the anticompetitive harm.23 To be fair, one should compare the above indicia of validity to the absence of any systematic evidence underpinning the critics’ charges.

#### Cartels bulldoze economic growth and cascade through umbrella effects on innovation.

Crowe ’16 [Jonathan and Barbora Jedlickova; 2016; Professor of Law at Bond University; Lecturer and Fellow at the Center for Public, International, and Comparative Law at the University of Queensland; Federal Law Review, “What’s Wrong with Cartels?” vol. 44]

Cartels, then, are widely viewed as immoral, as well as economically inefficient. The academic literature, however, has tended to focus primarily on economic factors. 15 There has been significant recent discussion of the rationales for criminalising cartel conduct, 16 but relatively few attempts to systematically integrate economic and moral considerations. The leading exception is Stuart Green's framework for analysing whitecollar crime, 1 7 which has been applied to cartels by a number of authors. 18 The present article suggests an alternative approach to this issue. We offer an integrated account of the wrongness of cartels that emphasises the relationship of cartel behaviour to the moral duty to promote the common good. Cartels are wrong because they undermine the role of open and competitive markets as a salient response to an important social coordination problem in a way that causes serious harm to community welfare. This combination of factors supplies a robust justification for both civil and criminal sanctions in appropriate cases.

The article begins by briefly exploring the traditional economic justification for prohibiting cartels. This economic case is relatively uncontroversial, but it provides necessary background for the wider argument. We then introduce the idea of common good duties. We argue that people have a duty to contribute to salient solutions to coordination problems that seriously threaten the common good of their communities. The next section explores the role of the competitive market in solving social coordination problems: we argue that support for market mechanisms and the competition values they embody can form part of a person's common good duties. This provides a normative basis for prohibiting cartels. We conclude by connecting this account of the wrongness of cartels with the respective roles of civil and criminal remedies. The resulting theory offers a principled foundation for the current framework of cartel regulation in Australia.

II. The Economic Harms of Cartels

Cartels are forms of collusive conduct that involve participants deciding to stop competing in certain ways -for instance, by setting the price, setting and decreasing output or dividing territories or customers. There is no uniform definition of 'cartel', but many formulations focus on the economic impacts of cartel behaviour. 19 Legal prohibitions on cartels typically target a range of anticompetitive conduct, including price-fixing, output restrictions, market-sharing arrangements and bid-rigging. 20 In this article, we will focus primarily on naked horizontal collusion, which is purposely used to restrict competition and has no obvious social benefit. We will use the term 'cartels' to refer to the above-mentioned varieties of anticompetitive horizontal collusion among independent economic entities. 21

The current approach to regulating cartels-as implemented, for instance, in Australia, the US and the EU- is broadly based on a framework of welfare economics informed by a neoclassical focus on economic efficiency and overall social welfare. 22 The neoclassical outlook, associated most notably with the Chicago School, imports a conception of economic agents as rational actors seeking to maximise their utility, along with a classical liberal emphasis on the beneficial consequences of a free and competitive market.23 This yields a strongly consequentialist approach to the regulation of cartel behaviour. The focus of regulatory efforts, on this view, falls on combating the harms caused by cartels in the form of decreased outputs. The purpose of regulation is to increase the costs of cartelisation and remove the incentives people might otherwise have to collude rather than compete.

The classical liberal tradition treats a free and competitive market as having high social value because it leads to higher productivity, lower prices and increased innovation. 24 A free and competitive market, on this simplified model, naturally reflects demand and supply. Suppliers (companies and other entities) compete for customers' attention essentially because they want to sell as many products as possible, for as high a profit as possible. Suppliers are therefore motivated to innovate and differentiate their products and services, while decreasing their cost of production. They have incentives to be more efficient. Price signals enable this process by aggregating the information available to actors in the market and expressed in individual transactions. 25 The price system is highly dynamic- it adjusts constantly as players in the market take account of new information and use it to guide their choices. It will probably never lead to perfect coordination of preferences under actual market conditions, but it plays this role more effectively than other available methods. 26 This information-sharing function of a competitive market is disturbed if competitors take measures to restrict competition.

There is one primary reason that someone would stop competing and start colluding: profit generation. For instance, if price competition becomes intensive through the reduction of the price of substitutable products, the market may reach a point where the total cost is equal to the price charged by the producer. Such a producer must assess its options for starting to profit again. It can, for example, lower its costs or perhaps improve its product - or it can become involved in a cartel, such as a price cartel. Cartel participants become involved willingly because of the prospect of generating better (and commonly monopolistic) profit. This increases the welfare of the cartel members, but decreases total and consumer welfare. The final price consumers pay is higher and there is less incentive to innovate or become more efficient (for example, by cutting costs) on the side of the cartel participants.

Cartels, then, harm social welfare by disrupting the competitive functioning of the market. They damage 'confidence in the market's ability to act as the chosen mechanism for transfer and distribution'. 2 7 There are also more specific forms of harm associated with cartels. Most importantly, cartels lead to higher prices and lower output of the products or services concerned. 28 Price cartel harm therefore has two major components. 29 The first is the transfer of wealth from customers to the price fixers generated by artificially high prices. This also decreases the total social welfare because the overcharge customers pay as part of the cartel price could be spent on additional goods or services. The second component of harm arising from price cartels is the reduction of the quantity of products sold. A higher price means consumers buy less of the product and thus generate a so-called 'deadweight loss', which is a sum of the lost utility from potential purchases made by consumers and the potential additional sales if the price had been a competitive one. 30

Other consequences of cartels include decreased innovation and efficiency. The members of a price-fixing cartel lose the motivation to produce their products for less than others and thus become less efficient. They can also lose the motivation to innovate and improve their products to attract more customers or, alternatively, increase prices once their products are better than others available. These effects may extend beyond the members of the cartel to other participants in the market. For example, cartels have been associated with 'umbrella effects' that arise where competing firms are assured of buyers, provided they set their price below that of the dominant company in the market. 31 If the dominant entity is part of a cartel, then other sellers will also be able to profit from its anticompetitive prices.

III. The Problem of the Baseline

Cartels, then, are economically harmful. They increase prices and decrease innovation, efficiency and output in the market, thereby making society as a whole worse off than it would otherwise have been. However, this consideration alone does not explain why cartels are morally objectionable. The proposition that cartels make the market less efficient is a descriptive claim; it cannot, by itself, generate a moral conclusion. The notion of harm, one might say, is normatively loaded: once we accept a general duty not to cause harm, we can then derive the normative conclusion that it is wrong to cause harm of the specific kind involved in creating cartels. However, this appeal to the wrongfulness of harm raises two further issues.

#### Microeconomic theory confirms---enforcing against collusion is the centerpiece of growth and innovation---AND makes growth sustainable.

Martinez ’21 [Diego and Pramuan Bunkanwanicha; carbon dated to August 17; M.A. in Finance from Universidad Complutense de Madrid, E.Ph.D. Candidate at ESCP Business School; Professor of Finance at ESCP Europe, Ph.D. in Economics from the University of Paris; ESCP Research Institute of Management, “Good Faith Competition as a Natural Mechanism for Sustainable Economic Growth,” <https://academ.escpeurope.eu/pub/IP%202021-31-EN.pdf>]

I. Introduction

Microeconomic theory defines the market as perfect competition when firms provide goods at a price that equals their marginal cost. Some common characteristics of a perfectly competitive market include homogenous products, all buyers and sellers as price takers, there is complete information, and no entry and exit barriers. Under the assumption of prices equal marginal costs, firms would have no or little incentive to innovate.

It is reasonable to expect that most industries are characterized by some degree of heterogeneity and product differentiation. In this situation, the competition encourages profit-maximizing firms to innovate to achieve abnormal returns.

Rooted in management literature known as the resource-based view of the firm, Barney (1991) argues that sustainable competitive advantage derives from the resources and capabilities a firm controls that are valuable, rare, imperfectly imitable, and not substitutable. It is arguable that the firm's sustainable competitive advantage should be connected with the environment where the firm operates. Good faith competition incentivizes firms to build sustainable competitive advantages through R&D investments, product differentiation, advertising, and capital-and cost-efficiencies. Firms need to invest in tangible and intangible resources to create competitive advantages and generate abnormal returns (returns on equity higher than the cost of equity). Firms also need to continue investing in maintaining those advantages over time to create long-term value.

Kline and Rosenberg (2010) define the process of innovation as a series of changes that affect not only hardware but also production, markets, and organizations. In fair competition markets, a firm's search for creating competitive advantages provides a continuous investment process and stimulates innovation, providing economic growth, employment, and welfare enhancement (Baumol and Strom 2007, OECD 2007, Daniels 1996).

Sustainable economic growth has important implications for society. In the long run, economic growth is mainly explained by technological progress. Sustained economic growth has an amplified effect on per capita income, and it is an effective mechanism to reduce poverty rates (Barro and Sala-i-Martin 2004, Sala-i-Martin 2006, Dollar et al. 2013). United Nations' 2030 Agenda for Sustainable Development1 includes eradicating poverty as an indispensable requirement for sustainable development. In fair markets, firms competing for competitive advantages take a crucial role, bringing the power of innovation that generates economic growth, resulting in an improved standard of living for the wider society. However, some firms may have incentives to collude to obtain extra-profits, harming consumers and, at the same time, negatively affecting the power of innovation. Regulators have to ensure the fair functioning of markets.

II. Advantages of good faith competition

The positive effect on society of firms' rivalry is based on three central ideas. The first one is that firms pursue a profit maximization strategy and expect to achieve abnormal returns. The second one is that industries have some degree of heterogeneity and product differentiation. Lastly, firms compete in fair markets. In this scenario, firms pursuing abnormal returns will make investments in order to develop competitive advantages. Investment in R&D is one of the most important activities driving competitive advantage, and firms in competitive industries enter into innovation races to differentiate their products. Innovation affects long-term economic growth through technological progress. The European Central Bank supports innovation as an essential driver of economic progress that benefits consumers, businesses, and the economy as a whole.

Fair market competition is one of the pillars for obtaining positive effects from rivalry. National and supranational organizations acknowledge the benefits of good faith competition. The Autorité de la concurrence, the competition regulator in France, argues that competition forces companies to be innovative and to stimulate growth and jobs. The European Union states that having firms competing fairly in the market benefits society. Consumers receive higher quality products at better prices, and competition incentivizes firms to innovate to differentiate their products and make firms more competitive in global markets.

In fair markets, the search for competitive advantages stimulates innovation and strengthens long-term economic growth. The Presidency Report to the Council of the EU (September 20th, 2019) on developing long-term strategies of sustainable growth identifies Research and Innovation (R&I) as a critical driver in response to the main challenges of the European economic growth model. Economic growth does not need to be explosive but recurrent over the long term. An example of the positive effects of long-term economic growth on income per capita is the U.S. economy. The US GPD per capita grew at a yearly rate of 1.8% between 1870 and 2000, resulting in an increase of 10 times, from $3,340 to $33,330 measured in 1996 dollars. However, reducing the yearly growth rate to 0.8%, the per capita rent in 2000 would have been $9,450, only 2.8 times the value of 1870, and the U.S. would be ranked in 45th position instead of 2nd out of 150 countries (Barro and Sala i Martin 2004).

Arguably, designing good faith competition markets is a natural mechanism to promote sustainable economic growth. Fair competition stimulates innovation, which is the main contributor to sustainable economic well-being.

#### Slow growth collapses the liberal order AND causes global hotspot escalation---extinction.

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Four structural forces will shape the future of International Relations: globalization (but without liberal rules, institutions, and leadership)1; multipolarity (the end of American hegemony and wider distribution of power among states and non-states2); the strengthening of distinctive, national and subnational identities, as persistent cultural differences are accentuated by the disruptive effects of Western style globalization (what Samuel Huntington called the “non-westernization of IR”3); and secular economic stagnation, a product of longer term global decline in birth rates combined with aging populations.4 These structural forces do not determine everything. Environmental events, global health challenges, internal political developments, policy mistakes, technology breakthroughs or failures, will intersect with structure to define our future. But these four structural forces will impact the way states behave, in the capacity of great powers to manage their differences, and to act collectively to settle, rather than exploit, the inevitable shocks of the next decade.

Some of these structural forces could be managed to promote prosperity and avoid war. Multipolarity (inherently more prone to conflict than other configurations of power, given coordination problems)5 plus globalization can work in a world of prosperity, convergent values, and effective conflict management. The Congress of Vienna system achieved relative peace in Europe over a hundred-year period through informal cooperation among multiple states sharing a fear of populist revolution. It ended decisively in 1914. Contemporary neoliberal institutionalists, such as John Ikenberry, accept multipolarity as our likely future, but are confident that globalization with liberal characteristics can be sustained without American hegemony, arguing that liberal values and practices have been fully accepted by states, global institutions, and private actors as imperative for growth and political legitimacy.6 Divergent values plus multipolarity can work, though at significantly lower levels of economic growth-in an autarchic world of isolated units, a world envisioned by the advocates of decoupling, including the current American president.7 Divergent values plus globalization can be managed by hegemonic power, exemplified by the decade of the 1990s, when the Washington Consensus, imposed by American leverage exerted through the IMF and other U.S. dominated institutions, overrode national differences, but with real costs to those states undergoing “structural adjustment programs,”8 and ultimately at the cost of global growth, as states—especially in Asia—increased their savings to self insure against future financial crises.9

But all four forces operating simultaneously will produce a future of increasing internal polarization and cross border conflict, diminished economic growth and poverty alleviation, weakened global institutions and norms of behavior, and reduced collective capacity to confront emerging challenges of global warming, accelerating technology change, nuclear weapons innovation and proliferation. As in any effective scenario, this future is clearly visible to any keen observer. We have only to abolish wishful thinking and believe our own eyes.10

Secular Stagnation

This unbrave new world has been emerging for some time, as US power has declined relative to other states, especially China, global liberalism has failed to deliver on its promises, and totalitarian capitalism has proven effective in leveraging globalization for economic growth and political legitimacy while exploiting technology and the state’s coercive powers to maintain internal political control. But this new era was jumpstarted by the world financial crisis of 2007, which revealed the bankruptcy of unregulated market capitalism, weakened faith in US leadership, exacerbated economic deprivation and inequality around the world, ignited growing populism, and undermined international liberal institutions. The skewed distribution of wealth experienced in most developed countries, politically tolerated in periods of growth, became intolerable as growth rates declined. A combination of aging populations, accelerating technology, and global populism/nationalism promises to make this growth decline very difficult to reverse. What Larry Summers and other international political economists have come to call “secular stagnation” increases the likelihood that illiberal globalization, multipolarity, and rising nationalism will define our future. Summers11 has argued that the world is entering a long period of diminishing economic growth. He suggests that secular stagnation “may be the defining macroeconomic challenge of our times.” Julius Probst, in his recent assessment of Summers’ ideas, explains:

…rich countries are ageing as birth rates decline and people live longer. This has pushed down real interest rates because investors think these trends will mean they will make lower returns from investing in future, making them more willing to accept a lower return on government debt as a result.

Other factors that make investors similarly pessimistic include rising global inequality and the slowdown in productivity growth…

This decline in real interest rates matters because economists believe that to overcome an economic downturn, a central bank must drive down the real interest rate to a certain level to encourage more spending and investment… Because real interest rates are so low, Summers and his supporters believe that the rate required to reach full employment is so far into negative territory that it is effectively impossible.

…in the long run, more immigration might be a vital part of curing secular stagnation. Summers also heavily prescribes increased government spending, arguing that it might actually be more prudent than cutting back – especially if the money is spent on infrastructure, education and research and development.

Of course, governments in Europe and the US are instead trying to shut their doors to migrants. And austerity policies have taken their toll on infrastructure and public research. This looks set to ensure that the next recession will be particularly nasty when it comes… Unless governments change course radically, we could be in for a sobering period ahead.12

The rise of nationalism/populism is both cause and effect of this economic outlook. Lower growth will make every aspect of the liberal order more difficult to resuscitate post-Trump. Domestic politics will become more polarized and dysfunctional, as competition for diminishing resources intensifies. International collaboration, ad hoc or through institutions, will become politically toxic. Protectionism, in its multiple forms, will make economic recovery from “secular stagnation” a heavy lift, and the liberal hegemonic leadership and strong institutions that limited the damage of previous downturns, will be unavailable. A clear demonstration of this negative feedback loop is the economic damage being inflicted on the world by Trump’s trade war with China, which— despite the so-called phase one agreement—has predictably escalated from negotiating tactic to imbedded reality, with no end in sight. In a world already suffering from inadequate investment, the uncertainties generated by this confrontation will further curb the investments essential for future growth. Another demonstration of the intersection of structural forces is how populist-motivated controls on immigration (always a weakness in the hyper-globalization narrative) deprives developed countries of Summers’ recommended policy response to secular stagnation, which in a more open world would be a win-win for rich and poor countries alike, increasing wage rates and remittance revenues for the developing countries, replenishing the labor supply for rich countries experiencing low birth rates.

Illiberal Globalization

Economic weakness and rising nationalism (along with multipolarity) will not end globalization, but will profoundly alter its character and greatly reduce its economic and political benefits. Liberal global institutions, under American hegemony, have served multiple purposes, enabling states to improve the quality of international relations and more fully satisfy the needs of their citizens, and provide companies with the legal and institutional stability necessary to manage the inherent risks of global investment. But under present and future conditions these institutions will become the battlegrounds—and the victims—of geopolitical competition. The Trump Administration’s frontal attack on multilateralism is but the final nail in the coffin of the Bretton Woods system in trade and finance, which has been in slow but accelerating decline since the end of the Cold War. Future American leadership may embrace renewed collaboration in global trade and finance, macroeconomic management, environmental sustainability and the like, but repairing the damage requires the heroic assumption that America’s own identity has not been fundamentally altered by the Trump era (four years or eight matters here), and by the internal and global forces that enabled his rise. The fact will remain that a sizeable portion of the American electorate, and a monolithically proTrump Republican Party, is committed to an illiberal future. And even if the effects are transitory, the causes of weakening global collaboration are structural, not subject to the efforts of some hypothetical future US liberal leadership. It is clear that the US has lost respect among its rivals, and trust among its allies. While its economic and military capacity is still greatly superior to all others, its political dysfunction has diminished its ability to convert this wealth into effective power.13 It will furthermore operate in a future system of diffusing material power, diverging economic and political governance approaches, and rising nationalism. Trump has promoted these forces, but did not invent them, and future US Administrations will struggle to cope with them.

What will illiberal globalization look like? Consider recent events. The instruments of globalization have been weaponized by strong states in pursuit of their geopolitical objectives. This has turned the liberal argument on behalf of globalization on its head. Instead of interdependence as an unstoppable force pushing states toward collaboration and convergence around market-friendly domestic policies, states are exploiting interdependence to inflict harm on their adversaries, and even on their allies. The increasing interaction across national boundaries that globalization entails, now produces not harmonization and cooperation, but friction and escalating trade and investment disputes.14 The Trump Administration is in the lead here, but it is not alone. Trade and investment friction with China is the most obvious and damaging example, precipitated by China’s long failure to conform to the World Trade Organization (WTO) principles, now escalated by President Trump into a trade and currency war disturbingly reminiscent of the 1930s that Bretton Woods was designed to prevent. Financial sanctions against Iran, in violation of US obligations in the Joint Comprehensive Plan Of Action (JCPOA), is another example of the rule of law succumbing to geopolitical competition. Though more mercantilist in intent than geopolitical, US tariffs on steel and aluminum, and their threatened use in automotives, aimed at the EU, Canada, and Japan,15 are equally destructive of the liberal system and of future economic growth, imposed as they are by the author of that system, and will spread to others. And indeed, Japan has used export controls in its escalating conflict with South Korea16 (as did China in imposing controls on rare earth,17 and as the US has done as part of its trade war with China). Inward foreign direct investment restrictions are spreading. The vitality of the WTO is being sapped by its inability to complete the Doha Round, by the proliferation of bilateral and regional agreements, and now by the Trump Administration’s hold on appointments to WTO judicial panels. It should not surprise anyone if, during a second term, Trump formally withdrew the US from the WTO. At a minimum it will become a “dead letter regime.”18

As such measures gain traction, it will become clear to states—and to companies—that a global trading system more responsive to raw power than to law entails escalating risk and diminishing benefits. This will be the end of economic globalization, and its many benefits, as we know it. It represents nothing less than the subordination of economic globalization, a system which many thought obeyed its own logic, to an international politics of zero-sum power competition among multiple actors with divergent interests and values. The costs will be significant: Bloomberg Economics estimates that the cost in lost US GDP in 2019- dollar terms from the trade war with China has reached $134 billion to date and will rise to a total of $316 billion by the end of 2020.19

Economically, the just-in-time, maximally efficient world of global supply chains, driving down costs, incentivizing innovation, spreading investment, integrating new countries and populations into the global system, is being Balkanized. Bilateral and regional deals are proliferating, while global, nondiscriminatory trade agreements are at an end. Economies of scale will shrink, incentivizing less investment, increasing costs and prices, compromising growth, marginalizing countries whose growth and poverty reduction depended on participation in global supply chains. A world already suffering from excess savings (in the corporate sector, among mostly Asian countries) will respond to heightened risk and uncertainty with further retrenchment. The problem is perfectly captured by Tim Boyle, CEO of Columbia Sportswear, whose supply chain runs through China, reacting to yet another ratcheting up of US tariffs on Chinese imports, most recently on consumer goods:

We move stuff around to take advantage of inexpensive labor. That’s why we’re in Bangladesh. That’s why we’re looking at Africa. We’re putting investment capital to work, to get a return for our shareholders. So, when we make a wager on investment, this is not Vegas. We have to have a reasonable expectation we can get a return. That’s predicated on the rule of law: where can we expect the laws to be enforced, and for the foreseeable future, the rules will be in place? That’s what America used to be.20

The international political effects will be equally damaging. The four structural forces act on each other to produce the more dangerous, less prosperous world projected here. Illiberal globalization represents geopolitical conflict by (at first) physically non-kinetic means. It arises from intensifying competition among powerful states with divergent interests and identities, but in its effects drives down growth and fuels increased nationalism/populism, which further contributes to conflict. Twenty-first-century protectionism represents bottom-up forces arising from economic disruption. But it is also a top-down phenomenon, representing a strategic effort by political leadership to reduce the constraints of interdependence on freedom of geopolitical action, in effect a precursor and enabler of war. This is the disturbing hypothesis of Daniel Drezner, argued in an important May 2019 piece in Reason, titled “Will Today’s Global Trade Wars Lead to World War Three,”21 which examines the preWorld War I period of heightened trade conflict, its contribution to the disaster that followed, and its parallels to the present:

Before the First World War started, powers great and small took a variety of steps to thwart the globalization of the 19th century. Each of these steps made it easier for the key combatants to conceive of a general war.

We are beginning to see a similar approach to the globalization of the 21st century. One by one, the economic constraints on military aggression are eroding. And too many have forgotten—or never knew—how this played out a century ago.

…In many ways, 19th century globalization was a victim of its own success. Reduced tariffs and transport costs flooded Europe with inexpensive grains from Russia and the United States. The incomes of landowners in these countries suffered a serious hit, and the Long Depression that ran from 1873 until 1896 generated pressure on European governments to protect against cheap imports.

…The primary lesson to draw from the years before 1914 is not that economic interdependence was a weak constraint on military conflict. It is that, even in a globalized economy, governments can take protectionist actions to reduce their interdependence in anticipation of future wars.

In retrospect, the 30 years of tariff hikes, trade wars, and currency conflicts that preceded 1914 were harbingers of the devastation to come. European governments did not necessarily want to ignite a war among the great powers. By reducing their interdependence, however, they made that option conceivable.

…the backlash to globalization that preceded the Great War seems to be reprised in the current moment. Indeed, there are ways in which the current moment is scarier than the pre-1914 era. Back then, the world’s hegemon, the United Kingdom, acted as a brake on economic closure. In 2019, the United States is the protectionist with its foot on the accelerator. The constraints of Sino-American interdependence—what economist Larry Summers once called “the financial balance of terror”—no longer look so binding. And there are far too many hot spots—the Korean peninsula, the South China Sea, Taiwan—where the kindling seems awfully dry.

Multipolarity

We can define multipolarity as a wide distribution of power among multiple independent states. Exact equivalence of material power is not implied. What is required is the possession by several states of the capacity to coerce others to act in ways they would otherwise not, through kinetic or other means (economic sanctions, political manipulation, denial of access to essential resources, etc.). Such a distribution of power presents inherently graver challenges to peace and stability than do unipolar or bipolar power configurations,22 though of course none are safe or permanent. In brief, the greater the number of consequential actors, the greater the challenge of coordinating actions to avoid, manage, or de-escalate conflicts. Multipolarity also entails a greater potential for sudden changes in the balance of power, as one state may defect to another coalition or opt out, and as a result, the greater the degree of uncertainty experienced by all states, and the greater the plausibility of downside assumptions about the intentions and capabilities of one’s adversaries. This psychology, always present in international politics but particularly powerful in multipolarity, heightens the potential for escalation of minor conflicts, and of states launching preventive or preemptive wars. In multipolarity, states are always on edge, entertaining worst-case scenarios about actual and potential enemies, and acting on these fears—expanding their armies, introducing new weapon systems, altering doctrine to relax constraints on the use of force—in ways that reinforce the worst fears of others.

The risks inherent in multipolarity are heightened by the attendant weakening of global institutions. Even in a state-centric system, such institutions can facilitate communication and transparency, helping states to manage conflicts by reducing the potential for misperception and escalation toward war. But, as Waheguru Pal Singh Sidhu argues in his chapter on the United Nations, the influence of multilateral institutions as agent and actor is clearly in decline, a result of bottom-up populist/nationalist pressures experienced in many countries, as well as the coordination problems that increase in a system of multiple great powers. As conflict resolution institutions atrophy, great powers will find themselves in “security dilemmas”23 in which verification of a rival’s intentions is unavailable, and worst-case assumptions fill the gap created by uncertainty. And the supply of conflicts will expand as a result of growing nationalism and populism, which are premised on hostility, paranoia, and isolation, with governments seeking political legitimacy through external conflict, producing a siege mentality that deliberately cuts off communication with other states.

Finally, the transition from unipolarity (roughly 1989–2007) to multipolarity is unregulated and hazardous, as the existing superpower fears and resists challenges to its primacy from a rising power or powers, while the rising power entertains new ambitions as entitlements now within its reach. Such a “power transition” and its dangers were identified by Thucydides in explaining the Peloponnesian Wars,24 by Organski (the “rear-end collision”)25 during the Cold War, and recently repopularized and brought up to date by Graham Allison in predicting conflict between the US and China.26

A useful, and consequential illustration of the inherent challenge of conflict management during a power transition toward multipolarity, is the weakening of the arms control regime negotiated by the US and the Soviet Union during the Cold War. Despite the existential, global conflict between two nuclear armed superpowers embracing diametrically opposed world views and operating in economic isolation from each other, the two managed to avoid worst-case outcomes. They accomplished this in part by institutionalizing verifiable limits on testing and deployment of both strategic and intermediate-range nuclear missiles. Yet as diplomatically and technically challenging as these achievements were, the introduction of a third great power, China, into this twocountry calculus has proven to be a deal breaker. Unconstrained by these bilateral agreements, China has been free to build up its capability, and has taken full advantage in ramping up production and deployment of intermediate-range ground-launched cruise missiles, thus challenging the US ability to credibly guarantee the security of its allies in Asia, and greatly increasing the costs of maintaining its Asian regional hegemony. As a result, the Intermediate Nuclear Force treaty is effectively dead, and the New Start Treaty, covering strategic missiles, is due to expire next year, with no indication of any US–Russian consensus to extend it. The US has with logic indicated its interest in making these agreements trilateral; but China, with its growing power and ambition, has also logically rejected these overtures. Thus, all three great powers are entering a period of nuclear weapons competition unconstrained by the major Cold War arms control regimes. In a period of rapid advances in technology and worsening great power relations, the nuclear competition will be a defining characteristic of the next decade and beyond. This dynamic will also complicate nuclear nonproliferation efforts, as both the demand for nuclear weapons (a consequence of rising regional and global insecurity), and supply of nuclear materials and technology (a result of the weakening of the nonproliferation regime and deteriorating great power relations) will increase.

Will deterrence prevent war in a world of several nuclear weapons states, (the current nuclear powers plus South Korea, Iran, Saudi Arabia, Japan, Turkey), as it helped to do during the bipolar Cold War? Some neorealist observers view nuclear weapons proliferation as stabilizing, extending the balance of terror, and the imperative of restraint, to new nuclear weapons states with much to fight over (Saudi Arabia and Iran, for example).27 Others,28 examining issues of command and control of nuclear weapons deployment and use by newly acquiring states, asymmetries in doctrines, force structures, and capabilities between rivals, the perils of variable rates in transition to weapons deployment, problems of communication between states with deep mutual grievances, the heightened risk of transfer of such weapons to non-state actors, have grave doubts about the safety of a multipolar, nuclear-armed world.29 We can at least conclude that prudence dictates heightened efforts to slow the pace of proliferation, while realism requires that we face a proliferated future with eyes wide open.

The current distribution of power is not perfectly multipolar. The US still commands the world’s largest economy, and its military power is unrivaled by any state or combination of states. Its population is still growing, despite a recent decline in birth rates. It enjoys extraordinary geographic advantages over its rivals, who are distant and live in far worse neighborhoods. Its economy is less dependent on foreign markets or resources. Its political system has proven—up to now—to be resilient and adaptable. Its global alliance system greatly extends its capacity to defend itself and shape the world to its liking and is still intact, despite growing doubts about America’s reliability as a security guarantor. Based on these mostly material and historical criteria, continued American primacy would seem to be a good bet, if it chooses to use its power in this way.30

So why multipolarity? The clearest and most frequently cited evidence for a widening distribution of global power away from American unipolarity is the narrowing gap in GDP between the US and China. The IMF’s World Economic Outlook forecasts a $0.9 trillion increase in US GDP for 2019–2020, and a $1.3 trillion increase for China in the same period.31 Many who support the American primacy case argue that GDP is an imperfect measure of power, that Chinese GDP data is inflated, that its growth rates are in decline while Chinese debt is rapidly increasing, and that China does poorly on other factors that contribute to power—its low per capita GDP, its political succession challenges, its environmental crisis, its absence of any external alliance system. Yet GDP is a good place to start, as the single most useful measure and long-term predictor of power. It is from the overall economy that states extract and apply material power to leverage desired behavior from other states. It is true that robust future Chinese growth is not guaranteed, nor is its capacity to convert its wealth to power, which is a function of how well its political system works over time. But this is equally the case for the US, and considering recent political developments is not a given for either country.

As an alternative to measuring inputs—economic size, political legitimacy, technological innovation, population growth—in assessing relative power and the nature of global power distribution, we should consider outputs: what are states doing with their power? The input measures are useful, possibly predictive, but are usually deployed in the course of making a foreign policy argument, sometimes on behalf of a reassertion of American primacy, sometimes on behalf of retrenchment. As such, their objectivity (despite their generous deployment of “data”) is open to question. What is undeniable, to any clear-eyed observer, is a real decline in American influence in the world, and a rise in the influence of other powers, which predates the Trump administration but has accelerated into America’s free fall over the last four years. This has produced a de facto multipolarity, whether explainable in the various measures of power—actual and latent—or not. This decline results in part from policy mistakes: a reckless squandering of material power and legitimacy in Iraq, an overabundance of caution in Syria, and now pure impulsivity. But more fundamentally, it is a product of relative decline in American capacity—political and economic—to which American leadership is adjusting haphazardly, but in the direction of retrenchment/restraint. It is highly revealing that the last two American presidents, polar opposites in intellect, temperament and values, agreed on one fundamental point: the US is overextended, and needs to retrench. The fact that neither Obama nor Trump (up to this point in his presidency) believed they had the power at their disposal to do anything else, tells us far more about the future of American power and policy—and about the emerging shape of international relations—than the power measures and comparisons made by foreign policy advocates.

Observation of recent trends in US versus Russian relative influence prompts another question: do we understand the emerging characteristics of power? Rigorously measuring and comparing the wrong parameters will get us nowhere at best and mislead us into misguided policies at worst. How often have we heard, with puzzlement, that Putin punches far above his weight? Could it be that we misunderstand what constitutes “weight” in the contemporary and emerging world? Putin may be on a high wire, and bound to come crashing down; but the fact is that Russian influence, leveraging sophisticated communications/social media/influence operations, a strong military, an agile (Putin-dominated) decision process, and taking advantage of the egregious mistakes by the West, has been advancing for over a decade, shows no sign of slowing down, and has created additional opportunities for itself in the Middle East, Europe, Asia, Latin America, the Arctic. It has done this with an economy roughly the size of Italy’s. There are few signs of a domestic political challenge to Putin. His external opponents are in disarray, and Russia’s main adversary is politically disabled from confronting the problem. He has established Russia as the Middle East power broker. He has reached into the internal politics of his Western adversaries and influenced their leadership choices. He has invaded and absorbed the territory of neighboring states. His actions have produced deep divisions within NATO. Again, simple observation suggests multipolarity in fact, and a full explanation for this power shift awaiting future historians able to look with more objectivity at twenty-first-century elements of power.

When that history is written, surely it will emphasize the extraordinary polarization in American politics. Was multipolarity a case of others finding leverage in new sources of power, or the US underutilizing its own? The material measures suggest sufficient capacity for sustained American primacy, but with this latent capacity unavailable (as perceived, I believe correctly, by political leadership) by virtue of weakening institutions: two major parties in separate universes; a winnertake-all political mentality; deep polarization between the parties’ popular bases of support; divided government, with the Presidency and the Congress often in separate and antagonistic hands; diminishing trust in the permanent government, and in the knowledge it brings to important decisions, and deepening distrust between the intelligence community and policymakers; and, in Trump’s case, a chaotic policy process that lacks any strategic reference points, mis-communicates the Administration’s intentions, and has proven incapable of sustained, coherent diplomacy on behalf of any explicit and consistent set of policy goals.

Rising Nationalism/Populism/Authoritarianism

The evidence for these trends is clear. Freedom House, the go-to authority on the state of global democracy, just published its annual assessment for 2020, and recorded the fourteenth consecutive year of global democratic decline and advancing authoritarianism. This dramatic deterioration includes both a weakening in democratic practice within states still deemed on balance democratic, and a shift from weak democracies to authoritarianism in others. Commitment to democratic norms and practices—freedom of speech and of the press, independent judiciaries, protection of minority rights—is in decline. The decline is evident across the global system and encompasses all major powers, from India and China, to Europe, to the US. Right-wing populist parties have assumed power, or constitute a politically significant minority, in a lengthening list of democratic states, including both new (Hungary, Poland) and established (India, the US, the UK) democracies. Nationalism, frequently dismissed by liberal globalization advocates as a weak force when confronted by market democracies’ presumed inherent superiority, has experienced a resurgence in Russia, China, the Middle East, and at home. Given the breadth and depth of right-wing populism, the raw power that promotes it—mainly Russian and American—and the disarray of its liberal opponents, this factor will weigh heavily on the future.

The major factors contributing to right-wing populism and its global spread is the subject of much discussion.32 The most straightforward explanation is rising inequality and diminished intergenerational mobility, particularly in developed countries whose labor-intensive manufacturing has been hit hardest by the globalization of capital combined with the immobility of labor. Jobs, wages, economic security, a reasonable hope that one’s offspring has a shot at a better life than one’s own, the erosion of social capital within economically marginalized communities, government failure to provide a decent safety net and job retraining for those battered by globalization: all have contributed to a sense of desperation and raw anger in the hollowed-out communities of formerly prosperous industrial areas. The declining life expectancy numbers33 tell a story of immiseration: drug addition, suicide, poor health care, and gun violence. The political expression of such conditions of life should not be surprising. Simple, extremist “solutions” become irresistible. Sectarian, racial, regional divides are strengthened, and exclusive identities are sharpened. Political entrepreneurs offering to blow up the system blamed for such conditions become credible. Those who are perceived as having benefited from the corrupt system—long-standing institutions of government, foreign countries and populations, immigrants, minorities getting a “free ride,” elites—become targets of recrimination and violence. The simple solutions of course, don’t work, deepening the underlying crisis, but in the process politics is poisoned. If this sounds like the US, it should, but it also describes major European countries (the UK, France, Italy, Germany, Poland, Hungary, the Czech Republic), and could be an indication of things to come for non-Western democracies like India.

We have emphasized throughout this chapter the interaction of four structural forces in shaping the future, and this interaction is evident here as well. Is it merely coincidence that the period of democratic decline documented by Freedom House, coincides precisely with the global financial and economic crisis? Lower growth, increasing joblessness, wage stagnation, superimposed on longer-term widening of inequality and declining mobility, constitute a forbidding stress test for democratic systems, and many continue to fail. And if we are correct about secular stagnation, the stress will continue, and authoritarianism’s fourteen-year run will not be over for some time. The antidemocratic trend will gain additional impetus from the illiberal direction of globalization, with its growth suppressing protectionism, weaponization of global economic exchange, and weakening global economic institutions. Multipolarity also contributes, in several ways. The former hegemon and author of globalization’s liberal structure has lost its appetite, and arguably its capacity, for leadership, and indeed has become part of the problem, succumbing to and promoting the global right-wing populist surge. It is suffering an unprecedented decline in life expectancy, and recently a decline in the birth rate, signaling a degree of rot commonly associated with a collapsing Soviet Union. While American politics may once again cohere around its liberal values and interests, the time when American leadership had the self-confidence to shape the global system in its liberal image is gone. It may build coalitions of the like-minded to launch liberal projects, but there will be too much power outside these coalitions to permit liberal globalization of the sort imagined at the end of the Cold War. In multipolarity, the values around which global politics revolve will reflect the diversity of major powers, their interests, and the norms they embrace. Convergence of norms, practices, policies is out of the question. Global collective action, even in the face of global crises, will be a long shot. To expect anything else is fantasy

Unbrave New World and Future Challenges

At the outset of this chapter we described these structural forces as interacting to produce more conflict and diminished prosperity. We also predicted a world with shrinking collective capacity to address new challenges as they arise. What specifically will such a world look like? We address below three principal challenges to global problem solving over the next decade.

Interstate Conflict

In the world experienced by most readers of this volume, conflict is observed within weak states, sometimes promoted by regional competitors, by terrorist groups, or by great powers, acting through surrogates or by indirect means. Sometimes, as in Syria, this conflict spills over to contiguous states and contributes to regional instability, and challenges other regions to respond effectively, a challenge that Europe has not met. Much of this will continue, but the global significance of such local conflicts will be greatly magnified by increasing great power conflict, which will feed—rather than manage or resolve—local instabilities and will in turn be exacerbated by them. Great powers will jockey for advantage, support their local partners, escalate preemptively. Conflicts initially confined to failing states or unstable regions will be redefined by great powers as global in scope and significance.

This tendency of states to view local conflicts in the context of a zero-sum, global struggle for power is familiar to students of the Cold War, but now with the additional challenges to collective action, expanded uncertainty and worst-case thinking associated with the power transition to multipolarity. We can easily observe increased conflict in US–China relations, as we will in US–Russia relations as future US administrations try to make up for ground lost during the Trump presidency, especially in the Middle East. We can observe it among powerful states with mutual historical grievances, now with a weakening presence of the hegemonic security guarantor and having to consider the renationalization of their defense: Japan-South Korea, Germany-France. We can observe it among historical rivals operating in rapidly changing security landscapes: India-China. We can observe it within the Middle East, as internal rivalries are appropriated by regional powers in a contest for regional dominance. We can observe it clearly in Syria, where the regime’s violent suppression of Arab Spring resistance led to all-out civil war, attracted outside support to proxy forces by aspiring regional hegemons Saudi Arabia and Iran, enabled the rise of ISIS, and eventually to great power intervention, principally by Russia. In a world of effective great power collaboration or American primacy, the Syrian civil war might have been settled through power sharing or partition, or if not, contained within Syria. The collapse of Yugoslavia, occurring during a period of US “unipolarity” and managed effectively, demonstrates the possibilities. Instead, with the US retrenching, Middle East rivals unconstrained by great powers, and great power competition rising, the Syria civil war was fed by outside powers, then metastasized into the region, and—in the form of refugee flows—into Europe, fundamentally altering European politics. Libya may be at the early stages of this scenario.

This is not the end of the Syria story. Russia has established itself as a major player in Syria and the Middle East’s power broker, the indispensable country with leverage throughout the region. China is poised to reap the financial and power benefits of Syrian reconstruction. The US has just demonstrated, in its act of war against the Iranian regime, its willingness, without consultation, to put its allies’ security in further jeopardy, accentuating the risks of security ties with Washington and generating added opportunities for Russia and China. The purpose here is not to critique US policy, but to point out the dramatically shifting power balance in a critical region, toward multipolarity. The dangers of such a shift will become apparent as some future US president attempts to reassert US influence in the region and finds a crowded playing field.

Can a multipolar distribution of power among several states whose interests, values, and political practices are divergent, all experiencing bottom-up nationalist pressures, all seeking advantages in the oversupply of regional instability, be made to work? I think not. Will this more dangerous world descend into direct military confrontation between great powers, and could such confrontation lead to use of nuclear weapons? Here the question becomes, what will this more dangerous world actually look like; what instruments of coercion will be available to states as technology change accelerates; how will states employ these instruments; how will deterrence work (if at all) among several states with large but unequal levels of destructive capacity, weak command, and control, disparate— or opaque—strategies and simmering rivalries; can conflict management work in a world of weak institutions? The collapse of the Cold War era nuclear arms control regime, the threat to the Non-Proliferation Treaty represented by the demise of the JCPOA, and multiple indications of an accelerating nuclear arms race among the three principle powers, augurs badly. Given the structural forces at play, and without predicting the worst, we are indeed entering perilous times.

Global Poverty and Inequality

Despite the challenges of volatility and disruptive change inherent in globalization, the world under American liberal leadership has managed a dramatic reduction of extreme poverty. According to World Bank estimates, in 2015, 10 percent of the world’s population lived on less than $1.90 a day, down from nearly 36 percent in 1990.34 In fact, as of September 2018, half the world is now middle class or wealthier.35 The uneven success of the UN Millennium Development Goals (MDGs) exemplifies this achievement, and demonstrates what is possible when open markets are managed through strong global institutions, effective leadership and interstate collaboration. What this liberal hegemonic system did not achieve, however, was a fair distribution of the gains from globalization within states, and among those states that for various reasons were not full participants in this system.

This record of partial achievement leaves us with a full agenda for the next fifteen years, but without the hegemonic leadership, strong institutions, ascendant liberalism or robust global growth that enabled previous gains. There are powerful reasons to question the sustainability of these poverty reduction gains, leading to doubts about the realization of the Sustainable Development Goals, which have replaced the MDGs as global development targets.36 (See Jens Rudbeck’s chapter and Sidhu’s UN chapter for SDGs). Skeptics have pointed to slowing global growth, specifically in China, whose demand for imported commodities was a major factor in developing country growth and job creation; growing protectionism in developed country markets, fueled by bottom-up forces of nationalism, and from top-down by a weakened global trading regime and increased geopolitical rivalry; the effects of accelerating climate change on agriculture, migration and communal conflict in poor countries; and the growth burst among poor countries from the rapid transition to more efficient use of resources, a transition that is now slowing down.37

Perhaps the greatest concern in this scenario is a general deterioration in the developing country foreign investment climate. Foreign direct investment (FDI) has been a major contributor to growth, job creation, and poverty alleviation among poor countries. It has incentivized growthfriendly policies, reduced corruption, introduced technology and effective management practices, and linked poor countries to foreign markets through global supply chains.38 It has stimulated growth of indigenous manufacturing and service companies to supply new foreign investments.

It has been the major cause of economic convergence between rich and poor countries. From 2000 to 2009, developing economies’ growth rates were more than four percentage points higher than those of rich countries, pushing their share of global output from just over a third to nearly half.39 However, FDI flows into poor countries are imperiled by the structural forces discussed here. Political instability arising from slower growth and environmental stress will increase investors’ perception of higher risk, reinforcing their developed country bias. Protectionism among developed countries will threaten the global market access upon which manufacturing investment in developing countries is premised, causing firms to pare back their global supply chains. As companies retrench from direct investment in poor countries, the appeal to those countries of Chinese debt financed infrastructure projects, under the Belt-Road Initiative with little or no conditionality, but at the risk of “debt traps,” will increase.

Global Warming

The question posed at the beginning of this section is whether the international system, evolving toward multipolarity and rising nationalism, will find the collective political capital to confront challenges as they arise. Global warming is the mother of all challenges, and the weakness in the system’s capacity to respond is clear. With the two major political/economic powers and greenhouse gas emitters locked in deepening geopolitical conflict (and with one of them locked in climate change denial, possibly through 2024), the chances of significantly slowing global warming or even ameliorating its effects are very slim. We are reduced to the default option, nation-specific adaptation to climate change, which will impose rising human, political and economic costs on all, and will widen the gap between rich countries with adaptive capacity (of varying degrees), and the poor, who will suffer deteriorating economic, political, and social conditions. (For a contrary, optimistic view see Michael Shank’s chapter, which credits new actors—like cities—as playing a more constructive role in climate mitigation.) This would bring to a close liberal globalization’s greatest achievement; the raising of 1.1 billion people out of extreme poverty since 1990,40 with all its associated gains in quality of life (in the WHO Africa region, for example, life expectancy rose by 10.3 years between 2000 and 2016, driven mainly by improvements in child survival and expanded access to antiretrovirals for treatment of HIV).41

Several forces are at work here. The problem itself is graver—in magnitude and in rate of worsening—than predicted by climate scientists. The UN Intergovernmental Panel on Climate Change (IPCC), the major source of information on global warming, has consistently underpredicted the rate of climate deterioration. This holds true even for its “worst-case scenarios,” meaning that what was meant as a wake-up call has in fact reinforced complacency.42 (see Michael Shank’s chapter for further discussion of climate change). The IPCC, in its 2019 report, has tried to undo the damage by emphasizing the acceleration in the rate of warming and its effects, the only partially understood dynamic of climate change, and—given wide uncertainty—the possibility of unpleasant surprises yet to come. This strengthens the scientific case for urgency—to both severely limit greenhouse gas emissions, and to increase investment in ameliorating the effects.

Unfortunately, the crisis comes at a moment when the climate for collective action is ice cold. Geopolitical competition incentivizes states to out produce each other, regardless of the environmental effects. Multipolarity complicates collective action. Economic stagnation mandates job creation, making regulation politically toxic. Bottom-up nationalism/populism causes states to pursue “relative gains,” meaning that if the nation is seen as gaining in a no-holds-barred economic competition with others, the negative environmental effects can be tolerated. A post-Trump presidency would help, with the US rejoining the Paris Agreement, and lending its weight to tighter regulation, increased R and D, and stronger economic incentives to reduce carbon emissions. Keep in mind, however, that President Obama was fully behind such efforts, but in a deeply polarized America was unable to implement measures needed to fulfill the Paris obligations through legislation, and his executive orders to do this were swiftly overturned by Trump.

Conclusion

It may be tempting to hope that post-Trump, the US can regain its global leadership and exert its considerable power in a liberal direction, but with enough self-awareness of its relative decline to share responsibility with others. This was, I believe, the broad direction of the Obama strategy, evidenced by the JCPOA and the Trans-Pacific Partnership: liberal, collective solutions to global problems, as US dominance receded.

This would constitute an optimistic scenario, and it confronts two major problems: can US internal politics support it (can, for example, the country legislate controls on carbon, essential for the global credibility and durability of such commitments); and is the world ready to reengage with American leadership, given the damage to its reputation and the structural forces discussed in this chapter?

My educated guess is no, on both counts. The rot within is extensive, the concrete evidence clear in the economic inequality/immobility numbers, the life expectancy numbers, the deep political polarization, between the two major parties, between regions, between cities and rural areas. We are in fact a long way from fitness for global leadership, and the recognition of this by others will accelerate the decline of American influence. The rest of the world is well on its way toward adjusting to post-American hegemony, some by renationalizing their defense, or by cutting deals with adversaries, by building new alliances or by seizing new opportunities for influence in the vacuum left by American retrenchment. The evidence for this will accumulate. Observe the current and emerging Middle East, where all these post-hegemonic strategies are visible.

#### Expectation of strong growth stops nuclear war and nationalist bloc formation.

Kampf ’20 [David; June 16; PhD Fellow at the Center for Strategic Studies at The Fletcher School, MA in International Affairs from Columbia University; World Politics Review, “How COVID-19 Could Increase the Risk of War,” https://www.worldpoliticsreview.com/articles/28843/how-covid-19-could-increase-the-risk-of-war]

Other theories posit that economic bonds between countries have limited wars in recent decades. Dale Copeland, a professor of international relations at the University of Virginia, has argued that countries work to preserve ties when there are high expectations for future trade, but war becomes increasingly possible when trade is predicted to fall. If globalization brought peace, the recent wave of far-right nationalism and populism around the world may increase the chances of war, as tariffs and other trade barriers go up—mostly from the United States under President Donald Trump, who has launched trade wars with allies and adversaries alike.

The coronavirus pandemic immediately elicited further calls to reduce dependence on other countries, with Trump using the opportunity to pressure U.S. companies to reconfigure their supply chains away from China. For its part, China made sure that it had the homemade supplies it needed to fight the virus before exporting extras, while countries like France and Germany barred the export of face masks, even to friendly nations. And widening economic inequalities, a consequence of the pandemic, are not likely to enhance support for free trade.

This assault on open trade and globalization is just one aspect of a decaying liberal international order, which, its proponents argue, has largely helped to preserve peace between nations since World War II. But that old order is almost gone, and in all likelihood isn’t coming back. The U.N. Security Council appears increasingly fragmented and dysfunctional. Even before Trump, the world’s most powerful country ratified fewer treaties per year under the Obama administration than at any time since 1945.

Trump’s presidency only harms multilateral cooperation further. He has backed out of the Paris Agreement on climate change, reneged on the Iran nuclear deal, picked fights with allies, questioned the value of NATO and defunded the World Health Organization in the middle of a global health crisis. Hyper-nationalism, rather than international collaboration, was the default response to the coronavirus outbreak in the U.S. and many other countries around the world.

It’s hard to see the U.S. reluctance to lead as anything other than a sign of its inevitable, if slow, decline. The country’s institutionalized inequalities and systemic racism have been laid bare in recent months, and it no longer looks like a beacon for others to follow. The global balance of power is changing. China is both keen to assert a greater leadership role within traditionally Western-led institutions and to challenge the existing regional order in Asia. Between a rising China, revanchist Russia and new global actors, including non-state groups, we may be heading toward an increasingly multipolar or nonpolar world, which could prove destabilizing in its own right.

Finally, the pacifying effect of nuclear weapons could be waning. While vast nuclear arsenals once compelled the United States and the Soviet Union to reach arms control agreements, old treaties are expiring and new talks are breaking down. Mistrust is growing, and the chance of an unwanted U.S.-Russia nuclear confrontation is arguably as high as it has been since the Cuban missile crisis.

The theory of nuclear peace may no longer hold if more countries are tempted to obtain their own nuclear deterrent. Trump’s decision to abandon the Iran nuclear deal, for one thing, has only increased the chance that Tehran will acquire nuclear weapons. It’s almost easy to forget that, just a few short months ago, the United States and Iran were one miscalculation or dumb mistake away from waging all-out war. And despite Trump’s efforts to negotiate nuclear disarmament with Kim Jong Un’s regime in Pyongyang, it is wishful thinking to believe North Korea will give up its nuclear weapons. At this point, negotiators can only realistically try to ensure that North Korea’s nuclear menace doesn’t get even more potent.

In other words, by turning inward, the United States is choosing to leave other countries to fend for themselves. The end result may be a less stable world with more nuclear actors.

If leaders are smart, they will take seriously the warning signs exposed by this global emergency and work to reverse the drift toward war.

If only one of these theories for peace were worsening, concerns would be easier to dismiss. But together, they are unsettling. While the world is not yet on the brink of World War III and no two countries are destined for war, the odds of avoiding future conflicts don’t look good.

The pandemic is already degrading democracies, harming economies and curtailing international cooperation, and it also seems to be fostering internal instability within states. Rachel Brown, Heather Hurlburt and Alexandra Stark argue that the coronavirus could in fact sow more civil conflict. If this proves accurate, the increase in civil wars is likely to lead to more external meddling, and these next proxy wars could soon precipitate all-out international conflicts if outsiders aren’t careful. With the usual deterrents to conflict declining around the world, major wars could soon return.

#### Serial collusion devastates innovation in the chemical sector.

Kovacic et al. ’21 [William, Robert Marshall, and Michael Meurer; 2021; Global Competition Professor of Law and Policy at George Washington University Law School; Distinguished Professor of Economics at Pennsylvania State University; Professor of Law at Boston University; Boston University School of Law Research Paper Series, “Patents and Price Fixing by Serial Colluders,” No. 21]

In a recent article on price fixing, we coined the term “serial colluder” to designate multi-product firms that have participated in many cartels, involving a range of participants, and initiated at different dates.15 Several chemical firms meet this definition because of their participation in at least thirty different chemical cartels spanning at least three decades.16 Our earlier article also addressed the business model of serial colluders and the failure of anti-cartel law to deter such behavior. In some cases, weak monitoring and high-powered incentive payments to product division managers may have fostered multiple cartels without encouragement from, or even contrary to the instructions of, upper management. This “rogue manager” explanation of serial collusion is often invoked by corporate directors seeking a story that deflects blame away from them. A more troubling explanation for serial collusion is that price fixing is an integral part of the business model of certain firms, and high-level managers advocate for and assist with collusion throughout the firm. We believe serial colluders in certain industries have run “portfolios of cartels.” In support of this “business model” explanation, in previous work we presented various kinds of indirect evidence that serial colluders in the chemical industry have indeed run a portfolio of cartels.17 Unaddressed in that previous work is an examination of how serial colluders may use patents and patent licensing schemes to initiate or maintain a cartel.

In Section I of this paper, we find that serial colluders increased patenting during the duration of their cartels, which is consistent with the theory that these firms use new patents to support cartelization. The magnitude of this increase is above and beyond incremental increases in patenting over time. We also find that “core” serial colluders (but not other major serial colluding chemical firms) increased patenting on products that they did not produce but that were being cartelized by their fellow colluders, which is consistent with the view that serial colluders engage in reciprocal practices across distinct markets.18 On the whole, our analysis of patenting practices for serial colluders in the chemical space suggests ongoing use of patents to initiate or maintain cartels, a practice that may apply to other industries with serial colluders as well.

Finding that the empirical data support our hypothesis of serial colluders using patents to create and maintain cartels, we next probe in Sections II and III reasons for why this conduct might evade agency enforcement and effectively help to coordinate cartels. Unlike the older cartels that openly used patents to directly restrain output, modern serial colluders running a portfolio of cartels potentially use patents in ways that are indirect and less likely to be noticed by private plaintiffs and government enforcers. We then explore how cartel participants in the modern era (excepting pay-for-delay cases like Actavis) appear to use patents to deter entry into cartelized markets, facilitate intrafirm communications and actions in support of collusive conduct, and communicate with other serial colluders about their portfolio of cartels under the guise of discussing their portfolio of patent licenses.

For the remainder of the Article, we discuss how the existing antitrust jurisprudence regarding patents and price fixing requires major upgrades to account for the dramatic modern improvements in our understanding of the economics of collusion. In older cases, judges recognized that firms could use patent licenses directly to restrict output, raise prices, or boost competitors’ marginal costs, 19 but they may not have appreciated the many indirect ways that patents can increase cartel stability and profitability. As discussed in greater detail below, patents provide an avenue for ongoing communication among rivals about output and pricing. Patent pools and cross-licensing arrangements are especially useful for organizing cartels across product types. Furthermore, licensing regimes may permit a firm to organize supportive resources within the firm without raising legal compliance concerns.

Anticipating these benefits to cartel formation and maintenance, this Article goes on to suggest that serial colluders may engage in strategic patenting. That is, they procure patents to advance cartel goals rather than to promote innovation. We present data on global patent procurement by price fixers in the chemical industry that is consistent with this view. Importantly, firms managing a portfolio of cartels can use patents in a reciprocal way to stabilize cartels across markets where not all firms participate as producers in each market. Within the network of chemical cartels, for example, we see evidence that certain firms use patents to promote cartels in markets for products they do not produce. Firms may use the threat of a patent lawsuit to punish deviators and discourage outsiders from attempting to enter a cartelized market. They may also use patent licenses to audit licensee sales and monitor compliance with cartel rules. One firm might perform such a service for other firms in the collusive network with the expectation that the non-participant would get similar help managing their own portfolio of cartels from other serial colluders in the future.

Further, in this Article, we probe deeply into the ways serial colluders can coordinate their patent practices to enhance cartel profits and stabilize their cartels. Our previous work on serial collusion documented that modern anti-collusion enforcement has not adequately deterred massive, prolonged multi-market price-fixing schemes.20 We also explained how various forms of reciprocity among serial colluders increased their cartel profits and made cartels more resilient.21 We expand on this topic with respect to the use of patents for cartelization, which we touched on only briefly in previous work.

This Article also describes gaps in existing antitrust enforcement and scholarly analysis of patenting practices. Recognition of serial collusion helps us to identify further flaws in the conventional treatment of patent licenses that allegedly facilitate price fixing. As one example, case law favors vertical patent licenses by applying rule of reason analysis to restrictions that could earn per se condemnation if organized as horizontal licenses.22 Such deference stems partly from worries that anti-collusion enforcement could weaken returns to patents and discourage research and innovation, as well as concerns that there may be legitimate reasons for suppliers, manufacturers, retailers to coordinate some activities. Yet, past practice of serial colluders show that firms can and do evade per se condemnation by simply organizing a middle man to stand as an upstream patent pool organizer. Thus, we reject such deference for vertically organized patent licenses in the context of serial colluders that are managing a portfolio of cartels, because what appears to be a vertical relationship is often part of the network of connections among serial colluders. Similarly, the leading scholarly commentary on patents and price fixing suggests that socially desirable licenses can be sorted from socially harmful licenses by determining whether significant rents flow to the licensor.23 This test may be effective in the context of an isolated cartel affecting a single market.24 As we explain in Section IV, this test has little or no value in the context of serial collusion where the firms are managing a portfolio of cartels.

Finally, in this Article, we provide additional policy recommendations tailored to the abuse of patents by serial colluders. Our earlier work lays out various reforms to anti-collusion policy that could mitigate the harms of serial collusion. In Section V, we go further and explain how certain patent-related behaviors by firms that do not participate directly in cartelizing a particular market can be used to infer collusion in that market (when the outsider is part of a network of serial colluders). We also discuss penalties and liability that antitrust and patent agencies should impose on firms that use their patents to facilitate collusion by others. Specifically, we argue for generous application of the patent misuse defense to render unenforceable patents used to facilitate price fixing.25 Entry would be easier and patent-based cartel punishments would be eliminated if cartel patents are left unenforceable. Finally, we identify possible adjustments in the institutional arrangements by which the federal antitrust enforcement agencies address the use of patents and patent licensing to facilitate collusion.

This Article is organized as follows. Section I presents empirical evidence that serial collusion is a serious problem, that serial colluders in the chemical industry use the patent system intensively in ways that suggest strategic patenting, and that their patenting behavior is consistent with their use of patents to enhance multi-market price fixing. Section II considers the evolution of antitrust doctrine and policy related to patent assertion and licensing as collusive devices. Notwithstanding existing strictures, this section reviews how patent practices can facilitate cartelization. Section III turns to the role that patents can play in supporting serial collusion. Section IV discusses the modernization of doctrines related to patents and price fixing in response to the threat of serial collusion. Section V offers policy recommendations and additional concluding comments.

I. Serial Collusion and Patents: Case Study in the Global Chemical Industry

Serial collusion in the chemical industry dates back to the 1880s and has reappeared in most decades since then.26 German chemical firms have been prominent price-fixers and often cartel ring-leaders, but they have been joined by chemical firms from the United States, England, France, Belgium, the Netherlands, Canada, Switzerland, South Korea, and Japan.27 Dozens of different chemical products have been affected by price fixing at some point.28 Historically, some of these collusive agreements were regional; others were global. Some were short-lived; others spanned decades. This history, and the specific role of patents to instituting and maintaining cartels in the global chemicals market, is described below.

A. Historical and Modern Cartelization of the Global Chemical Industry

Patents played a significant role in chemical cartels during the first half of the twentieth century. 29 Margaret Levenstein observes that “[d]uring most of the 30 years preceding World War I, bromine producers in the United States and Europe colluded, pooling output, dividing up markets, and raising prices.”30 In the period leading up to World War II, German chemical firms engaged in a variety of practices that Heinrich Kronstein has called “monopolizing by patents.” 31 One technique employed by the “combine” of chemical companies was to direct the research arm of each participant to procure as many patents as possible, to use them for strategic ends.32 From his study of patents and cartelization in 1920s Germany, Kronstein reported that “[m]ore and more the chemical industry began to apply for patents on practically everything. The research laboratories of the few remaining chemical works, connected among themselves by cartel and working agreements, systematically studied entire fields and closed them by a large number of patents.”33 In fields such as plastics and pharmaceuticals, “[e]ach publication in any chemical review or each patent application of any applicant in any country was given to the staff of the research laboratory to find anything that could be patented, no matter if the patent was a patent of evasion or supplement or protection against other inventors.”34 This phenomenon Kronstein described resembles the pattern of recent patenting behavior in the chemical sector we document below—where patenting activity by cartel participants increases dramatically during the period of illegal collaboration for the purpose of consolidating market share for existing firms and keeping out entrants.35

A second method documented by Kronstein and other researchers involves the extensive use of patent licensing agreements among major U.S. and foreign chemical producers and their subsidiaries to establish effective networks for global cartelization.36 Kronstein reports that in the decades leading up to World War II, “[t]he participation of an American enterprise in a world cartel chiefly through the device of patent exchange became very common.”37 In 1946, George Stocking and Myron Watkins reported “that a division of market territories for products coming within the scope of [cartel] patents and secret processes in a given field usually entail[ed] a complete division of territories for all related products.”38

A third method of cartelization involved the use of multiple licensing arrangements to cartelize entire domestic markets. In the late 1930s, the DOJ successfully challenged Ethyl Gasoline Company for creating an elaborate system of licensing arrangements for the production and use of tetra-ethyl lead to stabilize prices for motor fuel. 39 In another prominent American example of the technique applied outside the chemical sector, in the 1940s, the DOJ prosecuted United States Gypsum for using minimum price terms in patent licenses to cartelize the gypsum wallboard industry.40 For about a decade, Gypsum had granted licenses with largely identical price restrictions to nearly all of the industry’s numerous firms.41 In upholding the government’s challenge to Gypsum’s licensing terms, the Supreme Court observed, “the industry is completely regimented, the production of competitive unpatented products suppressed, a class of distributors squeezed out, and prices on unpatented products stabilized.”42

The rash of chemical industry cartelization has continued to modern times. In the three decades since 1980, the European Commission (EC) prosecuted chemical producers for collusion in 32 separate markets. 43 Notable American antitrust cases brought against chemical producers during this period ended cartels in the markets for lysine, citric acid, and vitamin C. 44 Since 2010, the Korean Fair Trade Commission (KFTC) fined participants in a chemical additives cartel. 45 Today, the EC is investigating an ethylene cartel, 46 and a massive investigation of serial collusion by generic drug companies is ongoing in the United States.47 Whereas the scope of these investigations has not focused on what role patents may have played in helping to facilitate these cartels, we suspect that patents did play a role.48 We explore this conjecture by examining the patenting behavior of colluding firms before, during, and after agency enforcement to explore whether these firms may have pursued patents for strategic ends.

#### Extinction.

Danielpour ’14 [Steven; April 2014; Director of Specifications at HOK, Professor at the Pratt Institute; PaintSquare, “Sustainable Coatings: Shifting the Paradigm,” https://www.paintsquare.com/archive/?fuseaction=view&articleid=5271]

New technologies and processes will help deliver the innovations needed to respond to mankind’s greatest challenges, says HOK’s firmwide director of specifications.

Whether you’re an architect or facility owner interested in ensuring healthy buildings and communities, a contractor navigating the many shades of “green” coatings or a supplier responding to market demand for these coatings, sustainability matters.

But what makes a coating “sustainable” in the built environment, and why should we care?

Wikipedia defines sustainability as “a characteristic of a process or state that can be maintained at a certain level indefinitely.” Production, distribution and application of sustainable coatings must meet current needs without compromising our ecosystems’ ability to sustain future populations.

Continuing to build the way we have built, using the materials we have used for centuries, is no longer viable in light of diminishing energy, water and other resources. Key megatrends, including population growth, climate change and a proliferation of information, make sustainable coatings all the more critical.

So it’s exciting to see the industry responding with advanced technologies that are healthier for building occupants and the environment, while achieving high performance and durability. We see it in such innovations as the newest generation of PVDF (polyvinylidene fluoride) coatings, polysiloxane coating systems, advanced anti-microbials and more.

And just ahead we can expect to see phase-changing coatings that will respond chemically to cooler or warmer conditions, for instance, to improve energy efficiency in the building envelope. We may see roofing materials that reflect and absorb heat as appropriate, using phase-changing materials and nanotechnology.

Such cutting-edge technologies, along with processes that reduce waste, reuse byproducts and allow reformulation into new products, promise game-changing improvements for coatings.

Let’s take a closer look at the drivers that will make sustainable coatings increasingly important, and the processes and technologies on the horizon.

Responding to Dwindling Resources

The logic is simple: If we continue to consume natural resources faster than they can be replenished, and if we produce wastes for future generations to deal with, we’ll have a harder and harder time maintaining life on Earth as we know it.

Scientific research on species extinction makes it clear that human survival depends on maintaining our ecological cycle, as well as those of other species and their habitats. Yet we’re barreling like a runaway train toward depleting some key resources.

Petroleum: Petrochemicals, a necessary feedstock for high-performance coatings, derive from fossil fuels that took millions of years to create; they are not readily replenished. Sustainable resource management requires that we conserve irreplaceable resources through closed-loop manufacturing, reusing manufacturing byproducts and recycling waste into new products.

Water Resources: Only 3 percent of the Earth’s water is potable, and most of this supply is locked in the polar ice cap. Just 0.003 percent of the world’s water is readily available for human consumption, and 16 percent of that is used to manufacture building materials and construct buildings. Worse yet, due to pollution, 40 percent of streams, 45 percent of lakes and 50 percent of estuaries in the United States were deemed not clean enough to support fishing and swimming in a 2000 Environmental Protection Agency study. The Index of Watershed Indicators reports that only 15 percent of our watershed has relatively good water quality.

Forests: Rain forests play an important role in maintaining Earth’s air quality, absorbing carbon dioxide emissions and VOCs (volatile organic compounds), while replenishing the air with oxygen. Statistics show that the annual rate of global deforestation is equal to an area the size of the state of Georgia. This is critical, because it has been estimated that when more than 70 percent of an ecosystem is lost, the remainder may be unable to sustain the environment needed for survival.

Waste: The United States generates enough garbage daily to fill 63,000 garbage trucks, which, lined up, would stretch 400 miles from Los Angeles to San Francisco. The building industry accounts for 20 percent of this waste stream.

Energy: The U.S. Department of Energy estimates that improvements in U.S. building energy efficiency using existing technology could save $20 billion. Forty percent of the world’s energy is used to construct and operate buildings.

The numbers are grim, but designers and suppliers have real options for countering these trends. We can employ what I like to call the Seven Principles of Sustainable Design:

Use Low-Impact Materials: Select non-toxic, sustainably produced or recycled materials that require little energy to process.

Promote Energy efficiency: Use less energy to manufacture more efficient products.

Select for Quality and Durability: Use durable, longer-lasting and better-functioning products to minimize replacement frequency.

Design for Reuse and Recycling: Design products, processes and systems for performance in a commercial “afterlife.”

Employ Bio-Mimicry: Use scientific data to redesign industrial systems along biological lines, enabling the constant reuse of materials in continuous closed cycles.

Substitute for High-Use Service: Shift modes of consumption from single ownership to public/shared ownership (e.g., private automobile to car-sharing service). Promote minimal resource use per unit of consumption.

Choose Renewable Sources: Use materials extracted from nearby (local or bioregional), sustainably managed renewable sources that can be composted (or fed to livestock) when usefulness has been exhausted.

Responding to a Changing Society

Beyond the challenges we face in conserving scarce resources, a few key megatrends underscore the importance of sustainable coatings.

Population Growth: World population doubled from 2.5 billion in 1950 to 5 billion in 1990; it is projected to reach 9.8 billion in 2050. The population is also shifting from rural areas to major metropolitan areas, with people migrating for better employment, commerce and quality of life. New construction will be required to support growth and urbanization. We’ll need to replace, upgrade, repurpose and conserve existing structures and infrastructures.

Climate Change: Once mislabeled “global warming,” the significant, lasting change from relatively mild, predictable weather patterns to more unpredictable patterns increasingly will affect industrialized farming and dense urban populations. We’ll see more pressure to produce materials, products and assemblies that can withstand extreme variances in weather. Basic code-compliant solutions that are “good enough” today will no longer be acceptable.

We’re now designing disaster-mitigation plans and hardening essential facilities and infrastructure, as new codes require mitigation of rising water levels and storms we once saw every 100 years.

We can expect to see carbon dioxide emissions regulated, promoting net-zero buildings whose every feature is designed to reduce energy use and associated carbon emissions.

Greater emphasis will be placed on energy efficiency and energy recovery, as well as water-resource management and conservation.

Information Explosion: Information is growing exponentially, and a corollary increase in access to this information through the Internet means that people are more informed than ever about optimum human health and the risks associated with exposure to chemicals. We pore over studies seeking to define the “tipping point” for toxemia in terms of parts per billion of key compounds. We worry about information that links exposure to changes of DNA affecting future generations.

These health concerns are driving changes that have tremendous implications for building materials.

* New Regulations: States increasingly introduce regulations designed to control exposure and assure public health. The International Green Construction Code is now used for baseline sustainability in regular building codes.
* VOC Limits: VOCs are regulated on the West Coast via the South Coast Air Quality Management District, and on the East Coast via the Ozone Transport Commission. Recent changes in California have lowered VOC limits to a maximum of 50 grams per liter in coatings.
* New Organizations: The Living Building Challenge introduced a chemical “Red List” banning hazardous chemicals from use on projects.
* More Transparency: As a result of requirements in LEED v4 for product transparency, manufacturers of products used on LEED projects must detail the chemical content of the products in HPDs (health product declarations) and EPDs (environmental protection declarations).
* New Social Contract: Major petroleum chemical companies are forced to address the population’s desire to shift from oil and coal to natural gas and to renewable energy and biomass materials.

Technology Explosion: The last 20 years of mergers and acquisitions led to large chemical plants manufacturing single resins. The future lies in small batch processing of custom chemicals and new processing technologies. These include nano-technology, micron-level changes to alter product performance; phase-changing materials, capable of storing and releasing large amounts of energy; and regenerative chemicals that respond to environmental changes.

What do these megatrends mean for the chemical industry? They portend a shift in processes, standardization and approach.

Closed-Loop Processes: Manufacturing closed loops are economically advantageous, reduce/ eliminate waste, reuse byproducts and allow reformulation into new products without downcycling. Shaw Carpet is one success story, creating nylon 6 fibers that can be recycled 100 percent into new carpet. Shaw’s activity resulted in record profits, as producing carpet with nylon 6 requires no new petrochemicals.

Tightening of Standards/LCA: Life-cycle costing is the true measure of value instead of traditional first-cost thinking. That is important where better products require less maintenance. Tightening standards will help designers maintain quality through specifications.

In fact, as coatings technologies advance, our reliance on standards increases. Standards organizations whose certifications for sustainable offerings fail to keep up with national programs, or whose certifications don’t perform as intended, will be bypassed. For coatings specific standard groups to survive, they must align with national standards and address high performance and durability.

Stricter Guidelines: In the healthcare and science laboratory industries, stricter guidelines will be required to combat hospital-acquired infections and address the harsh chemicals/disinfectants necessary to stem infections.

Alchemizing Toxic Chemicals: The storage of large quantities of toxic chemicals at various waste sites necessitates that we incorporate toxic chemicals in ways that alchemize them, creating non-toxic, stable, safe products that can be reused and recycled, without toxicity. For example, LEED supports the use of fly ash, the byproduct of coal manufacturing, as cement replacement in concrete production. This activity will decrease chemical reservoirs of fly ash so that they no longer pose a health hazard.

Creating Coatings for the Future

Coatings technology has evolved as manufacturers respond to market needs and awareness.

Getting the Lead Out: For decades lead was added to paints and coatings to improve durability and color retention. Research into the hazards of lead paint, and lead dust, made the industry move from lead to safer alkyd formulations. Recent awareness of the high VOC content has led manufacturers to replace alkyds with lower-VOC acrylic latex systems.

Where initial productions met market skepticism regarding performance and durability, formulation improvements now offer paint coatings with low VOCs and better performance, durability, color retention and color-hiding capability than older technologies.

Improving Corrosion-Resistant Coatings: Corrosion-resistant coatings for architecturally exposed structural steel have been three-coat systems consisting of organic or inorganic zincrich primers, epoxy intermediate and aliphatic polyurethane topcoats as the most durable high-performance coatings. Advances in the last 20 years have led to two-coat polysiloxane coating systems that, for mild to moderate atmospheric exposure, provide excellent corrosion resistance along with color and gloss retention said to surpass that of polyurethanes.

Improving Coatings to Protect Aluminum: Coatings to protect aluminum required chromate pretreatment for surface preparation and bonding of PVDF resin coatings. Awareness of the toxicity of hexavalent chromate prewashes led to development of coatings that do not need chromate prewashes but offer the same service life and durability.

In addition, the EPA introduced a significant new use rule (SNUR) last September to limit/eliminate perfluorinated compounds (PFCs) in PVDF coatings in response to overwhelming evidence that these chemicals are persistent bioaccumulative toxicants. PFCs were used as surfactants to improve the bond between coatings and metals. Producers of PVDF coatings altered the chemistry to remove perfluorooctanoic acids. Combining PVDF coatings with acrylics, coatings companies created low-VOC, water-based PVDF coatings with the same performance as the solvent-based PVDFs and that can be applied in the field, making initial application and long-term maintenance easy. Other chemical companies altered the chemistry of PVDF coatings further, developing powder coatings that can be applied in the field or in the shop with the same performance as 20-year warrantable fluid-applied systems.

Advancing Anti-Microbials: In high-performance interior coatings for laboratories and hospital facilities, epoxy paints and coatings recently have been replaced with two-component waterborne polyurethane systems based on advancements in polyurea technology. These systems provide high-durability coatings that can contain anti-microbial additives. They have great color retention and durability, while reducing dry time in shop preparations.

Controlling Moisture in Buildings: Rain screen design and energy regulations led to improvement in the building energy envelope through creation of air barrier systems. Controlling the movement of moisture through the building envelope increases the durability and life of the thermal envelope. Fluid-applied air barriers face new challenges as IBC 2012 adopts NFPA 285, mandating assembly fire testing of the exterior envelope. Companies must alter formulations to respond to new requirements for fire test performance.

Overcoming Issues of Fire-Resistant Chemicals: In the last year, fire-resistant coatings came under attack due to studies linking halogenated products to human health issues. Early formulations migrated, leaching chemicals in the environment. Independent research studies showed fire-retardant coatings to be carcinogenic and endocrine disruptors.

Recent formulations provide more durability and intimate bond chemicals in chemical composition of insulation products to prevent leaching and the related hazards. However, the public damage sustained as a result of published reports has led makers of children’s clothing, bedding and toys to remove fire-resistant chemicals from their products. Some design professionals are pushing for building code legislation to remove the requirement that building insulation be fire resistant.

So what developments can we expect in architectural coatings technology?

Phase-Changing Technology: Phase-changing materials will become more mainstream to address changes in environmental conditions. Coatings will change chemistry in response to environmental changes. These coatings will improve the energy efficiency of the building envelope, while minimizing unwanted effects.

Cool Roofing: Some debate surrounds cool roof technology. Reflective roof coatings help reduce energy demand during cooling cycles by reflecting heat from solar radiation. LEED points are available for use of cool roof coatings that help limit the heat island effect in urban environments. Recent research indicates that cool roofs are most effective in reducing the building energy use where the number of cooling days exceeds the number of heating days. Darker roofs may provide better energy performance in colder regions. However, water runoff from black roofs increases the temperature of water in rain and water runoff, and may be harmful to downstream biomes. Cool roof systems not only reduce the heat island effect locally, but also minimize this damage to ecosystems miles away.

Titanium Dioxide Coatings: TiO2 coatings clean surfaces through photocatalytic action, using UV light to activate coatings to bond with carbon dioxide. They produce hydrocarbon runoff and oxygen and clean the environment. Here are some examples.

* As a concrete additive, titanium dioxide maintains white concrete surfaces, minimizing maintenance, by de-bonding with carbon and dirt. It cleans the air by cycling and capturing carbon particles and VOCs.
* In healthcare environments, TiO2 coatings may stimulate antimicrobial action. Operating rooms can “self-clean,” eliminating bacteria between operations by activating enzymatic action through exposure to UV, infrared or other spectral light.
* In another application of TiO2 used as a photocatalyst, the technology is used to coat “self-cleaning glass.” While relatively expensive, such technologies may be valuable in polluted areas like China, where rains pose a durability threat to building materials that self-cleaning chemicals can mitigate.
* Data reveal that indoor air quality is 10 times more toxic than exterior air. Tightening the building envelope has exacerbated this issue. Manufacturers have produced TiO2- based surface treatments that are activated by UV light to actively purify air when applied to interior and exterior surfaces.

Reenvisioning What’s Possible

These are exciting developments, but they’re just the beginning. Here are but a few innovations to look for in coming years.

Regenerative Coatings. Such coatings alter their chemistry to respond to the environment in ways that are regenerative. For example, cool roof coatings will be developed to respond to hot days by reflecting light and to cold days by absorbing heat. This technology will be available through integration of phase-changing materials and nanotechnology.

Better Insulation. Thinner, lighter, more efficient insulations will come down in price, become more mainstream and be adopted by building codes to increase thermal control of the interior environment.

Inherently Fire-Resistant Coatings. These coatings will use nano-technology to produce products that are inherently flame and fire resistant, so fire retardants are not necessary.

More broadly, we can expect the product transparency requirements in LEED v4 and chemical bans from groups like the Living Building Challenge to fundamentally change our approach to materials development and selection. The industry will produce healthier, environmentally sustainable chemicals and products that mitigate problems while maintaining performance and long life.

This effort will depend on greater cooperation among design professionals, chemical companies, manufacturers and fabricators. It will take communication on individual projects, as well as collaboration through cross-industry channels. The challenges and stakes we face are unprecedented in human history, but so are the opportunities.

## 1AC---Private Antitrust

Advantage Two is Private Antitrust.

#### Private antitrust litigation is inevitable.

Foix et al. ’20 [Danyll, Ann O’Brien, Carl Hittinger, and Jeanne-Michele Mariani; October 19; Partner at Baker Hostetler’s Washington D.C. Office; former member of the US Department of Justice in the Antitrust Division; Adjunct Professor teaching antitrust law at the Drexel University Thomas R. Kline School of Law; law clerk; Global Competition Review, “United States: Private Antitrust Litigation,” <https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/2021/article/united-states-private-antitrust-litigation>]

Private price-gouging litigation

A recent flurry of price-gouging lawsuits in the United States suggests that this could be only the beginning of a swell of private litigants bringing claims of alleged price-gouging due to covid-19. These lawsuits may foreshadow the nature of future private price-gouging litigation and the parties that might find themselves entangled in such litigation.

The recent lawsuits suggest that price-gouging cases will be premised on various forms of price-related allegations. Some of these cases allege conventional price-gouging, such as a recently filed case by egg purchasers alleging that egg prices nearly tripled between the onset of the pandemic and the end of March and have remained at price levels deemed unlawful (at least 10 per cent higher than usual) under the California Unfair Competition Law (UCL). [26](https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/2021/article/united-states-private-antitrust-litigation#footnote-010) Other recent cases suggest claims may be based on market or consumer preference changes due to the pandemic, such as in a case alleging food delivery companies, which have increased in use during the pandemic, wielded their power to force restaurants to charge uniform prices for menu items in violation of federal antitrust laws. [27](https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/2021/article/united-states-private-antitrust-litigation#footnote-009) This case also suggests that price-gouging may become a commonplace, additional cause of action in antitrust complaints challenging conduct during the pandemic.

Along with price-gouging and antitrust claims, recent cases show additional causes of action may be expected. Across the country, numerous suits alleging breach of contract and consumer protection violations also have been filed in the wake of covid-19, particularly against gyms, sports and other membership clubs. [28](https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/2021/article/united-states-private-antitrust-litigation#footnote-008) In these cases, the plaintiffs usually allege deceptive trade practices when the clubs continued to charge membership or usage fees despite their facilities being closed due to the pandemic. Although gyms and sports clubs have been the primary targets so far, the case theory advanced by the plaintiffs’ lawyers could apply to any business and has already been advanced against resorts and popular theme parks where customers retain yearly passes. [29](https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/2021/article/united-states-private-antitrust-litigation#footnote-007)

A broad swath of firms may be accused of price-gouging, as demonstrated in recent cases. As an example, in a case filed in federal court in California, the plaintiffs allege that more than 20 of the largest egg producers, distributors and retailers in the United States [30](https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/2021/article/united-states-private-antitrust-litigation#footnote-006) price-gouged in violation of the California UCL. [31](https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/2021/article/united-states-private-antitrust-litigation#footnote-005) Relying on the California Attorney General’s statement that its price-gouging law ‘applies to transactions between manufacturers, wholesalers, distributors, and retailers as it does between retailers and consumers’, [32](https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/2021/article/united-states-private-antitrust-litigation#footnote-004) the plaintiffs sought damages from any and all of the producers and retailers that increased their transaction prices by 10 per cent or more during the pandemic emergency. This case illustrates that more than customer-facing retailers may be sued and participants at every level in a distribution or supply chain may be subject to price-gouging litigation. [33](https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/2021/article/united-states-private-antitrust-litigation#footnote-003)

Similarly, a wide variety of products may be subjected to price-gouging claims, as illustrated by a series of recent cases. A class action case against an online retailer shows that price-gouging claims can include items as diverse as black beans, hair remover, facial cleanser, pain relief tablets and laundry detergent. [34](https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/2021/article/united-states-private-antitrust-litigation#footnote-002) Even a single item may lead to litigation. In a recent case against a grocery store chain, the plaintiff focused on toilet paper in alleging that grocery stores sold essential items in excess of their pre-covid-19 prices and in violation of the California UCL. [35](https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/2021/article/united-states-private-antitrust-litigation#footnote-001) While price-gouging laws focus on ‘essential’ items, the identification of these items can depend on the nature of a given emergency, and the ongoing covid-19 litigation has defined little limitation for such items during the pandemic.

The private cases filed during covid-19 indicate that class actions may be the popular vehicle for bringing cases with price-gouging and antitrust claims. Nearly all the recent cases brought by consumers have been class actions. Because price-based, consumer allegations can present common issues of fact or law, these allegations may be amenable to class-wide litigation. Also, the plaintiffs bringing price-gouging cases can be incentivised to pursue class claims when they file in jurisdictions that permit the recovery of restitution on behalf of the citizens of the state. [36](https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/2021/article/united-states-private-antitrust-litigation#footnote-000) For these reasons, price-gouging cases, especially those involving consumer purchases, will likely continue to be litigated as class actions.

Conclusion

United States price-gouging laws are intended to protect victims of life-altering disasters from having to pay exorbitant prices for essential products. The complex web of state and federal price-gouging laws can be hard to navigate as companies try to price scarce, difficult-to-source, essential products during the pandemic. There is very little legal precedent to look to for guidance, as very few price-gouging cases have been litigated to conclusion. While the covid-19 pandemic has led to the commencement of many federal, state and private cases focused on price-gouging, these cases may take years to play out. The cases recently filed, however, indicate that price-gouging and antitrust allegations may go hand-in-hand for many complaints, any number of products may be targeted for price-gouging, firms at all levels of distribution or supply chains may be vulnerable to claims, and class actions will continue to be the popular vehicle for litigating these cases.

#### Arbitration hamstrings enforcement and structurally incentivizes collusion.

Elhauge ’15 [Einer; 2015; Petrie Professor of Law at Harvard Law School, Founding Director of the Petrie-Flom Center for Health Law Policy, Biotechnology and Bioethics, former Chairman of the Antitrust Advisory Committee to the Obama Campaign; Fordham International Law Journal, “How Italian Colors Guts Private Antitrust Enforcement by Replacing it with Ineffective Forms of Arbitration,” vol. 38]

The same problem infects consents to arbitration clauses that waive the right to effective vindication of antitrust law. If buyers acted together, then they would only consent if those waivers made them better off. But acting individually, each buyer has incentives to consent in exchange for a trivial discount from the inflated market-wide prices that will result when all buyers consent to effectively immunizing antitrust violations against them. It takes only a trivial discount because each buyer knows that their individual decision whether to consent has little effect on whether the market-wide harm from immunizing antitrust violations occurs.

To put it another way, competitive markets are a public good, from which each buyer in a market benefits, whether or not that buyer contributes to the creation of that public good by rejecting conduct or agreements that keep that market competitive. Thus, buyers inevitably have incentives not to contribute; instead they will predictably consent to conduct and arbitration waivers that result in uncompetitive markets.

The future implications are alarming. Given the Italian Colors decision, it is hard to see why all businesses would not at least insert arbitration clauses into their contracts that preclude class arbitration. Given the limited nature of discovery in arbitration, that alone will bring US private enforcement largely into convergence with Europe, and perhaps will leave US private enforcement even less effective than the European Union in the future if the new EU directive leads to stronger national rules on discovery and class actions.

Businesses are likely to go even further given the Supreme Court’s logic that arbitration provisions are permissible whenever they eliminate only the right to prove a claim, rather than the right to pursue it. Under this logic, parties could adopt arbitration provisions eliminating the ability to introduce economic expert testimony altogether, even though that would effectively preclude not only class suits but also suits by corporate plaintiffs that might have large enough stakes to fund an expert. The Court offered two responses to this possibility. First, it said, “it is not a given that such a clause would constitute an impermissible waiver,”12 which alarmingly suggests this possibility might well be in our future. Second, the Court said that this possibility would be different because “such a clause, assuming it makes vindication of the claim impossible, makes it impossible not just as a class action but even as an individual claim.”13 But that rationale conflicts with the Court’s logic that the difference is between being able to pursue a claim and prove it, and disturbingly suggests the Court is resting instead on a hostility to class actions over corporate suits.

Moreover, the Court’s logic would also seem to permit many other possible ways of gutting antitrust enforcement that the Court did not address. Parties could adopt provisions that preclude discovery even more than it is already limited in arbitration, say by barring any discovery into market definition, power, or anticompetitive effects. Indeed, the Court’s distinction between barring proof versus barring pursuit of a claim would even suggest that arbitration clauses could baldly prohibit offering any proof in arbitration on market definition, power, or anticompetitive effects, because that would go simply to the right to prove the claim. This would leave private enforcement by US buyers even less effective than in Europe.

This development would immunize businesses against US federal antitrust enforcement by anyone who contracts with them, which is almost any private party who can sue given that federal antitrust law largely limits antitrust enforcement to direct purchasers. The main exception would be antitrust suits by rivals excluded by exclusionary conduct, who may have no contract with the defendant and thus no arbitration provision. But that is hardly an adequate substitute because:

[A]ny rival claim will be limited to the competitive profits the rival could have earned on some share of the market in the but-for world. A monopolist will generally find it profitable to pay such low competitive profits on a smaller market share out of the monopoly profits it gains on its monopoly market share.14

Further, “it is too easy to cut side deals with rivals through settlements that may satisfy the financial interests of the rivals but fail to fix (or even worsen) the anticompetitive problem.”15 Indeed, the Italian Colors decision creates incentives for them to cut side deals that include arbitration provisions that bar effective antitrust enforcement between them. And given that the Italian Colors decision allows each business to use arbitration clauses that effectively immunize them against their buyers, businesses might not have much incentive to even try to exclude each other since it is more profitable to instead collude and jointly exploit their buyers.

#### Empowering private antitrust enforcement stimulates competition in the healthcare sector.

Helm ’17 [Anne; 2017; Chief of Staff to the Chancellor & Dean at the Hastings College of the Law at the University of California; Saint Louis University Journal of Health Law and Policy, “Optimizing Private Antitrust Enforcement in Health Care,” vol. 11]

I. Introduction

Americans are paying too much for health care services and insurance, in large part due to insufficient competition among providers and payors.1 Waves of consolidation in these markets have fortified providers and insurers with market power, resulting in higher prices and lower quality for consumers.2 As antidotes, health economists and other policy advocates have proposed various legislative, regulatory, and enforcement solutions.3 Yet private antitrust enforcement is rarely recommended to remedy health care market dysfunction. Whereas public antitrust enforcement is generally touted as indispensable,4 private antitrust enforcement is often disregarded as baseless, self-serving litigation that only strains judicial resources and may even raise costs.5 But the notion that private litigation is important should not be controversial.6 Private antitrust enforcement can restore competition, deter antitrust violations, and compensate victims in the markets for health care services and insurance, and, accordingly, the United States should be looking for ways to optimize it.

When passed, the antitrust statutes envisioned private cases as a fundamental part of an overall enforcement scheme.7 Indeed, the treble damages remedy was meant to spur private litigation.8 The Supreme Court has acknowledged as much: “By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as ‘private attorneys general.’”9 The Court later elaborated, “The treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators.”10 Over the last century, private cases have greatly outnumbered public enforcement actions.11 Recently, however, “private actions have caught up in the well-orchestrated, ideologically driven ‘tort reform’ movement” and have been characterized as “legalized blackmail” as opposed to a vital component of our statutory antitrust scheme.12 Private antitrust enforcement does not deserve this characterization and indeed is a much needed means to address health care pricing.

Antitrust law is premised on the notion that competition leads to lower costs, higher-quality products and services, and encourages investment and innovation. In health care, as former Federal Trade Commission (FTC) Chair Edith Ramirez stated, “The success of health care reform in the United States depends on the proper functioning of our market-based health care system.”13 Although highly regulated and somewhat complicated by the buyer and seller relationships among patients, providers, and payors, health care in the United States is nonetheless market-based. As such, the sector depends on competition to drive prices down and quality up, even after the at-risk Patient Protection and Affordable Care Act.14 There is a real need for more antitrust enforcement in health care. As to hospital mergers, a named top public enforcement priority,15 the FTC has only challenged one percent of mergers over the past decade.16 And, even with both the FTC and the Department of Justice (DOJ) enforcing the federal antitrust laws, the lower-priority cases challenging anti-competitive conduct are even more scant, and criminal cases are rarer still.17 In this void, private antitrust enforcement is essential to address market power in health care, and one that assumes a role that public enforcement cannot—or does not—presently fill.18

The insufficiency of public enforcement to address antitrust concerns in health care will likely only be exacerbated by the new presidential administration, under which at least one commentator has noted that “it is fair to expect some tempering of the level of activity that characterized the Obama administration.”19 Generally, Republican administrations are less likely to intervene in transactions and challenge the conduct of businesses, and despite some campaign rhetoric to the contrary, President Trump’s appointments seem to indicate an approach more in line with the party than with a new populism.20 Of course, political influence is not limited to the federal realm; in states, the political priorities of elected attorneys general influence antitrust policy as well. Nevertheless, even the most aggressive public enforcement scheme would be incapable of addressing antitrust issues in health care without its private cousin.

What can private antitrust enforcement accomplish? Effective enforcement achieves deterrence, compensates victims,21 and maintains or restores competition in health care markets. Private enforcement allows health care entities to police their own markets and consumers to seek relief from anticompetitive acts. But it is often said that antitrust laws are meant to protect competition and consumers, not competitors.22 The concern is that entities, acting in their own self-interest, will use the antitrust laws to try to modify contracts, redress various business torts, stifle competition, and extort settlements from rivals.23 Despite criticisms that private suits are self-interested and therefore anti-competitive, a lawsuit can be both self-interested and pro-competitive.24 Indeed, the antitrust laws were written to take advantage of private plaintiffs’ incentives and information to bring suits that benefit both themselves and consumers.

Moreover, to limit the likelihood of abuse, courts have narrowed the per se doctrine, increased standing requirements,25 and augmented the pleading standards; all of which deter frivolous, self-serving suits. In any event, studies have shown that antitrust actions by competitors in more concentrated markets, like health care markets, are more likely to be pro-competitive than they would be in more dispersed industries.26 Some would argue that these measures even overdeter and overscreen.27

#### Antitrust expands coverage quality and reverses data blocking---a consilience of research proves.

Gaynor ’21 [Martin; May 19; E.J. Barone University Professor of Economics and Public Policy at Heinz College in Carnegie Mellon University; Statement before the Committee on the Judiciary Subcommittee on Competition Policy, Antitrust, and Consumer Rights U.S. Senate, “Antitrust Applied: Hospital Consolidation Concerns and Solutions,” <https://www.judiciary.senate.gov/imo/media/doc/Gaynor_Senate_Judiciary_Hospital_Consolidation_May_19_2021.pdf>]

4 Evidence on the Impacts of Consolidation

There is now a considerable body of scientific research evidence on the impacts of hospital consolidation (see Gaynor et al., 2015; Tsai and Jha, 2014; Gaynor and Town, 2012a,b; Dranove and Satterthwaite, 2000; Gaynor and Vogt, 2000; Vogt and Town, 2006, for reviews of the evidence).

4.1 Impacts on Prices

4.1.1 Hospital Mergers

There are many studies of hospital mergers. These studies look at many different mergers in different places in different time periods, and find substantial increases in price resulting from mergers in concentrated markets (e.g., Town and Vistnes, 2001; Krishnan, 2001; Vita and Sacher, 2001; Gaynor and Vogt, 2003; Capps et al., 2003; Capps and Dranove, 2004; Dafny, 2009; Haas-Wilson and Garmon, 2011; Tenn, 2011; Thompson, 2011; Gowrisankaran et al., 2015). Price increases on the order of 20 or 30 percent are common, with some increases as high as 65 percent.6

These results make sense. Hospitals’ negotiations with insurers determine prices and whether they are in an insurer’s provider network. Insurers want to build a provider network that employers (and consumers) will value. If two hospitals are viewed as good alternatives to each other by consumers (close substitutes), then the insurer can substitute one for the other with little loss to the value of their product, and therefore each hospital’s bargaining leverage is limited. If one hospital declines to join the network, customers will be “almost as happy” with access to the other. If the two hospitals merge, the insurer will now lose substantial value if they offer a network without the merged entity (if there are no other hospitals viewed as good alternatives by consumers). The merger therefore generates bargaining leverage and hospitals can negotiate a price increase.

Overall, these studies consistently show that when hospital consolidation is between close competitors it raises prices, and by substantial amounts. Consolidated hospitals that are able to charge higher prices due to reduced competition are able to do so on an ongoing basis, making this a permanent rather than a transitory problem. Moreover, there is no difference between not-for-profit and for-profit hospitals in the extent to which they raise prices due to increased market power.

There is also more recent evidence that mergers between hospitals that are not near to each other can lead to price increases. Quite a few hospital mergers are between hospitals that are not in the same area (see Figure 4). Many employers have locations with employees in a number of geographic areas. These employers will most likely prefer insurance plans with provider networks that cover their employees in all of these locations. An insurance plan thus has an incentive to have a provider network that covers the multiple locations of employers. It is therefore costly for that insurer to lose a hospital system that has hospitals in multiple locations – their network would become less attractive. This means that a merger between hospitals in these different locations can increase their bargaining power, and hence their prices.

There are two recent papers find evidence that such mergers lead to significant hospital price increases. Lewis and Pflum (2017) find that such mergers lead to price increases of 17 percent. Dafny et al. (2019) find that mergers between hospitals in different markets in the same state (but not in different states) lead to price increases of 10 percent.

Understanding the competitive effects of cross-market hospital mergers is an important area for further investigation, and determining appropriate policy responses (Brand and Rosenbaum, 2019).

4.1.2 Hospital Acquisitions of Physician Practices

Studies that examine the impacts of hospital acquisitions of physician practices find that such acquisitions result in significantly higher prices and more spending (Capps et al., 2018; Neprash et al., 2015; Baker et al., 2014; Robinson and Miller, 2014). For example, Capps et al. (2018) find that hospital acquisitions of physician practices led to prices increasing by an average of 14 percent and patient spending increasing by 4.9 percent.

4.2 Impacts on Quality

Just as important, if not more, than impacts on prices are impacts on the quality of care. The quality of health care can have profound impacts on patients’ lives, including their probability of survival.

4.2.1 Hospital Mergers

A number of studies have found that patient health outcomes are substantially worse at hospitals in more concentrated markets, where those hospitals face less potential competition.

Studies of markets with administered prices (e.g., Medicare) find that less competition leads to worse quality. One of the most striking results is from Kessler and McClellan (2000), who find that risk-adjusted one year mortality for Medicare heart attack (acute myocardial infarction, or AMI) patients is significantly higher in more concentrated markets.7 In particular, patients in the most concentrated markets had mortality probabilities 1.46 points higher than those in the least concentrated markets (this constitutes a 4.4% difference) as of 1991. This is an extremely large difference – it amounts to over 2,000 fewer (statistical) deaths in the least concentrated vs. most concentrated markets.

There are similar results from studies of the English National Health Service (NHS). The NHS adopted a set of reforms in 2006 that were intended to increase patient choice and hospital competition, and introduced administered prices for hospitals based on patient diagnoses (analogous to the Medicare Prospective Payment System). Two recent studies examine the impacts of this reform (Cooper et al., 2011; Gaynor et al., 2013) and find that, following the reform, risk-adjusted mortality from heart attacks fell more at hospitals in less concentrated markets than at hospitals in more concentrated markets. Gaynor et al. (2013) also look at mortality from all causes and find that patients fared worse at hospitals in more consolidated markets.

Studies of markets where prices are market determined (e.g., markets for those with private health insurance) find that consolidation can lead to lower quality, although some studies go the other way. In my opinion the strongest scientific studies find that quality is lower where there’s less competition. For example, Romano and Balan (2011) find that the merger of Evanston Northwestern and Highland Park hospitals had no effect on some quality indicators, while it harmed others. Capps (2005) finds that hospital mergers in New York state had no impacts on many quality indicators, but led to increases in mortality for patients suffering from heart attacks and from failure. Hayford (2012) finds that hospital mergers in California led to substantially increased mortality rates for patients with heart disease. Cutler et al. (2010) find that the removal of barriers to entry led to increased market shares for low mortality rate CABG surgeons in Pennsylvania. Haas et al. (2018) find that system expansions (such as those due to merger or acquisition) can pose significant patient safety risks. Short and Ho (2019) find that hospital market concentration is strongly negatively associated with multiple measures of patient satisfaction.

4.2.2 Hospital Acquisitions of Physician Practice

Research on the effects of hospital ownership of physician practices does not find evidence of improved quality. McWilliams et al. (2013) find that larger hospital owned physician practices have higher readmission rates and perform no better than smaller practices on process based measures of quality. (Scott et al., 2018) find no improvement in quality of care at hospitals that acquired physician practices compared to those that did not. Koch et al. (2020) do not find significant effects of hospital ownership of physician practices on Medicare patients’ health outcomes. Short and Ho (2019) also find a limited effect of hospital ownership of physician practices on Medicare quality measures, but find that increased market concentration is strongly associated with reduced quality. Further, the testimony of Dr. Kenneth Kizer in a recent physician practice merger case (Federal Trade Commission and State of Idaho v. St. Luke’s Health System, Ltd, and Saltzer Medical Group, P.A.) documents that clinical integration is achieved with many different forms of organization, i.e., that consolidation isn’t necessary to achieve the benefits of clinical integration.8

4.2.3 Patient Referrals

There has been concern about the possible impact of hospital ownership of physician practices on where those physicians refer their patients, and whether that is in the patients’ best interests (Mathews and Evans, 2018). A number of studies have found that patient referrals are substantially altered by hospital acquisition of a physician practice. (Brot-Goldberg and de Vaan, 2018) find that if primary care physicians in Massachusetts are in a practice owned by a health system they are substantially more likely to refer to an orthopedist within the health system that owns the practice. They also estimate that this is largely due to anti-competitive steering. (Venkatesh, 2019) examines Medicare data and finds a 9-fold increase in the probability that a physician refers to a hospital once their practice is acquired by the hospital. Hospital divestiture of a practice has the opposite effect (Figure 6). A study by Walden (2017) also employs Medicare data and finds that hospital acquisitions of physician practices “increases referrals to specialists employed by the acquirer by 52 percent after acquisition”, and reduces referrals to specialists employed by competitors by 7 percent. Whaley et al. (2021) find evidence of a substantial shift of referrals to hospitals as a result of hospital ownership of physician practices, and Young et al. (2021) find that hospital acquisitions of physician practices led to increases in inappropriate referrals for diagnostic imaging.

4.2.4 Labor Market Impacts, Monopsony Power

It is also possible that health care consolidation can have impacts on labor markets. Consolidation that causes competitive harm in the output market does not necessarily cause harm to competition in the input market (monopsony power is the term for market power in buying inputs). For example, two local grocery stores may merge to monopoly in an area, but they purchase frozen food items on a national market with lots of competition. Conversely, it is possible that a merger may have no harm to competition in the output market, but cause competitive harm in an input market. For example, consider two coal mines located in the same area that merge. Coal is sold on a national market, so the merger will not cause competitive harm. However, if the coal mines are the largest (or only) employers in the area, then the merger will cause harm to competition in the labor market.

In the case of health care, however, both the output market for health care services and the input market for labor are local. As a consequence, a merger that causes harm to competition in the market for health care services has nontrivial potential to harm competition in the labor market. The extent to which such a merger will cause labor market harms depends on the alternatives that workers have in terms of the types of other jobs available and where they are located. Nonspecialized workers, such as custodians, food service workers, and security guards are less likely to be affected by a merger, since their skills are readily transferable to other employers in other sectors.9 Workers who have specialized skills that are not readily transferable to other employers in other sectors are more likely to be harmed. For example, consider a town with two hospitals, a large automobile assembly plant, and multiple retail and service establishments. If the two hospitals merge to monopoly, hospital custodians and security guards will have alternatives at the assembly plant or at the retail or service establishments. As a consequence, competition for these workers may be little affected by the merger. Nurses and medical technicians, however, have nowhere else to turn in the local market, so there will be substantial harm to competition for health care workers.

There are a number of papers that have demonstrated the presence of monopsony power in the market for nurses (see e.g., Sullivan, 1989; Currie et al., 2005; Staiger et al., 2010). These papers demonstrate that hospitals possess and exercise monopsony power in the market for nurses. They do not, however, provide direct evidence on the impacts of consolidation. A recent paper, however, looks directly at the impacts of hospital mergers on workers’ wages. Prager and Schmitt (2021) look at the impacts of 84 hospital mergers nationally between 2000 and 2010. They find that hospital mergers that resulted in large increases in concentration substantially reduced wage growth for workers with industry specific skills, but not for unskilled workers. They find that “Following such mergers, annual wage growth is 1.1 percentage points slower for skilled non-health professionals and 1.7 percentage points slower for nursing and pharmacy workers than in markets without mergers.” This suggests that hospital mergers can harm competition in the labor market for workers with skills specific to the hospital industry.

The impacts of consolidation on labor markets (and input markets generally) is an area where study is needed to understand the nature of the impacts of consolidation and evidence of those effects. Moreover, antitrust authorities need to know to what extent merger enforcement focused on output markets addresses potential input market competitive harms, and to what extent input markets require a separate focus. Further, if the agencies are to pursue enforcement in this area they need to develop economic and legal approaches to this issue.

4.3 Impacts on Costs, Coordination, Quality

It is plausible that consolidation between hospital, physician practices or insurers, in a number of combinations, could reduce costs, increase care coordination, or enhance efficiency. There may be gains from operating at a larger scale, eliminating wasteful duplication, improved communications, enhanced incentives for mutually beneficial investments, etc. However, it is important to realize that consolidation is not integration. Acquiring another firm changes ownership, but in and of itself does nothing to achieve integration. Integration, if it happens, is a long process that occurs after acquisition.

While the intuition, and the rhetoric, surrounding consolidation, has been positive, the reality is less encouraging. The evidence on the effects of consolidation is mixed, but it’s safe to say that it does not show overall gains from consolidation (Neprash and McWilliams, 2019). Merged hospitals, insurers, physician practices, or integrated systems are not systematically less costly, higher quality, or more effective than independent firms (see Burns and Muller, 2008; Burns et al., 2015; Goldsmith et al., 2015; Burns et al., 2013; McWilliams et al., 2013; Tsai and Jha, 2014).

For example, Burns et al. (2015) find no evidence that hospital systems are lower cost, Goldsmith et al. (2015) find no evidence that integrated delivery systems perform better than independents, Koch et al. (2018) find higher Medicare expenditures for cardiology practices in consolidated markets, and McWilliams et al. (2013) find higher Medicare expenditures for large hospital-based practices. In contrast, Schmitt (2017) finds evidence of significant cost savings (4-7 percent) due to hospital mergers, with the exception of mergers of hospital in the same market (and thereby likely competitors). Gaynor et al. (2021) examine the merger of two large hospital chains. They find that the acquisition led to adoption of a new electronic medical record system, and similarity of management practices, but neither the profitability of the acquired hospitals or the acquiring hospitals increased, nor did patient outcomes improve. Beaulieu et al. (2020) report that “Hospital acquisition by another hospital or hospital system was associated with modestly worse patient experiences and no significant changes in readmission or mortality rates. Effects on process measures of quality were inconclusive.”

After more than 3 decades of extensive consolidation in health care, it seems likely that the promised gains from consolidation would have materialized by now if they were truly there.

5 Anticompetitive Conduct

Firms that acquire a dominant market position usually wish to keep it. The incentive to maintain or enhance a dominant position can be beneficial when it leads the firm to deliver value to consumers in order to keep or gain their business. This can result in lower prices, higher quality, better service, or enhanced innovation. There may also be strong incentives for such firms to engage in anticompetitive practices in order to disadvantage competitors or make it difficult for new products or firms to enter the market and compete.

There are prominent instances of firms in the health care industry engaging in what appear to be anticompetitive tactics. Cooper et al. (2019) find that hospitals with fewer potential competitors are more likely to negotiate contracts with insurers that have payment forms that are more favorable to them (e.g., fee for service) and reject payment forms they dislike (e.g., DRG based payment). While this is not an anticompetitive practice, it suggests that hospitals with market power are able to negotiate contracts with insurers that contain anticompetitive elements. This indeed is the issue in some recent antitrust cases. These cases revolve around the use of restrictive clauses in hospital contracts with insurers.10

These clauses prevent insurers from using methods to direct their enrollees to less costly or better hospitals. One of these methods is called tiering - a practice where enrollees pay less out of their own pockets for care received from providers in a more favorable group (“tier”), and pay more if they see a provider in a less favorable tier. Insurers use tiering to give enrollees incentives to obtain care at less costly or higher quality providers. This system thus gives providers an incentive to do the things it takes to be in the more favorable tier, and is a way to promote competition. Another method is steering - enrollees are directed to providers who are preferred, due to lower costs or higher quality. Steering also promotes competition - providers have incentives to agree to lower prices or provide better quality or service in order to be in the preferred group. A third method employed by insurers is transparency – providing enrollees with information about the costs or quality of care at different providers. The intent is to provide enrollees with the information they need to choose the right provider, and by doing so to give providers incentives to compete on those factors.

In both of the antitrust suits mentioned above, the health systems had negotiated clauses in their contracts with insurers which prohibited the insurers from using any of these methods to try to direct patients to lower cost or better providers. The clauses prohibiting the use of these methods are called “anti-tiering,” “anti-steering,” and “gag” clauses. The concern with the use of these restrictive clauses is that they harm competition by preventing insurers by using methods that provide incentives to providers to compete to attract patients. The lawsuit by the DOJ against Carolinas Health System was settled, with the health system agreeing not to use these restrictive clauses.11 The California Attorney General’s lawsuit against Sutter Health System was also settled, with a similar outcome. 12

At present there is no systematic evidence on the extent to which anti-tiering, anti-steering, and gag clauses are being employed by health systems in their contracts with insurers, nor analysis of their impacts. This is an area which needs investigation to document the extent of the practice and its impacts.

Another practice that raises concerns is “data blocking” (Savage et al., 2019). Data blocking is a practice in which health systems impede or prevent the flow of patients’ clinical data to providers outside their system. It is also refers to a practice by electronic medical record (EMR) providers to impede the flow of data to rival EMR systems via lack of compatibility. Data blocking by providers makes it more difficult for patients to go to rival providers, locking them in, since their medical information doesn’t go with them. Reducing patient mobility across providers harms competition and benefits incumbents. While there are extensive reports of data blocking, there isn’t systematic evidence on the extent of the practice, or on its impacts. Study is needed to understand the nature of data blocking, and the extent to which it leads to harm to competition or to efficiencies.

#### Effective healthcare solves existential risks from pandemics and bioterror.

Millett ’17 [Piers and Andrew Snyder-Beattie; August 1; Ph.D. and Senior Research Fellow in the Future of Humanity Institute at Oxford University; M.S. and Director of Research in the Future of Humanity Institute at Oxford University; Health Security, “Existential Risk and Cost-Effective Biosecurity,” vol. 15]

Cost-Effective Biosecurity

How should we balance speculative risks of human extinction in a biosecurity portfolio? Here we turn to cost-effectiveness analysis, which is one method of prioritizing public projects.[29](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5576214/#B29) Cost-effectiveness analysis is helpful if our goal is to maximize the effect of our resources to achieve a measurable aim (such as life-years saved or cases of disease averted). Here we compare the cost-effectiveness of reducing risks in the categories of incidents, events, disasters, and existential risks.

Calculating Costs

The US federal government was projected to spend almost $13 billion on health security–related programs in 2017.[59](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5576214/#B59) To our knowledge, there has not been a quantitative assessment of how this spending has reduced the chances of bioterrorism, biowarfare, or even naturally occurring pandemics. However, the World Bank estimates that it would cost $1.9 billion to $3.4 billion per year over 5 years to bring all human and animal health systems up to minimal international standards, and it suggests that these measures would prevent at least 20% of pandemics. [60](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5576214/#B60) Many countries do not currently have healthcare systems that meet international standards—for example, in 2014 only 33% of countries reported their national arrangements met those required under the International Health Regulations.[61](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5576214/#B61)

These mitigation measures would be adopted to be effective regardless of whether a disease outbreak originates naturally, accidentally, or deliberately. The ability to rapidly detect and characterize the agent involved helps fast-track public health and R&D responses. Acting promptly enables basic public health measures that might decrease the likelihood of spread (such as social distancing) and track its emerging epidemiology (providing critical input for tailoring the responses). Even if we lack existing or candidate vaccines or therapeutics, having the capacity to treat symptoms can have a dramatic impact on case fatality rates.

We therefore assume that strengthening healthcare systems to meet international standards would have an impact on mitigating all types of disease risk, ranging from incidents and events to existential risks. We extend the World Bank's assumptions to include bioterrorism and biowarfare—that is, we assume that the healthcare infrastructure would reduce bioterrorism and biowarfare fatalities by 20%. We conservatively assume that existential risks will be reduced by only 1%, since any potential existential risk would likely be deliberately designed to overcome medical countermeasures.

We calculate that purchasing 1 century's worth of global protection in this form would cost on the order of $250 billion, assuming that subsequent maintenance costs are lower but that the entire system needs intermittent upgrading.[†††††](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5576214/#fn18) To calculate the cost per life-year saved, we use the equation C/(N × L × R), where C is the cost of reducing risk, N is the number of biothreats we expect to occur in 1 century, L is the number of life-years lost in such an event, and R is the reduction in risk achieved by spending a given amount (specified by C). For non-extinction risks, we increase L 50 times over to denote 50 life-years saved per life. The denominator N × L × R denotes the total number of life-years saved. In a subsequent model we also apply a discount rate to represent policymakers concerned only about lives in the short term.

Results

Including future generations into our cost-effectiveness calculations demonstrates that reducing existential risks, even if they are improbable, can be incredibly cost-effective in expectation ([Table 2](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5576214/table/T2/)). Depending on the model used, we estimate that we can purchase 1 quality adjusted life-year in expectation for 10s of dollars (with outliers suggested around 12 cents to $1,600). Even with the most conservative estimates of existential risk, reducing the risk of human extinction is at least 100 times more cost-effective than standard biosecurity interventions, and possibly up to 1 million times more cost-effective.

#### Government agencies will overlook AI monopolization, risking widespread misinformation and algorithmic distopia.

Chakravorti ’21 [Bhaskar; July 27; Dean of Global Business in the Fletcher School at Tufts University, Ph.D. in Economics from the University of Rochester; Wired, “Biden’s ‘Antitrust Revolution’ Overlooks AI—at Americans’ Peril,” <https://www.wired.com/story/opinion-bidens-antitrust-revolution-overlooks-ai-at-americans-peril/>]

Despite the executive orders and congressional hearings of the “Biden antitrust revolution,” the most profound anti-competitive shift is happening under policymakers’ noses: the cornering of artificial intelligence and automation by a handful of tech companies. This needs to change.

There is little doubt that the impact of AI will be widely felt. It is shaping product innovations, creating new research, discovery, and development pathways, and reinventing business models. AI is making inroads in the development of [autonomous vehicles](https://www.ft.com/content/46ff4fe4-0ae6-4f68-902c-3fd14d294d72), which may eventually improve road safety, reduce urban congestion, and help drivers make better use of their time. AI recently predicted the molecular structure of almost every protein in the human body, and it helped develop and roll out a Covid [vaccine in record time](https://www.wsj.com/articles/how-ai-played-a-role-in-pfizers-covid-19-vaccine-rollout-11617313126). The pandemic itself may have accelerated AI’s incursion—in emergency rooms for [triage](https://www.technologyreview.com/2020/04/23/1000410/ai-triage-covid-19-patients-health-care/); in airports, where [robots spray](https://www.latimes.com/politics/story/2021-05-04/covid-automation-robots-trends-effects-on-workers) disinfecting chemicals; in increasingly automated [warehouses](https://www.uschamber.com/co/good-company/launch-pad/warehouse-robotic-automation-coronavirus-pandemic) and [meatpacking plants](https://www.wsj.com/articles/meatpackers-covid-safety-automation-robots-coronavirus-11594303535); and in our remote workdays, with the growing presence of chatbots, speech recognition, and email systems that get better at completing our sentences.

Exactly how AI will affect the future of human work, wages, or productivity overall remains unclear. Though service and blue-collar wages have lately [been on the rise](https://www.cnbc.com/2021/07/17/why-the-biggest-job-wage-boom-is-blue-collar-.html), they’ve stagnated for three decades. According to MIT’s Daron Acemoglu and Boston University’s Pascual Restrepo, [50 to 70 percent](https://www.nber.org/papers/w28920) of this languishing can be attributed to the loss of mostly routine jobs to automation. [White-collar occupations](https://www.brookings.edu/wp-content/uploads/2019/11/2019.11.20_BrookingsMetro_What-jobs-are-affected-by-AI_Report_Muro-Whiton-Maxim.pdf) are also at risk as machine learning and smart technologies take on complex functions. According to [McKinsey](https://hai.stanford.edu/ai-future-work-conference), while only about 10 percent of these jobs could disappear altogether, 60 percent of them may see at least a third of their tasks subsumed by machines and algorithms. [Some](https://siepr.stanford.edu/system/files/Artificial%20Intelligence%20and%20the%20Modern%20Productivity%20Paradox-%20A%20Clash%20of%20Expectations%20and%20Statistics.pdf) researchers argue that while AI’s overall productivity impact has been so far disappointing, it will improve; [others](http://bostonreview.net/forum/science-nature/daron-acemoglu-redesigning-ai) are less sanguine. Despite these uncertainties, most [expert](https://www.gsb.stanford.edu/insights/misplaced-fear-job-stealing-robots)s agree that on net, AI will “become more of a challenge to the workforce,” and we should anticipate a [flat to slightly negative impact](https://www.mckinsey.com/featured-insights/artificial-intelligence/notes-from-the-ai-frontier-modeling-the-impact-of-ai-on-the-world-economy) on jobs by 2030.

Without intervention, AI could also help undermine democracy–through amplifying misinformation or enabling mass surveillance. The past year and a half has also underscored the impact of algorithmically powered social media, not just on the health of democracy, but on health care itself.

The overall direction and net impact of AI sits on a knife's edge, unless AI R&D and applications are appropriately channeled with wider societal and economic benefits in mind. How can we ensure that?

A handful of US tech companies, including Amazon, Alibaba, Alphabet, Facebook, and Netflix, along with Chinese mega-players such as Baidu, are responsible for $2 of every $3 spent globally on AI. They’re also among the top AI patent holders. Not only do their outsize budgets for AI dwarf others’, including the [federal government](https://www.nationaldefensemagazine.org/articles/2021/2/10/federal-ai-spending-to-top-$6-billion)’s, they also emphasize building internally rather than buying AI. Even though they buy comparatively little, they’ve still cornered the AI [startup](https://www.cbinsights.com/research/report/ai-in-numbers-q1-2020/) acquisition market. Many of these are [early-stage](https://www.bloomberg.com/news/articles/2020-03-16/big-tech-swallows-most-of-the-hot-ai-startups) acquisitions, meaning the tech giants integrate the products from these companies into their own portfolios or take IP off the market if it doesn’t suit their strategic purposes and redeploy the talent. According to research from my [Digital Planet](https://sites.tufts.edu/digitalplanet/the-shifting-geography-of-talent/) team, US AI talent is intensely concentrated. The median number of AI employees in the field’s top five employers—Amazon, Google, Microsoft, Facebook, and Apple—is some 18,000, while the median for companies six to 24 is about 2,500—and it drops significantly from there. Moreover, these companies have near-monopolies of data on key behavioral areas. And they are setting the stage to become the primary suppliers of AI-based products and services to the rest of the world.

Each key player has areas of [focus](https://www.manceps.com/ai-examples) consistent with its business interests: Google/Alphabet spends disproportionately on natural language and image processing and on optical character, speech, and facial recognition. Amazon does the same on supply chain management and logistics, robotics, and speech recognition. Many of these investments will yield socially beneficial applications, while others, such as [IBM’s Watson](https://www.nytimes.com/2021/07/16/technology/what-ever-happened-to-ibms-watson.html?action=click&module=In%20Other%20News&pgtype=Homepage)—which aspired to become the go-to digital decision tool in fields as diverse as health care, law, and climate action—may not deliver on initial promises, or may fail altogether. Moonshot projects, such as level 4 driverless cars, may have an excessive amount of investment put against them simply because the Big Tech players choose to champion them. Failures, disappointments, and pivots are natural to developing any new technology. We should, however, worry about the concentration of investments in a technology so fundamental and ask how investments are being allocated overall. AI, arguably, could have more profound impact than social media, online retail, or app stores—the current targets of antitrust. Google CEO Sundar Pichai may have been a tad overdramatic when he declared that AI will have [more impact on humanity than fire](https://www.marketwatch.com/story/artificial-intelligence-is-more-profound-than-fire-electricity-or-the-internet-says-google-boss-11626202566), but that alone ought to light a fire under the policy establishment to pay closer attention.

Biden's antitrust revolutionaries need a four-step plan to confront the AI revolution.

Antitrust authorities must first be forward-looking. They must recognize that the AI chess pieces being moved today will shape tomorrow’s endgame–particularly in a tech industry with high barriers to entry and early moves that are hard to reverse after scale. Tech antitrust action often occurs after it’s too late. Policymakers should also trace the outlines of multiple future AI scenarios, including a dystopian one. They must imagine, for example, a society that suffers from “algorithmic poverty,” in which users generate data as unpaid “labor,” which is used to train algorithms that in turn displace wage-producing labor.

#### Technological misinformation is an existential threat.

Lin, 19—senior research scholar for cyber policy and security at the Center for International Security and Cooperation and Hank J. Holland Fellow in Cyber Policy and Security at the Hoover Institution, both at Stanford University (Herbert, “The existential threat from cyber-enabled information warfare,” Bulletin of the Atomic Scientists, 75:4, 187-196, dml) [language modifications denoted by brackets]

Corruption of the information ecosystem has become an existential threat to civilization as we know it because prosperity and advancement depend on a secure information infrastructure and environment that provides human beings with contextualized, reliable, trustworthy information when and where it is needed. Information is as much a part of human ecology and the essence of being human as DNA (itself a form of information!) is a part of the evolutionary processes in biological systems.

Today, chaos reigns in much of the information ecosystem on which societies depend. In many forums for political and societal discourse, national leaders shout about fake news, by which they mean information they do not like. These same leaders lie shamelessly, calling their lies truth, or perhaps “truthful hyperbole.” Acting across national boundaries, these leaders and their surrogates exacerbate existing divisions, creating rage and diminishing confidence in elections and democratic institutions. Using unsupported anecdotes and sketchy rhetoric, denialists undermine well-established science about climate change and other urgent issues. Established institutions of the government, journalism, and education – institutions that have traditionally provided stability – are under attack precisely because they have provided stability.

The founding of the Bulletin predates by several decades the widespread availability of computers, the Internet, smart phones, search engines, and social media. Few could imagine in 1945 a technological environment that affords today’s high-speed and widespread connectivity, high degrees of anonymity, insensitivity to distance and national borders, easy and customized information searches, democratized access to publishing capabilities, inexpensive production and consumption of information content (including and increasingly importantly emotionally evocative video and audio content), disintermediation of established information sources, and ubiquitous, always-on, always-available access to information sources through mobile devices.

Such advances in information technology have heralded the arrival of the information age, a world in which taking near-immediate advantage of information opens up enormous opportunities in both the private and public sectors for improved delivery of existing products and services and, perhaps more important, the creation of entirely new products and services. Products and services can be customized to individual needs and preferences on a large scale and at more affordable costs. Transactional friction can be tremendously reduced. Through the Internet of Things, actuators and sensors can be connected to process control computers to optimize the behavior and function of physical systems. Everywhere that information can be used to create and improve new and existing functionality (that is, essentially everywhere), one can find or imagine new information technologies to do so.

At the same time, advances in information technology have a dark side. The same increases in the volume and velocity of information have created a louder and more chaotic information environment that stimulates fast, angry, reflexive, intuitive, and visceral thinking, reaction, and action in people and thus displaces more complex, reflective, and rational thought. In a chaotic environment of information overload, people are more likely to use mental shortcuts as a way to reduce the cognitive burden that such an environment places on their thinking.

In recent years, we have seen how the Internet, social media, and mobile devices (and other technologies) can be used by foreign adversaries to interfere in elections and to disrupt the democratic process. We have seen:

● Social media exploitation of cognitive biases to increase their impact and reach – short messages of 280 characters and emotionally evocative video/ audio clips are nearly ubiquitous and much more the norm than they ever were two decades ago.

● Disintermediation of established information sources that reduces the role and influence of those previously responsible for providing factual information and proliferates information sources. The US Supreme Court noted in Associated Press v. US (1945) that “the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.” Today, modern information technology has enabled the creation of a larger number of information sources than the 1945 US Supreme Court could possibly have imagined.

● Search engines that return highly visible results for queries based in large part on the popularity of those results and the inferred desires of the user for specific information rather than their actual importance to those queries. Such functionality also makes it easier than ever for people to find information online “by doing their own research,” thus indulging in their confirmation biases by selectively finding and attending only to information that confirms one’s beliefs. Search engine optimization techniques enable gaming of search algorithms to promote the visibility of false, misleading, or worthless information. ● Many-to-many connectivity that enables the formation of echo chambers and media bubbles that reinforce pre-existing beliefs.

● Large-scale data mining that allows adversaries to sift huge amounts of personal data on individuals to identify and target those most susceptible to customized, inflammatory, false, malign, or misleading messages – and also to keep such messages away from public view.

● Near-immediate data transfer, which enables propaganda and other malign information to spread far and wide quickly, while efforts to correct false information are more expensive, often fall short, and frequently fail altogether.

● Inauthentic voices that are largely indistinguishable from authentic ones. Macedonian entrepreneurs discovered ways to monetize an affinity of Trump voters for fake news (Subramanian 2017). Paid human employees of the Internet Research Agency created and spread false information on behalf of the Russian government prior to the 2016 U.S. election (MacFarquhar 2018). And automated “bots”–accounts purportedly associated with human users but in fact managed entirely or mostly by machines – add further chaos to the information environment.

Is this state of information affairs really new? Haven’t adversaries of all stripes always employed propaganda and lies – otherwise known as information warfare (or at least a big part of it) – to advance their interests?

Yes. Information warfare indeed has a long pedigree that reaches into the past for at least the three millennia since the Trojan Horse enabled Greek warriors to breach the walls around the city of Troy. Much more recently, the rise of the Nazi regime in Germany relied on propaganda. As Hitler (1925, 155–56) wrote:

[I]ts purpose must be . . . to attract the attention of the masses and not by any means to dispense individual instructions to those who already have an educated opinion on things or who wish to form such an opinion on grounds of objective study – because that is not the purpose of propaganda, it must appeal to the feelings of the public rather than to their reasoning powers. . . . The art of propaganda consists precisely in being able to awaken the imagination of the public through an appeal to their feelings, in finding the appropriate psychological form that will arrest the attention and appeal to the hearts of the national masses. . . . The receptive powers of the masses are very restricted, and their understanding is feeble.

But more so today than at any earlier point in human history, human beings are vulnerable to information warfare. At the same time that new information technologies have led to an increase in the volume and velocity of information available on Earth by many orders of magnitude in the past few decades, the cognitive architecture of the human mind is more or less unchanged on the time scale of centuries or even millennia.

On human cognition

Research in the fields of cognitive and social psychology has formalized what Hitler knew intuitively. We now understand that human cognitive processing capability is not unlimited; humans have finite cognitive resources that can be “used up” under mentally stressful circumstances. Findings from the same cognitive psychology that has transformed neoclassical economics into behavioral economics (and resulted in three Nobel Prizes in economics) have made clear the “bounded rationality” of human thought and the simultaneous existence in every individual of the capability to engage in two types of cognitive processing.

Specifically, heuristic dual-system cognitive theory posits that human beings have two systems for cognitive processing – an intuitive, reflexive, and emotionally driven mode of thought (often designated as System 1) and a slower, more deliberate, analytical mode of thought (often designated as System 2). Kahneman (2011) provides a primer on System 1 and System 2 thinking. (See Petty and Cacioppo 1986; Chaiken 1987 for other variants of dual-system cognitive theory; see Kruglanski and Thompson 1999 for a contrary view on dual-system cognitive theory.)

System 1 is designed to operate rapidly, but it can do so because it does not take account of all available information and is thus more prone to error (also called bias). System 2 operates more slowly but is more likely to take into account the available information and is less prone to error. People engaging in System 1 information processing respond more emotionally and less rationally or critically than in System 2 processing.

Most important, System 1 thinking is the default mode of thought for human beings – it uses smaller amounts of cognitive resources, relies on simple gutbased judgments, and is used more often when humans are under stress. For most situations encountered in everyday life, System 1 thinking is adequate and produces mostly valid and useful outcomes, but it often fails when a situation requires complex inferences for understanding. For such situations, System 2 thinking, which is effortful and consumptive of cognitive resources, is more often appropriate – and when individuals fail to use System 2 when it is appropriate to do so, they are easily misled.

Most individuals are capable of both System 1 and System 2 thinking; thus, the important operative question is the circumstances under which they select one or the other type of thinking. Psychology has accumulated considerable evidence relevant to this question.

For example, Taber and Lodge (2006) show that an individual tends to be less critical of information that is favorable to his or her position than of information that is not favorable – that is, he or she is more likely to engage in System 1 thinking for favorable information. People have a confirmation bias in their information seeking and processing behavior – they preferentially seek out information that is consistent with their beliefs and they are highly critical of (or ignore) information that contradicts their beliefs. In a meta-analysis of 91 studies, Hart et al. (2009) considered two motivations for how an individual might select information to consume – the desire to gain an accurate understanding of reality and the desire to feel validated in his or her beliefs. These two motivations conflict when an accurate understanding of reality does not validate one’s beliefs, and such a situation motivates the question of which of these motivations is more powerful. Hart et al. concluded that both motivations drive human informationseeking behavior, thus moderating each other to a certain extent, but that on balance, humans do exhibit a tendency towards the validation of their beliefs. People are also subject to belief perseverance (a.k.a. a continuing influence effect) – a cognitive bias through which individuals do not revise beliefs based on erroneous information even when they know for sure that such information is erroneous (Lewandowsky et al. 2012).

Maintenance of an individual’s social identity is an important influence on his or her invocation of System 1 or System 2 thinking. Evidence suggests that individuals tend to adopt the views of the peer groups that are most salient to them, even if the “objective” or “factual” information available to them contradicts those views. (Asch 1951 performed the classic “conformity experiments” that demonstrated this phenomenon in the early 1950s.) Uncritical System 1 thinking is active in processing information that is consonant with the beliefs and attitudes of those peer groups. Critical and skeptical System 2 thinking is active in processing information that is dissonant to those groups’ beliefs. These effects (that individuals tend to accept salient group norms) are even more pronounced in an anonymous environment, such as that which characterizes much online interaction (Postmes et al. 2001).

Lastly, there is evidence that emotion and motivation affect cognition. For example, people who are angry tend to rely more heavily on simple heuristic cues (suggestive of System 1 thinking) than those who are not angry (Bodenhausen, Sheppard, and Kramer 1994). Individuals are more likely to stereotype people (a form of System 1 thinking) when that stereotype is consistent with their desired impression of those people; conversely, when the stereotype is inconsistent with their desired impression, individuals tend to inhibit the use of this stereotype (Kunda and Sinclair 1999). Negative emotions (such as those induced by the receipt of information incongruent with a person’s prior beliefs) can improve the ability of a person to reason logically, thus enabling him or her to negate or discount that information (Goel and Vartanian 2011).

In the new information environment, exploitation of human cognitive architecture and capabilities – which are largely unchanged from what existed millennia ago – provides the 21st century information warrior with cyber-enabled capabilities that Hitler, Stalin, Goebbels, and McCarthy could have only imagined. By exploiting cognitive limitations, the perpetrators of cyber-enabled information warfare have learned to exacerbate prejudices, biases, and ideological differences; to add heat but no light to political discourse; and to spread widely believed “alternative facts” in advancing their political positions.

Russian interference in the 2016 US presidential election has dominated news headlines ever since. But interference by authoritarian countries in the elections of democratic states – as undesirable and threatening as it may be – is hardly the only negative consequence of cyber-enabled information warfare. The problems of nuclear war and climate change are hard enough to solve even when well-intentioned, well-informed parties on all sides share a basic understanding and knowledge of the relevant facts. Yes, they may have different values and different priorities, may act under different constraints, and be able to bring to bear different levels of resources to these problems.

But without shared, fact-based understandings of the blast, thermal, and radiation effects of nuclear explosions, what hope is there for national leaders to reach agreements to reduce the threat of nuclear holocaust [war] or to make good decisions about nuclear weapons use in times of crisis? Without shared, fact-based understandings that rising atmospheric carbon dioxide concentrations caused by human beings result in corresponding increases in global temperature and climatic disruption, what hope is there for national leaders to reach agreements to begin serious efforts at decarbonizing their economies?

Climate change denialism

Climate change denialism can be fairly characterized as cyber-enabled information warfare against the reality of large-scale anthropogenically-induced climate change. In the responses of people resistant to taking action to mitigate climate change, we see a number of psychological factors at work (Zaval and Cornwell 2016). For example, one key element of System 1 thinking is the availability heuristic, with which individuals tend to associate the likelihood of an event with the ease with which they can remember similar events in the past. But the long-term consequences of climate change are unprecedented in recorded human history and obviously people have no personal memories of unprecedented events.

Moreover, climate change is a long-term process whose inexorable progression is easily masked by short-term fluctuations in local weather conditions. For example, public concerns about climate changes correlate with local weather conditions (Krosnick et al. 2006). Climate change deniers are also quick to flag for public attention days that are particularly cold as “evidence” that global warming is not occurring and thus, they claim, discrediting theories of climate change. This illustrates a bias known as attribute substitution, as Kahneman and Frederick (2002) describe, through which individuals substitute salient information (such as the cold temperature today) for information that is more relevant but harder to understand (such as information about global climate change).

People are also subject to a loss-aversion bias, in which they place greater weight on losses than gains of equal value. In 1992, the United States committed itself to the United Nations Framework Convention on Climate Change, although President George HW Bush also stated that “the American way of life is not up for negotiation” – and in 2018, the United States withdrew from the Paris Agreement (which was based on the convention). The argument? That the United States would have to give up too much if it kept to the agreement.

To close this (merely illustrative) exploration of biases relevant to climate change denialism, the optimism bias suggests that people consider themselves exceptions when considering the likelihood of a negative event occurring. That is, bad things may happen to other people, but they won’t happen to me, even though I and those other people are similar in important and relevant ways. In a climate context, the bad things may involve sea level rise or heat waves – and the misperception that “others may suffer from such problems but I won’t” diminishes the power of personal concern as a driver for rational decision making.

Connecting the operation of these cognitive biases to the affordances of modern information technologies is not difficult. For example, Roxburgh et al. (2019) demonstrate how the characteristics of specific weather events (e.g. hurricanes or snowstorms) and “short-term socio-political context can play a critical role in determining the lenses through which climate change is viewed.” Note especially the importance of “short-term socio-political context” – precisely the context that social media shapes.

Elsasser and Dunlap (2013) noted the influential role of a variety of newspaper columnists in advancing denialist arguments and thus amplifying these arguments to a broad segment of the American public. Fewer in number then, essentially all columnists today (of all political leanings) have a social media presence that they use to publicize their work, and in many instances their online presence is driven in significant part by social media and reach many more readers online than in print. Furthermore, subtleties and nuances in their extended written pieces are likely to be lost when they are represented in social media.

Another important element of climate change denialism is the easy accessibility of seemingly-authoritative information that casts doubt on the well-established science of climate change. As reported by The Guardian, a variety of largely secret funding sources distributed $118 million to 102 denialist organizations (Goldenberg 2013). Oreskes and Conway (2011) provide the definitive work on deliberate information campaigns to obscure the scientific truth on a range of issues from smoking to climate change. These denialist organizations have generated a variety of products for public and policy consumption (but – unsurprisingly – not many peer-reviewed scientific articles) that are easily accessible to the public, mainstream media outlets, and policy makers. Their products are broadly disseminated through social media and easily found through customized search, and they are sought by reporters who seeking to cover “both sides” of a controversy that is intellectually equivalent to a “controversy” about whether the earth is round or flat.

Nuclear conflict

On the risks of nuclear conflict, theories and approaches to nuclear deterrence and strategic stability developed prior to the collapse of the Soviet Union in the late 1980’s and early 1990’s rest on the presumption of rationality in national decision makers. In particular, they assume that adversaries are deterred from attacking by a threat of retaliation that would impose costs on the adversary that would outweigh any conceivable benefits that it would gain from an attack (Morgan 2003). Central to this assumption is a rational adversary that can and does make a calculation of expected costs and benefits, compares them, and then acts accordingly.

But the psychologically informed understanding of realworld decision making described above was not accepted widely in the scientific literature until approximately the same time as the collapse of the Soviet Union, and the seminal work in such understanding occurred only in the decade previous to that. What a psychologically-informed understanding of real-world decision making tells us is that the rationality assumption at the base of much traditional thinking on deterrence and strategic stability is untenable, given that humans have evolved to rely on intuitive, reflexive, heuristic System 1 thinking to make decisions, particularly when faced with time pressures, surprise and other obstacles to the deliberate calculation implied by System 2 thinking (Kahneman 2011). Psychology tells us that – more often than not – the fast, intuitive judgements of System 1 often take precedence over the slower, more analytical thinking of System 2.

The challenges posed by reflexive reliance on System 1 thinking are greatly accentuated by characteristics of today’s information environment. Social media networks in particular are optimally designed to stimulate System 1 thinking – emotional, reflexive, immediate – and they rapidly transmit content among like-minded individuals, creating the ideal conditions for public polarization and divisiveness to occur (Pfeffer, Zorbach, and Carley 2014). Multiple narratives rapidly emerge around complex events; citizens splinter into their own informational universes and are unable to agree on an underlying reality. Political leaders themselves are subject to these conflicting narratives and may even be active and influential participants in one or another of them.

It is thus easy to posit that in this information environment, manipulated information – either artificially constructed or adopted by a strong grassroots base – could be used by interested parties to generate pressure on leaders to act. At the same time, leaders themselves are likely to be facing information overload and less able to distinguish analyzed information from their own intelligence sources and other, unvetted information originating from their constituencies.

The coming information dystopia

Nuclear war and climate change are arguably the most important existential challenges today that are compounded by the corruption of the information ecosystem. But even if a single miraculous stroke the laws of physics were changed to make nuclear weapons impossible to build and operate and to immediately eliminate anthropogenic emissions at zero cost, cyber-enabled information warfare could still can lead to an information dystopia. Here are some possible elements:

● Adversaries manufacture numerous graphic videos of American soldiers (complete with sound effects) committing battlefield atrocities, and spread them widely through the Internet. Once upon a time, highquality video forgeries were difficult and expensive to make. AI-based technologies will bring this socalled deepfake capability to the masses, and anyone with imagination, a modicum of technical skill, and a personal computer will be able to distribute reasonably realistic forgeries. Denials will be issued but of course will also not be believed by large fractions of viewers. Even if proof of inauthenticity can be provided, such evidence will not affect the responses of many viewers.

● Political campaigns conduct similar efforts to discredit political opponents (e.g. “showing” an opponent making controversial or disqualifying remarks before an election). But they also use the existence of deepfake technologies to deflect attention from authentic and real evidence of their own political and personal misdeeds. For example, a real video of a candidate punching an old lady who supports his opponent will be dismissed as “one of those deepfakes that anyone could have produced.”

● Financial markets are disrupted by falsified videos of CEOs making announcements regarding company prospects that are much more pessimistic than expected. Attempts to correct the record are drowned out in a subsequent flood of contradictory information, all of which appear at first glance to be authentic.

● Public safety is compromised by reports of local disasters (e.g. explosions of chemical plants that result in the release large amounts of toxic gases). These reports, along with “authentic” video of people choking amidst locally familiar locations (e.g. well-known fields or sport stadiums), cause spontaneous mass evacuations. Contradictory directions for evacuation broadcast using social media result in chaos on the streets and highways.

● Public health is placed at risk when the safety and efficacy of medical treatments known to be safe and effective are publicly questioned through active disinformation campaigns conducted on the Internet and in bookstores. Attempts to provide valid information are met with responses such as “that’s what the pharmaceutical companies and medical establishment want you to think, but just look at what’s happened to our children.”

● Children in schools are threatened by online campaigns to spread rumor, innuendo, and positive or negative information about various students. Conducting such campaigns for pay becomes the business model of entrepreneurs who advertise that they can guarantee admission to selective colleges, boost the social standing of the children of their clients, or take revenge on those who have harmed such children, all in anonymous and untraceable ways.

● Journalists, political leaders, and judges are compromised by artfully forged emails and alterations to other documents that are mixed with entirely authentic leaked emails and documents and are indistinguishable from them.

A world with these elements – and many more comparable ones – will be the inevitable result if and when deployment and use of the tools of cyber-enabled information warfare become widespread. And even more troubling is the fact that not every bit of information needs to be corrupted for this dystopian outcome to occur – it will require only a fraction of it to be corrupted for people to lose faith entirely in “objective” and “trustworthy” sources of information, the result of which will be that people will fractionate into their own information realities.

Fearing the end of the enlightenment

The Enlightenment established reason and reality as the foundational pillars of civilized discourse. In such discourse, logic matters, and a logical contradiction between statement A and statement B means that at least one of those statements is false. The truth of a statement about the world is tested by its correspondence to objective reality rather than by how many people believe it; that is, empirical data are influential. Furthermore, statements known to be wrong or false do not affect conclusions or choices between alternative courses of action.

Cyber-enabled information warfare provides the tactics, tools, and procedures – in short, the means – to replace the pillars of logic, truth, and reality with fantasy, rage, and fear. In a world of ubiquitous cyber-enabled information warfare, communication and information inflame passions rather than informing reason, play to the worst in people’s cognitive architectures rather than the best, and divide rather than unify. Deliberate corruption of the information ecosystem could be seen as an analog of poisoning water supplies that can be done remotely, inexpensively, and anonymously. All of this is just another way of saying that today it is possible to see glimmerings of an anti-Enlightenment that can possibly take root and that would indeed be the end of civilization as we know it.

#### Anticompetitive effects of AI are nascent but enabled by government inflexibility and arbitration---facilitating private litigation solves.

Banicevic et al. ’18 [Anita, Gabrielle Kohlmeier, Dajena Pechersky, and Ashley Howlett; Fall 2018; Coalition of attorneys working under the technology compliance working group, including legal experts from Davies Ward Phillips & Vineberg LLP, and the working group chair; Compliance and Ethics Spotlight, “Algorithms: Challenges and Opportunities for Antitrust Compliance,” p. 8-12]

III. Anticompetitive Effects of Algorithms

Although algorithms provide significant competitive benefits for firms and consumers, they present novel challenges for competition authorities—and by extension, compliance teams. In particular, there is a rising concern that algorithms increase the potential for both tacit and overt collusion.29

Collusion occurs when competing firms coordinate or act in a manner to set prices above the market equilibrium with the objective of increasing profits. While this may result in short-term profits to the market actors involved in the arrangement, collusion harms consumers, is anticompetitive, and leads to poor long-term economic outcomes.30

There are two forms of collusion, overt and tacit. In a free market, firms are free to act to maximize their profits, as long as they are acting independently. Overt collusion refers to anticompetitive conduct that is facilitated through explicit agreements, written or oral. It is illegal in most jurisdictions around the world. Tacit collusion, also known as conscious parallelism, refers to anticompetitive conduct that can be achieved without explicit coordination between competing firms. Although competing firms decide their profit-maximizing strategies independently, they are able to arrive at and maintain a noncompetitive outcome. Conscious parallelism is generally not illegal because there is no underlying illegal behavior or action to sanction.31

Algorithms that facilitate overt collusion present no real new legal challenges to competition authorities. If a firm is found to have coordinated with other market actors through algorithms, provided there is evidence of direct or indirect contact showing there to be an explicit agreement between market actors, competition authorities have the necessary tools to discipline the actors involved in the arrangement.32

The challenge lies with tacit algorithmic collusion. Some scholars believe that algorithms could become capable of facilitating collusion without the need for any communication or coordination between market actors. Dynamic pricing algorithms, for instance, can assess and adjust prices for thousands of products and services in milliseconds in response to changes in competitor prices. The concern is that, as a result, firms might choose not to discount products and services if they perceive the benefit to be short-lived. Some have argued that this leads to tacit collusion since firms are seen as able to “set” and maintain market prices through algorithms without explicitly coordinating.33

In most algorithms, market actors can input the general rules that map inputs to outputs or they can at least decrypt the algorithm to understand why an algorithm behaves a certain way. Some academics have argued that deep learning algorithms create further issues for competition authorities. They have posited that the development of deep learning algorithms means that market actors may not necessarily know how or why a particular algorithm arrives at particular outputs as such algorithms would essentially act autonomously towards potentially anticompetitive outcomes.34

The concept of tacit algorithmic collusion is disputed, however, with prominent scholars presenting data showing that, currently, such collusion is no more than an unproven theory.35 Professor Salil Mehra commented before the Federal Trade Commission (FTC) that “[t]here has been scaremongering based on fears that artificial intelligence will somehow destroy competition as we know it.” In his view, “these fears are premature . . . because technological development is still far from creating some sort of autonomous algorithmic cartel robot.”

As economist Ai Deng explains, although some algorithms may do a better job than humans at establishing cooperative relationships, a number of assumptions underlying antitrust fears about algorithms have little, if any, empirical support.36 Real world competitive decisions are highly complex, presenting significant computational and technical challenges, and current research shows that designing algorithms capable of learning to cooperate in such an environment is very difficult. In fact, a growing body of theoretical and experimental economic literature posits that algorithms have to learn to communicate with one another and react to communications to achieve a collusive outcome in a market with more than two market actors. Although this may be theoretically possible, the development of algorithms that are able to communicate in this way is still in its very early stages.37

The debate on whether tacit algorithmic collusion is a possibility is far from settled. However, the existence of that debate does not detract from the fact that algorithms have arrived and have materially influenced the way in which market actors execute their functions.

IV. Algorithms and Antitrust Compliance in the United States

A. Collusion

Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits all agreements that unreasonably restrain trade. When discussing the application of the traditional analysis of illegal collusion in the algorithmic pricing context, U.S. antitrust officials have emphasized the importance of the existence of an agreement, which is often missing or harder to detect when algorithms are used. As Maureen Ohlhausen has explained, “[t]he type of technology used to communicate with competitors is wholly irrelevant to the legal analysis. Whether it is phone calls, text messages, algorithms or Morse code, the underlying legal rule is the same—agreements to set prices among competitors are always unlawful.”38

The U.S. Supreme Court has defined an agreement as “a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement.” 39 This broad definition includes not only explicit agreements to set prices collusively, but also exchanges of competitively sensitive, nonpublic information between competitors for anticompetitive purposes. The antitrust laws do not, however, prohibit companies from engaging in conscious parallelism or interdependent pricing, where an agreement is not present.40 The mere fact that competitors monitor, and even match, each other’s public pricing information is not sufficient to establish a Section 1 violation.

During a hearing before the Senate Subcommittee on Antitrust, Competition Policy, and Consumer Rights on October 3, 2018, Assistant Attorney General Makan Delrahim stated that the use of algorithms to create anticompetitive effects is an “important issue” that antitrust enforcers are struggling with both in the U.S. and in Europe.41 For the most part, antitrust enforcers in the U.S. agree that allegations of collusion involving algorithms should be analyzed under the same legal standards as any other collusive conduct.42 Barry Nigro, a deputy assistant attorney general in the Antitrust Division of the Department of Justice (DOJ), has reportedly stated that “when analyzing whether conduct constitutes collusion, an observer should ‘take out’ the fact that an algorithm was involved[.]”43 Nonetheless, some officials have noted that while U.S. antitrust laws generally provide the tools necessary to address anticompetitive conduct facilitated by algorithms, the use of algorithms may make it harder to identify collusion and may require antitrust enforcers to employ new investigative techniques.44 With respect to the difficulty of detecting algorithm-enabled collusion, Maureen Ohlhausen, former Acting Chairman of the FTC, has commented that, as with other types of price-fixing conduct, the DOJ’s leniency program and the threat of criminal penalties should incentivize self-detection and cooperation with enforcers where external detection is not enough.45

The DOJ and private plaintiffs have brought cases involving price-fixing using algorithms or other nontraditional electronic tools. For example, in U.S. v. Topkins, 46 the first antitrust e-commerce criminal prosecution, DOJ charged David Topkins and his coconspirators with using pricing algorithms to engage in a conspiracy to fix the prices of posters sold in the Amazon Marketplace. Specifically, the conspirators “agreed to adopt specific pricing algorithms for the sale of the agreed upon posters with the goal of coordinating changes to their respective prices.”47 Topkins pleaded guilty to price fixing in violation of Section 1 and agreed to pay a $20,000 criminal fine.

In Meyer v. Kalnick, 48 private plaintiffs alleged that drivers agree with Uber to charge certain fares with the understanding that all other Uber drivers are agreeing to charge the same fares. They further alleged that this agreement is facilitated by Uber’s pricing algorithm, which all drivers use to set their fares. The plaintiffs alleged that this arrangement amounted to a hub-and-spoke conspiracy in violation of Section 1.49 The court denied the defendant’s motion to dismiss, but Uber subsequently moved the matter to arbitration.

In October 2018, Assistant Attorney General Makan Delrahim stated that the DOJ had a criminal case that he expected would come to a conclusion in the next two weeks related to the use of search algorithms by competitors to effectuate price fixing, which he added would be the “first of its kind.” 50 Further details on the case that he was referring to have not yet been released.

B. Price Discrimination

Pricing algorithms can be used to discriminate among buyers. For example, a seller may use an algorithm to charge different prices or offer different discounts to customers located in different states. The DOJ and FTC have said that algorithmic price discrimination should be analyzed using the same legal framework as price discrimination in other contexts, and “[a]lgorithmic pricing that leads to price discrimination—without incorporating competitor data—is unlikely to raise competition concerns.”51

A seller who charges competing buyers different prices for the same product may be liable for price discrimination under the Robinson-Patman Act, 15 U.S.C. § 13(a). The U.S. antitrust agencies have not actively enforced the act in decades.52 Some enforcers have noted, however, that algorithmic pricing may lead to new and more sophisticated methods of price discrimination.53 Private parties continue to sue under the act’s provisions.54 Companies using algorithmic pricing may face litigation from private plaintiffs if the algorithm facilitates actionable price discrimination.

As algorithms are increasingly used by businesses to narrowly target specific types of customers, their use might enhance the risk of a merger challenge where markets can be defined by differential pricing. The 2010 Horizontal Merger Guidelines55 authorize the agencies to challenge a proposed merger if it is likely to be anticompetitive in any relevant market, no matter how small. The Merger Guidelines instruct that the antitrust agencies will evaluate the possibility of price discrimination against targeted customers and further provide that “[w]hen discrimination is reasonably likely, the agencies may evaluate competitive effects separately by type of customer.”56

Businesses are empowered by sophisticated pricing algorithms to process large amounts of data and analyze more granular data regarding consumer characteristics than was previously possible. Algorithms enable sellers to segment their customers into smaller and smaller groups and engage in more targeted price discrimination methods.57 The more differentiated the algorithmic pricing program is, the narrower the antitrust agencies may define the relevant markets for purposes of evaluating the competitive effects of a potential merger.58 A proposed merger that has no anticompetitive effects in one market segment may thus be found to substantially decrease competition in a smaller “price discrimination market.”

#### Enforcing antitrust against digital collusion optimizes corporate governance of artificial intelligence rollout---extinction from multiple interlocking crises.

Critch ’20 [Andrew and David Krueger; June 11; Research Scientist and Ph.D. at the Center for Human-Compatible AI at the University of California, Berkeley; Executive Director of the Dialogue Institute, Ph.D. from Temple University; Arxis, “AI Research Considerations for Human Existential Safety,” p. 33-85]

Hazardous deliverables. Supposing humanity develops highly advanced AI systems, those systems could aid humans in developing other technologies which would themselves pose significant global risks to humanity. Nuclear weapons, chemical weapons, and bioweapons are examples of such hazardous technologies that have been developed in the past, without the aid of AI technology.

Risks arising from the development of more such hazardous technologies in the future—with or without the assistance of AI in the development process—are not explicitly addressed by the technical directions of this report. However, such risks could be addressed by related principles of safe and ethical oversight.

Suboptimal futures. More generally, it has been argued that futures where humans exist, but are not flourishing to the degree one would hope, should be considered existential risks or at least be treated with the same degree of severity as human extinction risks. For example, Bostrom (2013) considers “permanent stagnation” and “flawed realization” scenarios, wherein human civilization respectively either “fails to reach technological maturity” or “reaches technological maturity in a way that is dismally and irremediably flawed”. These scenarios are excluded from this report for two reasons. The first reason is to avoid debate in this report the issue of what constitutes a suboptimal future, as discussed somewhat in Section 2.9. The second reason is that these other risks do not naively belong under the heading “existential”, so most readers are not likely to be confused by their omission.

4 Flow-through effects and agenda structure

Sections 5, 6, 8, and 8 of this report may be viewed as a very coarse description of a very long-term research agenda aiming to understand and improve interactions between humans and AI systems, which could be viewed as ongoing throughout the full historical development of artificial intelligence, multi-agent systems theory, and human-computer interaction.

How can one begin to account for the many ways in which progress in different areas of AI research all flow into one another, and how these flowthrough effects relate to existential risk? The task is daunting. To organize and reduce the number of possible flow-through effects one would need to consider, the research directions in this report have been organized under the subsections of Sections 5, 6, 8, and 9, which themselves are related by a lattice structure depicted in Figure 7.

4.1 From single/single to multi/multi delegation

Research on single/single delegation can be expected to naturally flow through to a better understanding of single/multi and multi/single delegation, and which will in turn flow through to a better understanding of multi/multi delegation.

4.2 From comprehension to instruction to control

Sections 5, 6, and 8 are each divided into subsections regarding the human ability to either comprehend AI systems, instruct AI systems, or control AI systems, as defined in Section 2.7. Within each section, comprehension research can be expected to benefit but not subsume instruction research, and comprehension and instruction research can be expected to benefit but not subsume control research.

4.3 Overall flow-through structure

Put together, the flow-through effects discussed above combine to yield the lattice depicted in Figure 7 below. This lattice defines the overall organizational structure for Sections 5, 6, 8, and 9, and summarizes the bulk of the “discovery flow-through” effects that should be expected between research directions in this report. Whenever a research direction would contribute to multiple corners of this subsection lattice, it is discussed under the earliest relevant subsection, leaving its usefulness to subsections further down in the lattice to be implied from the document structure.

4.4 Research benefits vs deployment benefits

Suppose that a major breakthrough is made in single/single delegation, but that multi/multi delegation remains poorly understood. If the breakthrough leads to the release of several AI systems each intended to serve a different human stakeholder, then a multi/multi interaction scenario immediately results. In such an event, the R&D process that designed the AI systems will not have accurately accounted for the interaction effects between the multiple humans and systems. Hence, many errors are likely to result, including safety issues if the AI systems are sufficiently impactful as a collective.

In the preceding scenario, single/single research flows through to a harm, rather than a benefit, in a multi/multi deployment setting. Such scenarios can make it very confusing to keep track of whether earlier developments will help or hinder later developments. How can one organize one’s thinking about such flow-through effects? One way to reduce confusion is to carefully distinguish research benefits from deployment benefits. While research on earlier nodes can be reasonably expected to benefit research on later nodes, the opposite effect can hold for deployment scenarios on later nodes. This happens when research on an earlier node results in a premature deployment event in a setting where research on a later node was needed to ensure proper functioning. For instance, Figure 8 summarizes a causal pathway whereby research on single/single delegation could robustly lead to realworld errors in multi/multi delegation.

Of course, it is common sense that the premature distribution of a powerful new technology can be hazardous. However, combined with the observation that single/single systems can easily be replicated to yield a multi/multi interaction scenario, the potential for premature deployment implies that an understanding of multi/multi delegation for powerful systems may be needed in short order after the development of any powerful single/single delegation solutions. For any AI technology with the potential for global impact, this observation should not be taken lightly. Society may typically learn to correct premature deployment errors through experience, but an error that yields a human extinction event is not one that we humans can learn from and correct later.

4.5 Analogy, motivation, actionability, and side effects

In the next few sections, the reader may soon notice a series of repeated subheadings, intended to suggest a methodology for thinking about long-term risks. The intended meaning behind these subheadings will be as follows:

* “Social analogue”. These subsections are post-hoc analogies for introducing each research direction by comparing desired AI system properties with typical human properties. The analogies can only be fitting to the extent that AI systems might be designed to operate according to similar principles as humans. Hence, the motivation and actionability subsections (below) aim to give more precise illustrations that are intended to expand, clarify, and supersede these analogies.
* “Scenario-driven motivation”. These subsections explain the final causal pathway through which a given research direction could be used to reduce existential risk. In aggregate, this content is intended to illustrate just some of the many technical and social mechanisms through which AI research and existential safety are intertwined. Motivations for some sections may be directly at odds with other sections. At best this suggests a hedged portfolio of approaches to existential safety; at worst, some approaches may need to be cut short if they present serious negative externalities.
* “Instrumental motivation”. These subsections explain how a given research direction could be steered and applied to benefit other research directions in this report.
* “Actionability”. These subsections aim to provide illustrative examples of existing work relevant to a given research direction. This report falls woefully short of providing fair and comprehensive overviews of the large corpora of work relevant to each direction, and for this the authors apologize in advance.
* “Consideration of side effects”. These subsections examine ways in which particular research ideas could be taken in directions that would be problematic from an existential safety perspective. The fact that many research directions are “dual purpose” in this way seems unavoidable: when examining capabilities relevant to existential risk, there is always the possibility that poor judgments about how to intervene on those capabilities could make matters worse.

5 Single/single delegation research

This section begins our examination of research directions relevant to existential safety in the delegation of tasks or responsibilities from a single human to a single AI system.

Consider the question: how can one build a single intelligent AI system to robustly serve the many goals and interests of a single human? Numerous other authors have considered this problem before, under the name “alignment”. For a diversity of approaches to AI alignment, see Soares and Fallenstein (2014); Taylor et al. (2016); Leike et al. (2018).

The AI alignment problem may be viewed as the first and simplest prerequisite for safely integrating highly intelligent AI systems into human society. If we cannot solve this problem, then more complex interactions between multiple humans and/or AI systems are highly unlikely to pan out well. On the other hand, if we do solve this problem, then solutions to manage the interaction effects between multiple humans and AI systems may be needed in short order.

(Despite the current use of the term “alignment” for this existing research area, this report is instead organized around the concept of delegation, because its meaning generalizes more naturally to the multistakeholder scenarios to be considered later on. That is, while it might be at least somewhat clear what it means for a single, operationally distinct AI system to be “aligned” with a single human stakeholder, it is considerably less clear what it should mean to be aligned with multiple stakeholders. It is also somewhat unclear whether the “alignment” of a set of multiple AI systems should mean that each system is aligned with its stakeholder(s) or that the aggregate/composite system is aligned.)

Social analogue. As a scenario for comparison and contrast throughout our discussion of single/single delegation, consider a relationship between a CEO named Alice who is delegating responsibilities to an employee named Bob:

* (comprehension) In order to delegate effectively to Bob, Alice needs some basic understanding of how Bob works and what he can do— Alice needs to comprehend Bob to some degree.
* (instruction) Alice also needs to figure out how to explain her wishes to Bob in a way that he will understand—to instruct Bob.
* (control) If Bob genuinely wants to enact Alice’s wishes as she intends them, that is a good start, but he can still falter, perhaps catastrophically. Perhaps he might ignore or severely misinterpret Alice’s instructions. So, Alice also needs some systems in place to control Bob’s involvement in the company if he begins to behave erratically. For instance, she should be able to revoke his computer system or building access if needed. As Bob’s employer, Alice also maintains the legal authority to fire him, at which point other company employees will typically stop accommodating his plans.

Consideration of side effects. There are a number of potentially negative side effects of developing single/single delegation solutions in general, which are included here to avoid repetition:

* (racing) If near-prepotent AI systems are eventually under development by competing institutions, single/single delegation solutions might increase the willingness of the systems’ creators to move forward with deployment, thereby exacerbating Type 2a risk (unsafe development races).
* (enfeeblement) Widespread consumer dependence on single/single AI systems could lead to Type 2c risk (human enfeeblement) if the systems take on so many mental and physical tasks that human capabilities begin to atrophy.
* (misleading safety precedents) Single/single delegation solutions that only work for non-prepotent AI systems could create a false sense of security that those solutions would scale to near-prepotent and prepotent systems, increasing Type 1c risk (unrecognized misalignment). For instance, “just turn it off when it’s malfunctioning” is a fine strategy for many simple machines, but it won’t work if the AI system is too pervasively embedded in key societal functions for shutting it down to be politically viable (e.g., food distribution), or if the system will develop and execute strategies to prevent humans from shutting it down even when they want to.
* (premature proliferation) If single/single delegation solutions are deployed broadly without sufficient attention to the multi/multi delegation dynamics that will result, the resulting interaction between multiple humans and/or multiple AI systems could be destabilizing to society, leading to as-yet unknown impacts. This general concern was discussed in Section 2.8.1.

5.1 Single/single comprehension Comprehending a human employee is quite different from comprehending an AI system. Humans have many cognitive features in common, due to some combination of common evolutionary and societal influences. Therefore, a human may use an introspective self-model as a stand-in for modeling another person—to “put oneself in someone else’s shoes”. By contrast, artificial intelligence implementations are by default quite varied and operate very differently from human cognition. A recent and salient illustration of the difference between machine and human intelligence is the vulnerability of present-day image classifiers to the perturbations that are imperceptible to humans Szegedy et al. (2013), due the many degrees of freedom in their high dimensional inputs Goodfellow et al. (2014). For instance, Su et al. (2017) trained an All Convolutional Network to achieve 86% accuracy on classifying images in the CIFAR-10 database of 32 × 32 images, and found that 68.36% of the images could be transformed into a misclassified image by modifying just one pixel (0.1% of the image), with an average confidence of 73.22% assigned to the misclassification. As well, Athalye et al. (2017) developed a method for constructing physical objects that are deceptive to machine vision but not to human vision. The method was used to construct a toy replica of a turtle that was misclassified as a rifle from almost all viewing angles, by TensorFlow’s standard pre-trained InceptionV3 classifier (Szegedy et al., 2016), an image classifier with a 78.0% success rate of classifying ImageNet images using the “top-1” scoring rule. The fact that the image classifier networks in these experiments tend to fail outside their training sets means that the networks themselves have difficulty generalizing. This alone is not a problem with human/AI comprehension. However, the fact that the networks fail in ways that humans find surprising means that our own understanding of their capabilities is also prone to generalizing poorly. In particular, humans are unlikely to be able to comprehend AI systems by generalizing from simple analogies to other humans. As such, research specifically enabling human/AI comprehension will likely be needed to achieve and maintain a reasonable level of understanding on the part of human users and even AI developers. 5.1.1 Direction 1: Transparency and explainability One approach to improving human/AI comprehension is to develop methods for inspecting the inner-workings of the AI system (transparency), or for explaining the counterfactual dependencies of its decisions (explainability). These techniques can then be used guide R&D by helping engineers to better understand the tools they are building. Perhaps good metrics for transparency and/or explainability could be used as objectives to guide or constrain the training of complex systems. Together, transparency and explainability are sometimes called “interpretability”. Social analogue. Businesses are required to keep certain records of decisions made and actions taken in order to remain amenable to public oversight, via government agencies such as the IRS. This makes the expenditure of business resources on illegal activities at least somewhat difficult. If one views an AI system as somewhat analogous to a corporation—a non-human entity which nonetheless pursues an objective—one might hope to impose analogous internal record-keeping requirements that could be used by humans to detect undesirable cognitive patterns before they would manifest in harmful actions. Doing so would require a degree of transparency to the humans imposing the requirements. Scenario-driven motivation. The decision to deploy a powerful AI system should come with a high degree of confidence that the system will be safe, prior to system being deployed. In particular, the researchers and developers responsible for the system should have enough insight into the its inner workings to determine that it is not misaligned and prepotent. Just as business tends to move faster than governance, powerful AI systems will likely eventually operate and make decisions on a time scale that is too fast for humans to oversee at all times. The more we are able to understand how such systems work, the less likely they will be to surprise us. Thus, AI transparency improves our ability to foresee and avert catastrophes, whether it be with a powerful AI system or a rudimentary one. Explainability, or after-the-fact transparency, also serves to improve human predictions about AI systems: aside from explanations informing humans’ future predictions about what the system will do, if we impose explainability as a constraint on the system’s behavior, we might avert at least some behaviors that would be surprising—to the point of being inexplicable—to the human. Hence, this direction could apply to reducing Type 1b and 1c risks (unrecognized prepotence and unrecognized misalignment), by helping us to understand and predict the prepotence and/or misalignment of a system before its deployment. Transparency and explainability techniques could also be used to reduce Type 1d risks (involuntary MPAI deployment), such as by enabling the inspection any AI-dependent computer security infrastructure in use by AI development teams. Actionability. There is already active research working to make the decisions of modern machine learning systems easier to explain, for instance, Yosinski et al. (2015) and Olah et al. (2017) have created visualization tools for depicting the inner workings of a neural network. While the decisions made by a neural network routinely combine thousands of variables under intricate rules, it is in principle possible to locally approximate arbitrarily complex decisions by identifying a small number of critical input features that would most strongly affect the output under relatively small changes. This can be used to provide tractable “local” explanations of AI decisions that might otherwise be difficult or impossible for humans to comprehend (Ribeiro et al., 2016). Modifying the objective function or architecture of a machine learning system to require a degree of explainability to human inspectors could result in systems that are more legible to human overseers (Zhang et al., 2018). One might hope to achieve better generalizability than most earlier work on explainability for AI systems, such as Van Lent et al. (2004). Perhaps quantitative models of pragmatic communication (Goodman and Stuhlmüller, 2013), wherein speakers and listeners account for one another’s goals to communicate and thereby cooperate, could be useful for representing objective functions for explainability. Or, perhaps sparse human feedback on the understandability of a self-explaining ML system could be augmented with frequent feedback from an automated dialogue state-tracking system, e.g., as studied by Henderson et al. (2014). This would mean repurposing the dialogue state-tracking system to give quantitative feedback on the understandability of the outputs of the self-explaining system, based on the state-tracker’s experience with understanding human dialogue. Explanations in natural language are an active area of exploration, e.g., by Hendricks et al. (2016). The use of natural language is promising because it is in principle infinitely expressive, and thus opens up a wide space of possible explanations. However, their technique currently produces afterthe-fact “rationalizations” that do not always correspond to the decision procedure actually employed by the AI system in each classification instance. Further work on producing natural language explanations should focus on ensuring faithfulness to the underlying reasoning of the system in each decision instance. As Hendricks et al. remark, future models could “look ‘deeper’ into networks to produce explanations and perhaps begin to explain the internal mechanism of deep models”. This objective is critical: the goal of explainability should be to inform human users, never to appease or convince them. By contrast, if explanations are optimized merely to convince the human of a foregone conclusion, the system is essentially being trained to deceive humans in situations where it has made a mistake. Starting down the path of developing such deceptive AI systems might exacerbate Type 1b, 1c, and 1d risks (unrecognized prepotence, unrecognized misalignment, and involuntary MPAI deployment). Robotic motion planning is another area of application for transparency. Using a simple model that treats humans as Bayesian reasoners, robots can adjust their motion using that model to more legibly convey their goal to a human collaborator (Dragan et al., 2013), and plan action sequences that will be easier for humans to anticipate (Fisac et al., 2016). Studies of mutual adaptation in human-robot collaboration seek to account for humans’ ability to infer and conform to the robot’s plan while also expecting it to reciprocate (Nikolaidis et al., 2016). To guide progress in any application area, it would be useful to understand the features of transparency and explanation that (1) humans instinctively prefer, and (2) aid in improving human judgment. For example, humans tend to prefer certain features in the explanations they receive, including simplicity (Lombrozo, 2007) and “exportable dependence”, i.e., usability of the explanation for future predictions and interventions (Lombrozo and Carey, 2006; Lombrozo, 2010). These principles could be quantified in objective functions for training prototypical “explainable AI” systems. Consideration of side effects. One possible source of negative side effects could occur if transparency and explaiability (T&E) tools are developed which enable engineers to build much more complex systems than they would otherwise be able to construct, and if AI systems nearing prepotence turn out to be beyond the reach of the T&E methods. So, if T&E methods are developed which hasten tech development but for whatever reason cannot be applied to ensure the safety of near-prepotent systems, the result would be a precarious situation for humanity. 5.1.2 Direction 2: Calibrated confidence reports This research direction is concerned with developing AI systems which express probabilistic confidence levels that roughly match their success rates in answering questions or choosing good actions. For instance, among statements that a knowledge database system assigns a 89%-91% probability of truth, roughly 90% of those statements should turn out to be true. Expressing calibrated confidence to accompany decisions can be seen as a subproblem of transparency or explainability, but has other applications as well. Social analogue. Suppose Bob sells Alice an investment promising her a 99% chance of doubling her money by the end of the year. However, Alice also learns that among many other investments that Bob has sold claiming “over a 95% chance of doubling”, only 65% actually doubled. Therefore, even though Bob’s “99%” recommendation claims a very good expected value, Alice does not end up believing Bob’s explicit claims about the likelihood of success. Suppose Alice also receives an investment tip from Charlie, who claims a 99% chance of doubling in value. When Alice investigates Charlie’s past performance, he has no prior record of either success or failure rates on which to base her judgment. Alice also investigates Charlie’s reasons for claiming the investment will double, and finds that Charlie has done almost no market research, and knows very little about the investment. Even without a track record, Alice is able to reason that Charlie is probably not very well calibrated, and does not end up believing his claim. Scenario-driven motivation. Ultimately, the decision to deploy a powerful AI system should come with a well-calibrated prediction that the system is non-prepotent and/or aligned, prior to its deployment. A working methodology for producing calibrated confidence reports could be used for this, in conjunction with well-codified notions of prepotence and/or misalignment. That is to say, one could ask a confidence reporting system for the probability that a given AI system is aligned and/or non-prepotent. Hence, this direction could help to address Type 1b and 1c risks (unrecognized prepotence and unrecognized misalignment). In addition, reliable confidence reports could be used to temper an AI system’s online behavior. For instance, a powerful AI system could be required to shut down or act conservatively when its confidence in the humanalignment of in its decision-making is low, thereby reducing the probability of catastrophes in general. Instrumental motivation. •Direction 10 (corrigibility). Well-calibrated uncertainty could help an AI system to recognize situations where shutdown or repair is needed. •Direction 11 (deference to humans). Calibrated confidence reports could be used to trigger increased human oversight when an AI system’s confidence in its own good performance is low (Hadfield-Menell et al., 2016b). •Direction 17 (hierarchical human-in-the-loop learning (HHL)). Correctly identifying its uncertainty also allows an AI system to make better use of a limited supply of human feedback. For instance, an RL agent can specifically request feedback about human preferences or rewards when it is less certain (Christiano et al., 2017) or when the information is expected to help it improve its policy (Krueger et al., 2016). Thus, to make marginal improvements to scalable oversight, improvements to calibration need only lead to better-than-random decisions about what kind of feedback is useful. Actionability. Efforts to represent model uncertainty in deep learning (Gal and Ghahramani, 2016; Kendall and Gal, 2017) are directly applicable to developing well-calibrated confidence reports from AI systems. There are many recent papers focussed on improving calibration for machine learning models used to make uncertain predictions or classifications (Guo et al., 2017; Lakshminarayanan et al., 2017; Lee et al., 2017; Liang et al., 2017; DeVries and Taylor, 2018; Hafner et al., 2018; Kuleshov et al., 2018). Because of the inevitability of some model misspecification in any system one might build, perfectly accurate calibration may be impossible to achieve in reality. Thus, it is important to determine when and how one can reliably achieve precise calibration, and when and how awareness of imperfect calibration (in a sense, “meta calibration”) can be leveraged to improve active learning and corrigibility. For instance, Liu et al. (2015) propose an active learning approach that accounts for a model’s inductive bias and thereby outperforms random selection of queries. Meanwhile, understanding the implications of miscalibration can motivate future work by suggesting applications of calibration solutions. As a case study, Carey (2017) provides examples of how misspecification of an RL agent’s priors in an “off-switch” game (Hadfield-Menell et al., 2016b) can lead to incorrigibility of the RL agent, via miscalibration about when to defer to the human. Consideration of side effects. The potential negative side effects of this work are similar to those of Direction 1 (transparency and explainability), i.e., the risk that these methods might accelerate tech development without scaling to apply to near-prepotent systems. One way this could occur is if calibrated safety reports are fundamentally more difficult to produce for a system with the capacity for developing a plan to deceive the safety assessment protocol. Perhaps this issue, if it arose, could be mitigated with other transparency techniques for detecting if the system is planning to deceive the safety assessment. 5.1.3 Direction 3: Formal verification for machine learning systems For any safety criterion that one could hope for a powerful AI system to meet, a combination of empirical (experiment-driven) and formal (proof/argument-driven) verification methods might be relevant and useful. This direction is about bolstering formal methods. Social analogue. When a venture capital (VC) firm chooses to invest in a start-up, they look for formal legal commitments from the company regarding how and when the VC firm will be entitled to redeem or sell its shares in the company. Suppose instead the start-up offered only a word-of-mouth agreement, appealing to fact that the VC firm has never been swindled before and are hence unlikely to be swindled now. The VC firm would likely be unwilling to move forward with the actual transfer of funds until a formal, legally enforceable agreement was written and signed by the start-up. With the written agreement, the firm can develop a greatly increased confidence that they will eventually be entitled to liquidate their investment. Scenario-driven motivation. At the point of deploying any powerful AI system or system component that could result in prepotence and/or misalignment, reliance entirely on empirical tests for alignment and/or controllability is likely to be unsatisfying and perhaps even reckless. Indeed, the test “will this system overthrow human society after it is deployed?” is not an experiment one would like to actually run. But how can one know the outcome of an experiment before running it? In other high-stakes engineering endeavors, such as building a bridge or launching a rocket, one is never satisfied with merely testing the components of the bridge or rocket, but also use formal arguments from well-established principles of physics to establish bounds on the safety of the system. Such principled analyses serve as a guide for what can and cannot be concluded from empirical findings, e.g., “if force X amounts to less than 100 Newtons and force Y amounts to less than 200 Newtons, then in combination they will amount to less than 300 Newtons”. Laying out such arguments in an explicit form allows for the identification of key assumptions which, if violated, could result in a system failure (e.g., a bridge collapse, or a rocket crash). As AI systems become more powerful, persons and institutions concerned with risks will expect to see similarly rigorous formal arguments to assess the potential impacts of the system before deployment. Some would argue that such assessments should already have been carried out prior to the deployment of widespread social media technology, given its pervasive impact on society and potential to affect the outcome of national elections. Techniques and tools for automatically generating formal assessments of software and its interaction with the real world will thus be in increasing demand as more powerful AI systems are developed. Actionability. Since many present-day AI systems involve deep learning components, advances in scalable formal verification techniques for deep neural networks could be potentially very valuable. For instance, Dvijotham et al. (2018) have developed an anytime algorithm for bounding various quantities definable from network weights, such as robustness to input perturbations. Katz et al. (2017) have adapted the linear programming simplex method for verifying or refuting quantifiable statements about ReLU networks. Akintunde et al. (2018) and Lomuscio and Maganti (2017) have begun developing methods for reachability analysis of feed-forward ReLU neural networks. Selsam et al. (2017) have developed an automated proof assistant for generating machine-checkable proofs about system performance as a step in the engineering process. Their training system, Certigrad, performed comparably to Tensorflow. For even more rigorous verification, one must also consider assumptions about the so-called trusted computing base (TCB), the core software apparatus used to interpret and/or compile code into binaries and to write and verify proofs about the code. Kumar et al. (2018) argue that verification with a very small TCB is possible with appropriate adjustments to the programmer’s workflow, and that such workflows are already possible in systems such as CakeML (Kumar et al., 2014) and Œuf (Mullen et al., 2018). In order to formally specify societal-scale safety criteria that formal verification tools would go on to verify for powerful AI systems, input may be needed from many other research directions, such as Directions 8, 7, and 13 (human cognitive models, human belief inference, and rigorous coordination models). Consideration of side effects. There is an interesting duality between design and verification in the creation of AI systems by human developers, that can be seen as analogous to the duality between training and testing in the creation of image classifiers by supervised learning algorithms. Specifically, when some fraction of formal verification specs for an AI system are withheld from the human developers who design and build the system, the withheld specs can serve as an independent test of the system’s performance (and hence also the quality of the developers’ design process). This is similar to how, after a classifier has been “built” from a training dataset by a supervised learning algorithm, a separate testing dataset typically serves as an independent test of the classifier’s accuracy (and hence also the quality of the learning algorithm). Such independent tests are important, because they reveal “overfitting” tendencies in the learning algorithm that make past performance on the training data an overly optimistic predictor of future performance on real data. Conversely, using the entirety of a supervised learning dataset for training and none of the data for testing can result in a failure to detect overfitting. The analogue for human developers designing AI systems is that including too many automated verifications for the developers to use throughout the design processes enables the developers to fix just the automatically verifiable issues and not other issues that may have been overlooked. Thus, if one publishes all of one’s available formal verification methods for testing an AI system’s performance, one impoverishes one’s ability to perform independent tests of whether the developers themselves have been sufficiently careful and insightful during the design process to avoid “over-fitting” to the specs in ways that would generalize poorly to real-world applications. This potential side effect of making too many formal verification specs publicly available can be viewed as an instance of Goodhart’s Law (Manheim and Garrabrant, 2018): “When a measure becomes a target, it ceases to be a good measure.” Simply put, if all known proxy measures for safety are made publically available in the form of automated tests, it could become too easy for reseachers to accidentally or intentionally learn to “cheat” on the test. What this means for formal verification methods is that once a useful formal safety verification standard is developed, a non-trivial decision needs to be made about whether to publish reproducible code for running the safety test (making it a “target”), or to keep the details of the test somewhat private and difficult to reproduce so that the test is more likely to remain a good measure of safety. For very high stakes applications, certain verification criteria should always be withheld from the design process and used to make final decisions about deployment. 5.1.4 Direction 4: AI-assisted deliberation Another approach to improving human/AI comprehension is to improve the human’s ability to analyze the AI system’s decisions or recommendations. In this report, AI-assisted deliberation (AIAD), refers to the capability of an intelligent computer system to assist humans in the process of reflecting on information and arriving at decisions that the humans reflectively endorse. In particular, this might involve aiding the human to consider arguments or make observations that would be too complex for the human alone to discover, or even to fully reason about after the point of discovery. AIAD can be viewed as being closely complementary with transparency and explainability (T&E): while T&E methods aim to present information in a 45 form amenable to human comprehension, AIAD would assist the humans in directing their own thoughts productively in analyzing that information. Social analogue. A busy executive can benefit greatly from the assistance of employees and expert advisors who make it easier for them to evaluate important choices. At the same time, reliance on deliberative assistance leaves the executive prone to accidental or intentional manipulation by the assistant. Scenario-driven motivation. It is possible that humanity will collectively insist on relatively simple constraints for any powerful AI system to follow, that would ensure the humans are unlikely to misunderstand its reasoning or activities. Absent such constraints, humans can be expected to struggle to understand the discoveries and actions of systems which by design would exceed the humans’ creative abilities. The better guidance one can provide to the human overseers of powerful systems, the less likely they will be to overlook the misalignment or prepotence of an AI system. Hence, AIAD could be used to address Type 1b and 1c risks (unrecognized prepotence and unrecognized misalignment). At the same time, if AIAD technologies are eventually developed, caution may be needed to prevent their use in ways that would accidentally or intentionally deceive or distract humans away from key safety considerations, especially for high-stakes applications that could be relevant to existential risk. (For instance, presentday social media services employ a plethora of interactive AI/ML systems to capture and maintain user attention, and many people report that these services distract them in ways they do not endorse.) Instrumental motivation. Improved human deliberation would be directly useful to safety methods that rely on human feedback. This includes Directions 6, 17, and 23 (preference learning, hierarchical human-in-the-loop learning (HHL), and moderating human belief disagreements) Actionability. There is also evidence that automated systems can be used to aid human deliberation on non-technical topics. The delivery of cognitive behavioral therapy (CBT) by automated conversational agents over the internet has been found to be somewhat effective for reducing some symptoms of general psychological distress, in comparison with reading an e-book (Twomey et al., 2014) or simply awaiting an in-person therapist (Fitzpatrick et al., 2017). One might therefore hypothesize that automated problem-solving agents could assist in the making of stressful or otherwise difficult decisions. Christiano (2017) has proposed a recursive framework for decomposing problems assisting deliberation, recursively named “Humans Consulting HCH (HCH)”. This method has undergone some empirical testing by a new research group called Ought.org (2017a,b). Consideration of side effects. Widespread use of AIAD could lead to unexpected societal-scale effects. For example, if humans come to rely on AIAD more than their fellow humans to help them deliberate, perhaps trust between individual humans will gradually become degraded. As well, providing AIAD without accidentally misleading or distracting the human 46 may remain an interesting and important challenge. To avoid this, it may be necessary to develop an operationalized definition of “misleading”. 5.1.5 Direction 5: Predictive models of bounded rationality Both humans and AI systems are subject to bounds on their computational abilities. These bounds will likely need to be accounted for, explicitly or implicitly, in predicting what independent and collaborative behaviors the humans and AI systems can or will exhibit. Ideally, a good model of a boundedly rational decision-making system should be able to predict what sorts of the decisions the are too hard, or sufficiently easy, for the system to make correctly with its given computational resources. Social analogue. When a law school student with a poor memory and slow reading speed fails a final examination, it is apt to attribute their failure to a lack of ability rather than a lack of desire to pass. On the other hand, if a student known to have a prodigious memory and a fast reading speed is seen to fail such an exam, it may be more appropriate to infer that they are insufficiently motivated to pass. Thus, observing the same behavior from two different humans—namely, failing an exams—lead us to different conclusions about their desires (trying to pass and failing, versus not caring much about passing). In this way, thinking informally about a person’s mental capabilities is key to making inferences about their desires. Conversely, suppose you know your attorney has the best of intentions, but nearly failed out of law school and required numerous attempts to pass the bar exam. If a serious lawsuit comes your way, you might be inclined to find a more skilled attorney. These situations have at least three analogues for AI systems: (1) humans accounting for the limitations of AI systems, (2) AI systems accounting for the limitations of humans, and (3) AI systems accounting for the limitations of other AI systems. Scenario-driven motivation. See the instrumental motivations. Instrumental motivation. Numerous directions in this report would benefit from the ability to calculate upper and lower bounds on a given cognitive capacity of a system, as a function of the computational resources available to the system (along with other attributes of the system, which are always needed to establish non-trivial lower bounds on performance): • Direction 6 (preference learning). Inferring the preferences of a human from their words and actions requires attributing certain failures in their behavior to limitations of their cognition. Some such limitations could be derived from resource bounds on the human brain, or even better, on relevant cognitive subroutines employed by the human (if sufficient progress in cognitive science is granted to identify those subroutines). • Direction 17 (hierarchical human-in-the-loop learning (HHL)). The degree of oversight received by an AI system should be sufficient to overcome any tendency for the system to find loopholes in the judgment of an overseer(s). A precise model of how to strike this balance would benefit from the ability to predict lower bounds on the cognitive abilities of the overseer and upper bounds on the abilities of the AI 47 system being overseen, accounting for their respective computational resources. • Direction 28 (reimplementation security). Upper bounds on the collective capabilities of malicious hackers could be used to estimate whether they have sufficient resources to re-train, re-program, or otherwise compromise a powerful AI system or the security protocols surrounding it. It would be informative if such bounds could be derived from estimates of the hackers’ total computational resources. (Although this would not protect against flaws in the assumptions of the designers of the system to be protected, which are the main source of real-world security breaches.) • Direction 29 (human-compatible equilibria). Suppose some sufficiently sharp upper bounds on the collective capabilities of the non-human-agents in a multi-agent system could be predicted as a function of their computational resources. These bounds could be used to set limits on how much computation the non-human agents are allowed to wield, so as to ensure a sufficient degree of control for the humans while maintaining the usefulness of the non-human agents to the collective. • Direction 26 (capacity oversight criteria). Bounds on the capabilities of both AI systems and humans could be used to determine whether an AI system is sufficiently computationally endowed to be prepotent. This could lead to more definable standards for when and when not to worry about Type 1b risks (unrecognized prepotence). • Direction 8 (human cognitive models). Griffiths et al. (2015) have argued that computational limitations should be accounted for in human cognitive models. A better understanding of how an ideal bounded reasoner manages computation for rational decision-making could lead to better predictive and interactive models of humans, which could flow through to work on Directions 1, 4, 7, and 11 (transparency and explainability, AI-assisted deliberation, human belief inference, and deference to humans). Actionability. Most experimental work in the field of machine learning is concerned with assessing the capabilities of AI systems with limited computation. Therefore, it could be fruitful and straightforward to begin experimental approaches to each bullet point in the instrumental motivation section above. However, to bolster experimental approaches, it would help to develop a rigorous framework for planning and evaluating such experiments in advance. Currently, no satisfactory axiomatic theory of rational thinking under computational limitations—such as the hardware limitations inherent in a human brain, or any physical computer system—is known. One essential difficulty is that probability estimates calculated using bounded computational resources cannot be expected to follow the laws of probability theory, which require computation in order to satisfy (see the historical note below). For example, it can take a great deal of computation to prove that one statement is logically equivalent to another, and therefore to deduce that the statements should be assigned the same probability. Agent models which assume agents’ beliefs follow the rules of probability 48 theory—which assign equal probability to logically equivalent statements— are therefore unrealistic. Another difficulty is that it is unclear what rules the beliefs of reasoners in a multi-agent system should be assumed to satisfy, especially when the reasoners are in competition with one another. Competition means the agents may have an incentive to deceive one another; when one agent deceives another, should the deceived agent be blamed, or the deceiver, or both? On one hand the deceived agent is failing to protect itself from deception; on the other hand the deceiver is failing to uphold a basic principle of good faith communication that might be fundamental to effective group-scale interactions. Garrabrant et al. (2016) have made some effort to resolve these difficulties by developing a model of a bounded reasoner called a “logical inductor”, along with a suite of accompanying theorems showing that logical inductors satisfy a large number of desirable properties. A logical inductor’s capabilities include converging toward satisfying the laws of probability over time, making well-calibrated predictions about other computer programs including other logical inductors, the ability to introspect on its own beliefs, and self-trust. Logical inductors also avoid the fallacy of treating the outputs of deterministic computations as random events, whereas past models of bounded reasoners tend to assume the reasoner will implicitly conflate uncertainty with randomness (Halpern et al., 2014). However, the logical inductor theory as yet provides no upper bounds on a bounded reasoner’s capabilities, nor does it provide effective estimates of how much computation the reasoner will need for various tasks. Thus, progress on bounded rationality could be made by improving the Garrabrant model in these ways. Consideration of side effects. A working predictive theory of bounded rationality would eliminate the need to run any machine learning experiment whose outcome is already predicted by the theory. This would make machine learning research generally more efficient, hastening progress. The theory could also inspire the development of new and more efficient learning algorithms. It is unclear whether such advancements would reduce or increase existential risk overall. Historical note. Chapters 1 and 3 of Do the Right Thing (Russell and Wefald, 1991) contain a lengthy discussion of the challenge of treating bounded rationality axiomatically. Some excerpts: “[...] computations are treated as if they were stochastic experiments, even when their outcomes are completely deterministic. [...] Given the absence of a satisfactory axiomatic system for computationally limited agents, our results have only a heuristic basis, strictly speaking.” (p. 25) “These time-limited estimates, which Good (1977) called dynamic probabilities and utilities, cannot obey the standard axioms of probability and utility theory. Just how the axioms should be revised to allow for the limited rationality of real agents without making them vulnerable to a charge of incoherence is an important open philosophical problem, which we shall not attempt to tackle here. [...] the formulae here and in chapters 4 and 5 have as yet only a heuristic justification, borne out by practical results.” (pp. 60-61) 49 Despite this, many attempts to axiomatize bounded rationality since then, such as by Halpern and Pass (2011), continue to prescribe that the agent should model the outputs of unfinished computations using probability. 5.2 Single/single instruction 5.2.1 Direction 6: Preference learning Preference learning is the task of ensuring that an AI system can learn how to exhibit behavior in accordance with the preferences of another system, such as a human. Social analogue. When a CEO asks her employee to help increase their company’s profits, she implicitly hopes the employee will do so without conspiring to have her fired from the company in order to replace her with someone more effective, or by engaging in immoral acts like hacking a competitor’s bank account. The CEO’s preferences are thus quite a bit more complex than the statement “help us increase profits” alone might suggest. Moreover, because she cannot easily specify the innumerable things she hopes the employee will not do, the employee must exercise some independent judgment to infer the CEO’s preferences from surrounding social context. Scenario-driven motivation. Preference learning is mainly relevant to mitigating Type 1c risks (unrecognized misalignment), and requires striking a balance between literal obedience and independent judgment on the part the AI system. If a superintelligent factory management system is instructed with the natural language command, “make as many paperclips as possible this year”, one of course hopes that it will not attempt to engineer nanotechnology that fills a sphere two light-years in diameter with paperclips Bostrom (2014, Chapter 8, “Infrastructure Profusion”). At the same time, if it does not make any paperclips at all, it will tend to be replaced by another system which does. Without a satisfactory procedure for striking a balance between literal obedience and independent judgment, we humans may be unable to instate our preferences as governing principles for highly advanced AI systems. In particular, the continued existence and general well-being of human society—a highly complex variable to define—would be placed at risk. Actionability. Specifying an AI system’s objectives directly in terms of a score function of the environment to be maximized can lead to highly unpredictable behavior. For an example, programming a cleaning robot to maximize the amount of dirt it picks up could result in the robot continually spilling out dirt for itself to clean (Russell et al., 2003, Chapter 17.1). Similarly, a reinforcement learning system trained to maximize its score in a boat racing game learned to drive in circles to collect more points instead of finishing the race (Amodei and Clark, 2016). One approach to this problem is to use preference learning, i.e., to design AI systems to adjust their model of human preferences over time. Human preference learning is already an active area of research with numerous past and present applications, for example in product recommendation systems or automated software configuration. New commercial applications of 50 preference learning, such as personal assistant software, will surely become more prevalent over the coming decade. There are numerous mathematical formulations of preference learning problem; see Braziunas (2006) for a review. In a sequential decision-making setting, the problem can be expressed as a POMDP, where the human’s preferences are encoded as information about the environment determining which states are desirable (Boutilier, 2002). This formulation involves not only learning human preferences, but taking actions that satisfy them. This is the full problem of preference alignment: aligning an AI system’s behavior with the preference a user. Preference learning is further complicated in a cooperative setting, where the human is also taking actions directly toward their goal. Here, success for the AI system is defined as the combined efficacy of a human/AI team working toward a common objective that is understood primarily by the human. This setting can also been represented as a POMDP, where the human’s actions are part of the environment’s transition function (Fern and Tadepalli, 2010). The human’s actions can then be taken as evidence about their preferences, such as using inverse reinforcement learning (IRL), also known as inverse optimal control (Kalman, 1964). This approach was introduced by Javdani et al. (2015). Somewhat concurrently, Hadfield-Menell et al. (2016a) introduced cooperative inverse reinforcement learning (CIRL), a problem framing where a human and an AI system share common knowledge that the AI system is attempting to learn and optimize the human’s objective. The CIRL framing been used to explore the possibility of “pragmatic” robots that interpret human actions with an awareness that the human is attempting to teach them (Fisac et al., 2017). Using similar but slightly different assumptions from CIRL (in particular, using limited levels of metacognition on the part of the human and robot, yielding non-equilibrium strategies), Milli and Dragan (2019) show that non-pragmatic robots are more robust than pragmatic robots, even when humans are in fact trying to teach them about their preferences. In these experiments, joint performance is improved when the robot takes a literal interpretation of the human, even when the human is not attempting to be literal. There are some concerns that present-day methods of preference learning may not suffice to infer human preferences in a form sufficiently detailed to safely direct the behavior of a prepotent or near-prepotent AI system. Thus, in order to be marginally valuable for the purpose of reducing existential risk, a focus on approaches to preference learning that might scale well for directing more advanced systems (as in Tier 1 risks) may be needed. For this, heuristics for minimizing the unintended side effects of the system’s operation (Amodei et al., 2016; Krakovna et al., 2018), avoiding taking optimization to extremes (Taylor, 2016b), or taking optimization instructions too literally, also known as “reward hacking” (Amodei et al., 2016; Ibarz et al., 2018)), could be useful to codify through theory or experiment. Absent an approach to single/single delegation that would address such issues implicitly and automatically, heuristics could be helpful as transient rules of thumb to guide early AI systems, or to provide inspiration for rigorous and scalable long-term solutions to preference alignment. As well, preference learning methods that account for idiosyncrasies of human cognition may also be needed to avoid interpreting errors in judgement as preferred outcomes. For instance, Evans and Goodman (2015) explore preference learning methods accounting for bounded cognitive capacity in the humand, and (Evans et al., 2016) account for biases in the 51 human’s judgement. An alternative approach would be to ascertain how humans themselves infer and convey preferences (Baker and Tenenbaum, 2014; Lucas et al., 2014; Meltzoff, 1995), and develop AI systems to use the same methods. This approach is being investigated by Stuart Armstrong, in as-yet unpublished work. Consideration of side effects. If AI systems or human institutions use preference learning to develop a highly precise understanding of human preferences, that knowledge could be used in ways that are harmful to the humans. For instance, satisfying the short-term preferences of the humans in question could be used as part of a longer-term strategy to gain and exploit their trust in ways that they will later regret. Thus, to respect the wishes of the persons or institutions whose preferences are being learned, certain measures may be needed to ensure that preference learning capabilities are usually or always deployed within a preference alignment methodology. Historical note. The challenge of clearly specifying commands to an intelligent machine was also remarked by Norbert Wiener (Wiener, 1960); see the historical note in Section 2.2 for a direct quote. 5.2.2 Direction 7: Human belief inference An AI system that is able to infer what humans believe about the factual state of the world could be better suited to interact with humans in a number of ways. On the other hand, it might also allow the system to acquire a large amount of human knowledge by inferring what humans believe, thereby enabling prepotence. As such, this research direction is very much “dual use”. Social analogue. Suppose Alice is a doctor, and Bob is her intern. A hospital patient named Charlie has previously experienced severe allergic reactions to penicillin. One day, Charlie gets an ear infection, and Alice prescribes penicillin for the treatment. Now suppose Bob is nearby, and knows about Charlie’s allergy. What should Bob do about Alice’s decision? If Bob assumes Alice’s beliefs about the world are correct, this would mean either Alice wishes to harm Charlie, or that that Charlie is in fact no longer allergic to penicillin. However, the pragmatic thing is for Bob to infer something about Alice’s beliefs: in this case, that Alice is not aware of Charlie’s allergy. This inference will likely lead Bob to ask questions of Alice, like whether Charlie’s allergy has been accounted for in the decision. Scenario-driven motivation. See the instrumental motivations. Instrumental motivation. Progress on the theory and practice of belief inference could improve our understanding of • Direction 4 (AI-assisted deliberation). This may require AI systems to model human beliefs, implicitly or explicitly, in order to decide when and how to assist in their deliberation. • Direction 6 (preference learning). Suppose a model describing humans does not account for potential errors in a human’s beliefs when observing the human. Then, when the human fails at a task due to 52 erroneous beliefs, the model will interpret the human as wanting to the fail at the task. Hence, belief inference is important for preference inference and thereby preference learning. • Direction 11 (deference to humans). A number of protocols for AI systems deferring to humans could involve inferring the beliefs of the human. For instance, “defer to the human’s beliefs when the human is more likely to be correct than me”, or “defer to the human in situations where the human will believe I should have deferred to them”. These protocols behave very differently when the human’s beliefs are incorrect but the human wants to be deferred to anyway, say, for policy-level reasons intended to maintain human control. Nonetheless, they both take inferred human beliefs as inputs. • Direction 24 (resolving planning disagreements). Humans with differing beliefs may come into disagreements about what policy a powerful AI system should follow. An AI system that is able to infer the nature of the differing beliefs may be able to help to resolve the disagreement through dialogue. Actionability. Human beliefs should likely be inferred through a variety of channels, including both natural language and demonstrations. Bayesian methods specifically for extracting human priors (Griffiths and Kalish, 2005) have been explored to determine human priors on variables such as box office earnings and the lengths of poems (Lewandowsky et al., 2009). For learning human beliefs from demonstrations of human actions, a generalization of Inverse Reinforcement Learning (Abbeel and Ng, 2004) could be viable, such as by modeling the human as solving a POMDP. There is a small amount of quantitative evidence that humans model other agents (and presumably other humans) in this way, i.e., by assuming the other agent is solving a POMDP and figuring out what the agent’s beliefs and desires must be to explain the agent’s behavior (Baker et al., 2011). If humans indeed make use of this “POMDP inversion” method in order to model each other, perhaps AI systems could use POMDP inversion to model humans. Differentiable MDP solvers and POMDP solvers can be used for gradient descent-based approaches to maximum-likelihood estimation of the MDP or POMDP an agent believes it is solving. This would enable a learner to simultaneously infer the prior, transition rule, and reward function in the mind of a demonstrator. Empirical testing could then assess the efficacy of this approach for assessing the beliefs of humans from their demonstrations. Reddy et al. (2018) has explored this methodology in a user study with 12 human participants. Consideration of side effects. There are several major concerns about AI systems that are able to infer human beliefs. • (rapid acquisition of human knowledge) If an AI system can infer human beliefs in a usable form, it can acquire human knowledge. For instance, if an AI system is capable of reading and understanding natural language corpora, perhaps all of the knowledge of the internet could be made available to the system in an actionable form. The ability to absorb human knowledge at scale would eliminate one of the main barriers to prepotence, namely, that human society has accumulated wisdom over time that is not by default usable to a powerful AI system. Belief inference methods, especially through natural 53 language processing that could be repurposed to process natural language corpora, could therefore enable prepotence and exacerbate all Tier 1 risks (MPAI deployment events). • (deception of humans) A related issue is that any sufficiently detailed model of a human person could be used to deceive that person, by reverse-engineering what they would need to see or hear in order to become convinced of a certain belief. If an AI system is able to deceive all of human society, this could enable prepotence via social acumen, thereby exacerbating all Tier 1 risk (MPAI deployment events). Alternatively, if an AI system is already prepotent via non-social means, but only sufficiently skilled in deception that it can can deceive a small number of individuals humans, it might trick its creators into deploying it prematurely, which would also increase Type 1b and 1c risks. These issues would need to be averted somehow to ensure that the net impact of human-modeling technology is a reduction in existential risk. 5.2.3 Direction 8: Human cognitive models Models of human cognition that are representable in a mathematical or otherwise digital form could be useful for designing human/AI interaction protocols for addressing other problems in this report. On the other hand, they could also be abused to manipulate humans. This research direction, like many, is “dual use”. Social analogue. Suppose Alice is the CEO of a law firm, and Bob is her assistant. Alice has been hoping for some time that her firm would take on CharlieCorp as a client. Once day, CharlieCorp sends Alice a long email, cc’ing Bob, which ends with “... we are therefore seeking legal counsel. We assume from your past cases that you would not be interested in taking us as a client, but thought it would be a good idea to check.” Alice, having a busy week, fails to read the last line of the email, and replies only with “Thanks for the update.” Luckily, Bob realizes that Alice might have overlooked the ending, and sends her a ping to re-read it. Alice rereads and responds with “Looking at your situation, we’d actually be quite interested. Let’s set up a meeting.” Here, Bob is implicitly modeling not only Alice’s desire to work with CharlieCorp, but also Alice’s attentional mechanism. In particular, Charlie thinks Alice’s attention was not directed toward the end of the email. Later, CharlieCorp asks Bob a question about a very long document. That day, Alice’s schedule is clear, and knowing Alice is a fast reader who is familiar with the subject matter of the document, Bob forwards the question to Alice for her to think about. Here, Bob is modeling Alice’s attentional capacity, her written language comprehension, as well as the contents of her memory. Scenario-driven motivation. See the instrumental motivations. Instrumental motivation and actionability. Progress on the theory and practice of human cognitive modeling could improve our understanding of 54 • Direction 4 (AI-assisted deliberation). To the extent that AI systems may eventually be needed to assist humans in safety assessments of other AI systems, understanding the quirks and limitations of human thinking may be helpful in designing a system that helps humans to reach a sound conclusion. To this end, Ought.org (2017b) have attempted to generate datasets of examples of human deliberative output. Collecting more data of this sort could help to train and/or validate models of human cognitive functions involved in deliberation. • Direction 6 (preference learning). To infer a person’s preferences from their behavioral outputs, it would help to understand the mapping B from preferences to behavior, including speech. Then, preference inference amounts to inverting that mapping: given observed behavior b, we seek to find preferences p that would satisfy B(p) = b. Direction 7 (human belief inference) has already discussed how the person’s beliefs play a role in defining the map B. However, B is parametrized by other features of human cognition aside from beliefs and preferences, such as planning, attention, memory, natural language production, and motor functions. Isolating or at least narrowing our uncertainty about those variables could thus help us to reduce uncertainty in the “behavior equation” B(p) = b that we are solving when performing preference inference. As an example of early work in this direction, Steyvers et al. (2006) models the interaction of inference and memory. • Direction 11 (deference to humans). Suppose an AI system plans to defer to humans to take over from certain confusing situations, but those situations would either be too complex for humans to reason about, or too prone to the influence of particular human biases for humans to handle the situation responsibly. This means that even routine applications of AI technology, in situations where the AI hands off control or decision-making to a human, will likely need to account explicitly or implicitly for human cognitive peculiarities aside from preferences. Developing principled and generalizable hand-off procedures that will scale with the intelligence of the AI system may require better models of human cognition. As a simple present-day example, self-driving car technology must account for human reaction time when handing control over to a human driver (Dixit et al., 2016). • Direction 24 (resolving planning disagreements). Disagreements between humans might sometimes be due to different tendencies in more basic cognitive functions like attention and memory. For example, if Alice has a great memory and Bob has a terrible memory, Alice might disagree with Charlie on the nature of their unrecorded verbal agreements, and Bob—if he knows he has a bad memory—might not trust Alice to be the arbitrator of those disagreements. Thus, an AI system that offers compromises that humans are likely to accept may need a working model of humans’ cognitive capacities aside from their preferences. Identifying and explaining these differences could be helpful in dispute resolutions, and hence in facilitating agreements to continue sharing ownership of powerful AI systems. For example, Taber and Lodge (2006) shows that political disagreements arise to some extent from motivated skepticism, and Griffiths et al. (2008) show that cultural disagreements should be expected to arise from inherited inductive biases. Such nuances may also prove essential in Direction 22 55 (modeling human committee deliberation). Consideration of side effects. There are a number of potentially dangerous and wide-reaching side effects to developing high-fidelity human cognitive models. • Manipulation of humans. Human cognitive models can be used to manipulate humans. This can already be seen in social media platforms that develop user models to generate addictive features to keep users engaged. If sufficiently detailed, perhaps human cognitive models could be used by an AI system to manipulate all of human society in a goal-directed fashion. In principle this could enable prepotence through social acumen, thereby exacerbating all Tier 1 risks (MPAI deployment events). • Impoverished third-party safety testing. If detailed human models are made publicly available, we impoverish our ability to perform “hold-out” safety testing and verification for powerful AI systems, as in Direction 3 (formal verification for machine learning systems). Specifically, if precise human models are not made publicly available, and instead withheld by a independent AI safety testing institution, then the models could be used to design simulation-based safety tests as a regulatory safety check for AI systems built by private corporations or the public. However, if the human models used in the safety tests were released, or derivable by institutions other than the safety testers, then the models could be used by corporations or individuals deploying AI systems to “game” the regulatory testing process (Taylor, 2016c), the way a student who knows what questions will be on exam doesn’t need to learn the rest of the course material. In particular, this could lead to an increase in Type 1b and 1c risks (unrecognized prepotence and unrecognized misalignment). Thus, a judicious awareness of how and when to apply human-modeling technology will be needed to ensure it is shared appropriately and applied beneficially. See also Direction 7 (human belief inference) for a consideration of side effects of modeling human beliefs specifically. 5.3 Single/single control 5.3.1 Direction 9: Generalizable shutdown and handoff methods As with any machine, it remains important to maintain safe shutdown procedures for an AI system in case the system begins to malfunction. One might operationalize “shutdown” as the system “no longer exerting control over the environment”. However, in many situations, ceasing to apply controls entirely may be extremely unsafe for humans, for example if the system is controlling a self-driving car or an aircraft. In general, the sort of shutdown procedure we humans want for an AI system is one that safely hands off control of the situation to humans, or other AI systems. Hence, the notion of a handoff can be seen as generalizing that of a shutdown procedure. In aviation, the term “handoff” can refer to the transfer of control or surveillance of an aircraft from one control center to another, and in medicine the term is used similarly for a transfer of responsibilities from one doctor to another. This research direction is concerned with the development of generalizable shutdown and handoff techniques for AI systems. 56 Social analogue. Suppose AliceCorp hires Betty to take on some mission-critical responsibilities. In case Betty ever becomes ill or uncooperative and can no longer perform the job, other employees must be ready to cover off Betty’s responsibilities until a replacement can be found. Such handoffs of responsibility can be quite difficult to coordinate, especially if Betty’s departure is a surprise. For instance, any documented instructions for performing Betty’s responsibilities may need to be documented in a manner that is readable to other employees, given their more limited context and perhaps experience. Therefore, many companies will go to great lengths to maintain detailed documentation of responsibilities and handoff procedures. Similar procedures are often needed but missing on the scale of industries: when certain companies become “too big to fail”, governments are left with no means of replacing them with better versions when they begin to malfunction. Scenario-driven motivation. Generalizable shutdown and/or handoff procedures could reduce the risk of Type 1b and 1c risks (unrecognized prepotence and unrecognized misalignment) by making it easier for humans to regain control of a situation where an AI system is malfunctioning or behaving drastically. In general, future applications of powerful AI systems may pose risks to society that cannot be simulated in a laboratory setting. For such applications to be responsible, general principles of safe shutdown and safe handoff procedures may need to be developed which are known in advance to robustly generalize to the high-stakes application. Somewhat orthogonally, perhaps the involvement of many humans in training and/or drills for AI→human handoffs could create a source of economic involvement for humans to reduce Type 2b risk (economic displacement of humans), and/or cognitive stimulation for humans to reduce Type 2c risk (human enfeeblement). Actionability. Practically speaking, almost any existing computer hardware or software tool has a custom-designed shutdown procedure, including AI systems. However, there has not been much technical work on generalizable strategies for shutting down or handing over control from an AI system. In human–robot interaction literature, there is a body of existing work on safe handovers, typically referring to the handoff of physical objects from robots to humans. For instance, Strabala et al. (2013), have studied both robot-to-human and human-to-robot handovers for a variety of tasks. Moon et al. (2014) showed that using humanlike gaze cues during human-robot handovers can improve the timing and perceived quality of the handover event. For self-driving cars, Russell et al. (2016) show that human motor learning affects car-to-driver handovers. For unmanned aerial vehicles, Hobbs (2010) argue that “the further development of unmanned aviation may be limited more by clumsy human–system integration than by technological hurdles.” Each of these works contains reviews of further relevant literature. For coordination with multiple humans, Scerri et al. (2002b) put forward a fairly general concept called transfer of control for an AI system coordinating with multiple humans, which was tested in a meeting-planning system called Electric Elves (E-Elves). The E-Elves system was used to assist in scheduling meetings, ordering meals, and finding presenters, over a 6-month period by a group of researchers at the University of Southern California. Scerri et al. describes the mathematical model underlying 57 the system, which used an MDP formulation of the human/AI interaction problem to express coordination strategies and assess their expected utility in terms of “the likely relative quality of different entities’ decisions; the probability of getting a response from an entity at a particular time; the cost of delaying a decision; and the costs and benefits of changing coordination constraints”. Perhaps similar general principles could be used to design shutdown and/or handover processes in other settings. In any task environment, one might try to operationalize a safe shutdown as “entering a state from which a human controller can proceed safely”. As a cheaper proxy to use in place of a human controller in early prototyping, another AI system, or perhaps a diversity of other AI systems, could be used as a stand-in during training. Suites of reinforcement learning environments such as OpenAI Gym (Brockman et al., 2016) could be used to ascertain the generality of any given safe handover technique. Consideration of side effects. As with any safety methodology, if safe handover methods are developed for near-term systems and erroneously presumed to generalize to more powerful systems, they could create a false sense of security. For instance, suppose generalizable solutions are developed for handing off control from a single AI system to a single human, such as from a self-driving car to a human driver. The same principles might not work to hand off control from an automated air traffic control system to human air traffic controllers, which might require solving a coordination problem between the humans who receive the control in the event of a shutdown. Or, a simple “suspend activity and power down” procedure might be used to shut down many simple AI systems, but then someday fail to effectively shut down a powerful misaligned system that can build and execute copies of itself prior to the shutdown event. Thus, to apply ideas from this research direction responsibly, one must remain on the lookout for unique challenges that more complex or capable AI systems will present. Historical note. Wiener has also remarked on the difficulty of interfering with a machine which operates on a much faster time scale than a human. “We have seen that one of the chief causes of the danger of disastrous consequences in the use of the learning machine is that man and machine operate on two distinct time scales, so that the machine is much faster than man and the two do not gear together without serious difficulties. Problems of the same sort arise whenever two operators on very different time scales act together, irrespective of which system is the faster and which system is the slower.” (Wiener, 1960) 5.3.2 Direction 10: Corrigibility An AI system is said to be corrigible if it “cooperates with what its creators regard as a corrective intervention, despite default incentives for rational agents to resist attempts to shut them down or modify their preferences” (Soares et al., 2015). In particular, when safe shutdown procedures are already designed and ready to execute, a corrigible AI system will not work against its human operator(s) to prevent being shut down. Social analogue. A person is said to be “corrigible” if they are capable of being corrected, rectified, or reformed. An “incorrigible” person is one 58 who does not adjust their behavior in response to criticism. If an employee behaves in an incorrigible manner, an employer may rely on the ability to terminate the employee’s contract to protect the company. Imagine, however, an incorrigible employee who is sufficiently crafty as to prevent attempts to fire them, perhaps by applying legal technicalities or engaging in manipulative social behaviors. Such a person can cause a great deal of trouble for a company that hires them. Scenario-driven motivation. As AI systems are developed that are increasingly capable of social intelligence, it becomes increasingly important to ensure that those systems are corrigible. An incorrigible AI system whose goals or goal inference instructions are mis-specified at the time of its initial deployment poses a Type 1c risk (unrecognized misalignment) to humans if it is able to prevent us from modifying or disabling it. Actionability. Hadfield-Menell et al. (2016b) have shown that a reinforcement learning system can be given uncertainty about its reward function in such a way that human attempts to shut it down will tend to cause it to believe that being shut down is necessary for its goal. This is not a full solution to corrigibility, however. Carey (2017) shows that incorrigibility may still arise if the AI system’s uncertainty about the reward function is not appropriately specified. Moreover, Milli et al. (2017) point out that too much reward uncertainty can lead an AI system to underperform, so there is a balance to be struck between expected performance and confidence that shut-down will be possible. As a potential next step for resolving these issues, experiments could test other mechanisms aside from reward uncertainty for improving corrigibility. For example, see Direction 20 (self-indication uncertainty) below. A different approach to corrigibility for reward-based agents is to somehow modify their beliefs or reward function to make them more amenable to shutdown or modification. Armstrong and O’Rourke (2017) provides an overview of attempts in this direction. Consideration of side effects. Progress on the problem of corrigibility does not seem to present many negative side effects, other than the usual risk of falsely assuming that any given solution would generalize to a highstakes application without sufficient testing. 5.3.3 Direction 11: Deference to humans Deference refers to the property of an AI system actively deferring to humans on certain decisions, possibly even when the AI system believes it has a better understanding of what is right or what humans will later prefer. Social analogue. Suppose Allan is a patient and Betty is his doctor. Allan is bed-ridden but otherwise alert, and Dr. Betty is confident that Allan should receive a dose of anesthetic to help Allan sleep. Suppose also that the Dr. Betty is bound by law to ask for the patient’s consent before administering this particular anesthetic, and that she expects the patient to say “no”. Even if Dr. Betty is very confident that she knows what’s best for the patient, the doctor is expected to defer to the patient’s judgment in this case, rather than, say, administering the anesthetic in secret along with the patient’s other medications. That is, the doctor is sometimes required 59 to defer to the patient, even when confident that the patient will make the wrong choice. Instrumental motivation. Theoretical models and/or training procedures for deference to humans could help directly with • Direction 10 (corrigibility). In order to preserve the corrigibility of an AI system over time, we will need AI systems to not only respond to corrective interventions, but to seek them out as a matter of policy, particularly on decisions that could lead to a loss of corrigibility. • Direction 17 (hierarchical human-in-the-loop learning (HHL)). A generic deference capability may allow AI systems to serve as useful delegates in a chain of command including humans and other AI systems. • Direction 29 (human-compatible equilibria). A notion of deference to humans that is stable as AI systems evolve and replicate over time might constitute an important class of Direction 29 (humancompatible equilibria). Actionability. Simulated experiments where one AI system is required to seek out and defer judgment to another AI system could be fruitful for developing and testing protocols for deferring to outside judgment. Milli et al. (2017) show that performance trade-offs are to be expected when requiring direct obedience to commands. Experiments to ascertain an appropriate balance between deference and autonomy for minimizing tail risks arising from system mis-specification could be highly informative. Consideration of side effects. Too much deference to humans could lead to catastrophic errors. For instance, if a powerful AI system responsible for managing the electrical grid of a city were to defer to a single human on the decision to shut it down, perhaps many people could suffer or die as a result. In the future, perhaps larger systemic failures of this sort could present existential risks. 5.3.4 Direction 12: Generative models of open-source equilibria AI systems are in principle completely inspectable to humans, in that their execution can create a perfect log of every internal state that occurs. The degree to which the internal “thought processes” of such machines will be understandable to humans will likely depend on the success of future research on Direction 1 (transparency and explainability). Whatever degree of transparency and/or explainability can be achieved, its implications of the game-theoretic relationship between systems and humans should be explored. But, so far, very little game theory research has been carried out to ascertain, either analytically or by simulation, what equilibria arise between agents when one agent is assumed to be partially or fully transparent to another. Social analogue. Suppose Alice is very good at reading Bob’s body language, such that if Bob tries to deceive her or make plans that she would dislike, Alice will notice. His thoughts, in addition to his outward actions, have a direct impact on his interactions with Alice. Thus, Bob has an incentive to think differently than he would if he were less transparent to Alice. 60 This changes the space of actions Bob can take, because actions that would require planning will produce side effects in Alice’s awareness. For example, if Bob begins to formulate a plan to deceive Alice, she might notice and try to shut him down and/or simply see through the deception. Similarly, imagine two nations which have a large number of spies investigating one another. If Nation A begins to plan a trade embargo against Nation B, spies may leak this information to Nation B and trigger early responses from Nation B prior to Nation A’s instatement of the embargo. The early response could range from submissive behavior (say, conceding to Nation A’s expected demands) to preemptive counter-embargoes, depending on the situation. Scenario-driven motivation. Could a powerful AI system someday learn or infer how to deceive its own developers? If possible, it could constitute a Type 1b or 1c risk (unrecognized prepotence or unrecognized misalignment). If not possible, it would be reassuring to have a definite answer as to why. This is a question for “open source game theory”, the analysis of interactions between decision-making entities that are partially or fully transparent to one another. More broadly, deception is only one important feature of a human/AI equilibrium in which mutual transparency of the human and the AI system could play a key role. Another might be intimidation or corruption: is it possible for the mere existence of a particular powerful AI system—in a partially or fully transparent form—to intimidate or corrupt its creators to modify or deploy it in ways that are harmful to the public? In a diffuse sense, this might already be happening: consider how the existence of social media platforms create an ongoing incentive for their developers to make incremental updates to increase user engagement. While profitable for the company, these updates and resulting increases in engagement might not be beneficial to the overall well-being of individual users or society. To understand the dynamics of these mutually transparent relationships between humans and AI systems, it might help to begin by analyzing the simplest case of a single human stakeholder interacting with a single relatively transparent AI system, and asking what equilibrium (long-run) behaviors are possible to arise. Instrumental motivation. Generative models of machine learning agents reaching equilibria in open-source games could be helpful toward understanding • Direction 17 (hierarchical human-in-the-loop learning (HHL)). In scenarios where one AI system is tasked with assisting in the oversight of other AI systems, it might make sense for the overseer system to be given access to the sources codes or other specifications of the systems being overseen. By contrast, classical game theory assumes that players are capable of private thoughts which determine their actions. Hence, the relationship between an AI system and a system overseeing its source code is outside the assumptions of classical game theory. • Direction 29 (human-compatible equilibria). An AI system’s source code will likely be visible to the humans who engineered it, who will likely use that code to run simulations or other analyses of the system. This relationship is also outside the assumptions of classical game theory. 61 Actionability. Halpern and Pass (2013) have already remarked that “translucency” rather than opacity is a more realistic assumption when modeling the interaction of human institutions, or humans who can read one another’s body language. Moreover, remarkably different equilibrium behavior is possible when agents can read one another’s source code. Tennenholtz (2004) developed the notion of program equilibrium for a pair of programs playing a game which, when given access to one another’s source code, have no positive incentive to be replaced or self-modified. Strikingly, it turns out that open-source agents can achieve certain cooperative (or defective) equilibria that are in principle not possible for closed-source agents (Critch, 2019). Understanding whether and how such equilibria could arise amongst advanced AI systems (and how various design choices might affect these outcomes), or between AI systems and humans, is an important question for understanding how multi-agent AI systems will equilibrate with humans. Consideration of side effects. This direction could be problematic from an existential risk perspective if models of open-source equilibria are later used to preferentially develop AI/AI/AI coordination methods in the absence of human/AI coordination methods or multi-human multi-AI coordination methods. Such methods could lead to Type 2b and 2c risks (economic displacement of humans and human enfeeblement) and/or Type 2c risk (human enfeeblement) if they result in too much human exclusion from economically productive work. 6 Single/multi delegation research This section is concerned with delegation from a single human stakeholder to multiple operationally separated AI systems (defined below). As powerful AI systems proliferate, to diminish Type 1b and 1c risks (unrecognized prepotence and unrecognized misalignment), it might help to have ways of predicting and overseeing their collective behavior to ensure it remains controllable and aligned with human interests. Even if serving a single human or human institution, coordination failures between large numbers of interacting machines could yield dangerous side effects for humans, e.g., pollutive waste, or excessive consumption of energy or other resources. These could constitute Type 1c risks (unrecognized misalignment). Conversely, unexpectedly well-coordinated interactions among multiple AI systems could constitute Type 1b risk (unrecognized prepotence), for instance, if a number of cooperating AI systems turned out to be capable of collective bargaining with states or powerful corporations. To begin thinking clearly about such questions, we must first decide what to count as “multiple AI systems” versus only a single AI system: Operational separation. Roughly speaking, for the purposes of this report, when we say “multiple AI systems” we are referring to a collection of AI-based algorithms being executed on physically or virtually separated computational substrate units, with each unit having a relatively high-bandwidth internal integration between its sensors, processors, and actuators, but only relatively low-bandwidth connections to other units. We say that such units are operationally separated. It might be tempting to simplify the number of concepts at play by viewing the collective functioning of operationally separate units as a single 62 “agent” to be aligned with the human stakeholder. However, this perspective would elide the mathematical and computational challenges involved in balancing the autonomy of the individual units against the overall functioning of the group, as well as the non-trivial task of dividing up responsibilities between the units. Dec-POMDPs. The concept of a Decentralized Partially Observable Markov Decision Process, or Dec-POMDP (Oliehoek et al., 2016), is a useful formalism for describing the problem faced by multiple AI systems (i.e., multiple operationally separated units) working to serve a common purpose. Variants of Dec-POMDPs can also be considered, such as by adding uncertainty to the reward function or transition dynamics, or more refined assumptions on computational limitations. 6.1 Single/multi comprehension If companies and governments deploy “fleets” of AI systems to serve specific objectives—be they in physical or virtual environments—humans will likely seek to understand their collective behavior in terms of the individual units and their relationships to one another. From one perspective, a fleet of AI systems might be viewed as “just a set of parallel processing units.” But, when the systems are engaged in interactive intelligent decision-making based on objective-driven modeling and planning, new tools and abstractions may be needed to organize our understanding of their aggregate impact. This section is concerned with research to develop such tools and abstractions. Single/multi delegation seems poised to become increasingly relevant. Modern computer systems, and machine learning systems in particular, already make increasing use of parallel computation. This is in part because the speed of individual processors has started to encounter physical limits, even though the cost of a FLOP has continued to decline rapidly. However, there are also increasingly relevant physical limits to communication bandwidth between processes; thus future large-scale computer systems will almost certainly employ a high degree of operational separation at some scale of organization. 6.1.1 Direction 13: Rigorous coordination models The Von Neumann-Morgenstern utility theorem and resulting utility theory (Morgenstern and Von Neumann, 1953; Von Neumann and Morgenstern, 2007) provides a principled framework for interpreting the actions of a single agent: optimizing an expected value function conditioned on a belief distribution over the state of the world. Can an analogous theory be developed for a cooperative multi-agent system to serve a single goal or objective? In addition to utilities and beliefs, the model should also include mathematical representations of at least two other concepts: • Communications: packets of information exchanged between the agents. These could be modeled as “actions”, but since communications are often designed specifically to directly affect only the internal processes of the agents communicating, they should likely receive special treatment. • Norms: constraints or objective functions for the policies of individual agents, which serve to maintain the overall functioning of the group rather than the unilateral contributions of its members. 63 Social analogue. Humans, of course, communicate. And our reliance upon norms is evident from the adage, “The ends do not justify the means”. An individual person is not generally expected to take actions at all costs to unilaterally optimize for a given objective, even when the person believes the objective to serve “the greater good”. Instead, a person is expected to act in accordance with laws, customs, and innate respect for others, which ideally leads to improved group-scale performance. Scenario-driven motivation. If there is any hope of proving rigorous theorems regarding the collective safety of multi-agent systems, precise and accurate mathematical definitions for their components and interaction protocols will be needed. In particular, theorems showing that a collective of AI systems is or is not likely to become prepotent or misaligned will require such models. Hence, this direction applies to the reduction of Type 1b and 1c risks (unrecognized prepotence and unrecognized misalignment). Moreover, common knowledge of problems and solutions in this area may be necessary to motivate coordination to reduce Type 1a risks (uncoordinated MPAI development), or to avoid dangerous interactions with powerful AI systems that would yield Type 1d risk (involuntary MPAI deployment). Actionability. The framework of Dec-POMDPs introduced by Bernstein et al. (2002) provides a ready-made framework for evaluating any architecture for decentralized pursuit of an objective; see Oliehoek et al. (2016) for an overview. As such, to begin proving a theorem to support the use of any given coordination protocol, one could start by stating conjectures using the language of Dec-POMDPs. Protocols could be tested empirically against existing machine learning methods for solving Dec-POMDPs. In fact, any given Dec-POMDP can be framed as two distinct machine learning problems: • Centralized training for decentralized execution. This is the problem of producing—using a centralized training and/or learning system— a suite of decentralized “agents” (sensor/actuator units) that collectively pursue a common objective. As examples of recent work in this area: – Sukhbaatar et al. (2016) treat a system of decentralized agents undergoing centralized training as a single large feed-forward network with connectivity constraints representing bandwidthlimited communication channels. The authors find that on four diverse tasks, their model outperforms variants they developed with no communication, full-bandwidth communication (i.e., a fully connected network), and models using discrete communication. – Foerster et al. (2016) propose two approaches to centralized learning of communication protocols for decentralized execution tasks. The first, Reinforced Inter-Agent Learning (RIAL), has each agent learn its communication policy through independent deep Q-learning. The second, Differentiable Inter-Agent Learning (DIAL), allows the training system to propagate error derivatives through noisy communication channels between the agents, which are replaced by discrete (lower bandwidth) communication channels during execution. 64 – Foerster et al. (2017) explore, in a collaborative multi-agent setting with no communication at execution time, two methods for making use of experience replay (the re-use of past experiences to to update a current policy). Each method aims to prevent the learners from confusing the distant-past behavior of its collaborators with their more recent behavior. The first method treats replay memories as off-environment data (Ciosek and Whiteson, 2017). The second method augments past memories with a “fingerprint”: an ordered tuple comprising the iteration number and exploration rate, to help distinguish where in the training history the experience occurred. • Decentralized training for decentralized execution. This is the problem of a decentralized set of learners arriving at a collective behavior that effectively pursues a common objective. As examples of recent related work: – Matignon et al. (2012) identify five qualitatively distinct coordination challenges—faced by independent reinforcement learners pursuing a common (cooperative) objective—which they call “Pareto-selection”, “nonstationarity”, “stochasticity”, “alter-exploration” and “shadowed equilibria”. – Tampuu et al. (2017) examine decentralized Q-learners learning to play variants of Pong from raw visual data, including a cooperative variant where both players are penalized equally when the ball is dropped. The variety of problems and methods in recent literature for training collaborative agents shows that no single architecture has been identified as universally effective, and far from it. None of the above works is accompanied by a rigorous theoretical model of how coordination ought to work in order to be maximally or even sufficiently effective. Hence the motivation for more rigorous foundations: to triage the many potential approaches to learning for single/multi delegation. Consideration of side effects. In order for research enabling multiagent coordination to eventually lead to a decrease rather than an increase in existential risk, it will need to be applied in a manner that avoids runaway coordination schemes between AI systems that would constitute a Type 1a, 1b, 1c, or 1d risk (uncoordinated MPAI development, unrecognized prepotence, unrecognized misalignment, or involuntary MPAI deployment). In particular, coordination-learning protocols compatible with a human being serving as one of the coordinating agents may be considerably safer in the long run than schemes that exclude humans. Present methods do not seem particularly suitable for explicitly including humans in the mix. 6.1.2 Direction 14: Interpretable machine language Just as today we seek more enlightening explanations for the actions of a neural network in order to improve our ability to evaluate and predict its behavior, in the not-too-distant future we will likely find ourselves seeking to understand the content of communications between AI systems. 65 Social analogue. Business regulations that generate legible, auditable communications within and between companies increase the difficulty for those companies to engage in corrupt business practices. This effect is of course only partial: despite the significant benefits of auditing requirements, it is usually still possible to find ways of abusing and/or circumventing legitimate communication channels for illegitimate means. Scenario-driven motivation. As we humans delegate more of our decisions to AI systems, we will likely require those systems to communicate with each other to achieve shared goals. Just as transparency for an individual AI system’s cognition benefits our ability to debug and avoid systematic and random errors, so too will the ability to interpret communications between distinct decision-making units. This benefit will likely continue to scale as the scope and number of AI systems grows. For AI capabilities approaching prepotence, interpretability of communications between AI systems may be needed to avoid Type 1b and 1c risks (unrecognized prepotence and unrecognized misalignment). The more broadly understandable the interpreted communications are made, the better developer coordination can be enabled to diminish Type 1a risk (uncoordinated MPAI development). Since interpretable communications are more easily monitored and regulated, interpretable communication standards may also be helpful for regulating communicative interactions with powerful deployed AI systems, including communications that could precipitate Type 1d risk (involuntary MPAI deployment). Actionability. As techniques develop for machine learning transparency and interpretability, similar techniques may be adaptable to ensure the interpretability of machine–machine communications in multi-agent settings; see Direction 1. Or, there may arise entirely novel approaches. Bordes et al. (2016) explore the use of end-to-end trained dialog systems for issuing and receiving API calls, as a test case for goal-oriented dialogue. In this setting, one could consider a dialogue between two machines, Machine A and Machine B, where A treats B as a machine+human system in which the human on rare occasions attempts to understand messages from A to B and penalizes the system heavily if they are not understandable. As an alternative or complement to sparse human feedback, perhaps machine–machine language could be constrained or regularized to be similar to human language, as in Lewis et al. (2017). Or, perhaps frequent automated feedback on the understandability of the A/B communication channel could be provided by a dialog state-tracking system (DSTS). As DSTS normally attempts to understand human dialogue (Henderson et al., 2014), but perhaps one could be repurposed to give automated feedback on whether it can understand the communication between A and B. Consideration of side effects. Any attempt to design or select for interpretability could lead to accidentally deceiving humans if one optimizes too much for human satisfaction with the communications rather than the accuracy of the human’s understanding. A particular concern is “steganography”, where information is “hidden in plain sight” in a way that is invisible to humans; demonstrate steganography in cycleGANs (). 66 6.1.3 Direction 15: Relationship taxonomy and detection In any attempt to train a multi-agent system to perform useful tasks like delivery services and waste collection, it is already clear that our choice of training mechanism will tend to affect whether the individual agents end up exhibiting cooperative or competitive relationships with one another. Aside from “cooperative” and “competitive”, what other descriptors of relationships between agents in a multi-agent system can be quantified that would allow us to better understand, predict, and perhaps improve upon the system’s behavior? Social analogue. Alice and Bob work together on a team whose responsibility is to send out a newsletter every week. Alice always asks to see the newsletter before Bob sends it out. Bob has expressed that he thinks Alice’s review is an unnecessary step, however, Alice continues to advocate for her review step. Are Alice and Bob in a competitive or cooperative relationship here? The answer could be somewhat complex. Perhaps Alice and Bob both really have the newsletter’s best interests at heart, and know this about each other, but Alice just doesn’t trust Bob’s judgment about the newsletters. Or, perhaps she doubts his loyalty to their company, or the newsletter project specifically. Perhaps even more complicatedly, she might trust Bob’s judgment about the content entirely, but prefer to keep the reviews in place to ensure that others know for sure that the newsletter has her approval. This scenario illustrates just a few ways in which disagreements in working relationships can arise from a variety of different relationships between beliefs and values, that do not always involve having different values. Scenario-driven motivation. To avert Type 1b and 1c risks (unrecognized prepotence and unrecognized misalignment), any single institution deploying multiple powerful AI systems into the real world will need to have a sufficient understanding of the relationships that would arise between those systems to be confident their aggregate behavior would never constitute an MPAI. To avoid Type 1a and 1d risks (uncoordinated MPAI development and involuntary MPAI deployment), development teams will collectively need to maintain an adequate awareness of the potential interactions between their own AI systems and AI systems deployed by other teams and stakeholders. For instance, consider the possibility of a war between AI systems yielding an unsurvivable environment for humanity. • If the warring AI systems were developed by warring development teams, the aggregate AI system comprising the interaction between the warring systems would be an MPAI. This would constitute a Type 1a risk (uncoordinated MPAI development), or a Type 1e risk (voluntary MPAI deployment) if one of the teams recognized that their involvement in the war would make it unsurvivable. Such cases could perhaps be made less likely by other “peacekeeping” AI systems detecting the violent relationship between the conflicting systems, and somehow enforcing peace between them to prevent them from becoming an MPAI in aggregate. • If the war or its intensity was unexpected or unintended by the developers of the AI technology used in the war, it could constitute a 67 Type 1b, 1c, or 1d risk (unrecognized prepotence, unrecognized misalignment, or involuntary MPAI deployment). Such cases could perhaps be made less likely by detecting and notifying developers when violent relationships are arising between the systems they develop and deploy, and allowing developers to recall systems on the basis of violent usage. On the other hand, an unexpected coalition of AI systems could also yield a runaway loss of power for humanity. If the coalition formation was expected by everyone, but human institutions failed to work together to stop it, then it would constitute a 1a or 1d. Developing a methodology for identifying and analyzing relationships between AI systems might be among the first steps to understanding and preventing these eventual possibilities. Crucially, there may be many more complex relationships between powerful AI systems that we humans would struggle to define in terms of simple war or peace, furthering the need for a systematic study of machine relationships. In any case, both positive and negative results in research on relationship taxonomy and detection could be beneficial to making negative outcomes less likely: • Benefits of negative results. If the relationships between nearprepotent AI systems begin to appear too complex to arrange in a manner that is legibly safe for humanity, then researchers aware of this issue can advise strongly for policies to develop at most one very powerful AI system to serve human civilization (or no such system at all, if multi/single delegation also proves too difficult). In other words, advanced warning of unsurmountable difficulties in this research area might help to avoid heading down a so-called “multi-polar” development path for powerful AI technologies. • Benefits of positive results. If the relationships between nearprepotent AI systems appear manageable, perhaps such systems could be used to keep one another in check for the safety of humanity. In other words, positive results in this area might help to optimize a “multi-polar” development pathway to be safer on a global scale. Actionability. One approach to this research area is to continually examine social dilemmas through the lens of whatever is the leading AI development paradigm in a given year or decade, and attempt to classify interesting behaviors as they emerge. This approach might be viewed as analogous to developing “transparency for multi-agent systems”: first develop interesting multi-agent systems, and then try to understand them. At present, this approach means examining the interactions of deep learning systems. For instance, Leibo et al. (2017) examine how deep RL systems interact in two-player sequential social dilemmas, and Foerster et al. (2018) explore the consequences of agents accounting for one another’s learning processes when they update their strategies, also in two-player games. Mordatch and Abbeel (2018) examine the emergence of rudimentary languages from a centralized multi-agent training process, giving rise to a variety of interactive behaviors among the agents. Consideration of side effects. This sort of “build first, understand later” approach will become increasingly unsatisfying and unsafe as AI technology improves, especially if AI capabilities ever approach prepotence. As remarked by Bansal et al. (2017), “a competitive multi-agent environment 68 trained with self-play can produce behaviors that are far more complex than the environment itself.” As such, it would be useful to develop a methodology for relationship taxonomy and detection that not only makes sense for current systems but will generalize to new machine learning paradigms in the future. For this, a first-principles approach rooted in the language of game theory and/or economics may be necessary as a complement to empirical work. 6.1.4 Direction 16: Interpretable hierarchical reporting This research direction is concerned with arranging hierarchies of AI systems that report to one another and to humans in a manner that resembles a present-day human business, and that would be legible to human overseers. Hierarchy is a natural solution to the problem of “scalable oversight” (Amodei et al., 2016) for teams of AI systems and/or humans, because hierarchies often lead to exponential gains in efficiency by reducing the complexity of problems and systems to smaller parts. In a hierarchical reporting paradigm, AI systems could be developed for the express purpose of “middle management”, to provide intelligible reports and questions either directly to humans, or other AI systems. By involving human overseers at more levels of the hierarchy, perhaps a greater degree of interpretability for the aggregate system can be maintained. Social analogue. Imagine the CEO of a large corporation with thousands of employees. The CEO is responsible for making strategic decisions that steer the company towards desirable outcomes, but does not have the time or expert technical knowledge to manage all employees and operations directly. Instead, she meets with a relatively small number of managers, who provide her with summarized reports on the company’s activities that are intelligible to the CEO’s current level of understanding, with additional details available upon her request, and a limited number of questions deferred directly to her judgment. In turn, each manager goes on to review other employees in a similar fashion. This reporting structure is enriched by the ability of the CEO to ask questions about reports from further down in the “chain of command”. Scenario-driven motivation. Consider a world in which autonomous, nearly-prepotent AI systems have become capable of interacting to generate a large number of business transactions that generate short-term wealth for their users and/or trade partners. Who or what entity can oversee the net impact of these transactions to avoid negative externalities in the form of catastrophic risks, e.g., from pollution or runaway resource consumption? Historically, human governments have been responsible for overseeing and regulating the aggregate effects of the industries they enable, and have benefited from human-to-human communications as a source of inspectable documentation for business interactions. If no similar report-generation process is developed for AI systems, human businesses and governments will face a choice: either to stifle the local economic gains obtainable from autonomous business transactions in favor of demanding more human involvement to generate reports, or to accept the risk of long-term loss of control in favor of the short-term benefits of more autonomy for the AI systems. If and when any nation or corporation would choose the latter, the result could be: 69 • An increase in Type 1c, 1b, and 1d risks (unrecognized misalignment, unrecognized prepotence, and involuntary MPAI deployment) due to the inability of the companies releasing AI systems to monitor their potential prepotence or misalignment through reporting mechanisms, and • An increase in Type 1a risks (uncoordinated MPAI development) due to the inability of human authorities such as governments and professional organizations to recognize and avert decentralized development activities that could pose a risk to humanity in aggregate. Thus, it would makes sense to find some way of eliminating the pressure to choose low-oversight regulatory regimes and business strategies, by making high-oversight strategies cheaper and more effective. Hierarchical reporting schemes would take advantage of exponential growth of the amount of supervision carried out as a function of the depth of the hierarchy, and may become a key component to scaling up supervisory measures in a cost-effective manner. One potential approach to this problem would be to deploy AI systems in “middle management” roles that curate reports for human consumption. One can imagine chains of command between submodules that oversee one another for safety, ethics, and alignment with human interests. Just as communication between employees within a company can be made to produce a paper trail that helps to some degree with keeping the company aligned with governing authorities, perhaps teams of AI systems could be required to keep records of their communications that would make their decision-making process more inspectable by, and therefore more accountable to, human overseers. Such an approach could serve to mitigate Tier 1 risks (MPAI deployment events) in full generality. Actionability. The interpretability aspect of this research direction would benefit directly from work on Directions 1 (transparency and explainability). The concept of hierarchical learning and planning is neither new nor neglected in reinforcement learning (Dayan and Hinton, 1993; Kaelbling, 1993; Wiering and Schmidhuber, 1997; Sutton et al., 1999; Dietterich, 2000; Kulkarni et al., 2016; Vezhnevets et al., 2016; Bacon et al., 2017; Tessler et al., 2017). The conception of different levels of the planning hierarchy as separate agents is also familiar (Parr and Russell, 1998). By viewing levels of hierarchical planning as separate learning agents, one can ask how to improve the transparency or interpretability of the subagents to the superagents, along the lines of Direction 1 (transparency and explainability). Ideally, the “reports” passed from subagents to superagents would be human-readable as well, as in Direction 14 (interpretable machine language). Hence, work on building interpretable hierarchical reporting structures could begin by combining ideas from these earlier research directions, subject to the constraint of maintaining and ideally improving task performance. For instance, one might first experiment with unsupervised learning to determine which ‘report features’ should be passed from a sub-agent to a superagent, in the manner learned by the agents in Mordatch and Abbeel (2018). One could then attempt to impose the constraint that the reports be human-interpretable, through a combination of real human feedback and artificial regularization from natural language parsers, although as discussed in Direction 1 (transparency and explainability), it is unclear how to ensure such reports would reflect reality, as opposed to simply offering “rationalizations”. 70 Consideration of side effects. If the humans involved in interpreting the system were insufficiently concerned with the safety of the public, they might be insufficiently vigilant to avert catastrophic risk from rare or unprecedented events. Or, if the humans individually cared about catastrophic risks, but were for some reason uncomfortable with discussing or reporting the potential for rare or unprecedented catastrophes, their individual concerns would not be enough to impact the collective judgment of the system. Hence, Type 2d risk (ESAI discourse impairment) might undermine some of the usefulness of this research direction specifically for existential risk reduction. Finally, if the resulting systems were interpretable to humans, but the institutions deploying the systems chose not to involve enough humans in the actual task of interpreting the systems (say, to operate more quickly, or to avoid accountability), then advancements in this area would accrue mostly to the capabilities of the resulting systems rather than their safety. 6.2 Single/multi instruction This section is concerned with delivering instructions to N operationally separated decision-making units to serve the objectives of a single human stakeholder. This problem does not reduce to the problem of instructing N separate AI systems to each serve the human on their own. This is because coordination solutions are needed to ensure the units interact productively rather than interfering with one another’s work. For instance, given multiple “actuator” units—each with the job of taking real-world actions to affect their physical or virtual environments—a separate “coordinator” unit could be designed to assist in coordinating their efforts. Conveniently, the role of the coordinator also fits within the Dec-POMDP framework as a unit with no actuators except for communication channels with the other units. 6.2.1 Direction 17: Hierarchical human-in-the-loop learning (HHL) Just as reports will be needed to explain the behavior of AI systems to humans and other AI systems, queries from subsystems may be needed to aid the subsystems’ decision-making at times when they have insufficient information or training to ensure safe and beneficial behavior. This research objective is about developing an AI subsystem hierarchy in a manner compatible with real-time human oversight at each level of the hierarchy. Social analogue. Many companies are required to undergo financial audits on a regular basis. For example, the California Nonprofit Integrity Act requires any charity with an annual gross revenue of $2 million or more to have their financial statements audited, on an annual basis, by an independent certified public accountant. This ensures that the taxpayer has a representative—the auditing firms—involved in the management of every tax-exempt company of a sufficient size. Suppose instead that California’s Franchise Tax Board attempted to audit every company itself; the FTB would quickly become overwhelmed by the amount of information to process. Hence, the notion of an auditing firm is a replicable and hence scalable unit of organization that allows for more pervasive representation of taxpayer interests, at a scale of authority that is intermediate between the employees of individual companies on the low end and the California Franchise Tax Board on the high end. 71 Scenario-driven motivation. Active learning—that is, machine learning driven by queries from the machine to a human about areas of high uncertainty—seems potentially necessary for ensuring any AI system makes economical use of the human labor involved in training it. It is likely possible to arrange AI systems into a hierarchy, as in Direction 16 (interpretable hierarchical reporting), where lower-level systems make queries to higherlevel systems. In such a set-up, human beings could be involved in answering the queries, either • only at the topmost level of the hierarchy, or • at all or most levels of the hierarchy. The latter option would seem better from an employment perspective: more roles for humans in the hierarchy means a reduction of Type 2b risk (economic displacement of humans), and if the roles involve maintaining valuable human skills, a reduction of Type 2c risk (human enfeeblement). Involving a human at each node of the hierarchy also seems better from the perspective of accountability and governance. Many human laws and accountability norms are equipped to deal with hierarchical arrangements of responsibilities, and hence could be applied as soft constraints on the system’s behavior via feedback from the humans. In particular, human-checked company policies could be implemented specifically to reduce Type 1b, 1c, and 1d risks (unrecognized prepotence, unrecognized misalignment, and involuntary MPAI deployment), and nation-wide or world-wide laws could be implemented to reduce Type 1a and 1e risks (uncoordinated MPAI development and voluntary MPAI deployment). The weight of these laws could derive in part from the accountability (or less euphemistically, the punishability) of the individual humans within the system if they fall short of their responsibilities to instruct the system according to safety guidelines. Such a system of accountability might feel daunting for whatever humans would be involved in the system and therefore accountable for global safety, but this trade-off could well be worth it from the perspective of existential risk and long-term human existence. Actionability. Engineering in this area would benefit from work on Direction 16 (interpretable hierarchical reporting) because of the improved understanding of the aggregate system that would accrue to the engineers. After deployment, in order for each human in the HHL system to oversee their corresponding AI system in a time-efficient manner, techniques would be needed to train each AI system to take a large number of actions with only sparse feedback from their human supervisor on which actions are good. Amodei et al. (2016) identify this issue as a problem in what they call “scalable oversight”, and propose to approach it via semi-supervised reinforcement learning (SSRL). In SSRL, where a managing or training system (which might involve a human) provides only sparse input into the decisionmaking of a reinforcement learner. They outline six technical approaches to scalable oversight, and potential experiments to begin work in this area. Sparse rewards are merely one piece of the puzzle needed to be solved to enable HHL. Abel et al. (2017) aim to develop a schema for “Humanin-the-Loop Reinforcement Learning” that is agnostic to the structure of the learner. Scaling up human-in-the-loop interaction models in a principled and generalizable manner is a rich technical challenge. To reduce confusion about whether solutions would be applicable for more complex or civilization-critical tasks, it is recommended that authors include in their 72 publications some discussion of the scalability of their solutions, e.g., as in Saunders et al. (2017). Consideration of side effects. Hierarchical decision-making structures present a clear avenue for general AI capabilities advancements. These advancements may fail to reduce existential risk if any of the following problems arise: • The institutions deploying the resulting AI systems choose not to involve enough humans in the hierarchy. For instance, the institution might prefer this outcome to speed up performance, or avoid accountability. • The AI systems in the hierarchy are insufficiently legible to the humans, i.e., if progress on Direction 16 (interpretable hierarchical reporting) has been insufficient, or not applied to the system. • The humans involved in the hierarchy are insufficiently individually motivated to think about and avert unprecedented catastrophic risks. • The humans in the hierarchy are uncomfortable discussing or reporting their concerns about unprecedented catastrophic risks. 6.2.2 Direction 18: Purpose inheritance As AI systems are used increasingly in the development of other AI systems, some assurance is needed that the deployment of a putatively “aligned” system will not lead to the creation of dangerous systems as a side effect. To begin thinking about this dynamic informally, if an AI system A takes actions that “create” another AI system B, let us say that B is a “descendant” of A. Descendants of descendants of A are also considered to be descendants of A. Given a satisfactory a notion of “creating a descendant”, we say that A has a heritable purpose to the extent that there is some purpose—that is, some internally or externally specified objective— which A’s own actions directly benefit, and which the collective actions of A’s descendants also benefit. This research direction is concerned with the challenge of creating powerful AI systems with any particular heritable purpose, with human survival being a purpose of special interest. While the precise definition of “creating a descendant” is interesting to debate, the relevant definition for this report is whatever notion can best guide our efforts to reduce existential risk from useful real-world AI systems. In particular, our notion of “creation” should be taken fairly generally. It should include cases where A creates B • “intentionally”, in the sense of being directed by a planning process internal to A which represents and selects a series of actions for their utility in creating B; • “subserviently”, in the sense of being directed by a human or another AI system with an intention to use use A as a tool for the creation of B; or • “accidentally”, in the sense of not arising from intentions on the part of A or other systems directing A. Whatever the definition, safety methods applicable for broader definitions of “descendant” will be able to cover more bases for avoiding existential risks from descendant AI systems. 73 Social analogue. A human corporation may be viewed as having a heritable purpose if it only ever creates subsidiary companies that effectively serve the parent corporation’s original purpose. To the extent that subsidiaries might later choose to defect against the parent’s mission, or create further subsidiaries that defect, the parent’s purpose would not be considered perfectly heritable. When a human institution builds an AI system, that system can be viewed as a “descendant” of the institution. So, if an AI system brings about human extinction, it could be said that human civilization itself (as an institution) lacks the survival of the human species as a heritable purpose. Scenario-driven motivation. An AI system with the potential to create prepotent descendants presents a Type 1b risk (unrecognized prepotence). As an unlikely but theoretically enlightening example, an AI system performing an unconstrained search in the space of computer programs has the potential to write an AI program which is or becomes prepotent. In general, it may be difficult to anticipate which AI systems are likely to instantiate descendants, or to detect the instantiation of descendants. At the very least, a powerful AI system that is not itself an MPAI, but which lacks human survival as a heritable purpose and is used to develop other AI systems, could constitute a Type 1c risk (unrecognized misalignment). For instance, an automated training system for developing machine learning systems could be used as a tool to develop an MPAI, and hence the training system would lack human survival as a heritable purpose. Actionability. Lack of technically clear definitions of “instantiate a descendant” and “heritable purpose” are obstructions to this research direction. Some definitions would be too restrictive to apply in reality, while others would be too permissive to imply safety results even in theory. Hence, next actions could involve developing clearer technical conceptions of these ideas that are adequate for the purposes of guiding engineering decisions and reducing existential risk. There are at least two distinct approaches one might consider: • Approach 1: Avoidance techniques. This approach develops an adequate definition of “instantiating a descendant”, and uses the resulting concept to design AI systems that entirely avoid instantiating descendants, thus obviating the need for purpose inheritance. There has not been much research to date on how to quantify the notion of “instantiating a descendant”, though a few attempts are implicit in literature on agents that “copy”, “teleport”, or “tile” themselves (Yudkowsky and Herreshoff, 2013; Orseau, 2014a,b; Soares, 2014; Fallenstein and Soares, 2015). One problem is that current theoretical models of AI systems typically assume a well-defined interface between the AI system and its environment, receiving inputs only via well-defined sensors and making outputs only via well-defined actuators. Such models of AI systems are sometimes called dualistic, after mind-body dualism. In reality, AI systems are embedded in the physical world, which they can influence and be influenced by in ways not accounted for by the leaky abstraction of their interface. Orseau and Ring (2012) consider a fully embedded version of AIXI (Hutter, 2004; Everitt and Hutter, 2018) and conclude that in this setting: “as soon as the agent and environment interact, the boundary between them 74 may quickly blur or disappear” (Orseau and Ring, 2012), but these works do not attempt to resolve the questions this raises about identifying descendants. Thus, a more general and real-world applicable notion of “instantiating a descendent” is needed. Alternatively, one could imagine a “know it when we see it” approach to defining the concept. However, such an approach might not scale well to regulating systems that could find ways of replicating and/or engineering new systems that humans would not easily recognize as cases of replication and/or engineering. Thus, a characterization of “instantiating descendants” that is simultaneously rigorous and realworld applicable is missing. The reader is invited ponder potential approaches to formalizing this problem. • Approach 2: Heritability results. Develop an adequate definition for “instantiating a descendant”, as well has “heritable purpose”, and use these conceptions in one of two ways: (a) Possibility results: Develop AI systems with the heritable purpose to serve and protect humanity as a whole, in particular by avoiding existential risks and MPAI deployment events; or (b) Impossibility results: Develop demonstrations or arguments that Approach 2(a) is too difficult or risky and that Approach 1 is better. These approaches are more difficult than Approach 1 because they involve more steps and concepts. Nonetheless, some attempts in this direction have been made. Yudkowsky and Herreshoff (2013); Fallenstein and Soares (2015) and others consider AI systems reasoning about the heritable properties of their descendants using logic, which remains a topic of ongoing research. One remaining challenge is to maintain the strength of descendants’ reasoning in the face of self-reference issues, which is addressed to some extent—at least asymptotically—by Garrabrant et al. (2016). It could also be valuable to empirically evaluate the propensity of agents based on current machine learning techniques to create descendants. For instance Leike et al. (2017) devise a toy grid-world environment for studying self-modification, where they consider the behavior of reinforcement learning algorithms. Considering more complex environments where descendants are still easy to identify by construction would be a good next step. Learning to predict which behaviors are likely to instantiate descendants in such settings would be also be useful. Consideration of side effects. Progress on possibility results in Approach 2(a) would be dual purpose, in that the results would likely create the theoretical capability for other purposes aside from “serve and protect humanity” to be inherited and proliferated. As well, progress on defining the notion of descendant in Approach 1 could be re-purposed for a better understanding of heritability in general, and could thereby indirectly contribute to dual purpose progress within Approach 2(a). 6.2.3 Direction 19: Human-compatible ethics learning It is conceivable that human-favorable behavior norms for a powerful AI system interacting with human society could be derived from some more 75 fundamental ethical abstraction, such as loyalty or reciprocity of an agent toward other agents that have allowed its existence, which would include humans. This research direction involves investigating that possibility. Social analogue. Many individuals experience a sense of loyalty to the people and systems that have empowered them, for example, their parents and teachers, their country of origin, the whole of human civilization, or nature. As a result, they choose to align their behavior somewhat with their perceptions of the preferences of those empowering systems. Scenario-driven motivation. It is conceivable that many peculiarities of human values will not be easily describable in terms of individual preferences. There may be other implicit constraints on the behavior of individual humans that would violate the von Neumann-Morgenstern rationality axioms for individual agents, but might be valuable at the scale of group rationality. For example, a person might reason “I won’t do X because if everyone did X it would be bad, even though if only I did X it might be slightly good.” Failing the development of an explicit theory for learning “nonpreferential” human values, a fallback option might be to discover cooperative ethical principles from scratch, and then test to see if they suffice for sustainable cooperation with humans. This would add another potential pathway to alignment, thereby reducing Type 1c risk (unrecognized misalignment). Perhaps the ethic “avoid acquiring too much power” could be among the ethical principles discovered, leading to a reduction in Type 1b risk (unrecognized prepotence). In principle, preference learning and ethics learning could be complementary, such that partial progress on each could be combined to build more human-aligned systems. Instrumental motivation. In addition to posing an complementary alternative to preference learning, work on human-compatible ethics learning could yield progress on • Direction 6 (preference learning) and Direction 24 (resolving planning disagreements). It is conceivable that a single basic principle, such as loyalty or reciprocity, would be enough to derive the extent to which an AI system should not only achieve preference learning with the human customer who purchases the system, but also with the engineers who designed it, and other individuals and institutions who were passively tolerant of its creation, including the public. The system could then in theory be directed to exercise some of its own judgment to determine the relative influence various individuals and institutions had in its creation, and to use that judgment to derive appropriate compromises between conflicts in their preferences. • Limited instances of Direction 28 (reimplementation security). A system which derives its loyalties implicitly from the full history of institutions and people involved in its creation—rather than from a simple “whom to serve” attribute—might be more difficult to redirect to serve the purposes of a delinquent individual, thus addressing certain instances of reimplementation security. Actionability. This direction could benefit from progress on Direction 13 (rigorous coordination models), to the extent that human-compatible ethics 76 will involve cooperation with humans. Decentralized learning of cooperation is more likely to be applicable than centralized learning of cooperation: when an AI system learns to cooperate with a human, the human’s beliefs and policies are not being controlled by the same training process as the AI system’s. That is, any group that includes humans and AI systems working together is a decentralized learning system. Implicit progress and insights might also be drawn from working on other research directions in this report, such as Directions 1, 6, 11, 20, and 24 (transparency and explainability, preference learning, deference to humans, self-indication uncertainty, and resolving planning disagreements). AI researchers will likely encounter disagreements with each other about how to operationalize ethical concepts such as loyalty or reciprocity to humanity, just as developing technical definitions of concepts like cause, responsibility, and blame have also been topics of debate among AI researchers (McCoy et al., 2012; Halpern, 2015). Hence operationalizing these concepts may need to go through numerous rounds of discussion and revision before researchers would converge on satisfactory definitions of what constitutes ethics learning, and what ethics are human-compatible. Consideration of side effects. In order to selectively advance technology that would enable human/machine cooperation rather than only machine/machine cooperation, studies of decentralized machine/machine cooperation will need to be thoughtful about how humans would integrate into the system of cooperating agents. Otherwise, these research directions might increase the probability of runaway economies of AI systems that cooperate well with each other at the exclusion of human involvement, increasing Type 2b and 2c risks (economic displacement of humans and human enfeeblement). 6.2.4 Direction 20: Self-indication uncertainty AI systems can be copied, and can therefore be implemented in numerous distinct environments including test environments, deployment environments, and corrupted environments created by hackers. It is possible that powerful AI systems should be required to be built with some awareness of this fact, which we call “self-indication uncertainty”. Social analogue. Self-indication uncertainty is not a matter of necessary practical concern for most humans in their daily life. However, suppose a human named Alice awakes temporarily uncertain about whether she is still dreaming. Alice may be viewed as being uncertain about whether she is “Real Alice” or “Dream Alice”, a kind of self-indication uncertainty. To put it another way, Alice is uncertain about whether her current perceptions and actions are taking place in the “real world” or the “dream world”. A more familiar but perhaps more tenuous analogy is the following. Suppose Alex is a supporter of a certain political party is considering staying home instead of voting, because he expects his candidate to win. He might find himself thinking thoughts along the lines of “If I stay home, does that mean many other supporters of my party will also stay home? And if so, doesn’t that mean we’ll lose?” Now, consider the mental subroutines within Alex that are deciding whether he should stay home, and generating the above question in his mind. These subroutines may be viewed as uncertain about whether they are deciding just for the one voter (Alex), or for a large number of “copies” of the same decision-making procedure inside the 77 minds of many other supporters of her party. In other words, the voteor-stay-home subroutine has self-indication uncertainty about who (and in particular, how many party members) it is operating within. Scenario-driven motivation. See instrumental motivations. Instrumental motivation. Progress on modeling or training selfindication uncertainty could be useful for some instances of: • Direction 10 (corrigibility). Ensuring that an AI system that is able to wonder if it is a misspecified version of its “true self” could aid in motivating the system to seek out corrections for those misspecifications. For example, consider an AI system which, after real-world deployment, maintains some degree of uncertainty about whether it is operating in a pre-deployment test environment. Such a system might be more likely to comply with shut-down commands if it believes noncompliance in the test environment would result in non-deployment and therefore no opportunity to pursue its real objective in the real world. It may even be the case that some degree of self-indication uncertainty of this form is needed for an AI system to exhibit the degree of “humility” that humans naturally exhibit and would like to see exhibited in AI systems. That is to say, it remains an open question whether implicit or explicit self-indication uncertainty is a necessary condition for corrigibility. • Direction 11 (deference to humans), Direction 17 (hierarchical humanin-the-loop learning (HHL)), and Direction 29 (human-compatible equilibria). A computerized decision algorithm that knows it is being implemented on many different machines at once might reason, when making a decision, about the consequence of all of its copies making that same decision, rather than fallaciously assuming that only one of its copies will do it. This could allow an individual AI system acting within a collective or hierarchy of other AI systems to derive and follow principles that are appropriate for the entire group, playing a role in the multi-agent dynamics of HHL and human-compatible equilibria. Perhaps deference to humans is such a principle. • Direction 12 (generative models of open-source equilibria). For each decision a game-playing agent takes, it could be made uncertain about whether the resulting action is taking place in its own reasoning (its true self) or in another player’s model of the agent’s reasoning (an approximate representation of its true self). • Direction 28 (reimplementation security). An AI system which knows it might be running on a hacker’s computer might be intrinsically motivated to take extra precautions before a highly-impactful action like disabling a portion of the electrical grid. Actionability. Any particular method for representing indexical uncertainty for an agent can be readily tested for efficacy in solving Decentralized POMDPs (Dec-POMDPs), a well-known problem class for stating decentralized coordination problems between agents with a common objective (Bernstein et al., 2002). For inspiration, Dec-POMDPs can also be related to older work on decision problems with imperfect memory (Piccione and Rubinstein, 1997), by observing that solving a Dec-POMDP is equivalent 78 to solving a “memoryless POMDP”, i.e., a POMDP where the solution policy is prohibited from passing information from one time step to the next. Piccione and Rubinstein (1997), and later Taylor (2016a) using more modern notation, have shown that any memoryless POMDP solution may be viewed as a Nash equilibrium, by viewing each memory loss as the creation of a new agent with the same utility function but with a certain form of uniform uncertainty about which agent it is. The form of uncertainty used in the equilibrium, which Bostrom calls the “Self-indication assumption” (Bostrom, 2007), could be incorporated in decentralized Dec-POMDP solvers and tested for scalability. Future work would need to account for the possibility that copies of an AI system can be made with only minor variations, in which case perhaps a non-Boolean concept will be needed for whether to view two such systems as sharing the same identity. Consideration of side effects. How to ideally implement self-indication uncertainty for an AI system is a subtle question, because it might enable the system to reason about whether it is operating within a test environment or a real environment. If the system is successful in determining whether or not it is undergoing a test, it could choose to exhibit different behavior in the test than in reality, thus invalidating tests used to assess the system’s safety. Hence, there are ways in which self-indication uncertainty as a capability could undermine certain approaches to safety. 6.3 Single/multi control Analogues of Direction 9 (generalizable shutdown and handoff methods), Direction 10 (corrigibility), and Direction 11 (deference to humans) all exist for a multi-agent system serving a single human principal. Achieving solutions to these problems in a single/multi control setting will likely involve challenges that did not exist in the single/single paradigm. This section aims to identify some such problems. For instance, what precisely does it mean to shut down an AI system if it is able to transmit a copy of its source code to another existing AI system prior to being turned off? Unlike in the other research sections of this report, actionable research directions are not identified in this section, only problems. Network design and administration: a present-day analogue. The design and administration of communications and computing networks may be viewed as solving present-day analogues of single/multi control problems, to the extent that network components can be viewed as very rudimentary AI systems. For instance, maintaining communications networks requires methods for modifying and shutting down network components. The patent literature includes techniques for upgrading a programmable device in communication with a server (San Martin et al., 2002), transmitting an emergency shutdown signal to a malfunctioning device in the network (Litwin Jr and Ramaswamy, 2006), and gracefully shutting down intermediate network nodes Scudder et al. (2008). Similarly, maintaining computing networks involves somewhat analogous methods, with patents including techniques for allowing a job on a node in a computing cluster to shut down that node if it is malfunctioning (Block et al., 2005), and putting to sleep or terminating idle virtual machines to sleep to conserve cloud computing resources (Huang et al., 2014; Rigolet, 2017). 79 However, each of the above methods seems to depend on components following pre-defined protocols, rather than learned protocols. Moreover, irrespective of the method, most of the available literature on the shutdown and maintenance protocols for communications and computing networks is contained in patents—which generally only contain enough detail to enforce ownership disputes—as opposed to research literature that is intended to convey knowledge. As such, there might be considerable room for academic progress in this area. Single/multi delegation will likely present novel control problems. Just as novel administrative challenges arise for present-day computing networks that are not needed for operating a single computer, single/single control solutions are not likely to be entirely sufficient to solve single/multi control problems. Consider the problem of safe shutdown for a multi-agent system. Any operationalization of the command “safely hand off control to a human or other system” from Direction 9 could be deployed in parallel to hand off control from each agent to another “backup” agent assigned to it, such as a human overseer. However, novel failure modes might then arise, including the following: • Unsafe composition of local shutdown protocols. Safe protocols for shutting down single agents in a multi-agent system might not be safe when applied to all the agents at once, e.g., if the resulting disruption to overall system performance would be unsafe. To give a human social analogy: while it might be relatively safe for one doctor at a hospital to take a sick day when they’re not feeling well, it would not be safe for all the doctors in the hospital to do so at the same time. • Malfuctioning of local shutdown protocols. If most agents in a multi-agent system successfully shut down as a result of a global shutdown command, but some agents remain active, the actions of the remaining agents might be highly unsafe outside of the context of rest of the system. To give a human social analogy: the action of a human pilot taking off an airplane is normally a safe action to take, but would be an incredibly unsafe action if air traffic controllers around the world were on strike. Thus, any procedure that takes air traffic controllers off the job had better take pilots off the job as well. What present-day AI research directions could be undertaken that could begin to address these issues? The task of identifying concrete next actions for single/multi control research, beyond the repeated local application of single/single control solutions, is a challenge left to the reader and future researchers. 7 Relevant multistakeholder objectives Before proceeding to discuss research directions on multi/single and multi/multi delegation, this section outlines some objectives that Sections 8 and 9 will build upon in their scenario-driven motivations. These objectives may also serve as general, high-level guidelines in the furtherance of multi/single and multi/multi delegation research. A diagram of the objectives and their most direct relationships is provided in Figure 10. Note on the meaning of “misalignment”. In a setting involving multiple stakeholders with diverse values, what should be considered an “aligned” AI system? While there is much room for debate about what constitutes alignment from the perspective of all of humanity, by contrast there is a great deal of agreement among people that the world becoming unsurvivable to humanity would be a bad outcome. More generally, there may be many outcomes that nearly everyone would agree are worse than the status quo, such that the concept of misalignment might be more agreeably meaningful than alignment in many multi-stakeholder scenarios of interest. In any case, for the purpose of this report, MPAI will continue to refer to AI systems whose deployment would be unsurvivable to humanity, as it was defined in Section 2.3.

7.1 Facilitating collaborative governance

As time progresses and the impacts of AI technology increase, existential safety concerns and other broadly important issues will likely lead to an increased pressure for states and companies to collaborate in the governance of AI technology.

What is collaborative governance? For the purposes of this report, collaboration between stakeholders in the oversight of AI technology refers to the exchange of reliable information and commitments between the stakeholders. Collaborative governance of AI technology refers to collaboration between stakeholders specifically in the legal governance of AI technology. The stakeholders could include representatives of governments, companies, or other established groups.

Making the governance of AI technology more collaborative, i.e., involving more exchange of information and commitments in the governance process, is not guaranteed to be safer or more effective, as elaborated somewhat below.

Moreover, the technical properties of AI systems themselves can add to or detract from the options available for multiple stakeholders to collaborate in the oversight of the systems’ activities. We therefore adopt the following objective:

Objective 7.1 (facilitating collaborative governance) is to make it easier for diverse stakeholders to collaborate in the oversight of powerful AI technologies, by the co-development of AI technology and accompanying governance techniques that will capture the benefits of collaboration in certain aspects of governance while avoiding forms of collaboration that would be unsafe or unnecessarily costly relative to independent governance.

This objective may be somewhat complex to achieve, because the potential benefits collaborative governance may also come with a variety of pitfalls that need to be avoided, as follows.

Potential benefits of collaborative governance. Consider a scenario where some powerful new AI capability is being implemented by multiple human institutions, collaboratively or independently, to pursue one or more purposes, such as:

* efficient distribution of electricity from power plants in a safe and equitable manner;
* global health research requiring difficult-to-negotiate privacy policies for patients;
* education tools that might enable the spread of cultural values that are difficult to agree upon; or
* environmental monitoring or protection systems that might require difficult-to-negotiate economic policies.

There are a number of reasons why the developing institutions might be motivated to collaborate in the governance of this technology, including:

1. to ensure fair representation of diverse views and other objectives in governing their system(s);
2. to pool the collective knowledge and reasoning abilities of the separate institutions; or
3. to ensure sufficient weight is given to other objectives that are of interest to everyone involved (such as existential safety), relative to objectives only of interest to one person or institution.

Items B and C here point to an existential safety argument for collaboration in the governance of AI systems: a committee of representatives from different institutions of would be less likely to accidentally (by B) or intentionally (by C) take risks that a single institution might be willing to take. This consideration is elaborated further in Objective 7.3 (reducing idiosyncratic risk-taking).

Pitfalls of collaborative governance. In pursuing collaborative governance for AI systems, it is important to be mindful that collaborative governance does not guarantee better outcomes than independent governance. In general, too much collaboration or the wrong kinds of collaboration between institutions can in general lead to a variety of problems:

* Fragility: if the institutions become more dependent upon one another through collaboration, a failure of one institution risks failure of the other.
* Interference: the institutions’ operations could become entangled in unexpected ways, leading to unexpected errors.
* Collusion: by collaborating, the institutions could gain too much power or influence relative to other institutions or the public; antitrust and competition laws exist to prevent these outcomes.
* Groupthink: membership in a group can sometimes cloud the judgement of individuals, by a process known as groupthink (Janis, 1971; Hart, 1990; Janis, 2008; Esser, 1998; Janis, 2008; Bénabou, 2012). In groupthink, individual beliefs are warped to match the prevailing group consensus. Collaboration between institutions might reduce groupthink within each institution by exposing individuals to views from outside their institution, but it could also increase groupthink if the institutions begin to view themselves as a single large group.

Innovations in collaborative governance for powerful AI systems should aim to account for these and other failure modes of collaborative decisionmaking that would be harmful to many objectives, including safety.

How and when should governance be collaborative? When, and in what ways, can collaborative governance of AI systems be more effective than independent governance by essentially separate institutions? This is a daunting and multi-faceted question that is beyond the scope of this report to resolve. However, we do aim instigate some technical thinking in this area, particularly as pertaining to existential safety.

Sources of historical lessons. Absent a satisfying theory of how and when to collaborate in the governance of powerful AI systems, studies of successes and failures in the oversight of safety-critical technologies could yield informative lessons with implications at various scales of governance.

On the failure side, Sasou and Reason (1999) have developed a broad taxonomy of team decision-making failures in the oversight of safety-critical systems, through examining case studies in aviation, nuclear power, and the shipping industry. Charles Perrow’s widely cited book Normal Accidents (Perrow, 1984)—written partially in response to Three Mile Island nuclear accident of March 1979—predicts catastrophic failure in hazardous systems when those systems involve “complex and tightly coupled” interactions. Subsequent technological disasters are also considered in the 1999 edition (Perrow, 1999), such as the Bhopal industrial chemical leak in India in December 1984 (Shrivastava, 1992), the explosion of the US space shuttle Challenger in January 1986 (Vaughan, 1996), and the Chernobyl nuclear accident in Russia in April 1986 (Meshkati, 1991). Perrow contrasts these events with “normal accidents”, concluding that they involved serious managerial failures and were not inevitable consequences of the underlying technological systems.

On the success side, positive lessons can be taken from human institutions with strong track records for the safe provision of highly valued services in hazardous industries. This point has also been argued somewhat by Dietterich (2019). There is an existing corpus of academic studies examining so-called high reliability organizations (HROs), i.e., “organizations that operate beneficial, highly hazardous technical systems at high capacity with very low risk, for instance, the effective management of physically (and often socially) very hazardous production processes with very low incidents of operational failure” (LaPorte and Thomas, 1995). Examples of organizations identified and studied closely as HROs by organizational researchers include

* two nuclear-powered aircraft carriers (Rochlin, 1989; Roberts, 1989, 1990; Roberts et al., 1994; Schulman, 1993),
* the US Federal Aviation Administration’s Air Traffic Control system (Roberts, 1989; Klein et al., 1995),
* several nuclear power plants (Klein et al., 1995; LaPorte and Thomas, 1995; Bourrier, 1996),
* electricity providers (Roberts, 1989; Schulman et al., 2004), and
* a large California fire department (Bigley and Roberts, 2001).

HRO researchers have gone on to produce theories and recommendations for organizations in general to achieve high reliability (LaPorte, 1996; Rochlin, 1999; Roberts and Bea, 2001a,b; Ericksen and Dyer, 2005). Perhaps similar theories could someday be formulated quantitatively as principles for multi/single and multi/multi AI delegation in powerful AI systems.

Summary. Collaborative governance of AI systems is attractive from the perspective of issues that concern everyone, such as existential safety. However, collaborative governance is not automatically more effective than independent governance. The objective of this subsection, facilitating collaborative governance, means finding collaborative AI governance techniques that are beneficial from many perspectives (including existential safety), and that avoid pitfalls of collaborative governance. How exactly to achieve this is a complex social question that is beyond the scope of this report to answer, but is something the authors are beginning to explored somewhat at a technical level.

7.2 Avoiding races by sharing control

If powerful AI technology is developed in a manner that makes it difficult for multiple stakeholders to share control of a single system, there is some degree of pressure competing stakeholders to race in AI development so as to secure some degree of control over the how the technology is first used. Conversely, the pressure to race can be alleviated somewhat by developing AI technology in a manner that makes it easier for multiple stakeholders to control a single system, such as by designing the system to receive inputs representing beliefs and values from multiple users. Hence, we adopt the following objective:

Objective 7.2 (avoiding races by sharing control) is to make collaborative oversight of AI systems by companies and governments sufficiently easy and appealing as to significantly reduce pressures for AI development teams to race for first-mover advantages in the deployment of powerful AI systems, thereby reducing Type 2a risk (unsafe development races). The nature of the collaboration between the overseeing stakeholders could involve exchange of information, exchange of commitments, or both.

This objective may be challenging to pursue while respecting the letter and spirit of antitrust laws. Thus, some degree of progress on Objective 7.1 (facilitating collaborative governance) may be needed to ensure that control-sharing between companies cannot lead to collusion or other unfair business advantages that would harm society.

## 1AC---Solvency

#### Arbitration assessment is biased towards enforcement---requiring effective vindication solves, balances competing law, and restores statutory relief under antitrust.

Rubinoff ’20 [Matt; May 1; J.D. Candidate at Pennsylvania State University, Managing Editor; Arbitration Law Review, “Too Big to Arbitrate? Class Action Waivers, Adhesive Arbitration, and Their Effects on Antitrust Litigation,” vol. 12]

(d) The Post-Epic Systems World

The Epic Systems decision reignited an already tense debate on the status of class action waivers and mandatory arbitration clauses, and their possible detrimental effects on the working public.56 In the almost two years since the 2018 ruling, lower court decisions have just started to show the lasting impact of the Court’s unwavering support for enforcing adhesive arbitration clauses.57 Notably, the First, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuit Court of Appeals have already addressed the remnants of the Court’s decision in Epic Systems. 58 As expected, early case decisions show strong, continued judicial support for the enforcement of class action waivers, even when class action proceedings result in a valid award for plaintiffs.59 Though decidedly settled in the current judicial system, removal of access to class action remains a contentious issue in the debate around arbitration clauses, especially as it relates to existing federal antitrust laws.

III. The Antitrust Landscape in an Adhesive Arbitration World

(a) Land of the Free, Home of the Lawsuit

Much of the conversation around mandatory arbitration agreements and the inclusion of class action waivers has to do with the perceived fight between the strong and the weak.60 David versus Goliath; the little consumer or employee versus the large corporation. As the Supreme Court continues to support the enforceability of adhesive arbitration agreements, concerns as to the rights of workers and consumers come front and center in the debate.61

Historically, Americans have always loved lawsuits.62 Any one citizen’s access to the court system provides for a sense of individual power, freedom, and the innate ability to right a wrong. Recently, however, the frequency of class action lawsuits has trended downward.63 On the heels of Epic Systems, according to publicly available data, “2019 marked the first year in more than a decade that there were fewer federal class action lawsuits alleging unpaid wages, job discrimination, and mishandled retirement benefits.”64 Further, the Economic Policy Institute estimates that by 2024, around eighty-three percent of private sector workers, nearly ninety-five million people, will be forced to resolve disputes through adhesive arbitration agreements.65

Those in favor of adhesive arbitration agreements suggest that the pre-determined adjudication procedure brings “efficiency and economy to the marketplace for all its participants.”66 While it is true that arbitration allows for quicker processing and award determinations compared to lagging judicial procedures, the theory does not consider the elimination of access to the marketplace for some of those participants.67 Similar to discouraged workers no longer factoring into a society’s estimated unemployment rate, sometimes the elimination of previous market actors prevents us from seeing the forest for the trees. 68 Accordingly, this analogy is an apt comparison to the state of adhesive arbitration and its effects on antitrust laws and litigation.

(b) Mitsubishi and the Effective Vindication Doctrine

In 1985, the Supreme Court attempted to peacefully mediate the differences between the enforcement of arbitration laws and antitrust violations. In Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc. (“Mitsubishi”), the Court held that claims under American antitrust laws, as they relate to international agreements, may be submitted to arbitration so long as the agreement includes a valid arbitration clause.69 The Court reasoned that “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”70 However, the Court also noted a plaintiff has the opportunity to show that the arbitral forum does not fully vindicate his or her rights, and upon that showing, a court may hold the arbitration agreement unenforceable and permit the plaintiff’s pursuit of the claim in federal court.71

Following Mitsubishi, this “effective vindication doctrine” provided an out for antitrust claimants who believed their cases were not suited for an arbitral forum, whether or not they signed a mandatory and adhesive agreement.72 Following this decision, for example, courts used the doctrine to invalidate class action waivers, as well as provisions that prevented an arbitrator from awarding the appropriate treble damages under an antitrust claim.73 For nearly three decades, courts struck a harmonious balance between enforcing arbitration agreements under the FAA and allowing valid antitrust claims to proceed in federal court when necessary or otherwise “vindicated.”74 This balance, however, ultimately tipped well in favor of arbitration enforceability in Italian Colors.

As described above, Italian Colors held in favor of enforceability of arbitration agreements under the FAA, and that the federal laws do not support the invalidation of a class arbitration waiver solely because the costs involved in the process exceed the total potential recovery. 75 The plaintiffs’ arguments included citing the effective vindication doctrine, claiming that the costs from mandatory individual arbitration proceedings, such as finding and preparing expert witness testimony, significantly prevented their rights to proper antitrust remedy in the form of class action adjudication.76

In dismissing these claims, the Court dismantled the credibility of the effective vindication doctrine, describing the doctrine as dictum. 77 Without this practical safeguard, scholars suggest the post-Italian Colors world leaves “potential antitrust defendants . . . more likely to use arbitration clauses to substantially reduce the probability of antitrust liability and the amount of damages recovered by successful antitrust plaintiffs.”78 Enforcing class action waivers in mandatory arbitration clauses prevents plaintiffs from accessing traditional antitrust litigation, and confers significant disadvantages to defendants. 79

Footnote 77:

77 See id. at 235 (“The ‘effective vindication’ exception to which respondents allude originated as dictum . . . where we expressed a willingness to invalidate . . . arbitration agreements that ‘operat[e] . . . as a prospective waiver of a party’s right to pursue statutory remedies’”)

End of footnote 77.

#### It threads the needle---course correction must be federal and empower private litigation while avoiding overdeterrence.

Loureiro ’19 [Raul; 2019; J.D. upon the year of publication from the University of Pennsylvania, writing under the guidance of Professor Stephen Burbank; University of Pennsylvania Journal of Business Law, “Ineffective Vindication of Antitrust Rights,” vol. 21]

Introduction

The policy of antitrust law in the United States is to increase consumer welfare, and this policy is undermined by the Supreme Court’s most recent interpretation of the principle of effective vindication. In this paper, I argue that a dynamic interpretation of the principle of effective vindication advances the policy goal of antitrust. Without a robust principle of effective vindication, it becomes far too easy for potential antitrust defendants to use arbitration agreements to shield themselves from antitrust liability. This is particularly problematic in the antitrust context given the large amount of enforcement that occurs through private suits.

The efficacy of the principle of effective vindication depends upon the interpretation of the principle as a dynamic concept. If a court is able to invalidate an arbitration agreement only under very narrow circumstances, then the principle’s purpose is undermined. The vitality of this doctrine is conditioned on the ability of a court to consider whether someone is functionally precluded from vindicating his federal statutory right regardless of whether an agreement precludes vindication on its face. The majority decision in the case of American Express Company v. Italian Colors Restaurant undermines the doctrine of effective vindication by conceptualizing the doctrine as static.1 This decision undermines the antitrust policy of maximizing consumer welfare by obstructing the private enforcement of antitrust rights.

I. The Principle of Effective Vindication

The Federal Arbitration Act 2 (FAA) made arbitration agreements “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 3 This language has been interpreted by the Court as creating a strong policy in favor of arbitration agreements.4 The savings clause of this provision indicates that an arbitration agreement can be invalidated on contract common law grounds.5 However, in AT&T Mobility LLC v. Concepcion, the Court held that a state policy against class waivers in arbitration agreements on the basis of unconscionability was invalid because “[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.”6 This decision preempting state contract policy weakened the savings clause insofar as unconscionability is a reason, rooted in common law, for invalidating a contract.

Assuming that Concepcion reduces the ability of courts to invalidate arbitration agreements, the decision makes the federal policy in favor of arbitration much stronger. This decision left some uncertainty regarding the situations under which a court could invalidate an arbitration agreement that included a class action waiver.7 One possible answer is using the effective vindication principle to invalidate such agreements, which “might prove more like the eye of a needle through which claimants must pass to gain refuge from class action waivers” rather than an open floodgate for arbitration agreement invalidation. 8

The Court first articulated the effective vindication principle in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., saying that the federal policy in favor of arbitration agreements applies “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum.”9 The Court was explicit: “By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”10 It stands to reason that under the principle of effective vindication an arbitration agreement would be invalidated if it resulted in a party forgoing its substantive rights.

II. The Italian Colors Case

The effective vindication principle was examined and all but rejected in Italian Colors. 11 In this case, the Court held that an arbitration clause that made a suit prohibitively expensive was valid under the effective vindication principle because, “the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy.”12 This decision undermines the principle of effective vindication and limits its ability to be of any use by making a meaningless distinction.

The dispute in Italian Colors arose from an agreement between American Express and various merchants, which accept American Express cards as payment from their customers.13 The agreement in question contained an arbitration clause in which the merchants waived their right to bring suit as a class.14 Importantly, the agreement also foreclosed potential plaintiffs from “joinder or consolidation of claims, informal coordination among individual claimants, or amelioration of arbitral expenses.”15 The merchants claimed that American Express violated §1 of the Sherman Act16 by a tying arrangement between their charge cards and credit cards.17

Proving a violation of the antitrust laws is expensive because of the economic experts that have to be contracted to provide analysis of the market and the anticompetitive effects of the challenged behavior.18 In this case, “the cost of an expert analysis necessary to prove the antitrust claims would be at least several hundred thousand dollars, and might exceed $1 million, while the maximum recovery for an individual plaintiff would be $12,850, or $38,549 when trebled.”19 The key is that this assessment is in regards to an individual plaintiff. However, bringing the suit through some sort of joinder device would overcome the difficulty of prohibitive costs because the various plaintiffs would be able to share the cost of the proceedings.20

A. Narrowing Effective Vindication

The majority opinion in Italian Colors limits the principle of effective vindication through narrowing the circumstances under which the principle applies. The Court confirmed the existence of the principle, and notes that the principle “would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.”21 The Court does not say in which situations—other than an agreement that forbids the right to pursue a statutory right—the principle will apply. 22 It is notable that the majority also qualifies the application of the principle in the situation of prohibitive court fees by saying that the principle “perhaps” applies in this situation. Although the Court indicates otherwise, it seems like it is only affirming the principle insofar as the arbitration clause explicitly forbids a potential plaintiff from making a claim for a given statutory right. It is difficult to see under what other circumstances the principle would apply when even prohibitive administrative fees are only “perhaps” covered.

The decision to narrow the effective vindication principle is defended in two ways, the first is through an appeal to pre-class action jurisprudence and the second is through a formalistic view of the principle. First, the opinion argues that antitrust suits existed before class action proceedings, and “the individual suit that was considered adequate to assure ‘effective vindication’ of a federal right before adoption of class-action procedures did not suddenly become ‘ineffective vindication’ upon their adoption.”23 But, this case was not only about the class action waiver, instead it had to do with all of the provisions in the agreement that prevented a claim from being economically feasible. 24 The class action waiver by itself does not render the vindication of this right ineffective, rather the result of ineffective vindication stems from the agreement as a whole.

It is because the Court looks narrowly at the agreement solely in terms of the class action waiver that it can make the argument based on the history of class action procedures. The dissent indicates the root of the majority’s argument: “To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled.”25 In fact, the majority opinion does not address whether the provisions in the agreement that prevent fee shifting or sharing of the expert report have any impact on the matter.26 These provisions must be of great import to the case because had either of them not existed, the plaintiffs would have been able to proceed and vindicate their rights.27

The majority opinion fails to consider the bearing that the other provisions foreclosing economical adjudication have on the matter. Instead of seriously addressing these, the Court decided to assert that the other provisions were not important because they were not part of the holding in the court below.28 However, the second circuit decided the case based upon the notion that there was no way that the suit could be brought in a way that was economically rational. This rationale necessitates taking into account the provisions in the agreement that foreclosed other means of cost sharing.29 Therefore, the first defense for narrowing the effective vindication principle rests on a failure to take into account the entire agreement.

Moreover, the appeal to the pre-class action era ignores the fact that the cost of proving an antitrust claim has increased dramatically ever since the introduction of sophisticated economic analysis into antitrust doctrine. Not only is the cost of experts higher, but also the increased costs of discovery in the digital age militate toward a reconceptualization of the scope of the effective vindication principle.30 The cost of litigation and expert testimony in a modern antitrust case is another factor that the majority fails to consider in its first argument defending its position.

#### Removing barriers to private, class action litigation is crucial to overall deterrence of anticompetitive conduct---particularly for cartels---empirical data proves.

AAI ’21 [American Antitrust Institute; August 4; Washington, D.C.-based non-profit education, research, and advocacy organization, citing research conducted by Professor John Davis at the University of San Francisco School of Law; American Antitrust Institute, “The Critical Role of Private Antitrust Enforcement in the United States,” <https://www.antitrustinstitute.org/wp-content/uploads/2021/08/Huntington-Report-FINAL-1.pdf>]

I. Introduction

With all of the attention currently focused on public enforcement and legislative reform of the antitrust laws, less attention is being paid to private enforcement.1 But Congress considered private antitrust enforcement indispensable for promoting competition. The judiciary has so recognized time and time again. In California v. American Stores Co., for example, the Supreme Court proclaimed, “Private enforcement of the [Clayton] Act was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition.”2

Private enforcement is not a substitute for vigorous public enforcement. Both are necessary to foster competition. But private enforcement plays an important part, one that becomes more significant when public enforcement recedes.3 And, unlike public enforcers, private enforcers can obtain significant damages on behalf of the victims of antitrust violations.4 This serves as a crucial source of deterrence for illegal anticompetitive conduct and the primary means of compensating victims for harms suffered at the hands of cartelists and dominant firms.5 The importance of the antitrust class action, a major private enforcement device, is clear. The recently released 2020 Antitrust Annual Report: Class Action Filings in Federal Court (“2020 Report”)6 by Huntington National Bank and the University of San Francisco School of Law (“USF Law”) reflects that the cumulative total settlement amount recovered for victims in antitrust class actions from 2009-2020 was over $27 billion.7

Antitrust class actions recover damages from companies engaged in harmful, illegal conduct, such as price fixing and attempted monopolization, in markets for important and essential products and services. The most active defendants during the period, for example, included companies providing financial services, pharmaceuticals, automobile parts, and electronics parts. 8 In light of the vital role played by private antitrust enforcement, and the antitrust class action in particular, continued empirical analysis of trends in activity is essential. This analysis aids in understanding and evaluating proposals for reforming the antitrust laws in the U.S. and such proposals’ impact on private enforcement, the public-private partnership, and ultimately on competition and consumers.

II. Overview of the Commentary

The American Antitrust Institute (AAI)9 and Professor Joshua P. Davis at USF Law10 evaluated the 2020 Report with the goal of identifying its major implications for private enforcement in the U.S. The 2020 Report builds and expands on the 2019 Antitrust Annual Report: Class Action Filings in Federal Court (“2019 Report”)11, which assessed private enforcement activity from 2009-2019. Like the 2019 Report, the 2020 Report relies largely on data for private U.S. antitrust class actions available through Lex Machina, as well as supplemental data analysis.12 The 2020 Report extends the dataset to the eleven-year period covering 2009-2020, thus allowing for a deeper analysis of private enforcement trends and their implications. The analysis provided in this Commentary highlights the importance of private antitrust enforcement in the U.S. system and the particularly important role played by the antitrust class action.

III. Observations and Implications for Private Enforcement

The 2020 Report provides further evidence of a divergence between public and private enforcement trends. As public enforcement has waned, private filings have waxed, undermining the notion that class actions simply ride the coattails of public enforcement. On the contrary, the data suggest that as lax public enforcement fosters higher market concentration and invites bad behavior, private filings may compensate for underenforcement in an effort to address the resulting antitrust violations.

Looking beyond the number of enforcement actions filed and focusing on the results of the actions, the rich data reveal more nuance to this narrative. Despite increased private actions in the face of decreased public enforcement, the amount of money recovered from violators by both public and private enforcers has diminished. For public enforcers, this diminution is to be expected, as fewer cases have been brought. For private enforcers, though, the explanation likely lies with other trends, most notably the increasing headwinds faced by private enforcers due to heightened pleading and class certification standards. If these explanations are correct, the clear implication is that for private enforcement to fulfill its increasingly vital role as a complement and a backstop to public enforcement, these trends must be reversed.

A theme we noted in the 2019 Report, and that continues to feature in the 2020 Report, is the tremendous variability in the data on some measures related to settlement size. Aggregate settlement amounts over the period vary widely from year to year. By disaggregating the settlements by size, however, we are able to observe that settlements at different levels trend somewhat independently. Very large settlements, which are few in number, drive most of the variability in the aggregate data. But trends and anomalies in very small settlements cannot be entirely discounted, as they are the force behind one of the highest recovery years in the period, 2018.

Finally, building on analysis from our 2019 commentary, we take a deeper dive on attorneys’ fees and how they correspond to settlement amounts. Our findings reinforce the tentative conclusion from last year’s analysis that the so-called “megafund doctrine”—a dramatic decrease in attorneys fee percentages on settlements above a threshold of about $100 million—does not operate in federal antitrust cases in a significant way. Rather, decreases in the fee award percentage in antitrust cases are not discrete and drastic, but rather gradual, much like marginal tax rates in the United States. In what follows, we discuss each of the above observations in more detail and provide analysis of their implications for private enforcement, many of which suggest fertile areas for additional study.

A. The Relationship of Private to Public Enforcement: Riding on Coattails or Stepping into the Breach?

A long-running antitrust policy debate centers on the value that private enforcement adds to the antitrust enterprise as a whole. Critics of private actions maintain that private plaintiffs often follow an easy trail blazed by government enforcers, and that private enforcement therefore does not supplement worthwhile public actions as much as it should. Proponents of private actions have sought to debunk this claim with empirical evidence suggesting that many large and successful private antitrust cases often precede, or else expand the scope of relief sought in, any overlapping government actions.13

Data from the 2020 Report, together with future reports, may warrant a reexamination of this debate through a different lens. Apart from the question of the extent to which private enforcement serves as a useful complement to public enforcement, it may also be worth inquiring into the extent to which private enforcement serves as a substitute for public enforcement, particularly during periods of government forbearance.

As AAI noted in an independent report, “The State of Antitrust and Competition Policy in the U.S.,” several indicators had suggested a decline in government cartel enforcement at the midway point of the Trump Administration.14 Perhaps most notably, the average number of cartel investigations opened during the period from 2017-2018 was 80% lower than the annual average number of investigations opened over the previous three administrations (1993-2016). In addition, the average number of corporations fined by the Trump agencies in 2017 and 2018 fell by about 45% relative to the Obama Administration.

Notably, the 2020 Report shows that private federal consolidated antitrust filings rose significantly during each year of the Trump Administration. First, they increased from 74 in 2017 to 136 in 2018. But in 2019, they rose dramatically to a ten-year-high of 211. And, in 2020, that number was eclipsed, with 220 filings. In other words, a dramatic increase in private filings appears to have occurred immediately subsequent to a substantial decline in the opening of government cartel investigations and the number of corporations fined.

# 2AC

## Adv---Solvency

### 2AC---AT: Solvency

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#### Private suits are key---they’re exponentially more deterring AND public suits link harder.

Davis ’17 [Joshua and Robert Lande; 2017; Professor and Director of Center for Law and Ethics at the University of San Francisco; Venerable Professor of Law at the University of Baltimore, M.P.P. and J.D. from Harvard University; Scholar Works, “Restoring the Legitimacy of Private Antitrust Enforcement,” Ch. 6]

I. Private Antitrust Cases are a Critical Component of Effective Antitrust Enforcement

A. The Central Role of Private Enforcement

Congress intended that private parties play a central role in enforcement of the Sherman Act, and sought to encourage this by awarding treble damages, mandatory attorneys’ fees and costs to prevailing victims.5 In numerous cases the Supreme Court has underscored the importance of the private treble damages remedy to the enforcement of the antitrust laws. For example, in Reiter v. Sonotone Corp., the Court explained:

Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging private challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.6

Footnote 6:

6 Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979); see also Mitsubishi Motors Corp. v. Soler ChryslerPlymouth, Inc., 473 U.S. 614, 635 (1985) (“The treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators.”); Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 151 (1987) (Clayton Act “bring[s] to bear the pressure of ‘private attorneys general’ on a serious national problem for which public prosecutorial resources are deemed inadequate”).

End of footnote 6.

As has been observed, “government cannot be expected to do all or even most of the necessary enforcement” for numerous reasons – in addition to budgetary constraints – including “undue fear of losing cases; lack of awareness of industry conditions; overly suspicious views about complaints by ‘losers’ that they were in fact victims of anticompetitive behavior; higher turnover among government attorneys; and the unfortunate, but undeniable, reality that government enforcement (or nonenforcement) decisions are, at times, politically motivated.”7

Treble damages also are critical for deterrence because a great deal of anticompetitive conduct evades detection and challenge, and for this reason many antitrust violations would be profitable if violators were liable only for the amount of their overcharges.8 In addition, treble damages also promote antitrust’s compensation goal because so many cases settle for far less than the statutory maximum.9 Treble damages were thought to “make the [private] remedy meaningful by counterbalancing ‘the difficulty of maintaining a private suit against a combination such as is described’ in the Act.”10

## T---Per Se

### 2AC---T---Per Se

#### 2. No bright line---‘per se’ and ‘rule of reason’ is a false distinction.

Souter ’99 [David H, joined by William Rehnquist, Sandra Day O'Connor, Antonin Scalia, and Clarence Thomas; May 24; Justice on the Supreme Court of the United States, writing for the majority; Westlaw, “California Dental Ass'n v. F.T.C.,” 526 U.S. 756]

Saying here that the Court of Appeals's conclusion at least required a more extended examination of the possible factual underpinnings than it received is not, of course, necessarily to call for the fullest market analysis. Although we have said that a challenge to a “naked restraint on price and output” need not be supported by “a detailed market analysis” in order to “requir[e] some competitive justification,” National Collegiate Athletic Assn., 468 U.S., at 110, 104 S.Ct. 2948, it does not follow that every case attacking a less obviously anticompetitive restraint (like this one) is a candidate for plenary market examination. The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like “per se,” “quick look,” and “rule of reason” tend to make them appear. We have recognized, for example, that “there is often no bright line separating per se from Rule of Reason analysis,” since “considerable inquiry into market conditions” may be required before the application of any so-called “per se” condemnation is justified. Id., at 104, n. 26, 104 S.Ct. 2948. “[W]hether the ultimate finding is the product of a presumption or actual \*780 market analysis, the essential inquiry remains the same-whether or not the challenged restraint enhances competition.” Id., at 104, 104 S.Ct. 2948. Indeed, the scholar who enriched antitrust law with the metaphor of “the twinkling of an eye” for the most condensed rule-of-reason analysis himself cautioned against the risk of misleading even in speaking of a “spectrum” of adequate reasonableness analysis for passing upon antitrust claims: “There is always something of a sliding scale in appraising reasonableness, but the sliding scale formula deceptively suggests greater precision than we can hope for.... Nevertheless, the quality of proof required should vary with the circumstances.” P. Areeda, Antitrust Law 1507, p. 402 (1986).15 At the same time, Professor Areeda also emphasized the necessity, particularly great in the quasi-common-law realm of antitrust, that courts explain the logic of their conclusions. “By exposing their reasoning, judges ... are subjected to others' critical analyses, which in turn can lead to better understanding for the future.” Id., 1500, at 364. As \*\*1618 the circumstances here demonstrate, there is generally no categorical line to be drawn between \*781 restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one. And of course what we see may vary over time, if rule-of-reason analyses in case after case reach identical conclusions. For now, at least, a less quick look was required for the initial assessment of the tendency of these professional advertising restrictions. Because the Court of Appeals did not scrutinize the assumption of relative anticompetitive tendencies, we vacate the judgment and remand the case for a fuller consideration of the issue.

#### 3. The aff is a per se prohibition - we don’t look at effects, we look at legal status

#### 4. The floor---‘by at least expanding’ automatically meets.

Andrew ’18 [Andrew; January 25; instructor; Crown Academy of English, “Preposition BY – Meaning and use,” <https://www.crownacademyenglish.com/preposition-by-meaning-use/>]

by + ING form of verb

This describes how to do something. It describes the method for achieving a particular result.

#### Counter-interpretation:

#### ‘Antitrust law’ and ‘prohibitions’ both include the Rule of Reason.

Light ’19 [Sarah; 2019; Legal Studies Professor in the Wharton School at the University of Pennsylvania, Stanford Law Review, “The Law of the Corporation as Environmental Law,” vol. 71]

While antitrust law can serve as an environmental mandate by prohibiting collusive behavior that keeps environmentally preferable goods from the market, there is also conflict between antitrust law’s goals of promoting competition and environmental law’s goals of promoting conservation.192 Because antitrust law's per se rule and rule of reason operate on a somewhat fluid continuum, 193 this Subpart discusses the two doctrines together. The per se rule operates as a prohibition, whereas the rule of reason operates as both a prohibition and a disincentive.

As noted above, antitrust law generally prohibits certain types of market activity - price fixing, horizontal boycotts, and output limitations - as illegal per se, and harm to competition is presumed. 194 For example, if an industry association declines to award a seal of approval necessary for a product's sale without any good faith attempt to test the product's performance, but rather simply because that product is manufactured by a competitor, such an action would be illegal per se. 195 Under this Article's framework, a per se violation is thus a prohibition.

The more fact-intensive inquiry under the rule of reason tests "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." 196 While this extremely broad statement might suggest that any fact is relevant to the inquiry, the salient facts under the rule of reason are "those that tend to establish whether a restraint increases or decreases output, or decreases or increases prices." 197 If an anticompetitive effect is found, then the action is illegal and the rule of reason operates, like the per se rule, as a prohibition. 198 The rule of reason can also operate as a disincentive, even if no court finds an anticompetitive effect, as uncertainty and litigation risk may discourage firms from undertaking legally permissible, environmentally positive industry collaborations. 199

#### ‘Anticompetitive business practices’ are horizontal or vertical restraints on competition.

OECD ’3 [Organization for Economic Cooperation and Development, April 24; Glossary of Statistical Terms, “Anticompetitive Practices,” https://stats.oecd.org/glossary/detail.asp?ID=3145]

Definition:

Anticompetitive practices refer to a wide range of business practices in which a firm or group of firms may engage in order to restrict inter-firm competition to maintain or increase their relative market position and profits without necessarily providing goods and services at a lower cost or of higher quality.

Context:

The essence of competition entails attempts by firm(s) to gain advantage over rivals. However, the boundary of acceptable business practices may be crossed if firms contrive to artificially limit competition by not building so much on their advantages but on exploiting their market position to the disadvantage or detriment of competitors, customers and suppliers such that higher prices, reduced output, less consumer choice, loss of economic efficiency and misallocation of resources (or combinations thereof) are likely to result.

Which types of business practices are likely to be construed as being anticompetitive and, if that, as violating competition law, will vary by jurisdiction and on a case by case basis. Certain practices may be viewed as per se illegal while others may be subject to rule of reason. Resale price maintenance, for example, is viewed in most jurisdictions as being per se illegal whereas exclusive dealing may be subject to rule of reason. The standards for determining whether or not a business practice is illegal may also differ. In the United States, price fixing agreements are per se illegal whereas in Canada the agreement must cover a substantial part of the market. With these caveats in mind, competition laws in a large number of countries examine and generally seek to prevent a wide range of business practices which restrict competition. These practices are broadly classified into two groups: horizontal and vertical restraints on competition. The first group includes specific practices such as cartels, collusion, conspiracy, mergers, predatory pricing, price discrimination and price fixing agreements. The second group includes practices such as exclusive dealing, geographic market restrictions, refusal to deal/sell, resale price maintenance and tied selling.

Generally speaking, horizontal restraints on competition primarily entail other competitors in the market whereas vertical restraints entail supplier-distributor relationships. However, it should be noted that the distinction between horizontal and vertical restraints on competition is not always clear cut and practices of one type may impact on the other. For example, firms may adopt strategic behaviour to foreclose competition. They may attempt to do so by pre-empting facilities through acquisition of important sources of raw material supply or distribution channels, enter into long term contracts to purchase available inputs or capacity and engage in exclusive dealing and other practices. These practices may raise barriers to entry and entrench the market position of existing firms and/or facilitate anticompetitive arrangements.

#### They include single acts.

Corradino ‘3 [Dolph; 2003; Attorney in Little Falls, former judge of the New Jersey Municipal Court; Lexis, “TMK Assocs. v. Landmark Dev.,” 2003 Conn. Super. LEXIS 2464]

They argue that "in order to successfully allege a violation of CUTPA, the plaintiff must allege more than a singular occurrence"; "there must be a pattern of unfair or deceptive trade practices"; "the plaintiff failed to plead more than a single act (of) unfair or deceptive business practices." This argument was laid to rest in Johnson Electric Co. v. Salce Contracting Assocs., 72 Conn. App. 342, 805 A.2d 735 (2002). There, "the trial court held that, because the plaintiff did not prove that the defendant had engaged in a repeated course of misconduct, the plaintiff did not establish that the defendant violated CUTPA." Id. page 349. The court disagreed, ruling that, 'The trial court improperly declined relief to the plaintiff on the ground that it had alleged and proven only a single act of misconduct." Id. page 353.

#### ‘Prohibitions’ disallow specific actions.

Blackmun ’92 [Harry Andrew, Anthony McLeod Kennedy, and David H Souter; Justices on the Supreme Court of the United States; Lexis, “Cipollone v. Liggett Group,” 505 U.S. 504]

Although the plurality flatly states that the phrase “no requirement or prohibition” “sweeps broadly” and “easily encompass[es] obligations that take the form of common-law rules,” ante, at 2620, those words are in reality far from unambiguous and cannot be said clearly to evidence a congressional mandate to pre-empt state common-law damages actions. The dictionary definitions of these terms suggest, if \*536 anything, specific actions mandated or disallowed by a formal governing authority. See, e.g., Webster's Third New International Dictionary 1929 (1981) (defining “require” as “to ask for authoritatively or imperatively: claim by right and authority” and “to demand as necessary or essential (as on general principles or in order to comply with or satisfy some regulation)”); Black's Law Dictionary 1212 (6th ed. 1990) (defining “prohibition” as an “[a]ct or law prohibiting something”; an “interdiction”).

## CP---States

### 2AC---CP---States

#### Arbitration is federalized---state action will be preempted.

Rubinoff ’20 [Matt; May 1; J.D. Candidate at Pennsylvania State University, Managing Editor; Arbitration Law Review, “Too Big to Arbitrate? Class Action Waivers, Adhesive Arbitration, and Their Effects on Antitrust Litigation,” vol. 12]

(a) The Federal Arbitration Act

In 1925, Congress enacted the Federal Arbitration Act (“FAA”) “in response to widespread judicial hostility to arbitration agreements.”14 Originally proposed as “special interest legislation,” the New York State Chamber of Commerce helped lobby the bill in an effort to secure federal legislation related to arbitration agreements and to support the recently enacted New York state arbitration laws.15

In its final form, the FAA validated agreements to arbitrate and solidified the notion that contractually submitting disputes to arbitration did not violate public policy.16 Today, armed with the support of the Supreme Court, the FAA shields arbitration agreements at “every stage and aspect of the arbitral process.” 17 Moreover, due to the federalization of arbitration law, the Supreme Court routinely uses the FAA to strike down state laws or state court decisions that do not support the enforceability of valid arbitration agreements.18

Footnote 18:

18 See Robert Marcelis, US Supreme Court Tells Lower Courts to Enforce Arbitration Agreements, JURIST (Feb. 16, 2013, 5:00 PM), https://www.jurist.org/commentary/2013/02/robert-marcelis-arbitrationagreement/ (“[Concepcion represents] the watershed case in the Court’s repudiation of state laws that work to invalidate arbitration agreements).

End of footnote 18.

(b) Major Expansions in Adhesive Arbitration

Mandatory or adhesive arbitration represents the most controversial aspect of domestic arbitration law.19 Over the years, the Supreme Court’s continued validation of adhesive arbitration agreements and class action waivers has ignited public discontent.20 Traditionally, the process pits commercial parties against the common individual.21 Inherently, companies seek to avoid litigation, especially class action lawsuits, because of the unnecessary costs, time, and potential negative publicity.22 On the other side of the aisle, advocates for class action believe the process remains essential to fairness and social justice.23 Consequently, about a decade ago, the Supreme Court further solidified its position in favor of arbitrability, as well as the FAA’s inherent power to pre-empt state laws concerning the invalidation of arbitration agreements.

Footnote 20:

20 See id. (“While plaintiffs in years past could use state laws to invalidate arbitration agreements, the US Supreme Court recently restricted the viability of these challenges”).

End of footnote 20.

#### The counterplan’s class actions suits get removed to federal court and squashed like a bug.

Klonoff ’13 [Robert; Dean and Professor of Law, Lewis & Clark Law School; Hodge O'Neal Corporate and Securities Law Symposium, “The Future of Class Actions: The Decline of Class Actions,” 90 Wash. U. L. Rev. 729, lexis]

Federal Rule 23(f) had one serious limitation: it only operated for class actions in federal court. If the case was brought in state court and was not successfully removed, Rule 23(f) did not apply. Even if, in addition to the state case, there was overlapping litigation in federal court involving the same or a similar class, the federal court could rarely control what the state court did. The reason is that federal courts have only limited authority to enjoin class actions in state court. 73 Yet, many of the most egregious examples of class action abuse had occurred in the state courts, often by elected judges who favored class members over large, out-of-state corporations. 74

The concerns about abuses in state court were not without foundation. During the hearings on CAFA, members of Congress heard about myriad instances of alleged abuse by state-court judges and plaintiffs' counsel. 75 These included many examples in which class members recovered only small sums of money or undesirable coupons, rebates, or vouchers. 76 In one well-publicized example, the Bank of Boston settlement, class [\*744] members actually ended up losing money (for instance, one class member recovered $ 4 but the bank charged her an $ 80 fee that went towards the $ 8.5 million attorneys' fee award). 77

Thus, based on some legitimate - if at times exaggerated - concerns, Congress adopted a landmark statute to ensure that most major class actions could be removed to federal court. 78 President George W. Bush signed CAFA into law on February 18, 2005. 79

CAFA was deemed necessary because the then-existing law on diversity and removal made it difficult for defendants to remove even nationwide state-law class actions to federal court. Although cases involving federal questions are removable to federal court under 28 U.S.C. §§1331 and 1441, 80 the general law of removal, which applied pre-CAFA, permitted removal of state-law class actions to federal court only if a case satisfied the stringent requirements for diversity jurisdiction - complete diversity between plaintiffs and defendants 81 and (absent supplemental jurisdiction) an amount-in-controversy of $ 75,000 per claimant. 82 Moreover, prior to CAFA, defendants had only one year from the date of filing to remove a class action to federal court, 83 and one defendant in a multi-defendant case could not remove a case to federal court without the [\*745] consent of all defendants. 84 Finally, removal was not allowed when any of the defendants was a citizen of the state where the suit was brought. 85

CAFA eliminated these restrictions by (1) permitting removal with "minimal diversity," i.e., any class member diverse from any defendant and an amount in controversy for the entire case of more than $ 5 million; 86 (2) permitting removal without regard to the one-year deadline for removal prior to CAFA; 87 (3) permitting removal by one defendant without the consent of the other defendants; 88 and (4) permitting removal even when a defendant is a citizen of the state where the suit was brought. 89 Through these and other provisions, 90 CAFA became an important vehicle to ensure that the vast majority of significant class actions were heard in federal court.

CAFA has in fact had an enormous impact in shifting most class actions to federal court. 91 The combination of CAFA and Rule 23(f) gave federal courts the opportunity to address a host of important class certification issues.

#### Federal judicial attitudes ensure class actions get removed to federal court and slaughtered by procedural barriers

Bartholomew ’15 [Christine; Spring; Associate Professor, SUNY Buffalo School of Law; Brooklyn Law Review, “Redefining Prey and Predator in Class Actions,” 80 Brooklyn L. Rev. 743, lexis]

The outcry for class action reform continued into the early 2000s, when the blackmail myth eventually drove Congress and the judiciary to undertake changes to class action mechanisms. These changes were meant to protect defendants, stripping the advantages intended by Rule 23. The largest change adopted under the guise of equalizing class actions was the 2005 Class Action Fairness Act (CAFA). Though Congress originally labeled the Act the "Consumer Class Action Bill of Rights," 155 the Act did not aim to help consumers but rather solve "the problem of unfair settlements and excessive attorneys' fees." 156 Hence, [\*765] CAFA was Congress' adoption of and response to the blackmail myth and efficiency and autonomy concerns. 157

In addition to discouraging class actions by limiting attorneys' fees, CAFA expanded federal diversity jurisdiction to force state class claims back into federal court. 158 [Footnote 158] 28 U.S.C. § 1332(d)(2) (2005). Plaintiffs' class action attorneys sought refuge in state courts. Unlike their federal brethren, state court judges demonstrated a clearer willingness to allow class actions. Mullenix, supra note 115, at 525-26. These state court successes only fueled anti-class action sentiment and gave critics new cause to reinvigorate arguments centered on protecting alleged corporate wrongdoers. The reinvigorated arguments found a sympathetic environment in the current pro-corporate neoliberal environment. [End Footnote 158] The removal of class actions from state court was predicated as a measure essential to "equalize" the treatment of defendants in pending state and federal class actions, as state courts were perceived as more sensitive to local plaintiffs. However, once again, empirical evidence did not support this alleged need to protect corporate defendants. 159

The expansion of federal jurisdiction has had very real consequences for class action plaintiffs. As Professor Rice explains:

[C]orporate defendants are substantially more likely to win tortbased class actions when those claims are litigated in federal courts of appeals. And corporate defendants won large percentages of tortbased, federal class actions regardless of whether class members sued multinational corporations and insurers jointly or individually. Corporate defendants "win" ratios in federal courts are 66.7% and 84.6%, respectively. 160

[\*766] Thus, while CAFA was enacted to promote fairness, in actuality it has helped corporations evade class action liability.

With multistate class actions now funneled into federal court, 161 federal judicial activism continues to chip away at class action procedures. The Roberts Court's pro-corporate record is well-established. After just five terms, the Roberts Court ruled for business interests 61% of the time. 162 This is in contrast to 46% in the last five years of the Rehnquist Court and 42% of all Courts since 1953. 163 The Court's corporate protection has greatly limited class actions. 164 The Roberts Court has actively heightened procedural requirements, making it harder to get into court; harder to plead a business tort class claim; and harder to certify a federal class. 165

Now, the dominant judicial attitude towards class actions is knee-jerk skepticism. At the inception of any class action, scales already tip heavily in the defendant's favor. Putative class members' very attempt to pursue class claims places them in a suspect posture for judges. In fact, the tenor in some class certification decisions assumes the claims are of questionable merit from the outset. As one court recently stated, "denying or granting class certification is often the defining moment in class actions (for it may . . . create unwarranted pressure to settle nonmeritorious claims on the part of defendants) . . . ." 166

Even assuming corporate defendants need more protection, the Supreme Court has added substantial gatekeeping [\*767] to class actions during the last decade alone. 167 One of the primary new gates to business tort class claims is Bell Atlantic Corporation v. Twombly, which altered the pleading standard for a complaint. 168 In Twombly, the Supreme Court returned to blackmail and efficiency rationales to justify empowering judges to dismiss class claims they deem implausible based on their "judicial experience and common sense." 169 The Supreme Court's tenor demonstrates a clear disdain for class actions, framing them as potentially asserting "a largely groundless claim . . . tak[ing] up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value." 170 This skepticism and new pleading standard means class plaintiffs must now prove their case without the aid of discovery. 171

For many areas of law, this standard means little. For example, in a typical contract case, a plaintiff need only allege facts for each element of the claim, with potentially more emphasis on breach and damages allegations. So long as a party states facts "plausibly suggesting (not merely consistent with)" illegal conduct, 172 the complaint should stand.

But in antitrust and consumer fraud claims, what is "plausible" is far more relative. Twombly permits a judge to subjectively decide whether she believes wrongdoing is plausible in a given industry. 173 This subjectivity is notably deadly for putative antitrust class actions. Two out of every three antitrust claims filed since Twombly have been dismissed [\*768] on Rule 12(b)(6) motions, 174 a figure nearly 25% higher than in torts or contracts cases. 175 Thus, even assuming class actions needed more gatekeeping--a suspect assumption--Twombly more than sufficed.

Nonetheless, Twombly is far from the only obstacle to realizing class actions' potential. In American Express Co. v. Italian Colors Restaurant, 176 the Court provided potential defendants with a powerful tool to avoid class actions altogether. 177 A potential defendant need only include an arbitration clause that precludes class actions to avoid such suits. 178 By inserting the correct magic language in the fine print of a product's terms and conditions, a potential defendant can immunize itself from class actions. 179

This decision reflects another autonomy-based justification for narrowing class actions: freedom of contracts--even if that freedom is illusory to the average consumer. Freedom to contract focuses on the capabilities of autonomous legal actors, while concurrently failing to recognize the power differential between corporations and consumers. To the Court's majority, class actions wrongly interfere with that freedom and thus need curtailing. As Justice Kagan accurately describes the decision: "The Court today mistakes what this case is about. To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled." 180

These procedural changes significantly restricted the viability of class actions. As Senator Arlen Spector noted:

[\*769] The effect of the Court's actions will no doubt be to deny many plaintiffs with meritorious claims access to the federal courts and, with it, any legal redress for their injuries . . . . I think that is an especially unwelcome development at a time when, with the litigating resources of our executive-branch and administrative agencies stretched thin, the enforcement of federal antitrust, consumer protection, civil rights and other laws that benefit the public will fall increasingly to private litigants. 181

The true perniciousness of these changes, however, is their alleged intent to make class actions fairer. Since class actions equalize judicial access and consumers' regulatory power, restricting Rule 23 does not create fairness or social justice. It instead returns consumers to their original posture--namely one of disadvantage against large corporate defendants. The next part explores consumers' pre-existing disadvantages in vulnerability terms.

#### The Court will revoke the CP on commerce clause grounds.

HLR ’21 [Harvard Law Review; January 11; Legal journal published by the Harvard Law Review Association at Harvard University, ranked number one in law journal citations; Harvard Law Review, “State Courts and the Federalization of Arbitration Law,” vol. 134]

I. The Awkward State-Federal Dynamic

Congress passed the FAA unanimously in 1925. 6 Historical context suggests, and most scholars agree, that Congress intended the law to be purely procedural.7 The statute contains no express preemption provision,8 and it is unlikely that the pre–New Deal Congress relied on a modern understanding of its Commerce Clause power in enacting the FAA.9 Despite these observations, the modern Supreme Court has interpreted § 2 of the Act as a substantive commitment to a federal pro-arbitration policy that preempts state laws contrary on their face or in application.10

A. Preemption of State Law Under the FAA

Section 2 of the FAA is the basis of the Supreme Court’s expansive preemption decisions. The statute provides that agreements to arbitrate “in any maritime transaction or a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”11 While scholars and dissenting Justices have insisted that § 2 was designed to apply only in federal court,12 the Court has imbued the statute with a broad-reaching substantive commitment to enforcing arbitration agreements in both state and federal courts.13 In doing so, the Court has effectively nullified any wisdom that state legislatures or courts might bring to bear on the increasing prevalence of arbitration clauses in contracts.

This section traces the Court’s expansion of the FAA, dividing the case law into four categories: (1) first-generation cases; (2) second-generation cases; (3) cases on procedural requirements in the formation of arbitration agreements; and (4) cases on separability doctrine. The first two categories track both substantive and chronological components of the case law: first-generation cases, generally decided before second-generation ones, address situations to which the FAA arguably extends explicitly, while second-generation cases address the FAA’s effect on the arbitration process.14 The latter two categories are treated separately because they do not squarely fit within the first two.

1. First-Generation Cases. — Southland Corp. v. Keating, 15 a dispute over an arbitration clause in a franchise agreement,16 began the process of federalizing state contract law. Chief Justice Burger, writing for a majority, held that “[i]n enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”17 The Court asserted that Congress enacted §2 pursuant to its Commerce Clause authority.18 The Court also maintained that if the FAA applied in federal but not state court, the law would “encourage and reward forum shopping.”19

In dissent, Justice O’Connor read § 2 more narrowly, arguing that the statute’s legislative history conclusively established that it applies only in federal courts.20 She discussed the text of other FAA provisions, such as §§ 3 and 4, that expressly apply only in federal (not in state) courts.21 She also contended that Congress passed the FAA “specifically to rectify forum-shopping problems created by this Court’s decision in Swift v. Tyson.”22

Following Southland, several courts adopted an evasive device. These courts read the “involving commerce” phrase in § 2 to require parties to a contract with an arbitration clause to have actually contemplated an interstate arrangement.23 In Allied-Bruce Terminix Companies v. Dobson, 24 the Court rejected this test and expressly declined to overrule Southland, 25 holding that § 2 exercises Congress’s Commerce Clause authority to its limit.26 Thus, what mattered was not party intentions but whether the agreement involved interstate commerce in fact.27 In a later case, the Court reversed a state court ruling that an arbitration agreement between an Alabama lender and an Alabama construction company did not involve interstate commerce.28

### Net Benefit---AT: Court DA

#### CP links harder to any Court DA---state action kills stare decisis, politicizes judiciary.

HLR ’21 [Harvard Law Review; January 11; Legal journal published by the Harvard Law Review Association at Harvard University, ranked number one in law journal citations; Harvard Law Review, “State Courts and the Federalization of Arbitration Law,” vol. 134]

B. Stare Decisis and Post-Southland Developments

Starting from the position that Southland was wrongly decided and that its applications and extensions have proved damaging, the argument for continued state court resistance to Southland must have more to stand on. While it is of course true that “stare decisis is not an inexorable command,”138 the national legal system’s aspiration to finality is a vital consideration,139 and is especially so in the FAA context.

Applying stare decisis is a messy business and inescapably involves normative ideas not all will share. Doctrinally speaking, however, two propositions are clear, settled, and relevant. First, whatever the import of stare decisis generally, there is a hefty rule of stare decisis in statutory interpretation cases.140 The justification for that rule rests, at bottom, on a separation of powers rationale: Congress has the authority to amend or repeal the law if the Court misreads legislative instruction, and imposing a “super strong” burden on revisiting the Court’s reading of a statute encourages Congress to perform its functions of overseeing the court system and ensuring its will is effectuated.141 Second, the force of precedent is “at [its] acme” in cases involving property and contract rights.142 Courts do not operate in a vacuum, and private parties in the commercial world often arrange their affairs according to extant understandings of their rights and obligations.

These considerations, coupled with the Court’s post-Southland readings of the FAA, lead to two conclusions. First, the Court has long since passed the point of no return to a purely procedural reading of § 2. The necessary justification for a retreat would need to be doubly weighty: it would need to explain why the Southland error is so grave that it overcomes the heightened burdens associated with statutory- and contract-rights holdings. Virtually none of the Court’s decisions over the last few decades, except arguably Volt, provide the basis for limiting or dispensing with Southland’s substantive commitments. A retreat in the face of widespread state resistance would signal acquiescence to political and judicial pressure — a perception the Court increasingly strives to avoid.143 Second, state courts gain little, and do damage, by misapplying the FAA. Rather than paring back § 2 in the face of criticism, the Court’s response has been to double down. While a “strict constructionist” reading of the Court’s FAA preemption decisions might have been defensible years ago, today it is not. Few gaps in the doctrine remain left to exploit, and state court resistance contributes to the perception and reality of uneven administration of the law.

Of course, the error of Southland and its progeny is, in a sense, of constitutional dimension — as is any error of statutory interpretation.144 And from time to time, the Court has recognized and rectified shocks to the federal system, even where Congress could have intervened but chose not to.145 But the Court has never effected a 180-degree reversal in a context mirroring its relentless four-decade project of expanding the FAA, sometimes in unanimous decisions.146 Until or unless it does, state courts that flout the clear reach of the Court’s decisions will only compound the constitutional imbalance.

## CP---Section 5

### 2AC---CP---Section 5

#### FTC act is a ‘core antitrust law.’

FTC ’13 [Federal Trade Commission; first saved on the Wayback Machine’s Internet Archive on December 14, 2013; “The Antitrust Laws,” https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws]

Congress passed the first antitrust law, the Sherman Act, in 1890 as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." In 1914, Congress passed two additional antitrust laws: the Federal Trade Commission Act, which created the FTC, and the Clayton Act. With some revisions, these are the three core federal antitrust laws still in effect today.

#### Agency regulations ‘expand scope.’

Sagers ’15 [Christopher L; 2015; the James A. Thomas Distinguished Professor of Law and Faculty Director of the Cleveland-Marshall Solo Practice Incubator; Handbook on the Scope of Antitrust, “Introduction,” Ch. 1, p. 9]

B. Sources of the Scope of Antitrust Law

The scope of federal antitrust law is governed by three separate authorities: (1) the U.S. Constitution, (2) the language of the antitrust statutes themselves, and (3) the language of other federal statutes and regulations.

#### Any shred of opposition will be snuffed out by the court.

Carbonneau ’20 [Thomas; November 18; Samuel P. Orlando Distinguished Professor of Law at Pennsylvania State University, Faculty Director of the Arbitration Institute; Arbitration Law in a Nutshell, “The Central Themes of American Arbitration Law,” Ch. 2]

An ideological war exists between the U.S. Supreme Court and a number of lower federal and state courts in which the lower courts criticize the Court’s support for arbitration—in particular, contest the legality and desirability of adhesive arbitration. The Court appeared to be convinced that, if any exceptions to arbitrability were made, arbitration would cease to resolve the limitations and dysfunctionality of civil litigation. Its unequivocal support for arbitration was built upon the received wisdom that tolerating exceptions to a legal rule announces the rule’s eventual demise. The exception(s) inexorably become the rule. In terms of arbitration, permitting exceptions to arbitrability would, over time, lead to the reassertion of exclusive judicial jurisdiction over civil litigation. Mindful of the long-standing judicial animosity toward arbitration, the Court believed it could quell the rivalry only by developing a legal doctrine that categorically supported the legitimacy and desirability of arbitration. Any hint of doctrinal ambiguity would be used by the adversaries of arbitration to create a wave of enmity by which they hoped to rout contemporary arbitration from the legal system.

The conceptual differences that promoted this disagreement related to the role of law and judicial decision-making in the American legal system. The opponents of contemporary arbitration perceive the ‘emphatic federal policy favoring arbitration’ as a debasement of the juridical work and professional function of the judiciary and a dangerous curtailment of judicial authority in American society. Federal judges especially are convinced of the specialty of their function and the comparative inferiority of arbitrators. Their conviction arguably emanates from the Constitution itself. Arbitration can readily be seen as a vulgarization of the process of judicial litigation, irretrievably contaminating it with half-baked adjudicatory proceedings.

In arbitral adjudication, legal rules are transformed into general validations of the accommodations reached between private decision-makers. Arbitral rulings have none of the trappings of rules borne of politically-conferred authority which enable the fulfillment of public responsibilities.

#### Antitrust guidance stalls AND no follow on.

Baer ’20 [Bill; October 1; Visiting Fellow in Governance Studies, former Assistant Attorney General for Antitrust at the U.S. Department of Justice and Director of the Bureau of Competition at the Federal Trade Commission, J.D. from Stanford University; Testimony Before the United States House of Representatives, “Proposals to Strengthen the Antitrust Laws and Restore Competition Online,” <https://www.brookings.edu/wp-content/uploads/2020/05/Bill-Baer-10.1.20-Testimony-to-House-Antitrust-Subcommittee.pdf>]

So where do we go from here? One strategy has the antitrust enforcers developing new policy guidance in areas such as vertical mergers, standard essential patents, and high tech platforms to nudge the courts towards a less skeptical view of the need for assertive enforcement. The joint DOJ/FTC Horizontal Merger Guidelines have, as I noted earlier, over time increasingly been relied on by the courts as providing a framework for determining whether the combination of two rivals risks harm to consumers and to competition.

There are at least two reasons to doubt whether reliance on that strategy will be sufficient. First, it took years for the courts to embrace the soundness of the merger guidelines—indeed more than a decade. Can we afford to wait that long? Second, there is no guarantee that the courts will embrace that new guidance. The mindset that antitrust enforcers are more likely to be wrong than right, and that as a result, we should at all costs avoid the risk of over-enforcement, is pretty well-entrenched in antitrust jurisprudence. Absent some further direction from Congress, those biases are unlikely to change.

#### The FTC has never won a section 5 case and legislative backlash nullifies the CP.

Jones & Kovacic 20 [Alison Jones\* and William E. Kovacic. Alison Jones, Professor of Law, King’s College London. William Kovacic. George Washington University, Washington DC, USA \*\*\* United Kingdom Competition and Markets Authority, United Kingdom. "Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy." https://journals.sagepub.com/doi/pdf/10.1177/0003603X20912884]

There is no doubt therefore that Section 5 was designed as an expansion joint in the U.S. antitrust system. It seems unlikely to us, nonetheless, that a majority of FTC’s current members will be minded to use it in this way. Further, even if they were to be, the reality is that such an application may encounter difficulties. Since its creation in 1914, the FTC has never prevailed before the Supreme Court in any case challenging dominant firm misconduct, whether premised on Section 2 of the Sherman Act or purely on Section 5 of the FTC Act.96 The last FTC success in federal court in a case predicated solely on Section 5 occurred in the late 1960s.97 The FTC’s record of limited success with Section 5 has not been for want of trying. In the 1970s, the FTC undertook an ambitious program to make the enforcement of claims predicated on the distinctive reach of Section 5, a foundation to develop “competition policy in its broadest sense.”98 The agency’s Section 5 agenda yielded some successes,99 but also a large number of litigation failures involving cases to address subtle forms of coordination in oligopolies, to impose new obligations on dominant firms, and to dissolve shared monopolies.100 The agency’s program elicited powerful legislative backlash from a Congress that once supported FTC’s trailblazing initiatives but turned against it as the Commission’s efforts to obtain dramatic structural remedies unfolded.101

#### The plan reverses collapsing judicial legitimacy

Glover ’15 [Maria; June 2015; Professor of Law at the Georgetown University Law Center, J.D. from Vanderbilt University; Yale Law Journal, “Disappearing Claims and the Erosion of Substantive Law,” vol. 124]

Introduction

The Supreme Court’s recent arbitration jurisprudence represents the culmination of a three-decade-long expansion of the use of private arbitration as an alternative to court adjudication in the resolution of disputes of virtually every type of justiciable claim. As a result of this jurisprudence, cases that would otherwise proceed in the public realm—the courts—have been moved to a purely private realm, which is largely shielded from judicial and public scrutiny. Many observers have noted that this decades-long privatization of dispute resolution and attendant adjudicative mechanisms has led to both a loss of confidence in public adjudication and a loss of public adjudication itself—an erosion of the public realm. However, the Court’s arbitration jurisprudence from the last five years—and particularly its 2013 decision in American Express Co. v. Italian Colors Restaurant 1 —does far more: it undermines the substantive law itself. Indeed, the Court’s most recent arbitration jurisprudence has conferred upon private entities a more fundamental power, antecedent to the authority to adjust the mechanisms of adjudication used to enforce substantive law. This power is more akin to lawmaking. A private entity, through contractual arbitration provisions, can now significantly reduce or even remove its substantive legal obligations by eliminating claiming. That private contract drafter can, in effect, wield quasi-lawmaking power by rendering substantive law inapplicable to a great deal of its primary conduct. Given the central role of private enforcement to the achievement of legislative directives, 2 private entities can therefore use contractual arbitration provisions effectively to erode substantive law from the books, with the consequent erosion of both the private compensatory goals and public deterrent objectives of that law.

As an initial matter, one can situate the trend toward privatizing dispute resolution within a broader narrative about the erosion of the public realm in the world of litigation writ large. For years, scholars have traced, and alternatively lamented and lauded, the near-total disappearance of the trial, the most public feature of our civil litigation system.3 There are myriad explanations for the decline in trial rates,4 but an undoubted descriptive consequence of the vanishing trial—and the corresponding rise of settlement as the dominant endgame in litigation—has been a decline in the transparency of case outcomes and often of the judicial and litigation processes behind those outcomes. Normatively, scholars have argued that the large-scale shift from trial to settlement has resulted in significant losses to the values of democratic participation, legitimacy, deterrence, accuracy, judicial independence, egalitarianism, transparency, and peacekeeping.12 Moreover, the confidentiality of private settlements frustrates public access and deprives future litigants of the benefits of precedential decision-making.13 As I have discussed in prior work, the rise of settlement, unaccompanied by procedural change that would provide for robust pre-trial judicial assessment of the merits of claims, has resulted in fewer judicial pronouncements of law and judicial applications of law to facts.14 Moreover, some have argued that this state of affairs diminishes public confidence in public institutions and leads to stagnation in public law.15

Similar arguments have been raised about the values lost when public proceedings and transparency are traded for the arguable convenience and efficiency of private dispute resolution through arbitration. First, privatizing disputes that would otherwise be public may well erode public confidence in public institutions and the judicial process by removing disputes from the public realm. Litigation proceedings in court enable public discussion of governmental and other public affairs; they provide checks against both unfairness to some litigants that may flourish behind closed doors 16 and potentially corrupt practices by attorneys, judicial officers, and litigants.17 Second, and relatedly, privatizing dispute resolution may undermine the functioning of judicial institutions themselves by decreasing public and private investment in the courts.18 Third, privatization threatens to impede public awareness of the substantive law, inasmuch as private proceedings frustrate the public’s ability to understand the state of the law, how particular laws are interpreted, and how claims are pursued.19

#### Judicial legitimacy solves extinction

Davis and Morse ’18 [Christina and Julia; September 19; Professor of Government at Harvard University; Professor of Political Science at the University of California at Santa Barbara; International Studies Quarterly, “Protecting Trade by Legalizing Political Disputes: Why Countries Bring Cases to the International Court of Justice,” vol. 62]

Trade, Conflict, and Adjudication

We argue that countries turn to international adjudication to protect trade flows under conditions of strong economic interdependence. This argument is built on two key assumptions. First, states believe that an international dispute over territory, fishing rights, or another salient issue could harm trade. Second, states view international adjudication as an effective way to end the dispute. Given the risk of harm to economic relations and the potential for courts to contribute to conflict resolution, states with high trade value vested in a relationship will be more willing to undertake costly litigation. This section elaborates on the general conditions of our theory and then explains why the ICJ is a good venue for testing the relationship between economic interdependence and international adjudication. The Adverse Impact of Conflict on Trade The premise that conflict disrupts trade is central to the theory of commercial peace. Russett and Oneal (2001) draw on the work of philosopher Immanuel Kant to argue that interdependence deters conflict by raising its costs. According to this reasoning, war interrupts trade while peace promotes stable commerce, leading states to calculate that the gains of peace are significant compared to the costs of war.4 Other perspectives focus on the informational role of interdependence to lower uncertainty between states (Reed 2003). Gartzke, Li, and Boehmer (2001) contend economic interdependence allows states to signal their resolve through their willingness to bear the economic costs of confrontation.5 A host of empirical studies supports the idea that conflict reduces trade (Keshk, Reuveny, and Pollins 2004; Long 2008). Several potential channels connect trade and conflict, including direct damage to infrastructure and transportation resulting from actual conflict, sanctions policies, and informal discrimination by governments or private actors. Glick and Taylor (2010) find that the effect of war on trade is significant and persistent. At a lower level, political tensions may also suppress trade (Pollins 1989; Fuchs and Klann 2013). Consumer boycotts and financial market reactions in some cases have led to adverse market impact (Fisman, Hamao, and Wang 2014; Heilmann 2016; Pandya 2016). Simmons (2005) finds that territorial disputes have a sizable negative impact on trade even in the absence of militarized action. Others suggest states anticipate the potential adverse impact of conflict on trade, and therefore trade less to begin with if they think that war is likely. In such a scenario, the marginal economic costs of war should be insufficient to change a state's calculation for going to war (Morrow 1999; Barbieri 2002). Gowa and Hicks (2017) contend that trade is largely diverted through third-party channels, which compensate for having less direct trade with the adversary. We assume that leaders and business constituencies on average believe that conflict damages trade relations. Political conflict could lead governments to adopt sanctions against an adversary or to restrict financial flows. Violence likely disrupts trading routes and slows the movement of goods. The potential for adverse financial market reactions and consumer response adds further unpredictability about the risk of spillover from political disagreement into economic harm. Substitution through third parties could alleviate the harm, but this would still increase trade costs. The expected harm to trade motivates states to pursue the resolution of disputes. Adjudication as a Conflict Resolution Mechanism When states want to resolve an interstate dispute, why would they choose adjudication rather than negotiations, economic sanctions, or militarized action? In some cases, the decision follows an episode of military conflict as part of an effort to normalize relations. In other disputes, countries may turn to a legal venue to prevent a problem from ever reaching the stage that could produce serious political tensions or threats of force. The literature offers three broad types of explanations for why states pursue adjudication: legitimacy, informational benefits, and domestic obstacles to settlement. At the systemic level, international norms support peaceful conflict resolution. Some contend that rule of law has come to shape the identities of states, forming norms about appropriate action in both the domestic and international spheres (Finnemore and Sikkink (1998, 902). When international law has been established through fair procedures and offers coherent principles, it forms a legitimate source of authority in international affairs that generates an independent “compliance pull” on state behavior (Franck 1990, 65). International courts combine both legitimacy and authority as they help states solve specific disputes about how to interpret international law; the growing role for international courts in international affairs represents an important trend (Alter 2014; Alter, Helfer, and Madsen 2016). Integration with national courts has reinforced states’ use of the European Court of Justice (ECJ), which stands out for its expansive caseload and impact on state behavior (Alter 1998). The ICJ has achieved a relatively strong record of compliance with rulings (Schulte 2004; Llamzon 2007; Mitchell and Hensel 2007; Johns 2012). Legal settlement can help states coordinate policies through the provision of information. Compared to bilateral negotiations or nonbinding third-party arbitration, adjudication conveys a government's willingness to reach an agreement (Helfer and Slaughter 2005; Gent and Shannon 2010). Having taken the public step to initiate legal action, a government would appear inconsistent and incur a reputational penalty if it also took unilateral measures such as sanctions or military actions before the legal process had reached a conclusion. This shapes the diplomatic context because participants know that the matter will neither escalate into violence nor disappear through neglect. A court ruling offers a focal point amidst uncertainty about how to interpret the terms of an agreement (Ginsburg and McAdams 2004; Huth, Croco, and Appel 2011). As the record-keeper of past actions, courts support systems of tit-for-tat and reputational enforcement (Milgrom, North, and Weingast 1990; Carrubba 2005; Mitchell and Hensel 2007). In these informational theories of courts, states may comply with court rulings in the absence of coercive measures or the threat of sanctions because the reputational costs of noncompliance are too high. Rather than simply interpret law, courts coordinate expectations about enforcement. Johns (2012) models the circumstances whereby mobilization of third-party actions in support of a court ruling generates endogenous enforcement that can affect outcomes. In this way, multilateral enforcement makes an international court different from the pressure available in bilateral negotiations. International courts also offer a way for states to frame settlements to appeal to domestic audiences (Fang 2008). Simmons notes that even when the same deal could be reached in negotiations or through a court decision, a negotiated settlement could be viewed as a sign of weakness while legal resolution would be a positive signal for future cooperation (Simmons 2002, 834). This dynamic occurs because “domestic groups will find it more attractive to make concessions to a disinterested institution than to a political adversary” (Simmons 2002, 834). In research on several prominent ICJ cases, Fischer (1982, 271) emphasizes the court has helped governments to save face. Consequently, those governments unable to reach agreements over domestic opposition may find it easier to do so with the involvement of a third-party ruling. Allee and Huth (2006a) show that governments with higher levels of domestic political constraints are more likely to choose adjudication over negotiation for settling territorial disputes. Domestic political constraints also increase the probability of filing complaints at the WTO (Davis 2012). The mobilization of domestic groups plays a critical role in litigation patterns at the ECJ (Alter and Vargas 2000).

## CP---Merger

### 2AC---CP---MergersArbitration is entirely a judicial construction---the Supreme Court will extinguish any hint of opposition.

Carbonneau ’20 [Thomas; November 18; Samuel P. Orlando Distinguished Professor of Law at Pennsylvania State University, Faculty Director of the Arbitration Institute; Arbitration Law in a Nutshell, “The Central Themes of American Arbitration Law,” Ch. 2]

An ideological war exists between the U.S. Supreme Court and a number of lower federal and state courts in which the lower courts criticize the Court’s support for arbitration—in particular, contest the legality and desirability of adhesive arbitration. The Court appeared to be convinced that, if any exceptions to arbitrability were made, arbitration would cease to resolve the limitations and dysfunctionality of civil litigation. Its unequivocal support for arbitration was built upon the received wisdom that tolerating exceptions to a legal rule announces the rule’s eventual demise. The exception(s) inexorably become the rule. In terms of arbitration, permitting exceptions to arbitrability would, over time, lead to the reassertion of exclusive judicial jurisdiction over civil litigation. Mindful of the long-standing judicial animosity toward arbitration, the Court believed it could quell the rivalry only by developing a legal doctrine that categorically supported the legitimacy and desirability of arbitration. Any hint of doctrinal ambiguity would be used by the adversaries of arbitration to create a wave of enmity by which they hoped to rout contemporary arbitration from the legal system.

The conceptual differences that promoted this disagreement related to the role of law and judicial decision-making in the American legal system. The opponents of contemporary arbitration perceive the ‘emphatic federal policy favoring arbitration’ as a debasement of the juridical work and professional function of the judiciary and a dangerous curtailment of judicial authority in American society. Federal judges especially are convinced of the specialty of their function and the comparative inferiority of arbitrators. Their conviction arguably emanates from the Constitution itself. Arbitration can readily be seen as a vulgarization of the process of judicial litigation, irretrievably contaminating it with half-baked adjudicatory proceedings.

In arbitral adjudication, legal rules are transformed into general validations of the accommodations reached between private decision-makers. Arbitral rulings have none of the trappings of rules borne of politically-conferred authority which enable the fulfillment of public responsibilities.

#### They view it as constitutionally grounded and will tear apart legislation---arbitration law is an exclusive judicial domain.

Carbonneau ’20 [Thomas; November 18; Samuel P. Orlando Distinguished Professor of Law at Pennsylvania State University, Faculty Director of the Arbitration Institute; Arbitration Law in a Nutshell, “The Central Themes of American Arbitration Law,” Ch. 2]

These criticisms are simultaneously powerful and perplexing. They make a strong case against the current usage and status of arbitration. The strength of the criticism resides primarily in the link it establishes to the traditional: what is familiar and what has always been done. In rejecting arbitration, the tribunals in coastal liberal enclaves ironically seek to conserve the existing order and defend established practices and mechanisms. The fear that private adjudication induces and which leads liberal courts to embrace conservative values is, in fact, an accurate reaction to and assessment of contemporary arbitration. The fear is entirely justified because the ‘emphatic federal policy’ betokens a revolution. It is a revolution in which the Court is both an instigator and a perpetrator. The judicial endorsement of arbitration represents a fundamental change in the values of legal civilization and the role these values play in American society.

The Court was the first U.S. public institution to understand the need for change in civil litigation and how it was to be achieved. The understanding took place over several decades and numerous rulings. At the outset, the policy objective was timid, careful, and hesitant. As the value of the decisional law grew, the Court’s doctrinal leadership became more confident and focused. Toward the end of the persistent evolution, new concepts and revamped paradigms emerged which challenged the fundamental givens in the previous order. The Court saw and promoted arbitration as an effective and lawful process for the adjudication of disputes that could remedy the legal system’s inability to offer workable civil litigation. The redefinition of arbitration revealed the dysfunctionality and exposed the contradictions of adversarial litigation, along with the consequence of the disabling applications of excessive procedural due process. In attempting to offer rigorously constitutional civil litigation, American law imposed a counterproductive, unconstitutional burden on American society. It denied most citizens their right to the redress of their civil grievances. For the Court, arbitration resolved this problem without placing greater demands on the public fisc or the court system. It is entirely accurate to see (and impossible to deny) that the U.S. Supreme Court’s decisional law on arbitration constitutes judicial legislation. The Court’s opinions have substantially altered and added to the content of the enacted statute. There appears to be a tacit understanding between the Court and the U.S. Congress that arbitration falls within the Court’s exclusive bailiwick.

## DA---Court Politics

### 2AC---DA---Court PTX

#### Laundry list of hot button cases thump AND no swing.

Gorod ‘9-9 [Brianne; September 9; chief counsel for the Constitutional Accountability Center; The New Republic, “Is It Finally Curtains for Roe?” <https://newrepublic.com/article/163519/roe-wade-supreme-court-fall-term>]

The new Supreme Court term is about to begin, and it promises to be a blockbuster. With cases involving abortion and guns already on the docket, and the possibility that an affirmative action case may be added as well, this term will present the court’s new six-member conservative supermajority with the opportunity to usher in major shifts in the law. What the justices do with those opportunities will be a test of their commitment to precedent and, for many of them, their self-professed commitment to originalism.

Perhaps the biggest issue on the court’s docket this term will be abortion. A little over a year ago, in a case called June Medical Services LLC v. Russo, the Supreme Court gave abortion rights advocates [a win](https://reproductiverights.org/case/scotus-june-medical-services/supreme-court-abortion-june-medical/) when it held unconstitutional a Louisiana law that required physicians who perform abortions to have admitting privileges at a nearby hospital. In [his opinion](https://supreme.justia.com/cases/federal/us/591/18-1323/#tab-opinion-4267231) concurring in the ruling, with which he joined the court’s (then) four liberal members, Chief Justice John Roberts extolled the importance of precedent, observing that “for precedent to mean anything, the doctrine must give way only to a rationale that goes beyond whether the case was decided correctly.” Because the Louisiana law was identical to a Texas law the court had previously [struck down](https://www.nytimes.com/2016/06/28/us/supreme-court-texas-abortion.html), the chief justice voted to strike down the Louisiana law.

But with the replacement of Justice Ruth Bader Ginsburg by Justice Amy Coney Barrett, the chief justice’s vote will not be dispositive when the court hears Dobbs v. Jackson Women’s Health Organization this term. In Dobbs, the court will be considering a challenge to the constitutionality of a [Mississippi law](https://law.justia.com/codes/mississippi/2018/title-41/chapter-41/gestational-age-act/section-41-41-191/) that, with limited exceptions, bans abortions after the fifteenth week of pregnancy. The lower courts rightly [concluded](https://reproductiverights.org/appeals-court-strikes-down-mississippi-15-week-abortion-ban/) that this pre-viability ban on abortion was unconstitutional under the Supreme Court’s precedents, and Mississippi now asks the court to overrule those precedents.

According to Monica Simpson, executive director of [SisterSong](https://www.sistersong.net/reproductive-justice), a Southern-based, national reproductive justice organization that works to improve policies that affect the reproductive lives of women of color, “If the Supreme Court decides to overturn ... precedent under Roe v. Wade, the consequences will be devastating for communities like mine in Georgia, where we are currently fighting against a six-week abortion ban in court.” As she further explained, “The right to access abortion care is a crucial aspect of bodily autonomy, which is too often denied to Black people and others from marginalized backgrounds.”

This case is a huge test for the court and its newest justices, all three of whom—Barrett, Brett Kavanaugh, and Neil Gorsuch—professed a commitment to precedent at their confirmation hearings. Repeatedly, the Supreme Court has been asked to overrule Roe, and repeatedly it has [reaffirmed](https://www.theusconstitution.org/litigation/june-medical-services-l-l-c-v-gee/) that decision. But in an ominous sign, the court, over the dissents of Chief Justice John Roberts and Justices Breyer, Sotomayor, and Kagan, recently [refused](https://www.nytimes.com/2021/09/01/us/supreme-court-texas-abortion.html) an emergency request to block Texas’s six-week abortion ban from going into effect, thus functionally gutting Roe. In doing so, the court not only undermined the right to abortion, but also its own legitimacy. If the new conservative supermajority does, in fact, vote in Dobbs to fully jettison Roe and the other long-standing precedents that recognize a constitutional right to access abortion simply because they were not, in the views of those justices, “decided correctly,” it will deliver an even more significant blow not only to the right to abortion, but also to the legitimacy of the court.

It should also deliver a blow to the claims by many members of the court that they follow the text and history of the Constitution, wherever it leads. When the Reconstruction framers drafted the Fourteenth Amendment, they chose [sweeping language](https://www.theusconstitution.org/blog/lincoln-the-supreme-court-and-the-reconstruction-revolution/) to protect the full panoply of fundamental rights for all, and they viewed both personal liberty and control over one’s body as among those fundamental rights. The Fourteenth Amendment thus guarantees the right to access abortion, and the court’s originalists should recognize that.

Dobbs is not the only blockbuster case on the court’s docket. In New York State Rifle & Pistol Association Inc. v. Bruen, the court will be considering whether New York’s denial of two individuals’ applications for concealed-carry licenses for self-defense [violates](https://www.scotusblog.com/2021/04/court-to-take-up-major-gun-rights-case/) the Second Amendment. In 2008, in a case called District of Columbia v. Heller, the Supreme Court held that the Second Amendment [protects an individual right](https://supreme.justia.com/cases/federal/us/554/570/#tab-opinion-1962738) to own guns for self-defense, but also made clear that “[l]ike most rights, the right secured by the Second Amendment is not unlimited.”

In the years since Heller, it has fallen to the lower courts to determine what gun regulations are constitutional, with very little guidance from the Supreme Court. The Second Circuit Court of Appeals concluded that the New York law [was constitutional](https://casetext.com/case/kachalsky-v-cnty-of-westchester#p83), explaining that because “our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public, ... [the law] passes constitutional muster if it is substantially related to the achievement of an important governmental interest.” The circuit court went on to conclude that “New York has substantial, indeed compelling, governmental interests in public safety and crime prevention,” and the law is “substantially related” to those interests. When the Supreme Court decides Bruen, how it rules may ultimately be as important as what it rules, because the guidance it provides about how courts should decide the constitutionality of gun regulations could have ramifications that extend far beyond the New York law at issue in the case.

As if these two huge cases were not enough, the court may add another big issue to the docket before the term ends: affirmative action. And as in the abortion case, the court is being asked to overrule a long-standing precedent: Grutter v. Bollinger, the 2003 case that held that universities may consider race as a factor in admissions. In Students for Fair Admissions Inc. v. President & Fellows of Harvard College, an organization called Students for Fair Admissions sued Harvard under a federal law that prohibits entities that accept federal funds from discriminating on the basis of, among other factors, race. The lower courts [rejected the challenge](https://www.washingtonpost.com/education/2020/11/12/harvard-admissions-asian-americans-ruling/), concluding that Harvard’s “limited use of race in its admissions process in order to achieve diversity ... is consistent with the requirements of Supreme Court precedent.” The group challenging Harvard’s admissions policy has asked the court to hear the case, and the [court has called](https://www.scotusblog.com/2021/06/justices-request-governments-views-on-harvard-affirmative-action-dispute/) for the views of the solicitor general.

Here, as in Dobbs, both constitutional text and history, as well as the court’s own precedent, require the same result—upholding the lower court decision. After all, at the same time the framers of the Fourteenth Amendment drafted that amendment, they also enacted a [long list](https://www.theusconstitution.org/litigation/fisher-v-university-of-texas-i-u-s-sup-ct/) of race-conscious legislation designed to guarantee equality of opportunity for all persons regardless of race. The Supreme Court’s repeated rulings upholding universities’ use of race as one factor in admissions decisions are entirely consistent with that history. In other words, if the court ultimately decides to take up this case, it—no less than Dobbs—will be a real test of the justices’ commitment to the text and history of the Constitution, as well as to the court’s own precedent.

While those three cases are likely to dominate headlines about the court this term, they’re hardly the only important ones on the docket. The court will also be deciding, among many other matters, whether individuals can challenge conduct that has a disparate impact on the basis of disability, whether an important federal civil rights law allows plaintiffs to recover damages for emotional distress, and whether it is constitutional for a state to provide students with funding for private schools but prohibit them from attending schools that provide religious instruction.

#### The plan is not partisan.

Robert Manduca 19, Assistant Professor, Sociology, University of Michigan, "Antitrust Enforcement as Federal Policy to Reduce Regional Economic Disparities," The ANNALS of the American Academy Political and Social Science, Vol. 685, Issue 1, 09/10/2019, SAGE.

Among possible federal regional development policies, reinvigorated antitrust enforcement stands out in several ways that make its establishment as a policy more likely. First, it is salient and familiar to voters. Most voters have encountered monopolies in their daily lives, whether they be airlines, utilities, internet providers, or tech platforms. Almost everyone has had a negative experience with a company too large or omnipresent to avoid in the future. Breaking such companies up offers a response to angry customers who would otherwise not have any way to express their frustration.

Moreover, aggressive antitrust enforcement has a long history in the United States, and it was widely practiced within the lifetimes of many voters. It has been a stated principle of capitalist economics since Adam Smith (Smith 1827), albeit one that has often been honored in the breach. In the United States specifically, antitrust enforcement fits with a longstanding American skepticism toward “bigness” (Lemann 2016; Rosen 2016). Perhaps for these reasons, the current antitrust movement has managed to find support among both liberals and conservatives. A poll conducted in September 2018, for instance, found that 65 percent of Americans—and 54 percent of Trump voters—think the government “should do more to break up corporate monopolies” (Dayen 2018). And leading proponents of antitrust enforcement in Congress and the media are found on both sides of the aisle (Crane 2018).

Perhaps more important than its broad appeal among voters, antitrust enforcement has the potential to attract support, or at least avoid opposition, from a wide range of organized interest groups. Of particular note is the potential for corporate ambivalence on this issue. Unlike many progressive economic policies, many companies—including quite powerful ones—stand to benefit from a reinvigorated antitrust regime. Yelp, for instance, has been a major critic of Google’s abuse of its search monopoly for several years (Dougherty 2017). When AT&T attempted to acquire T-Mobile in 2010, some of the most vocal opposition came from competitor Sprint (Singel 2011), though that did not stop Sprint from initiating its own bid for T-Mobile recently. Even Walmart, the largest retailer in the country, recently joined with other brick and mortar retailers to call on the Federal Trade Commission (FTC) to examine “persistent oligopolies in other parts of the retail system,” specifically singling out the market power of Amazon and Google (Dodge 2019). Companies like these could potentially become strong supporters of specific antitrust enforcement actions or a new antitrust movement in general.

#### Under the radar---antitrust is invisible.

Baum ’10 [Lawrence and Neal Devins; 2010; professor emeritus in the Department of Political Science at Ohio State University; Sandra Day O’Connor Professor of Law and Professor of Government at William and Mary Law School; the Georgetown Law Journal, “Why the Supreme Court Cares About Elites, Not the American People,” vol. 98]

It is worth underlining the point that a great deal of the Court’s work is essentially invisible to the public. Decisions in fields such as antitrust and patent law may be highly consequential, but it seems unlikely that there are strong public feelings about those decisions. Even if Justices seek to maintain the Court’s legitimacy, they have no reason to worry that public outrage in decisions in those fields will damage this legitimacy.170 More telling, the Rehnquist Court’s federalism revival was unnoticed by most of the mass public. During the period from 1992 to 2006, the Court invalidated eleven federal statutes on federalism grounds,171 thereby shifting the balance between the federal government and the states substantially. Nevertheless, these decisions (although prompting significant law review commentary) appeared to have low political salience.172 Of 229 Gallup Poll questions that explicitly referenced the Supreme Court during this period, there was not a single question concerning these decisions or any other Supreme Court invalidations of federal statutes.173

#### No spillover or internal link---one ruling is insufficient.

DeVeaux ’10-4 [Amelia Thomson-DeVeaux; 2021; citing Lawrence Baum, a political science professor at Ohio State University, Neal Devins, a professor of law and government at the College of William & Mary, and Michael Salamone, a political science professor at Washington State University; 538, “Why The Supreme Court Probably Doesn’t Care What Most Americans Think About Abortion Or Gun Rights,” https://fivethirtyeight.com/features/why-the-supreme-court-probably-doesnt-care-what-most-americans-think-about-abortion-or-gun-rights/]

And this might be right. On one hand, it’s not obvious that a single unpopular ruling -- even if it’s high-profile -- would be enough to sow widespread doubt in the Supreme Court’s legitimacy. Take the outcome in Bush v. Gore, where a divided Supreme Court, split along partisan lines, effectively handed the presidency to George W. Bush. The ruling was intensely controversial at the time, but it appears to have had little lasting impact on the court’s image. And although it might be hard to imagine, the same could be true of a decision that overturns or reshapes Roe — particularly if the justices merely limit the constitutional right to abortion, rather than eliminate it.

But the question of how a highly conservative Supreme Court majority will navigate public opinion isn’t going away. And it becomes even more relevant if the conservatives maintain control of the court for years or even decades.

“In the past, even if the court was trending conservative overall, it wasn’t like the conservatives always won and the liberals always lost,” said Michael Salamone, a political science professor at Washington State University who studies the Supreme Court and public opinion. “Now it’s looking like conservative victories are going to be a lot more consistent and a lot more far-reaching.”

### 2AC---AT: Warming

#### Class action litigation solves warming

Juhn ’21 [Mina; 2021; J.D. Candidate at the Fordham University School of Law, B.A. in 2013 from Wellesley College; Fordham Law Review, “Taking a Stand: Climate Change Litigants and the Viability of Constitutional Claims,” vol. 89]

Introduction

As the impacts of global warming on human and natural systems increase, so too do the number of lawsuits brought to mitigate them.1 There is widespread scientific consensus that global warming is changing the global climate in a manner deleterious to both human and natural systems.2 Eighteen of the nineteen warmest years on record have occurred since 2001, and even the staunchest climate change skeptics recognize the dynamics of the carbon cycle.3 In 2018, the Intergovernmental Panel on Climate Change (IPCC) issued a report stating that if greenhouse gas emissions continued at their current rate, the resulting temperature increases could destroy coral reefs, exacerbate wildfires, jeopardize food supplies, and contribute to political instability in developing nations.4 Climate change is “one of the key challenges of our lifetimes and future generations,”5 and there is significant evidence linking extreme weather events and the onset of climate change to human activity.6

The velocity and permanency of global warming have become topics of increasing urgency in recent decades7 but have been met in the United States by legislative stagnation and agency deregulation.8 Congress’s failure in the last thirty years to enact any major legislation to regulate greenhouse gas emissions has coincided with a sharp increase in climate lawsuits.9 This perceived inaction from the political branches has compelled some plaintiffs to turn to the judicial system to combat anthropogenic climate change via a growing class of environmental lawsuits known as “climate change litigation.”10 These litigants do not purport to supplant the political process, and there remains a general consensus that the political branches should address climate change via legislative or executive action.11 Yet, in the absence of a large-scale or effective response to the growing climate crisis, plaintiffs have attempted to compel regulatory and political action through the courts.12

Climate change litigation encompasses many types of lawsuits that seek to hold certain actors accountable for their contributions to or failures to act on climate change.13 Plaintiffs may bring litigation against federal and state governments, city administrations, and corporations; the most common claimants are environmental organizations, industry trade groups, local governments, and citizen groups.14

In the United States, climate change litigation has traditionally involved statutory claims or claims sounding in common-law tort doctrines.15 In contrast to administrative or common-law claims, rights-based climate change lawsuits against governments and public authorities have recently gained traction.16 These public law actions seek to compel federal, state, and local governments to escalate their efforts to address climate change by raising human rights and constitutional arguments.17

To date, the most prominent climate change lawsuit18 of this type— noteworthy both for the scope of its constitutional claims and the youth of its plaintiffs—is Juliana v. United States.19 The twenty-one young plaintiffs allege that, despite the federal government’s obligation to reduce carbon emissions, the government has actively facilitated the country’s increased carbon emissions by supporting the fossil fuel industry.20 The Juliana plaintiffs argue that the government’s actions have violated their “fundamental constitutional rights to life, liberty, and property.”21

In 2016, the case generated extensive media coverage when Judge Ann Aiken of the District Court of Oregon declared that “the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.”22 In January 2020, a panel of the Ninth Circuit reversed the lower court’s decision for lack of standing.23 Although the Ninth Circuit acknowledged that federal policies contributed to sustaining high levels of carbon emissions, the court decided that carbon emissions policies presented political questions that required resolution by the political branches.24 As a result, the panel held that the plaintiffs did not satisfy the requirements for Article III standing and reversed the lower court’s decision.25

The Ninth Circuit’s decision is emblematic of the judiciary’s typical response to climate change litigation, particularly to the cases in which plaintiffs advance constitutional or rights-based claims.26 Often, the judiciary finds that policymaking discretion, class certification, or separation of powers concerns restrict their ability to grant relief and routinely dismisses suits for lack of standing.27

This Note examines federal climate change lawsuits in the United States alleging constitutional violations. Part I begins with a brief overview of statutory and common-law claims in climate change litigation and proceeds to a discussion of the legal rights and issues implicated by constitutional claims. Part I also introduces Juliana as a case study for evaluating the legal strategies and justiciability issues involved in rights-based arguments. Part II reviews the arguments for and against pursuing constitutional claims in climate change litigation, focusing on the procedural and substantive issues raised. Part III argues that constitutional claims in climate change litigation should be granted standing and that they merit judicial review.

I. Overview of Climate Change Litigation

Climate change litigation is unified in its focus on the harmful impacts of climate change, but plaintiffs have utilized an array of approaches, which has resulted in a range of litigation strategies.28 Climate change litigation extends beyond the traditional confines of environmental litigation—which focuses largely on air and water pollution, the preservation of endangered species, and environmental impact statements29—to cases that argue for a constitutional right to a stable climate and the rights of future generations.30

This part establishes several necessary legal foundations. Part I.A reviews federal statutory and common-law causes of action. Part I.B discusses the sources of rights for constitutional claims and the justiciability issues involved. Part I.C introduces Juliana—this Note’s central case study of a constitutional climate change lawsuit—and reviews its procedural posture and legal arguments.

A. Traditional Sources of Legal Rights

The legal bases for climate change lawsuits include statutory, common-law, and constitutional causes of action.31 Statutory claims are the most common, followed by claims sounding in common-law tort doctrines, in particular public nuisance, private nuisance, and negligence.32 Constitutional claims comprise a comparably smaller but growing subset of climate change litigation.33 This Note focuses primarily on the strength and generativity of constitutional claims34 brought by environmentalist plaintiffs but begins with an instructive overview of the other categories of climate litigation.

1. Statutory Authority

A significant number of climate change lawsuits allege violations of federal statutes and regulations, including the Administrative Procedure Act,35 the National Environmental Policy Act,36 the Clean Air Act of 196337 (CAA), the Clean Water Act of 1977,38 and the Endangered Species Act of 197339 Actions against private entities have also arisen under securities regulations or as requests under the Freedom of Information Act.40 According to an analysis of the Sabin Center for Climate Change Law’s climate change litigation database, which tracks lawsuits brought by environmental and citizen groups between 1990 and 2016, 65 percent of cases had a federal statutory cause of action.41

The most noteworthy climate lawsuits alleging statutory violations and challenging government efforts to regulate carbon emissions have been brought under the CAA. The U.S. Supreme Court’s seminal decision in Massachusetts v. EPA 42 in 2007 arguably instigated the current proliferation of climate change lawsuits and is the preeminent example of an environmental lawsuit seeking to compel government action under a statutory scheme.43 In Massachusetts, several U.S. states, cities, and environmental groups challenged the Environmental Protection Agency’s (EPA) denial of a rulemaking petition to regulate greenhouse gas emissions from motor vehicles.44 The plaintiffs alleged that the government’s inaction would result in specific climate change–induced harms—including serious adverse effects on human health—and sought to compel the government to regulate carbon dioxide emissions pursuant to the CAA.45 In response, the EPA argued that greenhouse gas emissions did not qualify as air pollutants and that the plaintiffs had not demonstrated a sufficient and particularized harm required to establish standing.46 The EPA further argued that even if it had authority to regulate greenhouse gases, it would be unwise to do so at that time.47

The Court found that greenhouse gas emissions qualified as air pollutants and consequently were subject to regulation by the EPA.48 The Court further held that the EPA’s refusal to regulate emissions constituted an actual and imminent harm and that the EPA was authorized and obligated under the CAA to regulate greenhouse gas emissions if the EPA determined that such emissions endanger public health and welfare.49

Writing in dissent, Chief Justice Roberts maintained that the claims constituted a nonjusticiable question and disputed the majority’s finding that the plaintiffs had demonstrated sufficient causation and redressability.50 Chief Justice Roberts also questioned whether the redress sought would alleviate a global problem like climate change, noting that approximately 80 percent of global emissions originate outside the United States.51 Justice Antonin Scalia, in a separate dissent, criticized the majority for depriving the EPA of Chevron deference in favor of its own policy determinations.52

In addition to causes of action brought under environmental statutes, plaintiffs have also brought claims under federal securities laws.53 These cases often allege that directors of oil and gas corporations violated their fiduciary duties to shareholders by misleading them as to the impact of the companies’ carbon output on global warming.54 For example, in Ramirez v. Exxon Mobil Corp.,55 a group of shareholders brought a class action suit under the Private Securities Litigation Reform Act of 1995,56 alleging that Exxon Mobil had defrauded investors by purposefully misrepresenting climate risks.57 In 2018, a Texas federal district court found that the shareholders had adequately pleaded the alleged misstatements and met the standard for a securities fraud claim.58 Current and former employees of Exxon Mobil advanced similar arguments in Fentress v. Exxon Mobil Corp.,59 in which the employees sued the company for violations of the Employee Retirement Income Security Act of 197460 (ERISA). The plaintiffs alleged that Exxon Mobil’s failure to disclose and consider the impact of environmental risks and its materially false statements about the health of the company constituted a breach of its fiduciary duties.61 While the court did not question the elements of climate change argued by the plaintiffs, citing Massachusetts, it found that the plaintiffs failed to meet the pleading standard for ERISA claims and dismissed the case.62 Plaintiffs in climate change litigation have had inconsistent degrees of procedural success when bringing claims under other federal statutes.

#### Warming doesn’t cause extinction---new studies.

Nordhaus 20 Ted Nordhaus, an American author, environmental policy expert, and the director of research at The Breakthrough Institute, citing new climate change forecasts. [Ignore the Fake Climate Debate, 1-23-2020, https://www.wsj.com/articles/ignore-the-fake-climate-debate-11579795816]//BPS

Beyond the headlines and social media, where Greta Thunberg, Donald Trump and the online armies of climate “alarmists” and “deniers” do battle, there is a real climate debate bubbling along in scientific journals, conferences and, occasionally, even in the halls of Congress. It gets a lot less attention than the boisterous and fake debate that dominates our public discourse, but it is much more relevant to how the world might actually address the problem. In the real climate debate, no one denies the relationship between human emissions of greenhouse gases and a warming climate. Instead, the disagreement comes down to different views of climate risk in the face of multiple, cascading uncertainties. On one side of the debate are optimists, who believe that, with improving technology and greater affluence, our societies will prove quite adaptable to a changing climate. On the other side are pessimists, who are more concerned about the risks associated with rapid, large-scale and poorly understood transformations of the climate system. But most pessimists do not believe that runaway climate change or a hothouse earth are plausible scenarios, much less that human extinction is imminent. And most optimists recognize a need for policies to address climate change, even if they don’t support the radical measures that Ms. Thunberg and others have demanded. In the fake climate debate, both sides agree that economic growth and reduced emissions vary inversely; it’s a zero-sum game. In the real debate, the relationship is much more complicated. Long-term economic growth is associated with both rising per capita energy consumption and slower population growth. For this reason, as the world continues to get richer, higher per capita energy consumption is likely to be offset by a lower population. A richer world will also likely be more technologically advanced, which means that energy consumption should be less carbon-intensive than it would be in a poorer, less technologically advanced future. In fact, a number of the high-emissions scenarios produced by the United Nations Intergovernmental Panel on Climate Change involve futures in which the world is relatively poor and populous and less technologically advanced. Affluent, developed societies are also much better equipped to respond to climate extremes and natural disasters. That’s why natural disasters kill and displace many more people in poor societies than in rich ones. It’s not just seawalls and flood channels that make us resilient; it’s air conditioning and refrigeration, modern transportation and communications networks, early warning systems, first responders and public health bureaucracies. New research published in the journal Global Environmental Change finds that global economic growth over the last decade has reduced climate mortality by a factor of five, with the greatest benefits documented in the poorest nations. In low-lying Bangladesh, 300,000 people died in Cyclone Bhola in 1970, when 80% of the population lived in extreme poverty. In 2019, with less than 20% of the population living in extreme poverty, Cyclone Fani killed just five people. “Poor nations are most vulnerable to a changing climate. The fastest way to reduce that vulnerability is through economic development.” So while it is true that poor nations are most vulnerable to a changing climate, it is also true that the fastest way to reduce that vulnerability is through economic development, which requires infrastructure and industrialization. Those activities, in turn, require cement, steel, process heat and chemical inputs, all of which are impossible to produce today without fossil fuels. For this and other reasons, the world is unlikely to cut emissions fast enough to stabilize global temperatures at less than 2 degrees above pre-industrial levels, the long-standing international target, much less 1.5 degrees, as many activists now demand. But recent forecasts also suggest that many of the worst-case climate scenarios produced in the last decade, which assumed unbounded economic growth and fossil-fuel development, are also very unlikely. There is still substantial uncertainty about how sensitive global temperatures will be to higher emissions over the long-term. But the best estimates now suggest that the world is on track for 3 degrees of warming by the end of this century, not 4 or 5 degrees as was once feared. That is due in part to slower economic growth in the wake of the global financial crisis, but also to decades of technology policy and energy-modernization efforts. “We have better and cleaner technologies available today because policy-makers in the U.S. and elsewhere set out to develop those technologies.” The energy intensity of the global economy continues to fall. Lower-carbon natural gas has displaced coal as the primary source of new fossil energy. The falling cost of wind and solar energy has begun to have an effect on the growth of fossil fuels. Even nuclear energy has made a modest comeback in Asia.

# 1AR

## CP---FTC

### 1AR---Thumper

#### FTC expansion now

Graham ‘9-16 [Jed; September 16; Author and analyst; Investor’s Business Daily, “FTC, Biden Antitrust Enforcement Push Takes On Amazon, Google — And The Supreme Court,” <https://www.investors.com/news/antitrust-enforcement-push-by-ftc-biden-takes-on-amazon-google-supreme-court/>]

Kahn Rejects Antitrust Enforcement 'Rule Of Reason'

Khan's strategy to achieve a better win-loss record — despite the courts — is taking shape.

Prior antitrust regulators, when they emerged from the dugout, strictly played defense. Khan has served notice that she'll be a hurler.

At her first meeting as chair on July 1, the commission voted 3-2 to rescind a 2015 Obama-era policy statement on Section 5 of the FTC Act. Kahn said that policy "doubled down on the Commission's long-standing failure to investigate and pursue 'unfair methods of competition.' "

Section 5 of the FTC Act, passed in 1914, empowered the agency to police corporate conduct that hadn't yet violated the Sherman and Clayton Acts, but could if left unchecked, according to Khan. Yet the Obama-era FTC essentially decided to put its Section 5 power in a drawer and lock it away.

That ill-defined, rarely used authority made Obama-era antitrust enforcers uneasy. Why? Because, as Kovacic has written, it comes with an "absence of limiting principles."

Courts have an entrenched, if murky, "rule of reason" standard for judging alleged antitrust violations. They assess all pro-competitive and anti-competitive factors to gauge whether the behavior is contrary to consumer welfare.

With antitrust cases proving hard to win, Khan and her Democratic colleagues are rejecting a "rule of reason" framework. In other words, they're trying to expand the strike zone for antitrust enforcement.

Because cases brought under Section 5 shield defendants from liability for treble damages in private litigation, courts might be more open to finding fault.

## CP---States

### Solvency---1AR

#### Federal judicial attitudes guarantee class actions get removed to federal court and slaughtered by procedural barriers

Bartholomew ’15 [Christine; Spring; Associate Professor, SUNY Buffalo School of Law; Brooklyn Law Review, “Redefining Prey and Predator in Class Actions,” 80 Brooklyn L. Rev. 743, lexis]

The outcry for class action reform continued into the early 2000s, when the blackmail myth eventually drove Congress and the judiciary to undertake changes to class action mechanisms. These changes were meant to protect defendants, stripping the advantages intended by Rule 23. The largest change adopted under the guise of equalizing class actions was the 2005 Class Action Fairness Act (CAFA). Though Congress originally labeled the Act the "Consumer Class Action Bill of Rights," 155 the Act did not aim to help consumers but rather solve "the problem of unfair settlements and excessive attorneys' fees." 156 Hence, [\*765] CAFA was Congress' adoption of and response to the blackmail myth and efficiency and autonomy concerns. 157

In addition to discouraging class actions by limiting attorneys' fees, CAFA expanded federal diversity jurisdiction to force state class claims back into federal court. 158 [Footnote 158] 28 U.S.C. § 1332(d)(2) (2005). Plaintiffs' class action attorneys sought refuge in state courts. Unlike their federal brethren, state court judges demonstrated a clearer willingness to allow class actions. Mullenix, supra note 115, at 525-26. These state court successes only fueled anti-class action sentiment and gave critics new cause to reinvigorate arguments centered on protecting alleged corporate wrongdoers. The reinvigorated arguments found a sympathetic environment in the current pro-corporate neoliberal environment. [End Footnote 158] The removal of class actions from state court was predicated as a measure essential to "equalize" the treatment of defendants in pending state and federal class actions, as state courts were perceived as more sensitive to local plaintiffs. However, once again, empirical evidence did not support this alleged need to protect corporate defendants. 159

The expansion of federal jurisdiction has had very real consequences for class action plaintiffs. As Professor Rice explains:

[C]orporate defendants are substantially more likely to win tortbased class actions when those claims are litigated in federal courts of appeals. And corporate defendants won large percentages of tortbased, federal class actions regardless of whether class members sued multinational corporations and insurers jointly or individually. Corporate defendants "win" ratios in federal courts are 66.7% and 84.6%, respectively. 160

[\*766] Thus, while CAFA was enacted to promote fairness, in actuality it has helped corporations evade class action liability.

With multistate class actions now funneled into federal court, 161 federal judicial activism continues to chip away at class action procedures. The Roberts Court's pro-corporate record is well-established. After just five terms, the Roberts Court ruled for business interests 61% of the time. 162 This is in contrast to 46% in the last five years of the Rehnquist Court and 42% of all Courts since 1953. 163 The Court's corporate protection has greatly limited class actions. 164 The Roberts Court has actively heightened procedural requirements, making it harder to get into court; harder to plead a business tort class claim; and harder to certify a federal class. 165

Now, the dominant judicial attitude towards class actions is knee-jerk skepticism. At the inception of any class action, scales already tip heavily in the defendant's favor. Putative class members' very attempt to pursue class claims places them in a suspect posture for judges. In fact, the tenor in some class certification decisions assumes the claims are of questionable merit from the outset. As one court recently stated, "denying or granting class certification is often the defining moment in class actions (for it may . . . create unwarranted pressure to settle nonmeritorious claims on the part of defendants) . . . ." 166

Even assuming corporate defendants need more protection, the Supreme Court has added substantial gatekeeping [\*767] to class actions during the last decade alone. 167 One of the primary new gates to business tort class claims is Bell Atlantic Corporation v. Twombly, which altered the pleading standard for a complaint. 168 In Twombly, the Supreme Court returned to blackmail and efficiency rationales to justify empowering judges to dismiss class claims they deem implausible based on their "judicial experience and common sense." 169 The Supreme Court's tenor demonstrates a clear disdain for class actions, framing them as potentially asserting "a largely groundless claim . . . tak[ing] up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value." 170 This skepticism and new pleading standard means class plaintiffs must now prove their case without the aid of discovery. 171

For many areas of law, this standard means little. For example, in a typical contract case, a plaintiff need only allege facts for each element of the claim, with potentially more emphasis on breach and damages allegations. So long as a party states facts "plausibly suggesting (not merely consistent with)" illegal conduct, 172 the complaint should stand.

But in antitrust and consumer fraud claims, what is "plausible" is far more relative. Twombly permits a judge to subjectively decide whether she believes wrongdoing is plausible in a given industry. 173 This subjectivity is notably deadly for putative antitrust class actions. Two out of every three antitrust claims filed since Twombly have been dismissed [\*768] on Rule 12(b)(6) motions, 174 a figure nearly 25% higher than in torts or contracts cases. 175 Thus, even assuming class actions needed more gatekeeping--a suspect assumption--Twombly more than sufficed.

Nonetheless, Twombly is far from the only obstacle to realizing class actions' potential. In American Express Co. v. Italian Colors Restaurant, 176 the Court provided potential defendants with a powerful tool to avoid class actions altogether. 177 A potential defendant need only include an arbitration clause that precludes class actions to avoid such suits. 178 By inserting the correct magic language in the fine print of a product's terms and conditions, a potential defendant can immunize itself from class actions. 179

This decision reflects another autonomy-based justification for narrowing class actions: freedom of contracts--even if that freedom is illusory to the average consumer. Freedom to contract focuses on the capabilities of autonomous legal actors, while concurrently failing to recognize the power differential between corporations and consumers. To the Court's majority, class actions wrongly interfere with that freedom and thus need curtailing. As Justice Kagan accurately describes the decision: "The Court today mistakes what this case is about. To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled." 180

These procedural changes significantly restricted the viability of class actions. As Senator Arlen Spector noted:

[\*769] The effect of the Court's actions will no doubt be to deny many plaintiffs with meritorious claims access to the federal courts and, with it, any legal redress for their injuries . . . . I think that is an especially unwelcome development at a time when, with the litigating resources of our executive-branch and administrative agencies stretched thin, the enforcement of federal antitrust, consumer protection, civil rights and other laws that benefit the public will fall increasingly to private litigants. 181

The true perniciousness of these changes, however, is their alleged intent to make class actions fairer. Since class actions equalize judicial access and consumers' regulatory power, restricting Rule 23 does not create fairness or social justice. It instead returns consumers to their original posture--namely one of disadvantage against large corporate defendants. The next part explores consumers' pre-existing disadvantages in vulnerability terms.

### Preemption---AT: California---1AR

#### California got preempted.

HLR ’21 [Harvard Law Review; January 11; Legal journal published by the Harvard Law Review Association at Harvard University, ranked number one in law journal citations; Harvard Law Review, “State Courts and the Federalization of Arbitration Law,” vol. 134]

2. Second-Generation Cases. — Perhaps the landmark second-generation case is AT&T Mobility LLC v. Concepcion. 29 There, a consumer agreement mandated arbitration of any disputes that arose between the parties, but prohibited class proceedings.30 The Concepcions nonetheless filed suit, pointing to a California Supreme Court decision that held class action waivers in adhesive consumer contracts unconscionable unless the party seeking arbitration demonstrated that bilateral arbitration was an adequate substitute for the deterrent effects of class actions.31

The Supreme Court held that § 2 preempted the California rule.32 Writing for the majority, Justice Scalia contended that “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”33 That conclusion followed for two reasons, said the Court. First, the “principal advantage” of arbitration is procedural informality, an advantage that would be lost if arbitrators had to decide the ancillary issues that attend class litigation.34 Second, the majority asserted that the lack of availability of an appeal from an arbitral award makes “[a]rbitration . . . poorly suited to the higher stakes of class litigation.”35

A later decision indirectly curtailed the ability of state courts to refuse enforcement of class action waivers. In American Express Co. v. Italian Colors Restaurant, 36 the parties had entered an agreement providing for arbitration of disputes but prohibiting class arbitration.37 Italian Colors opposed a motion to compel arbitration based on what the Court called the “effective vindication” theory.38 Because the cost of litigating the claim would by far exceed individual recovery, Italian Colors argued, the class action waiver was invalid as a prospective waiver of a right.39 The Court disagreed, citing Concepcion and again emphasizing the benefits of informality.40 Although the Italian Colors action began in federal court, the Supreme Court later summarily vacated a state court decision applying the effective vindication theory to an arbitration agreement.41

#### Empirics prove---preemption is absolute.

Rubinoff ’20 [Matt; May 1; J.D. Candidate at Pennsylvania State University, Managing Editor; Arbitration Law Review, “Too Big to Arbitrate? Class Action Waivers, Adhesive Arbitration, and Their Effects on Antitrust Litigation,” vol. 12]

In AT&T Mobility v. Concepcion (“Concepcion”), plaintiff consumers brought suit against AT&T in federal district court as part of a class action alleging AT&T engaged in false advertising and fraud.24 The district court denied AT&T’s motion to compel arbitration, citing the Discover Bank rule, which permitted voiding arbitral clauses that contained class action waivers in adhesive consumer transactions.25 The district court further reasoned that because the class action waivers prevented consumers from pursuing their proper right to recover, the arbitration provision was unconscionable.26 After the Ninth Circuit affirmed, the Supreme Court reversed.27

Led by Justice Scalia in the majority, the Supreme Court held that the FAA preempts any state law that goes against the intentions of the federal statute. 28 No matter how justified the state public policy, the Court reasoned that the California state law applied disproportionately to arbitration agreements.29 In the eyes of the Court, and in their expansive interpretation of Section 2 of the FAA, the California law conflicted with the enforceability of arbitration agreements.30

Footnotes 28, 29, 30:

28 See Concepcion, 563 U.S. at 341 (“When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA”).

29 See Carbonneau, supra note 1, at 234 (“By voiding a long-standing California decisional approach on the matter . . . and upholding the class waiver provision, the Court reasserted the hegemony of the federal law and policy on arbitration and eliminated any doubt about the current direction of American arbitration law”).

30 See Carbonneau, supra note 1, at 35. (“As a general rule, courts uphold arbitration agreements no matter what their deficiencies in formation might be”).

End of footnotes 28, 29, 30.

#### It’s happened twelve times.

Staman ’17 [Jennifer and Jon Shimabukuro; September 20; Legislative attorneys; Congressional Research Service, “Mandatory Arbitration and the Federal Arbitration Act,” <https://sgp.fas.org/crs/misc/R44960.pdf>]

Preemption and the FAA

Background

Historically, states have played an active role in the regulation of arbitration agreements, and all fifty states currently maintain statutes that operate alongside the FAA and govern the validity of arbitration agreements and awards. 44 However, state legislatures and state courts have also sought to place various restrictions on the enforcement of mandatory arbitration clauses and proceedings, particularly in situations where there may be unequal bargaining power between the contracting parties.45 These restrictions have included state requirements that mandate a judicial forum for certain kinds of legal disputes, as well as those that impose special conditions or procedural safeguards on the arbitration process.46

As the Supreme Court has noted, Section 2 of the FAA “limits the grounds for denying enforcement of ‘written provision[s] in ... contract[s]’ providing for arbitration,” and because of these limits, courts commonly find that the FAA preempts state laws or judicial rules that interfere with these contracts.47 Nevertheless, some state legislatures and state courts have attempted to invalidate certain mandatory arbitration agreements, commonly in instances where there is a perception that requiring the parties to settle their disputes through arbitration would be unfair, contrary to public policy, or would somehow not protect the interests of vulnerable individuals.48 The question of whether the FAA preempts a state law or judicial rule is a subject of recurring litigation that has come before the Court more than a dozen times.49 In these cases, the Court has routinely held that the FAA supersedes state requirements that restrain the enforceability of mandatory arbitration agreements.

The preemption doctrine originates from the Supremacy Clause of the Constitution, which establishes that the laws of the United States “shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”50 In general terms, federal preemption occurs when a validly enacted federal law supersedes an inconsistent state law.51 As a result, where federal and state laws are in conflict, the state law is generally supplanted, leaving it void and without effect.52 Courts frequently recognize that in analyzing the preemptive effect of federal law, the “purpose of Congress is the ultimate touch-stone.”53

Footnote 52:

52 See Maryland v. Louisiana, 451 U.S. 725, 746 (1981) (finding state laws that conflict with federal law are “without effect.”); Wickard v. Filburn, 317 U.S. 111, 124 (1942) (“[N]o form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress.”). See also generally Mut. Pharm. Co. v. Bartlett, 133 S. Ct. 2466, 2473 (2013) (“Under the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.”)

End of Footnote 52.

### Links to Court DA---1AR

#### State action implodes court legitimacy.

HLR ’21 [Harvard Law Review; January 11; Legal journal published by the Harvard Law Review Association at Harvard University, ranked number one in law journal citations; Harvard Law Review, “State Courts and the Federalization of Arbitration Law,” vol. 134]

2. Transparency. — State courts’ resistance to FAA preemption is often pretextual, as illustrated by the stratagems detailed above. Faithful adherence to FAA precedent would eliminate the need for pretext and result in more transparent decision making. Although most would consider transparency in legal reasoning to be a worthy ideal, whether transparency is an obligation,155 especially an absolute obligation, is relatively controversial.156 Although fulsome treatment of these issues is impossible here, a more faithful state court approach to FAA cases would likely produce more transparent decision making. Increased transparency in FAA cases is desirable for many reasons, which fall under two categories: reasons intrinsic to the judicial process and reasons external to that process.157

Extrinsic justifications for judicial candor focus on the benefits that candor produces. For instance, a requirement of reason-giving in judging “serves a vital function in constraining the judiciary’s exercise of power.”158 But because extrinsic proposals rest on contestable empirical judgments, the intrinsic justification for FAA candor is more powerful. The intrinsic line of argument focuses on the judiciary’s, and society’s, power of force over litigants.159 Judges, as stewards of that power, have a fiduciary responsibility to disclose the real reasons for their decisions because people have a right to know why they are bound by law, and thus why their freedom has been curtailed.160 On this view, the nature of judicial process itself imposes on judges an obligation of sincerity.161

Lamentably, many state courts have been opaque in their avoidance of FAA preemption. Consider Smith v. Nobiletti Builders, Inc., 162 a case in which a New York appellate court held an arbitration clause invalid under state law, blithely concluding that the FAA did not preempt state law because the contract did not involve interstate commerce.163 The court’s conclusion was so implausible in light of settled law that it suggests the court did not disclose — because it did not want to — the real reasons for its decision.164 Consider also the instances in which state courts have simply ignored separability issues before beginning analysis of an arbitration agreement’s validity.165 These state courts underperform their obligation to “make it intelligible to a reasonable reader who was acquainted with relevant law . . . how they could regard the reasons that they adduce in support of a decision as legally adequate under the circumstances.”166 Insufficient explanations are also missed opportunities to candidly evaluate the current system for adjudicating FAA cases: transparency holds potential to help create conditions for thoughtful dialogue, and constructive give-and-take, between state and federal courts.167 Further, transparency might assist Congress by illuminating undesirable systemic issues in FAA adjudication should it choose to intervene.

3. Promoting the Legitimacy of the Legal System. — The rule of law depends on the legitimacy, both real and perceived, of its commands, and state courts’ rejection of binding law undermines that legitimacy in several ways. Professor Richard Fallon identifies three different concepts of legitimacy: legal, sociological, and moral.168 Implausible state court applications of the Supreme Court’s FAA decisions implicate all three categories.

While legal legitimacy is hard to define, legitimacy and legality are not one and the same: illegitimacy is a charge typically directed only at the most condemnable judicial decisions.169 State courts that have openly defied FAA preemption have intimated that Southland is deserving of such disapprobation.170 But those decisions tended to ignore the commands of stare decisis and federal supremacy, both of which are constitutionally rooted, and thus legally legitimate, doctrines.171 Ironically, then, such decisions are probably more susceptible to charges of illegitimacy than the Supreme Court’s preemption cases.

Moreover, legal institutions are sociologically legitimate if the public perceives them as worthy of adherence “for reasons beyond fear of sanctions or mere hope for personal reward.”172 Stare decisis promotes sociological legitimacy by “assuring the public that it is ruled by law so conceived.”173 In disobeying the twin commands of stare decisis and federal supremacy, state court resistance to the FAA fosters the troubling idea that law changes based on the ideologies of legal actors.

Finally, widespread state court insubordination undermines continuing moral justifications for the existence of the current constitutional order.174 By displaying open resistance and rendering the law of arbitration less predictable, state courts have contributed to the destabilization of the national legal system’s workability. If, as most would agree, “a good legal system requires reasonable stability,”175 then state court decisions that attempt to reopen closed questions, or implausibly apply settled law, impair a key component of the national legal system’s claim to continuing moral legitimacy.

Conclusion

Getting things right matters, but it is not the only aim of a mature and cohesive legal system. For nearly forty years now, Southland and its progeny have endured harsh scholarly and judicial criticism, but to no avail. While a judicial retreat or a strict constructionist approach to interpreting § 2 might have been plausibly defensible at one time, they are no longer so. A substantive FAA is now our law, and state courts remain primarily responsible for applying it. The only remaining question is whether, absent congressional participation, state courts will accept the lamentable but unavoidable federalization of state contract law.

## DA---Court PTX

### 1AR---A/O---Aff Solves

#### Litigating against private companies is the only path to solve climate change---even small, collective victories generate global ripple effects necessary to mitigate AND adapt.

Ganguly et al. ’18 [Geetanjali, Joana Setzer, and Veerle Heyvaert; October 20; Ph.D. Candidate in the Department of Law at the London School of Economics and Political Science; British Academy Postdoctoral Fellow at the Grantham Research Institute on Climate Change and the Environment; Associate Professor of Law at the London School of Economics and Political Science; Oxford Journal of Legal Studies, “If at First You Don’t Succeed: Suing Corporations for Climate Change,” vol. 38]

1. Introduction

In recent talks, former NASA scientist James Hansen called for a wave of lawsuits against governments and fossil fuel companies that are delaying action on climate change. For Hansen, a pioneer of climate science, the key is to sue corporations like ExxonMobil, BP and Shell for the damage they are doing to the environment, those affected and future generations.1 Hansen is currently involved in a lawsuit against the US federal government, brought by his granddaughter and 20 others.2 Similarly, Jeffrey Sachs, economist, director of the Earth Institute at Columbia University and a UN special adviser, now urges citizens to pursue major polluters and negligent governments for liability and damages, and ‘flood the courts’ with legal cases demanding the right to a safe and clean environment.3

This article contributes to the burgeoning literature on climate litigation by examining recent developments in climate litigation launched against corporations. We argue that, notwithstanding the failure of a past generation of climate litigation to hold private actors to account, the second wave of pending court challenges is by no means doomed to failure. The second wave is characterised by a broader range of arguments and litigation strategies than its predecessor, and unfolds within a rapidly evolving scientific, discursive and constitutional context. We argue that this evolving context generates new opportunities for judges to rethink the interpretation of existing legal and evidentiary thresholds for claimants to meet the burden of proof and apply them in a way that will enhance the accountability of private greenhouse gas (GHG) emitters. Although the judicial enforcement of corporate accountability for climate change has proved elusive thus far, future cases may fare better. Moreover, even unsuccessful cases may help to guide climate change-responsive adjudication in the longer term.

The structure of this article is as follows. Section 2 situates our research within the broader context of climate litigation and explains the distinguishing characteristics of strategic private climate litigation, which is the focus of our investigation. Section 3 provides an expanded analysis of key issues in the first wave of strategic private climate litigation, and examines the challenges involving jurisdiction, standing and causation in prominent cases. Section 4 discusses the changes in the scientific, discursive and constitutional context in which current lawsuits emerge, and their likely impact on the outcome of adjudication. Section 5 contemplates the possibility that this second wave of private litigation may still end in failure, and reflects on the contribution, if any, of climate litigation under such circumstances. Section 6 presents conclusions and issues for further exploration.

2. Strategic Private Climate Litigation

Climate litigation is a broad and still maturing term that refers to the rapidly growing body of lawsuits in which climate change and its impacts are either a contributing or key consideration in legal argumentation and adjudication.4 More than 1000 cases have been identified as concerning climate change litigation—828 in the United States alone, and 263 cases in 25 other countries, with most filed since the mid-2000s.5 The majority have climate change as a secondary component of the lawsuit. Such ‘incidental climate litigation cases’ deal with issues from false green advertising to challenges over permits issued, to energy or coal mining activities. In the 25 non-US jurisdictions, over three-quarters of the cases concern climate change only at the periphery of the argument and acknowledge the issue as relevant but not determinative.6 Strategic climate litigation, in contrast, concerns cases initiated to exert bottom-up pressure on governments (‘strategic public climate litigation’) or corporations (‘strategic private climate litigation’) to mitigate, adapt or compensate for losses resulting from climate change. Strategic climate litigation cases are in the minority, but receive considerable attention from academics, state and non-state actors.

Strategic public climate litigation aims to influence public policy or policy decisions with climate change implications, primarily through the attainment of injunctive relief. Cases asserting governmental failure to account for GHG emissions associated with public projects and cases of judicial review of public regulatory action (or inaction) on climate change have already achieved some degree of success.7 The first was Massachusetts v Environmental Protection Agency (EPA) (2007), in which the US EPA was found in breach of its statutory obligations to regulate GHG emissions under the Clean Air Act.8 The 2015 Urgenda case, which held that, in failing to adopt sufficiently ambitious mitigation targets, the Dutch state had breached its duty of care visa`-vis society under Dutch tort law, as provided in section 6:162 of the Dutch Civil Law Code,9 heralded a new era for strategic public climate litigation.10 Mere months later, in the less publicised but equally momentous decision in Leghari, the Lahore High Court determined that the national government’s delay in implementing Pakistan’s climate policy constituted a breach of the country’s human rights obligations.11 The momentum created by Urgenda and Leghari led to similar cases emerging in the courts of several jurisdictions, from Belgium to India and the United States.12

The focus of this article, however, is not on strategic public but specifically on strategic private climate litigation. It involves cases launched with the explicit aspiration to influence corporate behaviour and strategies in relation to climate change.13 In the early 2000s, a small clutch of lawsuits against oil, gas and electric companies was tested in North American courts. Victims claimed that the actions of such companies exacerbated damages they suffered as a result of extreme weather events. The cases were high profile because of the novelty of their subject matter, yet all were unsuccessful. Claimants found it exceedingly difficult to surmount procedural and substantive thresholds. The discouraging precedents, however, evidently have not dampened enthusiasm for the cause.14 Indeed, a second wave of strategic private climate litigation can now be observed. The current strategic cases against private defendants typically allege climate change-related damage and seek compensation from major carbon producers.

Two strong motivations underpin renewed efforts to target corporations as defendants. The first relates to their appropriateness, that is, the argument that corporations are the ‘right’ parties to bear responsibility for climate change. Arguably, enterprises in energy, transport, agriculture and other manufacturing sectors such as cement bear a collective and therefore legal responsibility for climate change through their carbon-emitting activities.15 This view is also voiced by non-governmental organisations (NGOs) and climate activists. For example, a report published by the Climate Justice Programme asserts:

The Carbon Majors are responsible for two thirds of the human-made carbon emissions in the atmosphere today. These corporations have made outrageous profits while outsourcing the true cost of their product upon the poor who are paying with their homes, ability to grow food and with their lives.16

Moreover, corporations are increasingly cast as pivotal actors in the global effort to transition to low-carbon economies and improve resilience. Since the consumption of fuel products for electricity generation and transportation generates nearly 70% of global GHGs, corporations play a vital role in achieving climate change mitigation.17 When considering adaptation, corporations are involved in infrastructure provision, development and land use.

The second motivation relates to the potential effectiveness of targeted private climate litigation. Successful action against a relatively small group of corporations who are responsible for a large percentage of emissions could generate a considerable global impact. Richard Heede’s work, which seeks to measure the responsibility for carbon emissions of the ‘Carbon Majors’, the world’s largest GHG emitters, buttresses this argument.18 From a legal perspective, Hsu contends that ‘seeking direct civil liability against those responsible for [GHG] emissions’ is the only litigation strategy ‘that holds out any promise of being a magic bullet’.19 Hsu further observes that ‘[a civil] litigation strategy is potentially a means of regulation itself, as a finding of liability could have an enormous ripple effect and send [GHG] emitters scrambling to avoid the unwelcome spotlight’.20 Hence, private climate litigation targeted at the Carbon Majors may be more effective than either public litigation or alternative governance strategies.

The turn to private litigation targeting corporations is, furthermore, consistent with the transnationalisation of climate change governance in response to inadequate international regulation by states under the auspices of the United Nations Framework Convention on Climate Change (UNFCCC).21 The dismantling of the distinction between Annex I and non-Annex I member states in the post-Kyoto Protocol era, as well as deep resistance to the idea of state liability for loss and damage,22 has led to calls for a new approach that predominantly focuses on the responsibility of non-state actors, particularly Carbon Major companies with a presence in both Annex I and non-Annex I countries and operating in a transnational regulatory space.23

### 1AR---AT: Link

#### No one cares.

Crane 13 – Professor of law at the University of Michigan.

Daniel A. Crane, “Antitrust and the Judicial Virtues,” *Columbia Business Law Review*, no. 1, 2013, pp. 4, https://core.ac.uk/download/pdf/232689875.pdf.

Antitrust law is not plagued by a substantial countermajoritarian difficulty and thus presents no reason for judges to exercise passive or avoidant virtues. Judges making antitrust law do not have to worry that their decisions will trump the popular will, except in the limited sense that they may reject suits by public enforcers like the Justice Department or Federal Trade Commission ("FTC"). To the extent that judges promulgate legal norms different from those favored by the executive branch, a small countermajoritarian difficulty is presented. But since judicial antitrust decisions are theoretically reversible by Congress, the courts do not have the final word on antitrust questions, as they do in constitutional cases. There is therefore little reason for judges to worry that their decisions in antitrust cases will compromise the legitimacy of the courts by undermining popular will.

#### Even political elites.

Crane 13 – Professor of law at the University of Michigan.

Daniel A. Crane, “Antitrust and the Judicial Virtues,” *Columbia Business Law Review*, no. 1, 2013, pp. 22, https://core.ac.uk/download/pdf/232689875.pdf.

In Trinko and Microsoft, the judges spoke with a unified voice, politely papering over their deep differences. There is a moment for such harmony, particularly in cases like Brown v. Board of Education," where the political legitimacy, independence, and power of the Court would be instantly challenged by powerful reactionary forces. One could only wish that the Supreme Court could have spoken with an equally unified voice in Bush v. Gore," whichever way the decision came out. Thankfully, courts deciding antitrust cases have few reasons to worry that their decisions will provoke serious challenges to their legitimacy, independence, or power. Given the luxury of relative indifference to their decisions in the general population, and even among the political elite, antitrust judges may, and often should, candidly disclose their differences.

#### No link---studies prove the Court is bulletproof.

Gibson ’12 [James; July 15; Professor of Government and African-American Studies at Washington University in St. Louis, Director of the Program on Citizenship and Democratic Values; Social Science Research Network, “Public Reverence for the United States Supreme Court: Is the Court Invincible?” vol. 36]

Introduction

Political scientists and legal scholars continue to be obsessed with the so-called countermajoritarian dilemma created by the United States Supreme Court’s lack of accountability, particularly when coupled with its immense policy-making powers. Especially when the Supreme Court makes decisions that seem to fly in the face of public preferences—as in Kelo v. New London1 and Citizens United v. Federal Election Commission2 —concerns about the function of the institution within American democracy sharpen. Indeed, some seem to believe that by making policies opposed by the majority of the American people the Court undermines its fundamental legitimacy, its most valuable political capital.

The underlying assumption of these worries about the Supreme Court’s legitimacy is that dissatisfaction with the Court’s decisions leads to the withdrawal, or at least diminution, of support for the institution. So when the Court decides a high profile case like Citizens United in a widely unpopular direction, it is logical to assume that the Court’s legitimacy suffers. Again, the assumption is that legitimacy flows from pleasing decisions, but it is undermined by displeasing decisions.

At least some empirical evidence directly contradicts this assumption. In what is perhaps the most salient and politically significant decision of the last few decades, the Supreme Court’s decision in Bush v. Gore 3 effectively awarded the presidency to George W. Bush. One might have expected that this decision would undermine the Court’s legitimacy, at least with Democrats and probably with African-Americans as well. Yet several empirical research projects have indicated that, if anything, the Court’s legitimacy was boosted by this decision, even among Democrats and African-Americans.4 Bush v. Gore had great potential to chip away at the Court’s legitimacy—it was a deeply divided 5-4 decision; divided by the justices’ partisanships as well; it extended the Court’s authority into an area of law in which the Court had generally deferred to the states; the decision was severely criticized by some, with many in the legal academy describing the decision as a “self-inflicted wound”;5 and, of course, it was a decision of immense political importance. If Bush v. Gore did not subtract from the Court’s institutional legitimacy, it is difficult to imagine less momentous decisions undermining judicial legitimacy.

Political scientists have been studying the legitimacy of the Supreme Court for decades now, and several well-established empirical findings have emerged. The findings relevant to the countermajoritarian dilemma can be summarized in a series of nutshells:

* The Supreme Court is the most legitimate political institution within the contemporary United States. Numerous studies have shown that the American mass public extends great legitimacy to the Court; typically, Congress is depicted as being dramatically less legitimate than the Supreme Court. Indeed, some have gone so far as to describe the Supreme Court as “bullet-proof,” and therefore able to get away with just about any ruling, no matter how unpopular. And indeed, the United States Supreme Court may be one of the most legitimate high courts in the world.

#### No capital loss---unpopular decisions don’t correlate AND winners win.

Law ‘9 [David; March 2009; Professor of Law and Political Science at Washington University in St. Louis; Georgetown Law Journal, “A Theory of Judicial Power and Judicial Review,” vol. 97, p. 723]

IV. Implications of the Theory for Legitimacy-Based Accounts of Judicial Power

The argument that compliance with judicial decisions can be explained, in many situations, as the product of judicial coordination poses a strong challenge to conventional wisdom about the nature of judicial power. A common way of explaining why people obey courts, especially in unpopular or controversial cases, is to invoke the ill-defined concept of judicial legitimacy.174 It is often suggested that the Supreme Court enjoys a finite store of some intangible resource known as legitimacy, which can be cultivated over time but also depleted in a variety of ways.175 Legitimacy may be depleted, for example, by decisions that antagonize a significant portion of the population,176 smack of blatant partisanship or unprincipled vacillation,177 or otherwise blur the distinction between legal decisionmaking and ordinary political decisionmaking upon which courts stake their claim to obedience.178 From this perspective, a decision such as Bush v. Gore 179 constitutes a substantial withdrawal from a hard-earned store of legitimacy, of a kind that the Court cannot afford to make on a regular basis without jeopardizing future compliance with its decisions.180 This conventional view of legitimacy as a form of judicial currency yields two predictions. First, a court should be able to secure compliance with an unpopular or controversial decision as long as it possesses sufficient legitimacy to pay for that compliance. Second, every unpopular decision that a court renders should weaken its capacity to secure compliance with later decisions.

To conceive of judicial power as the power to coordinate behavior, however, leads to the opposite conclusion: one need not be popular in order to be powerful. A court’s ability to coordinate need not decrease simply because it renders unpopular (or unpersuasive, or unenforceable) decisions. To the contrary, the more often that a court renders unpopular (or unpersuasive, or unenforceable) decisions that are nevertheless obeyed, the greater the court’s power to coordinate may become. In the hypothetical case of George v. Albert, 181 for example, a controversial or unpersuasive decision in favor of George does not necessarily undermine the Court’s power to secure voluntary obedience to future decisions. Rather, if George successfully assumes the Presidency without overt resistance, the Court’s decision has instead reinforced the Court’s power. Mass compliance with the decision in favor of George is a brute demonstration of the Court’s ability to coordinate behavior on the outcomes that it announces.

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#### Multiple cases AND no swings.

DeVeaux ’10-4 [Amelia Thomson-DeVeaux; 2021; citing Lawrence Baum, a political science professor at Ohio State University, Neal Devins, a professor of law and government at the College of William & Mary, and Michael Salamone, a political science professor at Washington State University; 538, “Why The Supreme Court Probably Doesn’t Care What Most Americans Think About Abortion Or Gun Rights,” https://fivethirtyeight.com/features/why-the-supreme-court-probably-doesnt-care-what-most-americans-think-about-abortion-or-gun-rights/]

The Supreme Court is more conservative than it’s been in almost a century. ​​Its new term begins today, and by next June, when the term ends, Americans might finally understand what that means. Public opinion of the court is already at a record low after the court allowed a strict abortion law to go into effect in Texas in early September. Now, the justices are preparing to hear the court’s first major gun rights case since 2010 as well as a case on the future of abortion in the U.S. Both cases could result in decisions that are far more extreme than most Americans want.

In the past, a desire to preserve the court’s apolitical reputation kept the justices from straying too far from public opinion. That could happen again — in fact, Chief Justice John Roberts has so far proven remarkably adept at producing decisions that protect the court’s reputation and that are often portrayed as more moderate and mainstream than they really are.

This term, though, the other conservative justices might be fine with taking a very public right turn. Neither expanding gun rights nor overturning Roe v. Wade would be popular, yet the court is considering both — a sign of how conservative it has already become. The question now is whether the risk of a backlash is enough to keep the conservative majority from, say, overturning Roe in an election year.

“The justices are plainly conscious of public attitudes toward the court,” said Lawrence Baum, a political science professor at Ohio State University. “But that’s only one consideration for the justices and not necessarily the most important one — particularly on issues like abortion or gun rights where they may have intense personal preferences about the right outcome.”

The justices are already entering the term with mixed reviews from the general public. A Marquette University Law School poll conducted in September found that only 49 percent of Americans approved of the court, down from 60 percent just a year earlier. A Gallup poll conducted in September found a similar drop: Only 40 percent of U.S. adults approved of the court, down from 53 percent a year earlier. According to Gallup, a majority (53 percent) of U.S. adults now disapprove of the way the court is handling its job.