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Death Cult

#### **Invocation of death impacts is an obsession with body counts that culminates in genocidal violence---rejecting it is a gateway issue**

Bjork 93 [Rebecca Bjork, Former College Debater and Former Associate Professor at the University of Utah, Where She Taught Graduate and Undergraduate Courses in Communication and Women in Debate, Reflections on the Ongoing Struggle, Debater's Research Guide 1992-1993: Wake Forest University, Symposium, <http://groups.wfu.edu/debate/MiscSites/DRGArticles/Oudingetal1992Pollution.htm>]

While reflecting on my experiences as a woman in academic debate in preparation for this essay, I realized that I have been involved in debate for more than half of my life.  I debated for four years in high school, for four years in college, and I have been coaching intercollegiate debate for nine years.  Not surprisingly, much of my identity as an individual has been shaped by these experiences in debate.  I am a person who strongly believes that debate empowers people to be committed and involved individuals in the communities in which they live.  I am a person who thrives on the intellectual stimulation involved in teaching and traveling with the brightest students on my campus.  I am a person who looks forward to the opportunities for active engagement of ideas with debaters and coaches from around the country.  I am also, however, a college professor, a "feminist," and a peace activist who is increasingly frustrated and disturbed by some of the practices I see being perpetuated and rewarded in academic debate.  I find that I can no longer separate my involvement in debate from the rest of who I am as an individual. Northwestern I remember listening to a lecture a few years ago given by Tom Goodnight at the University summer debate camp.  Goodnight lamented what he saw as the debate community's participation in, and unthinking perpetuation of what he termed the "death culture." He argued that the embracing of "big impact" arguments--nuclear war, environmental destruction, genocide, famine, and the like-by debaters and coaches signals a morbid and detached fascination with such events, one that views these real human tragedies as part of a "game" in which so-called "objective and neutral" advocates actively seek to find in their research the "impact to outweigh all other impacts"--the round-winning argument that will carry them to their goal of winning tournament X, Y, or Z. He concluded that our "use" of such events in this way is tantamount to a celebration of them; our detached, rational discussions reinforce a detached, rational viewpoint, when emotional and moral outrage may be a more appropriate response.  In the last few years, my academic research has led me to be persuaded by Goodnight's unspoken assumption; language is not merely some transparent tool used to transmit information, but rather is an incredibly powerful medium, the use of which inevitably has real political and material consequences. Given this assumption, I believe that it is important for us to examine the "discourse of debate practice:" that is, the language, discourses, and meanings that we, as a community of debaters and coaches, unthinkingly employ in academic debate.  If it is the case that the language we use has real implications for how we view the world, how we view others, and how we act in the world, then it is imperative that we critically examine our own discourse practices with an eye to how our language does violence to others.  I am shocked and surprised when I hear myself saying things like, "we killed them," or "take no prisoners," or "let's blow them out of the water."  I am tired of the "ideal" debater being defined as one who has mastered the art of verbal assault to the point where accusing opponents of lying, cheating, or being deliberately misleading is a sign of strength. But what I am most tired of is how women debaters are marginalized and rendered voiceless in such a discourse community.  Women who verbally assault their opponents are labeled "bitches" because it is not socially acceptable for women to be verbally aggressive.  Women who get angry and storm out of a room when a disappointing decision is rendered are labeled "hysterical" because, as we all know, women are more emotional then men.  I am tired of hearing comments like, "those 'girls' from school X aren't really interested in debate; they just want to meet men."  We can all point to examples (although only a few) of women who have succeeded at the top levels of debate.  But I find myself wondering how many more women gave up because they were tired of negotiating the mine field of discrimination, sexual harassment, and isolation they found in the debate community. As members of this community, however, we have great freedom to define it in whatever ways we see fit.  After all, what is debate except a collection of shared understandings and explicit or implicit rules for interaction?  What I am calling for is a critical examination of how we, as individual members of this community, characterize our activity, ourselves, and our interactions with others through language.  We must become aware of the ways in which our mostly hidden and unspoken assumptions about what "good" debate is function to exclude not only women, but ethnic minorities from the amazing intellectual opportunities that training in debate provides.  Our nation and indeed, our planet, faces incredibly difficult challenges in the years ahead.  I believe that it is not acceptable anymore for us to go along as we always have, assuming that things will straighten themselves out. If the rioting in Los Angeles taught us anything, it is that complacency breeds resentment and frustration.  We may not be able to change the world, but we can change our own community, and if we fail to do so, we give up the only real power that we have.

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T Prohibit

#### Business practices are ongoing conduct defined by the behaviors of many market participants

Kerry Lynn Macintosh 97, Associate Professor of Law, Santa Clara University School of Law. B.A. 1978, Pomona College; J.D. 1982, Stanford University, “Liberty, Trade, and the Uniform Commercial Code: When Should Default Rules Be Based On Business Practices?,” 38 Wm. & Mary L. Rev. 1465, Lexis

These new and revised articles reflect a strong trend toward choosing default rules 4 that codify existing business practices. 5 [FOOTNOTE 5 BEGINS] In this Article, the term "business practices" is used to refer to practices that emerge over time as countless market participants exercise their freedom to engage in profitable transactions. For an account of the evolution of business practices, see infra Part II. As used here, "business practices" is broader and less technical than "trade usage," which the Code narrowly defines as "any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question." U.C.C. 1-205(2). [FOOTNOTE 5 ENDS] This is particularly true of the recent revisions to Articles 3 (Negotiable Instruments), 4 (Bank Deposits and Collections) and 5 (Letters of Credit).

#### Only per se illegality prohibits a practice---rules of reason prohibit anticompetitive effects for individual acts, or instances of ‘practice.’

John Paul Stevens 90, Justice, Supreme Court of the United States, “FTC v. Superior Court Trial Lawyers Ass'n,” 493 U.S. 411, Lexis

LEdHN[3C] [3C]LEdHN[14] [14]Equally important is the second error implicit in respondents' claim to immunity from the per se rules. In its opinion, the Court of Appeals assumed that the antitrust laws permit, but do not require, the condemnation of price fixing and boycotts without proof of market power. 15 The opinion further assumed that the per se rule prohibiting such activity "is only a rule of 'administrative convenience and efficiency,' not a statutory command." 272 U.S. App. D. C., at 295, 856 F. 2d, at 249.This statement contains two errors. HN10 [\*\*\*\*42] The per se [\*433] rules are, of course, the product of judicial interpretations of the Sherman Act, but the rules nevertheless have the same force and effect as any other statutory commands. Moreover, while the per se rule against price fixing and boycotts is indeed justified in part by "administrative convenience," the Court of Appeals erred in describing the prohibition as justified only by such concerns. The per se rules also reflect a long-standing judgment that the prohibited practices by their nature have "a substantial potential for impact on competition." Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 16 (1984).

[\*\*\*\*43] LEdHN[15] [15]As we explained in Professional Engineers, HN11 the rule of reason in antitrust law generates

"two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality -- they are 'illegal per se.' In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." 435 U.S., at 692.

[\*\*\*873] "Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable." Arizona v. Maricopa County Medical Society, 457 U.S. 332, 344 (1982).

[\*\*781] LEdHN[16] [16] [\*\*\*\*44] The per se rules in antitrust law serve purposes analogous to per se restrictions upon, for example, stunt flying in congested areas or speeding. Laws prohibiting stunt flying or setting speed limits are justified by the State's interest in protecting human life and property. Perhaps most violations of such rules actually cause no harm. No doubt many experienced drivers and pilots can operate much more safely, even at prohibited speeds, than the average citizen.

[\*434] If the especially skilled drivers and pilots were to paint messages on their cars, or attach streamers to their planes, their conduct would have an expressive component. High speeds and unusual maneuvers would help to draw attention to their messages. Yet the laws may nonetheless be enforced against these skilled persons without proof that their conduct was actually harmful or dangerous.

In part, the justification for these per se rules is rooted in administrative convenience. They are also supported, however, by the observation that every speeder and every stunt pilot poses some threat to the community. An unpredictable event may overwhelm the skills of the best driver or pilot, even if the [\*\*\*\*45] proposed course of action was entirely prudent when initiated. A bad driver going slowly may be more dangerous that a good driver going quickly, but a good driver who obeys the law is safer still.

#### Voting issue---key to link uniqueness and preventing bidirectionality on an otherwise virtually unlimited topic

#### Failure to specify agent beyond USfg in the plan text is a VI---moots mechanistic education and core neg ground

### 1NC---OFF

T Subsets

#### ‘Core antitrust laws’ must be economy wide---the aff only effects a subset

Gerber ’20 [David; October; Distinguished Professor of Law at Chicago-Kent College of Law, Illinois Institute of Technology; Oxford Scholarship Online, Competition Law and Antitrust, “What is It? Competition Law’s Veiled Identity,” Ch. 1, p. 14-15]

C. A Core Definition

The Guide uses the terms “competition law” and “antitrust law” to refer to a general domain of law whose object is to deter private restraints on competitive conduct. We look more closely at the terms:

1. “General”—The laws included are those that are applicable throughout an economy and thereby provide a framework for all market operations (there are always some exempted sectors). Laws dealing only with specific markets (e.g., telecommunication) do not play that role.

2. “Domain of Law” here refers to a politically authorized set of norms and the institutional arrangements used to enforce them.

Is it law—or is it policy? The relationship between “competition law” and “competition policy” is not always clear. Often the terms are used interchangeably, but there can be important differences between them. Both can refer to norms used to combat restraints on competition, but they represent two different ways of looking at the relevant laws, and the differences can influence how norms are interpreted and applied. “Law” implies that established methods of interpretation are used to interpret and apply the norms and that established procedures are the sole or primary means of enforcing and changing the norms. In this view, the norms are a relatively stable component of a legal system. Thinking of those same norms as “policy,” on the other hand, implies that they are a tool of whatever government is in power and that it can use and modify them as it wishes.

3. “Restraint” refers to any limitation imposed by one or more private actors that reduces the intensity of competition in a market.

4. “Competition” refers to a process by which firms in a market seek to maximize their profits by exploiting market opportunities more effectively than other firms in the market.

#### Substantial’ means in totality of circumstances

U.S. First Circuit Court of Appeals ’98 [United States Circuit Court; August 25; Federal Appeals Court of the First Circuit; Southwestern Learning, “Court Uses ‘Totality of Circumstances’ for Test of Substantial Abuse by Debtor,” http://www.swlearning.com/blaw/cases/court\_uses.html]

Decision Affirmed. The court joins other circuits in adopting the "totality of the circumstances" test as the measure of substantial abuse under the Bankruptcy Code. This is a flexible standard adopted by Congress to allow bankruptcy courts to consider the factors involved in each case and to prevent abuse of Chapter 7 filings. When there is evidence that the consumer can pay their debts, there is likely to be found substantial abuse.

#### Voting issue---creates a moral hazard to rush to small non-controversial tweaks that shreds limits and ground

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CIL CP

#### The United States federal government should substantially increase prohibitions on anticompetitive business practices by mandating ABCDE framework compliance by expanding the scope of its interpretive obligations under customary international law.

#### The CP competes and solves the case – it renders the same conduct equally unlawful, but expands CIL rather than antitrust statute – that signals U.S. adherence to norms of international economic law.

Banks ’12 [Ted; 2012; Scharf President, Compliance & Competition Consultants; Denver Journal of International Law & Policy, “40th Anniversary Edition: The International Law of Antitrust Compliance,” 368]

Introduction

It was not so long ago that the concept of international criminal law was an idea with which lawyers struggled. In 1987, Ved Nanda and M. Cherif Bassiouni put together what may have been the first one-volume compendium of information on antitrust, securities, extradition, tax, and other subjects that made up the developing area of international criminal law. Today, it is well-accepted that there are certain standards of behavior that are the norm in practically all nations, and through national laws and multinational treaties, these principles are entering the realm of customary international law.

Developments in the area of competition law, or antitrust as it is known in some countries, have been particularly dramatic. Countries understand that the encouragement of competition is a key to economic development, and national laws have been enacted where they did not exist before, along with enforcement cooperation agreements among increasing numbers of countries. 1 Enforcement of criminal antitrust laws takes place against both individuals and businesses, 2 and while it is clear that there are situations where business entities must be held responsible for actions of their employees, there are other situations where the intent of the corporation may be contrary to the actions of the employee. Throughout the world, in competition law, as well as in other areas of law, there is a consensus that it is appropriate for companies to adopt compliance and ethics programs to utilize management techniques to foster compliance with law. So, as standards of corporate [\*369] conduct become more universal, they reflect adherence to what is essentially an international law - the international law of competition. At the same time, more national authorities recognize that companies are expected to have compliance programs, and that a bona fide compliance program reflects a corporate intent not to violate the law, and therefore should be a positive factor in how authorities treat such companies, including as a mitigating factor for any penalty that might be imposed based on the ultra vires act by an employee.

It is well accepted that compliance and ethics programs are an expected part of corporate activity, and while no program can always guarantee human behavior, these programs do work to mitigate violations of law. Indeed, it can be said that it is now a standard for companies to have compliance programs or at least some elements of such programs such as codes of conduct. We submit that this growing recognition of the purpose of compliance and ethics programs has reached broad-based acceptance and should now be recognized in the competition law field by the United States and other governments as a standard of international law.

The Concept of Organizational Liability

Under many legal regimes, a corporation cannot be criminally punished for the actions of its employees, and until relatively recently (at least if you consider a century relatively recent), under the common law, a corporation was viewed as a legal fiction, 3 which could not be held liable for the criminal conduct of its employees. In the United States, it was not until 1909, in New York Central & Hudson River Railroad v. United States, 4 that the Supreme Court ruled that because the great majority of business transactions were conducted by corporations, it was time to abandon the "old and exploded doctrine" that a corporation was not indictable. 5 The Court reasoned that, as a matter of public policy, because a corporation could be held civilly liable, criminal liability should also follow. 6

This concept of corporate liability has been extended to the point where the business is often held liable for acts of employees even if the [\*370] company was not aware of the violation, 7 prohibited the conduct that led to the violation, 8 or there was no actual benefit to the corporation through the acts of the employee. 9 So even if none of the three justifications for corporate liability are present, i.e., knowledge, benefit, or authority, corporate liability for the acts of an employee - in addition to the liability of the employee - may still be found. A number of reasons have been given for this approach, but a consistent argument is that this type of liability will have an in terrorem effect on the corporation and force the entity to make certain that employees obey the law. 10 As a practical matter, it also reflects the reality that employees working through a corporation, whether or not their actions are authorized, can cause harm far beyond the abilities of one person. Therefore, according to this line of reasoning, it is appropriate that the entity be punished criminally (and pay civil damages).

The usual rule in the United States and other common law countries is that a corporation is liable for acts of agents and employees acting within the scope of their employment and, in most cases, with the intent to benefit the company. 11 This approach derives from the common law doctrine of respondeat superior, which held that a master is generally liable for the actions of servants, but may escape liability if the servant acts outside the scope of employment (i.e., takes action for [\*371] which there is no actual or apparent authority). 12 The concept of apparent authority, the authority that outsiders would normally assume the agent to possess judging from his or her position in the company and the circumstances surrounding previous instances of conduct, is often the foundation for a finding of corporate liability. 13 Employees are assumed to be acting within the scope of their employment 14 if they are doing acts on the corporation's behalf in the performance of their general line of work. 15 An agent must be "performing acts of the kind which he is authorized to perform, and those acts must be motivated - at least in part - by an intent to benefit the corporation." 16 It is not necessary that the acts actually benefited the corporation, only that they were intended to do so.

The court decisions and statutes that led to these multiple bases for finding enterprise liability grew up in an era where there was recognition of the power of the "faceless" corporation and the need to control its activities. Courts would impute knowledge or intent to the corporation, even where there was no benefit to the enterprise by the wrongful acts of the employee and the activities did not benefit the corporation, although some courts are willing to consider whether the violation was foreseeable. 17 In other situations, liability might be imputed to a corporate officer or director for failure to exert their authority to ensure that the corporation (i.e., acting through employees) did not do wrong. 18

But it is also an inescapable fact of our human existence that people are fallible, and that in some cases people will ignore instructions and do things that they were expressly forbidden to do. By holding a corporation liable for virtually anything that any employee does, a situation of strict liability is created that may, in fact, be outside the scope of many laws that require an intent to violate the law. [\*372] Notwithstanding the desire to control the power of the corporation, there are limits to what it can do. The efforts of the corporation to control the actions of employees are a valid consideration in determining whether the corporation should be held liable for the actions of an employee, as was noted in the instructions to the jury after the trial of Arthur Andersen in connection with the Enron debacle:

If an agent was acting within the scope of his or her employment, the fact that the agent's act was illegal, contrary to the partnership's instructions, or against the partnership's policies does not relieve the partnership of responsibility for the agent's acts. A partnership may be held responsible for the acts its agents performed within the scope of their employment even though the agent's conduct may be contrary to the partnership's actual instructions or contrary to the partnership's stated policies. You may, however, consider the existence of Andersen's policies and instructions, and the diligence of its efforts to enforce any such policies and instructions, in determining whether the firm's agents were acting within the scope of their employment. 19

The key here is "diligence." Was a compliance program something that existed only on paper, 20 or were there indicia of sincerity on the part of the corporation that showed that it legitimately tried to enforce its policy of compliance? The diligence of the corporation in enforcing its policy should be a key factor in determining if it is the kind of program that should entitle the corporation to some measure of mitigation from legal penalties imposed as a result of the actions of an employee that disobeyed the policy. 21

[\*373] Competition law imposes certain standards of behavior that are accepted because of an understanding that society benefits from competition. Therefore, in most cases, cartels are prohibited, as is abuse of market power or dominance. There is a recognition in many areas of law that transparency is beneficial, and thus bribes or secret rebates are prohibited for their disruptive impact on competition, as well as their inherent corruptness.

But how do these standards become accepted? It is not sufficient only to implement national laws and multinational agreements. Enforcement authorities recognize that there must also be private action to enforce policies within corporations and to demonstrate that noncompliance with law will not be tolerated. As will be discussed below, there are benchmarks of what is an "effective" compliance and ethics program that have received broad-based acceptance. Standards of international competition law cannot have their desired impact without international standards and efforts for compliance. Companies need to be able to know that what they do to implement compliance standards does matter so that they will make a diligent effort to prevent cartel behavior from happening. If a company has taken serious action to enforce its standards, such as by discharge of employees who violate the law, 22 this level of corporate compliance, which is expected by enforcement authorities, should be recognized when deciding how to treat corporations, including charging and penalty decisions.

So, there is a combination of factors at work here. Competition law standards are virtually universal in their acceptance. 23 To get those standards to actually be implemented by corporations, there need to be corporate compliance and ethics programs in place. Standards of culpability recognize that factors such as intent, knowledge, and benefit are relevant to findings of corporate liability. A number of countries do specifically encourage compliance and ethics programs, including in the antitrust area. 24 Therefore, this growing, worldwide acceptance, combined with universal necessity, has established an international law not just for antitrust, but for antitrust compliance. The countries that do not formally recognize the value of bona fide compliance programs as relevant to corporate liability, perhaps seduced by the possibility of collecting huge fines from a corporate piggy-bank, are out-of-step with the reality of what is necessary to truly promote the principles of competition law.

#### U.S. commitment prevents the disintegration of international economic law – extinction.

Arcuri ’20 [Alessandra; 2020; Full Professor of Inclusive Global Law and Governance at the Erasmus School of Law, Journal of International Economic Law, “International Economic Law and Disintegration: Beware the Schmittean Moment,” vol. 23]

Introduction

There was a time when national sovereignty was out of fashion. In the nineties, international lawyers were engaged in imaging the global order beyond the nation-state. Theories to make this order possible were proliferating: from Global Administrative Law to global constitutionalism.1 International Economic Law (IEL) played an important role in the journey toward the global order. Our markets could be integrated through an almost brand new organization, the World Trade Organization (WTO). The WTO was created and endowed with a powerful set of new agreements, promoting the harmonization of health and safety law—through the Sanitary and Phytosanitary (SPS) Agreement—and technical regulation—Technical Barriers to Trade (TBT) Agreement—and establishing (relatively uniform) Intellectual Property Rights regimes worldwide (the TRIPS Agreement). The WTO also included a brand new dispute settlement system, considered by many as a manifestation of the rule of law at the international level. Similarly, organizations such as the World Bank and the International Monetary Fund (IMF) were indirectly spreading (de-)regulatory policies throughout the developing world.2 Globalization, nudged by a global technocratic elite, was alive and kicking, back then.

Today we face a crisis of the regime of international economic law and, more broadly, global economic governance. The system appears broken for its incapacity to face some of the most daunting challenges of our time: the widespread and dramatic process of environmental degradation and the unacceptable inequalities between poor and rich. On its face, the phenomenon of far-right populists, partly reflected in Brexit and Trump politics, and spreading across the Atlantic is shaking the system of international economic law, by hailing nationalist policies. The idea that the nation-state may be a desirable source of disintegration of the global (legal) order is gaining traction across the political spectrum. It appears clear that the answer to the legitimacy crisis of the system of international economic law and governance offered by progressives3 resorts also to entrusting the nation state with more political space—a space that allegedly has been unduly constrained by the global economic order.

Not only politicians but also progressive academicians, such as Professor Dani Rodrik, have defended the importance of national sovereignty,4 as one of the necessary paradigms to fix our broken world order. The gist of the reasoning is simple: global institutions went too far in eroding national sovereignty, which is the real basis for democratic liberal regimes. Without the nation-state, environmental, industrial, and redistributive policies cannot be realized. As Rodrik put it: ‘So, I accept that nation-states are a source of disintegration for the global economy.’5

This article critically engages with the idea that the nation-state is a legitimate force of disintegration of the international economic order, with particular attention to trade and investment agreements. There are disparate circumstances, from the realm of food safety regulation to the regulation of capital flows,6 in which it is arguably desirable that domestic institutions (re-)gain more power. Most importantly, the nation-state is today an important site of democracy and, only for that reason, it is worth defending. Yet, in times of raising authoritarianism, it is crucial to reflect on some of the limits of the nation-state and on the necessity to develop alternative paradigms for integrating economies and societies.

This article presents a two-fold critique of the idea that an expansion of national sovereignty is going to achieve a better socio-economic world order per se. The first critique is internal, showing that the nation-state does not possess intrinsic characteristics to facilitate democracy, equality, and sustainability. The second is external and focuses on the necessity to look reflexively at the goals of the system of international economic law, to re-imagine it as capable to address questions of inequality and environmental degradation.

In a more pragmatic fashion, this article posits that more nation-state may be a misleading and possibly dangerous response to today’s daunting challenges. It is misleading in so far as it promises solutions that nation-states alone cannot deliver. It is dangerous in so far as the rhetoric of the nation-state paradoxically facilitates the turn toward an expansion of the ‘rule of exception’ and, eventually, authoritarianism. Above all, in advocating for disintegration through the nation-state, we need to reckon with our haunting past where economic autarchy has been deeply intertwined with the ascent of fascism and Nazism. If today the nation-state may appear as a beacon of democracy, the role of nationalism in generating the nemesis of democracy should not be neglected. In short, and at the risk of oversimplification, ‘America first’ echoes too closely fascist slogans.7

I. A PROGRESSIVE DEFENSE OF THE NATION-STATE AND THE RISK OF A ‘SCHMITTEAN MOMENT’

Let me start by rehashing the two interconnected and equally formidable challenges we are facing today: the question of environmental degradation and the unacceptable level of inequalities whereby a large part of the population in the world lives in poverty (both in developing and developed countries, but still overwhelmingly concentrated in so-called developing countries) vis-à-vis a small elite enjoying incredible wealth. Economic integration that does not deal with these challenges is not only doomed to fail; it is a type of economic integration that we should not aspire to.

It is plausible that Brexit and the disintegrationist economic policy of Trump have been partly enabled by the growing inequalities in the Anglophone nations. It is no brainer that a large fraction of Brexiteers and Trump voters are the ‘left behind.’8 In wealthy countries, the working class often felt left behind by thriving globalization, which has benefited only the elites. The—often labelled—‘populist turn’ rests on the idea that the ‘other’, the ‘foreigner’ has stolen ‘our’ welfare and a more nationalistic policy is needed to protect the losers of the current state of affairs. This is evident from Trump’s slogan ‘Buy American, Hire American.’ It is worrying how this type of nationalism is entrenched in racism and in the othering of the non-American.

However, as mentioned earlier, the case for more nation-state has also been made by ‘progressive’ politicians and intellectuals. Among progressive economists, Dani Rodrik stands out for having defended the nation-state with compelling arguments. Let me quote him at length: ‘When it comes to providing the arrangements that markets rely on, the nation-state remains the only effective actor, the only game in town. Our elites’ and technocrats’ obsession with globalism weakens citizenship where it is most needed—at home—and makes it more difficult to achieve economic prosperity, financial stability, social inclusion, and other desirable objectives.’9 Not only is the nation-state the only game in town, when it comes to issues of redistribution, social security and safety, the nation-state is also desirable because it can deliver institutional diversity which is needed to realize the social contract: ‘Developing nations have different institutional requirements than rich nations. There are, in short, strong arguments against global institutional harmonization.’10 The nation-states can meet different preferences, and ‘[i]nsufficient appreciation of the value of nation-states leads to dead ends.’ Rodrik also concedes that international market liberalization is the offspring of well-functioning nation-states rather than international institutions: ‘Domestic political bargains, more than GATT rules, sustained the openness that came to prevail.’11 Against this background, Rodrik defends ‘economic populism’ in so far as it constitutes a form of resistance to ‘liberal technocrats’ imposing undue restraints on domestic economic policy.12 The rigid focus on price stability in low-inflation environments is a clear example of global or EU-driven policies largely insensitive to the effects on employment and paradoxically even growth.13

Many of Rodrik’s arguments are compelling, such as his critique of the economic profession’s misleading analysis of trade and investment agreements. Some of his reform proposals, such as the strengthening of green industrial policy,14 are arguably desirable. Most crucially, the nation-state may be at present one of the most developed sites of democracy, albeit an imperfect one. When global institutions constrain nation-state policies formed following democratic decision-making, this may legitimately be seen as a threat to democracy. Rodrik’s work has had a wide echo in legal circles, as evidenced by the publication of a book with the goal of reimagining trade and investment law, 15 which is opened by several chapters all commenting—in overwhelmingly positive terms—on Rodrik’s Straight Talks on Trade. The nation-state and, more generally, sovereignty is (re-)gaining traction also among progressive political theorists. In times of economic and existential uncertainties, sovereignty is there to offer protection ‘from unfettered markets and from permanently incumbent austerity’ and it constitutes a ‘refusal of a “liquid society” and of its very solid … inequalities.’16 Some of the most lucid analyses of the current international economic order point at the dramatic consequences of an increase of capitalist power that has incapacitated states to act in defense of its own people.17 The attention on sovereignty is also partly reflected in recently negotiated provisions of new trade and investment agreements, where states are explicitly endowed with a ‘right to regulate.’ Despite the unclear practical implications of such jargon, its symbolic value is unambiguously bearing witness to the shared view that states ought to maintain (or regain) political space. Against this background, Trump’s claims to defend the Ohio steel workers by whatever trade measures it takes may appear more acceptable. Could we then read in this reinvigorated faith in sovereignty a ‘Grotian moment’?18

Without indulging on this question, this article posits that we should beware the ‘risk’ of entering a ‘Schmittean moment’.19 This term is here used to refer to a major shift toward an ideal of unfettered national sovereignty as the chief paradigm to re-orient the international (economic) order. Under such ideal, any international normative benchmark is brushed away by an allegedly more intellectually honest ‘political’ dimension, which can find its realization only in the decisionist state.20 To understand the risk of a ‘Schmittean moment’, it is important to recognize that the move toward more nation-state is partly animated by the legitimate concerns over the existing international legal order; legitimate concerns, which have eloquently been articulated by Schmitt himself.

Carl Schmitt’s work offers a lucid critique of the ‘exclusionary character of liberal universalism.’21 His critique exposes the hypocrisy underpinning many universalisms, most prominently the legal canon of ‘just’ war.22 In fact, it is the very core of the contemporary international legal project that gets questioned: ‘The concept of humanity is an especially useful ideological instrument of imperialist expansion, and in its ethical-humanitarian form, it is a specific vehicle of economic imperialism. Here, one is reminded of a somewhat modified expression of Proudhon’s: whoever invokes humanity wants to cheat.’23 This argument has direct relevance for the domain of international economic law. In an endnote to this claim—discussing the extermination of Indians in North America—Schmitt explains the danger to use certain moral canons as exclusionary devices: ‘As civilization progresses and morality rises, even less harmless things than devouring human flesh could perhaps qualify as deserving to be outlawed in such a manner. Maybe one day, it will be enough if people were unable to pay its debts.’24 This consideration is of extreme actuality in relation to the current international legal order, which seems to have crystallized structures of annihilation of debt states, and their very peoples.25 In decrying how the economical is rescinded by the political, Schmitt unveils the absent ‘presence’ of (mostly American) politics in the economy. In short, Schmitt’s analysis cogently engages with the problem of depoliticization that the international liberal order yields.26 It is at this juncture that the thoughts of Schmitt and Rodrik may intersect. In some sense, Schmitt’s critique resonates with the critique of ‘hyper-globalization’ articulated by Rodrik:27 ‘one type of failure arose from pushing rule making onto supranational domains too far beyond the reach of political debate and control.’28

Before elaborating on this intersection, it is key to rehash some flaws of Schmitt’s analysis. While he has certainly a point in showing how liberal universalism can be used to arbitrarily exert hegemonic power in the name of humanity (and has so been used in such way by the US and other predominantly Western countries), the alternative he implicitly propounds rests on a nostalgia for a mythical past—a golden age based on the jus publicum Europaeum. Regrettably, this age has been golden only for some; the jus publicum Europaeum for all its glory was made of colonial relations, exploitation, and violence. It has also been noted how Schmitt’s historical analysis, which portrays the times of the jus publicum Europaeum as times where war gets domesticated by the modern state eclipses the fact that the ‘development of the modern state apparatus … helped bring about unprecedented capacities for organized state violence, even if such violence was no longer typically unleashed against fellow Europeans.’29 His conception of sovereignty, which finds essential realization only in the ‘unlimited jurisdictional competence’ normalizes the rule of exception. A related trouble with Schmitt’s core normative ideas is the totalizing enemy-friendship antithesis: ‘the distinction of friend and enemy denotes the utmost degree of intensity of a union or separation, of an association or dissociation.’30 This is particular fatal to an ideal of nonviolent international law, as it denies even the aspiration of solidarity beyond borders.31 In other words, Schmitt conceptualization of the international legal order crystallizes nation-state borders in deeper existential structures, leaving no hope for common projects of different communities inhabiting the earth. In exposing the violence of allegedly humanitarian projects, Schmitt is de facto hollowing out the concept humanity, reducing its essence to violence in potentia: ‘the entire life of a human being is a struggle and every human being symbolically a combatant. The friend, enemy, and combat concepts receive their real meaning precisely because they refer to the real possibility of physical killing.’32 In denouncing the hypocrisy of moralism, Schmitt seems to negate the possibility of morality altogether. The Nomos of the earth, starting with the act of appropriation—nehmen (take)—and continuing with dividing the land—nemein (divide)—does not engage with the morality of the first act of appropriation nor with its division. And this is also what Hanna Arendt contests to Schmitt: ‘to remove justice from the content of the law.’33

### 1NC---OFF

Biz Con DA

#### Unpredictable shifts in antitrust spill over, decimating overall recovery.

Mitchell ’21 [Trace; March 3; Research Associate at the Mercatus Center at George Mason University, J.D. from George Mason University; Morning Consult, “Weaponizing Antitrust to Attack Big Tech Is a Bad Idea,” <https://morningconsult.com/opinions/weaponizing-antitrust-to-attack-big-tech-is-a-bad-idea/>]

From the House Judiciary report calling for dramatic antitrust reform to federal antitrust regulators and state attorneys general initiating lawsuits against Facebook and Google, government officials are once again calling for more aggressive antitrust enforcement to go after America’s tech businesses.

And while critics from all sides are reaching for any and all tools to go after “Big Tech,” weaponizing antitrust will only end up harming American consumers and the American economy at a time when we’re still trying to keep our heads above water.

Using antitrust to go after American tech won’t stop at Silicon Valley. Every sector of our economy will be at risk of politically motivated antitrust enforcement. And that won’t just hurt consumers searching for information on Google or shopping for products on Amazon — America’s economy could lose its global competitiveness amid a global pandemic.

In fact, the recent cases against [Google](https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws) from the Department of Justice and state attorneys general are a great example of just how this misuse of antitrust could harm Americans across the country and halt innovation in its tracks.

These suits conveniently forget how consumers benefit from Google’s suite of products in attempts to claim that Google unfairly monopolized the search and search advertising markets. Even worse, by claiming consumer harm, the government fails to truly grasp what consumers actually want.

You see, under the consumer welfare standard, antitrust enforcement is built to focus on what consumers want and whether consumers benefit. When the government argues Google is harming Americans because its products are preinstalled and even the default search engine on Apple, the government forgets that American consumers don’t think this is a problem.

The [vast majority](https://www.businessinsider.com/how-google-retains-more-than-90-of-market-share-2018-4) of search users prefer Google to its competitors. And through preinstallation, we get free-to-use products, quick searches and near-limitless information in an integrated system with the click of a mouse. It isn’t a problem; it’s a time saver. Further, because Google can reinvest in developing more user-friendly tech in a preinstalled ecosystem, we get interoperable apps that make our experience that much more convenient and intuitive. And even if consumers do want a different app, they can fix this problem with no heavy leg work or travel — just the swipe of a finger.

But if the government gets its way, the message could be disastrous for innovation: Even if your business benefits Americans and improves the user experience, the government can still put a target on your back. Not to mention, the government would be more likely to put a target on your back if you’re large and politically disfavored. Consumers across the internet and the American economy would be hurt and left without more accessible and more affordable technology as options.

We should be working to reward, not punish, innovation. Otherwise, the next Google may just decide it isn’t worth the time and effort.

Similarly, the Federal Trade Commission’s recent case against Facebook also puts the wants of policymakers above the actual interests of consumers.

Here, the government claims that Facebook harms consumers by acquiring and then integrating services like Instagram and WhatsApp. So harmful, the Federal Trade Commission says, that Facebook must divest from these services, even if that would harm American consumers, innovation and entrepreneurship for decades to come.

But this is not a case of consumer harm or bad behavior — Facebook’s acquisition of Instagram and WhatsApp helped ensure that consumers’ desires were prioritized. Through millions of investment dollars into research and development, Facebook turned good services into great services that consumers actively keep coming back to.

Through relentless product improvement, WhatsApp became a free-to-use platform and Instagram became one of the most successful photo-sharing social media apps in the world. In both cases, consumers benefited from convenient and state-of-the-art advancements. No longer do we have to pay to use messaging or search through multiple results to shop our influencer feed.

As it stands, the Federal Trade Commission case could splinter one successful tech company into multiple, less efficient organizations, setting a precedent that could affect every American industry. Consumers would not only lose Facebook’s free-to-use services but also potentially the next big clothing brand or the next hit microbrewed beer.

By impeding mergers, the sheer fear of potential antitrust enforcement would shutter the doors on small businesses from all sectors of the economy. So much investment in innovation is built on the possibility of being acquired by a larger player. Entrepreneurs and innovators from manufacturing, automotive and tech alike would be left with an unfortunate takeaway — succeed and benefit consumers, but not too much.

And with an economy still struggling to recover, the absolute last thing we need is to leave consumers without innovative and affordable choices, small businesses without key investment opportunities and our economy without a competitive edge globally.

But by weaponizing antitrust, we’ll get neither thoughtful intervention nor consumer benefits. Instead, the United States will lose ground to foreign competitors and American consumers will ultimately pay the price.

#### Extinction.

Skaperdas ’20 [Stergios; June 16; Professor of Economics at the University of California Irvine, former Director of the Center for Global Peace and Conflict Studies; Peace Economics, Peace Science and Public Policy, “The Decline of US Power and the Future of Conflict Management after Covid,” vol. 26]

Whether the pandemic ends soon or is longer-lasting, the global economy and global geopolitics are very likely to have a different shape than they had before its onset. The high likelihood of a world depression and the differential responses across countries – especially those of China and the US – is changing the existing distribution of power across the world.

After going over recent trends in the US’s superpower status, I will discuss the pandemic’s implications for the rise of China as a challenger to the US’s position and a consequent urgent importance for improving global conflict management. Urgency is justified because international institutions have atrophied over the past few decades whereas the possibilities for conflict are expanding.

During the late 90’s when many thought that the end of US dominance was ending, Wohlforth (1999) argued well that unipolarity – with the US as the sole superpower – was likely to last for decades. More recently, Brooks and Wohlforth (2016) noted that “[T]he United States currently has defense pacts with sixty eight countries – a security network that spans five continents, contains a quarter of the Earth’s population, and accounts for nearly three-quarters of global economic output.” Bleckley (2018) even asserts that unipolarity will last for the rest of this century.

I don’t confront the debate on “unipolarity” here. However, with the rapid economic growth of China and the emergence of Russia as a military and diplomatic competitor to the US in Eurasia, the US’s dominance in Eurasia cannot be taken for granted. If anything, as I will argue, the trends over the past two decades have been more negative for the US than is commonly recognized. With Eurasia having nearly 70 percent of the world’s population and about the same in total GDP (at PPP, IMF 2020), it will be no longer possible for a non-Eurasian power to dominate the world’s economics and geopolitics by itself.

1 Trends before the Pandemic

I will discuss recent trends relating China to the US in terms of three dimensions that are often used to assess great power status: the economy, military capabilities, and technology.

1.1 Economy

China has been quickly catching up with the US in its economy. In fact, by the beginning of 2020, China’s GDP at PPP was 37 percent higher than that of the US (IMF 2020). While GDP at nominal exchange rates might be better in projecting economic power, GDP at PPP is better in gauging the actual productive capacity of an economy.

The trend, however, that has been in favor of the US lately, has been the enhanced status of the US dollar as a reserve currency, paradoxically since 2008. The currency swaps between the Fed and other Central Banks – to help primarily the banks of US allied countries – appears to have been the major factor in this trend (Tooze 2018). This financial power has been increasingly used in sanctions against adversaries but even Allies.

1.2 Military

China has been rapidly modernizing and expanding its conventional forces but is very far away from becoming a peer to the US militarily.

The US has maintained its extraordinary predominance to move military resources by sea, land, and air throughout the world. However, the actual ability for the US to force its will on others has been shown to be limited recently. It can barely hold onto its troops in Afghanistan and Iraq and has had limited influence in Syria and in Libya. The fact that, after the assassination of Iranian General Suleimani, Iran was allowed to hit the US Al-Asad military base in Iraq (with apparently pretty accurate missiles) without any reaction shows the limits of US power projection. I suspect this is the first time that the US had one of its bases hit by another sovereign state without retaliating against them. While Iraq could be occupied, Iran is unlikely to be so – it is three times as big and populous as Iraq and its invasion would involve many additional complications.

Moreover, US aircraft carriers and bases are vulnerable to increasingly accurate missiles not just from Russia and China but from Iran as well. Hypersonic missiles are even deadlier, with Russia and China being reportedly ahead of the US in their development. With such vulnerabilities the US’s ability to project military power in Eurasia becomes much more limited. It would be no exaggeration to say that it is “game over” for the US’s projecting military power in Eurasia without the expectation of a challenge.

Finally, the relatively small wars that US have already entered have been extremely costly. The cost of the Iraq and Afghanistan wars to US alone was estimated 10 years ago by Stiglitz and Bilmes (2012) to be between $4-6 trillion, a quarter to 40% of US GDP at the time.

1.3 Technology

While the US was far ahead of China in technology and basic research barely a few years ago, China has been rapidly catching up. For example, one respectable index of current high-quality research is the Nature Index (natureindex.com) which includes articles only in the top natural science journals. In 2012 China’s scientific productivity was at 24% of the US but by 2019 it was 67% of the US’s level. This is likely a much better level than the Soviet Union ever achieved relative to the US. In technological disciplines such as computer science and AI China is likely in even better place.

Furthermore, China has been demonstrating the ability to rapidly learn how to adapt foreign technologies and implement them in production at large scale. Highspeed rail, for instance, expanded from nothing to a 30,000 km network within a decade, while pushing the technology to new limits. The US by contrast seems to have largely divested itself of the necessity of maintaining primacy in engineering and manufacturing. The US’s emphasis on expensive high-tech weaponry is largely driven by military-industrial complex rent-seeking and is, at best, a gamble that would have highly uncertain returns in a hypothetical conventional battlefield.

Overall, China, while still markedly militarily inferior, has become at least an equal to the US economically and has been catching up rapidly in technology, while Russia has been counter-balancing the US militarily and diplomatically in Eurasia.

2 Effects of the Pandemic

The pandemic has brought about Depression levels of unemployment in the US in record time and almost all countries are facing severe contraction.1 Employment is unlikely to reach its pre-pandemic level for a long time and, because this is happening simultaneously around the world, there is no single large country or region that could help lift the rest of the world with its demand.

However, in relative terms China and East Asia have been less affected thus far and will continue to do so as long as they maintain a better health policy response to the pandemic.2 China will likely have to restructure its economy to be less dependent on existing supply chains, rapidly expand the Belt-and-Road initiative, and expand its social welfare so as to rely more on internal demand for continued growth. Nevertheless, although all predictions now can be expected to have high variance, China is likely to come out in the end economically better off relative to the US.

Other widely discussed probable effects include the strengthening of the nation-state and a retreat of globalization in production, trade, and capital movements. We can envision scenarios from a mild retreat of globalization with shorter supply chains to a full blown new Cold War with two or more separate economic blocks.

Regardless of what the medium and long run will look like, the pandemic appears to have accelerated pre-existing trends of US declining power to the extent that we cannot say that there is one superpower dictating the international politics and economics of Eurasia. China and, secondarily, Russia will have much to say about how the global political economy evolves. Under such conditions opportunities for conflict increase and institutions of conflict management become ever more important.

3 The Alarming Future of Conflict Management

US policy until recently was as if the liberal trade hypothesis were true and there was no chance of an adversarial relation with China in the future. That is consistent with a neoclassical economic perspective according to which more trade is always better. However, trade policy cannot be separated from security considerations when there is the possibility of insecurity (Garfinkel et al. 2015; Skaperdas and Syropoulos 2001). Now US policy seems to have been reversed with China being treated, not as trade partner, but effectively as an enemy.

In such a case international institutions of conflict management would be important for reducing the chance of conflict, reducing the costs of arming, and allowing for smoother trade relations; most of all, for minimizing the chance of nuclear war. Those institutions, however, have gradually atrophied or have been intentionally boycotted during the time of US dominance. Over the past two decades, for example, and contrary to previous practices the US entered a number of wars without UN Security Council resolutions (including those that it could have obtained agreement such as the Afghanistan war). The recent withdrawal from the WHO, and the series of withdrawals from arms-control agreements (ABM, INF, Open Skies, and perhaps START) are other examples of the weakening of international institutions. Perhaps this is to be expected of a world hegemon, but the unilateralism appears to have increased while US power has been decreasing and the need for future restraint on all has become more visible. The conditions appear to be leading to a “bad” equilibrium without investments in conflict management and high probability of conflict as opposed to a “good” equilibrium with investments in conflict management and low probability of conflict (Genicot and Skaperdas 2002).

The times we are now have similarities with the pre-WWI period which combined a high degree of globalization with the absence of institutions of conflict management (instead of their atrophy that we now have). At the time, there was a wide-spread belief that economic interdependence, and the break of that interdependence and other costs that war brings about, would by themselves guarantee peace (see, e.g., Angell 1913). Yet war came unexpectedly and with a vengeance.

With the dismantling of previous arms control agreements, without good prospects for their replacement in the future, and the weakening of the UN and other international organizations, the risks and challenges facing the world include the following:

* Multiple-pronged arms races that go beyond hypersonic weapons to cyberweapons, autonomous weapon systems, other AI technology-enabled systems, and deployments in outer space. The costs and, most important, the multiple uncertainties that such arms races can generate are of immense risk. Highly risk averse leaders, perhaps as a result of a mistake or misunderstanding but not only so, could launch wars from which there might be no going back (Mearsheimer 2001; Wong et al. 2020).
* In the absence of nuclear weapons treaties, the only restraint on nuclear war is Mutual Assured Destruction (MAD). With new platforms, such as hypersonic missiles, that make possible delivery of nuclear weapons faster than it ever has been, could there be a greater temptation for a first strike (thinking that retaliation would never come)? Many examples of preconceptions, mishaps, and near-accidents from the 1950s and 60s that were not previously known (reported in Ellsberg 2017) show how the world we are now entering is likely more dangerous than the Cold War ever was.
* A scramble for trading partners and Allies across the world that could go beyond just the offering of carrots. The undermining of governments that are perceived to be unfriendly by one side and their shoring up by the other side often leads to less autonomy, externally-induced political conflicts, increased authoritarianism, and not infrequently to outright civil war. The danger of many countries in Eurasia, Africa, and Latin America becoming battlegrounds for continual proxy conflicts between the superpowers is increasing.

### 1NC---OFF

Court Clog DA

#### Antitrust litigation is uniquely complex and resource intensive---it’ll spike, trading off in other areas.

Warren ’15 [Daniel; 2015; JD from the Boston University School of Law, BS from Ohio State University; Review of Banking and Financial Law, “Stress Fractures: The Need to Stop and Repair the Growing Divide in Circuit Court Application of Summary Judgment in Antitrust Litigation,” vol. 35]

A. Summary Judgment Can Cut Short Extreme Costs

Antitrust litigation can involve enormous discovery costs, particularly when antitrust litigation overlaps with class action litigation. Due to the wide scope of many antitrust claims, discovery can implicate a broad range of documents, records, interrogatories, and depositions. In fact, "[s]trategically minded" plaintiffs can take advantage of antitrust law's "onerous discovery costs" by requiring the defendant "to respond to wide-ranging interrogatories, produce documents, and prepare for and defend depositions" with only a "facially plausible allegation" of an antitrust violation. These costs can take a very large toll on both large and small businesses. The legal hours necessary to answer and address discovery challenges can also impose extreme costs.

Plaintiffs can often use discovery costs as a weapona against defendants in antitrust litigation. The Seventh Circuit Court of Appeals stated that "antitrust trials often encompass a great deal of expensive and time consuming discovery and trial work" in explaining that the "very nature" of antitrust litigation should encourage summary judgment. The court's language here supports the idea that in antitrust litigation, summary judgment has a special value, greater even than its normal use in other areas of the law. Summary judgment can be used to cut short lengthy litigation where parties have already accrued extreme costs from discovery and one party still cannot produce a genuine issue of material fact.

In antitrust litigation, the value of summary judgment to mitigate discovery costs through shortening litigation is elevated to a special importance even greater than normal for three reasons. First, antitrust litigation normally involves large organizations, which magnifies the costs of those firms going through the discovery process. Large firms have a great number of involved employees and departments, all of which would likely be subject to the broad discovery that is characteristic of antitrust litigation. Summary judgment, though normally considered after discovery, is a procedural weapon available at nearly any point in this process, as "a party may file a motion for summary judgment at any time until 30 days after the close of all discovery." The existence of a stay for extension of discovery shows that summary judgment need not automatically wait for discovery's completion, and thus can be an invaluable safeguard against otherwise incredibly costly discovery. This safeguard allows summary judgment to be a powerful tool to radically lower discovery time and costs without "railroad[ing]" the other party.

Second, antitrust litigation is normally a slow process that takes a great deal of time. The amount of time necessary to process and review evidence produced by discovery leads to incredible legal costs, often disproportionately placed on the defendant firm. The plaintiff has the advantage over the defendant in deciding the scope of discovery costs, and may often tailor its claim in such a way as to avoid the discovery costs that a defendant's counterclaim may reflect back on the plaintiff. These lengthy trials can be effectively truncated by summary judgment, and thus summary judgment's normal value is even greater in the world of antitrust litigation where protracted trials are the norm.

Finally, the vast amount of evidence necessary to prove the elements of an antitrust claim contribute to the large discovery costs tied to antitrust litigation by overwhelming judges' ability to reign in discovery costs. Currently, we rely on judges to limit the range of discovery requested, but in the context of antitrust litigation, judges have difficulty dealing with the broad variety of evidence that may be called for. One analysis of the power of discovery described it as a costly and potentially abusive force, and determined judges' abilities to limit discovery costs on their own as "hollow" at best:

A magistrate supervising discovery does not--cannot--know the expected productivity of a given request, because the nature of the requester's claim and the contents of the files (or head) of the adverse party are unknown. Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests. Requesters have no reason to disclose their own estimates because they gain from imposing costs on rivals (and may lose from an improvement in accuracy). The portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow. We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define "abusive" discovery except in theory, because in practice we lack essential information. Even in retrospect it is hard to label requests as abusive. How can a judge distinguish a dry hole (common in litigation as well as in the oil business) from a request that was not justified at the time?

Summary judgment can also reduce costs to both parties by reducing time and discovery costs to the parties, and to the judicial system itself, by cutting short lengthy litigation. Both sides often incur costs from employing experts in various areas, researching and producing evidence necessary to prove or disprove elements of antitrust actions, and in the great many legal hours necessary for both plaintiffs and defendants--not to mention costs to the state--during lengthy litigation that is often fruitless due to an "incentive to file potentially equivocal claims." Antitrust law is structured in such a way as to have a "special temptation" for what would otherwise be frivolous litigation. As antitrust law is, by its very nature, between competitors, there is significant motivation to force costs on to other firms, perhaps even through frivolous legal claims or intentionally imposing other large legal costs. Costs can also multiply in antitrust litigation because antitrust actions are often combined with other particularly complex areas of law, such as patent law or class actions. Class actions particularly in the antitrust context can make trials "unmanageable." Combining two already complex areas of law is a recipe for large legal costs and prolonged litigation. The value of cutting costs short cannot be overstated, as antitrust litigation takes place in the arena of business competition. This means that firms are already engaged in close competition for antitrust cases to be relevant, and thus unnecessary costs can further distort the market.

#### Justices will shelve data protection.

Haley ’20 [Thomas; 2020; Faculty member at the University of Virginia Law School; Washington Law Review, “Data Protection in Disarray,” https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=5133&context=wlr]

The Seventh Circuit may have said the quiet part out loud: "The standing rule reduces the workload of the federal judiciary...." (205) While literally true, that is neither an accepted nor acceptable justification for standing doctrine. (206) The existence of a "Case" or "Controversy" does not depend on how pleased the court will be to hear it. Article III does not give the judiciary the ability to set its caseload. And a dispute will be no less adversarial between the parties if it is the tenth hearing on a court's calendar rather than the first. Indeed, around the time that the Supreme Court threw standing jurisprudence for a loop in Clapper, it admonished that federal courts are obligated to hear cases falling within their jurisdiction. (207)

Yet the appeal of the standing dismissal to the federal judge is impossible to ignore. The massive and increasing caseload in the federal courts is well known. In the data-protection context, cases typically promise to be long and involved. Most arise from large-scale data breaches or inappropriate, indiscriminate data collection. As such, they are usually brought as class actions and implicate complex technical issues. One can certainly understand why overworked judges might be eager to get such cases off their dockets.

With that in mind, dismissal for lack of standing has a special appeal over other means of dispensing with a case: it is a non-merits dismissal. Even if erroneous or improperly motivated, a dismissal for lack of standing works relatively little injustice, as its effect is only to banish the suit to state court. Moreover, as the data show, state-law and common-law claims predominate in data-protection litigation--the majority of cases analyzed involved such claims, while fewer than half of cases asserted claims under federal law. Allowing state courts to deal with state-law claims is a hallmark feature of the federal system, CAFA notwithstanding.

The Northern District of Illinois' BIPA series of cases may proceed from this impulse. Most were brought initially in state court, then removed to federal court by defendants who seemed intent on challenging plaintiffs' right to bring suit at all. Confronted with the prospect of overseeing a lengthy, complicated class-action lawsuit brought by plaintiffs who did not want to be in federal court in the first place against defendants who appeared to be engaging in gamesmanship, the judges of the Northern District of Illinois may well have viewed dismissal for lack of standing as the best of all possible worlds.

The data are potentially consistent with this explanation. In particular, appellate courts have been significantly more solicitous of plaintiffs in data-protection cases, finding standing in 75% of cases, compared to only 51% of district courts. In data-breach cases, which likely present both the most technically complicated inquiries and the most diffuse harms, appellate courts upheld standing in 79% of cases, compared to a mere 41% of district court cases.

#### That’s key to effective AI---downsides AND upsides are existential.

EPRS ’20 [European Parliamentary Research Service; 2020; Panel for the Future of Science and Technology; European Parliament, “The impact of the General Data Protection Regulation (GDPR) on artificial intelligence,” https://www.europarl.europa.eu/RegData/etudes/STUD/2020/641530/EPRS\_STU(2020)641530\_EN.pdf]

The future emergence of a general artificial intelligence is already raising serious concerns. A general artificial intelligence system may improve itself at an exponential speed and quickly become superhuman; through its superior intelligence it may then acquire capacities beyond human control. 10 In relation to self-improving artificial intelligence, humanity may find itself in a condition of inferiority similar to that of animals in relation to humans. Some leading scientists and technologists (such as Steven Hawking, Elon Musk, and Bill Gates) have argued for the need to anticipate this existential risk, 11 adopting measures meant to prevent the creation of general artificial intelligence or to direct it towards human-friendly outcomes (e.g., by ensuring that it endorses human values and, more generally, that it adopts a benevolent attitude). Conversely, other scientists have looked favourably on the birth of an intelligence meant to overcome human capacities. In an AI system's ability to improve itself could lie the 'singularity' that will accelerate the development of science and technology, so as not only to solve current human problems (poverty, underdevelopment, etc.), but also to overcome the biological limits of human existence (illness, aging, etc.) and spread intelligence in the cosmos. 12

The risks related to the emergence of an 'artificial general intelligence' should not be underestimated: this is, on the contrary, a very serious problem that will pose challenges in the future. In fact, as much as scientists may disagree on whether and when 'artificial general intelligence,' will come into existence, most of them believe that this objective will be achieved within the end of this century. 13 In any case, it is too early to approach 'artificial general intelligence' at a policy level, since it lies decades ahead, and a broader experience with advanced AI is needed before we can understand both the extent and proximity of this risk, and the best ways to address it.

Conversely, 'artificial specialised intelligence' is already with us, and is quickly transforming economic, political, and social arrangements, as well as interactions between individuals and even their private lives. The increase in economic efficiency already is reality (see Figure 2), but AIprovides further opportunities: economic, social, and cultural development; energy sustainability; better health care; and the spread of knowledge. In the very recent White Paper by the European Commission14 it is indeed affirmed that AI.

will change our lives by improving healthcare (e.g. making diagnosis more precise, enabling better prevention of diseases), increasing the efficiency of farming, contributing to climate change mitigation and adaptation, improving the efficiency of production systems through predictive maintenance, increasing the security of Europeans, and in many other ways that we can only begin to imagine.

The opportunities offered by AI are accompanied by serious risks, including unemployment, inequality, discrimination, social exclusion, surveillance, and manipulation. It has indeed been claimed that AI should contribute to the realisation of individual and social interests, and that it should not be 'underused, thus creating opportunity costs, nor overused and misused, thus creating risks.' 15 In the just mentioned Commission's White paper, it is indeed observed that the deployment of AI

entails a number of potential risks, such as opaque decision-making, gender-based or other kinds of discrimination, intrusion in our private lives or being used for criminal purposes.

Because the need has been recognised to counter these risks, while preserving scientific research and the beneficial uses of AI, a number of initiatives have been undertaken in order to design an ethical and legal framework for 'human-centred AI.' Already in 2016, the White House Office of Science and Technology Policy (OSTP), the European Parliament's Committee on LegalAffairs, and, in the UK, the House of Commons'Science and Technology Committee released their initial reports on how to prepare for the future of AI16. Multiple expert committees have subsequently produced reports and policy documents. Among them, the High-Level Expert Group on artificial intelligence appointed by the European Commission, the expert group on AI in Society of the Organisation for Economic Co-operation and Development (OECD), and the select committee on artificial intelligence of the United Kingdom (UK) House of Lords.17

The Commission's White Paper affirms that two parallel policy objectives should be pursued and synergistically integrated. On the one hand research and deployment of AI should be promoted, so

that the EU is competitive with the US and China. The policy framework setting out measures to align efforts at European, national and regional level should aim to mobilise resources

to achieve an 'ecosystem of excellence' along the entire value chain, starting in research and innovation, and to create the right incentives to accelerate the adoption of solutions based on AI, including by small and medium-sized enterprises (SMEs)

On the other hand, the deployment of AI technologies should be consistent with the EU fundamental rights and social values. This requires measures to create an 'ecosystem of trust,' which should provide citizens with 'the confidence to take up AI applications' and 'companies and public organisations with the legal certainty to innovate using AI'. This ecosystem

must ensure compliance with EU rules, including the rules protecting fundamental rights and consumers' rights, in particular for AI systems operated in the EU that pose a high risk.

It is important to stress that the two objectives of excellence in research, innovation and implementation, and of consistency with individual rights and social values are compatible, but distinct. On the one hand the most advanced AI applications could be deployed to the detriment of citizens' rights and social values; on the other hand the effective protection of citizens' from the risks resulting from abuses AI does not provide in itself the incentives that are needed to stimulate research and innovation and promote beneficial uses. This report will argue that General Data Protection Regulation can contribute to address abuses of AI, and that it can be implemented in ways that do not hinder its beneficial uses. It will not address the industrial and other policies that are needed to ensure the EU competitiveness in the AI domain.

### 1NC---OFF

OSG CP

#### The United States federal judiciary should issue a call for the views of the Solicitor General regarding increasing prohibitions on anticompetitive business practices by mandating ABCDE framework compliance under Section 7 of the Clayton Act. The Office of the Solicitor General should find in favor of granting certiorari and appropriate legal change.

#### The CP solves the case by having the Supreme Court invite the legal view of the Solicitor General and then having the Office support legal modification---they’ll follow advice, but the process of letting it develop before prohibition builds SG independence.

Lepore ’10 [Stefanie; March 2010; Assistant General Counsel for Litigation at EQT Corporation, Former Adjunct Professor of Law at Duquesne University, JD from the George Washington University School of Law, BA in Politics and Philosophy from the University of Pittsburgh; Journal of Supreme Court History, “The Development of the Supreme Court Practice of Calling for the Views of the Solicitor General,” vol. 35]

I. Introduction

“When the Supreme Court invites you, that's the equivalent of a royal command. An invitation from the Supreme Court just can't be rejected.”1 The guest most frequently invited to the Supreme Court is the Solicitor General. Even before the practice of the Supreme Court calling for the views of the Solicitor General process developed, the Court occasionally invited the Solicitor General to participate as amicus in important cases by submitting a brief and/or participating in oral arguments before the Court.2 As then–Solicitor General Simon E. Sobeloff remarked to then–Attorney General Herbert Brownell in a 1954 letter about the landmark school desegregation cases, “The Supreme Court has expressly extended an invitation to the United States to participate in the reargument. While this by no means compels participation, such an invitation is not to be lightly declined.”3

The Solicitor General “has developed a unique relationship with the Supreme Court, one in which it serves as an adviser as well as an advocate.”4 The Solicitor General fulfills his role as the Court's adviser and advocate by responding to the Court's invitation to express the views of the United States in given petitions for certiorari.5 Here, the Solicitor General acts as a special type of amicus, because the Solicitor General is neither a party to the proceeding nor opining on behalf of one of the parties, but rather acting as a sort of “partner” to the Justices.6 When the Justices believe that, before they can grant or deny a petition for certiorari, they would like another opinion of the merits of a petition, they “call for the views of the Solicitor General,” known colloquially as CVSG.7 Because of the enormous amount of trust that the Court has in the Solicitor General's office, the Court values the Solicitor General's opinion as “provid[ing][the] best judgment with respect to the matter at issue.”8 However, this unique relationship of trust between the Court and the Solicitor General, such that the Solicitor General's opinion is treated as tantamount to the opinion of a tenth Justice,9 did not develop until the 1950s.

This paper will examine how the CVSG process developed. Part II will provide general background information, explaining the office of the Solicitor General, the Supreme Court practice of granting certiorari and the reasons for doing so, and the process by which the Supreme Court invites the Solicitor General to express the opinion of the United States. Part III will examine the environment that laid the groundwork for the CVSG process to emerge: the personal relationships that existed between individual Justices and attorneys in the Office of the Solicitor General and the political climate that instituted a political partnership between the Court and the Solicitor General. Finally, Part IV will argue that the CVSG process represents the culmination of the mutually beneficial relationship between the Court and the Solicitor General and then describe the first petitions for certiorari in which the Supreme Court exercised its option to CVSG.

II. Background Information

A. The Solicitor General

Congress created the Office of the Solicitor General with the Federal Judiciary Act of 1870.10 As an officer within the executive branch, the President appoints the Solicitor General, and the Solicitor General is then subordinate to both the President and the Attorney General.11 In appointing the Solicitor General, the President looks at the same criteria that affect the nomination of a Supreme Court Justice: well-respected, legal experience, and probably shares a similar legal philosophy of the President's administration.12 Because the Solicitor General is formally a member of the Department of Justice, his office is in that department's building.13 However, as a testament to the Solicitor General's dual roles as government lawyer and adviser to the Supreme Court, he also has permanent chambers in the Court.14

“Politics and law are at the intersection of the solicitor general's responsibilities.”15 The Solicitor General must be “learned in the law” and is entrusted with representing the interests of the United States, assisting the Attorney General, and “translating the policies of the government, the president, and the executive branch into litigation.”16 The Solicitor General decides which cases that the government lost in lower courts will be appealed to the Supreme Court, controls government litigation at the Supreme Court, advocates as amicus curiae in cases where the government is not a party, and advises the Supreme Court on petitions for certiorari.17 Although the Solicitor General experiences some political pressure from the President and the President's administration, the tradition of independence of the Solicitor General's office helps to ensure that the Solicitor General largely retains autonomy from political sways.18 Indeed, the Attorney General does not usually attempt to control the litigation strategy of the Solicitor General.19 Instead, the Solicitor General's agenda is structured by the Supreme Court's agenda: as the Supreme Court's power and docket changes, so does the role of the Solicitor General.20 Not only is the Solicitor General's agenda structured around the Supreme Court, but the Solicitor General helps to set that of the Court: a “principal chore of the Solicitor's office is to help the Supreme Court set its docket by screening petitions for certiorari.”21

B. Grant, Deny, or CVSG: The Certiorari Process

“A petition for certiorari is, stripping away the legal verbiage, a request to the Supreme Court to hear and decide a case that the petitioner has lost either in a federal court of appeals or in a state supreme court.”22 Parties can file petitions for certiorari throughout the year, and the petitions therefore generally accumulate at between 80 to 100 per week.23 When a petition for certiorari first arrives at the Court, it is sent to the “cert pool,” which was first created at the suggestion of Justice Powell in 1972.24 The “cert pool” consists of the law clerks of the participating Justices, who collectively pool their law clerks to divide the petitions for certiorari among themselves.25 The law clerks divide the thousands of petitions so that one of them reads every petition, assesses the worthiness of the petition for the Court's review, and writes an annotated certiorari memo “outlining the facts and contentions” of the petition.26 The law clerks circulate the annotated certiorari memos for each petition for certiorari to the participating Justices, who then review the memos and make a preliminary decision on how to vote on the petition.27 Before the Justices meet collectively to determine the fate of a petition for certiorari, the Chief Justice circulates a “discuss list”—a list of the petitions that he would like to discuss with the other Justices.28 The Associate Justices are also free to add petitions to the “discuss list,” and any petition for certiorari not discussed at a conference is denied certiorari without a vote.29 For much of the year, except during the Court's recess between July and the last week of September, the Justices vote on the petitions for certiorari in weekly conferences held in a room next to the Chief Justice's Chambers.30 These Conferences in which the Justices vote on petitions for certiorari are only attended by the Justices; “they are not open to the public or to other Court personnel.”31

When a petition for certiorari is on the discuss list at a weekly conference and therefore ready for the Justices' ultimate decision, the Justices have several voting options.32 Most obviously, they can vote to grant in full or deny in full certiorari.33 However, they have several options that fall between these two extremes. For instance, sometimes the Justices believe that more information is necessary before they can reach a full decision to grant or deny certiorari, and they will therefore CVSG.34 If several petitions for certiorari raise the same issue, the Court may accept all of them “to address that issue more fully than a single case would allow them to do.”35 The Court may also choose to narrow the granting of certiorari by choosing one issue raised in the petition or posing an issue sua sponte to the parties.36

After the Court has granted certiorari, either in full or in part, the Court then decides between giving the petition full consideration and giving it summary consideration.37 For petitions granted full consideration, the Court will hear oral arguments, receive briefing on the merits from the parties, and issue “a decision on the merits with a full opinion explaining the decision.”38 If, instead, the Court gives a petition summary consideration, the petition may take two routes.39 Usually, in summary consideration, the Court issues a “GVR,” which entails granting certiorari (G), vacating the lower court decision (V), and remanding the case to the lower court for reconsideration (R).40 In the remainder of summary consideration petitions, the Court issues a per curiam opinion—a short, unsigned opinion on the merits.41

When hearing and deciding cases on the merits, the Court operates by majority rule.42 However, when making certiorari decisions, the historical practice of the Court, called the “rule of four,”43 is to require four out of nine votes from the Justices.44 The Court has never been very forthcoming about why one petition is deemed worthy of certiorari and another not worthy. Instead, it advises that “certiorari will be granted only for compelling reasons.”45 Those compelling reasons, though “neither controlling nor fully measuring the Court's discretion,” are described in Rule 10 of the Rules of the Court.46 The criteria described in Rule 10 for evaluating a petition for certiorari are: (1) a conflict between two appellate courts, often called a circuit split; (2) a conflict between the court at issue and Supreme Court precedent; (3) importance of the issues in the petition; and (4) procedural posture of the case.47 Although these criteria for certiorari may seem somewhat imprecise and vague, it has long been certain that “[t]he Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions.”48

C. The CVSG Process: Calling for the Views of the Solicitor General

“[T]he group of lawyers that has the greatest impact on the Court is the set of about two dozen who work for the Office of the Solicitor General in the Justice Department.”49 Indeed, when the Supreme Court calls for the views of the Solicitor General, the Solicitor General becomes “an important ally for the justices, who rely on the office's expertise to control their docket and help structure doctrinal development.”50 Essentially, the Supreme Court is requesting the Solicitor General's opinion on a petition for certiorari because the Justices believe that the petition is important and potentially worthy of certiorari but need more information, in the form of another legal opinion, before they can make a final decision.51 In the CVSG role, the Solicitor General puts aside any partisan advocacy concerns that the Office may otherwise have in order to “assist in the orderly development of the law and to insist that justice be done even where the immediate interests of the federal government may not appear to benefit.”52 The Solicitor General provides “a less partisan review of the law and a survey of existing precedent.”53 Traditionally, even where government interests would prefer otherwise, the Solicitor General does not hesitate to advise the Justices that the Court lacks jurisdiction over an issue raised in a petition or that the petition simply does not satisfy the Court's criteria for granting certiorari.54 There are a number of circumstances in which the Court will CVSG: where a federal interest is involved; where there is a new issue without established precedent; where there has been a change in the development of an issue; or where an evolving issue has become more complicated and attached to other issues.55 Former Solicitor General Kenneth Starr described the purposes of the CVSG process as follows:

The CVSG has a twofold purpose. First, it serves to guide the Court or assist the Court as to whether the case is important enough to merit review. Second, it serves to offer the position of the U.S. on the merits of the issue. With respect to the former …[i]t is a courtesy to the government. With respect to the latter—the position of the U.S.—there we followed the professional responsibility of assimilating the views of different parts of the Justice Department and the agencies and putting forth the best arguments.56

The high rate of correlation between the Solicitor General's certiorari recommendations and the Court's certiorari decisions is a testament to the Court's trust in the nonpartisan legal opinion of the Solicitor General.57 Indeed, the Terms from 2001 to 2006 saw a 100-percent correlation between the Solicitor General's recommendation that the Supreme Court grant certiorari and the Court's doing so.58 While the correlation is slightly less when the Solicitor General recommends that the Court should deny certiorari, the rate is still high enough to suggest more than simple coincidence.59

#### Calls for the views of the Solicitor General, or CVSG, are uniquely effective on complex civil statutory regimes like antitrust but distinct and purely advisory because they occur at the petitioning stage, before arguments on the merits.

Cordray ’10 [Margaret and Richard Cordray; November 2010; Professor of Law at the Capital University Law School, JD from Boalt Hall School of Law, BCL from Oxford University, BA from University of the Pacific; Attorney General for the State of Ohio, BA from Michigan State University, MA from Oxford University, JD from University of Chicago Law School; Boston College Law Review, “The Solicitor General's Changing Role in Supreme Court Litigation,” vol. 51]

Introduction

The U.S. Solicitor General, as the U.S. Supreme Court's premier advocate, has long exerted significant influence over both the Court's case selection decisions and its substantive decisions on the merits. Over the past two decades, the Solicitor General's use of that influence has changed dramatically, moving away from the certiorari stage, where the Court sets its agenda, in favor of broader participation as amicus curiae at the merits stage. 1

In the 1980s, when the Court's docket was brimming with cases, the Solicitor General participated vigorously (and highly successfully) at the case selection stage, seeking review in fifty cases per Term, and receiving it in over thirty. 2 But as the size of the Court's docket plunged from 170 cases per Term at the end of the Burger Court to just eighty per Term during the Roberts Court, the Solicitor General's office steadily and significantly scaled back the number of certiorari petitions it filed to a mere fifteen per Term. 3

While the Solicitor General's role in the Court's agenda-setting process was dwindling, the office's presence in the Court's merits docket was expanding. From participating in 60% of the merits cases during the 1980s, the Solicitor General's involvement grew to over 75% in the Rehnquist and Roberts Courts. 4 Surprisingly, almost all of this growth occurred in cases where the federal government was not a party: over the past fifteen years, the Solicitor General has sat out only twenty cases per Term, down from about seventy in the 1980s. 5 As a result, the Solicitor General now participates in considerably more cases as amicus than as a party (reversing the proportions of the 1980s), and does so with remarkable success, supporting the winner close to 90% of the time during the early years of the Roberts Court. 6

This Article looks at how the Solicitor General's participation has changed both at the certiorari and merits stages. With respect to the certiorari stage, we examine in Part II whether the Solicitor General's increasingly restrictive petitioning practices have played a role in the docket's decline, and we find strong evidence that they have had an independent dampening effect on the size of the Court's docket. 7 In addition, this Article considers why the Solicitor General's office has cut back its petitions so sharply. 8 We find that neither politics nor concerns about a hostile Court can adequately explain the steady downward trajectory, which occurred over the tenures of multiple solicitors general from across the political spectrum. 9 Instead, the pullback, at least initially, was a result of the federal government litigating fewer civil cases and winning more of them, leaving fewer candidates for review. 10 More recently, the decline also seems to reflect a tightening of the Solicitor General's standard for seeking review, perhaps in recognition of the Court's preference for hearing fewer cases. 11

We then consider in Part III the consequences of the Solicitor General's reduced involvement at the certiorari stage, which appears to have led the Court to grant more cases brought against the federal government. 12 We argue that, in presenting such a limited set of options to the Court, the Solicitor General has opened the door to other, more aggressive litigants, many of whom are highly effective advocates from the emerging Supreme Court bar. 13 As a result, the Solicitor General's office is surrendering some of its control over the government's litigation strategy, and relinquishing its central role in the Court's agenda-setting process.

With respect to the merits stage, this Article argues the Solicitor General's influence is growing. We track the Solicitor General's increasing presence in the Court's docket, looking at how the composition of the docket changed as the size of the docket contracted, and the particular areas in which the Solicitor General has expanded the office's participation as amicus. 14 We then discuss the leading theories on the Solicitor General's role in the constitutional hierarchy and consider whether the Solicitor General is now too aggressive in entering cases that are only tangentially related to the federal government's institutional interests. 15 In particular, we respond in Part III to concerns that the Solicitor General may be intruding too freely into controversies between private parties, and that the Solicitor General may be too profligate in entering high-profile cases which present hot-button political issues. 16 On both counts, we conclude that the Solicitor General has not overreached, but rather the office has largely limited its involvement to cases that directly implicate the institutional interests of the United States.

I. The Solicitor General

The Solicitor General, as the federal government's chief appellate lawyer, is the country's most influential litigator. 17 In recent years, the Solicitor General's involvement in the Supreme Court has changed in important ways, both at the certiorari and merits stages. 18 Before embarking on our discussion of these changes, we begin with a brief overview of the Solicitor General's office, describing its responsibilities, advantages, and extraordinary success in Supreme Court litigation.

A. Responsibilities

The Solicitor General is tasked with supervising all of the government's appellate litigation. 19 In performing this responsibility, the office focuses on two primary functions: coordinating the government's legal strategy across the various agencies and departments, and stepping in to represent the government in cases that have reached the Supreme Court level. 20

Consolidating all appellate litigation within the Solicitor General's office enables the federal government to coordinate and present a considered litigation strategy that looks beyond the immediate concerns of individual agencies to the longer-term interests of the federal government. 21 In a bureaucratic structure as vast as that of the United States, the specific litigation preferences of the individual agencies and departments often conflict with one another, or are inconsistent with the broader interests of the government as a whole. 22 The Solicitor General, however, is able to take a more comprehensive view, and thus pursue only those cases which present significant issues and are compatible with the government's larger goals. 23

Management of the government's overall litigation strategy is tightly interwoven with the Solicitor General's other primary focus--representing the United States in the Supreme Court. 24 Conducting all Supreme Court litigation involves a myriad of tasks, including selecting the cases on which to seek certiorari, writing briefs at the certiorari and merits stages, responding to the justices' requests for the Solicitor General's views on whether the Court should grant review in certain nongovernment cases, deciding whether to participate as amicus curiae, and presenting oral arguments. 25 Two of these tasks in particular--the selection of cases on which to seek certiorari and the decision of which cases to enter as amicus--are highly discretionary, and thus effectively enable the Solicitor General to set the government's legal agenda. 26

At the certiorari stage, the Solicitor General employs a rigorous screening process, petitioning for Supreme Court review in only a small fraction of the cases that the government loses below. 27 In determining which cases to pursue, the Solicitor General relies on the Supreme Court's own standards, which focus on the presence of a conflict between the lower courts and the importance of the issue. 28 The Court's standards, however, are highly amorphous, giving the justices virtually unfettered discretion and litigants limited guidance. 29

Nonetheless, former solicitors general have identified key factors that shape their decisions on whether and when to seek review. 30 First among these factors is the presence of a true conflict between the U.S. courts of appeals. 31 In addition, the Solicitor General looks for "important" cases, based on the degree to which the adverse ruling limits executive power, undermines enforcement of federal legislation, or restricts the federal government's power regarding the states or individuals. 32

Beyond these core factors, the Solicitor General considers whether the facts of a particular case present the issues and the government's position favorably, how the case will impact the long-term development of the law, whether the subject area will be of interest to the Court, and whether the government will win on the merits. 33 The Solicitor General also must prioritize, bringing only the most important cases to the Court. By carefully limiting the number of petitions filed, the Solicitor General's office not only safeguards its reputation with the Court, but also avoids ceding to the justices control over which cases from the federal government the Court will hear. 34

Political considerations also influence the Solicitor General's decision-making process. Although solicitors general frequently claim independence from politics, they are appointed by and serve at the pleasure of the President. 35 They are advocates for the policies and priorities of the administrations in which they serve, and ideology thus inevitably plays a role as they set the government's litigation agenda, select cases, and frame arguments. 36

The role of ideology is perhaps most evident in the Solicitor General's decisions on whether to participate in a case as amicus curiae. 37 The Solicitor General has great leeway to enter cases in which the government is not a party; indeed, the Supreme Court's procedures facilitate, and even encourage, the Solicitor General's doing so. The Court's rules specifically exempt the Solicitor General from the standard requirement that a prospective amicus obtain the consent of the parties or the Court to file a brief. 38 And further, although the Court rarely grants an amicus's request to participate in oral argument, it routinely permits the Solicitor General to do so. 39

In addition, at the petition stage, the Supreme Court frequently invites the Solicitor General to provide views on whether the Court should grant certiorari (a privilege extended to no other litigant), 40 and then generally follows the Solicitor General's recommendation. 41 [FOOTNOTE] 40 The Court periodically "calls for the views of the Solicitor General" on whether to review cases in which the United States is not a party. See Ruth Bader Ginsburg, Workways of the Supreme Court, 25 T. JEFFERSON L. REV. 517, 519 (2003) (opining that the Solicitor General "acts as a true friend of the Court" in this regard); Office of the Solicitor General Workload Report Compilation, 1984 Term Through 2008 Term 4-13 (Jul. 6, 2009) [hereinafter OSG Workload Reports] (unpublished data compilation) (on file with authors) (providing data on invitations received in each of the 1986-2008 Terms--ranging from a high of forty-three in the early 1990s to a low of eleven in the late 1990s--and the total number of amicus briefs filed at the petition stage). Most cases in which the Court takes this step are civil cases involving complex statutory or regulatory schemes. See David C. Thompson & Melanie F. Wachtell, An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General, 16 GEO. MASON L. REV. 237, 245, 280-81 (2009) (providing data on the Court's practices and examples of its inviting the Solicitor General's views in regulatory areas "involving complex regulatory regimes," including antitrust, intellectual property, and ERISA). The Solicitor General invariably files a brief in response to the Court's invitation both at the petition stage and, if the case is granted, at the merits stage. See SALOKAR, supra note 25, at 142-45 (discussing the Court's practice of inviting the Solicitor General to provide views on cases at the certiorari stage). The Court may also invite the Solicitor General to participate at the merits stage, but does so rarely. See EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 738 (9th ed. 2007). [END FOOTNOTE] At this stage, the Solicitor General's office typically comes in as amicus only in response to such an invitation, although it occasionally participates as amicus without invitation. 42

B. Success Rate

When the Solicitor General decides to pursue a case, the office enjoys remarkable success. This success begins with the petition stage and continues through the merits stage, whether the United States is participating as a party or as an amicus. 48

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#### The Solicitor General is intervening in suits to defend the social cost of carbon but has limited bandwidth and influence.

Clark ’22 [Lesley; January 19; Reporter at E&E News/Politico, BA at the University of Massachusetts, Amherst, Former Washington and White House Correspondent at McClatchy; E&E News ClimateWire, “Biden Fails to Fulfill Pledge on Climate Lawsuits,” https://www.eenews.net/articles/biden-fails-to-fulfill-pledge-on-climate-lawsuits/]

A DOJ spokesperson said it had "taken a wide variety of actions that address the climate crisis and will continue to look for ways to do so, including opportunities" to participate in the cases. "While we can’t comment on the deliberative process, climate change and environmental justice remain among the department’s top priorities," spokesperson Wyn Hornbuckle said.

Biden’s pledge to get involved in the climate fight came as part of his environmental justice plan, which emphasized the need to reduce pollution in low-income neighborhoods and communities of color.

During her own presidential campaign, Vice President Kamala Harris called for oil companies to be “held accountable,” saying they are “causing harm and death in communities."

Climate lawyers had expected the Biden administration to stand in contrast to Trump’s DOJ, which filed a half-dozen "friend of the court" briefs in support of the oil industry’s arguments in a procedural battle that has stalled the climate liability lawsuits.

While state and local governments have filed the cases in state courts, industry attorneys have tried to get the challenges bumped to federal courts, where the companies may stand a better chance of winning. The Supreme Court last year allowed federal appeals courts to consider a broader set of arguments in favor of federal jurisdiction, further delaying the climate cases (Greenwire, May 24, 2021).

“The president pledged that they would ‘strategically support’ the cases, and they have failed to do that,” said Richard Wiles, president of the Center for Climate Integrity. “And that’s significant. The Department of Justice is an important voice on the legal landscape, and its absence is conspicuous.”

Wiles said the department under Biden has not submitted briefs “or offered any support” for any of the cases — most of which are currently entangled in disputes over whether the cases should be heard in state or federal court.

Wiles said it’s possible that DOJ lawyers don’t believe state courts are the proper venue but noted that federal appeals courts have mostly ruled in favor of keeping the lawsuits in front of state judges.

“You would think that the DOJ would not hesitate to concur with what the courts have said,” Wiles said. “But they’re not doing that.”

Taking on the oil industry

Wiles said the U.S. government has historically been reluctant to confront the oil and gas industry.

Biden’s political fortunes have been hurt by rising gas prices, and the president was forced to defend himself last fall against charges of hypocrisy for calling on the world’s largest oil producers to increase output, even as he called for the world to slash emissions and move beyond fossil fuels.

His administration last year opened up more than 80 million acres of the Gulf of Mexico for auction after a court ruling, despite a campaign pledge to ban new oil and natural gas leasing on public lands and waters (Greenwire, Nov. 17, 2021).

“In the broader context, this just continues a very sad trend of administration after administration failing to take on the industry in any meaningful way,” Wiles said.

Donald Kochan, a professor and deputy executive director of the Law & Economics Center at George Mason University’s Antonin Scalia Law School, suggested that the administration could be waiting for its proposed climate legislation to succeed — or fail — before it engages with the judicial branch.

If Biden is unable to land his ambitious climate spending package, its collapse could “add fuel” to the plaintiffs’ argument that legislative gridlock has made it impossible to achieve climate gains in Congress, Kochan said.

“It could give them the ammunition to say, ‘Once again, we tried to go the legislative route, and again it failed. The court is the last and only hope,’“ he said.

Yet Kochan said he believes intervention by the judicial branch would be a mistake.

“It’s not a legitimate argument to say that because the Legislature is not producing, that it’s a legitimate claim for expanding the constitutional powers of the courts,” he said. “The courts are limited and should stay in their own lane. Congress and the administrative agencies are the best suited to resolve complex issues of policy and science that require expert analysis.”

He added, “If the executive branch becomes a cheerleader for judicial encroachment into their own sphere of authority, then one of the primary constitutional checks breaks down.”

Climate challengers stay mum

Democratic state attorneys, who have used congressional hearings and letters to urge Garland and DOJ to intervene in the climate liability litigation, were largely silent on the Biden administration’s lack of action.

Minnesota Attorney General Keith Ellison, who wrote a March editorial calling Biden’s pledge to back the lawsuits a “vitally important part of the new administration’s broader effort to restore trust in government,” declined through a spokesperson to comment.

Ellison in June 2020 filed a lawsuit against Exxon; Koch Industries Inc.; and the American Petroleum Institute, an oil and gas trade group, accusing the industry of misleading Minnesotans about climate change.

He and five other Democratic state attorneys involved in the climate liability fight last year urged DOJ to disavow the amicus briefs that the Trump administration had filed on behalf of the fossil fuel industry in some of the cases (Climatewire, April 7, 2021).

A spokesperson for D.C. Attorney General Karl Racine, who led that missive, declined comment but pointed to the letter, which cited Biden’s campaign pledge and argued that intervention by Trump’s DOJ had undermined their efforts.

Sara Gross, chief of the Affirmative Litigation Division at the Baltimore City Law Department, said the city would “certainly welcome the administration’s support” in its efforts “to hold fossil fuel companies accountable for their deception about their products and climate change and the costs that their actions are imposing on our residents, workers and businesses.”

The 4th U.S. Circuit Court of Appeals will take a fresh look next week at Baltimore’s lawsuit against BP PLC for flooding and other climate-related damages.

‘Weaponize the DOJ’

Although the administration hasn’t intervened in the climate liability suits, Biden’s campaign promise has come up in at least one other case.

Energy Policy Advocates, a conservative research group, pointed to the pledge in a brief it filed last February in the U.S. Court of Appeals for the District of Columbia Circuit in defense of the Trump administration’s decision to leave ozone standards unchanged.

The group’s attorney — Christopher Horner, who in a Washington Times column called Biden’s pledge an effort to “weaponize the DOJ” — warned in the brief that if the states that had sued over the ozone standards were unsuccessful in challenging the government, they might try to pursue public nuisance litigation.

“Further troubling and adding to concerns … is that the new administration ran for office vowing to deploy its Department of Justice to assist the same plaintiffs in private litigation,” Horner wrote.

The American Petroleum Institute, the oil and natural gas industry trade group that has been named as a defendant in several of the climate liability lawsuits, criticized Biden for issuing the pledge when he released his environmental justice plan in July 2020.

Paul Afonso, API’s senior vice president and chief legal officer, said at the time that “rather than wasting taxpayer resources endlessly litigating,” the focus should be on industry innovation and emissions reduction.

While API did not directly address the administration’s role in the litigation, the group pointed to a statement from Afonso in which he said, “The record of the past two decades demonstrates that the industry has achieved its goal of providing affordable, reliable American energy to U.S. consumers while substantially reducing emissions and our environmental footprint. Any suggestion to the contrary is false.”

Karen Sokol, a law professor at Loyola University, said Biden’s DOJ likely has limited bandwidth as it prepares for what she called a “coming wave of anti-climate lawsuits” challenging the steps it has taken to address emissions. Opponents have sued over the administration’s pause on oil and gas leasing and are mounting challenges to Biden’s bid to raise the cost of carbon.

And Solicitor General Elizabeth Prelogar is getting ready to defend EPA’s ability to regulate greenhouse gases from power plants before the Supreme Court next month in a case that could have major implications for Biden’s climate agenda (Climatewire, Nov. 1, 2021).

But Sokol said she had expected the administration to at least counter the Trump DOJ argument that the climate liability cases should be heard in federal court.

“I know the DOJ has a lot on its plate, but that would seem to be something that is pretty easy for them,” she said. “This is not strategic support in terms of weighing in on the merits of these claims. This is just based on a federal/state jurisdictional matter, and the executive has something to say about that.”

#### Antitrust expansion forces the OSG to play partisan hardball, crashing the office’s overall effectiveness.

Cordray ’10 [Margaret and Richard Cordray; November 2010; Professor of Law at the Capital University Law School, JD from Boalt Hall School of Law, BCL from Oxford University, BA from University of the Pacific; Attorney General for the State of Ohio, BA from Michigan State University, MA from Oxford University, JD from University of Chicago Law School; Boston College Law Review, “The Solicitor General's Changing Role in Supreme Court Litigation,” vol. 51]

I. The Solicitor General

The Solicitor General, as the federal government's chief appellate lawyer, is the country's most influential litigator. 17 <<FOOTNOTE BEGINS>> 17 See 28 U.S.C. § 505 (2006). By statute, the Solicitor General is required to be "learned in the law." Id. The Solicitor General is also responsible for conducting all Supreme Court litigation, determining whether the government will pursue an appeal to any appellate court, and determining whether the government will file an amicus brief or intervene in any appellate litigation. 28 C.F.R. § 0.20(a)--(c) (2008). <<FOOTNOTE ENDS>> In recent years, the Solicitor General's involvement in the Supreme Court has changed in important ways, both at the certiorari and merits stages. 18 Before embarking on our discussion of these changes, we begin with a brief overview of the Solicitor General's office, describing its responsibilities, advantages, and extraordinary success in Supreme Court litigation.

A. Responsibilities

The Solicitor General is tasked with supervising all of the government's appellate litigation. 19 In performing this responsibility, the office focuses on two primary functions: coordinating the government's legal strategy across the various agencies and departments, and stepping in to represent the government in cases that have reached the Supreme Court level. 20

Consolidating all appellate litigation within the Solicitor General's office enables the federal government to coordinate and present a considered litigation strategy that looks beyond the immediate concerns of individual agencies to the longer-term interests of the federal government. 21 In a bureaucratic structure as vast as that of the United States, the specific litigation preferences of the individual agencies and departments often conflict with one another, or are inconsistent with the broader interests of the government as a whole. 22 The Solicitor General, however, is able to take a more comprehensive view, and thus pursue only those cases which present significant issues and are compatible with the government's larger goals. 23

Management of the government's overall litigation strategy is tightly interwoven with the Solicitor General's other primary focus--representing the United States in the Supreme Court. 24 Conducting all Supreme Court litigation involves a myriad of tasks, including selecting the cases on which to seek certiorari, writing briefs at the certiorari and merits stages, responding to the justices' requests for the Solicitor General's views on whether the Court should grant review in certain nongovernment cases, deciding whether to participate as amicus curiae, and presenting oral arguments. 25 Two of these tasks in particular--the selection of cases on which to seek certiorari and the decision of which cases to enter as amicus--are highly discretionary, and thus effectively enable the Solicitor General to set the government's legal agenda. 26

At the certiorari stage, the Solicitor General employs a rigorous screening process, petitioning for Supreme Court review in only a small fraction of the cases that the government loses below. 27 In determining which cases to pursue, the Solicitor General relies on the Supreme Court's own standards, which focus on the presence of a conflict between the lower courts and the importance of the issue. 28 The Court's standards, however, are highly amorphous, giving the justices virtually unfettered discretion and litigants limited guidance. 29

Nonetheless, former solicitors general have identified key factors that shape their decisions on whether and when to seek review. 30 First among these factors is the presence of a true conflict between the U.S. courts of appeals. 31 In addition, the Solicitor General looks for "important" cases, based on the degree to which the adverse ruling limits executive power, undermines enforcement of federal legislation, or restricts the federal government's power regarding the states or individuals. 32

Beyond these core factors, the Solicitor General considers whether the facts of a particular case present the issues and the government's position favorably, how the case will impact the long-term development of the law, whether the subject area will be of interest to the Court, and whether the government will win on the merits. 33 The Solicitor General also must prioritize, bringing only the most important cases to the Court. By carefully limiting the number of petitions filed, the Solicitor General's office not only safeguards its reputation with the Court, but also avoids ceding to the justices control over which cases from the federal government the Court will hear. 34 <<FOOTNOTE BEGINS>> 34 See SALOKAR, supra note 25, at 114-15 (noting that solicitors general must set priorities so as not to overburden the Court or undermine the Solicitor General's reputation with it); Lee, supra note 27, at 598-99 (opining that, if the Solicitor General did not sharply restrict the petitions for certiorari he files, he would enable the Court, rather than the administration, to decide which cases were comparatively most important); cf. Cohen & Spitzer, supra note 22, at 396, 421 (contending that the Solicitor General's screening processes are so selective that it changes the Supreme Court's "menu of cases," making unavailable to the Court cases it would like to hear); id. at 414 (estimating that the Solicitor General may be withholding twenty percent of the cases that the Supreme Court would like to review). <<FOOTNOTE ENDS>>

Political considerations also influence the Solicitor General's decision-making process. Although solicitors general frequently claim independence from politics, they are appointed by and serve at the pleasure of the President. 35 They are advocates for the policies and priorities of the administrations in which they serve, and ideology thus inevitably plays a role as they set the government's litigation agenda, select cases, and frame arguments. 36 <FOOTNOTE BEGINS>> 36 See Devins, supra note 21, at 318 (noting that in selecting cases, the "Solicitor General must also balance concerns far removed from the standard criteria for cert-worthiness, including policy objectives of the Department of Justice and the White House"); John O. McGinnis, Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory, 44 STAN. L. REV. 799, 802-08 (1992) (reviewing CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION--A FIRSTHAND ACCOUNT (1991)) (arguing that, under the Constitution, the Solicitor General's role is to advocate the President's positions); see also infra notes 183-213 and accompanying text (discussing the role of the Solicitor General). <FOOTNOTE ENDS>>

The role of ideology is perhaps most evident in the Solicitor General's decisions on whether to participate in a case as amicus curiae. 37 The Solicitor General has great leeway to enter cases in which the government is not a party; indeed, the Supreme Court's procedures facilitate, and even encourage, the Solicitor General's doing so. The Court's rules specifically exempt the Solicitor General from the standard requirement that a prospective amicus obtain the consent of the parties or the Court to file a brief. 38 And further, although the Court rarely grants an amicus's request to participate in oral argument, it routinely permits the Solicitor General to do so. 39

In addition, at the petition stage, the Supreme Court frequently invites the Solicitor General to provide views on whether the Court should grant certiorari (a privilege extended to no other litigant), 40 and then generally follows the Solicitor General's recommendation. 41 <<FOOTNOTE BEGINS>> 40 The Court periodically "calls for the views of the Solicitor General" on whether to review cases in which the United States is not a party. See Ruth Bader Ginsburg, Workways of the Supreme Court, 25 T. JEFFERSON L. REV. 517, 519 (2003) (opining that the Solicitor General "acts as a true friend of the Court" in this regard); Office of the Solicitor General Workload Report Compilation, 1984 Term Through 2008 Term 4-13 (Jul. 6, 2009) [hereinafter OSG Workload Reports] (unpublished data compilation) (on file with authors) (providing data on invitations received in each of the 1986-2008 Terms--ranging from a high of forty-three in the early 1990s to a low of eleven in the late 1990s--and the total number of amicus briefs filed at the petition stage). Most cases in which the Court takes this step are civil cases involving complex statutory or regulatory schemes. See David C. Thompson & Melanie F. Wachtell, An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General, 16 GEO. MASON L. REV. 237, 245, 280-81 (2009) (providing data on the Court's practices and examples of its inviting the Solicitor General's views in regulatory areas "involving complex regulatory regimes," including antitrust, intellectual property, and ERISA). The Solicitor General invariably files a brief in response to the Court's invitation both at the petition stage and, if the case is granted, at the merits stage. See SALOKAR, supra note 25, at 142-45 (discussing the Court's practice of inviting the Solicitor General to provide views on cases at the certiorari stage). The Court may also invite the Solicitor General to participate at the merits stage, but does so rarely. See EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 738 (9th ed. 2007). <FOOTNOTE ENDS>> At this stage, the Solicitor General's office typically comes in as amicus only in response to such an invitation, although it occasionally participates as amicus without invitation. 42

At the merits stage, however, the Solicitor General exercises much greater discretion over whether to enter cases in which the government is not a party, and it is here that the office can "play partisan hardball." 43 Although most cases the Solicitor General enters involve legal issues that directly affect federal interests, 44 the office can, and periodically does, participate in cases raising issues of social policy independent of any direct federal interest. 45 <<FOOTNOTE BEGINS>> 44 See Lee, supra note 27, at 599 (providing examples of cases directly implicating federal interests, including Title VII cases, antitrust cases, securities cases, voting cases, and criminal cases); Cooper, supra note 38, at 686-90 (showing that, during the mid-1930s, mid-1950s, and mid-1980s, the Solicitor General filed the vast majority of the office's amicus briefs in cases involving either (1) the interpretation of federal codes or (2) a state issue that might affect a complementary federal issue (under, for example, the Fourth or Fifth Amendments to the Constitution)). <<FOOTNOTE ENDS>> In determining whether to participate as amicus, the Solicitor General considers whether presentation of the federal government's views will be valuable to the Court, whether there are significant federal law enforcement interests at stake, and whether the case presents issues that are critical to the administration's political agenda. 46 <<FOOTNOTE BEGINS>> 46 See CAPLAN, supra note 27, at 197 (describing the standards that former Solicitor General Archibald Cox employed in deciding whether to enter a case as amicus: the case had to present an important question of constitutional law, which would affect a large number of people, and would have an impact on the government's more direct interests, in the sense that the government would be directly affected by the outcome); Lee, supra note 27, at 599-600 (opining that "in every single case the Court would be better off if it had the benefit of [the Solicitor General's] views," but that the Solicitor General must carefully limit the number of cases entered, so as not to risk undermining the Solicitor General's special status with the Court); Steven Puro, The United States as Amicus Curiae, in COURTS, LAW, AND JUDICIAL PROCESSES 220, 221 (S. Sidney Ulmer ed., 1981) (quoting Robert Stern, former Acting Solicitor General, on the key question in deciding whether to participate as amicus: "'Is this case valuable in presenting the United States' arguments to the Court?'"). <<FOOTNOTE ENDS>> The significance of this last consideration is reflected in the pattern of amicus filings under different administrations: solicitors general in Democratic administrations have submitted substantially more amicus briefs in civil rights cases (and have primarily advocated pro-rights positions), whereas solicitors general in Republican administrations have submitted substantially more amicus briefs in criminal cases (and have generally advocated tighter restrictions on defendants' rights). 47

B. Success Rate

When the Solicitor General decides to pursue a case, the office enjoys remarkable success. This success begins with the petition stage and continues through the merits stage, whether the United States is participating as a party or as an amicus. 48

At the petition stage, the Court grants approximately 70% of the Solicitor General's petitions for certiorari, an astonishing number compared to the approximately 3% that the Court grants at the request of other litigants. 49 When the Solicitor General is participating as amicus at the petition stage--almost always at the Court's invitation 50 --the Court follows the Solicitor General's recommendation to grant or deny in well over 75% of the cases 51

At the merits stage, the Solicitor General's winning percentage is also extraordinarily high. Studies of various time periods show that when the Solicitor General represents the United States as petitioner, the Solicitor General wins 70-80% of the time (as opposed to other petitioners, who win approximately 60% of the time). 52 Even more impressive, as respondent the Solicitor General wins 50-60% of the time (as opposed to other respondents, who win approximately 40% of the time). 53 Overall, the Solicitor General's winning percentage is 60-70% (as opposed to the 50% win rate for all litigants). 54

When participating as amicus on the merits, the Solicitor General is even more successful than as a party. Overall, when the Solicitor General steps in as amicus, the office wins 70-80% of the cases, regardless of which side it supports. 55 And the Solicitor General's presence as amicus has a powerful effect on outcome: a petitioner's likelihood of winning increases approximately 17% when the Solicitor General comes in on its side and decreases approximately 26% when the Solicitor General supports the respondent. 56

C. Inherent Advantages

The Solicitor General's success is attributable to a variety of factors. Perhaps foremost is the expertise that the Solicitor General brings to each case. 57 The Solicitor General has a small staff of highly credentialed attorneys who specialize in Supreme Court advocacy. 58 These attorneys are experienced in crafting petitions for certiorari, writing briefs on the merits, and presenting oral argument, all of which demand different and specific skills. 59 In addition, the attorneys focus exclusively on the Supreme Court, so they are intimately familiar with the views and concerns of each justice, the nuances of precedent, and the most effective way to present argument. 60

With this expertise, the Solicitor General has built a reputation for excellence which has led the Court to rely on the Solicitor General to winnow out cases that do not merit the Court's attention, to present the Court with trustworthy arguments, and to provide the Court with valuable information about the practical ramifications of different decisions. 61 The Solicitor General carefully guards this special standing with the Court, "lest the reservoir of credibility which is the source of this special advantage be diminished." 62 <<FOOTNOTE BEGINS>> 62 Lee, supra note 27, at 597 (arguing that the Solicitor General must use the office's adversarial advantages "with discretion, with discrimination, and with sensitivity"); see also Strauss, supra note 61, at 172 (noting that the "Office's reputation with the Justices, and the Court's image of the Office, are very important both to the Office's ability to do its job for the Executive Branch and to the functioning of the government in general"); infra notes 263-266, 286-291 and accompanying text (discussing the debate over how political the Solicitor General can be without endangering the office's elevated status with the Court). <<FOOTNOTE ENDS>>

#### Failure to apply a strong SCC causes cascading economic contagion.

Bolton ’20 [Patrick, writing with other contributors; January 2020; Barbara and David Zalaznick Professor of Business at Columbia University and visiting Professor at Imperial College London, PhD from the London School of Economics; Bank for International Settlements Report, “The Green Swan: Central Banking and Financial Stability in the Age of Climate Change,” https://www.bis.org/publ/othp31.pdf]

One of the main difficulties at this stage is determining how a firm is exposed to climate-related risks throughout its value chain. A firm can be exposed to these risks through: (i) direct, so-called “scope 1” emissions (particularly important in sectors such as mining, aviation or the chemical industry); (ii) indirect, so-called “scope 2” emissions resulting from purchased energy (eg real estate or energy-intensive industries); and (iii) other indirect emissions related to its entire upstream and downstream value chain, so-called “scope 3” emissions.35 A case in point for scope 3 is the automotive industry, where the main exposure lies not so much with the sector’s own emissions (scope 1) or its energy sources (scope 2), but with carbon combustion by end users (scope 3). For buildings, scope 3 emissions are twice as high as direct emissions (Hertwich and Wood (2018)). This is not to say that the emissions related to scopes 1, 2 and 3 are sufficient to assess the exposure of a firm. For instance, a firm with high emissions today could become decarbonised and seize many opportunities under specific transition paths. Still, focusing on scopes 1, 2 and 3 means that a comprehensive risk assessment should look at potential vulnerabilities throughout the entire value chain.

The assessment of a firm’s exposure to its scope 1, 2 and 3 emissions and its translation into risk metrics can be conducted in quantitative or qualitative manners. The PACTA stress test model,36 based on International Energy Agency (IEA) technological pathways up to 2050 compatible with a specific climate scenario (eg a 2°C or 1.75°C rise in temperatures) and on proprietary databases including existing investment plans at the firm level, determines how each firm within specific sectors may become aligned or misaligned with the scenario. This insight then informs a delayed stress test tool that calculates shocks based on alternative cash flows, discounted in a valuation or credit risk model. The assessment of the risk materiality by sector is a key dimension of this methodology, which involves technological, market and policy considerations.

Another methodology, developed by Carbon Delta (2019), proceeds by breaking down each country’s emission reduction pledge (as indicated by its Nationally Determined Contribution, or NDC) into sector-level targets, and then assigning emission reduction quantities to a firm’s production facilities based on its emission profile within each sector, using a proprietary asset location database. The costs relative to the transition are then obtained by multiplying the required GHG reduction amount by the price per tonne of carbon dioxide (tCO2) obtained via IAMs for the scenario under analysis (eg for a 3°C, 2°C and 1.5°C rise in temperatures). In order to estimate the revenues that each firm could obtain from a low-carbon transition, Carbon Delta (2019) uses a database covering millions of low-carbon patents granted by authorities worldwide, and a qualitative assessment of each low-carbon patent portfolio as a proxy for firms’ adaptive capacity.

Other approaches rely more extensively on qualitative judgments regarding the adaptive capacity of firms in each sector. For instance, Oliver Wyman (2019) resorts to experts’ judgments to forecast how specific companies in the portfolio may adapt to climate-related risks, although it also includes quantitative tools to estimate impacts of scenarios on prices, volumes, cost, impairment and capital expenditure of counterparties. Carbone 4’s (2016) bottom-up assessment considers firms’ adaptive capacities to a low-carbon transition, relying on a mix of qualitative and quantitative indicators such as the investments made in R&D and the CO2 reduction objectives of the firm related to its scope 1, 2 and 3 emissions. Allianz Global Investor integrates technological, regulatory and physical considerations qualitatively into its asset allocation procedures (IIGCC (2018)).

Other approaches have also emerged to better account for the indirect exposures to climate-related risks, without necessarily relying on scopes 1, 2 and 3. For instance, Battiston et al (2017) classify economic activities into six sectors (fossil-fuel, utility, energy intensive, transportation, housing, and finance) and twenty subsectors based on their relative vulnerability to climate transition risks (as a function of their emissions). They further map out the exposure of financial institutions (through equity and debt) to these different sectors, which enables them to capture potential knock-on effects within financial networks. When applying a sectoral shock (eg a carbon tax), the firms in sectors that have not adapted their business model to the energy transition face increased costs and reduced revenues, whereas the firms that have invested in alternative technologies are able to increase their profits. This methodology can be applied to the financial system as a whole or to specific financial institutions (Battiston et al (2017)), and to different asset classes such as equity, corporate and sovereign bonds (Battiston and Monasterolo (2019)), while capturing second-round effects related to the holding of financial assets.

Another way of estimating indirect exposures is to look at production networks, as suggested by Cahen-Fourot et al (2019a,b). Using input-output tables for 10 European economies and based on the monetary value of productive capital stocks (Cahen-Fourot et al (2019b)), the authors seek to provide a systemic perspective on how the reduction in production in one sector can cascade to physical stocks supporting the rest of the economic activity through chains of intermediate exchange. That is, as physical inputs stop flowing from one sector to another, more sectors along value chains are also impacted. For instance, the mining and quarrying sector (including the extraction of fossil fuels), although it accounts for a relatively low share of value added, tends to provide crucial inputs for many other downstream economic activities such as construction, electricity and gas, coke and refined petroleum products or land transport; in turn, these sectors are critical for the correct functioning of public administration, machinery and equipment and real estate activities; and so on. In short, stranding an asset in one specific sector can trigger a “cascade of stranded assets” affecting many other sectors of the economy.

While these two approaches bring critical insights into the interconnectedness among sectors and potential transmission channels of transition shocks and could greatly benefit from being combined (see Graph 14), applying them to future scenarios is not without its challenges. Indeed, relying on existing sectoral classifications and interconnections cannot be assumed to serve as a good proxy for future interconnectedness, given the need to change the very productive structures of the economy. In this sense, they are probably more tailored to the conduct of a climate stress test with a relatively short-term horizon (assuming a static portfolio) than as a tool to be used by financial institutions in a dynamic environment.

Regardless of the approach chosen, some critical sources of uncertainty to keep in mind when conducting forward-looking risk assessments concern the ability to predict:

− *The development and diffusion of new technologies*: As new technologies that do not yet exist or are not yet widespread appear and scale up, they may reshape existing market structures in unpredictable ways. For instance, wholesale online distribution would have been unpredictable a few decades ago. With this in mind, it is difficult to predict how a specific firm will perform in a new environment that will be determined not only by its own strategy but also by multiple elements in its value chain;

− *Each firm’s market power*: In response to climate regulations, some firms may be able to offset an increase in operating costs through their customers (by increasing final prices) or suppliers (by decreasing purchasing prices), while others may not have this market power. For instance, after the introduction of the EU Emissions Trading Scheme (ETS) in 2005, some electricity generators were able to pass through more than 100% of the cost increase to consumers (UNEP-FI (2019)). Determining each firm’s market position and power and its related pass-through capacity in a dynamic environment remains a considerable task. Some methodologies (eg Oliver Wyman) aim to assess firms’ ability to withstand a decrease in demand due to possible product substitutions and cost pass-through (based among other things on the estimated price elasticity of demand); others examine the adaptive capacity of firms based on the potential development of low-carbon and emissions abatement technologies (eg Carbone 4; ET Risk).

− *The exposure to liability risks that have not yet arisen*: Existing methodologies focus on physical and transition risks, but liability risks may become increasingly important in the future. A case in point is PG&E (Baker and Roston (2019), Gold (2019)), the owner of California’s largest electric utility, which filed for bankruptcy in early 2019 after wildfire victims sued the company for failing to adjust its grid to the risks posed by increasingly drier climate conditions. Several legal actions against energy and oil and gas companies (eg Drugmand (2019)) are also under way, often brought by cities or civil society organisations seeking compensation for climate-related disasters or the non-compliance of their business plans with the Paris Agreement (Mark (2018)). These examples show how in the future, firms may be exposed not only to the physical and transition risks of climate change, but also to legal risks. However, assessing liability risks is a major challenge not only because of their inherent uncertainty (eg predicting which lawsuits will be triggered by future uncertain events) but also because of variations in the legal framework of each jurisdiction. For instance, in some jurisdictions the government acts as reinsurer “of last resort” in the case of natural disasters; in this case the risks end up being borne by the government rather than the firm or insurer.

Overall, the outcomes provided by each methodology are therefore highly sensitive to the ways in which they account for specific scenarios and how they translate them into static or dynamic corporate metrics that take into account the scope 1, 2 and 3 emissions. Although the lack of data is commonly and rightly invoked as a barrier to the development of climate-related risk assessment, it is also important to emphasise that bridging the data gap will not fully “resolve” the sources of uncertainty discussed above.

3.4 From climate-related risk identification to a comprehensive assessment of financial risk

Once a scenario has been translated into specific metrics at the firm or sector level, there remains the challenging task of integrating such an analysis into a financial institution’s internal risk management procedures/a supervisor’s practices. In this respect, some methodologies provide a scorecard or climate risk rating and estimates of the carbon impact of a portfolio (eg Carbone 4). Other methodologies aim to calculate the specific impact on asset pricing or credit risks, for instance through the concept of climate value-at-risk (climate VaR), which compares a climate disaster scenario to a baseline scenario. For instance, Carbon Delta estimates future cash flows generated by each firm and discounts them to measure current values that can inform credit risk models (eg a Merton model).

Regardless of the method chosen, at least three main methodological challenges should be kept in mind when conducting such an exercise.

First, it is possible for investors to see the long-term risks posed by climate change, while remaining exposed to fossil fuels in the short term (Christophers (2019)), especially if they believe that hard regulations will not be put in place anytime soon. The identification of the risk is one thing; mitigation is entirely another. For instance, Lenton et al (2019) find that the emergency to act is not only a factor of the risk at stake but also the urgency (defined as reaction time to an alert divided by the intervention time left to avoid a bad outcome). In other words, even identifying all the risks (if even possible) would not necessarily suffice to “break the tragedy of the horizon”. Accordingly, new approaches to risk such as MinMax rules (Battiston (2019)), where the economic agent takes a decision based on the goal of minimising losses (or future regrets) in a worst case scenario, may be needed. Other approaches to risk management such as real option analyses, adaptation pathways or robust decision analysis are also already used for specific projects such as infrastructure and large industrial projects (Dépoues et al (2019)).

However, there are no indications that financial institutions would naturally choose this approach (except in specific cases such as project finance), and it is unclear how regulators could promote its use by financial institutions. In other words, the question of how to adjust risk modelling approaches to allow for longer time horizons remains a challenging one (Cleary (2019, p 28)).

Second, it is possible for financial institutions to hedge individually against climate change, without reducing the exposure of the system as a whole as long as system-wide action is not taken. For instance, Kling et al (2018) find that climate-vulnerable countries exhibit a higher cost of debt on average. This means that as markets hedge against climate-related risks by increasing risk premiums, the risk is transferred to other players such as climate-vulnerable sovereigns, which also happen to be poorer countries on average. Carney (2015) had also noted that insurers’ rational responses to physical risks can paradoxically trigger new risks: for instance, storm patterns in the Caribbean have left many households unable to get private cover, prompting “mortgage lending to dry up, values to collapse and neighbourhoods to become abandoned” (Carney (2015, p 6)). Another risk may have to do with the development of financial products in response to climate-related risks, such as weather derivatives: these may help individual institutions hedge against specific climate-related risks, but they can also amplify systemic risk (NGFS (2019b, p 14)). In short, reckoning climate-related risks can lead financial institutions to take rational actions that, while hedging them individually from a specific shock, do not hedge against the systemic risks posed by climate change. For central banks, regulators and supervisors, this poses difficult questions, such as the adequate prudential regulation that should be deployed in response.

Third, in order to fully appreciate the potential systemic dimension of “green swan” events or “climate Minsky moments”, more work is still needed on how a climate-related asset price shock (eg stranded assets) could trigger other losses within a dynamic financial network, including contagion effects towards non-climate-related sectors. The 2007–08 Great Financial Crisis has shown how a shock in one sector, subprime mortgages, can result in multiple shocks in different regions and sectors with little direct exposure to subprimes (for instance, affecting German Landesbanken and southern Europe’s banking systems and sovereign credit risks). In this respect, abrupt shifts in market sentiment related to climate change could affect all players, including those who were hedged against specific climate-related risks (Reynolds (2015)).

These challenges go a long way towards explaining the “cognitive dissonance” (Lepetit (2019)) between the increased acceptance of the materiality of climate-related risks by financial institutions, and the relative weakness of their actions in response. In short, accounting for the multiple transmission channels of climate-related risks across firms, sectors and financial contracts while reflecting a structural change of economic structures remains a task filled with uncertainty. As a result, the question of how much asset values are affected and how much credit ratings should be impacted today in the face of future uncertain events remains unclear for deeper reasons than purely methodological ones. Despite these limitations, scenario-based analysis will remain critical for financial and non-financial firms aiming to increase their chances of adapting to future risks. That is, these methodological obstacles should not be a pretext for inaction, since climate-related risks remain real.

3.5 From climate-related risk to fully embracing climate uncertainty – towards a second “epistemological break”

The previous analyses have highlighted that regardless of the approach taken, the essential step of measuring climate-related risks presents significant methodological challenges related to: (i) the inability of macroeconomic and climate scenarios to holistically capture a large range of climate, social and economic factors; (ii) their translation into corporate metrics within a dynamic economic environment; and (iii) the difficulty of matching the identification of a climate-related risk with the adequate mitigation action. Climate-economic models and forward-looking risk analysis are important and can still be improved, but they will not suffice to provide all the information required to hedge against “green swan” events.

As a result of these limitations, two main avenues of action have been proposed. We argue that they should be pursued in parallel rather than in an exclusive manner. First, central banks and supervisors could explore different approaches that can better account for the uncertain and nonlinear features of climate-related risks. Three particular research avenues (see Box 5 below) consist in: (i) working with non-equilibrium models; (ii) conducting sensitivity analyses; and (iii) conducting case studies focusing on specific risks and/or transmission channels. Nevertheless, the descriptive and normative power of these alternative approaches remain limited by the sources of deep and radical uncertainty related to climate change discussed above. That is, the catalytic power of scenario-based analysis, even when grounded in approaches such as non-equilibrium models, will not be sufficient to guide decision-making towards a low-carbon transition.

As a result of this, the second avenue from the perspective of maintaining system stability consists in “going beyond models” and in developing more holistic approaches that can better embrace the deep or radical uncertainty of climate change as well as the need for system-wide action (Aglietta and Espagne (2016), Barmes (2019), Chenet et al (2019a), Ryan-Collins (2019), Svartzman et al (2019)). The concept of “risk” refers to something that has a calculable probability, whereas uncertainty refers to the possibility of outcomes that do not lend themselves to probability measurement (Knight (2009) [1921], Keynes (1936)), such as “green swan” events. The question of decision-making under deep or radical uncertainty is making a comeback following the 2007–08 Great Financial Crisis (Webb et al (2017)). According to former governor of the Bank of England Mervyn King, embracing radical uncertainty requires people to overcome the belief that “uncertainty can be confined to the mathematical manipulation of known probabilities” (King (2017, p 87)) with alternative and often qualitative strategies aimed at strengthening the resilience and robustness of the system (see also Kay and King (2020)).

As such, a second “epistemological break” is needed to approach the role of central banks, regulators and supervisors in the face of deep or radical uncertainty. This demands a move from an epistemological position of risk management to one that seeks to build the resilience of complex adaptive systems that will be impacted in one way or another by climate change. What should then be the role of central banks, regulators and supervisors in this approach? In the next chapter, we argue that the current efforts aimed at measuring, managing and supervising climate-related risks will only make sense if they take place within an institutional environment involving coordination with monetary and fiscal authorities, as well as broader societal changes such as a more systematic integration of sustainability considerations into financial and economic decision-making.

#### Extinction.

Skaperdas ’20 [Stergios; June 16; Professor of Economics at the University of California Irvine, former Director of the Center for Global Peace and Conflict Studies; Peace Economics, Peace Science and Public Policy, “The Decline of US Power and the Future of Conflict Management after Covid,” vol. 26]

Whether the pandemic ends soon or is longer-lasting, the global economy and global geopolitics are very likely to have a different shape than they had before its onset. The high likelihood of a world depression and the differential responses across countries – especially those of China and the US – is changing the existing distribution of power across the world.

After going over recent trends in the US’s superpower status, I will discuss the pandemic’s implications for the rise of China as a challenger to the US’s position and a consequent urgent importance for improving global conflict management. Urgency is justified because international institutions have atrophied over the past few decades whereas the possibilities for conflict are expanding.

During the late 90’s when many thought that the end of US dominance was ending, Wohlforth (1999) argued well that unipolarity – with the US as the sole superpower – was likely to last for decades. More recently, Brooks and Wohlforth (2016) noted that “[T]he United States currently has defense pacts with sixty eight countries – a security network that spans five continents, contains a quarter of the Earth’s population, and accounts for nearly three-quarters of global economic output.” Bleckley (2018) even asserts that unipolarity will last for the rest of this century.

I don’t confront the debate on “unipolarity” here. However, with the rapid economic growth of China and the emergence of Russia as a military and diplomatic competitor to the US in Eurasia, the US’s dominance in Eurasia cannot be taken for granted. If anything, as I will argue, the trends over the past two decades have been more negative for the US than is commonly recognized. With Eurasia having nearly 70 percent of the world’s population and about the same in total GDP (at PPP, IMF 2020), it will be no longer possible for a non-Eurasian power to dominate the world’s economics and geopolitics by itself.

1 Trends before the Pandemic

I will discuss recent trends relating China to the US in terms of three dimensions that are often used to assess great power status: the economy, military capabilities, and technology.

1.1 Economy

China has been quickly catching up with the US in its economy. In fact, by the beginning of 2020, China’s GDP at PPP was 37 percent higher than that of the US (IMF 2020). While GDP at nominal exchange rates might be better in projecting economic power, GDP at PPP is better in gauging the actual productive capacity of an economy.

The trend, however, that has been in favor of the US lately, has been the enhanced status of the US dollar as a reserve currency, paradoxically since 2008. The currency swaps between the Fed and other Central Banks – to help primarily the banks of US allied countries – appears to have been the major factor in this trend (Tooze 2018). This financial power has been increasingly used in sanctions against adversaries but even Allies.

1.2 Military

China has been rapidly modernizing and expanding its conventional forces but is very far away from becoming a peer to the US militarily.

The US has maintained its extraordinary predominance to move military resources by sea, land, and air throughout the world. However, the actual ability for the US to force its will on others has been shown to be limited recently. It can barely hold onto its troops in Afghanistan and Iraq and has had limited influence in Syria and in Libya. The fact that, after the assassination of Iranian General Suleimani, Iran was allowed to hit the US Al-Asad military base in Iraq (with apparently pretty accurate missiles) without any reaction shows the limits of US power projection. I suspect this is the first time that the US had one of its bases hit by another sovereign state without retaliating against them. While Iraq could be occupied, Iran is unlikely to be so – it is three times as big and populous as Iraq and its invasion would involve many additional complications.

Moreover, US aircraft carriers and bases are vulnerable to increasingly accurate missiles not just from Russia and China but from Iran as well. Hypersonic missiles are even deadlier, with Russia and China being reportedly ahead of the US in their development. With such vulnerabilities the US’s ability to project military power in Eurasia becomes much more limited. It would be no exaggeration to say that it is “game over” for the US’s projecting military power in Eurasia without the expectation of a challenge.

Finally, the relatively small wars that US have already entered have been extremely costly. The cost of the Iraq and Afghanistan wars to US alone was estimated 10 years ago by Stiglitz and Bilmes (2012) to be between $4-6 trillion, a quarter to 40% of US GDP at the time.

1.3 Technology

While the US was far ahead of China in technology and basic research barely a few years ago, China has been rapidly catching up. For example, one respectable index of current high-quality research is the Nature Index (natureindex.com) which includes articles only in the top natural science journals. In 2012 China’s scientific productivity was at 24% of the US but by 2019 it was 67% of the US’s level. This is likely a much better level than the Soviet Union ever achieved relative to the US. In technological disciplines such as computer science and AI China is likely in even better place.

Furthermore, China has been demonstrating the ability to rapidly learn how to adapt foreign technologies and implement them in production at large scale. Highspeed rail, for instance, expanded from nothing to a 30,000 km network within a decade, while pushing the technology to new limits. The US by contrast seems to have largely divested itself of the necessity of maintaining primacy in engineering and manufacturing. The US’s emphasis on expensive high-tech weaponry is largely driven by military-industrial complex rent-seeking and is, at best, a gamble that would have highly uncertain returns in a hypothetical conventional battlefield.

Overall, China, while still markedly militarily inferior, has become at least an equal to the US economically and has been catching up rapidly in technology, while Russia has been counter-balancing the US militarily and diplomatically in Eurasia.

2 Effects of the Pandemic

The pandemic has brought about Depression levels of unemployment in the US in record time and almost all countries are facing severe contraction.1 Employment is unlikely to reach its pre-pandemic level for a long time and, because this is happening simultaneously around the world, there is no single large country or region that could help lift the rest of the world with its demand.

However, in relative terms China and East Asia have been less affected thus far and will continue to do so as long as they maintain a better health policy response to the pandemic.2 China will likely have to restructure its economy to be less dependent on existing supply chains, rapidly expand the Belt-and-Road initiative, and expand its social welfare so as to rely more on internal demand for continued growth. Nevertheless, although all predictions now can be expected to have high variance, China is likely to come out in the end economically better off relative to the US.

Other widely discussed probable effects include the strengthening of the nation-state and a retreat of globalization in production, trade, and capital movements. We can envision scenarios from a mild retreat of globalization with shorter supply chains to a full blown new Cold War with two or more separate economic blocks.

Regardless of what the medium and long run will look like, the pandemic appears to have accelerated pre-existing trends of US declining power to the extent that we cannot say that there is one superpower dictating the international politics and economics of Eurasia. China and, secondarily, Russia will have much to say about how the global political economy evolves. Under such conditions opportunities for conflict increase and institutions of conflict management become ever more important.

3 The Alarming Future of Conflict Management

US policy until recently was as if the liberal trade hypothesis were true and there was no chance of an adversarial relation with China in the future. That is consistent with a neoclassical economic perspective according to which more trade is always better. However, trade policy cannot be separated from security considerations when there is the possibility of insecurity (Garfinkel et al. 2015; Skaperdas and Syropoulos 2001). Now US policy seems to have been reversed with China being treated, not as trade partner, but effectively as an enemy.

In such a case international institutions of conflict management would be important for reducing the chance of conflict, reducing the costs of arming, and allowing for smoother trade relations; most of all, for minimizing the chance of nuclear war. Those institutions, however, have gradually atrophied or have been intentionally boycotted during the time of US dominance. Over the past two decades, for example, and contrary to previous practices the US entered a number of wars without UN Security Council resolutions (including those that it could have obtained agreement such as the Afghanistan war). The recent withdrawal from the WHO, and the series of withdrawals from arms-control agreements (ABM, INF, Open Skies, and perhaps START) are other examples of the weakening of international institutions. Perhaps this is to be expected of a world hegemon, but the unilateralism appears to have increased while US power has been decreasing and the need for future restraint on all has become more visible. The conditions appear to be leading to a “bad” equilibrium without investments in conflict management and high probability of conflict as opposed to a “good” equilibrium with investments in conflict management and low probability of conflict (Genicot and Skaperdas 2002).

The times we are now have similarities with the pre-WWI period which combined a high degree of globalization with the absence of institutions of conflict management (instead of their atrophy that we now have). At the time, there was a wide-spread belief that economic interdependence, and the break of that interdependence and other costs that war brings about, would by themselves guarantee peace (see, e.g., Angell 1913). Yet war came unexpectedly and with a vengeance.

With the dismantling of previous arms control agreements, without good prospects for their replacement in the future, and the weakening of the UN and other international organizations, the risks and challenges facing the world include the following:

* Multiple-pronged arms races that go beyond hypersonic weapons to cyberweapons, autonomous weapon systems, other AI technology-enabled systems, and deployments in outer space. The costs and, most important, the multiple uncertainties that such arms races can generate are of immense risk. Highly risk averse leaders, perhaps as a result of a mistake or misunderstanding but not only so, could launch wars from which there might be no going back (Mearsheimer 2001; Wong et al. 2020).
* In the absence of nuclear weapons treaties, the only restraint on nuclear war is Mutual Assured Destruction (MAD). With new platforms, such as hypersonic missiles, that make possible delivery of nuclear weapons faster than it ever has been, could there be a greater temptation for a first strike (thinking that retaliation would never come)? Many examples of preconceptions, mishaps, and near-accidents from the 1950s and 60s that were not previously known (reported in Ellsberg 2017) show how the world we are now entering is likely more dangerous than the Cold War ever was.
* A scramble for trading partners and Allies across the world that could go beyond just the offering of carrots. The undermining of governments that are perceived to be unfriendly by one side and their shoring up by the other side often leads to less autonomy, externally-induced political conflicts, increased authoritarianism, and not infrequently to outright civil war. The danger of many countries in Eurasia, Africa, and Latin America becoming battlegrounds for continual proxy conflicts between the superpowers is increasing.

### 1NC---OFF

FTC DA

#### The FTC’s targeting supply chain instability but efforts depend on continued funding.

Terwilliger ’21 [Zachary; December 10; partner, Vinson & Elkins LLP; JD Supra, “Supply and Demand: Signs that the Supply Chain Crisis Is Attracting the Attention of White-Collar Regulators,” Lexis]

Global supply chains continue to reel from the impact of the COVID-19 pandemic. The Biden Administration has referred to bottlenecks in the supply chain as a national crisis.1 Recent remarks from antitrust regulators foreshadow increased scrutiny of perceived anticompetitive conduct arising out of supply chain disruption. Further, the Biden Administration's aggressive strategy to combat global corruption coupled with the inherent risks of the same posed by supply chain congestion suggest that related FCPA enforcement may also be on the horizon.

Background: Disruption to Global Supply Chains from the COVID-19 Pandemic Is Ongoing

The supply chain refers to the movement of goods and commodities from origin to customer, which involves coordination between manufacturers, shippers, transportation carriers, logistics providers, and retailers. In the early stages of the pandemic, many factories across the world were forced to shut down or reduce production. At the same time, demand for consumer goods increased dramatically as many consumers spent less on services and more on goods for their homes. This surge of demand clogged the system. In North America, for example, ports have become congested due to a shortage of dock space, lack of warehouse space, and a significant increase in inbound ships.2 The supply chain disruption is ongoing — goods remain scarce and prices are high.3 There has been an active effort on the part of the Biden administration to identify, study, and remedy supply chain vulnerabilities.4 However, unlike other pandemic-related issues[1], white collar regulators have been slow to announce enforcement actions relating to the supply chain crisis. This may not be the case for much longer. Recent comments from regulators along with established enforcement priorities suggest that antitrust and anticorruption enforcement actions could arise in the near term.

Antitrust Watchdogs Vocalize Concerns for Anticompetitive Conduct Relating to Supply Chains

The clearest indicia of looming enforcement actions come from antitrust regulators. In late November, the Department of Justice (DOJ) announced[2] it filed a civil antitrust suit to block the merger of U.S. Sugar and Imperial Sugar.5 Comments from Assistant Attorney General Jonathan Kanter[3] suggest that supply chain concerns were a consideration in the DOJ's decision to file suit: 'This deal substantially lessens competition at a time when global supply chain challenges already threaten steady access to important commodities and goods,' and the lawsuit seeks to 'protect the resiliency of American domestic sugar supply.'6

Another signal of potential enforcement action are Section 6(b) studies by the Federal Trade Commission (FTC).7 Less than a week after the DOJ filed suit to block the U.S. Sugar merger, the FTC announced[4] its intention to study supply chain disruptions to the extent 'these disruptions are causing ongoing hardships for consumers and harming competition in the U.S. economy.'8 Section 6(b) of the FTC Act authorizes the FTC to engage in investigative studies that need not have a law enforcement purpose.9 The FTC may order persons or entities to answer questions under oath and produce documents.10 In its 6(b) study relating to the supply chain, the FTC ordered several large retailers, wholesalers, and goods suppliers to respond to questions and to provide internal documents regarding supply chain disruptions. FTC Chair Lina Kahn[5] stated: 'I am hopeful the FTC's new 6(b) study will shed light on market conditions and business practices that may have worsened these disruptions or led to asymmetric effects.'

Considering both this Section 6(b) study and the DOJ's recent comments, it appears federal agencies are evaluating whether and how anticompetitive conduct has impacted supply chain disruptions.

Disruption to the Supply Chain Poses Sizeable Risk of Corruption and Regulators Are Already on High Alert

Although less overt than signals from antitrust regulators, there are likewise indications of potential supply chain-related anticorruption enforcement. Current supply chain conditions pose a significant risk for corruption. As consumer demand increases and supply chain disruptions persist, suppliers (among others) may feel pressure to secure an advantage in moving goods by any means necessary. In addition to making anti-corruption efforts a priority in general,11 the White House recommended in a June 2021 report that several departments, including DOJ, 'develop a spend plan to (1) fully-resource and staff their activities to trace strategic and critical material supply chains, investigate money laundering, corruption, links to organized crime, and human rights abuses; and (2) implement the appropriate mix of civil, criminal, and administrative enforcement actions.'12

#### Scope expansions spark backlash.

Kovacic ’20 [William; 2020; former FTC Chair, Global Competition Professor of Law and Policy, George Washington University Law School, JD Columbia University; U of Pennsylvania Journal of Business Law, “Keeping Score: Improving the Positive Foundations for Antitrust Policy,” U. of Pennsylvania Journal of Business Law, 23(1), https://scholarship.law.upenn.edu/jbl/vol23/iss1/3/]

The Political Assault on the FTC

From the late 1960s through the 1970s, the FTC pursued an extraordinarily ambitious agenda of competition and consumer protection matters.107 Significant antitrust litigation included challenges to dominant firm misconduct and collective dominance, distribution practices, horizontal restraints, and facilitating practices. 108 Many matters involved powerful economic interests,109 and in a number of cases the Commission sought structural relief in the form of divestitures or the compulsory licensing of intellectual property. 110 In 1974, the agency also initiated a program that required certain large firms to provide “line-of-business” data concerning a range of performance indicators.111

In the same period, the Commission used a mix of litigation and rulemaking to transform its consumer protection agenda.112 Through policy guidance and litigation, the agency introduced its advertising substantiation program that required firms to have support for factual claims made in their advertisements.113 The Commission initiated over twenty-five rulemaking proceedings and promulgated final rules involving a broad collection of product and service sectors.114

As a group, the FTC’s competition and consumer protection initiatives aroused fierce opposition from the affected firms and industries, which contested the agency’s actions in court and before Congress. 115 The complaints of industry resonated with a large, powerful bipartisan coalition of legislators116 who criticized the Commission’s activism, proposed various measures to curb the agency’s authority, 117 and ultimately adopted a number of restrictions in The Federal Trade Commission Improvements Act of 1980 (FTC Improvements Act). 118 In 1980, bitter opposition to elements of the FTC’s competition and consumer protection programs led Congress to allow the FTC’s funding to lapse, forcing the agency to temporarily cease operations. 119 Perhaps emboldened by the weak political support the Commission enjoyed before 1981, when the Democrats controlled the White House and both chambers of Congress, the Reagan administration briefly resumed the assault on the agency’s funding. In January 1981, David Stockman, Ronald Reagan’s first Director of the Office of Management and Budget (OMB), launched a short-lived effort to eliminate funding for the FTC’s competition policy program.120

The congressional and executive branch officials who criticized the FTC in this period advanced two positive claims to justify recommendations for withdrawing authority or funding for the Commission. One claim was that the agency’s choice of competition and consumer protection programs had contradicted congressional guidance about how the FTC should use its authority and resources.121 Many legislators complained that the agency had disregarded the legislature’s preferences and used its powers in ways that Congress never contemplated to fall within the FTC’s remit.122 As Congress considered bills in 1979 to limit the Commission’s powers, Congressman William Frenzel captured the prevailing legislative mood:

It is bad enough to be counterproductive and therefore highly inflationary, but the FTC compounds its sins by generally ignoring the intent of our laws, and writing its own laws whenever the whimsey strikes it . . .

Ignoring Congress can be a virtue, but the FTC’s excessive nose-thumbing at the legislative branch has become legend. In short, the FTC has made itself into virulent political and economic pestilence, insulated from the people and their representatives, and accountable to no influence except its own caprice.123

The Commission, Frenzel concluded, was “a rogue agency gone insane.”124

The accusation of Commission disobedience figured prominently in Senate deliberations on the 1980 FTC Improvements Act. In less-flamboyant but still pointed terms, the chief Senate sponsors of the FTC Improvements Act said restrictions were necessary to curb the agency’s unauthorized adventurism. Senator Howard Cannon explained: “The real reason that we have proposed this legislation for the FTC is because the Commission appeared to be fully prepared to push its statutory authority to the very brink and beyond. Good judgment and wisdom had been replaced with an arrogance that seemed unparalleled among independent regulatory agencies.”125

The accusation of disregard for congressional will soon echoed in statements by high level officials in the newly arrived Reagan administration. OMB Director Stockman recited a variant of this theme in an appearance before a House of Representatives Committee early in 1981 to address his proposal to eliminate funding for the agency’s competition mission. Stockman said, “ . . . in recent years the FTC has served the public interest very poorly, in major part because it has sought to expand its power and influence beyond that envisioned by Congress.”126

Beyond generalized claims of institutional disobedience, the accusation of disregard for congressional will was invoked to justify proposals to impose restrictions on specific FTC initiatives. For example, in the fall of 1979, the Senate Commerce Committee held hearings on a proposal by Senator Howell Heflin to eliminate the FTC’s power to order divestiture or other forms ofstructural relief in non-merger cases.127 This was a shot across the bow of the FTC’s pending “shared monopoly”128 cases involving the breakfast cereal and petroleum refining sectors, where the FTC had requested structural relief (divestitures and, in the cereal case, compulsory trademark licensing) to restore competition.129 Congress did not adopt the Helfin proposal, but the idea of eliminating or restricting the FTC’s power to seek divestiture remained a serious threat to the agency. Roughly a year after the Commerce Committee hearings on the Heflin amendment, on the day before the balloting in the 1980 presidential elections, Vice-President Walter Mondale appeared at a campaign rally in Battle Creek, Michigan (the headquarters of the Kellogg Company). The Vice-President assured his audience that, if he and President Jimmy Carter were reelected, the Carter administration would seek legislation to ban the FTC from obtaining divestiture in the breakfast cereal shared monopolization case.130

A second, related claim was that the FTC had abandoned any adherence to sound administrative practice and descended into utterly irrational decision making. The agency was not merely disobedient (“rogue”) but crazy (“insane”), as well.131 Here, again, Congressman Frenzel pungently made the point. The FTC, Frenzel said, “is a king-sized cancer on our economy. It has undoubtedly added more unnecessary costs on American consumers who it is charged with protecting, than any other half dozen agencies combined.” 132 David Stockman’s initial broadside against the Commission in February 1981 echoed this sentiment. In a newspaper interview, Stockman said the FTC “is a passel of ideologues who are hostile to the business system, to the free enterprise system, and who sit down there and invent theories that justify more meddling and interference in the economy.”133

The accusation of disobedience and the diagnosis of insanity fit poorly, or at least awkwardly, with the positive record of the FTC’s activities in the 1970s. As discussed immediately below, the rogue agency story clashes with the many instances, especially between 1969 and 1976, in which congressional committees and key legislators directed the agency to carry out an aggressive, innovative enforcement program against major commercial interests. In 1969, numerous legislators endorsed the view of two external studies that the FTC had used its authority timidly and ineffectively.134 Leading members of Congress demanded that the agency transform its competition and consumer programs or face extinction.135

Congress described the content of the desired transformation in several ways. At a high level, oversight committees and individual legislators called for a dramatic boost in the agency’s appetite to undertake ambitious, risky projects—to replace a cautious, risk-avoiding decision calculus with a bold philosophy that erred in favor of intervention and used the agency’s elastic powers innovatively. Congress’s admonition to be aggressive and use power expansively emerged again and again in confirmation proceedings and routine oversight hearings.136 During hearings in 1970 to confirm Caspar Weinberger to be the Commission’s new chair, Senator Warren Magnuson, Chairman of the Senate Commerce Committee, told the nominee to “maintain the right kind of morale by recruiting strongly and expanding . . . Trade Commission programs in order to perform the job well.”137 In setting out this charge, Magnuson seemed to recognize that the FTC would have to be steadfast in resisting backlash—including from Congress—that would emerge as the FTC went about “expanding” its programs. The Commerce Committee Chairman said Congress was calling on the FTC to perform “tasks that require a great deal of attention and a great deal of fortitude not to respond to any pressures that come from any place.”138

#### Supply chain failure cascades---extinction.

Sitaraman ’20 [Ganesh; September/October; Professor of Law at Vanderbilt Law School; Foreign Affairs, “A Grand Strategy of Resilience,” <https://www.foreignaffairs.com/articles/united-states/2020-08-11/grand-strategy-resilience>]

The coming era will be one of health crises, climate shocks, cyberattacks, and geoeconomic competition among great powers. What unites those seemingly disparate threats is that each is not so much a battle to be won as a challenge to be weathered. This year, a pandemic is forcing hundreds of millions of Americans to stay at home. Next year, it might be a 1,000-year drought that devastates agriculture and food production. The year after that, a cyberattack could take out the power grid or cut of critical supply chains. If the current pandemic is any indication, the United States is woefully underprepared for handling such disruptions. What it needs is an economy, a society, and a democracy that can prevent these challenges when possible and endure, bounce back, and adapt when necessary—and do so without sufering thousands of deaths and seeing millions unemployed. What the United States needs is a grand strategy of resilience.

For psychologists who research child development, resilience is what enables some children to endure traumatic events and emerge stronger and better able to navigate future stresses. For ecologists, resilience is an ecosystem’s ability to resist, recover, and adapt to ires, loods, or invasive species. For emergency, disaster relief, and homeland security experts, a resilient system is flexible, adaptable, and can withstand an impact. The writer Maria Konnikova has summed up the concept with a single question: “Do you succumb or do you surmount?”

The highest goal for American policymakers should be to preserve and defend the country’s constitutional democracy while enabling Americans to thrive regardless of their race, gender, location, or origin. A society that achieves that goal will be better prepared to face the next crisis. A more equal and more just nation is a more resilient one.

Although Americans tend to think of grand strategy as an overarching foreign policy vision, any true grand strategy requires a solid domestic foundation. The United States’ Cold War policy of containment, for instance, had a domestic analog, although it is less emphasized in the foreign policy community. For a generation after World War II, Democrats and Republicans alike embraced a model of regulated capitalism, with high taxes, inancial regulations, strong unions, and social safety net programs, and thus charted a path between the totalitarian control of the Soviet Union and the laissez-faire approach that had plunged the United States into the Great Depression. Regulated capitalism and containment together were the grand strategy that deined the post–World War II era. A grand strategy of resilience, likewise, will not meet with success unless the United States addresses the many forms of inequality, fragility, and weakness that undermine the country’s preparedness from within.

AGE OF CRISES

“Grand strategy” is a slippery term, with perhaps as many deinitions as authors who invoke it. It can describe a framework that guides and focuses leaders and societies on their aims and priorities. Critics of the notion believe this is impossible: no paradigm, they say, can help navigate a chaotic, uncertain future, and in any case, U.S. society is too polarized to identify a consensus paradigm today. But the skeptics have it backward. Grand strategy is won, not found. It emerges from argument and debate. And it is useful precisely because it offers guidance in a complex world.

Start with pandemics. For hundreds of years, quarantines have been essential to preventing the spread of infectious diseases. But today’s stay-at-home orders have exacted a devastating social, economic, and psychological toll on individuals and communities. Small businesses that are closed may never reopen. Tens of millions of people are out of work. Families are struggling to juggle childcare, homeschooling, and working from home. The government’s goal should be to minimize those disruptions—to build a system that can prevent economic disaster, secure supply chains for essential materials, and massively scale up production and testing when needed.

Climate change could pose an even bigger threat. A sustained drought, akin to the one that created the Dust Bowl during the Great Depression, could threaten the global food supply. Rising sea levels, especially when coupled with storms, could flood low-lying cities. Fires already disrupt life in California every year. Climate-induced crises will also lead to population migrations globally and, with them, social unrest and violence. Part of the answer is aggressive action to limit increases in temperature. But in addition, the United States must be able to endure climate shocks when they arise.

Consider also the country’s dependence on technology and the vulnerabilities it entails. Cyberattacks have already targeted U.S. election systems, banks, the Pentagon, and even local governments. The city of Riviera Beach, Florida, was forced to pay a ransom to cybercriminals who had taken over its computer systems; big cities, such as Atlanta and Baltimore, have faced similar attacks. Cyberattacks on the U.S. power grid, akin to the one that led to blackouts in Ukraine in December 2015, could “deny large regions of the country access to bulk system power for weeks or even months,” according to the National Academy of Sciences.

All these challenges will play out at a time of growing rivalry—and especially geoeconomic competition—among great powers. Over the last half century, the United States has been the world’s most powerful economy and has thus been relatively safe from outside economic pressures. But as China’s economic strength grows, that is likely to change. The United States and other democracies have become dependent on China for essential and nonessential goods. China’s ability to exploit that dependence in a future crisis or conflict should be extremely worrisome. A strategy based on resilience would help deter such coercion and minimize the disruption if it does occur.

THE HOME FRONT

One foundational weakness is that American democracy is beset by broken processes and vulnerable to outside meddling. Four years after Russia interfered in the 2016 presidential election, the United States has yet to take serious steps to protect is voting systems from hostile foreign governments and cybercriminals. Comprehensive reforms would include voter-veriied paper ballots and the auditing of voting results. A new agency charged with election security could develop standards and conduct mandatory training for election oicials, as Senator Elizabeth Warren, Democrat of Massachusetts, has proposed. And as the pandemic has made clear, voting should not require a trip to the ballot box on Election Day. Nationwide vote-by-mail and early voting policies would provide resilience during a crisis—and make voting easier and safer in ordinary times, too. Democracy is not resilient if people do not believe in it. Yet Americans’ trust in the government has been stuck near historic lows for years, and surveys show that startling numbers of citizens do not think democracy is important. It is no accident that this loss of faith has coincided with decades of widening economic inequality and a rising consensus that the government is corrupt. Study after study has shown that the U.S. government is far more responsive to the wealthy and big corporations than to ordinary citizens. Only sweeping changes to the rules regulating lobbying, government ethics, corruption, and revolving-door hiring from the private sector can restore public trust. Generations of racist policies—redlining, militant policing, and the failure to regulate predatory lending, to name just three examples— have done much to undermine U.S. resilience, too. A country will have trouble bouncing back when entire communities are disproportionately vulnerable in a crisis and when leaders use divide-and-conquer ideas to stir division and prevent solidarity across races. Fighting for justice is the morally right thing to do—and it makes American society stronger. When it comes to economic policy, an entire generation of American leaders embraced deregulation, privatization, liberalization, and austerity. The result has been staggering inequality, stagnant wages, rising debt loads, an intolerable racial wealth gap, shrinking opportunity, and rising anxiety. Low wages, limited social beneits, and an unafordable and ineicient health insurance system have weakened the country’s resilience by turning any economic shock into a potentially existential threat for many citizens. “Deaths of despair,” such as suicides and overdoses, plague rural areas. Meanwhile, the wealthy and powerful continue to push for and win lower tax rates, which increase their wealth and power and create artiicial political pressure to oppose social infrastructure spending. The damage to American resilience, in ordinary times and especially in a crisis such as the current one, has been considerable, as has the resulting loss of economic opportunity and innovation that could boost the United States’ power. Resilience demands reversing these trends: expanding health care and childcare to all Americans, restructuring the economy so that people gain higher wages, restoring the power of unions, making early education universal, and ensuring that students can graduate from college debt free. All these goals are eminently achievable. Oicials must also provide the basic infrastructure necessary to operate in the modern world. The United States has a long tradition of public investment in infrastructure—from the post oice to rural electriication to the national highway system. In recent decades, however, that legacy has been abandoned. The pandemic has revealed that, whether for telemedicine, remote work, or education, high-speed Internet is an essential utility, just like water and electricity. But nearly a quarter of rural Americans do not have adequate access to it, in part because Internet provision has been left to the marketplace. The country’s inancial infrastructure also needs to be updated. Millions of unbanked Americans are dependent on check cashers to access their hard-earned dollars, which eats into their wages and their time. Both in normal times and during a crisis, the Federal Reserve’s policies are less efective than they could be and favor inancial institutions because the Fed uses banks as intermediaries rather than interfacing directly with consumers. If every person or business instead had access to a no-fee, no-frills account at the Federal Reserve, it could reduce the unbanked population and ensure that everyone could get stimulus payments instantaneously in a crisis.

MARKET FAILURES

Decades of neoliberal capitalism have not made markets more resilient, either. Competition is suffering, and fewer companies are being founded, as monopolists and mega-corporations come to dominate one sector after another. The “shareholder primacy” philosophy and growing pressure from inancialization have turned some corporate leaders into short-term tacticians who use buybacks, leverage, tax strategies, and lobbying to increase their stock prices, even if doing so means greater fragility, volatility, and boom-and-bust economic cycles that lead to big taxpayer bailouts. As some sectors come to depend on just a few firms, prices rise, innovation surfers, and supply chains become fragile. Meanwhile, some companies amass so much power that they distort the democratic process by throwing their weight around in Washington.

## Adv---1

### 1NC---AT: Algo

#### No emerging tech impact

Caitlin Talmadge 19, Associate Professor of Security Studies in the School of Foreign at Georgetown University, as well as Senior Non-Resident Fellow in Foreign Policy at the Brookings Institution. "Emerging Technology and Intra-War Escalation Risks: Evidence from the Cold War, Implications for Today." https://www.tandfonline.com/doi/full/10.1080/01402390.2019.1631811

Yet the future relationship between emerging technologies and escalation may not be as straightforward as these statements imply. The debate about emerging technologies tends to portray them as a powerful independent variable – an exogenous factor that is both necessary and sufficient to cause conflict escalation. This paper argues instead that emerging technologies are more likely to function as intervening variables; they may be necessary for escalation to happen in some cases, but they alone are not sufficient, and sometimes they will not even be necessary. The strongest drivers of escalation will actually lie elsewhere, in the realms of politics and strategy. As a result, concern about new technologies is warranted, but determinism is not. An overemphasis on the dangers of technology alone ignores the critical role of political and strategic choices in shaping the impact of technology, and also could lead to a misplaced faith in arms control or other means of trying to stuff the technological genie back in the bottle.5

### 1NC---AT: Inequality

#### No inequality crisis and antitrust makes it worse---prefer studies on consumption instead of capital.

Wright et al 19 [Joshua D. Wright is University Professor and the Executive Director of the Global Antitrust Institute at Scalia Law School at George Mason University. Professor Wright also holds a courtesy appointment in the Department of Economics. In 2013, the Senate unanimously confirmed Professor Wright as a member of the Federal Trade Commission (FTC), following his nomination by President Obama. He rejoined Scalia Law School as a full-time faculty member in Fall 2015. "Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement." https://regproject.org/paper/consumer-welfare-the-rule-of-law-the-case-against-the-new-populist-antitrust-movement/]

Another assertion populist antitrust supporters regularly make is that prices have increased and output has decreased. Again, the evidence here is mixed at best.

The movement’s proponents claim increased monopoly power economy-wide has led to increased prices for consumers. One study by De Loecker and Eeckhout, for instance, purports to demonstrate an increase in markups since 1980, which they argue indicates market power has increased over this period.68 This study utilizes Compustat-compiled input and output data for firms across the U.S. economy to calculate firm-level markups, examining measures of sales, input expenditure, capital stock information, industry activity classifications, and accounting data measuring profitability and stock market performance.

While this study purports to demonstrate an increase in markups and, therefore, an increase in market power, there are several problems with this methodology and reasoning. Fundamentally, industrial organization economics literature has clearly established that profit margins, alone, are not reliable evidence of market power.69 Additionally, it is clear that increased markups, alone, are not reliable evidence of price increases. To understand whether higher markups translated to higher prices, we would need to understand additional factors, such as whether marginal costs have changed.70 If, for example, marginal costs decreased, markups could increase even if prices remained the same; indeed, depending upon how much marginal costs decreased, margins could increase even while prices decreased. Moreover, a trend toward higher markups does not necessarily indicate firm profits are likewise trending higher, as De Loecker and Eeckhout acknowledge. As they explain, a technological change that reduces variable, but increases, fixed costs might result in increased markups but not increased profits.

In addition, higher markups might simply reflect a shift in the composition of firms within the economy. Today, high-tech (and other) firms with low marginal costs but substantial R&D costs comprise a more significant percentage of the economy than they have historically. Consider, for instance, a software company that spends a tremendous amount developing an innovative new software that consumers download on their personal devices. While the marginal cost of selling each new unit of software would be miniscule, the company—to stay in business—would need to charge a price that helped it recoup the costs incurred to create its innovative product. The more firms within the economy employing this business model, the more we would expect to see higher markups, and so the less we could assume, based upon the existence of higher markups, alone, that those markups derive from increased market power.

Aside from the methodological issues with these studies, there is the added complication that other work finds conflicting results. Robert E. Hall, for instance, finds “no evidence that mega-firm-intensive sectors have higher price/marginal cost markups.”71 Notably, while he finds no real evidence of increasing markups in less regulated sectors like Manufacturing or Transportation and Warehousing, he does find a fairly strong trend of increasing markups in heavily regulated sectors like Finance and Insurance, and Health Care and Social Assistance—which is consistent with something other than concentration driving increased markups.72

Others examining the effect of concentration upon prices likewise find results that conflict with the populist antitrust movement’s claims. James Traina, for example, analyzes this same question, attempting to correct for another flaw in De Loecker and Eeckhout’s methodology: namely, De Loecker and Eeckhout focus only on the “cost of goods sold” (COGS) facet of firms’ operating expenses, omitting the “selling, general, and administrative expenses” (SGA) facet. Traina argues that SGA is an increasingly significant share of variable costs for firms in the U.S. economy, and demonstrates that once SGA is incorporated into De Loecker and Eeckhout’s measure of cost, markups actually remain flat (or decline).73

Similarly, Ganapati examines data from 1972-2012, and finds concentration issues do not lead to higher prices, but in fact correspond with increased output.74 He concludes that the concentrated industries he analyzes are concentrated not due to anticompetitive behavior, but “likely due to technical innovation or scale economies.”75 His findings are consistent with other work that finds that the trends in concentration populists condemn may, in fact, be related to changes in economies of scale and to their corresponding productivity improvements.76

Other studies upon which populist antitrust proponents rely purport to identify higher prices using different metrics. One such regularly-cited study is John Kwoka’s meta-analysis of retrospective studies of mergers, joint ventures, and other horizontal arrangements.77 Here, Kowka compiles data covering more than 3,000 mergers and concludes the average price effect for the studied mergers is a 7.22% increase.78 His findings have, however, been called into serious question. Experienced economists in the FTC’s Bureau of Economics, Michael Vita and David Osinski, identify several objections to Kwoka’s methodology and, accordingly, his findings. They explain why various methodological failings—including not using standard meta-analytic techniques to compute average price effects and standard errors, not weighting observations by their estimated variances (meaning all price estimates are treated the same regardless of their certainty), and omitting standard errors from his report—undermine Kwoka’s fundamental findings regarding price effects.79

The evidence upon which populist antitrust supporters rely in asserting that prices have increased is, accordingly, mixed at best. The studies they cite often attempt to examine very important—but also difficult to measure—questions. The limits of these studies must be acknowledged in any serious debate regarding the state of antitrust enforcement today. While many of these studies offer good initial insights, they mostly identify areas for further research. And in no case do they clearly identify systemic shortcomings in current antitrust enforcement efforts.

In addition to questionable empirical premises, the argument that we must abandon the consumer welfare standard because prices are higher and output is lower under this standard is in serious tension with remedies the populist antitrust movement proposes. Each of the proposed remedies would, as described above, diminish consumer welfare. If, for instance, we adopted a public interest standard, prices and output might be one concern—but employment, democracy, the environment, and inequality might be competing concerns. And lower prices, higher output, and product improvements would not have the trump card in the analysis they do today. Similarly, if we decided to ban vertical mergers or prohibit any transactions over a certain size, we would be preventing at least some transactions that would lower prices and increase output. This would appear to be particularly likely in the case of banning vertical mergers, a move which empirical evidence indicates has anticompetitive outcomes—i.e., higher prices or lower output—result only rarely.80 And it would lead to the perverse result of antitrust law deliberately fostering higher prices or lower output, meaning consumers would be less able to purchase products or services they desire.

Accordingly, even if prices and output have, in fact, trended in directions harmful to consumers, the better question to be asking is whether this is because enforcement under the consumer welfare standard is not at the optimal level. The consumer welfare standard focuses on just such factors—along with innovation, quality, and other consumer concerns. If the goal is to lower prices and increase output, it is difficult to see what better standard could be adopted than one that makes these consumer concerns its sole focus.

C. Increasing Antitrust Enforcement Would Reduce Inequality

Populist antitrust supporters further note that income inequality in the United States has increased dramatically in recent decades, and proffer that lax antitrust enforcement is (to varying degrees) to blame.81 The general intuition here is fairly easily stated: lenient antitrust enforcement allows firms to obtain market power, which allows them to reduce output, raise prices, and generate monopoly profits—all of which enriches shareholders. Shareholders are, by and large, in the top percentage of wealth and income distribution, so these increasing returns increase the wealth of the wealthiest and, thus, inequality.82

Imbedded in this theory are a couple key assumptions, both of which can be empirically tested. First, that inequality is increasing. The evidence here suggests inequality is likely increasing, though the magnitude of this increase is probably overstated. Second, that increasing antitrust enforcement would reverse this trend. On the proffered causal link between antitrust enforcement and inequality, there is, so far, a notable dearth of empirical support or development.

First, consider the evidence on inequality trends. Populist claims regarding increasing inequality largely rely upon analysis of the Gini coefficient for US incomes over the last 50 years, which appears to show a steep increase in inequality. Examining the ratio of the share of US income among the 5th quintile of income-earning households to the share among the 1st quintile of households likewise seems to show increasing inequality.83

While these data points offer interesting insights, it is again important to understand their limitations. As Robert Kaestner and Darren Lubotsky emphasize, for example, failing to account for government transfers and employee benefits—that presumably substitute, in part, for cash income—can meaningfully affect these kinds of inequality measures.84 One important example they explore is that of healthcare benefits. As healthcare costs have rapidly increased in recent years, omitting a measure of health insurance benefits (provided by employers or by the government) could significantly affect ultimate inequality findings. Kaestner and Lubotsky, in fact, analyze inequality measures accounting for this omission, and find that including health insurance benefits substantially lessens the difference between high-end and low-end incomes.85 They find the ratio of income between households at the 90th percentile and the 10th percentile to be approximately 5 in 1995, 5.2 in 2004, and 5.6 in 2012.86 So while their findings support the notion that inequality is increasing, they also suggest that the trend is significantly smaller than reported.

Examining household consumption trends tells a similar story. Scholars have argued that consumption might be a superior measure of welfare, given a “closer link between consumption and well-being.”87 Consumption trends would also seem to be relevant when considering antitrust enforcement efforts, as they offer more information regarding economic effects than isolated income or wealth measurements. Examining household consumption over the last couple decades indicates that inequality is increasing but at a muted rate.

Accordingly, the evidence does seem to indicate inequality is increasing by some amount. Potentially more-accurate measures of income and welfare, however, suggest this trend is not as significant as populists claim. So, the first assumption in this particular populist theory appears to be valid, if often overstated. That leads us to the second—and for this discussion, the critical—assumption that antitrust enforcement is driving the apparent inequality trend.

Second, consider the empirical evidence supporting a causal link between antitrust enforcement and inequality. This proffered link remains, thus far, largely theoretical and undeveloped empirically. Populist papers advocating for increased antitrust as a salve for increasing inequality do not offer empirical support for their preferred course of treatment. But other authors have begun to explore empirically the proposed tie between antitrust enforcement and inequality. Wright et al., for instance, present time series regressions relating measures of inequality to antitrust enforcement measures.88 While the authors acknowledge the standard reasons that these analyses cannot isolate, with confidence, causation, their work provides a useful foray into the empirical basis for the notion that antitrust enforcement and inequality are causally linked. The authors examine data from DOJ investigations between 1984 and 2016, focusing first on merger investigations, given the populist emphasis on merger activity, and then broadly examine all DOJ investigations for a more general enforcement measure. Their results do not offer “much empirical evidence to substantiate the proposed correlation between antitrust enforcement activity and inequality.”89

Populist claims that increased antitrust enforcement is necessary to combat a severe trend of increasing inequality thus appear to be overstated. While inequality appears to be increasing, the rate is likely more modest than the populist movement implies. And there is, as of yet, no empirical support for the underlying proposition that increasing antitrust enforcement levels would slow, stop, or reverse this trend.

#### Inequality has zero effect on war.

Gal Ariely 15, senior lecturer in the Department of Politics & Government, Ben-Gurion University of the Negev, PhD from the University of Haifa’s School of Political Sciences, “Does National Identification Always Lead to Chauvinism? A Cross-national Analysis of Contextual Explanations,” Globalizations, 2015, https://s3.amazonaws.com/academia.edu.documents/43980028/Ariely\_Globalizations\_2015.pdf?AWSAccessKeyId=AKIAIWOWYYGZ2Y53UL3A&Expires=1515397197&Signature=78lnbbHNRVjhLgOKyRPKm%2BK8M1o%3D&response-content-disposition=inline%3B%20filename%3DDoes\_National\_Identification\_Always\_Lead.pdf

With respect to internal explanations, the effects of income inequality and ethnic diversity are presented in Table 3. Models 3.1 and 3.2 indicate that neither directly affects chauvinism. H4 is therefore not supported. The results suggest, however, that both have a negative effect on the national-identification slopes. Contrary to our expectations, countries with higher levels of economic and ethnic division appear to exhibit a weaker relation between national identification and chauvinism. While these findings might seem to contradict H5, the pattern was caused by outliers. After excluding South Africa—the most unequal and ethnic diverse country in our sample—the effect of ethnic diversity is not even of borderline significance. After excluding Chile—the most unequal country in our sample—the interaction effects for economic inequality were also far from significant.

The results, therefore, do not support H5.21¶ Conclusions¶ During the historic phone call between President Obama and Iranian President Sheikh Hasan Rouhani in September 2013, the latter stated that his country’s nuclear program ‘represents Iran’s national dignity’.22 This declaration reflects the common perception that Iran’s nuclear program mobilizes Iranians in support of resisting further national humiliation at the hands of foreigners (Moshirzadeh, 2007). This reflects the important role national feelings play in the contemporary international arena. Evidence from other examples—such as the Israeli-Palestine conflict—indicates that national identity serves as a key factor in conflict resolution. The prominence of national feelings is not limited to the Middle East, their effect on public attitudes towards international issues, and conflicts also being manifest in the West (Billig, 1995; Kinder & Kam, 2010).¶ It is thus hardly surprising that scholars seeking to develop a better understanding of conflicts adopt a social-psychology perspective, replacing the deterministic view that identification with one’s in-group necessarily leads to antagonism towards out-groups with an examination of the broader social context. In line with this approach, the present paper focuses on the way in which political and social contexts encourage chauvinistic views towards the international arena and how they affect the relation between national identification and chauvinism.¶ Integrating various social and psychological theories, we investigated two external contextual explanations (globalization and conflict) and an internal explanation (social division). Employing cross-national survey data, we examined the relation between national identification and chauvinism across 33 countries. The findings indicate that a positive relationship exists between national identification and chauvinism across most of the countries, although the level differs from country to country. Using a multilevel regression analysis, we tested to see whether globalization, conflict, and social division correlate with this variation. The results indicate that social and political contexts are related to chauvinism and the ways national identifi- cation and chauvinism are linked. Although a closer relation exists between national identification and chauvinism in more globalized countries, globalization failed to explain the variation in chauvinism itself. These findings support the notion that globalization highlights the importance of national identity (Calhoun, 2007; Castells, 2011). While those sections of globalized societies that are attached to their country also tend to resist international cooperation and endorse hostile views, the complexity of the phenomenon—as evinced by the divergent findings of previous studies (e.g. Jung, 2008; Norris & Inglehart, 2009)—calls for further research of this interpretation. The fact that the current study is cross-sectional must also be taken into account, the findings adducing the relation but not the causal relations between the variables. In contrast to experimental studies, the present design is similarly limited in its ability to offer a robust control for alternative explanations.¶ Another external factor found to be relevant—to a certain degree—was conflict. Countries that suffered large numbers of deaths in conflicts and mobilized resources and personnel exhibited higher levels of chauvinism. When other indices for conflict were used, however, these results were not replicated. A possible explanation for this finding lies in the inherent limitation in the way in which conflicts are measured across various countries. Measuring international conflicts is a challenging task (Anderton & Carter, 2011). While the ways of measuring conflict were chosen because they reflect different dimensions of conflict in order to be representative of a wide range of countries, the problem of comparability cannot be ignored. An alternative explanation may derive from the fact that only deaths from conflict and resources/personnel mobilization are sufficiently significant to contribute to chauvinism. The limitations of our measurements of conflict and research design mean that this idea must remain speculative, however. In addition, it is important to emphasize that the sample of countries is also limited as many countries are not involved in conflict and there is also limited variation in the types of conflicts.¶ Contrary to what the divisionary theory of national mobilization would lead us to expect, neither economic inequality nor ethnic diversity were related to chauvinism or affected the relation between national identification and chauvinism. This finding might also be explained by the limitation of the current research design. The number of countries included in the ISSP 2003 National Identity Module being relatively small and the sample only covering countries with available survey data, the results relate solely to this specific sample of countries. Across another set of countries, social division might play a far more significant role. Another explanation might be the meaning given to national identification and chauvinism across the countries. While evidence exists for the comparability of the scales across most of the countries, the divergent meaning probably attributed to them in Germany, the United States, and Israel might form an additional limitation.

## Adv---2

### 1NC – Turn

#### Antitrust can’t solve and worsens vulnerabilities.

McLaughlin ’19 [Michael and Daniel Castro; April 10; research analyst at the Information Technology and Innovation Foundation; vice president at ITIF and director of ITIF's Center for Data Innovation; ITIF, “Breaking Up Big Tech Would Not Make Consumer Data More Secure,” https://itif.org/publications/2019/04/10/breaking-big-tech-would-not-make-consumer-data-more-secure; KP]

A growing number of advocates are arguing that many U.S. technology firms are too big and that antitrust regulators should break them up. For example, Senator Elizabeth Warren (D-MA) recently detailed how the government should break up Amazon, Google, and Facebook. Some advocates have wrongly justified similar positions by stating that smaller firms would have less data, and so consumers would be better protected from data breaches.

Data breaches refer to incidents of hacking that allow individuals to exfiltrate data from another party’s computer system, such as when hackers copied the data of nearly 150 million Americans from Equifax’s servers. Frequently, hackers use phishing attacks or ransomware to illicitly access data, but they can also exploit vulnerabilities in code, which is how hackers gained access to 30 million Facebook users’ accounts.

Many of the calls for antitrust action have to do with Facebook data. For example, two co-founders of the anti-Facebook campaign “Freedom From Facebook” published an op-ed in USA Today arguing that because of the recent data breach at Facebook, the Federal Trade Commission should go beyond a “historic fine” and “break up Facebook’s social media monopoly.” Some members of Congress have echoed these sentiments. For example, Senator Mark Warner (D-VA) stated that the data breach was “a reminder about the dangers posed when a small number of companies like Facebook or the credit bureau Equifax are able to accumulate so much personal data about individual Americans without adequate security measures.” Later, when asked about breaking up Facebook, he did not take the option off the table, instead saying “I see breakup as more of a last resort.” And Senator Richard Blumenthal (D-CT) noted that “Facebook has become a honeypot for malevolent lawbreakers who seek to undermine our society and democracy.” He too has stopped short of explicitly calling to breakup Facebook but has argued there is a link between competition and data protection, stating in January, “This is yet another astonishing example of Facebook’s complete disregard for data privacy and eagerness to engage in anti-competitive behavior.” The remedy, according to organizations like Open Market Institute and Color of Change, is for regulators to force Facebook to divest its ownership of Instagram and WhatsApp.

But if the problem is data breaches, antitrust is the wrong tool. There is no reason to believe that consumer data is more protected if five firms each hold data on 20 million Americans versus if one firm holds data on 100 million Americans. Plenty of companies with less data than Facebook—from Under Armour to Caribou Coffee—have had data breaches. And even if the government were to break up some of the largest tech firms, the resulting organizations would still represent enormous “honeypots” to malicious actors—for example, Instagram alone has 1 billion monthly users.

But more importantly, breaking up large tech firms would not make those smaller companies more secure. Indeed, larger firms have several advantages over smaller ones when it comes to security. Many security upgrades involve fixed, rather than variable costs. Larger firms can better afford to invest more in security since they can amortize the cost over a larger user base and benefit from economies of scale. They can also hire larger and more experienced security teams to prevent, detect, and respond to new threats. For example, Facebook has steadily increased the size of its staff dedicated to addressing security threats on its platform. In addition, breaking up large tech firms will not make U.S. elections less vulnerable to Russian interference, which Senator Warren has suggested. The data on large platforms is a rich source of intelligence on cyber threats. Alex Stamos, the former chief security officer at Facebook, has noted that Google “has the most useful data set available to any private company for tracking state adversaries and intelligence services.”

#### Small firms are cybersecurity risks – giants are more secure.

Peters ’19 [Chistopher; March 26; Chief Executive Officer, The Lucrum Group; Senate Hearing 116-260, “The Cybersecurity Responsibilities of the Defense Industrial Base,” https://www.govinfo.gov/content/pkg/CHRG-116shrg41313/html/CHRG-116shrg41313.htm; \*SMM = small to medium-sized manufacturers; KP]

The research shows that SMMs have a poor understanding of cybersecurity in general. They often do not understand the threats much less what to do about them.

This overall lack of awareness and preparedness should be alarming. Large manufacturers typically have very robust security measures for both their business and operating systems. That makes the less knowledgeable and poorly defended SMMs in the supply chain a greater target for cyber attacks particularly since they often handle much of the technical data sent from those larger contractors. Whether the attack is to steal intellectual property, introduce defects into weapon systems, or to shut down entire operations, the SMMs are prime targets.

### 1NC – No Systemic Risk

#### No systemic risk – big tech is patching up holes.

Chung ’21 [Ingrid; August 30; writer; National Review, “Big Tech Is Doing the Right Thing on Cybersecurity,” https://www.nationalreview.com/corner/big-tech-is-doing-the-right-thing-on-cybersecurity/; KP]

President Joe Biden recently met with Big Tech executives to discuss how to improve cybersecurity after recent cyberattacks in which government software contractor Solarwinds and oil pipeline Colonial Pipeline were targeted. Leading tech corporations, including IBM, Google, and Amazon, will all try to improve cybersecurity by investing in the training of personnel in this field and upgrading their respective encryption and security systems. Microsoft has also committed to investing $150 million in upgrades for cybersecurity systems of government agencies. Big Tech may not always do the right thing, but these plans to enhance cybersecurity are certainly something that we can all stand behind.

In recent years, as the Internet has become increasingly influential and indispensable, cybersecurity has, correspondingly, become an increasingly prominent threat to not only citizens’ privacy but also to national security. Former national-security adviser John Bolton explained the significance of cybersecurity to national defense in a recent National Review article, in which he characterized threats from cyberspace as “a multiplicity of hidden, ever-changing threats.” A recent report by the Heritage Foundation raised concern over espionage, trading of secrets, and the disruption of military commands and communication potentially being conducted in the cyber domain.

The effective regulation of cyberspace, a relatively new front for modern warfare characterized by its elusiveness and lack of boundaries, is sometimes challenging. Laxness in cybersecurity, however, has often led to catastrophic consequences. For instance, the WannaCry Ransomware Cyber Attack in 2017, in which files in affected computer systems were locked until ransom was paid for their decryption, affected approximately 200,000 computers in 150 countries and led to enormous financial costs. Victims of the cyber-extortion scheme included entities from government agencies such as the English National Health Service to major international corporates such as Boeing.

It is well established that both the state and leading tech corporations have a legitimate interest in enhancing cybersecurity. The government is responsible for engaging in national defense in the cyber domain and tech corporations are obligated to protect the privacy of their users, whose personal information is often entrusted to them.

Big Tech’s plans to cooperate with the government to improve cybersecurity through financial investments appears to be promising. While it may be difficult to predict the effectiveness of such investments, the fact that Big Tech and the government are placing the enhancement of cybersecurity close to the top of their agenda and are committing to coordinated efforts is good news. Big Tech, with its financial prowess derived from the sheer size of the industry, and a unique relationship with the use of cyberspace, is uniquely positioned to materially contribute to state-led efforts to secure cyberspace. Furthermore, investing in education on cybersecurity of employees may also be useful in raising awareness and amplifying the industry’s collective concern over capacity to combat cyberattacks in the long run.

### 1NC – No Disinformation

#### No disinformation impact – studies disprove persuasive effect.

Nyhan 19 – Brendan Nyhan, public policy professor at the University of Michigan. [Why fears of fake news are overhyped, 2-12-19, https://www.cnbc.com/2019/02/11/why-fears-of-fake-news-are-overhyped.html]

How easy is it to change people’s votes in an election?

The answer, a growing number of studies conclude, is that most forms of political persuasion seem to have little effect at all.

This conclusion may sound jarring at a time when people are concerned about the effects of the false news articles that flooded Facebook and other online outlets during the 2016 election. Observers speculated that these so-called fake news articles swung the election to Donald J. Trump. Similar suggestions of large persuasion effects, supposedly pushing Mr. Trump to victory, have been made about online advertising from the firm Cambridge Analytica and content promoted by Russian bots.

Much more remains to be learned about the effects of these types of online activities, but people should not assume they had huge effects. Previous studies have found, for instance, that the effects of even television advertising (arguably a higher-impact medium) are very small. According to one credible estimate, the net effect of exposure to an additional ad shifts the partisan vote of approximately two people out of 10,000.

In fact, a recent meta-analysis of numerous different forms of campaign persuasion, including in-person canvassing and mail, finds that their average effect in general elections is zero.

Field experiments testing the effects of online ads on political candidates and issues have also found null effects. We shouldn’t be surprised — it’s hard to change people’s minds! Their votes are shaped by fundamental factors like which party they typically support and how they view the state of the economy. “Fake news” and bots are likely to have vastly smaller effects, especially given how polarized our politics have become.

Here’s what you should look for in evaluating claims about vast persuasion effects from dubious online content:

How many people actually saw the questionable material. Many alarming statistics have been produced since the election about how many times “fake news” was shared on Facebook or how many times Russian bots retweeted content on Twitter. These statistics obscure the fact that the content being shared may not reach many Americans (most people are not on Twitter and consume relatively little political news) or even many humans (many bot followers may themselves be bots).

Whether the people being exposed are persuadable. Dubious political content online is disproportionately likely to reach heavy news consumers who already have strong opinions. For instance, a study I conducted with Andrew Guess of Princeton and Jason Reifler of the University of Exeter in Britain showed that exposure to fake news websites before the 2016 election was heavily concentrated among the 10 percent of Americans with the most conservative information diets — not exactly swing voters.

The proportion of news people saw that is bogus. The total number of shares or likes that fake news and bots attract can sound enormous until you consider how much information circulates online. Twitter, for instance, reported that Russian bots tweeted 2.1 million times before the election — certainly a worrisome number. But these represented only 1 percent of all election-related tweets and 0.5 percent of views of election-related tweets.

# 2NC

## T

### 2NC---AT: W/M

#### All they do is create a rule, allowing its use for case-by-case evaluation---until that rule is applied, this prohibits nothing at all!

Andriani Kalintiri 20, Lecturer in Competition Law at King's College London, “Analytical Shortcuts in EU Competition Enforcement: Proxies, Premises, and Presumptions,” Jnl of Competition Law & Economics (2020) 16(3): 392-433, Lexis

Firstly, normative assertions and economic propositions are what gives shape to the otherwise vague letter of the antitrust and merger provisions. Arguably, those provisions do not immediately reveal what is prohibited and are in need of elaboration to become operational. In this process, varying perceptions about the goals of the discipline may completely shift the focus of the analysis. 45 For example, if competition law is to be enforced with a view to protecting small- and medium-sized enterprises or employment-as opposed or in addition to, say, promoting consumer welfare-then different effects in the market may become relevant. 46 On the other hand, economic premises about the procompetitive or anticompetitive nature of the conduct at hand typically inform the choice between the application of a 'rule' or a 'standard'. 47 The prohibition, for instance, of cartels as 'by object' violations of antitrust law rests on the economic premise that conduct of this kind lacks any efficiency justification and thus a rule of prima facie illegality is not liable to chill procompetitive behaviour. 48 Conversely, the treatment of quantity rebates as prima facie lawful is grounded in the idea that this type of discount reflects the cost savings achieved by the undertaking in question. 49 In the same vein, the 'by effect' analysis of exclusive dealing under Article 101(1) TFEU is explained by the economic insight that behaviour of this kind may entail efficiencies. 50 Accordingly, normative and economic premises are instrumental in the construction of competition law.

### 2NC---AT: No Brightline

#### It’s a distinction with a difference---‘rule of reason’ and ‘per se’ have precise meanings AND access literature with completely different base assumptions.

Donald L. Beschle 87, Associate Professor of Law, The John Marshall School of Law. B.A., 1973, Fordham University; J.D., 1976, New York University School of Law; LL.M., 1983, Temple University School of Law. March. CURRENT TOPIC IN ANTITRUST: "What, Never? Well, Hardly Ever": Strict Antitrust Scrutiny as an Alternative to Per Se Antitrust Illegality., 38 Hastings L.J. 471

In response to recent attacks on per se rules, courts have clung to the term and to its absolutism by steadily narrowing the definitions of the types of behavior subject to those rules. The result has been not only much confusion, with words being used to designate things far narrower than their commonly understood meanings, but also the application of permissive rule of reason treatment to some behavior which, while not meriting absolute prohibition, clearly deserves careful antitrust analysis.

The proper response to this confusion is to retain the valid insight of per se jurisprudence, that certain types of behavior should be treated as more suspect than others, while abandoning the indefensible absolutism of the term "per se." However, since terms carry with them not only precise meanings, but also more general attitudes, "per se" must be replaced with a term which does not carry the permissive connotations which have become associated with the "rule of reason."

The best available term for this new test is strict antitrust scrutiny. The use of such a term, and the type of analysis it suggests, is well known in constitutional law, where it by no means is associated with leniency. When faced with conduct which would traditionally be labelled per se illegal under the antitrust laws, courts should apply strict antitrust scrutiny. They should ask whether the defendant can carry the heavy burden of demonstrating that its conduct is narrowly tailored to achieve a procompetitive end. By replacing a system which places absolute prohibitions on types of conduct which can be defined so narrowly as to be irrelevant with a system which places, not absolute prohibitions, but heavy negative presumptions, on a larger set of behaviors, strict scrutiny should, on the whole, lead to more vigorous antitrust enforcement.

#### There’s a clear test: can the practice described by the AFF ever legally occur after the plan? If it’s ever still allowed, it’s not prohibited!

Martin G. Vallespinos 20, LLM, University of Michigan Law School; Manager at Ernst & Young Detroit, “Can the WTO Stop the Race to the Bottom? Tax Competition and the WTO,” 40 Va. Tax Rev. 93, Lexis

Prohibited subsidies, as described in Article 3 of the SCM Agreement, are disallowed outright, and WTO members can unilaterally impose countervailing measures against the country sponsoring them. This category [\*146] includes (i) subsidies that are contingent, in law 237or in fact 238upon export performance 239and (ii) subsidies that are contingent upon the use of domestic over imported goods.

Export contingency can be "de jure" or "de facto." De jure export contingency derives from "the very words of the relevant legislation, regulation[,] or other legal instrument constituting the measure." 240De facto export contingency is met when "the facts demonstrate that the granting of a subsidy ... is in fact tied to actual or anticipated exportation or export earnings." 241The WTO jurisprudence regarding "de facto" contingency, however, is not uniform and WTO panels have set forth various alternative tests. In Australia-Automotive Leather II, the Panel established a standard of "close connection" between the grant of a subsidy and export performance. 242In Canada-Aircraft, the Panel and the Appellate Body ("AB") implemented the so called but-for test, which interprets the "tied to" language to be equivalent to a relationship of "conditionality" between the grant of a subsidy and export performance. 243Therefore, de facto contingency is met when "the facts demonstrate that the tax benefit would not have been granted ... but for anticipated exportation or export earnings." 244In the same case, the AB clarified that "it does not suffice to demonstrate solely that a government granting a subsidy anticipated that exports would result." 245This means that, in the AB's view, the granting authority's expectations on exports may not be sufficient to meet the standard, so the subsidy must be objectively contingent upon export [\*147] performance. 246In pursuit of a more objective criteria, the AB suggested that, "where relevant evidence exists, the assessment could be based on a comparison between, on the one hand, the ratio of anticipated export and domestic sales of the subsidized product ... and on the other hand, the situation in the absence of the subsidy." 247But both the Panel and AB further clarified that an assessment based on ratios is incapable by itself of establishing that a given subsidy is de facto contingent on export performance "in the absence of any meaningful analysis regarding how a subsidy's design and structure contributes to the presence of an incentive for a recipient to [favor] export sales over domestic sales." 248

With respect to domestic use contingency, Article 3.1(b) contains no reference to contingency in law or in fact. Nevertheless, the AB has found that Article 3.1(b)'s scope covers both de jure and de facto contingency. 249Also, both the Panel and the AB have concluded that the general guidance regarding evaluations of de facto export contingency should be applicable to de facto domestic use contingency. Finally, it should be mentioned that the Panel and AB decisions are not binding precedential authority but rather can be only strongly persuasive authority. Therefore, countries should be aware of all these alternative tests when designing their tax policies, as there is no certainty as to which criteria WTO decision makers may apply in the event of a dispute (e.g. but-for test, close connection test, assessments based on ratios, etc.).

A subsidy that is not considered "prohibited" can still satisfy the specificity criteria and become an actionable subsidy if it meets the two following requirements:

(1) Specificity: an actionable subsidy is considered specific when the eligibility to receive the benefits is limited to certain enterprises, industries, or areas; 250and

(2) Adverse effect: an actionable subsidy is considered adverse when it produces a serious prejudice to the interests of another member, an injury to its domestic industry, or a nullification or impairment of benefits accruing directly or indirectly to other members under the GATT. 251

### 2NC---AT: Predictability

#### ‘ANTICOMPETITIVE’---deeming a practice anticompetitive under antitrust law means declaring it per se illegal

Lewis Franklin Powell Jr., 77, US Supreme Court Justice, delivered the opinion of the Court. Cont'l T.V. v. GTE Sylvania, 433 U.S. 36. Argued February 28, 1977 ; June 23, 1977; as amended No. 76-15

[\*\*\*\*23] LEdHN[3] [3]LEdHN[4] [4]LEdHN[5A] [5A]LEdHN[6A] [6A]The traditional framework of analysis under § 1 of the Sherman Act is familiar and does not require extended discussion. Section [\*\*\*580] 1 HN1 prohibits "[e]ery contract, combination…, or conspiracy, in restraint of trade or commerce." Since the early years of this century a judicial gloss on this statutory language has established the "rule of reason" as the prevailing standard of analysis. Standard Oil Co. v. United States, 221 U. S. 1 (1911).Under this rule, the fact-finding weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. 15 [\*\*\*\*25] HN2 Per se rules of [\*50] illegality [\*\*\*\*24] are appropriate only when they relate to conduct that is manifestly anticompetitive. As the Court explained in Northern Pac. R. Co. v. United States, 356 U. S. 1, 5 (1958), "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." 16 [Note 16 HN3 Per se rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its procompetitive consequences. Cases that do not fit the generalization may arise, but a per se rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them. Once established, per se rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule-of-reason trials, see Northern Pac. R. Co. v. United States, 356 U.S. 1, 5; United States v. Topco Associates, Inc., 405 U.S. 596, 609-610 (1972), but those advantages are not sufficient in themselves to justify the creation of per se rules. If it were otherwise, all of antitrust law would be reduced to per se rules, thus introducing an unintended and undesirable rigidity in the law.]

In [\*\*\*\*26] essence, the issue before us is whether Schwinn's per se rule can be justified under the demanding standards of Northern Pac. R. Co. The Court's refusal to endorse a per se rule in White Motor Co. was based on its uncertainty as to whether vertical restrictions satisfied those standards. Addressing this question for the first time, the Court stated: S

"We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on [\*\*2558] competition and lack… any redeeming virtue' ( Northern Pac. R. Co. v. United States, supra, p. 5) and therefore should [\*51] be classified as per se violations of the Sherman Act." 372 U. S., at 263.I

Only four years later the Court in Schwinn announced its sweeping per se rule without even a reference to Northern Pac. R. Co. and with no explanation of its sudden change in position. 17 We turn now to consider Schwinn in light of Northern Pac. R. Co.

[\*\*\*\*27] The market impact of vertical restrictions 18 is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition. [\*52] 19 Significantly, the Court in Schwinn did not distinguish among the challenged restrictions on the basis of their individual potential for intrabrand harm or interbrand benefit. Restrictions that completely eliminated intrabrand competition among Schwinn distributors were analyzed no differently from those that merely moderated intrabrand competition among retailers. The pivotal factor was the passage of title: All restrictions were held to be per se illegal where title had passed, and all were evaluated and sustained under the rule of reason where it had not. The location restriction at issue here would be subject [\*\*\*582] to the same pattern of analysis under Schwinn.

[\*\*\*\*28] It appears that this distinction between sale and nonsale transactions resulted from the Court's effort to accommodate the perceived intrabrand harm and interbrand benefit of vertical restrictions. The per se rule for sale transactions reflected the view that vertical restrictions are "so obviously destructive" [\*\*2559] of intrabrand competition 20 that their use would "open the door to exclusivity of outlets and limitation of territory [\*53] further than prudence permits." 388 U. S., at 379-380.21 Conversely, the continued adherence to the traditional rule of reason for nonsale transactions reflected the view that the restrictions have too great a potential for the promotion of interbrand competition to justify complete prohibition. 22 [\*54] The Court's opinion provides no analytical support for these contrasting positions. Nor is there even an assertion in the opinion that the competitive impact of vertical restrictions [\*\*\*583] is significantly affected by the form of the transaction. Nonsale transactions appear to be excluded from the per se rule, not because of a greater danger of intrabrand harm or a greater promise of interbrand benefit, [\*\*\*\*29] but rather because of the Court's unexplained belief that a complete per se prohibition would be too "inflexibl[e]." Id., at 379.

#### ‘SUBSTANTIAL’---it means per se illegal

Philip C. Kissam 83, Professor of Law, University of Kansas. B.A. 1963, Amherst College; LL.B. 1968, Yale University. "Antitrust Law and Professional Behavior", 62 Tex. L. Rev. 1

A federal district court in Florida adopted this view in Feminist Women's Health Center, Inc. v. Mohammad, 415 F. Supp. 1258 (N.D. Fla. 1976), rev'd on other grounds, 586 F.2d 530 (5th Cir. 1978). A group of fee-for-service obstetricians allegedly conspired against a low fee, outpatient abortion clinic by discouraging physicians from working at the clinic and by refusing to provide requested backup services at the obstetricians' hospital. The defendants claimed that their actions were motivated by a concern that the clinic was providing inferior quality services. Id. at 1269-70. On a motion for a preliminary injunction, the district court rejected this defense because there was no evidence of inferior quality and because there was a substantial difference between the fees charged by the clinic and those charged by the fee-for-service physicians for the same services. Id. The court in effect held that the defendants had acted with an anticompetitive purpose and that the plaintiff properly relied on a per se theory. See id. at 1263, 1270.

Commentators have noted other cases in which fee-for-service physicians have denied hospital staff privileges to physicians who were associated with prepaid medical practices (HMOs) that threatened to compete with the fee-for-service physicians. See, e.g., Goldberg & Greenberg, supra note 36, at 59-62; Havighurst, Health Maintenance Organizations and the Market for Health Services, 35 LAW & CONTEMP. PROBS. 716, 777-81 (1970). There is no reason why an antitrust court should not apply the per se rule summarily in these cases if there are substantial anticompetitive purposes behind the exclusionary act. See Kissam, supra note 188, at 503.

#### antage innovation solves---we just force a mechanistic tether

#### Current proposals disagree on this issue, with some advocating prohibitions, and others advocating altered standards---that proves this is a real debate.

Brumfield et al. 21, Kevin C. Adam, Jaclyn Phillips & Chenuan Fu, 7/30/21. Antitrust Division, White & Case, LLP. "Technology Industry Should Watch Closely as the Executive Branch and Lawmakers Set Their Sights on Antitrust" https://www.whitecase.com/publications/alert/technology-industry-should-watch-closely-executive-branch-and-lawmakers-set

Separately, federal lawmakers were already taking aim at similar 'initiatives' through proposed legislation. On June 11, 2021, lawmakers from both parties in the House Judiciary Committee, led by Antitrust Subcommittee Chair David Cicilline (D-RI) and Ranking Member Ken Buck (R-CO), introduced five bills calling for substantial changes to existing antitrust law, such as: introducing new forms of prohibited conduct (i.e., self-preferencing); targeting acquisitions by technology companies that meet a defined size threshold; shifting burdens of proof; and mandating data portability and interoperability.

### 2NC---AT: PICs

#### Sector, product or company PICs don’t compete---antitrust prohibitions can include exemptions.

Frederick 89 (Donald A. Frederick-Attorney-Adviser. “MANAGING COOPERATIVE ANTITRUST RISK” , United States Department of Agriculture, Agricultural Cooperative Service, Cooperative Information Report 38, <https://www.rd.usda.gov/files/cir38.pdf>, 1989, date accessed 9/5/21)

This exposes farmers to considerable antitrust risk unless their joint marketing activity is conducted in a manner exempt from antitrust prohibitions. As one judge phrased it:

“It is clear that if individual agriculturalists, through the medium of a cooperative, jointly fixed prices, reasonably or otherwise, without statutory authorization, they would be subject to prosecution.” (emphasis added) 14/

## CP---OSG

### Perm: Do Both---2NC

#### 1. PROCESS---the perm eliminates the CVSG---it’s only possible for pending cases.

Days ’96 [Drew; October 1995; Solicitor General of the United States, LLB From Yale Law School, BA from Hamilton College; Southern Methodist University Law Review, “The Solicitor General and the American Legal Ideal,” vol. 49]

Third, the Solicitor General is often asked formally by the Supreme Court through a process referred to in the relevant jargon as "CVSG" (or "call for the views of the Solicitor General") to express his views on whether a pending petition for certiorari in a non-government case should be granted. In such instances, the Court is not seeking the advice of an advocate or a partisan, but rather of an officer of that court committed to providing his best judgment with respect to the matter at issue.

#### The perm’s fixed and preordained outcome demonstrates the OSG had no ex-ante influence.

Black ’11 [Ryan and Ryan Owens; 2011; Ph.D. and Professor of Political Science at Michigan State University; Ph.D. and Professor of Political Science and Affiliate Faculty in the Law School at Harvard University; Political Research Quarterly, “Solicitor General Influence and Agenda Setting on the U.S. Supreme Court,” vol. 64]

Still, scholars present various assorted theories on why she so commonly succeeds. The longest-standing view argued that much like a “Tenth Justice,” the SG serves as an agent of the Court (Caplan 1988). She plays a special role for the Court, screening cases and advocating positions that advance the goals of the Court as an institution (Salokar 1992). As one former clerk told us, the SG is expected to “play as an honest broker of the facts” when communicating with the Court. Perry’s (1991, 132) seminal text likewise is replete with comments from justices who assert that the SG aids the Court:

Every solicitor general . . . has taken this job very seriously . . . not to get us to take things that don’t require our attention relative to other things that do. They are very careful in their screening and they exercise veto over what can be brought to the board.

In recent years, scholars have taken a different tack and applied signaling theory to examine the ideological conditions under which justices accept the information provided to them by the SG (Bailey, Kamoie, and Maltzman 2005). Given an asymmetry in information between sender and receiver, the receiver relies on shortcuts, such as ideological agreement, to determine the accuracy of the sender’s signal. If the sender and receiver generally share the same worldview, the receiver has good reason to trust the information conveyed by the sender. Alternatively, if the sender and receiver hold competing worldviews, the receiver will discount the information except when it is contrary to the sender’s self-interest. Applying this theory to the Court’s relationship with the SG, Bailey, Kamoie, and Maltzman (2005) find that a justice is likely to vote with the SG when she is more liberal (conservative) than the justice but happens to take a conservative (liberal) position in the case.

Other theories assert that SG success is the result of separation of powers considerations (Johnson 2003). Because the Court relies on the executive to enforce its decisions, justices defer to the SG (Epstein and Knight 1998). Consistent with this theory, Johnson (2003) finds that the Court is more likely to invite the SG to participate in cases to determine whether the president will enforce its decisions. Along similar lines, Segal (1988) argues that SG success is the result of general deference by the Court to its more democratically elected counterparts.

Others claim, however, that the SG’s key to success is simply experience. Because she appears before the Court more often than any other litigant, the SG is “familiar with the predilections of individual justices and the Court” (Pacelle 2003, 44). Accordingly, “The Solicitor General is merely one of many successful lawyers who appear before the Court. . . . There is no evidence for the literature’s frequent assertion that the [SG’s] success is derived from an uncommon reputation as the Supreme Court’s leading practitioner” (McGuire 1998, 506).

But does the SG influence justices to behave differently than they would like? On this score, existing studies largely have been plagued by problems of observational equivalence (but see Nicholson and Collins 2008). To be sure, there is likely a role for all of these important theories in explaining SG success. Nevertheless, the question of SG influence remains unresolved. No existing work of which we are aware examines the likely action a justice would take but for the recommendation of the SG. We build off recent findings that yield strong predictions for justices’ agenda votes. By theorizing each justice’s ex ante desires in a case and analyzing whether they follow those predictions, we infer whether the SG influences them. Along the way, we discover a compelling role for the law and legal considerations.

Theory and Hypotheses

To examine whether SGs influence judicial behavior, we expand on the important contributions of Bailey, Kamoie, and Maltzman (2005), Pacelle (2003), and Wohlfarth (2009) and focus on both policy and legal considerations and the role they jointly play in justices’ decisions to set the Court’s agenda. We examine the Court’s agenda stage for three reasons.

First, justices set the Court’s agenda so as to achieve their policy goals. That is, justices set the Court’s agenda by looking ahead to the expected policy the Court will make if it hears the case to determine whether they prefer that policy over existing policy. Few quotes make the point so clearly as the following, which comes from a Blackmun clerk in the markup to a cert pool memo in Thornburgh v. Abbott (no. 87-1344):

I think it pretty much comes down to whether you want to reverse the judgment below (the likely outcome of a grant). If you are pretty sure you do, you should vote to grant now. Otherwise, it’s better to wait.

Systematic empirical studies likewise illustrate the tremendous importance of policy predictions during the agenda-setting stage. Justices cast their votes with one eye fixed on the Court’s expected merits outcome. For example, Black and Owens (2009a) find that, all else equal, justices are more likely to vote to hear cases when the policy they expect the Court to make is better for them than the status quo. Justices who are closer to the expected policy location of the Court’s decision are 75 percent more likely to grant review to a case than justices who prefer the status quo. Other studies find similar results (Caldeira, Wright, and Zorn 1999; Owens 2010; Boucher and Segal 1995).

Our second reason for focusing on the agenda-setting stage turns on the fact that there are fairly well defined and measurable legal variables that can theoretically be pitted against policy motivations, which provides us leverage to examine the limits of SG influence. Similar objectively defined and measurable legal factors at the merits stage do not currently exist.

Third, the agenda stage provides a good way for us to circumvent selection effects that could bias a finding in favor of SG influence. During the agenda stage, the SG makes recommendations to the Court as an amicus curiae one of two ways: voluntarily or at the direction of the Court. When the United States is not a party to the case, the SG may file an amicus brief with the Court stating why she thinks it should or should not grant review to a particular case. If the SG has not filed an amicus brief voluntarily, the Court can invite her to do so. When the Court invites the SG (called a “CVSG”), it issues a statement which reads, “The Solicitor General is invited to file a brief in this case expressing the views of the United States.” The invite is, in practice, an order by the Court to appear as an amicus at all stages of the case’s progression.2 If the SG primarily gets involved in cases she knows she will win, a finding of SG influence is likely to be exaggerated. What we seek, then, are cases where the threat from that selection bias is minimized—the CVSG minimizes such a threat. Thus, to avoid the selection effects we mentioned above, we examine invited and voluntary SG recommendations, though, as an empirical matter, invited recommendations far outnumber voluntary recommendations at the Court’s agenda-setting stage.3

#### 3. SHORT-CIRCUITING---the perm invites views, then immediately cuts them out by deciding. That snaps inter-branch relations.

Thompson ‘9 [David and Melanie Wachtell; Winter 2009; JD from Stanford Law School, BA from Yale University; Project Manager for the Special Report on Regulatory Reform at the Congressional Oversight Panel, JD from Stanford Law School, AB from Princeton University; George Mason Law Review, “An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and The Call for the Views of the Solicitor General,” vol. 16]

Given the delay caused by the long turnaround time at the Office of the Solicitor General, there is the question of whether a deadline should be imposed by the Court. While such an approach would provide greater predictability for parties and the Court, it is unlikely that the Court would take this step. First, and perhaps dispositive for this question, the SG is not a party in these cases, but rather is offering a service of the executive branch as a favor to the Court. Thus, it would be politically insensitive for the Court to require the SG to respond by a certain date. Second, any step by the Court to limit the amount of time available to the SG might be perceived as a criticism of the SG by the Court, potentially complicating the relationship between the two institutions.

Recently, Solicitor General Paul Clement himself weighed in on this issue in response to a party's application to require an invitation brief to be filed within thirty days of the Court's request. 239 His response further illuminates the process taken by the SG following a CVSG and makes the case for an allowance of greater time for the Office to respond. As Clement writes:

By their nature, such invitations are extended in cases that present difficult questions of law in litigation to which the United States is not a party and, most often, has not participated prior to the time the invitation is extended. Because the government generally does not have a previously formulated position on the question presented, doing so regularly involves considerable consultation with those both inside and outside the government. Representatives of this office routinely arrange meetings with counsel for the parties to the case before the Court, including in some instances follow-up meetings, in order to better understand the legal issues, litigation history, and record. We also engage in extensive consultation with interested departments and agencies within the government to ensure that we fully understand the implications of the questions presented on the broad array of government programs and interests. 240

## DA---OSG

### 2NC---Impact---OSG

#### Climate suits are key to mitigation globally---extinction.

Oppenheimer ’22 [Michael, Noah Diffenbaugh, Christopher Field, Stephen Pacala, Daniel Schrag, and Susan Solomon; January 24; Albert G. Milbank Professor of Geosciences and International Affairs at Princeton University, Heinz Award Winner and Fellow of the American Association for the Advancement of Science; Amicus Brief in West Virginia, et al., Petitioners, v. Environmental Protection Agency, et al., Respondents, “Brief of Climate Scientists Michael Oppenheimer, Noah Diffenbaugh, Christopher Field, Stephen Pacala, Daniel Schrag, and Susan Solomon as Amici Curiae in Support of Respondents,” http://www.supremecourt.gov/DocketPDF/20/20-1530/211180/20220124150915825\_20-1530%20et%20al.%20-%20bsac%20ClimateScientists.pdf]

The question presented in this case is of great importance to amici because it has the potential to curtail the United States’ ability to combat climate change at the federal level at a critical time. It is extremely likely that humanity’s greenhouse gas emissions have already fundamentally altered the Earth’s atmosphere, raising global surface temperature levels by about 2 degrees Fahrenheit since the late 19th century. While Americans have already felt, and will continue to feel, the impacts of climate change, regulatory action by EPA can still mitigate future danger—assuming EPA retains broad authority to act.

SUMMARY OF ARGUMENT

A decade ago, this Court recognized that EPA had found “‘compelling’ evidence” that humanity’s greenhouse gas (e.g., carbon dioxide) emissions have changed the Earth’s climate. See American Elec. Power Co. v. Connecticut, 564 U.S. 410, 417 (2011). At the time, the “dangers of greenhouse gas emissions” were projected to include “heat-related deaths; coastal inundation and erosion”; “more frequent and intense hurricanes, floods, and other ‘extreme weather events’”; and “drought due to reductions in mountain snowpack and shifting precipitation patterns.” Id.

The perilous future identified in American Electric has begun to emerge. Since that ruling, the scientific community has only grown more certain that humanity’s actions have rapidly increased the Earth’s temperature. It is now “unequivocal that human influence has warmed the atmosphere, ocean, and land.” Intergovernmental Panel on Climate Change, Sixth Assessment Report, Headline Statements at 1 (Aug. 2021) (“IPCC Sixth Assessment”).3 And there is “[e]xtensive evidence[] … that human activities, especially emissions of greenhouse gases, are the dominant cause” of global warming since the 1950s. See U.S. Global Change Research Program, Climate Science Special Report: Fourth National Climate Assessment, Volume I at 10 (2017) (“Fourth National Climate Assessment, Vol. I”).4 Global surface temperature has already risen about 2 degrees Fahrenheit when compared to the late 19th century.5 It is not too late to limit further warming and if greenhouse gas emissions can be significantly reduced, additional warming may amount to less than 2 degrees (i.e., a total warming of less than 4 degrees since the late 19th century). In the absence of sustained efforts to reduce greenhouse gas emissions, however, the total increase in temperature could surpass 10 degrees—leading to physical and ecological impacts that would be irreversible for thousands of years, if ever.

To put those numbers into perspective, the current 2 degree increase in temperature already has had notable effects across the country. Summer heatwaves and other periods of unusually warm weather have become more frequent and more intense, leading to balmy Decembers on the Atlantic Seaboard and temperatures in the Pacific Northwest during the summer of 2021 that were hot enough to melt power cables and buckle roads. Climate change has increased total rainfall and extreme flooding from storms like Hurricane Harvey, causing losses of human life and destroying billions of dollars of property in Texas and Louisiana. And rising temperatures have set the stage for a prolonged drought in the American west, increasing devastation from wildfires in environments as different as Montana forestland and the suburbs of Boulder, Colorado. If the world remains on a path of high and rising greenhouse gas emissions, and the global temperature increases by 10 degrees or more, the impact on the American way of life is expected to be far worse. Absent large expenditures on measures to defend the coast, children born this year could see portions of coastal cities like New Orleans, Miami, and Annapolis disappear under a rising ocean. Such large increases in temperature, and accompanying increases in frequency or intensity of extreme weather events and drought could also have severe impacts on the United States’ food security, economy, and national defense. These impacts would continue or accelerate already existing trends, but a dramatic increase in temperature raises the possibility of black swan events that have severe consequences but are difficult to predict—for example, destabilization of parts of the Antarctic or Greenland ice sheets leading to rates of sea level rise several times current estimates.

These projections are not a counsel of despair. It is still possible to mitigate the human and economic costs of climate change—as particularly relevant here, if greenhouse gas emissions from existing power plants and other sources can be reduced. But such mitigation will require significant coordination at the federal level. And this Court has recognized that EPA is the nation’s “primary regulator of greenhouse gas emissions,” the entity with “the scientific, economic, and technological resources [necessary to] cop[e] with issues of this order.” American Elec. Power, 564 U.S. at 428. Because the D.C. Circuit’s ruling below recognizes EPA’s obligation to develop the rules necessary to reduce greenhouse emissions, we respectfully submit that the decision should be affirmed.

ARGUMENT

I. IT IS UNEQUIVOCAL THAT HUMAN ACTIVITY IS THE CAUSE OF UNPRECEDENTED GLOBAL WARMING

A. The Greenhouse Effect Controls The Earth’s Temperature, Which Has Been Rising At An Unprecedented Rate

The basic physics of the greenhouse effect are wellestablished. The Earth’s atmosphere contains not just nitrogen and the oxygen we breathe, but also greenhouse gases like water vapor, carbon dioxide, methane, and nitrous oxide. Fourth National Climate Assessment, Vol. I at 74-80. As this Court has summarized, “greenhouse gases are so named because they ‘trap … heat that would otherwise escape from the [Earth’s] atmosphere.’” American Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410, 416 (2011). The resulting “‘greenhouse effect … helps keep the Earth warm enough for life.’” Id.

Indeed, much of the difference in surface temperature between the Earth, Venus (whose surface is hot enough to melt lead), and icy Mars can be explained by their respective greenhouse gas levels. See Climate Change, Part I: H. Comm. Hearing Before the Subcomm. on Environment at 3 (Apr. 9, 2019) (Testimony of Dr. Michael Oppenheimer) (“Oppenheimer 2019 Testimony”). 6 Without greenhouse gases, for example, the Earth’s average surface temperature would sink as lowas 0 degrees. NASA Earth Observatory, Effects of Changing the Carbon Cycle (June 16, 2011).7 It is similarly well-established that the Earth is warming at an unprecedented rate. See IPCC Sixth Assessment, Summary for Policymakers at 88; see also Fourth National Climate Assessment, Vol. I at 10 (“This period is now the warmest in the history of modern civilization.”). It can be stated with high confidence that the Earth’s surface temperature has risen more quickly since 1970 than it has in any other 50-year period since the days of Julius Caesar. Id. As a result, “the six warmest years on record have all occurred since 2012,” including 2021. See National Oceanic & Atmospheric Admin., U.S. saw its 4th-warmest year on record, fueled by a record-warm December (Jan. 10, 2022).9 For Maine and New Hampshire, 2021 was “their second warmest year on record” and one of the five warmest for 19 other “states across the Northeast, Great Lakes, Plains, and West.” Id.

We can state with high confidence that as temperatures have risen, the concentrations in the Earth’s atmosphere of the greenhouse gases (carbon dioxide, methane, and nitrous oxide) have also increased and now are higher than they have been in hundreds of thousands of years. IPCC Sixth Assessment, Summary for Policymakers at 8. Carbon dioxide alone makes up a higher percentage of the atmosphere than it has in millions of years. Id. As the National Oceanic and Atmospheric Administration charts below demonstrate, the concentration of carbon dioxide in the atmosphere has skyrocketed in the last sixty years—as is apparent by comparison with the prior 800,000 years.10

B. The Only Convincing Explanation For The Rapid Rise In Global Temperature Is That Human Activity Has Altered The Makeup Of The Earth’s Atmosphere

The observation of both a rapidly heating Earth and the skyrocketing levels of carbon dioxide in the modern era is not coincidental. Rather, the evidence is now “unequivocal that human influence has warmed the atmosphere, ocean, and land” and that “[w]idespread and rapid changes in the atmosphere, ocean, … and biosphere have occurred.” IPCC Sixth Assessment, Summary for Policymakers at 4. Indeed, “[g]reenhouse gas emissions from human activities are the only factors that can account for the observed warming over the last century; there are no credible alternative human or natural explanations.” U.S. Global Change Research Program, Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II at 39-40 (2018) (“Fourth National Climate Assessment, Vol. II”)11; see also, e.g., Mann et al., Record Temperature Streak Bears Anthropogenic Footprint, 44 Geophys. Res. Lett. 7936, 7936 (2017) (“th[e] sequence of record-breaking temperatures [between 2014-2016] had a negligible (<.003%) likelihood of occurrence in the absence of … warming” caused by human activity).

Specifically, the average surface temperatures both globally and in the United States have increased by about 2 degrees since the late 19th century, with the majority of that increase occurring in the last 35 years. See Lindsey & Dahlman, Climate Change: Global Temperature (updated Aug. 12, 2021);12 EPA, Climate Change Indicators: U.S. and Global Temperature (figs. 1-2) (updated Apr. 2021);13 Fourth National Climate Assessment, Vol. I at 14. With “significant reductions in the emissions of greenhouse gases,” it may be possible to limit that rise to less than 4 degrees. Fourth National Climate Assessment, Vol. I at 35. Without such reductions, the average global temperature increase could reach anywhere from 4 to 10 degrees by late in this century, depending on actual emissions. IPCC Sixth Assessment, Summary for Policymakers at 14.

Another demonstration of the connection between the rise in greenhouse gas concentrations in the atmosphere and global warming is a set of new observations from robotic thermometers (called “floats”) across the world’s oceans that are measuring heat absorption by the ocean at a global scale with unprecedented precision. See Destin, National Oceanic & Atmospheric Admin., The Argo Revolution (updated July 9, 2021).14 These floats show that the deep ocean is slowly warming across the globe, and such warming is a predictable consequence of rising atmospheric greenhouse gas levels. Johnson & Lyman, Warming trends increasingly dominate global ocean, 10 Nature Climate Change 757, 757, 760 (2020); Lyman et al., Robust warming of the global upper ocean, 465 Nature 334, 334, 336 (2010); IPCC, Special Report on the Ocean and Cryosphere in a Changing Climate, Summary for Policymakers at 7, 9 (2019) (“IPCC Ocean and Cryosphere”).15 Indeed, such sustained warming of the deep ocean cannot be explained by any process other than the rise of greenhouse gases.

As one of us has summarized, “the broad outlines of [this] problem bearing high risk for humans and society” have been clear for over thirty years, “even if many important details remained to be fleshed out.” Oppenheimer 2019 Testimony at 3. By the late 1980s, it was known that (1) “atmospheric carbon dioxide … was increasing and the only plausible explanation was fossil fuel combustion along with a lesser contribution from deforestation,” (2) “climate models projected a significant warming due to the increasing greenhouse effect,” and (3) “it was … understood that the warming could bring Earth to temperatures not experienced in several million years by the end of the 21st century.” Id. at 5. These findings led the United Nations—and later the United States, under the leadership of President George H.W. Bush—to create organizations dedicated to the study of climate change. Id. at 5-6 (discussing the founding of the Intergovernmental Panel on Climate Change); see also U.S. Global Change Research Program, Legal Mandate.16

Since its inception, the IPCC has released six full assessments of the basic science of climate change, the most recent of which is cited throughout this brief. Each report has provided increasingly strong evidence that human activity is responsible for the changes in the global climate:

* The Second Assessment, published in 1996, concluded that “The balance of evidence suggests a discernable human influence on global climate.” Oppenheimer 2019 Testimony at 6 (quoting IPCC, Second Assessment: Climate Change 1995 (1996) at 2217).
* The Third Assessment, published in 2001, found that “There is new and stronger evidence that most of the warming observed over the last 50 years is attributable to human activities.” Id. (quoting IPCC, Third Assessment: Climate Change 2001 at 5 (first published 2001)18).
* The Fourth Assessment, published in 2007, “strengthened this finding further: ‘Most of the observed increase in global average temperatures since the mid-20th century is very likely due to the observed increase in [human] greenhouse gas concentrations.’” Id. (quoting IPCC, Fourth Assessment: Climate Change 2007, Summary for Policymakers at 5 (first published 2007)19).
* The Fifth Assessment, published in 2013, stated that “‘[i]t is extremely likely that more than half of the observed increase in global average surface temperature from 1951 to 2010 was caused by [humanity’s] increase in greenhouse gas concentrations and other’ human activity.” Id. (quoting IPCC, Fifth Assessment: Climate Change 2014, Summary for Policymakers at 5 (first published 2013)20).
* And, as noted, the Sixth Assessment— published in August 2021—concluded that the evidence “unequivocal[ly]” shows that human activity has led to climate change. See supra p. 4.

The U.S. Global Change Research Program’s reports— which are jointly authored by thirteen federal agencies pursuant to the Global Change Research Act of 1990— have followed a similar trajectory as the IPCC’s.

* The first National Assessment, published in 2000, acknowledged that “[h]umans are asserting a major and growing influence on some of the key factors that govern climate” and that “[t]he intensity and pattern of temperature changes within the atmosphere implicates human activities as a cause.” See U.S. Global Change Research Program, Climate Change Impacts On The United States, Report Overview at 12-13.21
* The second National Assessment, published in 2009, stated that “[t]he global warming observed over the past 50 years is due primarily to human- induced emissions of heat-trapping gases.” See U.S. Global Change Research Program, Climate Change Impacts in the United States at 9 (emphasis added).22
* The third National Assessment, published in 2014, found that “observations unequivocally show that … the warming of the past 50 years is primarily due to human-induced emissions of heat-trapping gases.” U.S. Global ChangeResearch Program, Climate Change Impact in the United States at 5 (emphasis added).23
* And, as noted, the fourth National Assessment, first published in 2017, noted that there is “no convincing alternative explanation” for the global increase in temperature beyond human activity. Fourth National Climate Assessment, Vol. I at 10; supra pp. 4-5.

In sum, after decades of study, both the global and American scientific communities have arrived at the same, unequivocal conclusion: Human activity—in particular, the emission of greenhouse gases—has increased the Earth’s temperature. See, e.g., Fourth National Climate Assessment, Vol. II at 36 (“[T]he evidence of human-caused climate change is overwhelming and continues to strengthen.”).

II. CLIMATE CHANGE ALREADY AFFECTS EVERY AMERICAN AND—WITHOUT ACTION—ITS IMPACT ON DAILY LIFE IS EXPECTED TO GROW IN DRAMATIC AND NOT FULLY PREDICTABLE WAYS

1. Climate Change Has Already Had Notable Effects Across The Country

There is “a direct connection” between the 2 degree global temperature rise that has already taken place and “the resulting changes that affect Americans’ lives, communities, and livelihoods, now, and in the future.” Fourth National Climate Assessment, Vol. II at 36; see also id. at 55 (changes caused by warming “increasingly threaten the health and well-being of the American people”). Between 2015 and April 2018 alone, for example, “the United States … experienced 44 billiondollar weather and climate disasters …, incurring costs of nearly $400 billion.” Id. at 66-68. Indeed, warmer temperatures in the United States have already been associated with a number of interrelated long-term climate trends, short-term weather events, and resulting impacts, such as (1) extreme heat and heatwaves, (2) rising sea levels, and accompanying coastal flooding, (3) increases in the frequency and intensity of storms producing heavy precipitation, including hurricanes and typhoons, (4) more intense and longer droughts, (5) wildfires, and (6) habitat degradation increasing risk of local extinctions and biodiversity loss.

a. Extreme Heat and Heatwaves: Temperatures across the United States have “increased rapidly” since the 1970s and in recent years, “twice as many hightemperature records have been set as low-temperature records.” Fourth National Climate Assessment, Vol. I at 186, 190-192; see also supra p. 8. Heatwaves (i.e., “6- day periods with a maximum temperature above the 90th percentile”) have similarly increased in most places in the country. Fourth National Climate Assessment, Vol. I at 191. By the federal government’s estimate, the frequency has increased from 2 heatwaves per year in the 1960s to 6 per year in the 2010s. See EPA, Climate Change Indicators: Heat Waves (updated Apr. 2021).24 This is no coincidence, as historical warming has made the hottest days of the year both more likely and hotter between 1961 and 2010. Diffenbaugh et al., Quantifying the influence of global warming on unprecedented extreme climate events, 114 Proceedings Nat’l Academy Sci. U.S.A. (“PNAS”) 4881,4882 (2017).25 To take one recent example, an early study suggests that last summer’s heatwave in the Pacific Northwest—where temperatures rose 40 degrees above average, hot enough to melt power cables and make asphalt buckle—was “virtually impossible without human-induced climate change.” See Philip et al., Rapid attribution analysis of the extraordinary heatwave on the Pacific Coast of the US and Canada June 2021, World Weather Attribution (July 7, 2021);26 see also Januta, Pacific Northwest heat wave ‘virtually impossible’ without climate change-research, Reuters (July 8, 2021);27 see also Fischels, PHOTOS: The Record- Breaking Heat Wave That’s Scorching The Pacific Northwest, NPR (June 29, 2021).28

The increasing temperature is especially troubling because “[e]xtreme heat is the leading cause of climaterelated death in the” United States. See Climate Change Science: Hearing Before the H. Comm. on Science, Space, and Technology at 14 (Mar. 12, 2021) (Testimony of Dr. Michael Oppenheimer) (“Oppenheimer 2021 Testimony”).29 In particular, “[h]igh temperatures in the summer are linked directly to an increased risk of illness and death, particularly among older adults, pregnant women, and children.” Fourth National Climate Assessment, Vol. II at 55. From 1991 to 2018, 37% of heat-related summer deaths worldwide were attributable to human-caused climate change. Vicedo- Cabrera et al., The burden of heat-related mortality attributable to recent human-induced climate change, 11 Nature Climate Change 492, 492 (2021); see also Schwartz, More Than a Third of Heat Deaths Are Tied to Climate Change, Study Says, N.Y. Times (May 31, 2021).30

b. Sea Levels And Flooding: It can be stated with high confidence that global sea levels have risen faster since 1900 than over any prior century in 3000 years. See IPCC Sixth Assessment, Summary for Policymakers at 8. Rising sea levels are directly linked to climate change. Most of the heat trapped by greenhouse gases has been absorbed by the oceans, which have reacted to this heat as most liquids do—by expanding and taking up greater volume. Id. at 11; Oppenheimer 2021 Testimony at 5-6. At the same time, the ice sheets located around the Earth’s poles and mountain glaciers alike have begun to melt at an increasing rate—that meltwater eventually ends up in the ocean. See IPCC Sixth Assessment, Summary for Policymakers at 11; Oppenheimer 2021 Testimony at 5-6.

Ocean levels rose 2.5 times faster between 2006- 2015 (about 14 inches per century) than they did between 1901 and 1990 (about 6 inches per century). IPCC Ocean and Cryosphere, Summary for Policymakers at 10; Oppenheimer 2021 Testimony at 6. Rising sea levels have increased coastal flooding at high tide as much as “5- to 10-fold” over the norm in the 1960s in cities like Miami, Wilmington, North Carolina, and Charleston, South Carolina. Fourth National Climate Assessment, Vol. II at 99, 757. Similarly, areas of Norfolk, Virginia are now 4 times more likely to flood than they were in the 1960s. Id. at 758. And between 1932 and 2016, Louisiana lost 2006 square miles of land due in part to high rates of sea level rise. Id. at 775. That is the equivalent of one football field-sized piece of land disappearing every 34 to 100 minutes. Id.

c. Storms and Hurricanes: Heavy rain and snow storms across most of the United States “have increased in both intensity and frequency since 1901.” Fourth National Climate Assessment, Vol. II at 152. This result is consistent with higher temperatures leading to “higher levels of water vapor in the atmosphere, which in turn lead to more frequent and intense precipitation extremes.” Id. at 88. Storm-caused flooding inflicts billions of dollars in damage annually in the United States, and research suggests that intensifying storms have been responsible for about a third of those costs in recent years. Davenport & Diffenbaugh et al., Contribution of historical precipitation change to US flood damages, 118 PNAS 1, 3 (2021).31 For example, the exceptionally heavy precipitation and flooding events that occurred in the mid-Atlantic states including Pennsylvania, New Jersey, Maryland, and Washington, D.C. in 2018 were made 1.1 to 2.3 times more likely by human-caused climate change. Winter et al., Anthropogenic Impacts on the Exceptional Precipitation of 2018 in the Mid-Atlantic United States, 101 Bull. Am. Meteorological Soc’y 5, 5 (2020).32

Notably, the increase in intense rainstorms has combined with sea level rise to make hurricane season in the Atlantic Ocean more dangerous. Fourth National Climate Assessment, Vol. I at 27. While climate change may not necessarily increase the total number of hurricanes, hurricanes’ precipitation totals are expected to rise. Unusually high precipitation totals have been observed and directly linked to climate change in some recent hurricanes. For example, one study estimated that as much as 38% of the total rainfall from Hurricane Harvey—a storm that made landfall in Texas and Louisiana in 2017—was caused by “humaninduced climate change”; another study estimated that human activity made “the event itself three times more likely.” Fourth National Climate Assessment, Vol. II at 95. And higher sea levels in combination with storm surge have further increased the risk of coastal flooding. Trenberth et al., Hurricane Harvey Links to Ocean Heat Content and Climate Change Adaption, 6 Earth’s Future 730, 741-742 (2018) (using Hurricane Harvey to demonstrate how human-induced climate change causes higher sea temperature, intensifies storms, and increases flooding rains);33 Lin et al., Hurricane Sandy’s flood frequency increasing from year 1800 to 2100, 113 PNAS 12071, 12071-12073 (2016) (the frequency of Hurricane Sandy-like extreme flood events has increased significantly over the past two centuries due to the compound effects of sea level rise and storm surge).34

The results were catastrophic. The 2017 Atlantic hurricane season, for example, caused more than 250 deaths and $250 billion in damage. Fourth National Climate Assessment, Vol. II at 66. Hurricane Harvey’s rainfall in Houston was about 30 inches and higher amounts fell at some locations nearby, with its total rainfall “likely exceed[ing] that of any known historical storm in the continental United States.” Id. at 66, 95- 96. It killed 68 people and inflicted $125 billion in damage, National Oceanic & Atmospheric Admin., Service Assessment: August-September 2017 Hurricane Harvey iv (June 2018);35 it also “knocked out power to 300,000 customers in Texas,” including hospitals and water treatment facilities, Fourth National Climate Assessment, Vol. II at 643.

d. Droughts: Rising global temperatures can “play a critical role in increasing the rate of drought onset, overall drought intensity, and drought impact through altered water availability and demand,” Fourth National Climate Assessment, Vol. II at 399; and it can be said with medium confidence that “human-induced climate change” has made droughts worse by increasing the rate at which water evaporates into the atmosphere, IPCC Sixth Assessment, Summary for Policymakers at 8; see also id. at 24 (as temperatures increase in the future, “the level of confidence in and the magnitude of the change in droughts … increase”).

Drought conditions in recent years have caused billions of dollars in damage in the western half of the United States. Fourth National Climate Assessment, Vol. II at 67. For example, the Northern Great Plains region—which encompasses states like Idaho and North Dakota—endured a severe drought in 2017 that damaged wheat crops and forced ranchers to sell off their cattle because they were unable to feed them. Id. Even today, Lake Powell—the nation’s second-largest reservoir, which supplies drinking water to 40 million people in states like Utah and Arizona—is at just 27% of capacity. See Maffly, Feds tighten Colorado River flow at Glen Canyon Dam as ever-shrinking Lake Powell nears critical level, Salt Lake Tribune (Jan. 7, 2022);36 Meiners, Scientists see silver lining in fed’s latest efforts to avoid ‘dead pool’ at Lake Powell, St. George Spectrum & Daily News (updated Jan. 12, 2022).37

e. Wildfires: Climate change can also play a role in wildfires, as higher temperatures dry out vegetation and make forests more likely to burn. Fourth National Climate Assessment, Vol. I at 243. Extreme wildfires are increasing in the western United States and human-caused warming has contributed to at least two-thirds of that increase. Zhuang et al., Quantifying contributions of natural variability and anthropogenic forcings on increased fire weather risk over the western United States, 118 PNAS 1, 7 (2021);38 see also Diffenbaugh & Field, et al., Atmospheric variability contributes to increasing wildfire weather but not as much as global warming, 118 PNAS 1, 1 (2021) (Commentary).39 Specifically, “[h]uman-caused climate change is estimated to have doubled the area of forest burned in the western United States from 1984 to 2015.” Fourth National Climate Assessment, Vol. II at 521. During the summer of 2015 alone, “over 10.1 million acres—an area larger than the entire state of Maryland—burned across the United States.” Id. at 67-68. The scope of the wildfires in that year was unprecedented since recordkeeping began in 1960, burning over 5 million acres in Alaska and 1 million in Montana. Id. In both 2017 and 2020, more than 10 million acres across the United States were burned each year. Congressional Res. Serv., Wildfire Statistics (updated Oct. 4, 2021).40

As a more recent example, just last month, the suburbs of Boulder County, Colorado were hit by the most destructive wildfire in state history—one that damaged or destroyed roughly 1,000 homes, see NASA Earth Observatory, Colorado Faces Winter Urban Firestorm (Dec. 30, 2021).41 The six months prior to the fire were the warmest on record in the region, which was experiencing extremely dry conditions. Swain, The Deadly Dynamics of Colorado’s Marshall Fire, Outside (Jan. 11, 2022).42 Although climate change did not start the fire, in the words of one local researcher, it “led to a perfectly built stack of fuels in the fireplace, ready and waiting to be burned.” Freedman, Climate scientists grapple with wildfire disaster in their backyard, Axios (Jan. 3, 2022);43 see also Chuck, How climate change primed Colorado for a rare December wildfire, NBC News (updated Jan. 2, 2022).44

f. Loss of Biodiversity: Increases in temperature affect not just the land and seas, but the creatures that inhabit them. A hotter world “aid[s] the spread of invasive species” to new locations, while forcing other species to “shift[] their ranges … and [make] changes in the timing of important biological events.” Fourth National Climate Assessment, Vol. II at 53. For example, tree-killing bark beetles have been able to dramatically expand their ranges in both the eastern and western United States. Id. at 250, 649, 1115. And in the Mississippi River Basin—the home of over 300 fish species, as well as waterfowl, turkey, moose, and alligator—more frequent hot days and milder winters have begun to disrupt the wildlife’s mating and migration patterns. See National Wildlife Federation, A Hunter’s & Angler’s Guide to Climate Change: Challenges, Opportunities & Solutions 8-9 (Oct. 2021).45

In some cases, climate change has thinned species’ populations and contributed to local extinction. See Wiens, Climate-Related Local Extinctions are Already Widespread Among Plant and Animal Species, 14 PLOS Biology 1, 1 (2016) (“[C]limate-related local extinctions have already occurred in … 47% of the 976 species surveyed” and “will presumably become much more prevalent as global warming increases”);46 Panetta et al., Climate Warming Drives Local Extinction: Evidence from Observation and Experimentation, 4 Sci. Adv. 1, 1 (2018) (finding that “local warming is driving local extinction”).47 The Midwest, for instance, may soon lose iconic trees like the paper birch and the black ash. Fourth National Climate Assessment, Vol. II at 873, 886.

The loss of biodiversity is not limited to the land. Oceans are getting warmer, see supra pp. 11-12, 18, and “[i]t is virtually certain that human-caused [carbondioxide] emissions are the main driver” of ocean acidification, IPCC Sixth Assessment, Summary for Policymakers at 5. Acidification has caused a marked decrease in carbonate ions—the building blocks of coral and sea shells, Fourth National Climate Assessment, Vol. II at 357. The United States’ major coral reefs are thus both dying (from the increased water temperatures, among other contributors to decline) and unable to rebuild (due to acidification). Id. at 359, 368. If no action is taken to reduce greenhouse gas emissions, the percentage of live coral in Hawaii will decline from 38% in 2010 to 11% in 2050; in southern Florida, live coral will vanish almost entirely. See EPA, Multi-Modal Framework for Quantitative Sectoral Impacts Analysis: A Technical Report for the Fourth National Climate Assessment 171-172 (May 2017).48 Further north, the shellfish that live in the Gulf of Maine are also vulnerable to warming and ocean acidification, reducing the ability of Mainers to catch or raise shellfish like lobsters, scallops, blue crabs, and oysters. Fourth National Climate Assessment, Vol. II at 687. And on the other side of the country, salmon populations have been declining for decades and even facing extinction as a result of a warming climate. Crozier et al., Climate change threatens Chinook salmon throughout their life cycle, 4 Comms. Biology 1, 3, 5 (2021).49

2. Absent Action, More Severe Consequences Are Expected

Under any realistic emissions scenario, global surface temperature will continue to increase until at least 2050. IPCC Sixth Assessment, Summary for Policymakers at 14. If greenhouse gas emissions can be significantly reduced, additional warming may be limited to less than 2 degrees, or a total warming of less than 4 degrees since the late 19 century. Id. In the absence of sustained efforts to reduce greenhouse-gas emissions, the total increase in temperature could surpass 10 degrees. Id.

With “every additional increment[al]” change in temperature, “changes in extremes continue to become larger,” meaning “increases in the frequency and intensity of hot extremes, … heavy precipitation, … agricultural and ecological droughts; an increase in the proportion of intense tropical cyclones; and reductions in Arctic sea ice, snow cover and permafrost.” IPCC Sixth Assessment, Summary for Policymakers at 15. Failing to reduce greenhouse gas emissions will “impose substantial damages on the U.S. economy, human health, and the environment.” Fourth National Climate Assessment, Vol. II at 1347. It will also lead to physical and ecological impacts that would be irreversible for thousands of years—if ever. IPCC Sixth Assessment, Summary for Policymakers at 21 (noting that changes to ocean temperature and acidification—as well as to permafrost at the Earth’s poles—“are irreversible for centuries to millennia”).

Because listing all potential harms that could occur in the next thirty to eighty years as a result of climate change would require hundreds of pages, see, e.g.,Fourth National Climate Assessment, Vol. II at 72- 1308, we have included representative examples below.

a. Coastal Cities And Landmarks Flooded: Under even a low emissions scenario, oceans will rise approximately 7-13 inches by midcentury and approximately 11-23 inches in eighty years. Oppenheimer 2021 Testimony at 7; Oppenheimer, et al., Sea Level Rise and Implications for Low-Lying Islands, Coasts, and Communities 321, 327, in IPCC Special Report on the Ocean and Cryosphere in a Changing Climate.50 To put that amount of sea level rise in practical terms, by 2050, water levels during storms and very high tides that were only seen once a century are expected every year in places like Savannah, Jacksonville, Miami, and San Diego. Oppenheimer 2021 Testimony at 9. The Northeast also faces flooding, particularly in the historic districts of cities like Annapolis, Maryland and Newport, Rhode Island, as well as portions of Washington D.C. near the tidal basin. See Fourth National Climate Assessment, Vol. II at 695-696 (noting that the “historic districts” in coastal cities and towns—like Annapolis and Newport, Rhode Island—already “face the threat of rising sea levels”). Without reductions in greenhouse gas emissions, ocean levels would go even higher, as much as approximately 9-16 inches by midcentury and approximately 24-43 inches by 2100. Oppenheimer 2021 Testimony at 7; Oppenheimer, Sea Level Rise and Implications for Low-Lying Islands, Coasts, and Communities 327.

b. Food Security At Risk: In numerous parts of the world, “[c]limate change has already affected food security due to warming, changing precipitation patterns, and greater frequency of some extreme events.” IPCC, Climate Change and Land, Summary for Policymakers at 10 (2020).51 In the United States, “increases are expected in the incidence of drought and elevated growing- season temperatures,” which will decrease the “[a]verage yields of many commodity crops (for example, corn, soybean, [and] rice”) and “specialty crops” like fruits and vegetables. Fourth National Climate Assessment, Vol. II at 399-400; see also Gray, Global Climate Change Impact on Crops Expected Within 10 Years, NASA Study Finds, NASA (Nov. 2, 2021) (under a high emissions scenario, corn yields are projected to decline 24% by 2030).52

The Midwest’s agricultural sector will be hit particularly hard and is “projected to be the largest contributing factor to declines in the productivity of U.S. agriculture.” Fourth National Climate Assessment, Vol. II at 875. Indeed, “[p]rojected changes in precipitation, coupled with rising extreme temperatures before mid-century, will reduce Midwest agricultural productivity to levels of the 1980s” (assuming no major technological advances). Id. at 873.

c. Heat-Related Health Issues Spread: Rising heat will pose an increasing threat to human health. For example, if no action is taken to reduce greenhouse gas emissions, “almost three-quarters of the world’s population” will be exposed to deadly levels of heat and humidity for at least 20 days a year by 2100. Mora et al., Global risk of deadly heat, 7 Nature Climate Change 501, 505 (2017).

In North America, climate change is projected to shift the “geographic range and distribution of diseasecarrying insects and pests,” meaning that “more people” “could [be] expos[ed] … to ticks that carry Lyme disease and mosquitos that transmit viruses such as West Nile, … dengue, and Zika.” Fourth National Climate Assessment, Vol. II at 57, 545. Incidences of West Nile in particular “are projected to more than double by 2050[,]” “resulting in $1 billion per year in hospitalization costs and premature deaths under a higher [emissions] scenario.” Id. at 552. Moreover, “[i]ncreasing water temperatures associated with climate change are projected” to increase the number of “harmful algae and coastal pathogens” in fresh water. Id. at 545. In the Great Lakes, for example, “[i]ncreased water temperatures and nutrient inputs contribute to algal blooms, including harmful cyanobacterial algae that are toxic to people, pets and many native species.” Id. at 895.

d. Damage to National Economy: If greenhouse gas emissions are not reduced, the United States is projected to lose more than two billion labor hours a year by 2090 due to increasing temperatures, “costing an estimated $160 billion in lost wages.” Fourth Climate Assessment, Vol. II at 50. Other harms wrought by climate change, including to coastal property, air quality, roads, and inland flooding, are expected to lead to over $200 billion in additional damage on an annual basis. Id. at 1358. For consumers, energy and water costs may skyrocket—particularly in the southern United States—as the demand for air conditioning increases and the competition for water between individuals, farmers, and power plants continues to grow. See, e.g., id. at 777-778.

e. National Security At Risk: Rising temperatures and intensifying storms due to climate change also implicate the United States’ national security. The Department of Defense has recognized for well over a decade that “[g]lobal climate change will have wide ranging implications for U.S. national security interests.” See U.S. Department of Defense, The National Security Implications of Climate-Related Risks and a Changing Climate 2-3 (May 2015);53 see also U.S. Department of Defense, Climate Risk Analysis 4 (Oct. 2021) (“Climate change touches most of what th[e] Department does, and this threat will continue to have worsening implications for U.S. national security.”).54 For example, national security is directly “impacted by damage to U.S. military assets such as roads, runways, and waterfront infrastructure from extreme weather and climate-related events.” Fourth National Climate Assessment, Vol. II at 59. More broadly, “changes in climate increase risks … by affecting factors that can exacerbate conflict and displacement outside of U.S. borders, such as food and water insecurity and commodity price shocks.” Id. Indeed, “in worst-case scenarios[,] climate-change related impacts could … contribute to mass migration events or political crises, civil unrest, shifts in the regional balance of power, or even state failure.” U.S. Department of Defense, Climate Risk Analysis at 8.

f. Some of the Most Extreme Outcomes Are Unpredictable: It can be stated with high confidence that the probability of (currently) “low-likelihood, highimpact outcomes increases with higher global warming levels.” IPCC Sixth Assessment, Summary for Policy-makers at 27; accord Fourth National Climate Assessment, Vol. II at 66 (similar). For instance, “[h]uman influence has likely increased the chance of” multiple climate-change-related impacts occurring at the same time, like “concurrent heatwaves and droughts,” IPCC Sixth Assessment, Summary for Policymakers at 9 (emphasis omitted), or “extreme rainfall combined with coastal flooding,” Fourth National Climate Assessment, Vol. II at 44-45. The “physical and socioeconomic impacts” of such “compound extreme events can be greater than the sum of the parts.” Id. at 91. In the heatwave/drought example, demand for water would go up as supply goes down; in the extreme rainfall/coastal flooding example, ground that is already water-logged from the rain might absorb far less flood waters than normal.

Higher temperatures—and their accompanying effects— also increase the likelihood of “large-scale shifts in the climate system” (i.e., “tipping points”). Fourth National Climate Assessment, Vol. II at 66; see also IPCC Sixth Assessment, Summary for Policymakers at 27 (“with higher global warming levels,” “[a]brupt responses and tipping points of the climate system … cannot be ruled out”). For example, it can be projected with high confidence that—over the next eighty years—water from increased rainfall and melting ice will weaken the Atlantic ocean currents that move warm water north and cold water south. IPCC Sixth Assessment, Summary for Policymakers at 27; see also Fourth National Climate Assessment, Vol. I at 418. While it can be said with medium confidence that the currents will not collapse during this century, “[i]f such a collapse were to occur, it would very likely cause abrupt shifts in regional weather patterns and water cycles”—e.g., shifting rain events further south andaway from Europe, IPCC Sixth Assessment, Summary for Policymakers at 27 (emphasis omitted)—and could cause sea levels in the northeastern United States to rise as much as 1.6 feet, Fourth National Climate Assessment, Vol. I at 418. As another example, warming temperatures in the Arctic could release substantial amounts of carbon dioxide and methane trapped in the permafrost and the ocean floor, “driv[ing] continued warming even if human-caused emissions stopped altogether.” Id. at 418-419.

III. The United States Still Has the Opportunity to Help Mitigate the Effects of Climate Change

While we cannot avoid all negative effects from climate change, it is not too late to limit the harm. Indeed, “[m]any climate change impacts and associated economic damages in the United States can be substantially reduced over the course of the 21st century” through reducing greenhouse gas emissions. U.S. Fourth National Assessment, Vol. II at 1347. Practically speaking, this means that “[d]ecisions made today determine risk exposure for current and future generations” and “the severity of future impacts will depend largely on actions taken to reduce greenhouse gas emissions and to adapt to the changes that will occur.” Id. at 34.

As the nation with the second-highest emissions of carbon dioxide from fossil fuel combustion in the world (and higher than the largest emitter, China, on a per capita basis), Global Carbon Project, Global Carbon Budget at 19-20 (Nov. 4, 2021),55 the policies that the United States sets into place can make a substantial difference in the conditions that future generations will face. See IPCC Sixth Assessment, Summary for Policymakers at 27-29 (noting “with high confidence … that there is a near-linear relationship” between carbon dioxide emissions and global warming). Substantially reducing emissions could “avoid[] thousands to tens of thousands of deaths per year from extreme temperatures,” and “hundreds to thousands of deaths per year from poor air quality.” Fourth National Assessment, Vol. II at 1359. And if global warming can be limited to less than a total of 4 degrees, the ultimate economic costs of climate change this century could be less than 1/4 of what they would be under a high emissions scenario. Fourth National Assessment, Vol. II at 1360. This Court should exercise caution before unduly limiting EPA’s ability to enact rules that help protect the future for today’s and tomorrow’s children.

## DA---Bizcon

### Link – Top Level

#### Extending antitrust to emerging technology dampens innovation broadly.

Manne ’10 [Geoffrey A.; 2010; George Mason University School of Law and Department of Economics, International Center for Law and Economics; Journal of Competition and Economics, “Innovation and the Limits of Antitrust,” vol. 6; KP]

We propose a rule of per se legality for new product introductions. New product introductions-innovations-present the most troubling type of case for the application of antitrust liability. The large dynamic social benefits from innovation, coupled with the uncertainty surrounding determinations like market definition and market power, tip the error-cost calculation strongly in favor of new products. Although there are ample possibility theo- rems for conditions under which new product introductions or design changes can result in harm to consumers, the empirical literature tells a different story. As discussed above, there is overwhelming evidence that new product introductions and even minor innovations of both the product and contractual type are associated with large welfare gains, and there is little empirical support suggesting that this class of conduct warrants serious antitrust scrutiny. In short, antitrust scrutiny, even of the rule-of-reason variety, does not survive a cost-benefit analysis that incorporates the potential for error costs.

We recognize that antitrust arguments with respect to new products tend to be coupled with (or couched in terms of) ancillary anticompetitive conduct. For example, in the "product hopping" context, one can frame an argument as objecting not to the introduction of the new product but to the coupling of that introduction with the removal of a prior product. But pricing or contractual strategies employed to increase the acceptance of new products and recoup investment in R&D may be equally innovative and, regardless, essential to the success of the product innovation. Relabeling these theories does not alter the fundamental underlying problem that exist- ing economic evidence implies that, despite the theoretical possibility of harm identified in various models, the empirical evidence supporting the claim that product introductions are an antitrust policy relevant class of conduct is virtually non-existent. Even combined with evidence that the intent behind a particular product innovation was "predatory" (see below on admissibility of intent evidence), the cost of deterring innovation is substantial. 123 At the same time, as we discuss at length above, where antitrust liability is predicated on the product itself creating market power (for example, the creation of network effects or monopoly leveraging), an essential facility, or standard demanding interoperability, there is reason to expect that courts and enforcers will systematically under-appreciate the remaining avenues of meaningful competition.124 Finally, the remedial threat of predisclosure or other access requirements curtailing legitimate intellectual property protections (as in the Berkey case) also militates in favor of a safe harbor for new product innovations.

### Link---Outweighs Link Turn---2NC

#### Negativity bias---reactions are short-term and cascade.

Barkin ’19 [Tom; July 11; the president and CEO of the Federal Reserve Bank of Richmond, where he is responsible for monetary policy, bank supervision, payment services and the Fed’s National IT organization, M.B.A. from Harvard University; the Federal Reserve Bank of Richmond, “Confidence, Expectations and Implications for Monetary Policy,” https://www.richmondfed.org/press\_room/speeches/thomas\_i\_barkin/2019/barkin\_speech\_20190711]

In addition, the business reaction function has gotten faster. Short-termism has increased as activism in the market for corporate control has shifted companies’ focus. Just as with consumers, I think firms’ resilience is down. They start with lower confidence—another “hangover” from the Great Recession. At the same time, businesspeople tell me the length of the current upturn makes them nervous that another recession might be right around the corner.

The speed of the reaction function may be exacerbated by higher leverage. Corporate debt as a percentage of GDP is at an all-time high. Levered companies—and their creditors—have a bias toward taking action on negative news. This can mean cutting costs, reducing staff or pricing for volume.

Taken together, all these factors lead to an asymmetry in which firms are much more cautious about the downside than they are optimistic about the upside.

Perhaps both consumers and businesses have a higher bar for spending decisions. It’s possible that some of the tepid recovery from the Great Recession was a self-fulfilling lack of belief in the strength of the economy. Firms’ fear of failure could have prevented them from making investments even in the presence of reasonable returns.

This negative tilt, or asymmetry, continues today. Firms are frustrated with political polarization and uncertainty about trade and regulation. This limits their pricing courage and caps the upside on their spending and investment decisions.

For these reasons, a drop in confidence could lead to lower investment, lower output and eventually lower employment. If employment is placed at risk, consumption won’t be far behind. And that would place us in more serious difficulty. Put another way, I don’t discount the idea that we could talk ourselves into a recession.

#### Businesses react faster than the government can even implement policy.

Westfall ’21 [Peter; updated May 16; report includes input by Investopedia’s team while Westfall reviewed it, distinguished professor of information systems and quantitative sciences at Texas Tech University, PhD in statistics; Investopedia, “Consumer Confidence: A Killer Statistic,” <https://www.investopedia.com/articles/fundamental/103002.asp>]

Business Spending as Leading Indicator

Though not as powerful an indicator as consumer spending, business capital spending can be a killer statistic—since things can get ugly in a hurry when overall business investment precipitously cuts back. The impact on the economy can be felt at an even faster pace than if the cut occurred purely along consumer lines. The rationale is that today's sophisticated and large inventory-lean corporations often can gauge future demand before policymakers can implement changes, which often take months to kick in due to embedded policy lags.

Corporate spending is therefore very similar today to the role the stock market has played in most recoveries, and dramatic changes can be seen as a leading indicator for things to come. A rise in business spending could augur economic growth, while cutbacks in corporate capital spending can be viewed as an ominous indicator. The Purchasing Managers Index (PMI), is a representation of the progress in corporate spending.5

### Link---AT: Certainty---2NC

#### Businesses prefer uncertainty to a certain regulation.

Economist ’11 [The Economist; September 6; International newspaper that focuses on current affairs, international business, politics, and technology; The Economist, “Of red tape and recessions,” <https://www.economist.com/free-exchange/2011/09/06/of-red-tape-and-recessions>]

How much of our economic malaise can be blamed on regulatory uncertainty? Conservatives argue that a wave of Obama administration regulations and the threat of more to come are the primary hindrance to business confidence and hiring. Liberals say that the weak economy is far more important and that any regulations being enacted more than pay for themselves in economic terms.

I've been struggling with this question for months and have found the debate frustrating: the terminology is wrong and the subject poorly framed, the evidence fragmentary and unhelpful, and generalisations are rampant. So what follows are a few thoughts that I think clarify the debate, though without necessarily resolving it.

First, it is not “uncertainty” per se that bothers business. Whether uncertainty is unwelcome depends entirely on what's at stake. What would you prefer: 100% probability of dying next year, or 50%? Most of us would choose the latter. Similarly, business would prefer zero probability of a burdensome new rule, but if that's not possible, would certainly take 50% probability over 100%. The administration's decision to delay implementation of a new ozone standard perpetuates uncertainty. Business welcomed it nonetheless because now they do not have to spend money to meet it for at least two years, and perhaps forever if in the interim a new president chooses never to implement it. Does the Federal Reserve create some uncertainty when it undertakes quantitative easing? Probably, but in the process it makes the stability of inflation around 2% much more certain, and that, most businesses would say, is a reasonable trade-off.

### Uniqueness – Growth

#### Growth is strong and likely to surge.

Porter ’3-25 [Ira; 2022; citing Loretta Mester, president and chief executive officer of the Federal Reserve Bank of Cleveland; UDaily, “U.S. Economy Looks Strong,” https://www.udel.edu/udaily/2022/march/economic-forecast-loretta-mester-federal-reserve-cleveland-ceee/]

UD panel experts peer into the economy's future

U.S. economic growth continues to surge. And despite recent geopolitical action taken in Ukraine, which is causing markets to fluctuate, the U.S. economy will continue to see gains in 2022. That was the tone of the overall message of the 2022 Economic Forecast on Feb. 24.

This year’s event, sponsored by University of Delaware’s Alfred Lerner College of Business and Economics’ Center for Economic Education and Entrepreneurship (CEEE) and the Lyons Companies, was held virtually. Video can be found online.

Featured speakers included Loretta Mester, president and chief executive officer of the Federal Reserve Bank of Cleveland, Michael Farr, president and CEO of Farr, Miller & Washington LLC and chief market strategist for Hightower Advisors, and Hilary Provinse, executive vice president and head of mortgage banking at Berkadia, a Berkshire Hathaway company.

Dave Lyons Jr. gave opening remarks for the event, which his father David Lyons Sr. started in 2006, to educate Lyons Companies employees about how changes in the economy were expected to affect clients with whom they worked. It grew in 2007 when the company partnered with both UD to host the event and Michael Farr to speak. Carlos Asarta, Lerner College professor of economics and James B. O’Neill CEEE director, represented the university during the presentation.

Farr described David Lyons Sr., who passed away in 2018, as a great friend.

“David Lyons really cared about his community and he cared a lot about Delaware, and he wanted to make a difference. And this was one of the many ways David did that,” Farr said. “I always like to remember him as we start our program.”

A look into the U.S. economy

Mester, who participated in a 2019 Economic Forecast at UD, was the keynote speaker. She began her remarks assuring people that the U.S. economy was not to be underestimated. The proof was in the numbers.

Despite pandemic challenges the GDP grew 5½% in 2021, which was the highest pace since 1984. U.S. firms added 6.7 million jobs to their payrolls and the unemployment rate dropped to close to 4%, which was close to its pre-pandemic level.

“The economy’s strength was reflected by a strong demand by households and businesses, which was supported by fiscal and monetary policy,” Mester said. “And because vaccinations allowed the economy to reopen.”

Mester alluded to demand colliding with supply and labor shortages at one point, which caused prices to soar. As a result, inflation is currently the highest that it has been in 40 years, and nominal wages are accelerating.

“Differences in virus conditions and virus containment policies across the globe have disrupted global supply chains. Firms are struggling to get necessary parts and materials through clogged ports and transportation channels,” Mester said.

Mester said that because of this many businesses are facing higher costs for materials and this continues to put a strain on the economy. But there are hopeful signs, she said. Some businesses have started reporting that delivery times were becoming more predictable, but they had to wait longer than normal. There are signs that by the second half of 2022 there will be an easing of supply chains.

In addition to supply chain hiccups, businesses are struggling to find workers, Mester said. Payroll employment is almost 3 million jobs below its pre-pandemic rate. Pandemic related factors including child and elder care and fear of the virus have contributed to these factors. This does not include gig economy jobs. This number is low despite strong job level gains. Ultimately those job gains suggest positive signs for the labor market, Mester said.

“Now these factors should fade over time, but the precise timing and magnitude are open questions,” Mester said. “And if you look over a longer horizon, labor force participation has been trending down since the early 2000s due to demographics, and add to that that many more people retired during the pandemic than predicted.”

What this has done is prompt businesses to increase wages, offer signing bonuses, offer remote work and more flexible work schedules. In many cases, wage increases are not keeping up with inflation, Mester said. Personal consumption expenditures (PCE) inflation was above 6% by the end of 2021 and personal consumer price index (CPI) inflation was above 5%. While inflation is currently high, Mester said she expects it to improve but still be over 2% for 2022 and 2023.

To slow inflation, which Mester said is the Federal Open Market Committee’s goal, accommodation will be removed and the Fed Fund rate, which is now at zero to a .25%, will be increased starting in March.

Ultimately, Mester said she thought that the economic outlook for the remainder of 2022 would be that expansion will continue. She said that U.S. households and businesses have healthy balance sheets and that once the Omicron variant is behind us, the country’s demand should rebound.

### AT: Inflation

#### Inflation is transitory and the Fed will cool it without recession.

Krugman ’3-24 [Paul; 2022; Distinguished Professor at the City University of New York Graduate Center, Winner of the 2008 Nobel Memorial Prize in Economic Sciences; the New York Times, “How High Inflation Will Come Down,” https://www.nytimes.com/2022/03/24/opinion/inflation-united-states-economy.html]

Things are very different now. Back then almost everyone expected persistent high inflation; now few people do. Bond markets expect inflation eventually to return to prepandemic levels. While consumers expect high inflation over the next year, their longer-term expectations remain “anchored” at fairly moderate levels. Professional forecasters expect inflation to moderate next year.

This means that we almost surely aren’t experiencing the kind of self-perpetuating inflation that was so hard to end in the 1980s. A lot of recent inflation will subside when oil and food prices stop rising, when the prices of used cars, which rose 41 percent (!) over the past year during the shortage of new cars, come down, and so on. The big surge in rents also appears to be largely behind us, although the slowdown won’t show up in official numbers for a while. So it probably won’t be necessary to put the economy through an ’80s-style wringer to get inflation down.

That said, the Fed is probably too optimistic in believing that we can get inflation under control without any rise in unemployment. Statistical measures like the unprecedented number of unfilled job openings, anecdotal evidence of labor shortages and, yes, wage increases suggest that the job market is running unsustainably hot. Cooling that market off will probably require accepting an uptick in the unemployment rate, although not a full-on recession.

And for what it’s worth, the Fed’s plan for gradual rate hikes, which has already led to a major rise in mortgage rates, is likely to cause that unfortunately necessary cooling-off, especially combined with the fact that fiscal policy has turned contractionary as the big spending of early 2021 recedes in the rearview mirror.

So my message for those intoning dire warnings about the return of ’70s-type stagflation — which some of them have been itching to do for years — is that they should look at their history more carefully. The inflation of 2021-22 looks very different, and much easier to solve, from the inflation of 1979-80.

### AT: Ukraine

#### Economy and confidence are stable despite Ukraine.

Constable ‘3-1 [Simon; 2022; freelance economics and markets commentator for U.S. News & World Report; TIME Magazine, “Why Markets Bounced Back So Quickly After the Russian Invasion of Ukraine,” <https://time.com/6152988/ukraine-invasion-markets-rebound/> \*edited for language; KP]

Just a few days turned the tide of Russia’s invasion of Ukraine—for the world and for Wall Street, but in completely different ways.

Since the invasion began last week, hundreds of people have been killed and more than half a million have fled their homes to seek refuge in other countries. The human toll, already monstrous, will likely get worse still in the days and weeks to come as Russian forces step up their bombardment of Ukrainian cities.

However, Wall Street doesn’t view things with the same concern. Money and profits are what count in the trading rooms of New York City; human suffering not so much.

Over the last week, all-consuming pessimism among investors has quickly given way to sanguine optimism. In short, the fears that the crisis would morph into a global conflict shifted into something far less calamitous. Instead of imminent world-wide annihilation, Wall Street’s money wizards now see the NATO alliance as stronger than ever, and a feeble-looking Russia shunned by much of the world. This has led to a collective forecast that the conflict, while awful, won’t be as bad as previously thought.

“Initially, the invasion was seen as likely a global conflict, but then investors downsized it to a regional one,” says Jack Ablin, chief investment officer at Cresset Capital. “Sentiment perked up a bit since the matter has been reassessed.”

A weird confluence of Wall Street worries

What happened recently in the stock market is worth reviewing. Long before the invasion, Wall Street was already worried about the potential for the Federal Reserve to raise the cost of borrowing later this year. That concern led investors to bail on stocks and sent the S&P 500 index down approximately 8% in the year through Friday. Most of that decline happened long before the Russian invasion started early last week. The Ukraine crisis merely added to the market losses.

“Investors were trying to price in two things at once,” says Art Hogan, chief market strategist at National Securities Corporation.

Put another way, Wall Street stock traders were analyzing the likely effects of war in Europe, plus the impact of possibly higher interest rates. Both factors had the potential, at worst, to destroy corporate profits or, at a minimum, dent them. Working out what would happen was part of what caused last week’s market volatility and sent investors into a fear spiral that reached a peak mid-week.

“It came to a head on Wednesday with a crescendo of selling except for gold and energy,” Hogan says.

The price of Brent crude oil, the European benchmark, rallied well above $100 a barrel for the first time since 2014 on the back of concerns that oil supplies from Russia would get disrupted. Gold jumped 3.9%, to above $1,900 a troy ounce, as investors looked for a safe haven for their money.

Mid-week markets reversal

However, by Thursday, sentiment had switched to risk-on, meaning that investors were willing once again to take bets on so-called risky assets like stocks. In short, their worries about how bad the Fed and the war would be for Wall Street had not materialized. Both previously concerning matters got downgraded in the minds of bankers.

Of course, the matter wasn’t over, as alarming headlines continued breaking. However, the underlying trend was viewed as positive and helped cement the idea that the outlook for the global economy is better than previously expected.

Over the weekend, the western allies, including the U.S., the European Union, the U.K., and others, took the unprecedented step of blocking some Russian banks’ access to the international payment system known as SWIFT. This act will increasingly [devastate] ~~cripple~~ the country’s economy—as capital cannot flow into Russia as easily. “Rather than go to war, they said let’s choke off the Russian economy,” says Marc Chandler, chief market strategist at currency trader Bannockburn Global Forex.

In the wake of the SWIFT ban, the ruble has plunged to a record low value. It’s now worth less than one U.S. cent. The fall prompted the Russian central bank to more than double its key borrowing rate to 20% in an effort to defend its currency.

It wasn’t just money matters that changed. The weekend seems to have shifted the facts on the ground in Ukraine in a significant way. For now at least, the Russian military’s advance has slowed in the face of fierce resistance, and the two largest cities, Kyiv and Kharkiv, remain under Ukrainian control.

Perhaps the worst news was that Russian President Vladimir Putin announced he’d put his nuclear deterrent forces on high alert. That raised worries that Russia could be prepared to escalate the conflict.

Russia draws NATO closer together

However, calm heads have prevailed; the U.S. did not respond by raising its own nuclear status. “This isn’t chess, it’s poker, and the U.S. called Russia’s bluff,” Chandler says.

Separately, Sweden and Finland indicated that they may wish to join NATO, the Cold War military alliance led by the U.S. Meanwhile, Germany announced it would increase its military spending to 100 billion euros ($112 billion) in this year’s budget. That’s something that several U.S. presidents have demanded, but the largest European economy has failed to oblige until now. Germany said it would also send weapons to Ukraine, ending its long-standing post-Second World War position that it wouldn’t sell arms into war zones.

One consequence of an invigorated NATO will be more forces being stationed in Europe on a quasi permanent basis, Chandler says. In particular, a more united military front may cause other potential adversaries to avoid a conflict.

It’s not likely that the war will end soon. Russian forces are continuing their offensives against Ukraine’s major cities. And it is possible that the fighting could intensify. However, so far the prediction from the stock market is that the conflict won’t extend far outside Ukraine’s borders. Of course, that could change in a trice.

The result so far is that financial markets seem relatively calm, which should give investors a tad of confidence. “Given what was potentially at stake—nuclear war—the market’s response has been amazingly orderly,” Chandler says. “It’s conducive for a better outlook than we had a month ago.”

### Uniqueness – Confidence

#### Business confidence is high.

Mutikani ’3-24 [Lucia; 2022; reporter, citing U.S. Composite PMI Output Index; Reuters, “U.S. business activity rises to eight-month high in March – survey,” https://sports.yahoo.com/u-business-activity-rises-eight-135053568.html]

WASHINGTON (Reuters) - A measure of U.S. business activity increased to an eight-month high in March, fueled by strong demand for both goods and services, but Russia's war against Ukraine hurt sentiment.

S&P Global said on Thursday its flash U.S. Composite PMI Output Index, which tracks the manufacturing and services sectors, rose to a reading of 58.5 this month. That was the highest reading since July 2021 and followed 55.9 in February.

A reading above 50 indicates growth in the private sector. The continued rebound from a slump in January mostly reflected pent-up demand and the easing of COVID-19 restrictions across the country amid a massive decline in coronavirus cases, as well as less severe supply chain disruptions.

The flash composite orders index rose to a nine-month high, with businesses reporting that "a greater availability of inputs allowed them to be more competitive and win new customers."

## Adv---1

### 2NC---AT: Algo Bias

#### Monopolies reduce inequality

Atkinson ’18 [Robert and Michael Lind; March 30; PhD from the University of North Carolina; professor of practice at the Lyndon B. Johnson School of Public Affairs at the University of Texas, JD from the University of Texas Law School, International Relations MA from Yale University; Big is Beautiful: Debunking the Myth of Small Business, “The Bigger the Better: The Economics of Firm Size,” Ch. 4]

Productivity

Some critics of big business argue that the reason big firms pay their workers more is that they have market power and use that to charge higher prices, at least some of which they pass on to their workers in the form of higher wages while the rest is funneled to shareholders.

In fact, large firms pay more because they are on average more productive. One 1978 study of US manufacturing firms sought to determine whether large firms were more productive than smaller firms and, if so, whether that was the reason they were more profitable. The study found that on average, the four largest firms in any industry had profits 57 percent higher than the other firms in the industry.29 But these higher profits did not come from squeezing their suppliers, charging higher prices, or paying lower wages. Rather, the four largest firms in any industry enjoyed labor productivity rates on average 37 percent higher than the remainder of the industry. They passed on at least some of the gains to their workers, with average wages 15 percent higher than in the rest of the industry. And this advantage was experienced at all levels of workers, not just top managers. In fact, production workers in the largest four firms made on average 17.2 percent more than production workers in the rest of the industry.30

Why are big firms more productive? One reason is that they use more capital equipment to drive efficiency. Capital intensity is positively related to productivity and firm size.31 A 1988 national survey of 10,000 manufacturers found that technology use is positively correlated with plant size.32 Likewise, larger banks were significantly more likely to adopt ATMs when they were first developed in the early 1980s.33

But the willingness of large firms to spend money on equipment and software to drive productivity is just one factor. Even when this factor is controlled for by measuring total factor productivity, larger firms are still 16.6 percent more productive than smaller firms.34 This may be because of more economies of scale in production or because larger firms are simply better managed and operated.

#### Inequality has zero effect on war.

Gal Ariely 15, senior lecturer in the Department of Politics & Government, Ben-Gurion University of the Negev, PhD from the University of Haifa’s School of Political Sciences, “Does National Identification Always Lead to Chauvinism? A Cross-national Analysis of Contextual Explanations,” Globalizations, 2015, https://s3.amazonaws.com/academia.edu.documents/43980028/Ariely\_Globalizations\_2015.pdf?AWSAccessKeyId=AKIAIWOWYYGZ2Y53UL3A&Expires=1515397197&Signature=78lnbbHNRVjhLgOKyRPKm%2BK8M1o%3D&response-content-disposition=inline%3B%20filename%3DDoes\_National\_Identification\_Always\_Lead.pdf

With respect to internal explanations, the effects of income inequality and ethnic diversity are presented in Table 3. Models 3.1 and 3.2 indicate that neither directly affects chauvinism. H4 is therefore not supported. The results suggest, however, that both have a negative effect on the national-identification slopes. Contrary to our expectations, countries with higher levels of economic and ethnic division appear to exhibit a weaker relation between national identification and chauvinism. While these findings might seem to contradict H5, the pattern was caused by outliers. After excluding South Africa—the most unequal and ethnic diverse country in our sample—the effect of ethnic diversity is not even of borderline significance. After excluding Chile—the most unequal country in our sample—the interaction effects for economic inequality were also far from significant.

The results, therefore, do not support H5.21¶ Conclusions¶ During the historic phone call between President Obama and Iranian President Sheikh Hasan Rouhani in September 2013, the latter stated that his country’s nuclear program ‘represents Iran’s national dignity’.22 This declaration reflects the common perception that Iran’s nuclear program mobilizes Iranians in support of resisting further national humiliation at the hands of foreigners (Moshirzadeh, 2007). This reflects the important role national feelings play in the contemporary international arena. Evidence from other examples—such as the Israeli-Palestine conflict—indicates that national identity serves as a key factor in conflict resolution. The prominence of national feelings is not limited to the Middle East, their effect on public attitudes towards international issues, and conflicts also being manifest in the West (Billig, 1995; Kinder & Kam, 2010).¶ It is thus hardly surprising that scholars seeking to develop a better understanding of conflicts adopt a social-psychology perspective, replacing the deterministic view that identification with one’s in-group necessarily leads to antagonism towards out-groups with an examination of the broader social context. In line with this approach, the present paper focuses on the way in which political and social contexts encourage chauvinistic views towards the international arena and how they affect the relation between national identification and chauvinism.¶ Integrating various social and psychological theories, we investigated two external contextual explanations (globalization and conflict) and an internal explanation (social division). Employing cross-national survey data, we examined the relation between national identification and chauvinism across 33 countries. The findings indicate that a positive relationship exists between national identification and chauvinism across most of the countries, although the level differs from country to country. Using a multilevel regression analysis, we tested to see whether globalization, conflict, and social division correlate with this variation. The results indicate that social and political contexts are related to chauvinism and the ways national identifi- cation and chauvinism are linked. Although a closer relation exists between national identification and chauvinism in more globalized countries, globalization failed to explain the variation in chauvinism itself. These findings support the notion that globalization highlights the importance of national identity (Calhoun, 2007; Castells, 2011). While those sections of globalized societies that are attached to their country also tend to resist international cooperation and endorse hostile views, the complexity of the phenomenon—as evinced by the divergent findings of previous studies (e.g. Jung, 2008; Norris & Inglehart, 2009)—calls for further research of this interpretation. The fact that the current study is cross-sectional must also be taken into account, the findings adducing the relation but not the causal relations between the variables. In contrast to experimental studies, the present design is similarly limited in its ability to offer a robust control for alternative explanations.¶ Another external factor found to be relevant—to a certain degree—was conflict. Countries that suffered large numbers of deaths in conflicts and mobilized resources and personnel exhibited higher levels of chauvinism. When other indices for conflict were used, however, these results were not replicated. A possible explanation for this finding lies in the inherent limitation in the way in which conflicts are measured across various countries. Measuring international conflicts is a challenging task (Anderton & Carter, 2011). While the ways of measuring conflict were chosen because they reflect different dimensions of conflict in order to be representative of a wide range of countries, the problem of comparability cannot be ignored. An alternative explanation may derive from the fact that only deaths from conflict and resources/personnel mobilization are sufficiently significant to contribute to chauvinism. The limitations of our measurements of conflict and research design mean that this idea must remain speculative, however. In addition, it is important to emphasize that the sample of countries is also limited as many countries are not involved in conflict and there is also limited variation in the types of conflicts.¶ Contrary to what the divisionary theory of national mobilization would lead us to expect, neither economic inequality nor ethnic diversity were related to chauvinism or affected the relation between national identification and chauvinism. This finding might also be explained by the limitation of the current research design. The number of countries included in the ISSP 2003 National Identity Module being relatively small and the sample only covering countries with available survey data, the results relate solely to this specific sample of countries. Across another set of countries, social division might play a far more significant role. Another explanation might be the meaning given to national identification and chauvinism across the countries. While evidence exists for the comparability of the scales across most of the countries, the divergent meaning probably attributed to them in Germany, the United States, and Israel might form an additional limitation.

## Adv---2

### 2NC – Turn

#### Antitrust can’t solve and worsens vulnerabilities.

McLaughlin ’19 [Michael and Daniel Castro; April 10; research analyst at the Information Technology and Innovation Foundation; vice president at ITIF and director of ITIF's Center for Data Innovation; ITIF, “Breaking Up Big Tech Would Not Make Consumer Data More Secure,” https://itif.org/publications/2019/04/10/breaking-big-tech-would-not-make-consumer-data-more-secure; KP]

A growing number of advocates are arguing that many U.S. technology firms are too big and that antitrust regulators should break them up. For example, Senator Elizabeth Warren (D-MA) recently detailed how the government should break up Amazon, Google, and Facebook. Some advocates have wrongly justified similar positions by stating that smaller firms would have less data, and so consumers would be better protected from data breaches.

Data breaches refer to incidents of hacking that allow individuals to exfiltrate data from another party’s computer system, such as when hackers copied the data of nearly 150 million Americans from Equifax’s servers. Frequently, hackers use phishing attacks or ransomware to illicitly access data, but they can also exploit vulnerabilities in code, which is how hackers gained access to 30 million Facebook users’ accounts.

Many of the calls for antitrust action have to do with Facebook data. For example, two co-founders of the anti-Facebook campaign “Freedom From Facebook” published an op-ed in USA Today arguing that because of the recent data breach at Facebook, the Federal Trade Commission should go beyond a “historic fine” and “break up Facebook’s social media monopoly.” Some members of Congress have echoed these sentiments. For example, Senator Mark Warner (D-VA) stated that the data breach was “a reminder about the dangers posed when a small number of companies like Facebook or the credit bureau Equifax are able to accumulate so much personal data about individual Americans without adequate security measures.” Later, when asked about breaking up Facebook, he did not take the option off the table, instead saying “I see breakup as more of a last resort.” And Senator Richard Blumenthal (D-CT) noted that “Facebook has become a honeypot for malevolent lawbreakers who seek to undermine our society and democracy.” He too has stopped short of explicitly calling to breakup Facebook but has argued there is a link between competition and data protection, stating in January, “This is yet another astonishing example of Facebook’s complete disregard for data privacy and eagerness to engage in anti-competitive behavior.” The remedy, according to organizations like Open Market Institute and Color of Change, is for regulators to force Facebook to divest its ownership of Instagram and WhatsApp.

But if the problem is data breaches, antitrust is the wrong tool. There is no reason to believe that consumer data is more protected if five firms each hold data on 20 million Americans versus if one firm holds data on 100 million Americans. Plenty of companies with less data than Facebook—from Under Armour to Caribou Coffee—have had data breaches. And even if the government were to break up some of the largest tech firms, the resulting organizations would still represent enormous “honeypots” to malicious actors—for example, Instagram alone has 1 billion monthly users.

But more importantly, breaking up large tech firms would not make those smaller companies more secure. Indeed, larger firms have several advantages over smaller ones when it comes to security. Many security upgrades involve fixed, rather than variable costs. Larger firms can better afford to invest more in security since they can amortize the cost over a larger user base and benefit from economies of scale. They can also hire larger and more experienced security teams to prevent, detect, and respond to new threats. For example, Facebook has steadily increased the size of its staff dedicated to addressing security threats on its platform. In addition, breaking up large tech firms will not make U.S. elections less vulnerable to Russian interference, which Senator Warren has suggested. The data on large platforms is a rich source of intelligence on cyber threats. Alex Stamos, the former chief security officer at Facebook, has noted that Google “has the most useful data set available to any private company for tracking state adversaries and intelligence services.”

#### Small firms are cybersecurity risks – giants are more secure.

Peters ’19 [Chistopher; March 26; Chief Executive Officer, The Lucrum Group; Senate Hearing 116-260, “The Cybersecurity Responsibilities of the Defense Industrial Base,” https://www.govinfo.gov/content/pkg/CHRG-116shrg41313/html/CHRG-116shrg41313.htm; \*SMM = small to medium-sized manufacturers; KP]

The research shows that SMMs have a poor understanding of cybersecurity in general. They often do not understand the threats much less what to do about them.

This overall lack of awareness and preparedness should be alarming. Large manufacturers typically have very robust security measures for both their business and operating systems. That makes the less knowledgeable and poorly defended SMMs in the supply chain a greater target for cyber attacks particularly since they often handle much of the technical data sent from those larger contractors. Whether the attack is to steal intellectual property, introduce defects into weapon systems, or to shut down entire operations, the SMMs are prime targets.

### 2NC – No Systemic Risk

#### No systemic risk – big tech is patching up holes.

Chung ’21 [Ingrid; August 30; writer; National Review, “Big Tech Is Doing the Right Thing on Cybersecurity,” https://www.nationalreview.com/corner/big-tech-is-doing-the-right-thing-on-cybersecurity/; KP]

President Joe Biden recently met with Big Tech executives to discuss how to improve cybersecurity after recent cyberattacks in which government software contractor Solarwinds and oil pipeline Colonial Pipeline were targeted. Leading tech corporations, including IBM, Google, and Amazon, will all try to improve cybersecurity by investing in the training of personnel in this field and upgrading their respective encryption and security systems. Microsoft has also committed to investing $150 million in upgrades for cybersecurity systems of government agencies. Big Tech may not always do the right thing, but these plans to enhance cybersecurity are certainly something that we can all stand behind.

In recent years, as the Internet has become increasingly influential and indispensable, cybersecurity has, correspondingly, become an increasingly prominent threat to not only citizens’ privacy but also to national security. Former national-security adviser John Bolton explained the significance of cybersecurity to national defense in a recent National Review article, in which he characterized threats from cyberspace as “a multiplicity of hidden, ever-changing threats.” A recent report by the Heritage Foundation raised concern over espionage, trading of secrets, and the disruption of military commands and communication potentially being conducted in the cyber domain.

The effective regulation of cyberspace, a relatively new front for modern warfare characterized by its elusiveness and lack of boundaries, is sometimes challenging. Laxness in cybersecurity, however, has often led to catastrophic consequences. For instance, the WannaCry Ransomware Cyber Attack in 2017, in which files in affected computer systems were locked until ransom was paid for their decryption, affected approximately 200,000 computers in 150 countries and led to enormous financial costs. Victims of the cyber-extortion scheme included entities from government agencies such as the English National Health Service to major international corporates such as Boeing.

It is well established that both the state and leading tech corporations have a legitimate interest in enhancing cybersecurity. The government is responsible for engaging in national defense in the cyber domain and tech corporations are obligated to protect the privacy of their users, whose personal information is often entrusted to them.

Big Tech’s plans to cooperate with the government to improve cybersecurity through financial investments appears to be promising. While it may be difficult to predict the effectiveness of such investments, the fact that Big Tech and the government are placing the enhancement of cybersecurity close to the top of their agenda and are committing to coordinated efforts is good news. Big Tech, with its financial prowess derived from the sheer size of the industry, and a unique relationship with the use of cyberspace, is uniquely positioned to materially contribute to state-led efforts to secure cyberspace. Furthermore, investing in education on cybersecurity of employees may also be useful in raising awareness and amplifying the industry’s collective concern over capacity to combat cyberattacks in the long run.

#### Cascading collapse is a hoax.

Moosa ’10 [Imad; October 4; Finance Professor at RMIT in Melbourne, Australia; Journal of Banking Regulation, “The myth of too big to fail,” vol. 11]

There is only one argument for TBTF, the argument of systemic risk and failure. But there is no support in history for the proposition that the failure of one institution could bring about havoc on the financial system and the economy at large. There are numerous cases of financial institutions that were allowed to fail without significant systemic problems. The resulting losses were shared by a large number of investors and creditors, who would have been making good returns in previous years. Then some managers who had been accumulating huge personal fortunes through parasitic activities would lose their jobs and most likely find others. A failed institution would then disappear because of serious errors of judgements, so what? Is not this a feature of capitalism? Is not this the corporate version of the survival of the fittest? Is this not what Adam Smith believed in? Failure is necessary in a free market as it improves economic efficiency. When a company fails, a more successful company can buy its good assets, releasing them from incompetent management. The same applies to the labour force. It is a hoax to believe that catastrophic systemic losses can result from the failure of a badly managed financial institution.

### 2NC – No Disinformation

#### No disinformation impact – studies disprove persuasive effect.

Nyhan 19 – Brendan Nyhan, public policy professor at the University of Michigan. [Why fears of fake news are overhyped, 2-12-19, https://www.cnbc.com/2019/02/11/why-fears-of-fake-news-are-overhyped.html]

How easy is it to change people’s votes in an election?

The answer, a growing number of studies conclude, is that most forms of political persuasion seem to have little effect at all.

This conclusion may sound jarring at a time when people are concerned about the effects of the false news articles that flooded Facebook and other online outlets during the 2016 election. Observers speculated that these so-called fake news articles swung the election to Donald J. Trump. Similar suggestions of large persuasion effects, supposedly pushing Mr. Trump to victory, have been made about online advertising from the firm Cambridge Analytica and content promoted by Russian bots.

Much more remains to be learned about the effects of these types of online activities, but people should not assume they had huge effects. Previous studies have found, for instance, that the effects of even television advertising (arguably a higher-impact medium) are very small. According to one credible estimate, the net effect of exposure to an additional ad shifts the partisan vote of approximately two people out of 10,000.

In fact, a recent meta-analysis of numerous different forms of campaign persuasion, including in-person canvassing and mail, finds that their average effect in general elections is zero.

Field experiments testing the effects of online ads on political candidates and issues have also found null effects. We shouldn’t be surprised — it’s hard to change people’s minds! Their votes are shaped by fundamental factors like which party they typically support and how they view the state of the economy. “Fake news” and bots are likely to have vastly smaller effects, especially given how polarized our politics have become.

Here’s what you should look for in evaluating claims about vast persuasion effects from dubious online content:

How many people actually saw the questionable material. Many alarming statistics have been produced since the election about how many times “fake news” was shared on Facebook or how many times Russian bots retweeted content on Twitter. These statistics obscure the fact that the content being shared may not reach many Americans (most people are not on Twitter and consume relatively little political news) or even many humans (many bot followers may themselves be bots).

Whether the people being exposed are persuadable. Dubious political content online is disproportionately likely to reach heavy news consumers who already have strong opinions. For instance, a study I conducted with Andrew Guess of Princeton and Jason Reifler of the University of Exeter in Britain showed that exposure to fake news websites before the 2016 election was heavily concentrated among the 10 percent of Americans with the most conservative information diets — not exactly swing voters.

The proportion of news people saw that is bogus. The total number of shares or likes that fake news and bots attract can sound enormous until you consider how much information circulates online. Twitter, for instance, reported that Russian bots tweeted 2.1 million times before the election — certainly a worrisome number. But these represented only 1 percent of all election-related tweets and 0.5 percent of views of election-related tweets.

#### It’s less than 1% of media and history disproves the impact.

Pinker ’19 [Dr. Steven, Johnstone Professor of Psychology at Harvard University, “Why We Are Not Living in a Post‑Truth Era”, https://www.skeptic.com/reading\_room/steven-pinker-on-why-we-are-not-living-in-a-post-truth-era/]

Anyone who urges universities to live up to their mission of promoting knowledge, truth, and reason is bound to be confronted with the objection that these aspirations are just so 20th century. Aren’t we living in a post-truth era? Haven’t cognitive psychologists shown that humans are fundamentally irrational? Mustn’t we acknowledge that the pursuit of disinterested reason and objective truth are Enlightenment anachronisms?

The answer to all of these questions is “no.”

First, we are not living in a post-truth era. Why not? Consider the statement “We are living in a post-truth era.” Is it true? If so, it cannot be true.

Likewise, it is not the case that humans are irrational. Consider the statement, “Humans are irrational.” Is that statement rational? If it is, it cannot be true—at least, if it is uttered and understood by humans. (It would be another thing if it was an observation exchanged among an advanced race of space aliens.) If humans were truly irrational, who specified the benchmark of rationality against which humans don’t measure up? How did they conduct the comparison? Why should we believe them? Indeed, how could we understand them?

In his book The Last Word, the philosopher Thomas Nagel showed that truth, objectivity, and reason are not negotiable.2 As soon as you start making a case against them, you are making a case, which means you are implicitly committed to reason. Nagel calls this argument Cartesian, after Descartes’ famous argument that just as the very fact that one is pondering one’s existence shows that one must exist, the very fact that one is examining the validity of reason shows that one is committed to reason. A corollary is that we don’t defend or justify or believe in reason, and we certainly do not, as it is sometimes claimed, have faith in reason. As Nagel puts it, each of these is “one thought too many.” We don’t believe in reason; we use reason.

This may sound like logic-chopping, but it’s built into the way we make everyday arguments. As long as you’re not bribing or threatening your listeners to mouth agreement with you, but trying to persuade them that you’re right—that they should believe you, that you’re not lying, or full of crap— then you have conceded the primacy of reason. As soon as you try to argue that we should believe things by any route other than reason, you’ve lost the argument, because you’ve appealed to reason. That is why a defense of reason is unnecessary, perhaps even impossible.

As for the “post-truth era,” journalists should retire this cliché unless they can keep up a tone of scathing irony. It comes from the observation that some politicians—one in particular—lies a lot. But politicians have always lied. They say that in war, truth is the first casualty, and that can be true of political war as well. (The expression “credibility gap” had its heyday during the administration of Lyndon Johnson in the 1960s.) And the bending or inverting of truth by people in power has long been consequential, leading, for example, to the Spanish-American war, the First World War, the Vietnam War, and the Iraq War, right up to the near miss in the Persian Gulf in 2019.

Another inspiration for the post-truth cliché is the recent prominence of “fake news.” But this, too, is not a new development. The title of the James Cortada and William Aspray’s forthcoming Fake News Nation: The Long History of Lies and Misinterpretations in America, is self-explanatory, though the long history is by no means confined to America.3 The Protocols of the Elders of Zion, the hoaxed proceedings of a secret meeting of Jews plotting global domination, was advanced as fact by a number of prominent people in subsequent decades, including the industrialist Henry Ford. Countless pogroms, lynchings, and deadly ethnic riots have been sparked by rumors of the alleged perfidy of some minority group.

And the belief that fake news is displacing the truth itself needs to be examined for its truth. In their analysis of fake news in the 2016 American presidential election, Andrew Guess, Brendan Nyhan, and Jason Reifler found that it took up a minuscule proportion of the online communications (far less than 1 percent) and was mainly directed at partisans who were impervious to persuasion.4 This is hardly surprising: unless you were already marinated in a rightwing fever swamp, if you came across a social media post claiming that Hillary Clinton was running a child sex ring out of a Washington DC pizzeria, you would treat it as exactly what it is.

# 1NR

## CP---CIL

#### Institutional design is core of the topic and predictable.

Crane ’21 [Daniel; January 28; Professor of Law at the University of Michigan, J.D. from the University of Chicago; Notre Dame Law Review, “Antitrust Antitextualism,” vol. 96]

2. Importance of Institutions

If statutory texts have shown relatively little sustained power to reform antitrust, what has been effective? The answer, in short, is institutions. 258Although statutory amendments to the substance of antitrust law have not achieved the full reforms their texts and legislative histories would suggest on a lasting basis, significant and durable shifts in antitrust enforcement have come about as a result as institutional reforms and institutional factors. Section 5 of the FTC Act may have added nothing to the Sherman Act substantively, but the creation of the Federal Trade Commission has had lasting implications for federal antitrust enforcement. 259The courts may not have interpreted the private antitrust remedy nearly as broadly as section 4 of the Clayton Act reads, but the delegation of antitrust enforcement authority to "private attorneys general" has had very important long-term effects for the substantive development of antitrust law. 260 The Celler-Kefauver amendments could not achieve sustained increases in antimerger enforcement levels, but the Hart-Scott-Rodino Act's creation of a premerger notification regime radically shifted the locus and texture of merger law and policy from adjudication before generalist judges to administrative negotiations with agency technocrats. 261 For better or for worse, changes in institutional design have proven more consequential to antitrust enforcement than statutory recalibrations of the substantive standards.

This suggests that a Congress serious about changing the course of antitrust enforcement should pay at least as much attention to questions of institutional design and capacity as to the wording of substantive liability rules and standards. Over time, the courts may interpret the antitrust statutes away from their plain wording and legislative history, but courts have less interpretive power to rework institutional design. In some cases, as with respect to Hart-Scott, the consequence of the institutional design has been significantly to reduce the courts' role and transfer primary responsibility to other actors. If Congress is concerned that future judicial interpretation may diminish the vitality of a statute, one potential solution is to create an institutional framework for enforcement that does not depend heavily on judicial interpretation.

#### That requires considerations of CIL.

Helfer ’16 [Laurence; 2016; Professor of Law at Duke Law School; Michigan Journal of International Law, “Customary International Law: An Instrument Choice Perspective,” 563]

A core contribution that links these studies is their focus on instrument choice. An instrument choice framework assumes that rational states choose the type of legalized cooperation - and the norms and design features associated with it - that furthers their own interests. Although some versions of the framework assume that nations only pursue short-term material gains, more capacious and realistic approaches are fully compatible with the claim that states select legal instruments and their design attributes to advance a long-term preference for upholding international commitments.

Strikingly, however, the rational design, legalization, and instrument choice scholarship has all but ignored CIL. Numerous studies of international lawmaking barely mention custom, lump it together with soft law, or view it as a less binding form of commitment than treaties. More specifically, these accounts fail to consider the distinctive design features of CIL or whether and when states might choose custom as their preferred legal instrument.

#### Antitrust is unique – the CP legitimizes AND develops CIL.

Zwarensteyn ’13 [Hendrik; 2013; Professor of Business Law at Michigan State University; Wroclaw Review of Law, “Some Aspects of the Extraterritorial Reach of the American Antitrust Laws,” ISBN: 9789401744676]

(b) At the Supra-National Level:

An entirely different question which we will have to answer is how the above proposed system would function with regard to the transnational aspects of restraint of trade. Two different situations will have to be considered:

(1) The domestic level.

At the domestic level, the judges can be expected to be conversant with and attuned to the legal and the business problems involved, both from the national and the transnational points of view. It is of course, particularly with respect to the generally accepted and recognized principles of international (antitrust) law that we may insist that the judges apply these principles. This holds true both at the trial level and the appellate levels.

Even then it may happen that an appeal taken to the Court of Antitrust Appeals will be decided in a manner to which a foreign defendant, or his national government, objects on the grounds that the economy, or the sovereignty of the foreign State will be adversely affected, contrary to the rules of international law.

In such a case a review by the United States Supreme Court might seem of little value to the foreign government, particularly if the Supreme Court would only consider the proceedings in the courts below on the basis of the proper application of the law, and not on the basis of the merits of the case. This depends on the wording of the law. If the law contains clearly written rules with regard to transnational aspects of restraint of trade, it would seem highly improbable that the Supreme Court (or even the courts below) would ignore these rules.92

(2) The supra-national level.

The possibility exists that the interpretation of the law by the American domestic courts would lead to an unacceptable result as far as the foreign government is concerned.

To solve problems of this nature provisions need to be made for the review by a supra-national tribunal of cases with trans-national aspects. For convenience sake we shall designate this supra-national tribunal International Antitrust Court. Such a tribunal could conceivably be attached to the International Court of Justice. Another possibility would be to establish an independent Supra-National High Authority for Antitrust Matters, part of which could be a Supra-National Antitrust Court.

A third possibility could be the creation of an International Court of Arbitration for Antitrust Matters. While the organization of the above suggested tribunals may differ slightly in its practical day-to-day work, these differences will not have great impact, since the objectives remain the same.93 We submit that a supra-national tribunal such as suggested by us would not severely jeopardize the sovereignty of the nations affected, because law and economics rather than political considerations would be the major concern of these tribunals.

Furthermore, while these supra-national institutions would review national adjudication on the basis of internationally accepted rules of law and economics, still, they would have to be guided to a certain extent by the ratiocination of the antitrust courts at the national level. To that extent, these courts might even be considered as an extension of the national courts into the trans-national sphere. Conversely, these supra-national tribunals might provide proper guidance to national courts in those cases where trans-national problems of antitrust are submitted to the antitrust courts at the national level. To that extent, a proper interaction would result between the international and the national legal order of the nations of the world. 94

Of course, emotional outbursts can be expected if these supra-national tribunals would find that the national antitrust court had violated the accepted rules of international law. These outbursts will simply have to be countered by the statement that no international cooperation can effectively come about unless even the powerful nations of the world stand ready to have their judicial findings be tested against generally accepted rules or principles. Furthermore, international tribunals have at times reviewed cases which had been decided by national courts, including cases decided by the United States Supreme Court.95 Also, the creation of one more international court in addition to the existing ones does not disturb us; as matters stand today, there are several international tribunals dealing with a variety of rather heterogeneous subject matter. 96

A creation such as here suggested would not only be a vehicle to settle disputes. It would also significantly contribute to the further growth of international law, because it would develop and formulate new principles and rules of international antitrust law; that this is necessary will be shown later in this study.

Furthermore, a tribunal as here alluded to would be of importance with regard to the presently emerging extraterritorial reach of the antitrust law of the European Economic Community, 97 and thus, provide proper guidance with regard to the norms set there. Finally, the tribunal would be an aid to the courts in the emerging and developing nations of the world, in that it could provide guidance with the formulation of principles pertaining to the extraterritorial reach of restrictive trade legislation in those countries. Thus, the principles of international law would increasingly reflect the position that it contains the norms and notions of all nations of the world, rather than the domain of European countries who developed principles to regulate the international relations among themselves.98

There is an added reason for the establishment of an International Antitrust Court. The case for a unilateral application of national law enforcement exclusively by national courts has certainly not been made. On the contrary, this form of adjudication has even provoked the accusation that the (American) national courts were guilty of judicial aggression.99

It just might be possible that a case for antitrust enforcement at the supranational level could be made if the admittedly slower process of adjudication in accordance with the accepted principles of international law were undertaken in a spirit of cooperative effort. 100

We do not underestimate the problems that will confront a Supra-national Antitrust Court, particularly because of the conflicting regulatory policies which prevail in the various countries. 10l It is our conviction however, that the effort is worth the trouble because of the advantages we anticipate to be derived from it.

As early as 1946 the establishment of an international tribunal dealing with antitrust problems was proposed. 102 However, where that suggestion was made for the purpose to determine whether an international cartel would or would not be in conflict with international law, we submit that our proposal would purport to review the decisions of national courts on the basis of the internationally accepted rules of law and economics, against the background of what is necessary to maintain the harmony in the community of nations. Thus, a body of rules of law to which national governments would submit would gradually emerge. 103 in which the special character of the antitrust laws, as a separate area of the law, would find recognition. 104

#### U.S. acceptance causes cascading revision of CIL.

Howard ’20 [David; 2020; Attorney at Baker Botts LLP, J.D. from the University of Texas School of Law; Duke Journal of Constitutional Law and Public Policy, “A Revised Revisionist Position in the Law of Nations Debate,” Lexis]

At the Founding, the Framers viewed the law of nations as arising from positive or natural law, yet this is no longer the case. The law of state-state relations was quite clearly the most important of the three original categories of the law of nations, as it governed the relations between sovereign nations. This law of state-state relations created a system that nations followed to keep the peace and promote economic connections, and is referenced and incorporated in several constitutional provisions, such as the recognition power. However, customary international law has changed drastically since the Founding. Fundamental technological, social, and geopolitical change can accelerate the formation of CIL in what Professor Michael Scharf calls Grotian moments 67, or international constitutional moments.

Footnote 67:

"Grotian Moment" is a term used to describe a "paradigm-shifting development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance." See Michael P. Scharf, Seizing the "Grotian Moment": Accelerated Formation of Customary International Law in Times of Fundamental Change, 43 CORNELL INT'L L.J. 439, 440 (2010).

End of Footnote 67.

These are large turning points in the law of nations. The law of nations is not stagnant, and each state action--to varying degrees--affects that "general and consistent" state practice on which CIL is defined. Because CIL is an unwritten body of law and continues to change, there is tremendous difficulty in determining what it requires. There is even debate over what evidence should be used to define CIL. This is why "determinations of the content of customary international law implicate not only legal considerations but also considerations of U.S. foreign policy."

#### Expanded IEL stops plastic, nuclear, and endocrine disrupting waste – extinction.

Picard ’21 [Michael Hennessy; 2021; Research Fellow at the Institute of Advanced Studies; Hebrew University of Jerusalem Legal Studies Research Paper Series, “Exploring the Planetary Boundaries’ Wasteland: International Law and the Advent of the Molysmocene,” p. 204-217]

In their own ways, these neologisms convey some truths about the global conditions of life on Earth. Yet, as this chapter argues, they fall short in their attempt to provide a clear description of a contemporary era that has become saturated with pollution and waste.13 The descriptive limits of these neologisms are threefold. First, they draw the contours of a dystopian present inheritor of our (the human species’) many moral (and mortal) sins, while Earth destruction and pollution should be conceived as normal and logical consequences of human activities and not as an immoral abnormality. Second, these neologisms rest on a productivist/ destructive reading and, therefore, a highly deterministic account of a future in the making, and that is now unfolding right before our eyes. Yet, every day, a new world is being redesigned in the ashes of our productivist/destructive world.

Finally, these terms stress the effects of specific social configurations, whether they be colonial (Plantatiocene) or capitalistic (Capitalocene), as they are based on an ‘epistemic sediment’ of the Holocene, namely that of appropriation and accumulation ‘which is reactivated in many critical commentaries on the Anthropocene’.14 As this chapter argues, social configurations not only assemble life and nature, that is, productive forces on a global scale; they also organise the redistribution and dispersion of pollution around the globe, a fact that is often ignored.15 We inhabit waste, dirt and pollution.16 And waste, dirt and pollution inhabit us.17 Waste is a fundamental physical determinant of life and death in all known ecosystems.

Because of the descriptive, moral/ethical and normative lacunae that we sketched above, we wish to revive an old concept: Molysmocene. The term Molysmocene was coined in the 1960s by a French marine biologist named Maurice Fontaine18 to refer to a future wasteland era – an era in which we presently live.19 Molysmos means ‘defilement’, ‘filth’ or ‘stain’ in Greek (μολυσμός). In the Letters to the Corinthians, the Apostle Paul reveals in his second epistle: ‘Therefore, having these promises, beloved, let us cleanse ourselves from all defilement [molysmos in Greek] of flesh and spirit, perfecting holiness in the fear of God’ (2 Corinthians 7:1).

One may ask why we chose to use the term Molysmocene, and to add yet another neologism to the already long list. Three reasons explain this choice. First, pollution, waste and dirt collectively embody the law’s residual category or missing object par excellence.20 As Philippe Sands and colleagues underline, in the case of ‘wastes – which traditionally have been regulated incidentally to the attainment of other objectives – the overall international response has been fragmented, ad hoc and piecemeal’.21 This situation is partly caused by the lack of reliable data.22 However, available data tend to indicate that household and municipal solid wastes represent an extremely small percentage of all the wastes generated. For instance, a 2012 Canadian government report calculated that household and municipal waste amounted to less than 3 per cent of all the waste created. The majority, some 97 per cent of all the solid waste, was made of oil sands tailings, mine tailings, mine waste rock and livestock manure.23

More troubling, the report did not include data on manufacturing and agricultural waste (other than manure). In addition, the extreme tonnage of industrial waste, its heterogeneity and industries’ self-reporting deficiencies present vexing problems not only for accounting but also for the law, both domestic and international. As a result, mining, petrochemical and other synthetic waste (such as submarine tailings disposal, or microplastic and textile effluence) remains largely invisible to both domestic and international environmental law.24 The persistent perception that waste and pollution are not urgent concerns and that they are less harmful than one might think has been intentionally created by States and corporations, such as the petrochemical and mining sectors, which question scientifically established consensus on toxicity levels by setting up impossible standards of proof.25 Ecological risks, although visible and evident to both the corporations that create them and the affected communities that suffer from these risks, are rendered less visible to the governance bodies in charge of regulating them.26 By resurrecting the term Molysmocene from the abyss of marine biology, we modestly endeavour here to reintroduce the critical issue of toxic waste as a matter of concern in collective legal consciousness.

Second, waste – as an object, a phenomenon and an experience – is universal (however unevenly distributed around the globe), very much like the Capitalocene, for instance, is. However, contrary to the latter, waste’s universality will always remain with humans and non-humans, notwithstanding the survival of neoliberal capitalism.27 Very little of human waste is biodegradable, and the waste that is not is now being buried in the Earth’s crust and may become part of our species’ geological legacy.28 While waste has always been part and parcel of human and nonhuman activities,29 with the rise of industrial extraction and technological mass production, mineral and synthetic markers show how human waste and pollution have become a major geological force in the context of the Molysmocene.30

Third, the Molysmocene makes explicit a commonly shared, yet implicit, commonality that exists among all the other neologisms: each rests on an explicit characterisation of the global distribution of wealth (affluence) but remains silent on the issue of pollution, waste and dirt (effluence).31 The Molysmocene, however, foregrounds the idea that affluence and effluence are mutually constitutive, because they inevitably form what ecological economists call the ‘joint production’ of (neg)entropy or wealth/waste.32 In sum, the Molysmocene is the dark mirror of the Anthropocene: life is lived with, on, in and through waste, pollution and dirt. One of the most critical challenges today is that the joint production of (neg)entropy has reached a stage of irreversible overaccumulation by contamination. The overaccumulation of waste functions in tandem with the disruptive relations between property and prosperity. While the financial sector continues to accumulate unprecedented profits, resource extraction is surpassing the Earth’s natural regeneration rates, while often having the greatest impact on those most vulnerable to exploitation.33 The production of wastes is greater than can be absorbed by the planet’s sink mechanisms.34 Thus, in stratigraphic terms, sedimentary deposits of trash now form part of a new geological record, as waste is becoming a new layer of the Earth’s crust on the top of the lithosphere. This crust of civilisational waste (explicated by global plastics pollution, among others) we call the littersphere. The biosphere, the atmosphere and the lithosphere are increasingly conditioned by their interaction with the toxic littersphere. For example, some parts of the oceans are so polluted with plastic waste that international shipping lanes must be rerouted for freighters to reach their destination and unload yet more containers of disposable plastic.35 If the Molysmocene characterises a world fossilised by the unprecedented accumulation of anthropogenic waste across the globe, what does it tell us about the operation of the law?

This chapter is essentially a conceptual study investigating the legal implications of the Molysmocene. Environmental governance of planetary boundaries not only rests on definitional misunderstandings, miscalculated environmental costs and methodological inconsistencies; 36 it also carries pitfalls in the framing of environmental issues themselves. However, what if the shortcomings of environmental regulation are part of a more fundamental problem: the erasure of waste from most discussions on planetary boundaries? What if the lack of an understanding of waste flows is one of the most crucial limitations in advancing towards a comprehensive regime of international environmental law?37 Without knowledge of the extent and severity of the global waste crisis, scientists argue, it is impossible to develop coherent strategies to mitigate ecological harm. Therefore, this chapter attempts to shift our gaze towards a legal object, which has now become so visible that it can no longer be erased from human perception: waste.

Our hypothesis is that the breaching of planetary boundaries may partly be attributed to waste production in the Molysmocene. We argue that waste has irreversibly encroached, and continues to encroach, on the planetary boundaries of the Earth system. In order to successfully carry out their goals, calls for global environmental governance must therefore at least: (i) consider waste as a primary threat to the preservation of planetary boundaries; (ii) consider international law’s historic role in facilitating waste accumulation and dispersion; (iii) acknowledge the pivotal role waste may have in shifting and reordering the boundaries of law itself. We discuss each of these issues below.

2. THE BOUNDARIES OF PLANETARY WASTE

What is commonly referred to as the threat to planetary boundaries constitutes a sanitised normativity to address the global impact of human waste. The planetary boundaries concept is a framework designed to guide sustainable development policies and to help identify a safe operating space for humanity within the confines of the planetary boundaries. While we support the idea of identifying Earth’s limits to human activities and their negative externalities, we are uncertain that it sets the right boundaries or limits, because it does not include and/ or fully consider the aspect of waste. Other researchers appear to also share our scepticism. A recent study suggests that the planetary boundaries might provide an incomplete picture because the model tends to underplay the significance of waste generation, waste’s relation to all of the planetary boundaries and the impacts of waste on the entire Earth system.38 The study suggests: ‘[t]hough seldom emphasized, the crux of the limits to sustainable environmental dynamics lies in waste (mis-)management, which sets where boundary values might be.’39 The study concludes that ‘waste accumulation’ is the ‘primary problem’40 and the source of transgression for at least six of the nine planetary boundaries originally identified by Rockström and his team.41 In light of the need to more explicitly include waste as a central consideration in the planetary boundaries framework, we enumerate below the nine planetary boundary transgressions commonly referred to in the context of the Anthropocene and translate them into the language of the Molysmocene, which, we believe, more accurately details the scope and severity of global waste distribution.42

The first boundary, climate change, results from the steady increase in atmospheric carbon dioxide emissions, that is, air pollution:43 ‘CO2 concentration has risen from 280 parts per million (ppm) on the eve of the industrial revolution to 400 ppm in 2013, a level unmatched for 3 million years.’44 Primary sources of carbon dioxide pollution come from hazardous activities such as cement production, deforestation and burning of fossil fuels such as coal, oil and natural gas. Climate change is essentially instigated by the great acceleration in greenhouse gas-based pollution.

A second boundary, ocean acidification, is related to CO2 pollution, as it decreases the pH of water, killing corals, shellfish and plankton.45 Ocean acidification is closely linked to a third planetary boundary, which is the rate of biodiversity loss; a central concern and part of the debate focusing on the Sixth Mass Extinction event.46 This extinction is caused by, among other sources, industrial and consumer pollution, such as pesticides on land or plastic waste in oceans. Modern farming and transportation methods pollute water tables, rivers and estuaries with excessive nitrates and CO2, which in turn increases global warming and biodiversity loss. Global freshwater (itself another boundary) and its rich biodiversity is polluted by chemical and industrial waste, which now also affects climate patterns and water cycles.47 Biochemical flows of pesticides and chemical fertilisers, such as phosphorous and nitrogen, contribute to the pollution of fragile and diverse ecosystems,48 while toxic chemical contamination from persistent organic pollutants and other endocrinal disruptors have been shown to be a major factor of biodiversity loss. A recent study shows that more than 40 per cent of the global insect population has become extinct as a result of the intensive use of pesticides and anthropogenic eradication campaigns.49 Similarly, persistent organic compounds have caused dramatic reductions in bird populations and impaired reproduction and development in marine mammals.50 It is thus clear that both biodiversity and biosphere integrity more generally are severally impacted by human waste.

Entropic deforestation, industrial agriculture and the dumping of various pollutants are also responsible for land-system change. Land-system change is a fourth boundary transgression,51 and in this context relates to land converted to cropland and land for waste deposits (more generally known as landfill sites). Many countries, such as the United States, are now running out of landfill space for their municipal, commercial, mining, hazardous and radioactive wastes.52 The fifth boundary, stratospheric ozone depletion, is caused by chemical pollution, aerosol loading and the release of dust and smoke.53 Atmospheric aerosol loading, the sixth boundary, is caused by the same chemical pollutants, which accumulate within the atmosphere at varying levels depending on the region.54 The seventh boundary relates to the large quantities of chemical fertilisers such as nitrogen and phosphorus used in agricultural production, of which only a fraction is consumed by the plants or animals, with the rest accumulated in soil, lakes, rivers and oceans.55 As was already intimated above, human pressures on freshwater reserves and systems, the eighth boundary, disrupt normal water cycles. Overconsumption and pollution caused by municipal, commercial and industrial waste leaking and waste dumping seriously endanger global water reserves.56 Finally, chemical pollutants such as persistent organic pollutants, heavy metals and radionuclides, as well as the release of novel chemical entities, could have potentially irreversible and unpredictable synergic effects on living organisms.57

In sum, the human-driven production of waste may be considered as one of the principal drivers of planetary boundary transgression. This amounts, in the words of French geographer and Marxian theorist, Henri Lefebvre, to a *terracide* – the killing, destruction or death of the Earth.58 When garbage pushes back, the Anthropocene – the geological epoch shaped by humans – becomes the Molysmocene – a geological epoch shaped by the waste of humans. What role does international environmental law play in organising waste accumulation and dispersion and, ultimately, in disrupting Earth system processes?

3. BOUNDARY BINARIES: SOVEREIGNTY AND PLANETARY BOUNDARIES

International law is a set of norms, practices, institutions and discourses associated with the production of order, unity and coherence, while the idea of waste, pollution and dirt, by its very nature, remains synonymous with disorder and anarchy. The international legal order was historically construed in terms of its ability to distance and externalise waste that was seen to be created by the ‘uncivilised’ in the name of and for the benefit of the ‘civilised’.59 The common definition of waste is deeply rooted in the colonial legacy of international law. Waste was a metaphor used by European States to classify peoples between orderly, productive and sovereign communities, on the one hand, and ‘unproductive’ and ‘wasteful’ agents (including in particular indigenous peoples), that were also deprived of legal subjectivity as a result of such a classification, on the other hand.60 From Locke, to Vattel, to the League of Nations, the appeal to the legal concept of waste was instrumental in dispossessing ‘savages’ from their uncultivated land (or the more commonly used ‘waste land’) for the purpose of accumulation, enslavement and enclosure.61 In the pre-industrial era, the idea of waste, and everything that went with that impulse, was therefore construed as a legal, moral and ethical justification for the colonisers’ political economy of plunder in the so-called New World. International law, by expelling ‘superfluous’ peoples regarded as ‘wasteful’ in the colonies, enshrined the right for its legal subjects – States – to extract valuable resources from within their boundaries.62 Even marginalised people in cities faced a similar fate.63 According to one interpretation, enclosures in England were ‘a struggle over the land-use designation of “waste” in which advocates of the enclosures came to see open lands as a wasted commons’.64 Waste became the shameful antithesis to wealth in England, both in the colonies and in cities which, with England at the time being a colonial superpower that determined the foundations of international law, helped shape the political economy and social norms of the international legal order. Waste and pollution constituted an affront to authority and an injury to political and social legitimacy, and were seen to be an impediment to the creation of wealth.

‘Cleaning’, ‘organising’, and ‘unifying’ are thus constitutive of the ‘good’ international legal order and must be interpreted, in the context of the Molysmocene, as purifying rituals in which legal subjects purged themselves of defilement. As the British anthropologist Mary Douglas astutely underlined in 1966, dirt and pollution are not isolated phenomena; they are a part of a classificatory system and organising scheme of the order itself:

Dirt then, is never a unique, isolated event. Where there is dirt there is system. Dirt is the by-product of a systematic ordering and classification of matter, in so far as ordering involves rejecting inappropriate elements. This idea of dirt takes us straight into the field of symbolism and promises a link-up with more obviously symbolic systems of purity.65

International law plays such an organising, unifying and purifying role: it constitutes and institutes orderly normalness structured around affluence, while discarded waste is meant to be expelled from the realm of sovereignty and legal subjectivity. However, with time, international law’s creation of impregnable sovereign boundaries allowed the trespassing of planetary boundaries.66 From 1750 onward, that is, with the advent of the industrial age, and in sharp contrast to the earlier colonial period, ‘waste’ became associated with polluted water and air, which were considered to be side effects of economic development and industrialisation. 67 International law thus allowed legal subjects associated with the State to exploit and acquire territory and property at the expense of the biophysical properties of the Earth – which gradually became saturated, as a result, by the overaccumulation of waste in the industrial era. With the global expansion of modern capitalism in the nineteenth and twentieth centuries, international law became mainly preoccupied with affluence, that is, the production, distribution and protection of wealth.68 Effluence and all the negative externalities generated by the creation of wealth have, at least until very recently, been a peripheral matter of concern from which many marginalised and vulnerable people still suffer today;69 the colonial legacies of the wealth created by waste still continue under the guise of (global) unequal ecological exchanges and ecological debts.70 International law is therefore associated with the structural disadvantages faced by the global south in being confronted with the disproportionate amount of waste generated by the industrialised global north and exported to the global south. As a 2018 World Bank report points out:

Solid waste management is a universal issue that matters to every single person in the world. […] For example, the East Asia and Pacific region is the region that currently generates most of the world’s waste at 23%. And although they only account for 16% of the world’s population, high-income countries combined are generating over one-third (34%) of the world’s waste. […] And with over 90% of waste openly dumped or burned in low-income countries, it is the poor and most vulnerable who are disproportionately affected.71

The colonial legacy of the concept of waste also inhabits the historical evolution of international law. The 1941 Trail Smelter Arbitration case, an ‘iconic’72 event in the history of international environmental law, is revered in the field for having created two core principles of contemporary international environmental law: States’ duty to prevent transboundary environmental harm and the duty to compensate damages. In this case, offensive fumes from one country troubled the sovereign sense of order and wellbeing of another country. International law was summoned to re-establish that order by designing new rules governing relations between sovereign States and by recognising a duty not to cause transboundary air pollution and harm. This threshold implicitly recognises a right to pollute as long as it does not harm another sovereign State.73 As one commentator observed, ‘in the process [of the Trail Smelter Arbitration], air pollution became an accepted, culturally sanctioned consequence of industrial capitalism, and ‘smoke eating’ a normal part of everyday life’.74

The more recent problem of global plastic pollution further illustrates the underlying ‘right to pollute’ logic found in the working of international environmental law and, more generally, global governance mechanisms.75 A 2015 study shows that the global production of plastic rose from 2 million metric tons (Mt) in 1950, to 380 Mt in 2015. The total amount of plastics produced from 1950 through to 2015 is 7800 Mt. Half of this – 3900 Mt – was produced between 2002 and 2015.76 Ultimately, ‘around 4900 Mt – 60% of all plastics ever produced – were discarded and are accumulating in landfills or in the natural environment’.77 And yet, there is nothing in international environmental law that seeks to explicitly and comprehensively tackle this disaster. As it stands, international environmental law applicable to plastic pollution remains at best inefficient and at worst non-existent. One of the main challenges is to accurately monitor and mitigate the environmental load of the plastic industry by tracing the physical flows of plastic pollution across the many global supply chains and to regulate these. Much like dark matter in the realm of particle physics, the world of microplastics remains in the shadows of human perception. At the current stage of scientific understanding, only 1 per cent of the synthetic tide visibly ends up on the ocean surface, while the remaining 99 per cent is unaccounted for.78 How should international environmental law regulate this issue – admittedly a very difficult task? Another aspect of this challenge, which also reflects the inadequacies of global plastics governance, emanates from our restricted definition of ‘plastic waste’. As geographers point out, we tend to exaggeratedly focus on downstream plastic waste (curbing consumers’ behaviour and so on) instead of engaging in serious policy reforms to curb the production of plastics.79 International environmental law seems unable and unwilling to address this issue.

A further concern and difficulty for international environmental law is that most plastic pollution is released during extraction and production processes, which vastly exceeds the waste produced after consumption. Spanning a complex network of global supply chains, various sources of land, air and water pollution are seldom addressed by environmental law. The CO2 emissions from oil extraction, transportation and refining, as well as the microparticles released by petrochemical production sites, are just two examples of the wide scope of plastics contamination, which continues to fail to be monitored by national and international environmental agencies.80 Although the 1996 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters calls on all parties to establish national pollution registers, there is no internationally agreed strategy for the collection of data.81 The erosion of the efficacy of such information disclosure obligations reflects, among others, the dominance of capitalist, corporatised and consumer-driven market perspectives on social welfare within the main body of environmental law.82 Relatedly, the Protocol on Pollutant Release and Transfer Registers, which was signed by 38 States and which entered into force in 2009, is not designed to reduce pollution levels.83 While admittedly critically necessary and a step in the right direction, it must ‘merely’ enhance public access to information through the establishment of coherent, integrated, nationwide pollutant release and transfer registers. Yet, many carbon-intensive countries around the world – specifically Canada, the United States, China and some Latin American States and African States – are not parties to the Protocol.84

A final concern, which also complicates international environmental law’s response to the problem of global plastic pollution, is that plastic is not geographically equally produced and dispersed. It is unevenly distributed both at the source and at the sink. A 2016 MacArthur Foundation report found that, at the source, 95 per cent of plastic producing companies are headquartered in the European Union and the United States.85 Moreover, ‘the United States, Europe and Asia jointly account for 85% of plastics production, roughly split equally between the United States and Europe on the one hand and Asia on the other’.86 The global plastic demand is expected to reach 334,83 Mt and a value of approximately USD 654,38 billion by 2020.87 The MacArthur Foundation report further adds that at the sink, 82 per cent of all plastic leakage in the environment occurs in Asia, due mainly to a lack of waste management infrastructure.88 An estimated 4.4 to 12.7 million metric tons of plastic waste are thus added to the oceans annually, which often ends up on South Asian shores.89 A 2017 study concluded that up to 95 per cent of the world’s ocean plastic waste originates from just ten rivers: eight in Asia and two in Africa.90 With reference to the plastic life-cycle, one is tempted to conclude that international law clearly contributes to ordering and structuring the production, circulation, distribution and dispersion of plastic, from the oil well to the merchant shelves and to the landfills. However, when one looks at the plastic death-cycle, international environmental law seems to all but disappear from the picture. Net flows of plastic waste continue to be dispersed in the form of plastic pellets, microfibres and industrial externalities outside of sovereign jurisdictions, impacting riverbeds, streams and oceans across sovereign borders.91 Whereas plastic wealth accumulates on the enclaved telluric grounding of the sovereign Behemoth, plastic waste is immersed into the ebb and flow of a thalassic Leviathan.

These relative and variable legal processes not only illustrate the anthropocentric ontology of international law and of international environmental law in particular,92 but also highlight the anthropocentric sovereign enclosure of the world by extractive and capital-driven States, which rests on planetary exposure to an unsustainable accumulation of waste. As a consequence, the terra nullius of the Anthropocene is now facing the terra saturate of the Molysmocene: an emerging world in which waste has engulfed the planetary boundaries.

Terra nullius was a legal fiction engineered to dispossess ‘non-civilised’ peoples from their lands and activities.93 With the planet now saturated with waste, terra saturate more accurately expresses this new geological condition. International law accelerated, or at least has not prevented, the transition from terra nullius to terra saturate. Human production of waste as matter out of place, according to Mary Douglas,94 engineered a planet out of space, in the words of Michel Serres.95 Therefore, in the Molysmocene, waste must be conceived of as a strategy for land appropriation.96 Moreover, the foregoing analysis that we have conducted through the lens of the Molysmocene would suggest that colonial expansion is what caused a massive increase of waste accumulation and pollution, which transformed a bountiful land into a toxic void; precisely the terra nullius that ‘uncivilised’ people were accused of ‘wasting’.

4. WASTE SHIFTING AND REORDERING THE BOUNDARIES OF INTERNATIONAL LAW

The rise of the Molysmocene compels us to radically shift our understanding of international law. *Terra saturate* is deeply intertwined with international law in the twenty-first century. In terra saturate international law, and in the present case international environmental law, are strategies of avoidance and of redistributive affluence which, ultimately, reproduce the structural toxic tropes of the Anthropocene. How do we survive in a world saturated with waste? How does or should international law operate in such a world? How does or should international law organise the distribution of affluence and effluence in the context of ever-increasing waste?

In this section, we argue that the *Molysmocene* is in a process of reconfiguring the boundaries of international law. Kotzé and French coined the term *Lex Anthropocenae* to designate the need for transformative public and private global governance efforts to better protect Earth system integrity and tackle the socio-ecological crisis.97 Along similar lines, in this section we wish to stress the importance of *Lex Molysmocenae*. We argue that the very ubiquity of waste is itself a source of normativity;98 generally associated with ‘disorder’, waste forces itself upon us to reorder the law. This is so because waste is now (re)drawing the biophysical parameters of risk analysis that frame social and legal responses to the socio-ecological crisis.99 This new Lex Molysmocenae does not rest on the fragmented reality that exists between specialised institutions or various branches of international law. Rather, it emerges from the convergence of international environmental law and international political economy to incorporate waste into global value chains. In other words, the negative externalities of globalisation – once discarded and managed by environmental law – are increasingly now being recycled into positive values and goods that are regulated by international economic law.100

The 2017 Chinese ban on foreign waste imports is illustrative of this reordering of the boundaries of global economic and environmental regulation. When China decided to ban the import of foreign waste, the effects (political, legal, economic and otherwise) of this decision, rippled throughout the world. For example, the World Bank estimates that 270 million tonnes of waste are recycled every year.101 According to the Bureau of International Recycling, all this recycled waste has developed into a USD 200 billion industry globally.102 Yet, on 31 December 2017, China, which used to be the global recycling trade centre of the world, abruptly closed its borders to imports of recycled material following the enactment of the so-called National Sword policy.103 The policy imposes new standards for scrap imports which most countries cannot technically meet (such as 0.5 per cent contamination levels for paper, wood, ferrous and wire cables imports).104 This was a difficult requirement for many countries to fulfil, especially countries in Europe, as well as the United States. In the case of Europe, plastic waste exports from the European Union grew by more than 400 per cent from 2002 to 2015, with more than 85 per cent of the European Union’s plastic waste exports going to China in 2012.105 As for the United States, waste was its largest export to China, contributing 16 million tons in 2016, which amounted to a total of USD 5.2 billion. Between 1988 and 2016, China imported USD 81 billion worth of plastic waste. Since the ban was imposed, western countries have been struggling to find new dumping sites for their plastics.106 Rather revealingly, the the Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 1989,107 but instead to the World Trade Organization (WTO),108 despite the fact that rubbish and pollution remain rarely adjudicated by WTO panels and committees.109 This means that waste, though formally managed and regulated under domestic and international *environmental* norms, currently rather seems to be considered a commodity that must be regulated by international *economic* law. The Chinese notification to the WTO is therefore a clear example that waste has become a global commodity reordering the boundaries of law itself.

#### The perm creates statutory support for CIL, deflecting the precedent of independent enforceable obligations.

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III. Uses, Abuses, and Implications of Customary International Law in Domestic Law

Debates over the role of customary international law in domestic courts continue to produce differing opinions about the role of customary international law within the U.S. legal structure. While there is general agreement that customary international law plays some role, the extent of this role remains unclear. Three of the most important of the unanswered questions are covered in this section of this Note: (1) whether customary international law has the potential to trump federal legislation, (2) whether customary international law is federal law without empowering legislation from Congress, and (3) which political branch holds ultimate control over the interpretation of customary international law. The resolution of these issues will determine the power of customary international law in U.S. legal systems. In doing this, it may also change the balance of power between the respective federal branches by expanding the judiciary's ability to overrule federal law. In the final analysis, the answers to the preceding questions will determine whether customary international law or Congress controls in domestic legislation. The following section examines some currently viable theories about the power of customary international law in the U.S. legal system.

A. Dominance of Customary International Law over Federal Law

Jordan J. Paust, who has authored a book and several law review articles on the subject of customary international law, asserts that the incorporation [\*366] of this body of law into domestic law is required by the Constitution. He claims that "customary international law has been directly incorporable, at least for civil sanction and jurisdictional purposes, without the need for some other statutory base." 20 According to Paust, "the Founders clearly expected that the customary law of nations was binding, was supreme law, created (among others) private rights and duties, and would be applicable in United States federal courts." 21

Based on his claims of constitutionally mandated incorporation of customary international law, Paust delineates the areas of domestic law that this affects. In some applications, customary international law enhances the power of the "Executive under Article II, section 3 to 'take care that the Laws be faithfully executed.'" 22 In other applications, customary international law restricts the Executive: "Supreme Court and other opinions have also recognized that while exercising Presidential war powers, the Executive is bound by customary international law." 23 In addition to affecting the President and therefore indirectly the Legislative branch, Paust claims that customary international law directly shapes Congressional power because it "can limit the exercise of an otherwise appropriate Congressional power and thus can function partly as an aid for interpreting the extent of constitutional grants of power." 24 The power of customary international law also affects the courts, where it "may be relevant to an adequate interpretation of various sorts of Congressional power in order to functionally enhance such powers." 25 Finally, Paust claims that the "latter process of incorporation might include an enhancement of the power of Congress under Article I, section 3, clause 18 to enact legislation 'necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.'" 26

Because customary international law thus pervades the federal government, alternately limiting and expanding the powers of the respective branches, it becomes a defining body of law in relationship to the federal government. Hence, Paust writes, "in the case of an unavoidable clash between fundamental human rights supported by customary international law and a federal statute, the human rights (which have a constitutional status) [\*367] must prevail." 27 In normal conflicts between codified (treaty) international law and federal statute, the last-in-time rule applies; this rule dictates that whichever law was most recently enacted controls. 28 Paust claims that this rule dictates that, in conflicts between customary international law and federal statutes, customary international law always controls. 29 As Paust theorizes, "customary international law would necessarily be 'last in time,' since custom is either constantly re-enacted through a process of recognition and behavior involving patterns of expectation and practice or it loses its validity and force as law." 30 By this reasoning, custom is always a controlling authority in the face of a directly conflicting federal statute.

The extent to which Paust claims that customary international law influences and controls domestic law leads to the question of who, within the U.S. legal system, decides upon the content, interpretation, and manner of application of international law. While all three branches of the federal government will have some indirect control in forming customary international law, it also limits the scope of each. Hence, whichever branch is empowered to control the application and interpretation of this body of law within the domestic legal structure will be that much stronger, relative to the coordinating branches. In Paust's view, the judicial branch is responsible to "identify, clarify, and apply" this body of law. 31 In response to concerns that this role improperly changes the balance of powers, he asserts that "it is precisely because the federal judiciary has both the power and responsibility to identify and apply customary international law in cases otherwise properly before the courts that there is no violation of the separation of powers when federal courts apply international law while interpreting federal statutes." 32

In an article on human rights law and domestic courts, Richard B. Lillich explores the role and the ramifications of customary international law in United States law. Like Paust, Lillich bases his understanding of the role of customary international law on the finding that "customary international law, while not mentioned in the Constitution, is part of the law of the land to be determined and applied by the courts whenever appropriate in making a decision." 33 Based on this, Lillich states that "the starting point in ascertaining what international human rights norms have been received into customary international law--and therefore are rules of decisions for domestic [\*368] courts--commonly is thought to be the Universal Declaration of Human Rights . . . ." 34 The status of the Universal Declaration of Human Rights as a source of the customary international law rests solely on its position as evidence of existing customary international law. Lillich admits that, while the Universal Declaration of Human Rights resolution was adopted without a dissenting vote by the U.N. in 1948, it is not legally binding as a treaty, as it has never been ratified. 35

Thus, to the extent Lillich is correct that the Universal Declaration of Human Rights reflects--at least in part--customary international law, and to the extent that both Paust and Lillich are correct that customary international law is part of United States law which should be enforced and interpreted by the courts, it should also "be directly enforceable in domestic courts." 36 Most customary international law claims in U.S. courts have been based on a statute which provides for such a claim. The most common example of this is the Alien Tort Statute, which dates back to the Judiciary Act of 1789 and provides for federal jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations of a treaty of the United States." 37 The point of Lillich's suggestion is that, while there is nothing wrong with providing statutorily for the incorporation of customary international law, as has been done in the past, it is unnecessary or redundant.

The implications of Lillich's claim that customary international law may and ought to be directly incorporated into United States law even without statutory support are far reaching. He advocates that judges ought to use human rights law--and implicitly all of customary international law--without statutory support. Not only could claims be brought in federal and state courts without the benefit of enabling statutes, but, under the mirror principle, the United States has an obligation, enforceable domestically, to live up to the provisions of customary international law. 38 Beyond this direct effect, which has the potential to permit the voiding of a federal statute on the grounds that it conflicts with customary international law (as defined and recognized by the judiciary), Lillich predicts that customary international law should have the "greatest impact on domestic law in the future by influencing the courts' approach to constitutional and statutory standards." 39 This means that the Constitution, federal law, and state law should be interpreted in light of customary international law. As Lillich states, "litigants and judges already have invoked the Universal Declaration [of Human Rights] for precisely this purpose." 40 Lillich hails this new world of customary international law's direct and indirect incorporation into United States law as offering "significant as well as virtually limitless possibilities for achieving greater protection of the rights of individuals." 41

#### CIL is codified only when it proves it can override conflicting statute – the perm renders it mere gap-filler.

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1. Introduction

Being part of general international law, customary international law1 is in principle binding on all subjects of international law, including international organisations like the European Union2, the European Community and all of the EU’s Member States.3 The breach of rules of customary international law will entail the international responsibility of the subject(s) involved. However, for private individuals, what matters most is the question of whether and to which extent they are able to rely on a rule of customary international law before the courts in order to see their rights protected. In most domestic legal systems, national courts are under certain conditions willing to accept that a private individual invokes a rule of customary international law to interpret a domestic rule in conformity with customary international law; to derive a right out of a rule of customary international law; or - the strongest and most far-reaching use - to contest the legality of a rule of domestic law. However, this last type of reliance on customary international law is especially severely restricted if not rendered impossible in the case-law of many States.4

Although the case-law of the European Court of Justice (“Court of Justice”) has for many years taken rules of customary international law into account 5, it is only very recently, in the Opel Austria judgment6 of the European Court of First Instance (“Court of First Instance”) and in the Racke judgment7 of the Court of Justice, that the Community courts have explicitly relied on customary international law to test the validity of acts of EU institutions.

These two cases raise a variety of issues which will be analysed in this contribution. First, the question arises as to what the precise position of customary international law is in Community law8 (2). Secondly, Racke and Opel Austria raise the question under which conditions rules of customary international law can be invoked in Community law in order to challenge the validity of acts of EU institutions or rules of national law. This requires a careful analysis of the reasoning followed in the judgments concerned (3). In the third place, it should be examined how the Community courts’ case-law on the invocability of customary international law relates to their case-law on the invocability of treaties to which the EC is a party (4). It would be interesting to see whether there is any incoherence between the two lines of case-law and whether the outcome of a case before the Community courts could differ depending on the formal source of international law involved. Based on the insights acquired in the previous sections, we will end our contribution with some reflections relating to the nature of customary international law (5).

A preliminary remark should be made as to the terminology used in this contribution. The concept of “invocability” is often used interchangeably with that of “direct effect”. In the present contribution, however, we prefer the term “invocability” as it better catches the different manners in which customary international law can be used by private individuals, in particular the review of the legality of domestic (be it national or EC) rules and the interpretation of those rules in conformity with customary international law.9 The use of the term “invocability” also helps to distinguish our analysis, which concerns the relationship between the international legal order and domestic (national or EC) legal orders, from the context in which the notion of “direct effect” is typically used, namely the relationship between rules of Community law and rules of national law.10 When the term “direct effect” is used hereinafter, it will be in reference to the Court of Justice’s wellestablished case-law concerning the rights of private individuals derived from Community acts and/or their right to invoke EC law before a national court in order to assess the compatibility of national law with EC law.

2. The position of customary international law in Community law

Much has been written about the initial reticence of the Court of Justice regarding the relationship between general international law and EC law.11 One can find a specimen of such reticence in the Dyestuffs case (1972), a competition law case in which the Court avoided the problem of the limits which customary international law imposes on the EC’s jurisdiction in cartel cases.12 [FOOTNOTE] 12 Case 48/69, ICI v Commission [1972] ECR 619. As is known, the Court avoided the problem of customary law of jurisdiction by following the Commission’s argument that the parent companies outside the EC, by giving pricing instructions to their EC-based subsidiaries, were acting as a single entity so that the Commission’s decision could be seen as a simple application of the territoriality principle. One may compare this with the thorough examination of customary international law of jurisdiction by Advocate General Mayras in his opinion in this case: [1972] ECR 619, at 692-697. The Court avoided this question again in Joined Cases 6/73 and 7/73, Istituto Chemioterapico Italiano and Commercial Solvents v Commission [1974] ECR 223, points 36-41. [END FOOTNOTE] As Timmermans has rightly stressed, the Court’s initial reticence can largely be explained from its efforts to safeguard the autonomy of Community law vis-à-vis international law.13 However, since then the Court of Justice has made numerous references to customary international law, even though the wording used often blurs the precise formal source of the rule (typically, reference is made to “the general rules of international law”14, “the rules of (public) international law”15, “principles of international law”16 or even simply to “public international law”17 or “international law”18).

This is not to say, though, that through the Community case-law, the precise legal status and place of customary international law within the hierarchy of norms has been clear. Before Opel Austria and Racke the Court of Justice mainly relied on customary international law (i) to demarcate the limits of State or EC/EU jurisdiction and powers, (ii) as providing rules of interpretation and (iii) as a ‘gap-filler’ in the absence of specific EC rules. Although this may have been implicit in earlier case-law (see below), before the aforementioned judgments the Community courts had not explicitly confirmed the possibility that customary international rules could be relied upon to challenge the validity of Community acts (iv).

#### Including the plan obviates the showdown between CIL and domestic law – that prevents precedent-setting.

Kundmueller ‘2 [Michelle; May 1; Attorney specializing in constitutional law, candidate for a J.D. and M.A. in Political Theory from the University of Notre Dame, B.A. from Flagler College; Journal of Legislation, “Note: The Application of Customary International Law in US Courts: Custom, Convention, or Pseudolegislation?” vol. 28]

V. Conclusion

This Note has attempted to demonstrate some of the difficulties of applying customary international law in U.S. courts. At every level, there are unanswered questions. Many of these issues, like how "general" a practice or its acceptance must be in order to constitute customary international law, can only be given imprecise answers. Not only are these general problems inherent in all legal questions involving line-drawing in the defining of customary international law, but there is a virtual war being waged over where that line should be drawn and by whom. This issue, in turn, raises questions of constitutional importance, the gravity of which it is almost impossible to overstate. Practical concerns about the balance of powers, no less than theoretical misgivings over undermining our government's consentbased authority and legitimacy, demand our attention as the possibility of directly incorporating customary international law, perhaps even when in direct contravention of federal statute, comes closer to becoming a reality.

Current cases do not present any of these possibilities as realities. They do, however, contain the beginnings of what could become fundamental structural changes in customary--and hence, United States--law should the judicial system prove dominant in determining customary international law. Current cases show U.S. courts, on a fairly modest level, defining, determining, and applying customary international law. The cases have yet to produce a real showdown between domestic, either constitutional or congressional, and customary law. To date, congressional and executive actions and statements have been taken as one type of evidence in determining the content of customary international law, but they have not served as dispositive or controlling in the face of overwhelming evidence that customary international law as a whole dictates a contrary outcome.

This, of course, is the real issue. What happens when the will of the people or a dictate of the Constitution conflicts directly with customary international law? No doubt, our courts will do their best to interpret creatively so as to avoid such a conflict, but, eventually, the conflict will come, and a decision will be made. The conflict is inevitable due to the nature of modern customary international law. No longer delegated to issues traditionally understood as exterior, modern customary international law is beginning to define relationships between governments and their citizens and amongst citizens. [\*378]

The conclusions of this Note are three. First, there is an impending constitutional crisis, with the potential to alter the fundamental structure of our laws and the legal authority (if not the power) of the American people. Second, in this eminent struggle, Congress ought to take the lead, controlling through legislation the authority of customary international law in domestic matters and thus circumventing the potential conflict between international and domestic law by upholding the supremacy of U.S. law in domestic matters. The courts will by necessity play a crucial role, for they must concur that this role belongs to the legislature and that federal law is supreme. Third, U.S. courts must, in their role as interpreters of customary international law, hold ever present in their determinations the recognized definition of customary law, which encompasses both a custom and a convention element: the practice of nations ought not be ignored. By this means, they will be surer of applying customary international law as it exists, rather than as courts and commentators wish it to be.

#### Custom is binding and is well suited for antitrust because core laws leave broad scope for interpretive discretion.

Swaine ’1 [Edward; 2001; Assistant Professor, Legal Studies Department, The Wharton School, University of Pennsylvania; William and Mary Law Review, “The Local Law of Global Antitrust,” vol. 43]

This preference for local understanding does not require a parochial focus on the positions staked by those branches themselves, which we should assume are also capable of appreciating the views of their sovereign counterparts. 368 Nor does it require subscribing to the view that custom is federal law only by virtue of independent, political-branch lawmaking. 369 But where [\*719] primary sources suggest that the inquiry is a close one, any clear position staked out by the local sovereign should be favored in construing local political enactments. 370 This approach also bears on the treatment of emerging custom. As noted previously, it is inappropriate for a court to regard a yet-emerging custom as equivalent to one that has fully bloomed; at the same time, the line between the two is often hard to draw, and gainsaying a position taken by the political branches on the question may unduly interfere. The best approach, on balance, is to permit legitimate, if not necessarily wholly mature, assertions of customary inter-national law to influence the judicial construction of domestic law, without requiring that courts take a position on the existence or relevance of that norm at the precise moment of decision.

Perhaps unsurprisingly, this approach is well suited to antitrust. The Sherman Act is notorious for conferring interpretive freedom on the courts and federal agencies, 371 including the authority to reconcile its reach with international law.

Footnote 371:

E.g., Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933) (describing the Sherman Act as a "charter of freedom," with "a generality and adaptability comparable to that found … in constitutional provisions"); see also 1 Areeda & Hovenkamp, supra note 50, P 103, at 63 (explaining that "the Sherman Act effectively vested the federal courts with a power to make competition policy analogous to that of common law courts"); id. P 103 at 62-63 (observing that "judges sometimes talk as if Congress has already decided the question before them but [t]his is usually a misconception"); Frank H. Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533, 544-47, 551-52 (1983) (contrasting broad enactments such as the Sherman Act that invite courts to fashion common law with more precise enactments whose gaps should not be filled).

End of Footnote 371.

In enacting the Foreign Trade Antitrust Improvements Act of 1982 372 and the International [\*720] Antitrust Enforcement Assistance Act of 1994, 373 Congress appears to have deliberately avoided addressing the propriety of Timberlane and kindred jurisdictional tests. In taking advantage of this latitude, courts applying the Charming Betsy canon have properly refrained from resolving the scope of the custom bearing on the question. 374 The result allows arguably "soft" principles like comity the opportunity to emerge as international law. 375 If such [\*721] principles are more than merely colorable, and can be reconciled with federal antitrust laws, unnecessary conflict with domestic political enactments perhaps may be avoided.

C. Local Actors: Differentiating Authority

Respect for the separation of powers may seem superficial when the judiciary posits customary norms that purportedly bind the political branches. An international law of antitrust, for example, might constrain not only the initial exercise of prosecutorial discretion by the U.S. government, but also the ability of the federal courts to assist in any party's enforcement of the Sherman Act. In the face of such custom, half-measures are awkward. Deferring to the executive stewardship of foreign relations, for example, would simply leave U.S. law inconsistent with our international obligations. 376

Footnote 376:

Unless, of course, the international law is later- in-time, and is deemed to override the domestic law. See supra text accompanying note 339.

End of Footnote 376.

#### The CP creates an equivalent substantive obligation, sends a huge signal, is more certain and durable AND the act forwards an assertion of economic law that becomes quickly globalized.

Helfer ’16 [Laurence; 2016; Professor of Law at Duke University; Michigan Journal of International Law, “Customary International Law: An Instrument Choice Perspective,” vol. 37]

Strikingly, however, the rational design, legalization, and instrument choice scholarship has all but ignored CIL. Numerous studies of international lawmaking barely mention custom, lump it together with soft law, or view it as a less binding form of commitment than treaties. 11 More specifically, these accounts fail to consider the distinctive design features of CIL or whether and when states might choose custom as their preferred legal instrument. 12

An instrument choice perspective offers three interrelated insights that reveal custom's continuing relevance to contemporary international lawmaking. First, the perspective identifies the distinctive design elements that distinguish CIL from treaties and soft law. Second, instrument choice illuminates the constraints that limit states' use of custom to particular types of cooperation problems. And third, the approach predicts that states, in these constraints, will continue to prefer custom over treaties and soft law when custom's design features or its substantive norms offer advantages over treaties or soft law.

Before proceeding, we offer a few qualifications and caveats. First, in line with standard rationalist accounts of international cooperation, we view states as the primary actors. This does not imply that the individuals and institutions within states - executive branch officials, legislatures, civil society groups, and so forth - do not influence the selection of custom over treaties or soft law. Our focus, however, is on the dynamics of instrument choice at an international level, where the preferences of these actors have been aggregated and incorporated into the positions states adopt [\*567] vis-a-vis one another. We encourage other scholars to explore the micro-foundations of instrument choice, in particular when and why different domestic actors express a preference for custom over international conventions and nonbinding norms, and how those preferences are translated into official state policy.

Second, we make a simplifying assumption that nations intentionally select one international instrument over another. This assumption - that states "choose" custom, rather than having custom imposed upon them or having it develop as an essentially unconscious process - is borne out by the examples discussed in Part IV. We also recognize, however, that powerful nations have a greater ability than weaker states to control the content of CIL, and we take account of this fact in our analysis.

A third preliminary observation concerns our description of custom's "design features." We use this term to refer to the attributes or characteristics of CIL itself, not to specific tools or mechanisms, such as treaty exit and escape clauses that states can select, discard, or modify when negotiating written international instruments. 13 A state that chooses custom over treaties or soft law is expressing a preference for an instrument with characteristics that cannot be changed or are very difficult to modify. This comparative lack of flexibility helps us to explain why CIL is limited to particular types of cooperation problems - what we label as "custom's domains" - and to identify when custom's design features and substantive norms have advantages for one or more states over those of treaties and soft law.

The remainder of this Article proceeds as follows. We begin in Part II by considering custom's design features, which we distinguish from the canonical elements of custom (state practice and opinio juris) and the individual doctrines associated with CIL. Specifically, we contend that, as an ideal-type, custom is non-negotiated, unwritten, and universal, three characteristics that distinguish CIL from both treaties and soft law, which are almost always negotiated, written, and rarely universal either in formation or application. 14 These design features help to explain some of custom's peculiar doctrinal characteristics, and they cut across the doctrinal divide which is said to distinguish "traditional" and "modern" custom. 15

[\*568] Part III considers the constraints that limit states' recourse to CIL to particular types of cooperation problems or "domains." Although custom's design features make it ill-suited to resolve many transborder public goods or collective action problems, 16 we argue that states can nonetheless generate custom in a range of potentially important contexts. Drawing upon numerous historical and contemporary examples, we show that the design features discussed in Part II facilitate custom's formation primarily in three situations: when all states benefit from a customary rule with low distributional costs, when powerful nations impose a custom on weaker states, and when states seek to entrench shared normative values. Outside of these three domains - or where there is overlap among them - custom is much less likely to form.

Part IV considers custom's future in an international legal landscape dominated by multilateral treaties and soft law initiatives. We argue that states select CIL as their instrument of choice (within the constraints imposed by custom's domains) when its substantive norms or its design features confer advantages over those of soft law or treaties. For example, states may use custom to "unbundle" certain negotiated aspects of multilateral conventions, especially those that preclude reservations. A state could decline to become a party to such a treaty yet profess that some or most of its provisions (in particular those it favors) are binding as CIL. Drawing from the law of the sea, international economic law, human rights, the laws of war, and other substantive issue areas, Part IV provides numerous contemporary examples in which states prefer custom to treaties or soft law, based on either its substantive norms or design features. Accordingly, custom remains relevant even in the age of soft law and treaties, so long as states act within the constraints imposed by custom's domains. Part V concludes.

II. The Design Features of Customary International Law

This Part identifies three design features - custom's universality, its unwritten nature, and its non-negotiated character - that are essential structural characteristics of CIL, which differentiate it from treaties and soft law as a form of international cooperation. We distill these characteristics from the extensive legal literature on custom as a source of international law, in both its traditional and modern guises.

We acknowledge at the outset that these three design features (universal, unwritten, and non-negotiated) are ideal types, and that treaties and soft law share these features to a limited degree. However, if one views [\*569] each attribute along a spectrum, there can be little doubt that custom occupies the high end of the spectrum for each variable as compared to treaties and soft law. Moreover, custom's design features are fixed. Although states are largely free to select the design features of treaties and soft law that best suit their purposes, they generally lack the power to do so with respect to custom. 17 In the discussion that follows, we first address each characteristic separately and then consider potential objections to this typology.

A. Universal

Customary law aspires to universality in both its formation and application. Article 38 of the International Court of Justice (ICJ) provides the canonical definition of custom, as "a general practice accepted as law." 18 As the word "general" suggests, the practice of all nations is potentially relevant to the formation of custom. States may choose to negotiate treaties and soft law instruments with only a select group of states. By contrast, participation in the formation of custom is in principle open to all nations, 19 even if powerful or specially affected countries often have more control over its development than do weaker or less interested states. 20 Even for regional custom (discussed below), all states within the region may participate in the practice that gives rise to a legal obligation.

This formulation of the state practice requirement reflects a normative commitment to facilitating the creation of legal rules in which all nations participate and that, in turn, apply to all nations. 21 Consider how this compares with other sources. Treaties achieve universality, if at all, only after decades of arduous country by country ratification. 22 Indicia of widespread [\*570] state support for soft law are found in more diverse sources, such as votes for resolutions in international organizations, endorsements by government officials, campaigns by civil society groups, and nonbinding agreements. Yet there is no accepted method of evaluating these practices to determine the extensiveness of international support for nonbinding norms.

For custom, in contrast, it is widely agreed that a universal rule arises even when many or even most states do nothing. These nations are said to "tacitly accept" or "acquiesce" in an emerging rule; their consent may be "inferred" from silence, 23 if their consent is in fact required. 24 These assumptions, which make the development of universal custom markedly easier, hold true for both traditional and modern forms of custom. "Traditionally, customary law has been made by a few interested states for all." 25 The process unfolds inductively, building up from specific examples of affirmative practice. "The awareness and opinions of other states that take no overt position are rarely considered." 26 Modern custom flips this analysis, applying a deductive process that begins with assertions of opinio juris rather than discrete instances of practice. 27 The result in either case is the same: a universally applicable binding rule of international law. 28

Three legal doctrines buttress custom's universal aspirations: the position of new states, the status of persistent objectors, and assertions of regional custom. Each of these doctrines, properly understood, reinforces custom's universalist tendencies.

First, it is "widely accepted that a new State is bound by all rules of general customary international law which existed at the time that State came into being," although such a state had no opportunity to support, acquiesce in, or oppose these preexisting customs. 29 The rationales offered to justify this rule range from a benign desire to preserve stability in international relations to a nefarious effort to shackle "uncivilized" peoples emerging from colonialism to legal rules previously developed by and benefiting Western powers. 30 Whatever the explanation, there has been little [\*571] if any pushback against this doctrine from the dozens of new nations that have emerged since the end of the Second World War. 31 When paired with the well-settled (although recently challenged) prohibition on unilateral withdrawal from extant custom, 32 the result is a marked geographic expansion of customary law's reach.

The second legal doctrine, the persistent objector, arose to alleviate the anxieties of positivist scholars, who were troubled by the notion that states could be bound through acquiescence rather than express consent. 33 According to the doctrine's canonical definition, a nation that regularly and vociferously opposes an emerging custom will, if the new rule eventually forms, not be bound by the rule in its relations with other states. 34 Consistent with the rules applicable to the formation of custom, the option to object is open to all nations.

If states regularly staked out positions as persistent objectors, our claim that universal application is one of custom's distinctive features would be questionable. In fact, although most courts and commentators now accept the persistent objector concept in principle, 35 its application in practice is both exceedingly rare and difficult to sustain in those few instances when such an objection is raised. 36

Why might this be the case? One answer is found in the principle of reciprocity, which disadvantages putative objectors by forcing them to bear the new custom's burdens without enjoying its benefits. As Michael Byers has illustrated with an example from the law of the sea, "even the most powerful of the maritime States - the United States, the United Kingdom and Japan - eventually abandoned their persistent objection to the development of the twelve-mile territorial sea as a rule of customary international law." 37 They did so "at least partly as a result of coastal fishing and security concerns. Although foreign fishing vessels and spy ships were able to operate just outside the three-mile limits of the persistently objecting States, the objecting States' vessels were excluded from waters [\*572] within twelve miles of other States' coastlines." 38 Reciprocity, in other words, systematically discourages persistent objection to emerging customs that involve reciprocal rights and obligations. Thus, in practice, the doctrine of persistent objectors poses little if any impediment to custom's applicability to all nations. 39

A third doctrine reinforcing custom's universality is the presumption against regional custom. Commentators have long asserted that a custom can, in principle, be restricted to a geographically linked group of countries. Such a rule would bind only the states in that area, leaving nations elsewhere unaffected. If regional custom were a common source of international legal obligation, it would cast doubt on our universality claim. Examples are few and far between, not the least because the ICJ has actively discouraged the formation of regional custom.

In the Asylum Case, 40 the World Court considered Colombia's allegation that a Latin American custom required Peru to grant safe passage to an individual to whom Colombia had granted political asylum. The ICJ rejected this claim, reasoning that a state's silence in response to an emerging regional custom was to be construed as an objection. This is precisely the opposite of the rule governing global custom, where silence is equated with acquiescence. Why, David Bederman pointedly asks, "did the World Court change the calculus of consent for regional custom in The Asylum Case?" His answer:

One can only conclude that the Court wished to suppress regional custom, and there is no more effective way to do so than to declare a presumption that fundamentally disrupts the formation of such regional practices. [The ICJ] was concerned that development of distinctive bodies of regional rules - not just for Latin America, but perhaps also for Europe, Africa, and Asia - might unduly interfere with the universal aspirations of international law. 41

The use of procedural rules that discouraged regional custom thus "preserved the ICJ's prerogative to declare the content of customary international law … for the benefit of … the global community at large." 42

B. Unwritten

A second feature that distinguishes custom from treaties and nonbinding norms is that custom is an unwritten form of law. In a review of international law sources in the early years of the 20th century, Lassa Oppenheim asserted that "the rules of the present international law are to a great extent not written rules, but based on custom." 43 Numerous recent studies concur that custom is unwritten law, some even labeling this as one of custom's "defining characteristics." 44

In contrast, the vast majority of treaties are memorialized. Drafts are circulated and marked up during negotiations, ultimately leading to the adoption of a final authoritative text that is opened for signature. Several rules and institutional features of the international legal system provide strong incentives for states to put their agreements in writing. The Vienna Convention on the Law of Treaties (VCLT) - and the benefits of its many default rules - apply only to written treaties, a limitation intended to promote predictability and legal certainty and reduce future interpretive disputes. 45 In addition, treaties cannot be entrusted to a depository or included in published compendia such as the United Nations Treaty Series unless they are in written form. 46 Finally, some national laws require treaties to be memorialized for various purposes. 47

Nonbinding norms too are overwhelmingly written. Dinah Shelton's authoritative treatise identifies two types of soft law - primary and secondary - both of which are embodied in written instruments. Shelton defines primary soft law as "those normative texts not adopted in treaty form that are addressed to the international community as a whole or to the entire membership of the adopting institution or organization." 48 Examples include [\*574] the U.N. Standard Minimum Rules for the Treatment of Prisoners, the U.N. Standard Minimum Rules for the Administration of Juvenile Justice, the Declaration on Rights of Indigenous Peoples, and declarations adopted at the close of U.N.-sponsored human rights conferences. 49 Secondary soft law includes "the recommendations and general comments of international human rights supervisory organs, the jurisprudence of courts and commissions, decisions of special rapporteurs and other ad hoc bodies, and the resolutions of political organs of international organizations applying primary norms." 50 These illustrations reveal that primary and secondary soft law come in many shapes and sizes, but one feature that unites all of these examples is their written form.

To be sure, written documents often provide evidence - sometimes the best evidence - of state practice and opinio juris. Yet, references to written materials to prove these elements does not transform custom into written law. Rather, they further underscore the differences between custom on the one hand, and treaties and soft law on the other.

First, custom is a "norm without a [formal] act, at least, without a founding act, where you might hope to find its origin and from which you might be able to derive its authority." 51 Proving the existence of custom cannot, unlike most treaties and nonbinding norms, be done by consulting a single authoritative text. Rather, a putative rule must be pieced together from numerous sources - official publications, historical records, newspaper articles, and so forth - in dozens of nations. 52 Diligent researchers may identify these materials relatively easily for the few industrialized nations that publish digests of state practice, but the task is far more difficult elsewhere. And even for governments with large and sophisticated international law departments, "customary practices are often not formally recorded at all." 53

In addition, some treaties codify existing customary rules or crystalize the formation of new custom, with the result that the same norm exists in both sources of international law. This overlap between treaties and custom does not, however, render the latter as written law. To the contrary, [\*575] treaty and custom remain separate sources of obligation. 54 As we later explain, the enduring separation of these sources is particularly important for non-ratifying countries and for state parties that later withdraw from a treaty that embodies a customary rule.

C. Non-negotiated

A third distinctive characteristic of custom is that it is not negotiated in the manner of treaties and soft law. Commentators describe the practice that produces custom as "informal, haphazard, not deliberate, even partly unintentional and fortuitous" as well as "unstructured and slow." 55 Even scholars who perceive some order in this chaos characterize custom as emerging from a "struggle for law reflected in exchanges of signals, cues, bids, and responses" 56 among states "competing in a marketplace of rules." 57 Custom, in other words, is formed by iterated claims and defenses in which some "groups of states may 'bid' new norms, while others may object, and yet other countries may simply remain silent and so acquiesce." 58

This process does not involve negotiation, which is commonly defined as a "formal discussion between people who are trying to reach an agreement." 59 Custom is not produced by a formal discussion or exchange of views. In fact, the state practice that serves as its basis may not even be motivated by a desire to reach an agreement. 60

Many negotiations over legal instruments involve another element as well, bargaining. Negotiation over treaties, for example, often involves competing demands and concessions in which the parties trade various aspects of the form and substance of the agreement. Consider multilateral [\*576] conventions that regulate global public goods or club goods. 61 Most of these agreements contain carefully crafted compromises, often hashed out in exquisite detail among cross-cutting alliances. 62 A group of states may give up a preferred position in one section of a treaty (or in one treaty in a nested treaty regime, such as the WTO) in exchange for benefits in another section. Or a party may agree to less favorable substantive rules only if those rules are phrased very broadly or if the treaty includes express exit or escape clauses. 63 These exchanges expand the zone of agreement, facilitating the resolution of "multilateral coordination problems [that] cannot easily be solved in the informal, unstructured, and decentralized manner typically associated with customary international law." 64

Custom also generally arises on a rule by rule basis. State practice and opinio juris focus on a single, discrete legal issue, often expressed at a high level of generality, rather than a fully fleshed-out group of norms with carefully delineated contours and exceptions. This partly reflects the largely unwritten nature of custom, which increases the cost and reduces the efficacy of establishing multiple, related customs at the same time. But it also makes custom a useful tool for general international rules that eschew country-specific or case-specific tailoring. As Bradley and Gulati assert with reference to the custom of diplomatic immunity, "if nations can assume that the same rules of diplomatic immunity apply, no matter where, then there will be no need to negotiate specific rules every time a diplomatic mission is established in a new country." 65

One potential objection to our claim that custom is non-negotiated arises from the widely-held view that U.N. General Assembly resolutions are evidence of customary international law. These resolutions are sometimes the subject of intensive negotiations among dozens of countries, including on-the-record debates, bargaining among state representatives, and attempts to reach agreement on a written text. In 2013, for example, the General Assembly adopted a resolution on data privacy 66 that was the product of extensive negotiations. States that engage in widespread data collection were especially active in these negotiations and succeeded in weakening the resolution's final language. 67

[\*577] If such resolutions were in themselves binding as CIL, our claim about that source's distinctive features would be difficult to sustain. Although a few scholars have asserted that some General Assembly resolutions create "instant custom," 68 such a claim is now discredited. Rather, it is widely agreed that General Assembly resolutions provide only evidence of CIL, with the weight of that evidence dependent upon factors such as voting patterns, express reference to custom in the text, and, most importantly, whether legal norms referred to in the resolution are subsequently reinforced by other indicia of state practice and opinio juris. 69 In addition, structural limitations constrain opportunities for negotiation of General Assembly resolutions. The Assembly and its Main Committee include all U.N. members. Negotiation on this scale is unwieldy, reducing the ability of individual states to influence the drafting of language that describes the resolution's relationship to extant or emerging custom. 70

A second potential objection to custom as non-negotiated relates to the use of treaties as evidence of custom. 71 Some treaties are intended to codify preexisting custom, thereby rendering it less vague by memorializing it. 72 Such treaties may then serve as evidence of the content of the customary norm, meaning that the negotiation of the treaty is potentially also a negotiation about the content of custom. 73 Yet states have an incentive to continue to promote the customary norm even after the conclusion of the treaty because the norm binds all states, even those not party to the treaty. 74

[\*578] Other treaties aim to facilitate the development of new customary norms. Still other agreements both restate existing custom and include provisions that may crystalize into custom, in part through their inclusion in the treaty. The VCLT is a well-known example. To the extent that treaties such as the VCLT are adopted with the purpose of facilitating the formation of new custom, the negotiation of the treaty is potentially also an indirect negotiation of the customary norm.

Seen from this perspective, the distinction between custom and treaties may seem quite thin, particularly with regard to the comparatively non-negotiated character of custom. Jose Alvarez succinctly captures this view, arguing that many multilateral codification conferences are "international law-making fora for the purposes of not one but two potential sources of international obligation" - treaty-making and "the elaboration of codified custom." 75 Aware of this double function, states participating in such conferences employ "conscious stratagems for reaffirming, modifying, or elaborating codified custom." 76 This new form of creating custom, Alvarez contends, "responds to states' contemporary needs for a more rapid, less vague, and deliberative process for the establishment of preferably written and clear global rules." 77

Nevertheless, like General Assembly resolutions, treaty norms do not automatically become custom. As Robert Jennings has observed, "the very fact of changing the law from an unwritten source to a written source is in itself inevitably a major change." 78 Accordingly, the argument that treaty provisions reflect preexisting or subsequently formed custom is often contested or based on evidence found in multiple legal instruments. The purported duty to prevent transboundary pollution, for example, is based in part on certain treaty clauses, but also rests on soft law documents such as recommendations of the Organization for Economic Cooperation and Development, the Stockholm and Rio Declarations, and U.N. General Assembly Resolutions, among other sources. As a result, whether customary international law in fact imposes such a duty remains contested. 79

To the extent that treaties do articulate customary norms it is often because they reflect preexisting norms of customary law, like pacta sunt servada. The subsequent treaty does not render the preexisting custom negotiated. To the contrary, the act of codification often changes the content of rule for the treaty but not for its customary law antecedent. Codification treaties generally "lay down the customary rule in a more precise and systematic manner," and the "jus scriptum may cure omissions, eliminate [\*579] anachronisms, introduce recent doctrinal findings, or even consider the eventual enforcement (or adjudication) of the written rule. As a result, codification contains a creative element and regularly entails a certain amount of change." 80

Moreover, the kinds of treaties that are generally cited as evidence of custom tend to have a somewhat less negotiated character. Many are drafted or negotiated under the auspices of an international organization such as the United Nations General Assembly (through a referral to the International Law Commission). The involvement of international organizations tends to expand the number of states involved, 81 increase the presence of NGOs, involve high levels of openness, and increase the importance of independent experts - all of which reduces the ability of particular states to control the outcome. 82 Nevertheless, some of the treaties that emerge from this process are highly negotiated, including the U.N. Convention on the Law of Sea and the Rome Statute establishing the International Criminal Court. Consistent with their negotiated character, neither permits reservations, and both have proven to be especially controversial evidence of customary international law. 83

We anticipate a number of objections to our claim that CIL has three essential structural characteristics, which we label as custom's design features. Positivist international law scholars may protest that we give insufficient attention to state practice, opinio juris, and canonical legal doctrines associated with CIL. We agree that these topics are central to understanding when states choose custom over treaties and soft law. However, we see these doctrines - both in their traditional form and as re-envisioned by modern approaches to custom - as products of the three overarching attributes we identify. Indeed, analyzing custom from the perspective of its design features illuminates potential explanations for longstanding areas of doctrinal confusion, as well as topics, such as the persistent objector and the presumption against regional custom that garner significant attention in legal treatises but are rarely followed in practice.

Other commentators may challenge our claim that the three design features accurately characterize CIL or distinguish it from treaties and soft law. Some customary rules are, after all, memorialized in written documents, [\*580] and some nonbinding instruments are adopted by international organizations with little if any negotiation among member states. Our overarching response to this critique is to reiterate that custom's three distinctive attributes are not rigid, binary categories. We have been careful to describe custom as universal, unwritten, and non-negotiated in relation to treaties and soft law. If all three norms were located along a spectrum that runs, for example, from fully non-negotiated at one end to entirely negotiated at the other, custom would be much closer to one pole than the other two legal norms. The same is true for the other two characteristics. Our contention is that these differences, even if they are differences in degree rather than in kind, are empirically accurate, legally consequential and (as we now discuss) illuminate constraints on the creation of CIL that help to explain why custom has emerged in some areas of interstate cooperation but not others.

III. Custom's Domains

The foregoing section described three distinctive design features of CIL - it is universal, unwritten, and non-negotiated. Because these characteristics are relatively fixed and cannot be manipulated to the same extent as the design elements of treaties and soft law, 84 the characteristics constrain when states can turn to custom to create international law. Given these constraints, we argue that CIL forms primarily in three domains - when all nations benefit from a general legal norm with low distributional costs, when powerful countries make visible and sustained commitments to a legal norm, and when states seek to entrench shared normative values. The significance of each of the three distinctive design features varies context to context, but all three features are important to understanding custom's domains.

A. Custom that Benefits All States

States will use a non-negotiated, universal, and unwritten form of legalized cooperation to create rules from which all states benefit. Because such rules advantage all nations in relatively equal measure regardless of their size, economic might, or military power, they have few distributional consequences and reinforce the foundational principle of sovereign equality. 85

The three distinctive features of custom identified in Part II facilitate the generation of this category of international norms. Negotiation is unnecessary because states benefit from the rules as such without the need to make specific demands and concessions. Unwritten practice suffices to engender consensus about general rules that lack tailored or detailed provisions. Indeed, the unwritten character of custom helps to secure states' [\*581] agreement to a legal norm articulated at a high level of generality by deferring potential disputes over specific interpretations or applications. Universality means that states can predict that other nations will be bound to the rule, which may constrain self-interested behavior in the future when some states face strong incentives to defect.

All-states-benefit custom often arises from areas of interstate behavior that were previously unregulated by any international rules, and it is comprised of legal norms that are articulated at a high level of generality. Many venerable rules of international law have these qualities. 86 For example, all nations gain from having predetermined methods of communicating with each other through representatives without the fear of arrest or civil suits related to the officials' duties. Customary law thus provides for the immunity of diplomats and consular officials. Other examples include pacta sunt servana, territorial prescriptive jurisdiction, the prohibition of piracy, and the immunity of states from suit in foreign courts over sovereign or public acts (jure imperii). 87 Two additional illustrations from the law of the sea and outer space help to illuminate the contours of this category of custom.

Consider the mare liberum principle, first espoused by Hugo Grotius, which has long protected freedom of navigation over the world's oceans. As Sir William Scott wrote in an early 19th century court case rejecting British efforts to enforce a domestic ban on the slave trade against foreign vessels, the universal appeal of mare liberum was an important justification for its acceptance as custom:

all nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of all states meet upon a footing of entire equality and independence, no one state, or any of its subjects, has a right to assume or exercise authority over the subjects of another. 88

A similar rationale undergirds the countervailing custom that the flag state has sole jurisdiction over vessels that sail on the high seas under its badge of nationality. As one commentator has explained, the benefits accruing to all nations from the mare liberum and flag state rules were "mutually reinforcing," aiding the formation of both customs:

reciprocal respect for the exclusive jurisdiction of states over their ships provided a sort of state-to-state equality of opportunity. All states met upon equal footing on the high seas and could make free use of the sea for maximum benefit, but no state could independently impose its legislative will upon the modalities of use. 89

Turning from the oceans to the heavens, the universal recognition that "outer space is unsusceptible to national or private appropriation" aided rapid acceptance of the non-appropriation principle - a prohibition of territorial occupation or acquisition - as the customary ground norm for future activities in space. 90 The principle has benefitted all states, facilitating "the orderly development of space activities for more than forty years and … effectively preventing a colonial race in the high frontier." 91 To be sure, disagreements have arisen at the margins, in particular over the upper extent of the earth's atmosphere. But consistent with our theory, the contending positions over these boundary issues have been advanced, and compromises achieved, via multilateral treaties and soft law, not by challenges to the customary non-appropriation principle as such. 92

In sum, the all-states-benefit principle explains the formation of many foundational rules of customary international law. But it also sheds light on why custom plays only a limited role in other areas of interstate cooperation. Many important problems faced by the international community involve difficult and contentious questions of how to distribute the benefits and burdens of cooperation among differently situated states. If governments perceive that distributive effects of an international rule are high, unwritten and non-negotiated custom will serve as a poor alternative to treaties and soft law, where specific quid pro quo trade-offs can be worked out, or finely-tuned language can be negotiated, to suit all parties at the table. Climate change and other global environmental problems are prime examples. In these contexts, to the extent that custom forms at all, it will do so around highly abstract norms that leave distributive questions to future negotiations. For example, customary rules of international environmental law tend to be extremely broad and open-ended - what Dan Bodansky describes as a "common ethical framework." 93 They also tend to be derived from soft law and treaties, which allow states to shape rules with distributional consequences in mind. 94

[\*583] As explained above, the unwritten character of all-states-benefit custom means that the resulting legal rules are often amorphous and malleable. This facilitates widespread initial agreement to a rule, while also giving states leeway to assert their preferred interpretation when applying that rule to specific contexts or new circumstances. To be sure, no rule is entirely free from distributional consequences. As general rules become increasingly particularized in response to these claims, however, distributional issues often become more acute. Custom's distinctive features make it far less useful for resolving these distributional controversies. Instead, states attempt to resolve these concerns through treaty negotiations and codification exercises. Consistent with the argument advanced here, Tim Meyer has shown that efforts to codify preexisting custom is "often driven by distributional concerns." 95 This highlights an important corollary to our theory - over time, all-states-benefit custom tends to become more contentious as it is applied to new circumstances, increasing the likelihood that states will turn to treaty-making or codification to resolve disagreements over the norm. As we explain in Part IV, however, all-states-benefit custom remains relevant even after norms have been codified.

The history of sovereign immunity illustrates this trajectory. Early domestic suits against foreign states were often brought against state-owned maritime vessels. The doctrine of absolute immunity thus benefited countries with large navies and merchant marines, which were immune from suit. 96 On the other hand, private firms and individuals in these countries often had potential claims against foreign vessels, so these states bore the burden as well as the benefit of an absolute immunity rule. As states became more significant economic actors in first part of the 20th Century, the economic importance of state immunity rules increased, which magnified existing distributional effects and generated new ones. The benefits accruing to governments that nationalized private industries and the "State trading activities" of the Soviet Union and other socialist nations were particular concerns. 97 In part as a result, many states abandoned absolute [\*584] immunity in favor of a restrictive rule, which does not protect the commercial activities of foreign sovereigns. Consistent with our claim, although the absolute immunity arose with little dissent, the shift to restrictive immunity remains contested after more than a century. As one Chinese author recently explained, "developing countries, to better protect their own national interests, should continue to adhere to the principle of absolute immunity and should not follow the footsteps of the developed countries to accept the restrictive approach." 98

The heightened salience of distributional costs and the collapse of consensus around absolute immunity also coincided with the growth of treaties governing this topic. 99 Unable to secure acceptance of restrictive immunity as a customary rule, proponents of that approach turned to bilateral or regional agreements. 100 Efforts to codify restrictive immunity in a global treaty have been less successful. A U.N. convention endorsing that approach was adopted in 2004, but has yet to enter into force. 101

B. Hegemonic Custom

The non-negotiated, universal, and unwritten characteristics of custom also facilitate efforts by powerful states to create international rules that bind all nations. We label these rules as hegemonic custom. That powerful states play an important or even dispositive role in the formation of CIL is not a new observation, 102 but no other scholar has (to our knowledge) [\*585] linked the role of power to custom's distinctive design features or used it to develop a theory of instrument choice for custom. Below we discuss a number of variations of hegemonic custom, identify the conditions that make it more or less likely to be accepted by other nations, and analyze when powerful states turn to treaties and soft law to bolster their efforts to promote a desired customary rule. Before proceeding, we emphasize that we do not take a position on the normative desirability of hegemonic norm creation, focusing instead on its relationship to custom's distinctive characteristics. We take up normative issues in the paper's conclusion.

It is hardly surprising that powerful nations advance international rules that further their interests regardless of whether those rules benefit other countries. Yet given custom's universal scope and the ability of all states to object to the formation of an emerging norm, one might assume that attempts by hegemons to instantiate a preferred rule or practice as binding law would be doomed to failure. In fact, less powerful nations have sometimes embraced or at least acquiesced in campaigns for new customary rules by one or more powerful nations.

Perhaps the best examples involve the law of the sea. President Truman issued a proclamation in September 1945 claiming for the United States jurisdiction and control over its continental shelf, including beyond its territorial sea. 103 Because that area of the seabed was then part of the high seas and thus available for exploitation by all, the Truman Proclamation had significant distributional consequences. Yet coastal states quickly emulated the Proclamation and asserted sovereignty over their respective continental shelves. 104 Perhaps more surprisingly, landlocked nations also rapidly accepted the norm. The speed with which the custom crystalized was striking. As one commentator pithily noted, "the Truman proclamation was revolutionary in 1945 but passe by 1958." 105

What explains the rapid and universal acceptance of this new legal norm, advanced by the world's most powerful maritime nation, without formal negotiations or carefully delineated treaty texts? The timing - just after the end of the Second World War - was propitious. Many nations were still recovering from that conflict and others become economically or politically dependent on the United States during the Cold War's first decade. Both trends discouraged efforts to "challenge the [Truman] doctrine or reveal its flaws." 106 In addition, the new rule's distributional costs were somewhat uncertain. Most countries lacked the resources or technological knowhow to exploit the continental shelf (by drilling for oil, for example). [\*586] But such distributional costs that could be identified were partly mitigated by Truman's promise to issue leases to foreign corporations. Arguably the most important explanation for the doctrine's acceptance, however, was the claim by other coastal states - including two veto-wielding permanent members of the recently-created U.N. Security Council - that asserting sovereignty over their respective continental shelves was permitted by customary international law. 107

The credible, visible commitments to the new custom by these nations yielded a better outcome for all states than the uncertainty of no agreement, even if some governments would have preferred a different rule (in other words, there are distributional consequences in selecting a particular rule). Game theorists label this as a "battle of the sexes." 108 Ed Swaine has applied this analysis to the formation of new custom. He argues that "it is at these early stages where credible commitments, backed by reputational investment in the customary international law regime, may usefully diminish uncertainty and allow coordination to be attained more rapidly and with less friction." 109 Announcing a customary rule "permits a state to commit to one of the equilibria and to have its representation regarded as binding." 110 Although Swaine does not limit his analysis to a particular type of nation, his example - the development of the three-mile territorial sea - concerns a rule backed by two powerful maritime countries, England and the United States. 111

We extend Swaine's insight by explaining how custom's distinctive features facilitate the formation of hegemonic custom in a battle of the sexes situation. A hegemon's credible public commitment to a new legal rule on a take-it-or-leave-it basis may convince other governments that they are unlikely to obtain a more favorable rule through a treaty or soft law. Weaker states in particular may conclude that resistance is not worth the effort (since, by definition, the proffered custom is better than none), or they may see little reason to try to improve the rule through negotiations in which the powerful state may have an even stronger hand. For the new custom's proponents, this method of international norm creation is often faster and less onerous than either formal treaty-making processes or breaching existing rules. Although the "continual, overt exercise of power" is possible, it is also costly, providing hegemons with a strong incentive to legalize interstate relations in "settled rules." 112

[\*587] Another type of hegemonic custom concerns rules espoused during periods when a relatively small number of powerful nations dominated international society, a state of affairs that reached its apogee in the late 19th and early 20th century and continued, to a diminishing extent, until the end of colonialism in the 1960s. Commentators have rightly emphasized how the international rules of this period systematically harmed or ignored non-European nations and peoples. However, there were also battles over custom among the Western states. Britain's efforts to outlaw the transatlantic slave trade is the most prominent example.

Beginning in the early 1800s, Britain deployed a multi-prong strategy to stamp out the slave trade. It asserted a unilateral right to interdict vessels on the high seas, seized vessels carrying human chattel from Africa to the Americas, and sought to establish a basis in treaties and customary international law for proscribing the slave trade and enforcing that ban via interdiction. 113 The outcome of these efforts, by the end of the 19th century, was a customary law prohibition on the slave trade that extended to states that had not ratified treaties proscribing that practice and, by analogy to piracy, permitted any nation to seize slaving ships. 114

Unlike the Truman Proclamation, however, Britain's ultimately successful campaign against the slave trade required sustained legal and diplomatic efforts lasting over half a century. These efforts paired the negotiation of bilateral and multilateral treaties with other European powers and the United States with soft law declarations and assertions of customary international law. The early years of the campaign met with stiff resistance. The first bilateral treaties Britain secured did not authorize interdiction, and a key British court decision in 1817 held that searching vessels on the high seas infringed the exclusive jurisdiction of flag states. 115 The result, as Michael Byers has explained, was that the British government failed in its initial "attempt to assert a putative new right of customary international law against a nonconsenting state." 116

[\*588] This failure did not, however, lead Britain to abandon its effort to secure a universally applicable rule. Although the later treaties it negotiated outlawed the trade and provided a limited right of interdiction, these agreements did not bind nonparties. 117 Nevertheless, British ships continued to interdict the vessels of nations that were lawfully transporting African slaves across the Atlantic. 118 By these actions, Britain sought "to convert the[] practice of vigilante justice into a lawful act in accord with the larger framework of the public order of the oceans" and "a universally accepted legal norm." 119 The government did so by a clever recasting of slave trade as an act of piracy, a longstanding crime under customary international law that all nations were authorized to prevent and punish. 120

In sum, "the history of the British attempt to ban the transatlantic slave trade demonstrates how very difficult it is to achieve a customary international law right of interdiction on the high seas." 121 That such a custom arose notwithstanding the hurdles to its formation is due in large part to the sedulous campaign waged by the world's then most powerful maritime nation. To be sure, other factors aided the formation of the custom, most notably that "enforcing the prescription … became less contentious and more widely accepted when few states had a competing interest in favor of preserving the practice." 122 Yet as scholars have shown, the slave trade did not collapse under its own weight. To the contrary, governments and firms only abjured the lucrative practice in response to a massive transnational social movement and sustained political and legal pressure by abolitionist nations, most notably Britain, that reframed what had been viewed as an economic transaction in humanitarian terms. 123

Most important for our purposes, custom's distinctive features aided Britain's efforts to eradicate the slave trade. The government sought a universal ban, a result more easily achieved via a customary rule than by a series of bilateral and plurilateral treaties with varying terms that, in any event, did not bind nonparties. These gaps in treaty coverage were a genuine concern. As Noora Arajarvi has recently written, "many (dominant) countries, which were not party to the treaties, for instance Spain, continued to exercise the slave trade" during the middle decades of the 19th century. 124 This sheds additional light on the references to the slave trade as piracy in the compacts that Britain negotiated. Although these provisions [\*589] were "couched within an essentially contractual agreement," they had a broader aim: "extending the right of visitation to vessels from nonconsenting states" and thus facilitating the formation of a new custom. 125 Britain's interdiction of vessels on the high seas and its assertions of a legal right to interdict - both unwritten practices - were crucial to maintaining pressure on non-parties to renounce the slave trade. Finally, for nations reluctant to sign a treaty, negotiations were of little use; unilateral actions and assertions of legal rights were far more important.

The Truman Proclamation and the abolition of the slave trade are examples of successful hegemonic custom. Powerful nations do not, however, always prevail in their efforts to promote a new international rule. To the contrary, the rapid increase in the number of nations and in the diversity of their interests following the Second World War has eroded - although not entirely eliminated - the creation of hegemonic custom.

Demands by the United States and other capital-exporting nations for full compensation for expropriated alien property provides a classic example. The U.S. position was most famously asserted by U.S. Secretary of State Cordell Hull in a letter to the government of Mexico in the late 1930s. In response to Mexico's expropriation of property owned by U.S. nationals, Hull, coining the doctrine that was to bear his name, asserted that under customary international law "no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor." 126 According to some scholars,

Secretary of State Hull accurately presented the then current position in international law in 1938 when he wrote his famous letter to the Mexican Government … . Even though the Soviet Union and Latin American countries had challenged the rule before that time, it appears that the overwhelming practice and the prevailing legal opinion supported Hull's position." 127

If there was consensus regarding the standard of full compensation, however, it was short lived. By the 1960s, the objections of Latin American states were joined by those of newly independent countries in Africa [\*590] and Asia, which together turned to the U.N. General Assembly to assert a legal rule that was far more favorable to expropriating nations. 128

Yet the most extreme position advocated by capital-importing countries did not prevail. Latin American nations had long advocated a competing legal rule - the Calvo doctrine - which held that "aliens are not entitled to rights and privileges not accorded nationals, and that therefore they may seek redress for grievances only before the local authorities," not via international arbitration or diplomatic protection. 129 Since custom did not limit a government's power to seize the property of citizens, this national treatment standard gave expropriating states a legal justification for not compensating foreigners either. 130 Over time, however, expropriating countries abandoned this extreme position and accepted "that compensation must be paid for expropriated alien property as a matter of international law." 131 The amount of such compensation has remained contested, however, which helps to explain why the United States and European nations have successfully championed the Hull doctrine in a dense web of bilateral investment treaties, which now themselves are cited as evidence of CIL. 132

C. Normative Custom

States also use custom to entrench other-regarding values or goals in international law. We refer to this as "normative custom," which we broadly define to include an assertion of a customary rule that is plausibly advanced as salutary for the international legal system as a whole, even if the rule has distributional costs. The other-regarding character of normative custom distinguishes it most obviously from hegemonic custom - although the two categories may overlap, as illustrated by the divergent motivations for abolishing the slave trade, discussed above. We do not, however, endorse any external standard for assessing whether a putatively other-regarding custom is in fact generally desirable. 133 Rather, such claims will succeed or fail depending on whether other states and non-state actors accept the asserted normative custom as genuinely other-regarding. Although open-ended, this capacious conception of normative [\*591] custom intuitively captures one important way that states raise and contest claims about custom in the international legal order.

As with all-states-benefit and hegemonic custom, it is custom's characteristics as unwritten, universal, and non-negotiated that make it a useful instrument for states seeking to entrench a particular normative standard of conduct in the international legal order. First, normative custom is conducive to development through non-negotiated, tacit agreement. If for all-states-benefit custom there is no reason for any particular state to object, and if for hegemonic custom such objection would be futile, in the case of normative custom, there are political and moral impediments to contestation. Stated another way, normative custom develops through tacit consent if other nations feel morally or politically compelled not to speak out against it. Unlike all-states-benefit custom, there may be high distributional costs to the rules of normative custom, but the costs of contesting the rule are even higher.

Genocide and the death penalty provide useful opposing examples. A 1946 U.N. General Assembly Resolution prohibits genocide. 134 The resolution was adopted by a unanimous vote and no state representative publicly maintained that genocide was permissible under international law. 135 Now consider the death penalty. Many human rights advocates and some states have argued that customary international law prohibits capital punishment. But, many other governments publically refute the existence of such a custom, and some openly continue to impose and carry out death sentences, thereby preventing the norm from becoming custom through tacit consent. 136 At some point, the combination of active endorsement and tacit consent may become so widespread that a custom will form except for a handful of persistent objector countries. For now, however, the death penalty is not prohibited under CIL.

States seeking to develop normative custom may also be drawn to custom's universal applicability, such as its ability to bind new states not in existence when the norm developed and its ban on unilateral withdrawal. 137 In addition, some customary rules have attained the status of jus cogens - non-derogable rules that can only be changed by another rule of the same stature. 138 States seeking to develop the normative bona fides [\*592] of a customary rule would be especially drawn to these features, which help entrench the norm and make it valid against all nations in ways that treaties and soft law do not.

Universality is also attractive for normative custom. States motivated by other-regarding values likely want the norms they espouse to be accepted as broadly and deeply as possible. Anthea Roberts captures this desire when analyzing custom that is derived from treaties: "Where the treaty precedes the custom, the movement to custom often reflects recognition of, or a desire to recognize, the core commitments as non-revocable and binding on all states, thereby increasing their obligatory nature or scope." 139 The same is true of normative custom more generally.

Consider the well-known example of the prohibition on torture. The Convention against Torture is widely, but not universally, ratified. 140 For states that favor a global torture ban, instantiating such a ban in custom binds all nations, and does not permit states to withdraw unilaterally, as does the Convention. Some may challenge these assertions, citing the persistent objector doctrine. Yet even if that doctrine remains available in theory, its application to the prohibition on torture is especially unlikely. The torture ban embodies very widely-held values, and it would be costly for states to explicitly and openly reject such a prohibition. Theodor Meron makes a similar observation about the normative anchoring effect of custom when describing the dual protection of humanitarian norms: "[The] consensus that the Geneva Conventions are declaratory of customary international law would strengthen the moral claim of the international community for their observance because it would emphasize their humanitarian underpinnings and deep roots in tradition and community values." 141

Current controversies surrounding data privacy and mass surveillance offer a different example - the potential emergence of new normative custom. 142 Concerns about internet privacy and the collection of data have been increasingly voiced by states and civil society organizations in various multilateral venues. The U.N. General Assembly adopted two strongly worded and widely supported resolutions on "the right to privacy in the digital age" in 2013 and 2014. 143 The Office of the U.N. High Commissioner for Human Rights issued a report in June 2014 expressing strong support for protecting data privacy and serious concern with mass surveillance [\*593] and retention of personal data. 144 Most recently, in March 2015, the U.N. Human Rights Council adopted by consensus a resolution - supported by 55 co-sponsors from different regions - appointing a new special rapporteur to gather information on these same topics. 145

Regional and national developments are bolstering these emerging norms. 146 Domestic legislation in a growing number of countries provides a right to data privacy. 147 In a landmark ruling in 2014, the European Court of Justice invalidated the EU's Data Retention Directive as an infringement of the right to private life and protection of personal data. 148 The following year, special representatives of the OSCE, OAS, and African Union jointly condemned "untargeted or 'mass' surveillance [as] inherently disproportionate and … a violation of the rights to privacy and freedom of expression," 149 and the Special Rapporteur of the Inter-American Commission on Human Rights called on the Unites States "to introduce strong reforms to the NSA telephone metadata collection program." 150

Much of the debate surrounding data privacy focuses on the application of existing human rights norms to online settings, but it is framed in a way that reiterates the legally binding nature of these norms. 151 Some [\*594] commentators have gone further, arguing that extant international custom specifically protects a right of data privacy. 152 Whether states ultimately recognize customary law restrictions on mass data and surveillance will depend in part on whether data privacy is widely understood as a fundamental right, such that the political or moral costs of objecting to such a rule are too high to incur. We thus expect any custom that emerges from this process to rely heavily on tacit consent, with some governments taking strongly supportive positions and others acquiescing. Such a custom is also likely to be vague, deferring many questions about specific applications of the norm.

A possible impediment to the emergence of a data privacy custom would be objections by nations which, as a result of their more advanced technological capabilities, will incur higher costs of international regulation. Such opposition may, however, be weakened or even defused if a group of relatively powerful states actively supports the custom - a dynamic suggested by recent sparring over data privacy resolutions in the United Nations. 153 Hegemons may also turn to custom for a different reason - because they disagree with the capacious soft law norms advocated by human rights NGOs and experts and seek to develop competing (and more state-friendly) legal rules regarding data privacy.

D. Custom's Overlapping Domains

Extrapolating from the design features that constrain the formation of CIL, this Section has argued that custom has three principal domains: norms that benefit all states, norms backed by visible commitments from powerful nations, and custom that reflects shared normative values. International norms or potential norms that fall outside these domains are not well-suited for regulation via custom. For example, when a custom becomes increasingly distributional in effect, or when it loses the backing of a powerful (enough) hegemon, states are likely to shift to more negotiated forms of international cooperation. The shift from absolute to restrictive immunity is an example of the first, and the decline of the Hull doctrine due to opposition from newly independent states is an illustration of the second.

What we have labeled as domains might, however, also be conceptualized as a set of overlapping and interactive factors that tend to make the formation of custom more likely. For example, even if a putative customary [\*595] norm has distributional impact, a stronger, visible commitment from powerful countries may nevertheless spur its formation. All other things equal, the stronger the distributional effect, the greater the projection of power required.

Hegemons may also spur the formation of international rules that reflect deeply held normative values even if those rules also have distributional consequences. The Nuremberg Tribunal provides an illustration of such a hybrid hegemonic-normative custom. Together, the Tribunal and the Charter that created it, 154 their reception by states, and the subsequent affirmation of their principles by the U.N. General Assembly, 155 established individual criminal responsibility as part of CIL. 156 These developments were unquestionably driven by the visible commitments of the victors of World War II - the United States, France, the United Kingdom and the Soviet Union. 157 The Nuremberg Tribunal corresponded to widely-held normative values: the atrocities committed in World War II were unprecedented in scale and brutality, generating universal condemnation and widespread sense that perpetrators should be held legally accountable. 158

The influential Tadic decision by the International Criminal Tribunal for the former Yugoslavia (ICTY) 159 illustrates how a hybrid normative-hegemonic custom can arise notwithstanding its potential distributional effects. The ICTY Appeals Chamber in that case held that war crimes liability for grave breaches of the Geneva Conventions applies not only to armed conflicts between states but also to internal and non-international armed conflicts. 160 The judges purported to simply restate a preexisting customary rule, but the evidence they cited for that proposition was very thin. 161 The decision did, however, prompt subsequent state practice that crystalized into customary international law. 162

Tadic unquestionably had a normative component, which the Appeals Chamber emphasized in asserting that civilians in all types of armed conflicts should be protected from egregious conduct such as rape, torture, or [\*596] the wanton destruction of hospitals. 163 Yet, the Tadic rule also imposes greater costs on states that regularly experience civil wars or other armed conflicts within their borders. Under the Tadic rule, these states face potential war crimes prosecutions for their conduct in such conflicts; without the Tadic rule, they did not. This may explain the earlier opposition of developing countries to war crimes liability in non-international armed conflicts. 164 In addition, countries such China, India, Pakistan, and Russia opposed incorporating the Tadic rule into the International Criminal Court Statute in 1998. 165 Ultimately, this position was rejected, and the U.N. Security Council later endorsed the Tadic rule (at least tacitly) in resolutions concerning international crimes committed in Libya, 166 Sierra Leone, 167 and Rwanda. 168 By 2011, opposition to Tadic had dissipated further, with India, China, and Russia all voting in favor of a U.N. Security Council resolution asking the ICC to investigate the "serious violations of international humanitarian law" committed during the civil war in Libya. 169 No government criticized the referral on the grounds that potential war crimes had been committed during a non-international armed conflict. 170 According to one commentator, this silence may reflect a desire by developing countries to avoid "picking a fight with an institution established by the powerful Security Council." 171 In sum, the distributional consequences of Tadic were overcome by the confluence of normative and hegemonic support for the rule as international custom.

IV. The Future of Custom in an Age of Soft Law and Treaties

Having described custom's unique features and mapped its domains, we turn to a discussion of custom's relationship to treaties and soft law. This relationship might be understood as complementary: custom can be seen as a fungible form of "soft" hard law or "hard" soft law that exists on a continuum between soft law and treaties. Such a framing suggests that [\*597] custom may be rendered obsolete as unwritten international norms are codified and soft law grows in scope and complexity. 172

We recognize that custom sometimes functions as a complement to treaties or soft law, as the literatures on legalization and instrument choice at times suggest. But, the distinctive (and less malleable) characteristics of custom, as compared to soft law and treaties, create continuing incentives for states to choose custom over the other legal instruments if doing so advances their respective national interests or shapes the content, scope, or application of international rules in ways that favor them. If this account is correct, the demand for custom will not be affected by whether a particular subject area becomes more heavily populated by treaties and/or soft law.

We argue that there are two overarching rationales for states to choose custom over treaties and/or soft law: preferable substantive norms or preferable design features. States dissatisfied with the content of nonbinding norms or treaty provisions might, for example, attempt to develop alternative customary rules with different substantive obligations. Or states might agree with the substance of a treaty or soft law, but turn to custom because of its distinctive design features, such as its preclusion of the ability to "opt-out" by non-ratifications, treaty withdrawals, or reservations.

We represent the two dimensions of the choice between custom on the one hand and treaties and soft law in Figure 1 below. The legal instruments that are alternatives to custom appear on the x-axis, and the two rationales for states to choose custom are listed on the y-axis. The diagram depicts custom that arises later in time than treaties or soft law. 173 We focus on this temporal relationship because we view it as a more significant challenge to custom's continuing relevance to international cooperation. To be sure, as Tim Meyer has shown, custom that develops first may lead states that prefer codified legal norms to advocate, for example, for ILC-generated conventions or draft articles. 174 Yet if states continue to prefer custom - even in areas replete with treaties or nonbinding norms - such a choice casts doubt on predictions of custom's demise in an age of soft law and treaties, and on commentators who discount CIL's role in international cooperation.

A. Custom's Advantages over Treaties: Design Features

The top left box illustrates situations in which states turn to custom to modify or obviate the design features of preexisting international agreements. A prominent illustration of custom that competes with treaty design features is the protection of civilians in CIL and also in the 1949 Geneva Conventions for the Protection of Victims of War. Theodor Meron has argued that the protection of civilians in customary law is important in part because custom, unlike the Geneva Conventions, does not permit unilateral withdrawal and because "reservations to the Conventions may not affect the obligations of the parties under provisions reflecting customary law to which they would be subject independently of the Conventions." 175 Meron also notes that "as customary law, the norms expressed in the Conventions might be subject to a process of interpretation [\*599] different from that which applies to treaties" 176 - a further indication of custom's continuing relevance.

The protection of civilians is a hard case for our theory because the Geneva Conventions have been universally ratified, which some might claim renders custom irrelevant. More common but still supportive examples are multilateral agreements - such as the Convention on the International Sale of Goods and the Vienna Convention on the Law of Treaties - at least some provisions of which are accepted as having attained the status of CIL, thus permitting their application to countries that have refrained from ratifying those instruments. 177

A different use of custom to work around treaty design features is provided by the United States' relationship to the U.N. Convention on the Law of the Sea (UNCLOS). The United States played a lead role in negotiating UNCLOS, but has never ratified the Convention. It has, however, consistently maintained that some aspects of the Convention - in particular, those concerning freedom of navigation - reflect customary international law. 178 Critically for our purposes, the United States recognizes that the navigation rules embodied in these two sources of law are substantively the same. 179 However, because UNCLOS does not permit reser- vations, 180 it precludes treaty parties from opting out from any of its substantive provisions - including provisions, such as UNCLOS' dispute settlement clauses, to which the United States objects. By remaining outside of the Convention while selectively adhering to some of its provisions as custom, the United States is, controversially, using CIL to pick and choose those aspects of UNCLOS that benefit it while avoiding the concomitant burdens of provisions it disfavors 181 - [\*600] precisely what the no reservations clause of UNCLOS was adopted to prevent. 182

B. Custom's Advantages over Treaties: Substantive Norms

The box in the upper right quadrant of Figure 1 depicts situations in which states choose custom over treaties because they prefer CIL's substantive norms. 183 A different area of international maritime law provides a "striking example[] of modification" of a treaty through custom. 184 The 1958 Geneva Convention on the High Seas recognized the freedom of states parties to unilaterally exploit non-living resources on the deep seabed. 185 Yet in the years following the Convention's adoption, a competing principle - the "common heritage of mankind" - emerged and rapidly crystalized as custom. 186 Pursuant to this principle, a state could exploit seabed resources only when acting as an agent of the international community as a whole. 187 Importantly, the common heritage idea arose in part from legal claims by non-parties to the Geneva High Seas Convention, claims that would have gained little if any traction as treaty revisions, but [\*601] were far more salient as efforts to develop new CIL applicable to all nations. 188

The Tadic decision, discussed above in the context of custom's overlapping domains, provides another example of the substantive advantages of a custom over treaties that regulate the same subject area. The Geneva Conventions themselves apply almost exclusively to international armed conflicts, 189 leaving other military hostilities largely unregulated by the laws of war (with only a few exceptions, such as Common Article 3). 190 In Tadic, the ICTY held that certain provisions in the Conventions apply to internal armed conflicts as a matter of CIL. 191 In effect, the decision invoked custom to expand the Geneva Conventions' substantive norms to non-international armed conflicts. In the decades that followed, states increasingly embraced Tadic's substantive expansion of the customary laws of war beyond what the Geneva Conventions themselves require. Interestingly, states had previously considered and rejected precisely such an expansion when negotiating Protocols to the Geneva Conventions in the 1970s. 192

Humanitarian intervention offers another illustration of this relationship. The U.N. Charter prohibits the unilateral use of force in response to humanitarian crises in the absence of U.N. Security Council authorization or plausible claims of self-defense. 193 Yet as recent world events have made painfully clear, U.N. Security Council approval is often blocked by political differences among that body's five veto-wielding permanent members. As discussed in greater detail below, 194 some states dissatisfied with the status quo have turned to customary international law, implicitly or explicitly, to justify a military response to humanitarian crises if the U.N. Security Council fails to act. Such states are, in effect, claiming that custom offers a superior substantive norm that should displace the substantive constraints of the U.N. Charter.

C. Custom's Advantages over Soft Law: Design Features

The box on the lower left of Figure 1 depicts situations in which custom and soft law share the same substantive norms but have different design characteristics. The principal difference is obvious - CIL is legally binding and nonbinding norms are not. But there are other differences as well. Soft law is easier and faster to create and modify than custom, making it useful for situations of uncertainty and experimentation where flexibility is prized. Whether states can alter an existing customary rule without violating it is a question that has long bedeviled scholars. Deviating from soft law incurs no international legal responsibility and no (or at least lower) political and reputational costs, neatly sidestepping these difficulties.

#### Antitrust law is general – there’s wide scope for prohibition based on justifications outside domestic law.

HLR ’20 [Harvard Law Review; June 10; Harvard Law Review Association at Harvard University, ranked number one in law journal citations; Harvard Law Review, “Antitrust Federalism, Preemption, and Judge-Made Law,” vol. 133]

None of this is to say that ERISA preemption fails to raise federalism concerns or that the concerns addressed in Part II are unique to anti- trust. In its decision to expressly preempt state law in ERISA, a wise Congress should have considered the difficulties of preemption via judge-made law. Part II’s concerns with preemption via judge-made law could be applied to any delegation to the judiciary that overrides the states’ will. But given the brevity of federal antitrust statutes and the relative lack of executive branch involvement, Congress should be even more wary if it decides to preempt state antitrust law.159 [FOOTNOTE 159 BEGINS] 159 Complaints about brevity and lack of executive branch involvement land an even stronger blow against preemption via statute-independent federal common law. A grant of federal common lawmaking power does not have to be statutory. All that is needed to support the development of federal common law is “some expressed or implied affirmative grant of power to the national government by the Constitution or a statute enacted pursuant to it.” 19 MILLER, supra note 132, § 4514. When courts make law from a constitutional grant, there may not even be a brief statute. See, e.g., Clearfield Tr. Co. v. United States, 318 U.S. 363, 366–67 (1943) (“When the United States disburses its funds . . . it is exercising a constitutional function or power. . . . In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards.”); see also 19 MILLER, supra note 132, § 4515; Volokh, supra note 94, at 1429 (discussing courts’ “statute-independent federal common-lawmaking powers”). Because statute-independent common law is created completely by the courts, preemption via statute- independent common law will preempt the states while also excluding the federal executive branch.

#### It’s globally internalized AND will be codified later in statutory law.

Hakimi ’20 [Monica; 2020; James V. Campbell Professor of Law at the University of Michigan Law School; Michigan Law Review, “Why Should We Care About International Law?” vol. 118]

Introduction

International lawyers are used to having their discipline dismissed. A conspicuous strand of thought in U.S. foreign policy circles—known as realist— posits that international law does not matter. Realists of course recognize that states and other global actors speak the language of international law. But they view this discourse as cheap talk or epiphenomenal. They contend that state decisions on the international plane are animated not by the dictates of international law but by material interests and power. States act consistently with international law insofar as they have independent reasons for acting that way. If those reasons dry up, states, especially powerful states, can just violate the law; because the international legal system lacks centralized enforcement agents, any repercussions for the violation will be determined not by law but by the participants’ own interests and power relations. International law is again irrelevant.1

The realist position goes to the heart of the enterprise, so international relations and legal scholars have devoted enormous energy to refuting it. There is now an expansive literature on the efficacy of international law. Most of this work measures international law’s efficacy in terms that realists can appreciate, by asking whether international law helps to achieve specific policy outcomes—for example, reductions in greenhouse gas emissions, trade restrictions, or incidents of torture. The analysis ultimately turns on the facts. But it also entrenches a particular view of what makes international law worthwhile. It suggests that international law matters insofar as it advances the material outcomes that it itself prescribes.

Harold Hongju Koh2 has contributed enormously to this debate. More than twenty-five years ago, he articulated what is now a foundational theory about the efficacy of international law.3 The theory, in essence, is that states are habituated to comply with international law through a complex transnational legal process. Once a state engages with international law, disparate actors within and outside of government can invoke it to foster “institutional interaction whereby global norms are not just debated and interpreted, but ultimately internalized by domestic legal systems.”4 Internalized norms operate as domestic law; they establish “default patterns of international law-observant behavior,” which are “routinized and ‘sticky’ and thus difficult to deviate from without sustained effort” (p. 7). So the reason that international law is effective is that the transnational legal process pushes states toward obeying its mandates and thereby achieving its prescribed outcomes.

#### Stabilizing international law through direct incorporation is the only way to make law certain and predictable – the unchecked unilateralism of national law is destabilizing.

Noyes ’9 [John E.; 2009; Professor of Law, California Western School of Law, President of the American Branch of the International Law Association; Publicist, “The United States and the Law of the Sea Convention: U.S. Views Concerning the Settlement of International Law Disputes in International Tribunals and U.S. Courts,” https://bjil.typepad.com/publicist/2009/03/publicist01-noyes.html]

Yet refusing to allow direct application of the Convention in U.S. courts would also carry costs. It is consistent with some U.S. traditions to regard international law, even as it applies to individuals, as fully justiciable law, like domestic statutory and case law. In this view, applying the Convention in U.S. cases concerning individuals would be an ordinary exercise of judicial authority. In general, direct application of the Convention in cases involving individuals could have the salutary effect of promoting respect for basic human rights in other countries. There may be other benefits of such application as well. Recognizing the direct applicability of the Convention’s prompt release articles in U.S. court, for example, could defuse conflicts with other states. In addition, the U.S. tradition of promoting international trade and commerce – reflected in the Medellín dissent’s concern that the majority’s decision “threatens to deprive … businesses [and] property owners …. of the workable dispute resolution procedures that many treaties, including commercially oriented treaties, provide”[103] – suggests an historically strong reason not to read the Medellín Court’s non-self-execution holding too broadly. The concern with safeguarding commercial relationships also counsels against writing the non-self-executing provisions of the Advice and Consent Resolution too broadly, or at least counsels in favor of insuring that U.S. legislation fully implements Convention provisions.

If the Convention were self-executing, U.S. courts might help to build state practice and help to reinforce interpretations of the Convention that favor U.S. positions. It is unlikely that U.S. courts would reach decisions construing the Convention in ways that were antithetical to the views of the U.S. Executive Branch. First, U.S. courts could invoke a variety of other prudential abstention doctrines, such as the political question doctrine, to avoid hearing cases that might adversely affect truly sensitive matters of U.S. foreign policy. Both the majority and dissent in Medellín signaled this concern, noting that U.S. courts should not hear such politically sensitive cases. Second, when U.S. courts do apply treaties directly, the courts often accord great weight to the suggestions of the Executive Branch concerning the interpretation of the treaties.[104]

We would do well to remember the original justifications for including the third-party dispute settlement provisions in the Convention. These justifications – which U.S. officials articulated and supported during UNCLOS III – include promoting certainty, predictability, and stability, with respect to rules that greatly benefit the United States.[105] These dispute settlement provisions can help deter illegal behavior, as well as promote the peaceful settlement of disputes. Domestic enforcement of Convention provisions can also serve this end. At the most fundamental level, the Convention furthers the rule of law in the world – the values of using agreed-upon rules and procedures to resist unilateral assertions of jurisdiction or sovereign control, resolving differences even-handedly according to established rules, and providing stable expectations for international actors. Giving full effect to provisions for third-party dispute settlement at the international and national levels would help further these values.

#### Any deficit links to them – all antitrust statutes are indeterminate and require judicial evaluation.

Katz ’20 [Michael and Douglas Melamed; 2020; Sarin Chair Emeritus in Strategy and Leadership at the Haas School of Business and Professor Emeritus in the Department of Economics at the University of California, Berkeley; Professor of the Practice of Law at Stanford Law School, Stanford University; Pennsylvania Law Review, “Competition Law as Common Law: American Express and the Evolution of Antitrust,” vol. 168]

“[N]o statute,” Justice Scalia observed, “can be entirely precise, and . . . some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it.”1 This is particularly true of antitrust law because the core antitrust statutes are very brief and imprecise.2 Indeed, as the Supreme Court explained in National Society of Professional Engineers, “[t]he legislative history makes it perfectly clear that [Congress] expected the courts to give shape to the statute’s broad mandate by drawing on common law tradition.”3 Accordingly, “[f]rom the beginning the Court has treated the Sherman Act as a common-law statute.”4 In effect, Congress has delegated to the courts the fleshing out of both the normative standards to be applied in assessing conduct and the process by which courts determine whether these standards are violated. This delegation “permits the law to adapt to new learning.” 5

#### CIL is certain and clear enough for regular enforcement.

LSG ’6 [Law Society's Gazette; 2006; “Legal Update: Law Reports,” Lexis]

Held, for the purposes of these proceedings, the court accepted that customary international law was, without the need for any domestic statute or judicial decision, part of the domestic law of England and Wales, since the Crown did not challenge that proposition.

Customary international law recognised a crime of aggression and understood it with sufficient clarity to permit the lawful trial of those accused of the crime. It did not lack the certainty of definition required of a criminal offence.

It was at least arguable that war crimes, recognised as such in customary international law, would be triable and punishable under English domestic criminal law. However, war crimes were distinct from the crime of aggression. A crime recognised in customary international law might be assimilated into the domestic criminal law of England and Wales. But the authorities did not support the proposition that that result followed automatically (R v Keyn (Ferdinand) (The Franconia) (1876-77) LR 2 Ex D 63 considered and Hutchinson v Newbury Magistrates Court, Independent, 20 November, 2000 applied).