# 1AC Filed Rates – Georgetown – Michigan PS

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### 1AC – Energy

#### Advantage One is Energy:

#### The filed-rate doctrine is a ‘zombie energy law,’ shielding undead companies from liability for anticompetitive behavior.

Macey ’20 [Joshua; 2020; Law Professor at Cornell; Vanderbilt Law Review, “Zombie Energy Laws,” vol. 73, no. 4]

Today, these “zombie energy laws” entrench incumbent market power and prevent the deployment of renewables.15 The filed rate doctrine, for example, continues to shield energy companies from civil antitrust suits even though most energy companies no longer formally file rates with regulators.16 The requirement that regulators assess the financial viability of transmission projects before issuing a certificate of public convenience and necessity to site new transmission lines is a vestigial remnant of a rule that was once needed to prevent new entry into a utility’s exclusive service territory.17 In these ways, courts and regulators have clung to many of the rules that were created to protect customers in the public utility era but have since outlived their useful purpose.18

Footnote 16:

16. See Rossi, supra note 11, at 1646 (noting how courts have “allow[ed] the filed tariff doctrine to become an independent, firm-specific antitrust defense”). In twin cases decided in 1956, the Supreme Court instructed the Federal Power Commission (the regulatory predecessor to the Federal Energy Regulatory Commission (“FERC”)) to presume that any freely negotiated wholesale transaction was “just and reasonable” for purposes of the Federal Power Act and the Natural Gas Act. See Fed. Power Comm’n v. Sierra Pac. Power Co., 350 U.S. 348, 372 (1956) (holding that contract rates freely negotiated between sophisticated parties meet the just-andreasonable standard required by the Federal Power Act, even if they are unprofitable to the public utility); United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 344–45, 347 (1956) (same, but for the purposes of the Natural Gas Act). The presumption that freely negotiated energy contracts are “just and reasonable” applies even if FERC did not have an initial opportunity to review the contract. See NRG Power Mktg., LLC v. Me. Pub. Utils. Comm’n, 558 U.S. 165, 167 (2010) (“Under this Court’s Mobile–Sierra doctrine, FERC must presume that a rate set by ‘a freely negotiated wholesale-energy contract’ meets the statutory ‘just and reasonable’ requirement.”); Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1, 554 U.S. 527, 530 (2008) (“The presumption may be overcome only if FERC concludes that the contract seriously harms the public interest.”).

Article continues:

These zombie energy laws are now seriously degrading energy markets. They allow incumbents to raise prices and, worse, prevent clean energy companies from competing with incumbent fossil fuel generators. For example, Arkansas regulators recently blocked a multibillion dollar transmission line that would have enabled more than $7 billion of investment in renewable energy facilities after finding that only incumbent utilities are eligible to receive a certificate of public convenience and necessity in the state of Arkansas.19 Although the project would have reduced electricity prices in the southeast and provided enough clean energy to power over a million homes a year, it has been repeatedly delayed in part because state energy regulators have determined that only incumbent utilities were legally authorized to construct new transmission lines.20 The certificate of public convenience and necessity was originally designed to ensure that rate regulated utilities were able to honor their service obligations. Today, the requirement that regulators assess market demand before granting a certificate of public convenience and necessity entrenches incumbent market power and impedes the development of renewable suppliers.

Numerous scholars and policymakers have questioned the usefulness of these doctrines.21 This Article’s contribution is therefore not to provide a novel critique of these zombie energy laws. It is instead to point out that many of the seemingly diffuse problems that pervade modern electric power markets can be attributed to the historical origins of electricity regulation. All of these laws emerged to mitigate market power abuses under a regulatory system that has largely been abandoned. Their continued application is now facilitating market power abuses and blocking the development of cleaner and cheaper energy sources.

#### The doctrine serves no purpose in energy markets. Studies suggest FERC regulation can’t fix the market without restructuring the exception.

Macey ’20 [Joshua; 2020; Law Professor at Cornell; Vanderbilt Law Review, “Zombie Energy Laws,” vol. 73, no. 4]

The filed rate doctrine might have been a sensible rule when generators were regulated as public utilities. It is difficult to imagine how a plaintiff could have brought an antitrust case in court when utilities had a legal right to a monopoly and when regulators determined what prices were reasonable. The problem with the filed rate doctrine today is that many generators no longer actually file rates with public service commissioners.173

Footnote 173:

173. See Fed. Energy Regulatory Comm’n v. Elec. Power Supply Ass’n, 136 S. Ct. 760, 768 (2016):

Decades ago, state or local utilities controlled their own power plants, transmission lines, and delivery systems, operating as vertically integrated monopolies in confined geographic areas. That is no longer so. Independent power plants now abound, and almost all electricity flows not through “the local power networks of the past,” but instead through an interconnected “grid” of near-nationwide scope.

(quoting New York v. Fed. Energy Regulatory Comm’n, 535 U.S. 1, 7 (2002)).

The article continues:

Energy markets look radically different than they did a century ago. Much of the country’s generation is now compensated through competitive procurements, and, as of 2018, thirty-six percent of all generation is produced by independent power producers that are unaffiliated with investor-owned utilities.174 In the mid-1950s, the Supreme Court announced that it would assume that rates that had been negotiated at arm’s length were just and reasonable.175 Thus, in most of the country, private ordering—not formal ratemaking proceedings—now determines the profits generators make when they sell electricity.176

There is therefore no need for regulators to worry that antitrust suits will prevent the public service commissions from realizing their mandate to prevent discriminatory rates, because regulators in these parts of the country no longer rely on ratemaking proceedings to ensure that rates are just and reasonable. In fact, FERC now presumes that freely negotiated contracts are just and reasonable.177 When FERC and state energy regulators presume, without reviewing contracts in a ratemaking proceeding, that all freely negotiated contracts are just and reasonable, they do not have an opportunity to assess whether a contract has anticompetitive effects.

Yet the application of the filed rate doctrine to competitive energy markets means that market participants are largely shielded from the laws that mitigate anticompetitive behavior in ordinary markets. In 1986, the Supreme Court affirmed the filed rated doctrine on stare decisis grounds, and it did so despite recognizing that the doctrine no longer served its original purpose.178 Without authority to enforce antitrust laws, consumers have to trust that regulators will prevent collusive behavior and monopolistic pricing.

And regulators have failed to prevent market power abuses in electricity markets. Consider the 2000–2001 California energy crisis. At the turn of the twenty-first century, large generators began to strategically refuse to sell electricity until prices rose to astronomical levels.179 Companies such as Enron would purposefully export electricity that was needed in the state to neighboring states such as Nevada in order to drive up California electricity prices.180 Pacific Gas and Electric (“PG&E”), one of the two California companies that purchased electricity from generators to sell to consumers, was forced into bankruptcy when it found itself unable to afford electricity it was required to supply to Californians.181 This type of behavior contributed to market inefficiencies worth an estimated $12 billion.182 Suppliers’ anticompetitive behavior was one of the reasons wholesale prices increased so dramatically and was thus one of the reasons California had to implement rolling blackouts.183

Other states have experienced similar abuses. Texas found itself in the same position in 2005, when market manipulation cost Texans more than $70 million.184 In the summer of 2006, New York market manipulation cost New Yorkers approximately $150 million.185 Studies of energy prices have demonstrated that market manipulation is an ongoing problem and that the tools FERC uses to deter manipulation are ill-equipped to prevent the types of abuses that pervade energy markets.186

It arguably made sense to funnel antitrust suits against regulated monopolies through the federal regulator charged with overseeing those monopolies. That is because judicial enforcement may undermine a market’s entire rate structure and lead to discriminatory rates. On top of that, a company that enjoys a legal right to a monopoly is by definition permitted to engage in some conduct that would otherwise constitute an antitrust violation. In such cases, it arguably made sense to have the regulator responsible for ensuring that a company charge just and reasonable rates also make sure that the company is complying with service obligations imposed by state tort, contract, and antitrust laws.

Yet courts continue to apply the filed rate doctrine in restructured energy markets. The U.S. Court of Appeals for the First Circuit, for example, has held that “utility filings with the regulatory agency prevail over . . . other claims seeking different rates or terms than those reflected in the filings with the agency.”187 According to the Ninth Circuit, the doctrine is “a form of deference and preemption, which precludes interference with the rate setting authority of an administrative agency, like FERC.”188

As explained in Section III.C, the filed rate doctrine was a judicially created doctrine intended to make sure that the judiciary did not undermine rates filed in cost-of-service ratemaking proceedings. Today, however, FERC has replaced monopoly cost-of-service ratemaking with a market-based approach to setting wholesale rates in most of the country. The Commission now seeks to ensure “just and reasonable” rates “by enhancing competition” among multiple wholesale providers of electricity.189 FERC has done so because it has concluded that competition is the most effective way “to bring more efficient, lower cost power to the Nation’s electricity consumers.”190 To achieve that purpose, FERC has endeavored “to break down regulatory and economic barriers that hinder a free market in wholesale electricity”191 and it has chosen to rely on market forces in competitive auctions to fulfill its statutory charge of ensuring “just and reasonable” wholesale rates.192 Courts thus seem to reflexively apply the filed rate doctrine in restructured markets without recognizing that the doctrine has become obsolete in markets where energy regulators do not review every energy contract before determining that the contract is just and reasonable.193

Restructured energy markets are intended to create the same incentives as ordinary markets. To that end, exempting energy companies from judicial enforcement of ordinary tort, contract, and antitrust claims gives energy companies an exceptional privilege. In the cases described in this Section, the filed rate doctrine prevented civil plaintiffs from enforcing antitrust laws.194 In this way, a doctrine that was originally meant to protect consumers by ensuring utilities treat all customers fairly has become a weapon that generators yield to exploit their market power.

#### Energy prices are rising.

Smith 11-8 [Talmon; November 8; Economics reporter for The New York Times based in New York. Before joining the Business desk, he was a staff editor in Opinion, covering public policy, economics and culture; *The New York Times,* “Winter Heating Bills Loom as the Next Inflation Threat,” <https://www.nytimes.com/2021/11/08/business/economy/home-heating-prices-winter.html>; KS]

With consumers already dealing with the fastest price increases in decades, another unwelcome uptick is on the horizon: a widely expected increase in winter heating bills.

After plunging during the pandemic as the global economy slowed, energy prices have roared upward. Natural gas, used to heat almost half of U.S. households, has almost doubled in price since this time last year. The price of crude oil — which deeply affects the 10 percent of households that rely on heating oil and propane during the winter — has soared by similarly eye-popping levels.

And those costs are being quickly passed through to consumers, who have become accustomed to cheaper energy prices in recent years and now find themselves with growing concerns about inflation this year.

In the United States, the winter months account for about 50 to 80 percent of residential fuel consumption. And there is “a significant chance” consumers could face a “marked increase” in prices for heating, said Nina Fahy, an analyst for Energy Aspects, a research consultancy.

Last winter was warmer than average, which led to residential energy bills that were comparatively low. This season, heating costs could rise to levels not seen a decade, even if there isn’t a severe winter. Several factors — lower global fuel inventories, incentives for producers to let prices rise and a mismatch between supply and demand as economies emerge from the pandemic — may combine to push bills higher regardless.

Mark Wolfe, executive director of the National Energy Assistance Directors’ Association, a group of state officials administering aid to low-income households, says those living paycheck to paycheck, or just trying to save, aren’t going to be soothed by complex explanations about inventory levels, supply chains or global demand. When the bills start coming in December or January, he said, “the public’s going to get angry.”

Expert forecasts suggest that the southern half of the country, which has milder winters and relies on relatively cheap electricity for home heating, may enter spring largely unscathed. But the Northeast and the Northern Plains, as well as rural areas nationwide, are far more dependent on heating oil and propane, which are highly exposed to price spikes in commodity markets.

#### Private utilities are creating artificial shortages – limits supply and raises prices.

Vaheesan ’19 [Sandeep; October 25; Legal director at the Open Markets Institute. Vaheesan previously served as a regulations counsel at the Consumer Financial Protection Bureau, where he helped develop and draft the first comprehensive federal rule on payday, vehicle title, and high-cost installment loans; “MOTION OF OPEN MARKETS INSTITUTE FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT,” <https://static1-squarespacecom.proxy.lib.umich.edu/static/5e449c8c3ef68d752f3e70dc/t/5eaa1d9d2790182e187cc171/1588207017816/19-1678_Documents-as-filed.pdf>; KS]

Plaintiff-appellant accuses Eversource Energy and Avangrid (two vertically integrated utilities that distribute gas and electricity to end-use customers and own power generation assets) of misusing their market power at the natural gas resale level and engineering a chain of events that inflicted substantial harm on New England residents. The defendants-appellees abused their gas pipeline use rights to create an artificial shortage of resale gas, a key input for generating electricity in New England. By limiting the supply of gas in New England and raising the price of natural gas, the defendants-appellees increased the costs of generating electricity. And by raising the costs of generating electricity, they increased wholesale electricity prices and ultimately retail electricity costs for New Englanders by more than $3 billion.

#### Market power abuses drive up prices and grid vulnerabilities.

Gorodetsky ‘9 [Julia; Winter; Corporate securities lawyer for Andrews Kurth LLC; *Tulane Environmental Law Journal,* “Analogy By Necessity: The Filed Rate Doctrine and Judicial Review of Agency Inaction,” <https://www.jstor.org/stable/pdf/43294073.pdf?refreqid=excelsior%3A40dc35292abcd134d36ab5a0d941bbc6>; KS]

B. The Unique Nature of the Electricity Market and the Greater Potential for Market Abuse

The electricity market is different from any other competitive market in a way that makes it hard to control. This makes the electricity industry particularly prone to market power abuse by individual utilities.45 The wholesale electricity market is currently under FERC's jurisdiction.46 That means that private utilities are required to file their tariffs with FERC for its review and approval.47 During the approval process, FERC reviews the market share of the utility in order to determine whether the utility possesses the market power necessary to manipulate the market.48 Market power means the power of a single firm to drive prices upwards without losing its consumers.49 In its extreme form, market power leads to monopoly.50 Monopolies hurt consumers because they produce too little and charge too much.51

Currently, FERC employs the Federal Guidelines developed by the DOJ and the FTC for nonelectricity markets as a benchmark for the critical market share under which the utility is incapable of exercising market power.52 This market set by DOJ and FTC stood at twenty percent.53 What FERC does not account for is that the unique characteristics of the electricity market "directly translate into enhanced market power for generators and traders holding much smaller market shares than 20%."54 The nature of the electricity market is such that when the right conditions are met, even a utility with as little as one percent of the market share can exercise significant market power by withholding capacity and driving the prices upwards.55

The electricity market is unique in several ways. First, the demand for electricity is highly inconsistent over time.56 Second, electricity cannot be stored.57 That means that "[e]ach unit consumed must be produced at exactly the nanosecond it is consumed."58 Thus, unless consumers are responsive in their demand for electricity, the only way to stabilize prices is to add more generators because the future capacity cannot balance out the present capacity.59 The demand for electricity is fairly inelastic due to the lack of price information among consumers.60 Price elasticity of demand describes "the extent to which quantity demanded decreases in response to an increase in the price of a good or service."61 Therefore, consumer demand does not act as a constraint upon market power because consumption will continue at the same rate regardless of the price charged.62 Further, the number of generating facilities is relatively fixed due to the substantial entry barriers for production of electricity.63

Thus, varying demand for electricity and the inability to store electricity may result in tremendous price volatility in the electricity market.64 Further, these characteristics open the door to potential market power abuse by making it possible for one firm to artificially inflate prices by withholding its electricity generation capacity or raising its prices with impunity.65 The fact that the exercise of market power in the electricity market does not demand collusion makes the electricity market particularly vulnerable to abuse.66 In case of collusion, however, the price of electricity can soar even higher.67

Third, electricity is transmitted through an integrated transmission grid which may include several regions in the United States and Canada.68 Consequently, individual states can impact the market significantly yet have very little power to control it.69 Further, because electricity cannot be stored, the only way to operate the grid without causing blackouts is to balance generation and demand carefully in order to avoid surplus in the wires.70

#### Rising prices guarantee demand outpaces supply – ensures grid failure.

Kocieniewski & Malik 11-5 [David and Naureen; November 5; Reporters at Bloomberg; *Bloomberg;* “The Power Grid Is Just Another Casino for Energy Traders,” <https://www.bloomberg.com/news/features/2021-11-05/why-is-my-electric-bill-so-high-energy-traders-bets-could-be-the-culprit>; KS]

Anyone who pays a utility bill in the U.S. is familiar with the symptoms of an aging power grid perpetually in need of upgrades. Less visible are the entities that bet on, and make multimillion-dollar profits from, the grid’s shortcomings. GreenHat’s story shows that not only do American power customers have to contend with high electric bills, rolling blackouts, and increasingly common outages—they’re also underwriting a trading system that allows speculators to pocket the winnings and sticks ratepayers with some of the biggest losses.

Andrew Kittell grew up in the shadow of Wall Street. His father, Donald Kittell, was an executive with Morgan Stanley Dean Witter and later served as the chief financial officer for Sifma, the Securities Industry and Financial Markets Association. Andrew liked excitement—he skied and surfed—but told friends he’d learned from summer jobs on Wall Street that he didn’t care for financial risk. At Columbia Business School, he wrote in-depth research on the odds of winning at a casino, reaching conclusions that soured him on gambling, close associates say.

Kittell was hired out of school by Bear Stearns, for a unit that aimed to wring profit from the investment bank’s portfolio of power plants. After Bear’s 2008 bankruptcy, he wound up in Houston at JPMorgan Ventures Energy Corp. (JPMVEC), where he worked alongside fellow trader John Bartholomew. Bartholomew had spent years as a power purchaser at a Southern California utility; he boasted on his résumé that the experience had taught him how to take advantage of flaws in the state’s payment formulas for power generators.

In the broadest terms, power traders try to anticipate when demand will rise and supply will falter. JPMVEC did all that—and also focused on finding rules it could exploit. One example: During times of heightened demand, California officials would pay plant owners hefty ramp-up fees to bring more generators online. So JPMVEC wouldn’t switch on the handful of plants under its control until it could charge as much as 83 times the normal price of power. The plants would run for a bit, then shut down to await the next demand peak. In all, the firm employed 12 different strategies that federal officials determined went beyond typical behavior and were designed to game the system.

According to internal emails, senior JPMorgan executives expected the power unit to reap hundreds of millions of dollars, but by 2013 regulators had intervened. JPMorgan agreed that year to the second-largest settlement in FERC’s history: It paid a $285 million fine for what the settlement called “manipulative bidding strategies” and returned $125 million more in “unjust profits.”

The next year, Kittell, Bartholomew, and a third JPMVEC alumnus, Kevin Ziegenhorn, formed GreenHat. Through their lawyers, Bartholomew and Ziegenhorn declined to comment for this story.

FERC is the main enforcement authority for U.S. electricity markets. The Securities and Exchange Commission has also led major investigations into energy trading firms, including Enron, whose market manipulation and accounting fraud led to bankruptcy in 2001 and landed top executives in prison. But consumers’ first line of defense consists of four regional transmission organizations, or RTOs, and three single-state independent system operators, or ISOs (New York, California, and Texas have their own grids). These private companies grapple with a system that is part Escher, part Rube Goldberg. Day to day, the essential task is balancing supply and demand—and the power flow has to be precise, at a frequency of 60 hertz, or the grid can become unstable. It’s a daunting task considering that the grid is a sprawling patchwork cobbled together from lines running along paths built a century ago and vulnerable to challenges as unpredictable as extreme weather, mechanical breakdowns, falling tree limbs, cyberattacks, and solar flares. The grid operators also run the markets for financial instruments based on the cost of those disruptions.

GreenHat traded in a market operated by the largest of the grid keepers, the RTO known as PJM Interconnection LLC. PJM (the name originally stood for Pennsylvania, New Jersey, and Maryland) directs power from 1,400 generators through 85,100 miles of high-voltage cables in 13 Eastern states and the District of Columbia. Its 65 million electricity consumers have been spared the widespread blackouts that have affected tens of millions of people in Texas and California lately, but they’ve paid for that stability.

PJM is supposed to balance the interests of power companies, consumers, and communities, but for years it’s allowed major suppliers such as Exelon, Duke Energy, and American Electric Power to bill ratepayers for high-priced upgrades to sections of the grid where they predominate, according to an assortment of studies. Ari Peskoe, director of the Electricity Law Initiative at the Harvard Law School Environmental and Energy Law Program, says PJM’s reliable checkoff on new projects allows suppliers to preserve their market dominance and freeze out competition. It’s effectively “a protection racket” for the biggest providers, Peskoe says.

PJM has also allowed power providers owned by Wall Street firms such as Blackstone Inc. and KKR & Co. to tap into the billions of dollars a year PJM pays for what’s called reserve generation—the maintenance of clunker plants that are used only in emergencies, typically a few days a year. That limited role has been a lifeline for aging plants like the 52-year-old Homer City Generating Station in western Pennsylvania, once owned by General Electric Co. It’s a coal-burning plant made all but obsolete by the shale gas boom in the surrounding area. PJM pays it to stay online to help meet peak demand. Federal regulators, academics, consumer advocates, and market participants all say PJM pays for far too much capacity. PJM disagrees.

GreenHat found a similarly accommodating environment in PJM’s market for congestion contracts. Grid operators dole out rights to the excess congestion revenue they collect to utilities and other power suppliers. At regular auctions, the recipients can resell such rights as futures contracts. Winning bidders, including speculators like GreenHat, acquire their positions on credit; no money changes hands until the contracts’ terms end. That can be years in the future.

Similar markets operate around the country, but GreenHat found PJM’s especially attractive. In comments to close associates, Kittell cited one particular aspect: PJM allowed traders to buy large numbers of congestion contracts while posting very little collateral. To secure the positions that ultimately lost $180 million, PJM required GreenHat to pledge less than $600,000, FERC records show.

PJM declined to comment on the GreenHat case, citing FERC’s ongoing investigation. In emailed statements, PJM has said that since GreenHat’s default it has implemented “a comprehensive overhaul of credit reform, mitigation policies and procedures” that include stricter collateral requirements and the appointment of a chief risk officer in 2019. The new policies give PJM officials “authority to limit, rescind or terminate participants.”

PJM has also closed another regulatory gap. When GreenHat set up shop, PJM had no screening process in place for new traders or trading firms. It does now. The applications of the GreenHat executives were approved without so much as a Google search.

Anyone who’s paid surge pricing for an Uber has a general idea of what creates congestion revenue: Prices and surcharges climb steeply whenever demand exceeds suppliers’ capacity. In the electricity market, there are additional wrinkles. Overloading a power line causes wires to retain heat and stretch, putting them at risk of failure, so grid operators like PJM have to balance the limited capacity of the lines against the ceaseless ebb and flow of demand. When needed, they bring on additional power providers, at higher prices. Say the price on a given day is $30 per megawatt-hour. When there’s a little pressure on supply, that might rise a few dollars. As the pressure increases it might double, then increase tenfold, then twentyfold. PJM finally caps prices at $1,000 per MWh—but in the most extreme conditions they could surge to $3,750. Next year those prices can rise to more than $12,000.

When prices jump, grid operators charge every ratepayer the new, higher price—even though the initial providers continue to receive the previous, lower price. Imagine you’re riding in an Uber economy car when demand leaps so high that the only option available for new riders is limousines. And then imagine that the price you have to pay automatically increases to the limousine rate—even though your driver will collect only the economy rate.

The money that grid operators collect from consumers but don’t pay to power providers is congestion revenue. During the first six months of this year, consumers in PJM’s service area kicked in $354 million in such revenue, a 97% increase from a year earlier.

#### Grid failure is existential.

Weiss and Weiss ’19 [Matthew and Martin; May 29; National Sales Director at United Medical Instruments, UMI and Research assistant at the American Jewish University; Neurosurgeon at UCLA-Olive View Medical Center; Energy, Sustainability, and Society, “An assessment of threats to the American power grid,” vol. 9]

Consequences of a sustained power outage

The EMP Commission states “Should significant parts of the electrical power infrastructure be lost for any substantial period of time, the Commission believes that the consequences are likely to be catastrophic, and many people will die for the lack of the basic elements necessary to sustain life in dense urban and suburban communities.” [67].

Space constraints preclude discussion on how the loss of the grid would render synthesis and distribution of oil and gas inoperative. Telecommunications would collapse, as would finance and banking. Virtually all technology, infrastructure, and services require electricity.

An EMP attack that collapses the electric power grid will collapse the water infrastructure—the delivery and purification of water and the removal and treatment of wastewater and sewage. Outbreaks that would result from the failure of these systems include cholera. It is problematic if fuel will be available to boil water. Lack of water will cause death in 3 to 4 days [68].

Food production would also collapse. Crops and livestock require water delivered by electronically powered pumps. Tractors, harvesters, and other farm equipment run on petroleum products supplied by an infrastructure (pumps, pipelines) that require electricity. The plants that make fertilizer, insecticides, and feed also require electricity. Gas pumps that fuel the trucks that distribute food require electricity. Food processing requires electricity.

In 1900, nearly 40% of the population lived on farms. That percentage is now less than 2% [69]. It is through technology that 2% of the population can feed the other 98% [68]. The acreage under cultivation today is only 6% more than in 1900, yet productivity has increased 50 fold [69].

As stated by Dr. Lowell L Wood in Congressional testimony:

“If we were no longer able to fuel our agricultural machine in the country, the food production of the country would simply stop, because we do not have the horses and mules that used to tow agricultural gear around in the 1880s and 1890s”. “So the situation would be exceedingly adverse if both electricity and the fuel that electricity moves around the country……… stayed away for a substantial period of time, we would miss the harvest, and we would starve the following winter” [70].

People can live for 1–2 months without food, but after 5 days, they have difficulty thinking and at 2 weeks they are incapacitated [68]. There is typically a 30-day perishable food supply at regional warehouses but most would be destroyed with the loss of refrigeration [69]. The EMP Commission has suggested food be stockpiled for a possible EMP event.

A prescription for failure

Even if all the recommendations of the Congressional EMP Commission were implemented, there is no guarantee that the grid will not sustain a prolonged collapse. There should therefore be contingency plans for such a failure.

There is also another consideration. The foundational pillars of prior American nuclear defense policy, in today’s climate, are of uncertain validity. Mutual assured destruction is the Maginot line of the 21st century. Nonproliferation will prove difficult to resurrect.

The consequences of a widespread nuclear attack have been positioned to the public as massive deaths from blast effects, and then further lingering deaths from the effects of radiation. We suspect there will be no electricity, and there will be no electricity for a very long time.

There should be an actionable plan in anticipation of a possible prolonged collapse of the grid—a retro-structure and a skill set to provide a framework for survival. Our sense is there is no plan.

#### Rising prices forces electricity generation to rely on coal instead of natural gas – increases CO2 emissions globally.

Alvarez & Molner 10-12 [Carlos and Gergely; October 12; Senior Energy Analyst; Energy Analyst of Natural Gas; *IEA,* “What is Behind Soaring Energy Prices and What Happens Next?” <https://www.iea.org/commentaries/what-is-behind-soaring-energy-prices-and-what-happens-next>; KS]

Gas, coal and electricity prices have in recent weeks risen to their highest levels in decades. These increases have been caused by a combination of factors, but it is inaccurate and misleading to lay the responsibility at the door of the clean energy transition.

In this commentary, we provide an overview of the main drivers behind the current price increases and their near-term consequences.

The historic plunge in global energy consumption in the early months of the Covid-19 crisis last year drove the prices of many fuels to their lowest levels in decades. But since then, they have rebounded strongly, mainly as a result of an exceptionally rapid global economic recovery (this year is on track for the fastest post-recession growth in 80 years), a cold and long winter in the Northern Hemisphere, and a weaker-than-expected increase in supply.

Natural gas prices have seen the biggest increase, with European and Asian benchmark prices hitting an all-time record last week – around ten times their level a year ago. US month-ahead natural gas prices have more than tripled since October 2020 to reach their highest level since 2008. International coal prices are around five times their level a year ago, and coal power plants in China and India, the world’s two largest coal consumers, have very low stocks ahead of the winter season.

The strong increases in natural gas prices have prompted substantial switching to the use of coal rather than natural gas to generate electricity in key markets, including the United States, Europe and Asia. The increased use of coal is in turn is driving up CO2 emissions from electricity generation globally.

#### CO2 emissions locks in global warming.

Fecht ’21 [Sarah; February 25; Content manager at State of the Planet. She has previously worked as a freelance science journalist and an editor at Popular Science interviewing Jason Smerdon, climate scientist at Columbia University’s Lamont-Doherty Earth Observatory; *State of the Planet,* “How Exactly Does Carbon Dioxide Cause Global Warming?,” <https://news.climate.columbia.edu/2021/02/25/carbon-dioxide-cause-global-warming/>; KS]

“You Asked” is a series where Earth Institute experts tackle reader questions on science and sustainability. Over the past few years, we’ve received a lot of questions about carbon dioxide — how it traps heat, how it can have such a big effect if it only makes up a tiny percentage of the atmosphere, and more. With the help of Jason Smerdon, a climate scientist at Columbia University’s Lamont-Doherty Earth Observatory, we answer several of those questions here.

How does carbon dioxide trap heat?

You’ve probably already read that carbon dioxide and other greenhouse gases act like a blanket or a cap, trapping some of the heat that Earth might have otherwise radiated out into space. That’s the simple answer. But how exactly do certain molecules trap heat? The answer there requires diving into physics and chemistry.

When sunlight reaches Earth, the surface absorbs some of the light’s energy and reradiates it as infrared waves, which we feel as heat. (Hold your hand over a dark rock on a warm sunny day and you can feel this phenomenon for yourself.) These infrared waves travel up into the atmosphere and will escape back into space if unimpeded.

Oxygen and nitrogen don’t interfere with infrared waves in the atmosphere. That’s because molecules are picky about the range of wavelengths that they interact with, Smerdon explained. For example, oxygen and nitrogen absorb energy that has tightly packed wavelengths of around 200 nanometers or less, whereas infrared energy travels at wider and lazier wavelengths of 700 to 1,000,000 nanometers. Those ranges don’t overlap, so to oxygen and nitrogen, it’s as if the infrared waves don’t even exist; they let the waves (and heat) pass freely through the atmosphere.

With CO2 and other greenhouse gases, it’s different. Carbon dioxide, for example, absorbs energy at a variety of wavelengths between 2,000 and 15,000 nanometers — a range that overlaps with that of infrared energy. As CO2 soaks up this infrared energy, it vibrates and re-emits the infrared energy back in all directions. About half of that energy goes out into space, and about half of it returns to Earth as heat, contributing to the ‘greenhouse effect.’

Smerdon says that the reason why some molecules absorb infrared waves and some don’t “depends on their geometry and their composition.” He explained that oxygen and nitrogen molecules are simple — they’re each made up of only two atoms of the same element — which narrows their movements and the variety of wavelengths they can interact with. But greenhouse gases like CO2 and methane are made up of three or more atoms, which gives them a larger variety of ways to stretch and bend and twist. That means they can absorb a wider range of wavelengths — including infrared waves.

How can I see for myself that CO2 absorbs heat?

As an experiment that can be done in the home or the classroom, Smerdon recommends filling one soda bottle with CO2 (perhaps from a soda machine) and filling a second bottle with ambient air. “If you expose them both to a heat lamp, the CO2 bottle will warm up much more than the bottle with just ambient air,” he says. He recommends checking the bottle temperatures with a no-touch infrared thermometer. You’ll also want to make sure that you use the same style of bottle for each, and that both bottles receive the same amount of light from the lamp. Here’s a video of a similar experiment:

A more logistically challenging experiment that Smerdon recommends involves putting an infrared camera and a candle at opposite ends of a closed tube. When the tube is filled with ambient air, the camera picks up the infrared heat from the candle clearly. But once the tube is filled with carbon dioxide, the infrared image of the flame disappears, because the CO2 in the tube absorbs and scatters the heat from the candle in all directions, and therefore blurs out the image of the candle. There are several videos of the experiment online, including this one:

Why does carbon dioxide let heat in, but not out?

Energy enters our atmosphere as visible light, whereas it tries to leave as infrared energy. In other words, “energy coming into our planet from the Sun arrives as one currency, and it leaves in another,” said Smerdon.

CO2 molecules don’t really interact with sunlight’s wavelengths. Only after the Earth absorbs sunlight and reemits the energy as infrared waves can the CO2 and other greenhouse gases absorb the energy.

How can CO2 trap so much heat if it only makes up 0.04% of the atmosphere? Aren’t the molecules spaced too far apart?

Before humans began burning fossil fuels, naturally occurring greenhouse gases helped to make Earth’s climate habitable. Without them, the planet’s average temperature would be below freezing. So we know that even very low, natural levels of carbon dioxide and other greenhouse gases can make a huge difference in Earth’s climate.

Today, CO2 levels are higher than they have been in at least 3 million years. And although they still account for only 0.04% of the atmosphere, that still adds up to billions upon billions of tons of heat-trapping gas. For example, in 2019 alone, humans dumped 36.44 billion tonnes of CO2 into the atmosphere, where it will linger for hundreds of years. So there are plenty of CO2 molecules to provide a heat-trapping blanket across the entire atmosphere.

In addition, “trace amounts of a substance can have a large impact on a system,” explains Smerdon. Borrowing an analogy from Penn State meteorology professor David Titley, Smerdon said that “If someone my size drinks two beers, my blood alcohol content will be about 0.04 percent. That is right when the human body starts to feel the effects of alcohol.” Commercial drivers with a blood alcohol content of 0.04% can be convicted for driving under the influence.

“Similarly, it doesn’t take that much cyanide to poison a person,” adds Smerdon. “It has to do with how that specific substance interacts with the larger system and what it does to influence that system.”

In the case of greenhouse gases, the planet’s temperature is a balance between how much energy comes in versus how much energy goes out. Ultimately, any increase in the amount of heat-trapping means that the Earth’s surface gets hotter. (For a more advanced discussion of the thermodynamics involved, check out this NASA page.)

If there’s more water than CO2 in the atmosphere, how do we know that water isn’t to blame for climate change?

Water is indeed a greenhouse gas. It absorbs and re-emits infrared radiation, and thus makes the planet warmer. However, Smerdon says the amount of water vapor in the atmosphere is a consequence of warming rather than a driving force, because warmer air holds more water.

“We know this on a seasonal level,” he explains. “It’s generally drier in the winter when our local atmosphere is colder, and it’s more humid in the summer when it’s warmer.”

As carbon dioxide and other greenhouse gases heat up the planet, more water evaporates into the atmosphere, which in turn raises the temperature further. However, a hypothetical villain would not be able to exacerbate climate change by trying to pump more water vapor into the atmosphere, says Smerdon. “It would all rain out because temperature determines how much moisture can actually be held by the atmosphere.”

Similarly, it makes no sense to try to remove water vapor from the atmosphere, because natural, temperature-driven evaporation from plants and bodies of water would immediately replace it. To reduce water vapor in the atmosphere, we must lower global temperatures by reducing other greenhouse gases.

If Venus has an atmosphere that’s 95% CO2, shouldn’t it be a lot hotter than Earth?

The concentration of CO2 in Venus’ atmosphere is about 2,400 times higher than that of Earth. Yet the average temperature of Venus is only about 15 times higher. What gives?

Interestingly enough, part of the answer has to do with water vapor. According to Smerdon, scientists think that long ago, Venus experienced a runaway greenhouse effect that boiled away almost all of the planet’s water — and water vapor, remember, is also a heat-trapping gas.

“It doesn’t have water vapor in its atmosphere, which is an important factor,” says Smerdon. “And then the other important factor is Venus has all these crazy sulfuric acid clouds.”

High up in Venus’ atmosphere, he explained, clouds of sulfuric acid block about 75% of incoming sunlight. That means the vast majority of sunlight never gets a chance to reach the planet’s surface, return to the atmosphere as infrared energy, and get trapped by all that CO2 in the atmosphere.

Won’t the plants, ocean, and soil just absorb all the excess CO2?

Eventually … in several thousand years or so.

Plants, the oceans, and soil are natural carbon sinks — they remove some carbon dioxide from the atmosphere and store it underground, underwater, or in roots and tree trunks. Without human activity, the vast amounts of carbon in coal, oil, and natural gas deposits would have remained stored underground and mostly separate from the rest of the carbon cycle. But by burning these fossil fuels, humans are adding a lot more carbon into the atmosphere and ocean, and the carbon sinks don’t work fast enough to clean up our mess.

It’s like watering your garden with a firehose. Even though plants absorb water, they can only do so at a set rate, and if you keep running the firehose, your yard is going to flood. Currently our atmosphere and ocean are flooded with CO2, and we can see that the carbon sinks can’t keep up because the concentrations of CO2 in the atmosphere and oceans are rising quickly.

Unfortunately, we don’t have thousands of years to wait for nature to absorb the flood of CO2. By then, billions of people would have suffered and died from the impacts of climate change; there would be mass extinctions, and our beautiful planet would become unrecognizable. We can avoid much of that damage and suffering through a combination of decarbonizing our energy supply, pulling CO2 out the atmosphere, and developing more sustainable ways of thriving.

#### It outweighs other risks by a trillion times.

Ng ’19 [Yew-Kwang; May 2019; Professor of Economics at Nanyang Technology University, Fellow of the Academy of Social Sciences in Australia and Member of the Advisory Board at the Global Priorities Institute at Oxford University, Ph.D. in Economics from Sydney University; Global Policy, “Keynote: Global Extinction and Animal Welfare: Two Priorities for Effective Altruism,” vol. 10, no. 2, p. 258-266]

Catastrophic climate change

Though by no means certain, CCC causing global extinction is possible due to interrelated factors of non‐linearity, cascading effects, positive feedbacks, multiplicative factors, critical thresholds and tipping points (e.g. Barnosky and Hadly, [2016](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-bib-0005); Belaia et al., [2017](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-bib-0008); Buldyrev et al., [2010](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-bib-0016); Grainger, [2017](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-bib-0027); Hansen and Sato, [2012](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-bib-0029); IPCC [2014](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-bib-0031); Kareiva and Carranza, [2018](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-bib-0033); Osmond and Klausmeier, [2017](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-bib-0056); Rothman, [2017](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-bib-0066); Schuur et al., [2015](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-bib-0069); Sims and Finnoff, [2016](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-bib-0072); Van Aalst, [2006](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-bib-0079)).[7](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-note-1009_67)

A possibly imminent tipping point could be in the form of ‘an abrupt ice sheet collapse [that] could cause a rapid sea level rise’ (Baum et al., [2011](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-bib-0006), p. 399). There are many avenues for positive feedback in global warming, including:

* the replacement of an ice sea by a liquid ocean surface from melting reduces the reflection and increases the absorption of sunlight, leading to faster warming;
* the drying of forests from warming increases forest fires and the release of more carbon; and
* higher ocean temperatures may lead to the release of methane trapped under the ocean floor, producing runaway global warming.

Though there are also avenues for negative feedback, the scientific consensus is for an overall net positive feedback (Roe and Baker, [2007](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-bib-0065)). Thus, the Global Challenges Foundation ([2017](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-bib-0026), p. 25) concludes, ‘The world is currently completely unprepared to envisage, and even less deal with, the consequences of CCC’.

The threat of sea‐level rising from global warming is well known, but there are also other likely and more imminent threats to the survivability of mankind and other living things. For example, Sherwood and Huber ([2010](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-bib-0071)) emphasize the adaptability limit to climate change due to heat stress from high environmental wet‐bulb temperature. They show that ‘even modest global warming could … expose large fractions of the [world] population to unprecedented heat stress’ p. 9552 and that with substantial global warming, ‘the area of land rendered uninhabitable by heat stress would dwarf that affected by rising sea level’ p. 9555, making extinction much more likely and the relatively moderate damages estimated by most integrated assessment models unreliably low.

While imminent extinction is very unlikely and may not come for a long time even under business as usual, the main point is that we cannot rule it out. Annan and Hargreaves ([2011](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-bib-0004), pp. 434–435) may be right that there is ‘an upper 95 per cent probability limit for S [temperature increase] … to lie close to 4°C, and certainly well below 6°C’. However, probabilities of 5 per cent, 0.5 per cent, 0.05 per cent or even 0.005 per cent of excessive warming and the resulting extinction probabilities cannot be ruled out and are unacceptable. Even if there is only a 1 per cent probability that there is a time bomb in the airplane, you probably want to change your flight. Extinction of the whole world is more important to avoid by literally a trillion times.

#### The filed rate doctrine insulates price manipulation from private suits.

Vaheesan ’19 [Sandeep; October 25; Legal director at the Open Markets Institute. Vaheesan previously served as a regulations counsel at the Consumer Financial Protection Bureau, where he helped develop and draft the first comprehensive federal rule on payday, vehicle title, and high-cost installment loans; “MOTION OF OPEN MARKETS INSTITUTE FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT,” <https://static1-squarespacecom.proxy.lib.umich.edu/static/5e449c8c3ef68d752f3e70dc/t/5eaa1d9d2790182e187cc171/1588207017816/19-1678_Documents-as-filed.pdf>; KS]

Legislative and regulatory action have transformed the governance of gas and electricity industries since the 1970s. For much of the twentieth century, comprehensive public utility regulation governed the production and sale of gas and electricity. Federal and state regulators treated both industries as generally monopolistic and subjected firms to price regulation. Under this cost-of-service regulation, federal and state regulators established rates that allowed sellers of gas and electricity to recover their costs and earn a reasonable rate of return on their capital investments. Over the past 40 years, Congress and the Federal Energy Regulatory Commission (FERC) have curtailed the public regulation of prices in natural gas and electricity and introduced market competition in both industries. These legislative and regulatory actions have replaced regulator-approved rates with market-based prices in one or more levels of the gas and electric supply chains. Richard J. Pierce, Jr., The Evolution of Natural Gas Regulatory Policy, 10 Nat. Res. & Env. 53 (1995); Paul L. Joskow, Restructuring, Competition and Regulatory Reform in the U.S. Electricity Sector, 11 J. Econ. Persps. 119 (1997).

Under a system of market-based pricing, full and robust antitrust enforcement is vital to protect the public from the collusive, exclusionary, and unfair practices of producers and traders of electricity and natural gas. See Alfred E. Kahn, Deregulatory Schizophrenia, 75 Calif. L. Rev. 1059, 1059 (1987) (“While prepared to defend enthusiastically the deregulations with which I have been involved, I feel equally strongly that they have greatly accentuated the importance of antitrust enforcement.”). In this case, however, the Court expanded the filed rate doctrine, which was created to protect the integrity of regulatorapproved rates, to immunize Eversource Energy and Avangrid’s manipulation of market prices for electricity and gas from a private antitrust lawsuit. In broadening the filed rate doctrine to dismiss the plaintiff-appellant’s lawsuit, the district court granted a de facto license for sellers of gas and electricity to use their market power to transfer millions or even billions of dollars from the public into their own coffers.

Traditionally, the filed doctrine protected the integrity of rates that federal regulators had approved. Under the filed rate doctrine, the Supreme Court and this Court have declined to retrospectively alter rates that a regulator had approved in advance of taking effect. Square D Co. v. Niagara Tariff Bureau, Inc., 476 U.S. 409 (1986); Town of Norwood v. New England Power Co., 202 F.3d 408 (1st Cir. 2000). With market-based pricing, however, regulators do not require the prospective filing of rates and approve any rates in advance of their effectiveness.

The district court’s expansion of the filed rate doctrine to insulate marketbased prices from private antitrust lawsuits is both bad law and bad policy. First, the decision, in addressing the relationship between the Natural Gas and Federal Power Acts and the antitrust laws, repealed the Clayton Act’s private right of action. The Supreme Court has established a strong presumption against such implied repeals of federal statutes, including the antitrust laws. United States v. Borden Co., 308 U.S. 188 (1939). The Supreme Court has held that “[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.” United States v. Philadelphia National Bank, 374 U.S. 321, 350–51 (1963). Second, the decision undermines effective antitrust enforcement and the public benefits of market-based pricing regimes. With market-based pricing in gas and electricity, private antitrust lawsuits complement federal regulatory oversight and public antitrust enforcement, provide essential deterrence against collusive, exclusionary, and other unfair practices, and compensate the victims of antitrust violations in gas and electricity markets.

DESIRABILITY OF PARTICIPATION

The district court’s opinion improperly expanded the scope of the filed rate doctrine. The district court disregarded both the strong presumption against implied repeals of the antitrust laws and the importance of antitrust enforcement for competitive market-based pricing in gas and electricity. Amicus curiae will explain the legal authorities and policy considerations that support denying filed rate protection to the market-based prices at issue in this case. Amicus curiae’s brief will not duplicate arguments made by the parties. It will instead provide the amicus curiae’s distinct perspectives on the issues facing the Court.

CONCLUSION

For these reasons, the motion for leave to file an amicus curiae brief in support of the plaintiff-appellant should be granted.

#### Private right of action is key – it’s empirically more effectively than the DOJ and FTC.

Vaheesan ’19 [Sandeep; October 25; Legal director at the Open Markets Institute. Vaheesan previously served as a regulations counsel at the Consumer Financial Protection Bureau, where he helped develop and draft the first comprehensive federal rule on payday, vehicle title, and high-cost installment loans; “MOTION OF OPEN MARKETS INSTITUTE FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT,” <https://static1-squarespacecom.proxy.lib.umich.edu/static/5e449c8c3ef68d752f3e70dc/t/5eaa1d9d2790182e187cc171/1588207017816/19-1678_Documents-as-filed.pdf>; KS]

Although it did not even consider whether a clear repugnancy exists between the implicated statutes, the district court nonetheless repealed the Clayton Act’s private right of action. 15 U.S.C. § 15. The court ignored the strong presumption against implied repeals and improperly broadened the filed rate doctrine. In natural gas resale and wholesale electricity markets, market-determined pricing is the norm. See supra Part I. The plaintiff-appellant’s complaint “challenge[s] the background marketplace conditions” and not “the reasonableness of any rates expressly approved by FERC.” Oneok, 135 S. Ct. at 1602. See also Otter Tail, 410 U.S. at 374 (“When [commercial] relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws.”).

No “clear repugnancy” exists between the Clayton Act and the Federal Power and Natural Gas Acts. The plaintiff-appellant’s complaint does not ask or threaten to unsettle any prices individually filed with FERC before they took effect. In contrast to the individual rates that were prospectively filed in Town of Norwood and Square D, the defendants-appellees here did not file rates with FERC in advance of their effectiveness. Instead of charging regulator-approved or - validated rates, the defendants-appellees’ discretionary conduct4 helped set prices in the market. Indeed, as discussed infra in Part III.B, private antitrust enforcement and federal regulatory oversight complement each other in industries with marketbased prices – and together constrain the discretion of market actors and ensure that they cannot profit through collusive, exclusionary, and other unfair practices.

B. The Full Application of the Antitrust Laws Is Essential for Competitive Market-Based Prices

Since Congress and FERC have committed to market-based pricing in wellhead gas, resales of gas, and wholesale electricity, the full application of the antitrust laws is critical for ensuring the success of this legislative and regulatory market creation. Even as FERC maintains oversight of the electricity and natural gas markets, this regulatory supervision has important limitations and cannot be expected to root out all anticompetitive conduct. Antitrust enforcement complements FERC oversight and provides vital deterrence against anticompetitive practices in gas and electricity markets. Specifically, antitrust suits brought by injured consumers and businesses provide strong deterrence of anticompetitive conduct as well as compensation. In dismissing the plaintiffappellant’s suit, the district court severely weakened the effectiveness of the antitrust laws and empowered sellers of gas and electricity to profit through anticompetitive market conduct.

FERC oversight is not adequate to prevent anticompetitive conduct and ensure that markets in natural gas and electricity are free from collusive, exclusionary, and other unfair market conduct. Although FERC has an obligation to maintain “just and reasonable rates” under the Natural Gas and Federal Power Acts, 15 U.S.C. § 717c, it has only very limited tools to police specific anticompetitive conduct in the gas and electricity markets and to provide any remedy for anticompetitive market conduct it discovers after the fact.

Even assuming FERC acts against anticompetitive and other unfair conduct,5 its remedies provide inadequate deterrence and cannot be counted on to compensate injured parties. FERC can impose monetary penalties of up to a fixed maximum amount per day on parties over whom it has jurisdiction and who have violated FERC rules in gas or electricity markets. 15 U.S.C. 717t-1; 16 U.S.C. 825o-1(b). All such penalties, however, go to the United States Treasury, not to the injured customers, absent agreement by the defendant. FERC can also order disgorgement of ill-gotten profits as a result of market manipulation. Revised Policy Statement on Enforcement, 123 FERC ¶ 61,156 (2008). Both remedies are, at best, an imperfect approximation of market-wide injury to purchasers and, at worst, a small fraction of market harm and woefully inadequate to deter market misconduct. And they offer no guarantee of full compensation for injured parties.

Given FERC’s limited market oversight powers, antitrust enforcement plays an important role in gas and electricity markets. Antitrust lawsuits help identify and stop anticompetitive practices and ensure that market-based pricing serves the public. When sellers engage in collusion, exclusion and mergers, they can enhance and maintain their market power and profit at the expense of purchasers and rivals. See, e.g., Keyspan, 763 F.Supp. at 636 (describing alleged effects of anticompetitive swap agreement involving rival generators in New York City). As federal regulators have renounced or been deprived by Congress of direct pricesetting authorities, the full effectiveness of the antitrust laws is essential. Jim Rossi, Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era, 56 Vand. L. Rev. 1591, 1648 (2003). See also Alfred E. Kahn, Deregulatory Schizophrenia, 75 Calif. L. Rev. 1059, 1059 (1987) (“While prepared to defend enthusiastically the deregulations with which I have been involved, I feel equally strongly that they have greatly accentuated the importance of antitrust enforcement.”).

The filed rate doctrine’s limitation on private antitrust enforcement subverts the effectiveness of the antitrust laws. The ability of injured consumers and businesses to bring antitrust suits is a pillar of the American antitrust enforcement regime. Under the Clayton Act, “[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . ., and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.” 15 U.S.C. § 15. See, e.g., Blue Shield of Va. v. McCready, 457 U.S. 465, 472 (1982) (quoting Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 236 (1948)) (“Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations. . . . As we have recognized, ‘[t]he statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.’”).

Empirical research shows the public importance of “private attorneys general” and the value of having more enforcers on the beat against corporate collusion, consolidation, and monopolization. A study of 60 private antitrust lawsuits between 1990 and 2011 found that these actions generated more deterrence than the federal government’s entire criminal antitrust enforcement activity over the same period. Joshua P. Davis & Robert H. Lande, Defying Conventional Wisdom: The Case for Private Antitrust Enforcement, 48 Ga. L. Rev. 1, 26 (2013). And these lawsuits compensated injured parties, whereas public enforcement generally did not.

Under the district court’s neutering of private antitrust enforcement, market participants have expansive power to control markets through collusive and exclusionary conduct and extract billions in overcharges from the public. Their discretion and power are subject only to the limited oversight of FERC, supra, and resource-constrained public antitrust enforcement agencies. Kadhim Shubber, Staffing at Antitrust Regulator Declines under Donald Trump, Fin. Times, Feb. 7, 2019. Federal antitrust enforcers themselves have recognized the central role of suits brought by consumers and businesses injured by antitrust violations. See, e.g., Study of Monopoly Power: Hearing Before the H. Comm. on the Judiciary, 82 Cong. Rec. 15 (1951) (Statement of H. Graham Morison, Assistant Attorney General in charge of Antitrust Div., Dep't of Justice) (“[I]f you did away with the triple damages suit entirely and still wanted substantial enforcement in order to have economic freedom you would have to quadruple the size of the Antitrust Division.”).

The district court’s expansion of the filed rate doctrine establishes for gas and electricity a regime of “radical deregulation—markets absent common law and antitrust protections.” Rossi, supra, at 1596. By barring purchasers of power and potentially other market participants from bringing antitrust suits for damages, the court’s ruling blocks arguably the most effective antitrust enforcers—individuals and businesses—from vindicating their rights and protecting the public.

CONCLUSION

For the foregoing reasons, this Court should limit the filed rate doctrine to its scope as articulated by the Supreme Court in Square D and this Court in Town of Norwood. The district court improperly expanded the filed rate doctrine to cover market-based prices that are not filed with a federal regulator before they take effect. Accordingly, this Court should reverse the district court’s granting of the defendants-appellees’ motion to dismiss and remand the case for discovery.

#### The plan solves by ensuring arbitrarily approved rates are subject to antitrust.

Gorodetsky ‘9 [Julia; Winter; Corporate securities lawyer for Andrews Kurth LLC; *Tulane Environmental Law Journal,* “Analogy By Necessity: The Filed Rate Doctrine and Judicial Review of Agency Inaction,” <https://www.jstor.org/stable/pdf/43294073.pdf?refreqid=excelsior%3A40dc35292abcd134d36ab5a0d941bbc6>; KS]

This Article argues that judicial review of private party antitrust claims, predicated upon market-based tariffs and filed with a regulatory agency, is not precluded by the filed rate doctrine. Th study is limited to the electricity market. In order to argue in favor of judicial reviewability of private conduct under antitrust law, this Article analogizes the filed rate doctrine with agency inaction in law, which is governed by the doctrine of nonreviewability. In Heckler v. Cheney, the United States Supreme Court gave policy reasons for its conclusion that agency inaction was unreviewable.1 I will apply the reasoning offered by the Court in Heckler to the specifics of a case study and conclude that agency market-based tariff-approval decisions should be reviewable. The case study is California's electricity crisis of 2000-2001. In particular, the examination will concentrate Federal Energy Regulatory Commission's (FERC) poor handling of the crisis, its aftermath, and the antitrust claims that followed.

The presumption of reviewability shifts the burden to show that its approval of a marked-based rate was not arbitrary. Courts should subject an agency's decision to the arbitrary and capricious standard of review. This standard would require agencies to give explanations and standards. If the agency fails to show that the decision was not arbitrary, courts should refuse to apply the filed rate doctrine and should subject the claim to the operation of antitrust laws. Courts should not, however, determine which tariff would best serve the interests of the properly functioning deregulated electricity markets. Such determinations are best left to the legislature or the agency because antitrust law and agency regulation are complementary to each other.

#### That shields against market abuse by promoting accountability and preventing arbitrariness.

Gorodetsky ‘9 [Julia; Winter; Corporate securities lawyer for Andrews Kurth LLC; *Tulane Environmental Law Journal,* “Analogy By Necessity: The Filed Rate Doctrine and Judicial Review of Agency Inaction,” <https://www.jstor.org/stable/pdf/43294073.pdf?refreqid=excelsior%3A40dc35292abcd134d36ab5a0d941bbc6>; KS]

VI. Judicial Review and the Filed Rate Doctrine

There is little reason to continue to disallow judicial review of antitrust claims against utilities on account of the filed rate doctrine. As argued in the preceding section, such claims are likely to be found reviewable if subjected to the Heckler standard in lieu of FERC 's limited expertise with the competitive markets, and its subsequent lack of capacity to monitor and effectively deter market abuse by private utilities.237 Such claims should be subjected to the same principles courts utilize in reviewing claims arising from agency action under the arbitrary and capricious standard of review, namely, the requirement for explanation-giving and standard-setting.

Judicial scrutiny should be limited to the determination of whether the agency's decision was arbitrary, and if it was, courts should then subject the claim to antitrust laws. The determination as to whether rates approved by the agency were indeed sufficient for the proper functioning of a competitive market should be left to the legislature. The courts are poorly suited for the determination of proper rates prices.238

There are several other alternatives to judicial review of agency decision-making process for tariff approval, such as the expansion of the filed rate doctrine or judicial deference to the most politically accountable figure.239 However, judicial review seems to be the most workable solution in light of "the founding principles of the administrative state [which] are dedicated not only to promoting political accountability, but also to preventing administrative arbitrariness."240

The danger of arbitrariness undermines the legitimacy of an agency's decisions by generating "conclusions that do not follow logically from the evidence, rules that give no notice of their application, or distinctions that violate basic principles of equal treatment."241 Such arbitrary results are evident in the continuing application of the filed rate doctrine, which shields private utilities from antitrust claims and prevents remedy even when such rates were approved as a result of an inadequate agency review process and lack of agency expertise.242

Further, the filed rate doctrine, as it exists in its current form and application, poses a serious problem as an impediment to the effective operation of properly functioning deregulated electricity markets.243 The doctrine has to be either abolished or revised. The latter solution would result in keeping the doctrine while expanding an agency's enforcement authority. This solution is simply not workable, because expanding agency authority will not be an effective substitute for agency expertise and experience with competitive markets. Abolishing the doctrine entirely is a more viable answer to the problem at hand. Abolition, however, must be accompanied by judicial review of agency decision- making processes related to tariff approval.

Keeping the filed rate doctrine in its current state is an unwise policy decision. As elaborated earlier, the filed rate doctrine was developed by the courts as a rule of statutory construction out of "deference to a 'congressional scheme of uniform . . . regulation'" delegated to the agency.244 The construed congressional intent behind the filed rate doctrine was to protect consumers from price discrimination by public utilities.245 This intent, however, was later perverted when courts started employing the doctrine to shield regulated utilities from antitrust claims. The mere act of filing with an agency, such as FERC, effectively insulates the utility from antitrust claims, even when the agency's market- based rate-approval process is nothing more than rubber stamping the submitted rates.246 Thus, the doctrine opens the door to market power abuse which poses a serious danger to the proper functioning of deregulated electricity markets.

### 1AC – Plan

#### By expanding the scope of its core antitrust laws, the United States federal government should substantially increase prohibitions on nearly all anticompetitive business practices by the private sector that are currently exempted by the filed rate doctrine.

### 1AC – Econ

#### Advantage Two is Econ:

#### Business confidence is low – numerous indicators.

Marcos 9-28 [Coral; September 28; Business Reporter; *New York Times*, “Stocks Tumble in Worst Day Since May, as Tech Shares Slide and Bond Yields Climb,” <https://www.nytimes.com/2021/09/28/business/stock-market-today.html>; KS]

The prospect of the Federal Reserve not reaching as deep into its bottomless pockets is starting to hit home for investors.

The S&P 500 tumbled 2 percent on Tuesday — the worst one-day slide for the benchmark U.S. index since May — as investors faced the expected wind-down of the enormous bond purchases the central bank has made since the start of the pandemic.

“The deep sell-off highlights the extent of the nerves in the markets surrounding the moves of the Fed,” said Fiona Cincotta, senior financial markets analyst at Forex.com.

The coming slowdown of bond purchases is a sign of the Fed’s confidence that the economy is recovering from the upheaval of the pandemic. But, Ms. Cincotta noted, other factors are still making Wall Street wary.

“There’s also a combination of rising energy prices, concerns that inflation could be more entrenched in these elevated levels and the fact that consumer confidence is slowing,” she said.

The tumble extended into the Asian trading day on Wednesday, though investors signaled that confidence might be returning.

Stocks in Japan were down more than 2.6 percent midday. But losses in other Asian markets, like Hong Kong and mainland China, were more moderate. Futures markets were signaling that Wall Street would open modestly higher.

The trigger for Tuesday’s tumble, which cut across sectors, was a rise in the yield on the benchmark 10-year Treasury note. With the Fed preparing to slow its purchases as soon as November, investors have been selling off bonds before demand ebbs. On Tuesday, that pushed the 10-year’s yield up to 1.54 percent, its highest level since June.

Even though the Fed has said it doesn’t plan to increase interest rates for months or years, government bond yields are the basis for borrowing costs across the economy. When bond prices fall, yields rise — a move that can hinder the stock market’s performance because it makes owning bonds more attractive and can discourage riskier investments.

Higher rates would make borrowing more expensive for smaller companies, and the jump in yields was a blow to shares of several high-flying stocks. Etsy, the online craft marketplace, dropped 6 percent, and Shopify fell more than 5 percent. Both companies have soared during the pandemic.

“With tech stocks, you’re betting for a company to have a breakthrough years from now,” said Beth Ann Bovino, the chief U.S. economist at S&P Global. “If interest rates go up today, that value that you receive years from now is discounted.”

The biggest technology stocks — particularly Amazon, Apple, Microsoft, Google and Facebook — have a vast pull on the broader market and helped drag down the S&P 500. Apple fell 2.4 percent and was the best performer of the tech giants. Amazon dropped 2.6 percent while Microsoft, Facebook and Google were down by more than 3.5 percent.

But the declines cut across many sectors. Energy stocks were the exception, rallying after oil prices climbed early in the day. Schlumberger, ConocoPhillips, Halliburton and Exxon Mobil were among the best-performing shares in the S&P 500, though some of their gains faded as oil futures turned lower in the afternoon.

The Delta variant of the virus remains a concern for investors, while persistent supply-chain bottlenecks have affected everything from auto production to school lunches. In Washington, lawmakers remain deeply divided over spending on infrastructure and expanding social programs.

And another pressing fight is brewing over raising the nation’s debt limit — a dispute that could trigger a government shutdown. Treasury Secretary Janet L. Yellen warned lawmakers on Tuesday of “catastrophic” consequences if Congress does not deal with the debt limit before Oct. 18.

The unease is apparent in stock performance the past four weeks. The S&P 500 is approaching a 4 percent drop for September, ending seven straight months of gains. The winning streak had lifted stocks more than 20 percent, as investors seemed to largely shrug off any bad news.

Bumpy moments have usually involved the Fed. Tuesday’s trading echoed the volatility of earlier this year, when a jump in rates roiled financial markets. That rise happened as traders worried that higher inflation might cause the Fed to increase rates sooner than officials had forecast.

“There’s no doubt that the equity market does not like higher rates — there’s just no debate about it,” Ralph Axel, director of U.S. Rates Strategy at Bank of America.

Lauren Goodwin, an economist at New York Life Investments, wrote in a note to clients that investors have begun seeking out safer investments while weighing concerns including the debt-ceiling fight and regulatory actions in China.

#### **Energy prices drive inflationary pressures.**

Eberhart 9-21 [Dan; September 21; CEO of Canary, LLC.; *Forbes,* “Rising Energy Poses Big Inflationary Threat To U.S. Economy,” <https://www.forbes.com/sites/daneberhart/2021/09/21/rising-energy-poses-big-inflationary-threat-to-us-economy/?sh=7ada2d4377b2>; KS]

Fears about inflation are rampant in Europe where natural gas and power shortages are colliding with the onset of winter to drive energy prices to record-breaking levels. Mix in the effects of supply chain bottlenecks caused by the global pandemic and you have a dangerous cocktail of rising prices and falling purchasing power of must-have energy products.

And while the situation in the United States is not as bad, consumers and investors can’t afford to be complacent. Wall Street traders are watching what’s happening in Europe and anticipating inflation will continue to rise on these shores, too.

Concerns about the most recent Consumer Price Index (CPI) report put the jitters in traders that knocked the wind out of the sails of the stocks market. The year-over-year CPI rose 5.3 percent over its level last August and the core CPI is up 4 percent over the same period. That’s a slight decrease from where they were in July, but it’s still double the 2 percent inflation rate targeted by the Federal Reserve.

U.S. consumer prices increased at their slowest pace in six months in August, however those figures ignore the volatile food and energy components of the market. Consumers don’t have the luxury of ignoring rising prices for energy commodities like crude oil, natural gas, gasoline, and diesel. The cost of energy impacts prices throughout the supply chain – from production to transportation – and those extra costs ultimately filter down to the consumer at the end of the line.

Benchmark Brent crude oil now trades above $75 a barrel, or more than 45 percent above where it started the year, and analysts warn that a tightening oil market could prompt further gains.

Average U.S. retail gasoline prices are some 50 percent higher than a year ago at $3.19 a gallon, and with crude feedstock costs rising and some refineries still constrained after Hurricane Ida, they could also move higher.

The situation is most alarming in natural gas, which many consumers rely on to power and heat their homes. At over $5 per million Btu, benchmark Henry Hub natural gas prices are more than twice as high as a year ago, at an annualized rate equal to a $109 billion increase to consumers. The Energy Information Administration (EIA) reports that working natural gas stocks are 17 percent lower than a year ago and 7 percent below the five-year average.

Gas shortages in Europe and Asia are drawing more U.S. gas abroad as exports of liquefied natural gas (LNG), exacerbating market tightness here despite America’s vast gas reserves. The EIA says that natural gas exports are up 41 percent from a year ago.

The consultancy S&P Global Platts calculates that Henry Hub prices would have to increase to $10 per million Btu to provide incentive to U.S. producers to fulfill domestic natural gas demand rather supply the export market. At those price levels, which the United States experienced in 2008, would cause demand destruction in the manufacturing sector. Many manufacturers that consume large quantities of natural gas can no longer compete in the market at those prices, which results in a loss of jobs.

Low gas inventories and rising prices are a concern because the United States should now be building stocks for the winter when the heating season creates peak demand. The market is now in what’s known as a “shoulder season” when demand is structurally lower because the market is in between robust summer cooling demand and peak winter heating demand.

Instead, American consumers could be facing an uncomfortable winter if natural gas prices spike at the same time as crude oil and refined products push higher while the economy continues to recover from the pandemic.

It’s a dangerous prospect, particularly for lower income families who are hurt most by rising energy prices. A 50-cent-a-gallon increase in retail gasoline prices may not dent the wallet of wealthier consumers, but it can be incredibly painful for those with lower or fixed incomes.

And there’s another side to inflation in energy that can squeeze consumers. Investors use commodity markets to hedge their inflation risk, meaning they buy oil and gas futures contracts to hedge against the risk of consumer prices rising across the board. This speculative buying can drive up the price of the underlying commodity for consumers.

The Biden administration is understandably worried about rising energy prices but its attempts to blame the oil and gas industry are off base and show a lack of understanding of energy markets.

#### Inflation raises costs and decreases discretionary spending.

Troise 10-28 [Damian; October 28; Journalist at Associated Press; *Associated Press,* “Energy Prices Lift Oil and Gas Stocks, Weigh on the Economy,” <https://apnews.com/article/business-economy-prices-a906dbc90bf85a3caa11882e1eb861ec>; KS]

Energy prices are soaring in 2021 and oil and gas stocks are the clear winners, but the losers might just turn out to be businesses and consumers.

The energy sector has far outpaced the broader market in 2021. The S&P 500’s energy stocks are up more than 50%, compared with a roughly 20% gain for the overall index. Devon Energy, Marathon Oil and Occidental Petroleum have all more than doubled in value this year.

While energy stocks are reaping the benefits from high demand and lagging supplies, other areas of the economy are having a tougher time coping.

Surging oil and gas prices are adding to broader inflation pressures that are squeezing businesses and driving up costs. A wide range of manufacturers are finding it more costly to ramp up operations as energy costs rise. Airlines are getting hurt by higher jet fuel costs as they try to rebuild profits. Consumers in the U.S. and around the world are facing a tighter squeeze on their wallets from rising energy costs.

Fertilizer maker CF Industries briefly halted operations at two facilities in the U.K. in September because of high natural gas prices. Delta Air Lines CEO Ed Bastian warned investors earlier in October that fuel prices will hurt its ability to remain profitable through the end of the year. It expects a “modest” loss in the fourth quarter.

Consumers are already paying more for goods as companies pass through higher fuel costs, raw materials costs and supply chain disruptions. More worrisome to some analysts is what happens if people have to cut back on spending in order to pay for higher gas and home heating costs. The economic recovery depends on continued consumer spending, but higher energy costs could mean less discretionary spending on services, travel and goods.

#### The economic effects ripple through every industry and sector.

Salzman 11-9 [Avi; November 9; Senior writer at Barron's, covering stocks, the economy, and the impact of new technology on financial markets; *Barron’s,* “High Energy Prices Are Rippling Through the Economy,” <https://www.barrons.com/articles/high-energy-prices-are-rippling-through-the-economy-51636477167>; KS]

The latest government inflation figures show that prices are rising fast, and much of the momentum is coming from energy. The trends are already hitting businesses in several industries and will continue rippling through the economy. Investors should keep an eye out for shrinking margins—and possibly pressure on valuation—in the months ahead.

On Tuesday, the Bureau of Labor Statistics released the monthly producer price index, which measures prices of goods and services as they make their way through the supply chain. The report showed that the PPI rose 0.6% in October on a month-over-month basis, and 8.6% on a year over year basis, in line with economists’ expectations.

The consumer price index, which measures prices at the retail level, is scheduled to be released on Wednesday. That report is likely to show that escalating energy prices are forcing consumers to pay up for heating oil, propane, gasoline, and other fuels.

“I think more pain is going to come to the consumer, certainly, for this winter,” said Marcus McGregor, an energy analyst at asset manager Conning. “I think if you look at the latest reports, costs for propane, natural gas and any sources that are leading into the consumer’s home—if we have a really cold winter—are expected to increase significantly this winter. So I see more pain before relief when it comes to the U.S. consumer.”

Businesses are already having to adjust. The PPI shows how the escalating energy costs are affecting corporations—and how they may end up flowing through to consumers in several industries. The price of goods that were at the final stage of production (as opposed to component parts) rose 1.2% in the month, with three quarters of that jump having to do with a rise in the price of energy, according to the report. In October, oil prices rose 13%. Natural gas prices were flat in October, after jumping 34% in September, the largest one-month gain in 12 years.

That has been a boon for energy companies, which have led the market higher this year after trailing for much of the previous decade. Exxon Mobil (ticker: XOM) stock has soared 58% this year, and BP (BP) is up 34%.

But escalating energy prices are a draw on several other industries. Consumer goods get more expensive because it costs more to truck them to warehouses and stores.

“Higher commodity and freight cost impacts combined were a 400 basis point hit to gross margins,” said Procter & Gamble (PG) CFO Andre Schulten on the company’s earnings call last month.

Airlines get pinched, too, because fuel can account for about one-fifth of their expenses. Delta Air Lines (DAL), for instance, said on its latest earnings call that high fuel prices “will pressure our ability to remain profitable in the December quarter.”

“At present time, we’re expecting a modest loss in the fourth quarter with crude prices driving that up nearly 60% year-to-date and more than 15% just over the last month,” said CEO Ed Bastian.

Companies that make or process fuels and chemicals often run on natural gas. Refinery operator Valero Energy (VLO) said that its refinery operating expenses rose 6% in the third quarter largely because of higher natural gas prices. And any other business—including office work—that uses substantial amounts of electricity can be hurt when energy prices rise. Natural gas now accounts for the largest share of U.S. electricity generation.

Industrial companies can be hit too, as their operating expenses rise. Processed fuels used in manufacturing—things like oils, greases, natural gas, and diesel—are on average 34% more expensive than they were a year ago, according to the PPI. That, along with supply-chain problems around the world, are causing some industrial companies to warn investors that their margins could be hurt.

German chemicals company BASF (BASFY) said that high natural gas prices cost it 600 million euros in the first nine months of the year, but that October prices increases would make its operations even more expensive.

“Throughout basically all value chains, our suppliers, our customers and we ourselves continue to be confronted with increasing raw material, energy and transportation costs, supply chain constraints and the related and largely unforeseeable issues with material availability,” said CEO Martin Brudermüller on the company’s latest earnings call.

It’s a global problem that won’t be going away soon, and one that consumers are starting to feel too.

#### **Slows the U.S. economic recovery and guarantees recession.**

Mitchell 10-10 [Josh; October 10; Covers the U.S. economy from the Journal's Washington, D.C. bureau. He previously covered transportation policy and the bailouts of General Motors and Chrysler. Prior to the Journal, he worked as a reporter for the Baltimore Sun and the Palm Beach Post; *Wall Street Journal,* “Soaring Energy Prices Raise Concerns About U.S. Inflation, Economy,” <https://www.wsj.com/articles/soaring-energy-prices-raise-concerns-about-u-s-inflation-economy-11633870800>; KS]

The U.S. economy is facing a new threat: rising energy prices.

Crude oil has risen 64% this year to a seven-year high. Natural-gas prices have roughly doubled over the past six months to a seven-year high. Heating oil has risen 68% this year. Prices at the pump are up nearly a dollar over the past 12 months to a national average just over $3 a gallon. Coal prices are at records.

Higher energy prices could push up inflation in coming months, damp consumer spending on other products and services, and ultimately slow the U.S. recovery, economists say.

“For consumers it’s like a tax,” economist Kathy Bostjancic of Oxford Economics said of the price increase. While consumers will likely be squeezed, the energy-price rise “would have to be extreme and prolonged” to halt the economic recovery, she added. More likely, “we would just see growth decelerate more or a longer pause before growth resumes, and that we just get a bit stickier inflation in the meantime.”

Andreas Steno Larsen, an analyst at Helsinki-based Nordea Bank ABP, is more pessimistic. He said this year’s rise in energy prices has caused him to cut his estimate for U.S. growth next year to 1.5% from 3.5%. While he believes oil and gas prices will remain flat in coming months, he also sees a worst-case scenario in which they rise by another 40% some time next year, enough to push the U.S. and global economy into a brief recession in mid-2022.

The higher prices are being driven by rising demand and tight supplies. As the pandemic fades and consumers around the world step up spending, factories and service providers are ramping up production, which requires energy. Oil supplies are tight because oil-exporting countries have decided to increase production in measured steps instead of opening the taps more widely.

#### Economic decline causes interstate war.

Brands ’21 [Hal and Michael Beckley; September 24; Global Affairs Professor at Johns Hopkins University; Political Science Professor at Tufts University; Foreign Policy, “China Is a Declining Power—and That’s the Problem,” <https://foreignpolicy.com/2021/09/24/china-great-power-united-states/>]

Slowing growth makes it harder for leaders to keep the public happy. Economic underperformance weakens the country against its rivals. Fearing upheaval, leaders crack down on dissent. They maneuver desperately to keep geopolitical enemies at bay. Expansion seems like a solution—a way of grabbing economic resources and markets, making nationalism a crutch for a wounded regime, and beating back foreign threats.

Many countries have followed this path. When the United States’ long post-Civil War economic surge ended, Washington violently suppressed strikes and unrest at home, built a powerful blue-water Navy, and engaged in a fit of belligerence and imperial expansion during the 1890s. After a fast-rising imperial Russia fell into a deep slump at the turn of the 20th century, the tsarist government cracked down hard while also enlarging its military, seeking colonial gains in East Asia and sending around 170,000 soldiers to occupy Manchuria. These moves backfired spectacularly: They antagonized Japan, which beat Russia in the first great-power war of the 20th century.

A century later, Russia became aggressive under similar circumstances. Facing a severe, post-2008 economic slowdown, Russian President Vladimir Putin invaded two neighboring countries, sought to create a new Eurasian economic bloc, staked Moscow’s claim to a resource-rich Arctic, and steered Russia deeper into dictatorship. Even democratic France engaged in anxious aggrandizement after the end of its postwar economic expansion in the 1970s. It tried to rebuild its old sphere of influence in Africa, deploying 14,000 troops to its former colonies and undertaking a dozen military interventions over the next two decades.

#### Antitrust executive action now.

Tankersly ’12-25 [Jim and Alan Rappeport; 2021; reporters; the New York Times, “As Prices Rise, Biden Turns to Antitrust Enforcers,” https://www.nytimes.com/2021/12/25/business/biden-inflation.html]

WASHINGTON — As rising inflation threatens his presidency, President Biden is turning to the federal government’s antitrust authorities to try to tame red-hot price increases that his administration believes are partly driven by a lack of corporate competition.

Mr. Biden has prodded the Agriculture Department to investigate large meatpackers that control a significant share of poultry and pork markets, accusing them of raising prices, underpaying farmers — and tripling their profit margins during the pandemic. As gas prices surged, he publicly encouraged the Federal Trade Commission to investigate accusations that large oil companies had artificially inflated prices, behavior that the administration says continued even after global oil prices began to fall in recent weeks.

The push has extended to little-known agencies, like the Federal Maritime Commission, which the president has urged to search for price gouging by large shipping companies at the heart of the supply chain.

The turn to antitrust levers stems from Mr. Biden’s belief that rising levels of corporate concentration in the U.S. economy have empowered a few large players in each industry to raise prices higher than a more competitive market would allow.

### Case – 2AC

#### Growth is sustainable—newest data.

Pearce, 22—environment and development correspondent for the Breakthrough Institute, writing regularly for Yale Environment 360 among others, citing Narasimha Rao, Associate Professor of Energy Systems, Yale School of the Environment (Fred, “Green Growth Won’t Kill the Planet,” Breakthrough Journal, No. 15, Winter 2022, dml)

Rao’s findings ought to have a profound impact on the divisive discourse on climate change, which continues to pit the attempts of developing countries to eliminate poverty by mimicking Western modes of development against many in the West who see this path as ruinous for the planet and ultimately self-defeating for the poor. They are both wrong. In truth, there need be no incompatibility. Ecomodernists are right: humanity can have its cake and eat it, too.

Rao, who grew up in a middle-class family in Mumbai but with poverty around him, is now at Yale University and the International Institute for Applied Systems Analysis (IIASA), an Austria-based intergovernmental think tank. He has spent years as what he calls an “interdisciplinary scholar,” addressing both technological advances and social equity and how they might interact.

He says that, until recently, little climate-change analysis, social research, or futurology has seriously addressed whether climate and living standards can be fixed together. Ecomodernists stepped in with strong belief in the power of transformative technology to both deliver abundant energy and break the umbilical cord linking prosperity to pollution. But theirs is a predominantly supply-side and top-down perspective, which can lead to a presumption that the benefits of prosperity and abundant energy will trickle down to deliver decent living standards for all.

Critics like Anna Walnycki and Tucker Landesman at the International Institute for Environment and Development say a top-down perspective risks increasing social and economic inequality unless “policies are shaped around the needs of ordinary citizens,” especially those in low-income urban communities. Moreover, as Rao points out, energy inequality around the world is even greater than income inequality. And by some measures, more income seems to only increase energy inequalities, according to analysis by researchers at the University of Leeds.

To grapple with such issues, Rao’s work, centered in the Decent Living Energy project, takes a bottom-up approach. It starts with an assessment of the hard material needs for eliminating poverty—particularly for the billion-plus people living in informal urban settlements without decent housing, sanitation, water, and other basic services—and does the work of separating out the energy needs for eradicating poverty from those to meet the demands of affluence.

In this way, Rao has added real numbers to the idea of a decent living, upending past global measures of poverty, which were removed from the real lives and material needs of the poor. The most widely used is based on the single metric of daily income per head. Once a dollar a day, the cutoff has now become $1.90 per day for extreme poverty, with a higher threshold of $5.50 per day used by the World Bank for upper-middle-income countries. Almost half the world’s population does not achieve this standard. But what you can buy with those dollars varies vastly round the world, as does what you need to purchase to achieve a decent standard of living. Other measures have looked to well-being outcomes, most influential among them being the UN’s Human Development Index, which is based on life expectancy, years of schooling, and income. But it does not set a threshold level, or measure what material requirements are needed to get to an “acceptable” (different from “good”) outcome.

Rao, with his colleague Jihoon Min, attempts to do better by identifying a shopping bag of material requirements, or “satisfiers,” that are as near as possible universal prerequisites for a decent modern life. They call these requirements “material conditions that people everywhere ought to have, no matter what their intentions or conception of a good life, or what other rights they may claim.”

Those material needs fit into 10 broad indicators of basic human well-being: nutrition, shelter, living conditions, clothing, health care, air quality, education, access to information and communication services, mobility, and freedom to gather and dissent. A person who achieves them does not necessarily have a life that a wealthy person in the West would recognize as comfortable. But they would have a life that could be called decent and dignified.

Many of these requirements derive from widely accepted benchmarks, but others go further. For instance, nutrition requires not just sufficient calories, but also vitamins and minerals and a refrigerator to store food safely. There’s also the need for a cooker that does not fill the home with smoke, part of the air-quality category.

Shelter and adequate living conditions require not just a roof over your head, but also sufficient floor space (depending on household size, typically 30 square meters per person), durable home construction, and sufficient heating and cooling equipment for “thermal comfort.” Also required is “sufficient clothing to achieve basic comfort” and access to a washing machine.

Health care and living conditions requirements include on-premises sanitation and water supplies (50 liters per head per day), plus access to adequate health care facilities and a minimum of one physician per 1,000 people.

The social well-being criteria include not just nine years of education, but also access to communication networks including one phone and one television or computer per household. These new needs, Rao and Min say, may not appear essential to life, but are “globally desired by an overwhelming majority of people,” so not to have them risks social disengagement and ostracism. The electronics need not be personally owned, they note, but access is vital.

The same holds for mobility, which they regard as necessary for social engagement and employment or selling wares. The decent living requirement is set at access to motorized transport, such as a bus or motorbike, sufficient for an average of around 25 kilometres per person per day.

Rao and his colleagues’ analysis of needs is often surprisingly granular. Current thinking holds that households of a similar income level around the world generally want the same appliances. His household surveys nuance that. While most people in most places do want a TV, cellphone, and refrigerator, his study with Kevin Ummel found washing machines are less universally desired, and ovens and tumble driers even less so. Race, culture, and religion are all factors. Patterns also differ depending on whether people live in urban areas and on the status of women; urbanity and greater equality both drive up demand for appliances connected with cooking and washing. People who consume a lot of milk products—such as Sikhs in India—want a refrigerator more than those who do not.

White people, Rao and Ummel note, are more fixated on white goods—that is, large electrical appliances. But they care less about motorbikes and some cooking equipment such as rice cookers, which are much more widespread in Asia.

It is impossible to say what proportion of the world’s population meets all Rao’s standards—or none. Some places far outstrip the basics. The average American has almost six times the “decent” level of floor space and consumes almost seven times as much water. Germans average four and 2.5 times those “decent” levels, respectively. But Rao’s estimates suggest that only two-thirds of people have attained half of them, with nutrition the most achieved and mobility the least. In fact, “the majority of the global population does not currently have decent levels of motorized transport,” coauthor Jarmo Kikstra of Imperial College London, has pointed out.

All this confirms findings from Rao and his colleagues’ analysis published in the September Environmental Research Letters that “more people are deprived of DLS [decent living standards] than are income-poor.” Worldwide, more than three billion people lack access to clean cooking options, space cooling, sanitation, and transport, and more than two billion lack cold storage, decent housing, and proper access to clean water.

In sub-Saharan Africa, over 60 percent of people do not have access to eight of the requirements for a decent standard of living, with deficits for cooling, sanitation, transport, water access, cold storage, housing, television, and clean cooking. In South Asia, over half the population lacks adequate sanitation, transport, cooling, clean cooking, water access, and cold storage.

Most standards are almost universally met in rich nations. Yet the data also show that a third of North Americans and 44 percent of Western Europeans miss out on transport needed for mobility, while in both regions about a tenth miss out on decent sanitation. This means that, around the world, in every corner of it, hundreds of millions of people need more, and no green transition that denies it to them could be considered sustainable or just.

The Cost of Decency

But can the gaps in access around the world be filled—and without crashing the climate?

To be sure, creating a world where everyone can have a decent living standard will require new public infrastructure and more private energy use. As Rao points out, much of the progress will only be achievable collectively—through public water supply and sanitation services, clinics, schools, public transit, cellphone networks, and so on. Much else will be best secured—and with lowest energy needs—collectively as well, with better public transport rather than an automobile in front of every house, for instance.

But the great takeaway is that truly essential needs are, as Rao says, mostly “cheap in terms of energy.” Doing some calculations based on the information in Rao and his coauthors’ Environmental Research Letters article, the infrastructure needed to meet decent living standards worldwide by 2040 will add less than 4 percent to current consumer energy demand. Half of that will be for improved housing, a quarter for public transit systems. Annual requirements to sustain those living standards would add a further 17 percent, making a total increase in energy needs to meet decent living standards of the world of just around 20 percent. That compares with an expected increase in energy demand, without ensuring decent living standards for all, of around 50 percent.

Put another way, these authors say, “essential energy needs to meet everyone’s basic needs . . . could constitute a small share of projected energy growth, namely, around an order of magnitude lower than current US energy demand.” And their analysis, the authors point out, assumes “only modest efficiency improvements, rather than relying on an ideal, high-tech future.”

The energy needed, in other words, may be even less than the headline figures suggest. For the poorest billion or so on the planet, reductions in deprivation will often come with reductions in energy use and environmental impact. Marta Baltruszewicz and her coauthors at the University of Leeds have recently shown from studies in Nepal, Vietnam, and Zambia that the households with higher well-being indicators used more energy than households with lower well-being. Without access to electricity or gas, the researchers found, low well-being households burned more firewood and charcoal than their higher well-being neighbors, resulting in more pollution and deforestation. And lacking clean drinking water, they were forced to constantly boil dirty water to make it safe. Overall, the study found that “households achieving well-being have 60%-80% lower energy footprint of residential fuel use” than the average in those countries.

The bottom line, according to Rao’s coauthor Alessio Mastrucci of IIASA, is that “we do not have to limit energy access to basic services. . . . even under very ambitious poverty eradication and climate mitigation scenarios, there is quite a lot of energy still available for affluence.”

Just how much, of course, matters a great deal for those of us in the rich world with energy-intensive lifestyles and a social conscience. But even before considering any energy technology transformation that can provide more power with fewer emissions, there is hopeful news.

The affluent still consume most of the planet’s resources, with the wealthiest tenth of the planet’s population consuming 20 times more energy than the poorest tenth. But there has been increasing discussion about whether some rich nations are reaching “peak stuff,” a tipping point beyond which material needs no longer rise with wealth—and may even fall. For example, Jesse Ausubel of Rockefeller University has long argued that Western societies in general are starting to dematerialize.

And the evidence is growing, as studies increasingly call into question the presumed ratchet linking wealth and energy demands. For example, Europeans consumed 18 percent fewer raw materials in 2020 than they did in 2008, according to the European Commission. The British government’s Office for National Statistics calculated that the personal materials footprint of the average Brit—in food, textiles, construction materials, metals, fossil fuels, and so on—fell from 24.2 metric tons in 2001 to 13.4 metric tons in 2020.

Some of this decoupling is due to long-standing trends in improved technological efficiency, combined with more recent digital innovation. A single smartphone replaces a computer, a compass, a newspaper, and an alarm clock—not to mention a radio, a camera, a magnifying glass, a flashlight, and a music player. One optical fiber can do the work of a thousand copper phone wires. Global digital camera sales have declined by 87 percent in the past decade, as cameras in phones take their place.

Both public and private consumption patterns are changing in other ways, too. In the public domain, the assembly of infrastructure tends to peak as economies rapidly industrialize, and then falls. (That is why China has, in recent years, consumed 20 times more cement than America, and around eight times more steel too.) Even US president Joe Biden’s trillion-dollar infrastructure plans may not reverse this, since those appear to have less to do with cement and steel structures than broadband connectivity and power grids.

And American consumers are increasingly spending their money on experiences rather than on disposable material goods, according to McKinsey & Company analysts. Their findings suggest that, whereas prior generations defined themselves through their possessions, we now define ourselves more through our experiences, both real and virtual. The new car in the driveway matters less than the vacation you take with it. We don’t eat more, but instead go to more and better restaurants. We don’t buy ever more cheap furniture; we buy quality. Other modern lifestyle choices may also drive down material and energy requirements: eating less meat, going to the gym, and meeting up remotely rather than in person, for instance. People were driving less even before the COVID-19 lockdown.

If such trends continue, and if energy becomes less carbon-intensive, it would not be a stretch to imagine a world that can achieve decent living standards for all with few environmental tradeoffs.

#### Transition is impossible.

Smith ’21 [Noah; September 6; Finance Professor at Stony Brook University; Substack, “People are realizing that degrowth is bad,” <https://noahpinion.substack.com/p/people-are-realizing-that-degrowth>]

So even if there is a sustainable growth path, we are not currently on it. About this, degrowthers are right; a gentle, natural transition to green growth is possible, but is an unaffordable luxury. But degrowthers’ prescription is the wrong one.

The reason, in a word, is politics. The kind of massive intention reordering of global production and consumption that degrowthers fantasize about is not just pragmatically impossible to implement, it’s the kind of thing that essentially everyone in the world except for a few very shouty people in Northern Europe and the occasional Twitter activist is going to reject. To see why, let us turn to the excellent articles/podcasts by Milanovic, Piper, and Klein.

The political argument against degrowth

Milanovic actually has two excellent posts on the topic of degrowth. In the first one, he lays out why forcing developing countries to stay in poverty would be bad:

Let us suppose, for the sake of the argument, that we interpret “degrowth” as the decision to fix global GDP at its current level…Then, unless we change the distribution of income, we are condemning to permanent abject poverty some 15 percent of world population that currently earn less than $1.90 per day and some quarter of humankind who earn less than $2.50 per day…Keeping so many people in abject poverty so that the rich can continue to enjoy their current standard of living is obviously something that the proponents of degrowth would not condone.

Enforcing global degrowth would require freezing world income at about $17,000/year. That means that most people in the world would never even come close to current rich-world living standards — instead, they would at best only be able to reach the level currently enjoyed in China or Botswana. Perhaps that’s not such a horrible fate, but as Milanovic notes, this would require impoverishing most of the population of developed countries. He elaborates on this point in his new post, pulling no punches:

[In order to avoid keeping most of the world in poverty, degrowthers must] introduce a different [income] distribution (B) where everybody who is above the current mean world income ($PPP 16 per day) is driven down to this mean, and the poor countries and people are, at least for a while, allowed to continue growing until they too achieve the level of $PPP 16 per day. But the problem with that approach is that one would have to engage in a massive reduction of incomes for…practically all of the Western population. Only 14% of the population in Western countries live at the level of income less than the global mean…Degrowers thus need to convince 86% of the population living in rich countries that their incomes are too high and need to be reduced….It is quite obvious that such a proposition is a political suicide.

Milanovic quite rightly waves away degrowthers’ protestations that GDP is not a good measure of human welfare. GDP isn’t perfect, he notes, but it’s close enough where the basic point stands.

Demanding that people in rich countries accept absolutely catastrophic declines in their living standards is a political non-starter. Klein, on his podcast, tries to point this out as gently as possible:

I think that if the political demand of the [degrowth] movement becomes you don’t get to eat beef, you will set climate politics back so far, so fast, it would be disastrous. Same thing with S.U.V.s. I don’t like S.U.V.s. I don’t drive one. But if you are telling people in rich countries that the climate movement is for them not having the cars they want to have, you are just going to lose. You are going to lose fast…This is where the politics of [degrowth] for me fall apart…

I just don’t see the argument for degrowth as being anything but an extraordinarily slower way of approaching the politics, probably counterproductive compared to what we’re doing, which is I think you can make tremendous strides on climate change by deploying renewable energy technologies and giving people the opportunity to have a more materially fulfilling life atop those technologies.

Milanovic is less gentle, calling this “outright magical thinking”. He is correct. When you look at how much people in America are willing to sacrifice in terms of their material well-being in order to fight climate change, it’s far less than what Klein is talking about. And Klein is really softballing it here — it’s not just giving up beef and SUVs, it’s a dramatic reduction in the size of housing and the amount of food and the ease of transportation and the quality of medical care that people in rich countries enjoy. It is, frankly, not happening.

But even this vastly understates the political and practical difficulties of degrowth. Piper adds several key points. First of all, she notes, because developed countries have been decoupling resource use and growth for a while now, curbing resource use will actually cause a lot more restrictions on developing countries than Milanovic’s simple calculations would suggest:

From a climate change perspective, though, there’s a problem [with simply reducing rich-world living standards]. First, it means that degrowth would do nothing about the bulk of emissions, which are occurring in developing countries.

This is an incredibly important point. For example, China now produces more CO2 emissions than the U.S., the EU, and Japan combined:

(And no, this is not because of outsourcing, as you can see by looking at the trade-adjusted emissions numbers.)

Another way of looking at this is that China’s CO2 emissions per dollar of GDP are more than twice America’s, and about five times that of the EU. Any global degrowth plan that actually reduces resource use is going to entail more pain for China than its GDP numbers would suggest, simply because China is at a more resource-intensive stage of growth.

Do you think China will accept a substantial diminution of its living standards, in order to satisfy the environmental-economic diktats of activists in Northern Europe? If so, you need to rethink a great many things.

Anyway, Piper makes a second crucially important point. So far we’ve been waving our hands and talking about lowering rich-world GDP while raising GDP for poor countries. In fact, economies don’t work like that:

Second, the global economy is more interconnected than Hickel implies. When Covid-19 hit, poor countries were devastated not just by the virus but by the aftershocks of virus-induced slowdowns in consumption in rich countries.

There’s some genuine appeal to the idea of an end to “consumerism,” but the pandemic offered a taste of how a sudden drop in rich-world consumption would actually affect the developing world. Covid-19 dramatically curtailed Western imports and tourism for a time. The consequences in poor countries were devastating. Hunger rose, and child mortality followed.

Degrowth would thus require deep changes in the entire way that the global economy works. Change happens, but not like that; implementing the kind of reallocation schemes that degrowthers throw around with abandon would require global economic planning that would put Gosplan to shame. Klein points this out, again rather gently:

Degrowth is, as its advocates understand it, a act of global economic planning really without equal anywhere in human history. It is an act of extraordinary central planning.

In other words, it is abject fantasy.

Taken together, these criticisms are utterly devastating to the entire degrowth project. In its current form, it will not advance beyond a media fad. No matter how shrilly degrowthers quote apocalyptic projections, the things they call for simply will not happen.

#### Economic decline ensures leadership turnover.

Brückner ’19 [Markus and Hans Grüner; October 31; Economics PhD and Professor at Australian National University, External Consultant to IMF and World Bank; Economics PhD and Professor at the University of Mannheim, External Consultant to European Central Bank; Public Choice, “Economic growth and political extremism,” no. 185]

Abstract

We argue that the growth rate, but not the level of aggregate income, affects the support for extreme political parties. In our model, extreme parties offer short-run benefits to part of the population at the expense of a minority. Growth effects on the support for such parties arise when uncertainty exists over whether the same subset of individuals will receive the same benefits in the future. More people are willing to take political risks if economic growth is slow. Based on a panel of 16 European countries, our empirical analysis shows that slower growth rates are associated with a significant increase in right-wing extremism. We find no significant effect of economic growth on the support for extreme left-wing parties.

1 Introduction

Distributional consequences are associated with political extremism, both in the short run and in the long run. Extreme political parties often propose to redistribute resources away from specific subgroups of society, such as the rich, ethnic minorities, or citizens living in specific regions. This paper analyzes the impact of economic growth on the support for extreme political parties in western democracies. We argue that the growth rate, but not the level of aggregate income, affects the support for extremism.

In the first part of our paper, we discuss three alternative explanations for why an increase in the economic growth rate reduces the support for extreme political parties. Two well-known explanations are related to retrospective voting and behavioral effects, the latter meaning that voters may react more strongly to changes in than to levels of economic well-being. The third, novel explanation is that parties with extreme political platforms are perceived to create considerable uncertainty about the future distribution of income.

We develop a simple game-theoretic model that analyzes that uncertainty effect. In our model, extreme political parties offer short-run gains from redistribution to a group of individuals. However, the same individuals also face long-run losses owing to the higher income risk that is associated with an extreme regime.1 The model permits a comparative static analysis with respect to several key variables of interest. The growth rate is associated with larger future income risk. Such risk reduces the number of voters favoring extreme parties. The level of aggregate income has no effect on the support for extremism. Income inequality raises support for redistribution and affects the impact that a change in the growth rate has on the support for extremism.

An important feature of our model is that the effect of economic growth on the support for extremism depends on uncertainty of future income redistribution. If redistributive policies are perceived as predictable—in the sense that the same group will have income taken away from it in the future—then the political support for an extremist party is unaffected by growth.

In the empirical part of our paper, we estimate the relationship between economic growth and the support for extreme political parties using a panel dataset comprising 16 European countries. Our dependent variable is a survey-based measure, compiled by Euro-barometer, of respondents' support for extreme right-wing parties and extreme left-wing parties. We use that data, which spans more than three decades and contains entries on a semi-annual frequency, to estimate the effects of economic growth on the support for extremism. Our empirical analysis shows a significant negative effect of real per capita GDP growth on the support for extreme right-wing parties: controlling for country and time fixed effects, a one percentage point decline in real per capita GDP growth increases the vote share of extreme right-wing parties by up to one percentage point. We document that the negative effect of economic growth on the support for right-wing extremism is robust across estimation techniques and model specifications. We do not find a systematic effect of growth on the support for left-wing extremism.

A possible explanation for the differential effects between left-wing and right-wing extremism that relates closely to our theoretical model is that right-wing extremism might be associated with more uncertainty over what groups will be subject to income expropriation in the future. Left-wing extremism is associated with income redistribution, but little uncertainty exists over its target. Communist doctrine (see, for example, the Communist Manifesto by Marx and Engels 1848), envisions a classless society; i.e., a society wherein incomes are distributed equally. Over the past century, extreme left-wing parties have followed closely that doctrine by proposing to redistribute incomes from rich to poor; as opposition parties they have voted against laissez faire policies and, when in power, they have implemented programs that reduced the wealth and income prospects of the rich (see, e.g., Brown 2010).

Right-wing extremism, in contrast to left-wing extremism, does not advocate a classless society. Instead, it often is associated with discrimination against specific groups of society for racial, religios, political or other reasons.2 An extreme case of a murderous and discriminatory regime was the German fascist rule during the first half of the 20th century. One can see it as a direct consequence of the Nazi party's "Fuhrerprinzip"—"the principle of unconditional authority of the leader" (Bernholz 2017, p.9)—which created considerable uncertainty over who might be stigmatized, imprisoned or killed in the future.3 Indeed, from the Nazi period we know that various groups were stigmatized for different reasons4 and that stigmatization also was particularly erratic.5,6

The empirical analysis of our paper is related to Stevenson (2001), who examines the determinants of aggregate policy preferences in a panel of 14 European countries. One of Stevenson's main findings is that declines in economic growth cause policy preferences to shift to the right, while increases in economic growth cause policy preferences to shift to the left.7 Our paper differs from Stevenson in at least three important aspects. First, in contrast to Stevenson, we show that our empirical results are robust to controlling for country fixed effects, meaning that our results also hold at the within-country level, and not just in cross-section. Relatedly, Acemoglu et al. (2008, 2009) showed that the cross-country relation between income and democracy turns insignificant when country fixed effects are entered into the econometric model. Second, we provide evidence that our empirical findings reflect a causal effect of economic growth on political extremism. We show that our main findings are robust to estimating dynamic models that enable to test for Granger causality; and we also show that the main findings hold with an instrumental variables approach. Third, we distinguish in our empirical analysis between extreme right-wing and extreme left-wing parties. That distinction matters: a robust negative effect of economic growth is found on the support for extreme right-wing parties, whereas no systematic effect exists for the support of extreme left-wing parties. Our finding of a significant negative effect of economic growth on the support for right-wing extremism is in line with the finding of Bromhead et al. (2012), who show that the vote share of right-wing extremists during the Great Depression was significantly larger in those countries that experienced a more severe economic crisis. Using subnational data for 218 European regions during 1990-2016, Rao et al. (2018) find a significant negative effect of regional output on the vote share of extreme right-wing parties, but no signicant effect on extreme left-wing parties.

**Leadership turnover causes nuclear war.**

Bertoli ’18 [Andrew, Allan Dafoe, and Robert F. Trager; May 9; PhD and International Relations Professor at IE University, Spain; PhD and International Relations Professor at UCLA; Political Science Professor at UCLA; Journal of Conflict Resolution, “Is There a War Party? Party Change, the Left–Right Divide, and International Conflict,” vol. 63, no. 4]

Is the likelihood that a democracy will take military action against other countries largely influenced by which party controls the presidency? Many believe so (Palmer, London, and Regan 2004; Arena and Palmer 2009; Clare 2010). In modern American politics, one party is consistently identified as more hawkish than the other. Surveys have revealed that Republican voters consistently prefer more aggressive policies (Eundak 2006; Trager and Vavreck 2011; Gries 2014). Moreover, many believe that Al Gore, had he been elected, would not have invaded Iraq like President George W. Bush did (Jervis 2003; Lieberfeld 2005), and that the foreign policies of Hillary Clinton and Donald Trump would be similarly opposed (Paletta 2016).

Nevertheless, it is very difficult to determine whether the party in control of the presidency really has an important impact on foreign policy due to the selection of parties into particular domestic and international contexts. Put simply, which party controls the presidency is not random. For example, the victory of George W. Bush in 2004 can be attributed to a number of domestic and international factors at the time, including the American public's heightened concerns over national security following September 11. Similarly, Barack Obama's success in 2008 was influenced by problems at home and a decrease in public willingness to engage in military adventurism. Therefore, an observational analysis would likely be biased by such selection processes. Thus, even if countries behave differently when certain parties control the presidency, it would be very difficult to know if that difference is explained by the parties or by the environments into which the parties are selected.

In principle, we could overcome this problem by running an experiment in which we randomly assigned countries to be ruled by leaders from different parties. Such an ideal research design would avoid the confounding problem, making it possible to test whether countries tend to be more or less aggressive when certain parties control the presidency. Experiments are unmatched in their ability to identify causal effects, so this type of study could greatly improve our understanding of how electing candidates from different parties influences foreign policy.

We approximate this ideal experiment by using a regression discontinuity (RD) design. Specifically, we look at close presidential elections where a candidate from one party barely defeated a candidate from a different party. Such a design works if it is close to random which party won in these cases, a premise which is plausible given the inherent randomness in large national elections. Thus, we use close elections to get data that are similar to what would result from a real experiment. Such natural experimental designs are extremely rare in the study of war and thus warrant attention in the exceptional instances when they do occur.

We run two main analyses. First, we look at whether countries tend to be more (or less) aggressive when presidential candidates from right-wing parties barely defeat candidates from left-wing parties. This quasi-experimental comparison involves a small sample size (n = 29), but we still find noteworthy evidence that electing right-wing candidates increases the likelihood that countries will initiate high-level military disputes against other states. Second, to increase our statistical power, we examine cases where candidates from incumbent parties barely won or barely lost to candidates from challenger parties (n = 36). Specifically, we test whether countries experienced a larger change in their propensity to engage in military disputes when the candidate from the challenger party barely won. Thus, our key outcome of interest here is how much countries deviated from their prior levels of dispute involvement. We find statistically significant evidence that electing candidates from challenger parties causes countries to experience a larger change in their propensity to engage in military conflict with other states.

Upon further examination of the data, we find that the results from our second test are largely explained by a tendency for candidates from challenger parties to initiate military disputes in their first year in office. Thus, these findings support the theory that major leadership transitions tend to increase the chances of state aggression, either because new leaders lack the experience to manage international crises effectively or because they need to prove their resolve by acting tough.

This article makes several important contributions to the study of international relations. First, there is a long-standing debate in political science over whether leaders have an important independent impact on interstate conflict or whether their influence is largely constrained by strategic realities (Byman and Pollack 2001; Mearsheimer and Walt 2003; Jones and Olken 2009; Chiozza and Goemans 2011; Saunders 2011; Horowitz, Stam, and Ellis 2015; Croco 2015). This study provides quasi-experimental evidence that leaders do have a meaningful impact on foreign policy. Second, the results presented here suggest that domestic political ideology can spill over into the international realm. One of the main explanations for the democratic peace is that democracies act in accordance with their domestic norms when it comes to foreign policy (Morgan and Campbell 1991). The findings presented here support that hypothesis by showing that left-wing leaders do tend to behave more dovishly in international affairs. Third, these results suggest that we should be alert to the potential for interstate conflict when right-wing leaders are in office, as well as after elections where party control of the presidency changes hands.

This study is also notable because it is one of the first in the international relations literature to use a preanalysis plan. Prior to looking at any of the results, we pre-registered the main tests that we planned to conduct in this article. Our motivation here was to tie our hands, so that there could be no question of sifting through the data to find the statistical tests that produced the most interesting or significant results. The temptation for scholars to run many tests and then report the ones that are most "interesting" can lead to misleading findings. This danger has attracted a great deal of attention across scientific fields over the last decade, and it is seen by many as a major problem for quantitative research (Nosek et al. 2015). The purpose of preanalysis plans is to help ensure that research remains credible.

The article proceeds as follows. We first discuss the theoretical bases for the claim that party control of the presidency influences conflict decisions and review the existing empirical work on this subject. We then outline the research design in more detail. Next, we conduct design checks to verify that the research design is appropriate. We then present the results for party ideology. After that, we test whether party turnover leads to changes in the likelihood of state aggression. We then discuss the findings and conclude.

Leaders, Parties, and International Conflict

In recent years, much debate has arisen over whether leaders influence the chances of interstate conflict, and if so, how. A major question in this research program is whether leaders from certain parties are more likely to behave aggressively in foreign affairs or whether the ideology of the leader is largely unrelated to state behavior.

The theory that party control of the presidency influences the chances of interstate conflict can be derived from three premises. The first is that conservatives and liberals hold different views about the legitimacy or efficacy of military force. This assumption is backed by cross-national survey data showing that liberals tend to be more concerned with fairness, duties of care, and preventing harm, while conservatives tend to favor the preservation of social orders, the purity of sanctified objects, and loyalty to in-groups (Graham, Haidt, and Nosek 2009; Boer and Fischer 2013). Several studies have also found that these differences in moral foundations influence foreign policy attitudes (Schwartz 1992; Kertzer et al. 2014; Kertzer and Rathbun 2015). In particular, liberals are more "prosocial" and seek compromise internationally, in contrast to conservatives, who are more "proself” and therefore bargain more aggressively (Schwartz, Caprara, and Vecchione 2010).

The second assumption is that general differences in party attitudes appear at the elite level. There are two ways that these differences could affect the behavior of political elites. First, the political leaders could sincerely hold beliefs and preferences similar to those of their constituents, leading them to have different foreign policy strategies and goals. Alternatively, the leaders could have different beliefs and attitudes than their constituents, but nonetheless recognize that they must carry out their supporters' agenda if they hope to stay in office.

Although it is difficult to know the extent to which leaders true foreign policy preferences reflect those of their constituents, several observational studies show that changes in a leader's base correlate with changes in their approach to international affairs. First, Mattes, Leeds, and Carroll (2015) find that changes in the supporting coalitions of leaders predict foreign policy change, measured by the policy positions taken by nations in the United Nations General Assembly. Rathbun (2004) and Haas (2005) come to a similar conclusion looking at support for peace-enforcement missions, and Solingen (2009) finds that economic interests and the ideologies of partisan coalitions influence nuclear weapons policy. Therefore, even when a leader has different foreign policy beliefs and goals than the rest of the party, there may still be pressure to toe the party line.

The third assumption is that leaders from different parties can act on their divergent preferences. This means that international and domestic constraints on leaders cannot be so powerful that they largely limit leaders to a single course of action. For example, some realists argue that there is little room for leaders to have an independent impact on foreign policy because they all need to defend and advance the national interest (Mearsheimer 2001; Mearsheimer and Walt 2003). Regarding domestic constraints, Trager and Vavreck (2011) find that right-wing and left-wing leaders can have incentives to hide their "types." Liberal leaders may be forced to adopt more hawkish foreign policies because they fear that their moderation will sometimes be interpreted as weakness (Schultz 2005), whereas conservative leaders may have incentives to adopt more moderate policies because the public would likely judge them unduly aggressive if they acted hawkishly. Thus, leader preferences and political incentives could actually push in opposite directions.

Several previous studies have examined whether right-wing leaders tend to behave more aggressively in foreign policy than left-wing leaders. Using logistic regression on panel data covering eighteen parliamentary democracies from 1949 to 1992, Palmer, London and Regan (2004) find that right-wing governments are more likely to be involved in military disputes, while left-wing governments are more likely to see the disputes in which they are involved in escalate. Their explanation is that right-wing parties favor using force more often, so their leaders will engage in military conflict more often. However, when left-wing leaders engage in conflict, they will need to emerge victorious to justify their involvement, so they will be more likely to bargain tough and escalate if necessary. These researchers find that a shift from left to right government increases the chances of dispute initiation by about 50 percent and that left-wing governments are about twice as likely to escalate conditional on being in a dispute. Second, Arena and Palmer (2009) apply a probit model to panel data covering twenty stable democracies from 1960 to 1996 and find that right-wing governments are more likely to initiate disputes. Their theory is based on the finding that right-wing leaders are less likely to be removed from office for using force unwisely than left-wing leaders. This makes right-wing leaders more likely to start international conflicts in the hopes of increasing their domestic support. Third, Clare (2010) applies logistic regression to twenty parliamentary democracies from 1950 to 1998 and finds that parliamentary democracies are about twice as likely to initiate disputes when they are controlled by right-wing parties.

The central limitation of these studies is that their conclusions rest on the results of regression analysis on cross-national panel data. Such an approach is not guaranteed to eliminate bias from omitted variables. In fact, the results from this type of analysis can be badly biased, even when researchers control for a wide range of important covariates (Clarke 2005). In some cases, controlling for potential con-founders can even amplify bias (Pearl 2013). Thus, the results from these past studies should be interpreted as a tentative first cut at answering this question rather than the final word on the subject.

The design-based approach that we employ in this article gets around the omitted variable bias problem because the as-if random assignment of leaders to office should create balance across observable and unobservable pretreatment characteristics. In many other scientific fields, the results of conventional observational analyses have been overturned by design-based studies. For example, the validity of hormone replacement therapy and a variety of theories in development economics, psychology, and elsewhere have been overturned when experimental and quasi-experimental approaches were brought to bear (Women's Health Initiative 2002; Freedman 2009; Dunning 2012). Therefore, the tests that we present in this article provide an important step forward in our understanding of the empirical relationship between party control of the presidency and interstate conflict.

Before moving on to our research design, though, we should first lay out the hypotheses that we want to test. As we detail in our preanalysis plan, we started this project with the belief that leaders do matter and that electing leaders from different parties does affect the likelihood of state aggression. Given this prior, we formulated two main hypotheses. The first is the party ideology hypothesis, which predicts that electing leaders from right-wing parties will increase the likelihood of state aggression. The second hypothesis is highly general and speaks directly to the question of whether leaders matter in international relations. It posits that electing a leader from the incumbent party will lead to less change in international dispute behavior than electing a leader from a challenger party. We refer to this as the incumbent/challenger hypothesis.

Party Ideology Hypothesis: Electing presidential candidates from right-wing parties will make countries more aggressive than electing candidates from left-wing parties.

Incumbent/Challenger Hypothesis: Electing candidates from challenger parties will lead to a greater change in state aggression than electing candidates from incumbent parties (the absolute difference in aggression between presidential terms will be greater when there is party turnover).

One issue that is related to the incumbent/challenger hypothesis is that new leaders may be particularly likely to act aggressively early in their terms. There are several reasons why this might be the case. First, new leaders may lack the experience to manage international crises effectively, making it more likely that disagreements with other states will turn into military conflicts (Potter 2007). Second, new leaders may be more likely to want to show the international community that they are willing to use force abroad, which could strengthen their bargaining leverage in future international negotiations (Wolford 2007; Dafoe 2012). Third, new leaders may want to send a signal to their domestic audiences that they are tough when it comes to foreign affairs, which could increase their popularity at home. This idea that leaders are more likely to get involved in military disputes when they first arrive in office has received support from cross-national logistic regression analysis on panel data (Gelpi and Grieco 2001) and a mixed-methods analysis that looks at American presidents (Potter 2007).

While most of the existing theory and research on leadership transitions has focused on cases where new leaders come to office, a similar logic might be applied to party control of the presidency, particularly when it comes to the reputational mechanisms. New leaders who are from the same party as the old one should be able to associate themselves with the previous leader's reputation, giving them less of a need to signal their resolve. On the other hand, when leaders from challenger parties come to power, there should be less certainty that the new leader will have an approach to foreign policy that is similar to the old one's. In short, when party control of the presidency changes hands, it marks a more significant leadership transition (Mattes, Leeds, and Matsumura 2016). Thus, even if parties tend to behave pretty similarly across ideologies, we might still find that leaders from challenger parties might be much more aggressive early in their tenures.

Challenger Aggression Hypothesis: Electing candidates from challenger parties will lead to an increase in state aggression when the new leader takes office.

We did not preregister the challenger aggression hypothesis prior to looking at the results, but this was the only hypothesis we tested outside of those we preregis-tered. Thus, the findings do not reflect data mining. Nevertheless, some readers may wish to interpret the test of this particular hypothesis as exploratory.

Research Design

There are several different design-based approaches that could be used to investigate how leaders affect state behavior. One would be to look at all cases of leadership turnover and compare how countries behaved before and after the leadership change. This research design rests on the idea that countries are comparable before and after leadership transitions. This assumption may be plausible in some cases, but in others, it is clearly invalid. For example, the periods before and after normal electoral leader transitions are usually not comparable. Many countries elect the leader and members of the legislature at the same time, making it difficult to determine the effect of leadership change by itself. Similarly, looking at cases when leaders were forcibly removed from office also has its limitations, since leaders are usually removed at times of extreme political tension. Likewise, leadership changes that are caused by assassinations are not likely to provide valid comparisons. The new leader will probably have to deal with a more complicated political situation in the aftermath of the assassination, making the beginning of their term much different from the end of the previous leader's term.

Another potentially promising approach would be to focus on changes in leadership that resulted from the natural deaths of leaders. The timing of natural leader deaths should be fairly unrelated to the domestic and international environments. Moreover, the legislature will typically not change following the natural death of a leader, making it much easier to isolate the independent effect of leaders on foreign policy. However, the natural death approach is not well-suited for this particular study. The reason is that the new leader almost always comes from the same party as the old leader. Thus, this exogenous change in leadership does not provide much leverage in determining how party control of the presidency affects interstate conflict. This research design could be useful in looking at other types of variation in leaders, such as age, military experience, and occupational background. However, it is not a promising design for this study.

The approach that we take instead is to use an RD design. RD involves comparing units that barely surpassed and barely fell short of an important cut point that influenced treatment assignment. For example, if there was a test where everyone who scored a fifty or higher got a scholarship, researchers could assess the effects of getting the scholarship by comparing the students who scored fifty and fifty-one to the students who scored forty-eight and forty-nine. So long as there is no sorting at the cut point, as could happen if the graders had opportunity and motive to nudge some test takers above the cut point, it should be close to random which of these students won the scholarship, since they were all on the verge of getting it (Lee 2008).

Close elections provide an excellent opportunity to use RD analysis. Given the inherent randomness in the electoral process, whether candidates barely win or barely lose in close elections is plausibly as-if random (Eggers et al. 2015).1 Political scientists have used RD to study questions like how winning an election influences a party's likelihood of winning the next election (Lee 2008) and how winning an election affects a candidate's wealth later in life (Eggers and Hainmueller 2009). Scholars have also used RD to test how economic and political outcomes differ when Republican candidates for mayor barely defeat or barely lose to Democratic candidates (Pettersson-Lidbom 2008; Gerber and Hopkins 2011; Beland 2015; de Benedictis-Kessner and Warshaw 2016).

In this article, we look at close presidential elections. To our knowledge, this study is the first to apply RD specifically to presidential elections. For our analysis, we followed the procedures that were outlined in our preanalysis plan (which is available at the end of the Online Appendix). We will briefly summarize these procedures in the remainder of this section.

Our Statistical Approach

There are two general ways to analyze an RD. The first, known as the continuity approach, involves plotting two smoothing functions on either side of the cut point and estimating the difference at the cut point (Voeten 2014). This method should be used when the score, or "forcing variable," is continuous. The second method is the local-randomization approach, appropriate when the forcing variable is discrete (Lee and Card 2008; Cattaneo, Frandsen, and Titiunik 2015; Bertoli 2017). It involves drawing a window around the cut point and treating the units within that window like they were in a randomized experiment.

Since the forcing variable in this study is vote share in a presidential election, which is essentially continuous, we would normally use the continuity approach. However, we discovered in our preanalysis plan that the continuity approach had a type 1 error rate (false-positive rate) of 12 percent for this study, which we believe is due to our small sample size. Since the type 1 error rate should be 5 percent by design, we chose not to use this method, since it was overly likely to give us significant results. Instead, we used the local-randomization approach, which we found had a type 1 error rate of about 4 percent.

Defining Close Elections

We considered elections to be close if the top two candidates were within 2 percent of the cut point (48 percent to 52 percent range). Data on close races were available in the data set constructed by Bertoli, Dafoe, and Trager (2018). This data set includes every democratic election between 1815 and 2010, where democracies are defined as countries with Polity IV Institutionalized Democracy scores above five. The data set provides information on the top two candidates including their names, parties, and vote shares in the election. If there were more than two candidates running in an election, we focused only on the votes for the top two candidates, rescaling their vote shares accordingly. In cases where there were runoffs, we used their vote shares from the runoff rather than the initial election. We also excluded close elections in nondemocracies because we were concerned about fraud in these cases. Given the possibility of fraud, we did not feel confident in assuming that the outcomes of these elections were as-if random.

One complication that arose is that the United States elects presidents through the electoral college. This system makes it possible for candidates to lose the popular vote but still win the election if they defeat their rival in the electoral college. To deal with this issue, we counted the electoral college vote rather than the popular vote when looking at the United States. This decision is consistent with other similar studies (Bertoli, Dafoe, and Trager 2018). For every other country, we used the popular vote.

Measuring Party Ideology

To identify parties as left or right-wing, we evaluated the parties against each other according to their positions at the time of the election on social questions associated with liberalism and conservatism. Parties were judged further to the right when they expressed support for "traditional values," national, religious, racial, or ethnic in-groups, or the benefits of authority and traditional sources of authority such as a monarchy. Parties were judged further to the left when they expressed inclusive sentiments, a duty of care for vulnerable groups, and support for democratic principles. Secondarily, we evaluated parties as left or right on economic policy preferences. Advocacy for wealthier interests placed a candidate further to the right, and advocacy for the less well-off is associated with the left. These two social and economic dimensions are highly correlated, with the principal exceptions coming from communist and postcommunist countries. In these cases, the primary social dimension determined the left-right coding. When parties could not be easily classified as left or right according to these metrics, we excluded the election from the ideology test.

Main Analyses

We looked at two different types of close elections. The first were close elections between right-wing and left-wing parties, where it was essentially random whether the presidency was controlled by a leader with a right-wing or left-wing ideology. In total, we have twenty-nine close elections between right-wing and left-wing parties. The second set of close elections that we analyzed was narrow races between an incumbent and challenger party. In these cases, it was as-if random whether the country experienced party continuity or change in the executive branch. We have thirty-six of these close elections in our data set. For this group of cases, we were particularly interested in testing whether a change in party control of the presidency increased the likelihood of a change in state aggression.

Although our sample sizes are not large, the power tests that we ran at the beginning of this project indicated that we had a good chance of picking up a medium-sized or large effect. For the test of left- versus right-wing parties, we determined we would correctly detect (at a = .05) a medium-sized effect (0.5 standard deviation [SD]) 30 percent of the time, a large effect (0.8 SD) 54 percent of the time, and a very large effect (1.2 SD) 82 percent of the time. In the incumbency power analysis, we found that we would detect a medium-sized effect 55 percent of the time, a large effect 93 percent of the time, and a very large effect over 99 percent of the time. Also, if the effects were small or nonexistent, the power tests indicated that we would be able to establish confidence intervals that were precise enough to rule out very large (+1.2 SD) positive and negative effects.2

Moreover, although the results turn out to be significant at conventional levels, we encourage readers to avoid interpreting p values as either significant (p < .05) or not while reading this article and to bear the bias-variance trade-off in research design in mind. Almost all quantitative research in international relations lacks any claim to strong causal identification, being based on observational data and linear adjustment of largely ad hoc covariate sets. By contrast, the design presented here has a strong claim to causal identification and unbiasedness, providing a crucial complement to the vast majority of the literature which does not. Thus, since p values provide a continuous measure of how inconsistent the evidence is with the null hypothesis, a higher p value in an unbiased design may actually reflect more evidence against the null than a lower p value in a biased one. Small p values (e.g., p < .2), even if not significant at conventional standards, also provide important evidence in these contexts.

In addition to our two main tests, we examined whether candidates from challenger parties are more likely to initiate military disputes at the beginning of their terms than candidates from incumbent parties, which would be consistent with the theory that major leadership transitions make state aggression more likely. Our motivation for running this test came from reading Wolford (2007), Dafoe (2012), and Wu and Wolford (2016). These articles advance a compelling theory and intriguing empirical evidence that new leaders have reputational incentives to act tough when they first come to office. We find strong evidence consistent with this hypothesis.

Outcomes

We measured aggression using the number of militarized interstate disputes (MIDs) that a country initiates. These disputes are cases where countries explicitly threatened, displayed, or used force against other states (Ghosn, Palmer, and Bremer 2004). Specifically, we look at the number of these disputes that a state initiated starting from when the leader took office and ending at the date that the winner of the next election was scheduled to start. In cases where leaders were replaced part of the way through their term, we used the day that they left office instead. Since the length of time that candidates held office varied, we divided the total number of disputes by the duration of the time period. Thus, the unit of measurement is military disputes initiated per year in office.

We use slightly different versions of the outcome variables for our different tests. For the ideology test, we use military disputes initiated per year, as described in the previous paragraph. For the main incumbency test, we use the absolute change in military disputes initiated per year from the previous term. We use this variable because we are interested in evaluating whether there was a larger absolute change in military aggression when the challenger party barely won. Thus, the measure is:

Absolute change in military aggression =|MIDs/year during winner's term

—MIDs/year during previous term|

In other words, we are testing whether challenger parties gaining control of the presidency makes countries with high levels of prior aggression more likely to experience a decrease in dispute initiation and countries with low levels of prior aggression more likely to experience an increase in dispute initiation. We conduct a one-sided test for this analysis, since we expect that the absolute change will be larger for countries where the challenger party barely wins. Lastly, for the exploratory test about whether challenger candidates tend to be more aggressive when they first take office, we look at the number of disputes that each country initiated in the first year of the new presidential term.

Across these tests, our main outcomes are (1) military disputes initiated and (2) high-level military disputes initiated. High-level disputes are cases where countries used force against other states or entered into international wars.3 Following the preanalysis plan, we examine high-level disputes, which constitute actual uses of force, separately because the factors that drive posturing may be different from those that drive actual violence. As secondary outcomes, we look at (3) all disputes that countries engaged in and (4) all high-level disputes that countries engaged in. These cases include disputes that countries did not start but participated in nonetheless.

Estimation

We employ two estimation strategies. Our primary statistical analysis involves t tests. This is a simple approach, recommended for its parsimony and robustness, which is appropriate given the assumption that close elections were as-if random (Dunning 2012). As a secondary test, we plot the outcome as a function of the electoral result and estimate how the expected value of the outcome changes at the cut point using local linear regression, as is often done for RD designs. An advantage with using this approach is that it makes it possible to visualize how outcomes change at the cut point.

Design Checks

Our research design rests on one main assumption, necessary for internally valid estimates: the outcomes of the close elections considered in this study are as-if random. For example, the design would be invalid if any candidates could precisely manipulate their vote shares around the cut point, such as by counting the votes and adding just enough to win. This assumption should be valid for democracies provided that elections are fair (Eggers et al. 2015).

A second "representativeness" assumption facilitates generalizing from our results, and this is that the democracy years experiencing close elections are not dissimilar to democracy years in which elections are not close. If this assumption is reasonable, then we can generalize from our results to all democracy years. However, if the countries that had close elections are not representative of other democracies, then the causal estimates that we find may not reflect broader patterns in international relations.

We can test the as-if randomness assumption in two ways. First, we can check that the samples are balanced on important pretreatment characteristics. Figure 1 plots the balance using two-sided t tests. The graph on the left shows that countries where right-wing parties barely won were very similar to countries where left-wing parties barely won, and the graph on the right shows that countries where incumbent parties barely won were similar to countries where challenger parties barely won. In Figure 1, we look at twenty-four covariates, and not a single one is significantly imbalanced. Thus, the data are consistent with the assumption that who won these close elections was as-if random.

[[FIGURE ONE OMITTED]]

[[FIGURE TWO OMITTED]]

Second, we can test whether there is balance in the number of cases on either side of the cut point. Figure 2 shows how close right-wing and incumbent parties were to winning the presidency. For the twenty-nine close elections between right-wing and left-wing parties, there were sixteen cases where the right-wing party won and thirteen cases where the left-wing party won (p = .71). Similarly, for the thirty-six close elections between incumbent and challenger parties, there were seventeen cases where the incumbent party won and nineteen cases where the challenger party won (p = .87). Thus, there is no evidence of sorting in either sample.

[[FIGURE THREE OMITTED]]

We can also evaluate the external validity assumption by comparing the two samples to the broader population of all democracies since 1815. Figure 3 uses box-plots to compare our samples to the broader population with respect to covariates related to military power. The comparisons show that our samples are very similar to the broader population of democracies from 1815 to 2010. Thus, at least with respect to these covariates, there is little reason to believe that either of our samples consist of an idiosyncratic group of countries that would behave differently than most other democracies. Rather, the representativeness of our samples indicates that our results should be indicative of broader trends in international relations.

In sum, the outcomes of the close elections appear to be random, and the countries where the close elections happened are fairly representative of all other democracies. Therefore, the design appears to have worked very well. In the next two sections, we will look at how electing presidential candidates from different parties affects state aggression using this new empirical approach.

Results for Party Ideology

Our results indicate that right-wing parties tend to be more aggressive than left-wing parties. Table 1 shows the aggression levels of the countries that had close elections between right-wing and left-wing candidates. On average, the countries where right-wing parties barely won started .06 more disputes per year than countries where left-wing parties barely won. Similarly, they engaged in .10 more high-level disputes per year than countries where left-wing parties barely won. Given that the average duration of a presidential term for these countries is 4 years and 169 days, this adds up to .32 more disputes initiated and .43 more high-level disputes initiated over an average presidential term.

Figure 4 plots the estimates for the two main outcome variables along with the two other indicators of aggression. The confidence intervals are based on two-tailed t tests. They suggest that electing right-wing parties does increase state aggression, particularly when it comes to high-level disputes. Of course, all of these confidence intervals cover zero, so we cannot rule out zero effect with 95 percent confidence based on this analysis alone. The estimate most different from zero is of high-level disputes initiated (p = .25). For disputes initiated, the results appear to be more consistent with no effect (p = .64), as do the results for the supplemental tests of all disputes and all high-level disputes.

[[TABLE ONE OMITTED]]

[[FIGURE FOUR OMITTED]]

However, if we look at the specific disputes in more detail, the evidence that electing right-wing leaders increases state aggression grows stronger. While all the high-level disputes that the right-wing leaders engaged in involved unequivocal uses of force, the only high-level dispute that any of the left-wing leaders initiated is questionable and should probably be excluded. This dispute was between Costa Rica and Nicaragua in 1995, and it did not involve any military action by either country. Costa Rican police crossed the Nicaraguan border in pursuit of suspects and were arrested. Two days later, the Costa Rican police force retaliated by arresting two Nicaraguan police officers who had crossed the border "to get a drink of water." The two sides made a prisoner swap on the following day. If this case is dropped, then electing right-wing parties appears to lead countries to initiate . 12 more high-level disputes per year (p = .162).4

Moreover, the only reason that these results are not significant is because the United States (2001) is an outlier, which inflates the standard errors. We can address this issue by modifying the outcome to a simple indicator variable for whether countries initiated any high-level disputes (no = 0, yes = 1), which makes our test insensitive to outliers. The estimates then suggest that electing right-wing parties increases the chances that countries will initiate high-level military disputes by 25 percent (p = .041). Therefore, even though the initial tests were not statistically significant, they become more conclusive after we address some minor issues with the data.

Given the number of democracies in the world today, there may be enough close elections to get much more precise estimates a decade or two from now or maybe even after the next expansion of the MID data set. This design is definitely worth returning to in the near future. However, for the present, we will turn to a second test in the next section on more data that yields increased statistical power. This test provides further evidence that which party controls the presidency does affect the likelihood of state aggression.

Results for Incumbent versus Challenger Parties

The second test that we run compares cases where challenger parties barely defeated incumbent parties to cases where they barely lost to incumbent parties. In these cases, it was as-if random whether the incumbent or challenger party won. Thus, we can test how much military aggression changes when the party that controls the executive branch changes. The outcomes that we use for this test are the absolute changes in the military indicators between the term when the incumbent or challenger party barely won and the previous term. For this analysis, we use one-sided tests that assume that there will tend to be a larger change in military aggression when the challenger party barely wins.

Table 2 shows the absolute change in aggression levels for the countries that had close elections between candidates from incumbent and challenger parties. When the candidates from challenger parties barely won, the absolute change in disputes initiated per year was .031 greater than when candidates from incumbent parties barely won (p = .30; 26 percent increase from baseline). For high-level disputes, the difference is even more notable. The absolute change in high-level disputes initiated per year was .074 greater than when candidates from incumbent parties barely won (p = .046, 133 percent increase from baseline). The average length of the presidential terms for these data was 4.42 years, so this adds up to a difference of .33 high-level disputes initiated per presidential term. Figure 5 plots the confidence intervals for the aggression indicators.

This estimated effect is substantively large relative to other determinants of conflict that international relations scholars have analyzed. For example, past studies have found that revolutions increase the likelihood that countries will initiate military disputes by about 74 percent (Colgan 2010), arms transfers by about 60 percent (Krause 2004), and neutrality pacts with potential conflict joiners by about 57 percent (Leeds 2003). The effect of challenger parties winning appears to be in the ballpark of these estimates, although it is hard to nail down this effect very precisely because of the relatively small sample size.

Figure 6 illustrates the effect for high-level disputes across a greater range of margins of victory. As countries move from incumbent party victories (the points on the left) to challenger party victories (the points on the right), there is a large shift in the absolute change in high-level disputes initiated. Countries where the challenger party barely won experienced a much larger change than countries where the incumbent party barely won. Although this method of estimating the treatment effect was not the primary method that we discussed in our preanalysis plan, the results for this approach are fairly conclusive.

### T-Private – 2AC

#### 1 – The plans applies antitrust laws to private common carriers through the expansion of private rights of action.

Rossi ‘9 [Jim; November; Harry M. Walborsky Professor and Associate Dean of Research, Florida State University College of Law; *Administrative & Regulatory Law News*, “Why the Filed Rate Doctrine Should Not Imply Blanket Judicial Deference to Regulatory Agencies,” <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1319065>; KS]

Second, and especially relevant to judicial consideration of federal antitrust claims, there is a longstanding agency deference strand to the doctrine. Keogh v. Chicago & Northwestern Railway Co., 260 U.S. 156 (1922), held that a private antitrust plaintiff is precluded from recovering treble damages against a carrier based on the claim that a tariff filed with the interstate commerce commission was allegedly monopolistic. Justice Brandeis invoked a deference rationale, reasoning that the complex and technical issue of rates is best determined by the agency, not by a court.

II. Regulatory Gaps in Newly Restructured Markets

The filed rate doctrine has been used to bar antitrust claims in the deregulated electric power industry. In Town of Norwood v. New England Power Co., 202 F.3d 408 (1st Cir. 2000), the Keogh strand of the filed rate doctrine was invoked to bar a price squeeze claim against a utility – even where the tariff filed with FERC was based on competitively set prices. The Norwood court reasoned, “[i]t is the filing of the tariffs, and not any affirmative approval or scrutiny by the agency, that triggers the filed rate doctrine. ” Id. at 419.

However, as energy supply markets are deregulated, blanket deference to regulators under the filed rate doctrine is akin to pounding “a square peg into a round hole.” Richard Stavros, Lost in Translation: Critics Say FERC’s Filed Rate Doctrine is Wrong for the Times, PUBLIC UTILITIES FORTNIGHTLY, June 2004, at 4. One commonly articulated concern with the filed rate doctrine in competitive markets is that, by valuing regulatory over market price determinations, it stands in the way of competitive markets.

In addition, the filed rate doctrine may have the unintended consequence of encouraging strategic actions on the part of firms in the regulatory process with a purpose of limiting judicial involvement in the resolution of conflicts. If firms can opt out of judicial remedies merely by filing broad tariffs with regulators, this encourages a type of private manipulation of the regulatory process absent any third party oversight.

#### Controlled by private organizations without government funding.

Heritage ’19 [American Heritage Dictionary; carbon dated June 8, 2019; Fifth Edition, “private sector,” https://www.ahdictionary.com/word/search.html?q=private+sector]

The part of the economy that is controlled by individuals or private organizations and is not funded by the government.

### T-Judicial

#### ‘Nontraditional’ exemptions and immunities are topical under their interpretation.

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

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

#### The ‘scope of antitrust law’ is limited by statutory text. Either we meet, or no one does: any aff could modify statutory text.

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

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

#### ‘Expanding the scope of its antitrust laws’ means modifying whether the law applies to activities.

Carpenter ’3 [David W. Carpenter and Richard D. Klingler; July 23; Partner at Sidley Austin Brown LLP, Law Clerk to Supreme Court Justice William Brennan; Partner at Sidley Austin Brown LLP, Law Clerk to Supreme Court Justice Sandra Day O'Connor, Rhodes Scholar; Westlaw, “Brief of AT&T Corp., Cavalier Telephone, and Competitive Telecommunications Association as Amici Curiae in Support of Respondent” in Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, p. 22-23]

First, the language and history of the savings clause foreclose these claims. Even if consideration of the duties imposed by the 1996 Act would expand the “standards” and “scope of the antitrust laws” (DOJ Br. 11, 24) - which it \*23 would not - the savings clause does not say that the Act is to have no effect on the scope of antitrust laws. Rather, it says that “nothing in this Act … shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.” 47 U.S.C. § 152 note. As the legislative history makes explicit, this clause is designed to prevent claims that antitrust law is inapplicable to conduct regulated by the 1996 Act,16 and Congress adopted this clause because it understood - based on the experience of introducing competition into long distance and equipment markets - that antitrust enforcement is an essential supplement to efforts to open telecommunications markets to competition through access regulations.

### K

#### Homo Economicus is sustainable and doesn’t cause extinction.

Colatrella, 20—associate adjunct professor of government and sociology at the University of Maryland University College (Steven, “Solidarity or Human Rights? National Sovereignty and Citizenship in the Twenty-First Century,” *Bringing the Nation Back In: Cosmopolitanism, Nationalism, and the Struggle to Define a New Politics*, Chapter 2, pg 34-38, dml)

When one is seen by others to be only a human being, without any of the social, political or cultural characteristics that make one fully human, the result may be compassion and charity but it may also be just as likely be seen as an invitation to further abuse. “Bare life,” as Arendt and Agamben term it, cannot be the basis for human dignity.

For human rights still require states to enforce them, just not the same state that is repressing or violating them. But the enforcement of rights by external states or by “the international community” means war. Immanuel Kant warned that peace could not come from forcing a single state that refused to accept even a positive value or policy of the world community to get in line, since that is not peace but war (Kant). Machiavelli warned that republics need a plurality of republics, able to criticize each other, encourage each other to best practices, engage in competition. When all republics fall under a single central power—even a collective one—we find an empire, not a republic. A condition in which the world community was unanimous and forced a recalcitrant state into accepting policies it and its citizens had not approved would be analogous to empire, to that world polity that Arendt likewise warned would not result in a stronger enforcement of rights, but in the greatest threat to them, and one without external recourse for redress (Arendt 298).

Nor are these abstract problems. Mark Mazower has painstakingly shown that the entire conception of international law has always been based on the “standard of civilization” in which certain states were within such a standard, and so legitimized to enforce their conception of international law, while other peoples and states and communities were outside of it, and so vulnerable to having the will of others imposed upon them (Mazower 70). In short, colonialism, neocolonialism, and the current regime of human rights are closely linked, and it is no accident that the countries that find themselves targets of humanitarian interventions under the “responsibility to protect” are ones that are not within the current updated version of the standard of civilization—that is to say, not allies of the United States and often opposed to neoliberalism. Thus, even in shifting from the older national government’s responsibility to its own citizens to a conception that the international community has a responsibility to protect human rights, we find that we have merely changed which fox is guarding the chickens.

Human Rights and Global Citizenship

As a legalistic concept, human rights require a political authority to define what they are legally. One of the most widely cited works on human rights, Jack Donnelly’s Universal Human Rights in Theory and Practice fails from the start on this point with its key analogy: human rights, like property rights, are a preexisting condition. This notion has already been dismantled by Arendt as shown above. By contrast, international relations theorists recognize that human rights must be granted and recognized by global institutions, but the lack of a central international authority makes this very difficult. The realist school of international relations (Morgenthau; Waltz) sees anarchy reigning in a state of nature in world politics, making the protection of human rights well nigh impossible. The so-called English School of International Relations sees an international society as precarious, in which norms, though real, are enforced by national states that see adherence to such norms as advantageous for maintaining the international society and in the interest of the individual states in question (Bull). These theories are united in that they see international organizations as instruments for carrying out what has already been agreed to by national states. Neither position posits a global polity as existing, and many theorists in each camp would see such a polity as undesirable.

Others are less pessimistic. Constructivists view human rights as a discourse that has achieved a certain degree of autonomy from institutional settings, though the geopolitical limits on the discourse remain (Risse; Ropp and Sikkinke 16). Some political theorists seek to found human rights solely on the narrow basis of historical liberal theory, with all the baggage that this involves—from class privilege and economic doctrine to the policies of existing international organizations such as the IMF and WTO, and with the historical affiliation with Anglo-American hegemonies intact (Charvet and Nay). Samuel Moyn’s demonstration of the Christian roots of human rights merely shifts the instrument of human rights formation from political constitutionalism to Christian ethos. In both cases, however, the Western origin of the rights concept belies its alleged universality. Donnelly’s influential work engages in intellectual gymnastics to find a plausible basis for universal human rights. But even this work admits that despite all, people must live in determined polities or they would find themselves in a Hobbesian state of nature, and that in the end states have human rights responsibilities only to their own citizens and territorial residents (Donnelly 30–32).

Clearly, only global citizenship could address all of these difficulties, and there has been considerable work done on developing that idea. Robert Paehlke seeks the basis for global citizenship in the movements to limit corporate depravity and U.S. militarism worldwide, hoping ironically that the opposition to the current global governance regime will provide that same regime with a stronger basis for legitimacy (Paehlk 15, 200–02). Andrew Moravcsik instead argues that democratic republican governments have often accepted the limitations on sovereignty imposed by international human rights regimes when the gains in reducing domestic political uncertainty—the risk of having a domestic opposition reverse preferred policies—outweigh that compromise (Moravcsik 217–52). Efforts at conceptualizing a “global democracy” are perpetually challenged by the lack of any global, or even international, or even European demos or people (Held 220). Aristotle’s criteria continue to matter in the twenty-first century. It seems difficult to avoid the conclusion that even under the most global of human rights regimes, rights remain inextricably tied to domestic politics and national governments. If there is a role for civil society and popular social movements, their impact must be primarily at the national level, and be differentiated in that impact in different countries and political communities. To be effective beyond national boundaries, they must act in concrete ways in solidarity with brother and sister movements and struggles or with efforts to bring about analogous gains to those already won or being fought for in each other’s national political communities. This means that the struggles, acts of solidarity, and discourses of movements from the pre-globalization era, especially from the immediately preceding era of anti-colonial and analogous movements, are surprisingly relevant to addressing our problems today.

### FERC CP

#### 2 – Regulations cannot create private rights of action.

DOJ ’21 [Department of Justice; February 3; Federal executive department of the United States government tasked with the enforcement of federal law and administration of justice in the United States; *Department of Justice,* “IX. PRIVATE RIGHTS OF ACTION AND INDIVIDUAL RELIEF THROUGH AGENCY ACTION,” <https://www.justice.gov/crt/fcs/T6Manual9>; KS]

The Supreme Court’s Sandoval decision left open the question whether an individual may bring an action under 42 U.S.C. § 1983 to enforce Section 602 regulations. Sandoval, 532 U.S. at 300–01 (Stevens, J., dissenting). A year later, the Supreme Court answered this question in a case brought under Section 1983 to enforce the Family Educational Rights and Privacy Act (FERPA), finding that there is no private cause of action via Section 1983. Gonzaga Univ. v. Doe, 536 U.S. 273, 290 (2002). The issue before the Court was whether a plaintiff could bring an action under Section 1983 to enforce FERPA, even though FERPA created no private right of action. Id. The Supreme Court explained that there is no private right of action: “We have held that ‘[t]he question whether Congress … intended to create a private right of action [is] definitively answered in the negative’ where a statute by its terms grants no private rights to any identifiable class.” Id. at 283-84 (citing Touche Ross & Co. v. Redington, 442 U.S. 560, 576 (1979)). Following Sandoval and Gonzaga, a majority of circuits have held that where a statute does not confer a private enforceable right, regulations promulgated under the statute cannot create a private right of action.[3] Therefore, the regulations promulgated under Section 602 are unenforceable via a private action under Section 1983.

#### 3 – No private right of action or treble damages – Vaheesan & Gorodetsky say only private right of action create sufficient deterrence.

Hovenkamp ’12 [Hebert; December 21; Ben V. & Dorothy Willie Professor of Law, University of Iowa; *Penn Law: Legal Scholarship Repository;* “Antitrust and the 'Filed Rate' Doctrine: Deregulation and State Action,” <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2853&context=faculty_scholarship>; KS]

Speaking through Justice Brandeis, the Supreme Court held in Keogh that although the Interstate Commerce Act did not exempt railroads from antitrust liability, a private plaintiff may not recover treble damages based on an allegedly monopolistic tariff rate 3 filed with the ICC. Keogh very likely grew out of Justice Brandeis's own zeal for regulation and his concern for the protection of small business—in this case, mainly 4 shippers whom he felt were protected from discrimination by filed rates. The Keogh doctrine served to absolutize regulated rates by making them nearly immune from collateral attack. Under various degrees of deregulation, the doctrine makes little sense.

Justice Brandeis gave four reasons for this rule, each of which was later criticized by Judge Friendly (although he ultimately followed Keogh) in the Square D case. First, Justice Brandeis doubted the need for an antitrust remedy, for Interstate Commerce Act §85 gave shippers injured by illegal filed rates their actual damages plus attorney's fees. However, Judge Friendly pointed out that antitrust damages are often available to those with remedies under other bodies of federal law.7

Moreover, no remedy would be available from the ICC for an approved rate that had in fact been the product of an earlier conspiracy. And increasingly under deregulation, competition has determined reasonableness.8

Second, Justice Brandeis emphasized that the filed rate was legal for all purposes and not to be “varied or enlarged by either contract or tort of the carrier.”9 Granting an antitrust damage remedy to some shippers would result in an arbitrarily discriminatory rate structure inconsistent with the purpose of the Interstate Commerce Act to prevent rate discrimination among shippers. Even if every shipper brought an action, the net rates would be discriminatory “unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief.”10 But Judge Friendly pointed out that modern class actions increase the likelihood that all shippers affected by a monopoly rate can be joined and receive uniform relief and that the Brandeis argument proves too much. In all cases, one who recovers treble damages from a supplier receives a lower net price than those who do not. This puts the successful plaintiff in a favored position over the one who was equally injured but who failed to litigate or did so unsuccessfully.11

Third, Justice Brandeis noted that antitrust damages depend on proof that the rate paid exceeded the hypothetical rate that would have prevailed in the absence of the illegal conduct and that this hypothetical rate would have been approved by the ICC. What the ICC would have approved is a question better determined, at least initially, by the Commission rather than by the courts.12 But antitrust damages, far from forcing any particular rate on the ICC, merely reflect an estimate of what the price would otherwise have been­—neither more nor less accurately than in antitrust cases generally.13 Nor are damages necessarily more intrusive on agency processes than the antitrust injunctions available to private parties.15

Finally, Justice Brandeis believed that a shipper would not really be injured by an illegal rate that applied equally to its competitors, for all of them would then simply pass on the overcharge to their customers. The loss they actually absorbed would be purely speculative. But subsequent antitrust rulings have allowed those who pay an illegal overcharge to recover it (trebled) whether or not they passed it on.16 In any event, even if shippers in competition with one another are not injured significantly, the larger injury would accrue to consumers who would ultimately pay more for goods or services delivered by common carriers, or produced with energy supplied by price-regulated utilities.

The Supreme Court's Square D decision conceded that Keogh may have been “unwise as a matter of policy,”17 but reaffirmed it nonetheless on the ground that Congress had had ample opportunity to overturn it but had not done so.18 Since then the Supreme Court and lower courts have persisted in applying the doctrine and have even broadened its scope.

The implications of Keogh and Square D are that overcharge actions by consumers based on claims that a “filed” rate19 constitutes an antitrust violation will be dismissed. The rate must merely be filed and technically approved by the agency. It need not have been actively reviewed for accuracy or public interest considerations—indeed, it need not have been received at all in any meaningful sense.20 The doctrine operates as a rule against collateral attack: once filed, a rate may not be collaterally attacked in the courts. However, an objector may be able to ask the regulatory agency to review a rate within its jurisdiction, considering the objection.21 Of course, that proceeding would not be in antitrust and would not provide treble damages and attorney's fees as an inducement.

#### 4 – FERC lack experience and expertise – rates may seem reasonable to the agency, but are the result of a price-fixing regime.

Gorodetsky ‘9 [Julia; Winter; Corporate securities lawyer for Andrews Kurth LLC; *Tulane Environmental Law Journal,* “Analogy By Necessity: The Filed Rate Doctrine and Judicial Review of Agency Inaction,” <https://www.jstor.org/stable/pdf/43294073.pdf?refreqid=excelsior%3A40dc35292abcd134d36ab5a0d941bbc6>; KS]

Unfortunately, the actions by the regulators are very troubling. FERC's failure to detect market manipulation in California stems from the agency's general lack of familiarity with deregulation and market- based tariffs monitoring.159 FERC has extensive expertise with cost-of- services rates, but market-based tariffs are very different.160 Thus, while FERC has the expertise to determine just and reasonable cost-of-service rates, it lacks similar expertise in determining which market-based rates are just and reasonable.161 Further, FERC has failed to make the requisite findings to address this problem. Until recently, FERC had never taken upon itself to devise rules and parameters for efficient markets.162

Thus, judicial deference to FERC's expertise in the context of market-based tariffs is unwarranted because the agency lacks both experience and expertise in the subject matter. Further, FERC is not equipped with the proper jurisdictional authority to retroactively remedy the claims resulting from tariffs FERC itself has found to be unfair and unreasonable.163 Given the situation, judicially enforced antitrust laws would be more efficient in addressing potential market power manipu- lation. Unlike FERC, courts possess a solid and constantly evolving expertise in dealing with competitive markets.164 Further, courts are more responsive than agencies to legislative actions aimed at remedying potential market power abuse. Also, courts can issue retroactive remedies.165

During California's crisis, FERC was confronted by a market which operated extremely fast and which was not structurally competitive.166 Further, FERC was faced with "aggressive traders and generators primed to find and use loopholes in the protocols to increase their companies' profits and their personal bonuses.”167

FERC, however, did not take these competitive market realities into account. It analyzed the filed market-based rates by looking at the market share of the regulated utility under the faulty assumption that insufficient market share effectively denies the potential for market manipulation.168 FERC assumed that generators with market shares of less than twenty percent were incapable of exercising market power.16 However, the numbers employed by FERC were erroneously borrowed from the measures used by DOJ and FTC in analyzing a firm's market power in nonelectricity markets.170 The unique characteristics of the electricity market confer market power on a utility with market share as small as one percent during peak hours of demand.171

The lack of synchronization between retail and wholesale rates, which contributed greatly to the California crisis, further highlight FERC's inexperience with market-based rates. It also shows the income- patibility between the filed rate doctrine and maintenance of a properly functioning competitive market.

When California froze its retail prices, it assumed that FERC would impose much lower wholesale prices during the period of transition to the newly deregulated market.172 If such calculations were correct, the "headroom" between retail and wholesale prices would have allowed utilities to recover costs following the state-ordered unbundling.173 This assumption proved to be a serious miscalculation on the part of the state.174 When the wholesale prices soared, Pacific Gas and Electric Company started to accumulate massive debts and eventually filed for bankruptcy, unable to recover costs in the retail market.175

While the state retail market based its rate calculation on a mistaken assumption in regards to wholesale rates, FERC's wholesale rates were approved based on retail tariffs.176 FERC required that wholesale seller either show that they lacked market power or that they took measures to mitigate such power in order to have their rates approved.177 One of the "measures" taken by the wholesale sellers was to successfully claim that the retail market rate freeze would prevent them from passing higher costs to the consumers.178 However, FERC's decision to approve these wholesale rates, no matter how faulty, was immune from judicial review pursuant to the filed rate doctrine.179 In Pacific Gas & Electric Co. v. Lynch, the California district court held that FERC was not "obligated to adjust wholesale rates to harmonize with retail rates," even if FERC did rely on the state retail price freeze in its initial calculation of market- based rates.180

Further, FERC's authority to impose penalties only extends to ordering prospective refunds for rates not found to be "just and reasonable.”181 FERC cannot administer any other monetary penalties against violators.182 Thus, FERC is not effective in policing deregulated markets and deterring future violations.183 Further, the "just and reasonable" rate standard does not account for the fact that the market- based rate may seem "reasonable" to FERC yet be a result of a price- fixing conspiracy, and thus higher than the rate dictated by free market competition.184 Thus, antitrust violations could pass FERC's review unnoticed.

FERC's Order, issued on December 15, 2000, in response to California's electricity crisis, revealed the extent of FERC's inability to discipline the wholesale market.185 The Order announced that FERC would not intervene and stated two major conclusions.186 One acknowledged that FERC was under the obligation to ensure that wholesale prices were just and reasonable and that the state's current wholesale rates, all previously filed and approved by the FERC, were neither just nor reasonable.187 That conclusion notwithstanding, FERC refused to cap the current wholesale prices.188 The second conclusion referred to the demand for retroactive relief, which FERC denied.189 It cited the filed rate doctrine as justification for the assertion that all rates previously found by FERC to be just and reasonable were not eligible for a refund.190

FERC's Order made it clear that the filed rate doctrine applied to cost-of-service and market-based rates alike, thus revealing FERC to be a "paper tiger" incapable of disciplining competitive markets.191 The file rate doctrine became a legal loophole for rampant abuse in the already dysfunctional California market. 192 The Order, coupled with the knowledge that FERC was probably incapable of deterring price and market power manipulation, invited utilities to "game the system at will" by manipulating electrical supply and demand and driving prices upwards.193 Predictably, prices increased substantially, and the general result of the FERC Order was that "[t]he equivalent of outright looting occurred in plain sight.194

The extent of FERC 's lack of expertise in dealing with deregulate market prices was further confirmed by the findings of the Senate Committee on Governmental Affairs staff report in regards to FERC investigation of the Enron scandal.195 The report cited a "shocking absence of regulatory vigilance on FERC's part and a failure to structure the agency to meet the demands of the new, market-based system that the agency itself has championed.”196

### Section 5 CP

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

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

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

#### Guidance gets rolled back AND even the possibility wrecks certainty.

Dr. Simon F. Haeder 20, Assistant Professor of Public Policy at Penn State University, PhD in Political Science from the University of Wisconsin-Madison, and Dr. Susan Webb Yackee, Director of the La Follette School of Public Affairs and a Collins-Bascom Professor of Public Affairs and Political Science at the University of Wisconsin-Madison, PhD in Political Science from the University of North Carolina at Chapel Hill, “Policies that Bind? The Use of Guidance Documents by Federal Agencies”, Journal of Health and Human Services Administration, Volume 43, Issue 2, Fall 2020, p. 90-91

Given these distinctions, there are significant advantages and disadvantages to using guidance documents as policy tools. For instance, as suggested above, guidance document development is often seen as a faster, more flexible, and less proceduralized approach to policymaking than notice and comment rulemaking (Gluck et al., 2015; Mantel, 2009; Shapiro, 2014). Some observers may interpret these factors as advantages because they allow agencies to respond more nimbly to changing political circumstances or technical and scientific innovations. Less benevolent explanations may see the speed, as well as the reduced participation requirements attached to guidance documents, as a means to shield public policy development from necessary political oversight and public participation. Similarly, the ease of issuing guidance may be seen as an advantage on the one hand by allowing presidents to unilaterally move policy in the face of gridlock. However, on the other hand, as the bathroom guidance example above suggests, future presidents can relatively easily rescind previous guidances. As a result, one of the “costs” attached to policymaking via guidance documents is that they can result in a more volatile regulatory environment and with less certainty and predictability for regulated entities. In contrast, it is much more difficult to rescind a notice and comment rule is because it requires an agency to go through the full regulatory process (Kerwin & Furlong, 2018). Another way to consider the advantages and disadvantages of policymaking via guidance documents is to look at the human capital expenditures attached to these tools. As Shapiro (2014, 582) writes, policymaking via notice and comment rulemaking is much more “costly.” Agencies have to develop a robust written record to establish a political and, oftentimes, scientific basis for new regulations (West, 1995). Thus, the notice and comment process—which is closely policed by the courts—is intense in terms of agency resources. In contrast, the guidance document development process often requires less in terms of a written record and justification (Romano, 2019). This may be seen as a benefit to some, but to others, who believe that agency policymaking ought to only take place when a fully developed evidentiary record undergirds that decision-making, it may be seen as problematic.

#### No follow on.

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

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

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

#### 1 – The Court explicitly found that there is no PROA in Section 5 of the FTCA – suits under the CP would get laughed out of court

DALJ 74 [I cannot find the actual author of this article but it was published in the Duke Administrative Law Journal; 1974; Duke Administrative Law Journal; “Judicial Refusal to Imply a Private Right Of Action under the FTCA,” vol. 1974, p. 506-525, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2490&context=dlj]

The District of Columbia and the Ninth Circuit Courts of Appeals have recently held in Holloway v. Bristol-Myers Corp.' and Carlson v. Coca-Cola Co.2 that private parties, be they individuals or consumer interest groups, cannot maintain actions to vindicate rights asserted under the Federal Trade Commission Act (FTCA).3 In Holloway, two individuals and two consumer groups brought a class action in federal' district court4 against Bristol-Myers, the manufacturer of Excedrin, a non-prescription analgesic compound. The plaintiffs' claim was based primarily5 on FTCA provisions which prohibit unfair or deceptive trade practices" and false advertising which induces or is likely to induce the purchase of drugs.7 Specifically, the plaintiffs alleged that Bristol-Myers had made false statements in claiming that Excedrin is more than twice as effective an analgesic as aspirin and that this claim had been substantiated by a study of pain among patients in a hospital. The district court dismissed the action, holding that the FTCA does not create a right of action for private parties.8 In affirming the lower court's decision, the court of appeals concluded that both the history and structure of the FTCA indicate that the right to enforce its provisions lies solely in the administrative agency created by that Act, the Federal Trade Commission (FTC).9 Carlson, the second of these cases, was a class action brought against Coca-Cola and Glendenning Companies, Inc., its advertising agency, alleging that a nationwide promotional game, Big Name Bingo, was deceptively structured so as to deprive many participants of prizes to which they were entitled under the published rules of the game.10 Plaintiffs' claim that the scheme therefore constituted a violation of section 5 of the FTCA was rebuffed by both the district court and a majority of the Court of Appeals for the Ninth Circuit, which held that since no private right of action exists under the FTCA, the plaintiffs had failed even to establish the requisite basis for federal jurisdiction." In a vigorous dissent, however, Judge Solomon argued that even though the Act does not expressly provide for a private right of action, the court should have implied such a right "based on the established principle that a party has a cause of action when damaged by conduct that violates a statute enacted for his protection. '12

#### 3 – Courts have comparative institutional competence and jurisdiction to order refunds and treble damages.

Rossi ‘9 [Jim; November; Harry M. Walborsky Professor and Associate Dean of Research, Florida State University College of Law; *Administrative & Regulatory Law News*, “Why the Filed Rate Doctrine Should Not Imply Blanket Judicial Deference to Regulatory Agencies,” <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1319065>; KS]

As regulators implement competition policy for formerly rate-regulated services, judicial enforcement of remedies for market abuses based on violations of antitrust, tort and contract law can play an important role in protecting public welfare. While courts do not have the same degree of expertise that an agency possesses, courts do have some a comparative institutional competence in implementing enforcement regimes that could benefit competitive markets. Unlike regulatory agencies, courts do not depend on budget allocations or legislative delegations of specific regulatory jurisdiction. Courts have wider remedial authority and discovery powers than do regulatory agencies, and also have greater political independence.

Overbroad application of the filed rate doctrine is especially inappropriate where regulators have limited jurisdiction. For example, in 2004, a U.S. district court in Texas applied the filed rate doctrine to preclude antitrust claims for illegal conduct in deregulated wholesale power markets against numerous power supply companies. Texas Commercial Energy v. TXU Energy, Inc., 2004-2 Trade Cases ¶ 74,497, Util. L. Rep. ¶14,512 (S.D. Tex. 2004) (S.D. Tex., Corpus Christi 2004), affirmed 413 F.3d 503 (5th Cir. 2005). In declining to consider the merits of the antitrust claims, the court reasoned that the agency charged by the state legislature with overseeing the Texas electricity market, the Texas Public Utilities Commission (TPUC), possesses the “institutional competence to address rate-making issues in the [] market, one of the principles underlying the filed rate doctrine.” However, a regulator could only possess institutional competence if it also has the authority to act; at the time Texas had no express or implied private right of action for injured purchasers, and TPUC also lacked authority to order refunds and damages.

To the extent courts allow the mere filing of tariffs to presumptively determine whether a court will entertain the merits of claims of anticompetitive conduct, the filed rate doctrine invites even more radical deregulation than either Congress or the regulatory agencies accepting tariffs would prefer – that is, markets absent antitrust and common law remedies. Surely, Congress did not intend this in the Federal Power Act or in subsequent energy legislation. To the extent the filed rate doctrine privileges private choice over assessment of the public interest in choosing the mechanism for enforcement, courts should refuse to apply it automatically to preclude judicial enforcement.

### States CP

#### Preemption precludes any deviation.

Ikuta ’18 [Sandra S. Ikuta; January 22; Federal Court of Appeals Judge on the Ninth Circuit; Westlaw, “CallerID4u, Inc. v. MCI Commc'ns Servs. Inc.,” 880 F.3d 1048]

It has long been established that the tariff requirement of § 203 preempts state law. Because § 203 was modeled after similar provisions of the Interstate Commerce Act (ICA), “and share[s] its goal of preventing unreasonable and discriminatory charges,” the Supreme Court concluded that “the century-old ‘filed rate doctrine’ associated with the ICA tariff provisions applies to the Communications Act as well.” Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc., 524 U.S. 214, 222, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998). As applied to state law, the filed rate doctrine “is a form of deference and preemption, which precludes interference with the rate setting authority of an administrative agency.” Wah Chang v. Duke Energy Trading & Mktg., LLC, 507 F.3d 1222, 1225 (9th Cir. 2007). Under the doctrine, “the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext.” Cent. Office Tel., 524 U.S. at 222, 118 S.Ct. 1956 (quoting Louisville & Nashville R.R. Co. v. Maxwell, 237 U.S. 94, 97, 35 S.Ct. 494, 59 L.Ed. 853 (1915)). The doctrine “embodies the policy which has been adopted by Congress in the regulation of interstate [telecommunications services] in order to prevent unjust discrimination.” Id. (quoting Maxwell, 237 U.S. at 97, 35 S.Ct. 494).

7 When the filed rate doctrine applies, it generally precludes a regulated party from obtaining any compensation under other principles of federal or state law that is different than the filed rate. See Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156, 163, 43 S.Ct. 47, 67 L.Ed. 183 (1922). In Keogh, a manufacturer claimed it was entitled to damages under the Sherman Act caused by certain carriers that had conspired to set an unreasonably high filed rate. Id. at 160, 43 S.Ct. 47. The Court rejected this argument, reasoning that the rate approved by the Interstate Commerce Commission (ICC) was the legal rate and could not be “varied or enlarged by either contract or tort of the carrier.” Id. at 163, 43 S.Ct. 47. “This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention [sic] of unjust discrimination—might be defeated.” Id. The Court reasoned that if one manufacturer was able to recover for damages resulting from paying the filed rate, it effectively received a rate different than the filed rate, and would have a preference over its competitors. Id.

8 The Supreme Court later applied the doctrine to preclude state courts from awarding damages under state law, where doing so would interfere with the exclusive rate-setting authority of federal administrative \*1054 agencies. “In this application, the doctrine is not a rule of administrative law designed to ensure that federal courts respect the decisions of federal administrative agencies, but a matter of enforcing the Supremacy Clause.” Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 963, 106 S.Ct. 2349, 90 L.Ed.2d 943 (1986). In Arkansas Louisiana Gas Co. v. Hall, for example, the Supreme Court overturned a state court’s award of damages for breach of contract to federally regulated sellers of natural gas. 453 U.S. 571, 584, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981). The sellers had filed rates with the Federal Energy Regulatory Commission (FERC), as required under federal law, but alleged that they were entitled to a higher rate under a contract with their customer than the rate they had filed with FERC. Id. at 573–74, 101 S.Ct. 2925. The state court agreed, and held that the sellers were entitled to damages for breach of contract, notwithstanding the tariff-filing requirements and the filed rate doctrine. Id. at 575, 101 S.Ct. 2925. The state court reasoned that if the sellers had filed rate increases with FERC based on their negotiated contracts, the rate increases would have been approved. Id. The Supreme Court reversed, explaining that, in order to award damages, the state court had to “speculat[e] about what the Commission might have done had it been faced with the facts of this case.” Id. at 578–79, 101 S.Ct. 2925. Such an approach, the Court concluded, “would undermine the congressional scheme of uniform rate regulation” by allowing “a state court to award as damages a rate never filed with the Commission and thus never found to be reasonable within the meaning of the Act.” Id. at 579, 101 S.Ct. 2925. Because “under the filed rate doctrine, the Commission alone [was] empowered to make that judgment,” the Supreme Court concluded that the state court had “usurped a function that Congress has assigned to a federal regulatory body,” in violation of the Supremacy Clause. Id. at 582, 101 S.Ct. 2925.

The Supreme Court has consistently applied the filed rate doctrine to preclude the award of any rate other than the filed rate, even where doing so has resulted in harsh consequences. In Maislin Industries, U.S., Inc. v. Primary Steel, Inc., for example, the Supreme Court considered whether the bankruptcy trustee for a motor common carrier could collect undercharges for the difference between the rate the motor common carrier had negotiated with a shipper and the higher rate the motor common carrier had filed with the ICC. 497 U.S. 116, 122–23, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990). The Supreme Court held that the trustee could collect undercharges because the filed rate alone governed the legal relationship between the carrier and the shipper. The Court explained that “[i]n order to render rates definite and certain, and to prevent discrimination and other abuses, the statute require[s] the filing and publishing of tariffs specifying the rates adopted by the carrier, and ma[kes] these the legal rates, that is, those which must be charged to all shippers alike.” Id. at 126, 110 S.Ct. 2759 (alterations in original) (emphasis in original) (quoting Az. Grocery Co. v. Atchison, T. &S.F. Ry. Co., 284 U.S. 370, 384, 52 S.Ct. 183, 76 L.Ed. 348 (1932)). Strict adherence to the filed rate doctrine was necessary to prevent carriers from “misquoting” rates, as a means of charging different rates to different customers. Id. at 127, 110 S.Ct. 2759. The Supreme Court rejected the shipper’s argument that awarding the filed rate rather than the negotiated rate would give the carrier a windfall, explaining that federal law “requires the carrier to collect the filed rate.” Id. at 131, 110 S.Ct. 2759 (emphasis in the original). Allowing the collection of any other rate would “sanction[ ] adherence to unfiled rates,” thereby “undermin[ing] the \*1055 basic structure of the Act.” Id. at 132, 110 S.Ct. 2759.

9In short, § 203 and the accompanying filed rate doctrine preempts state law claims that conflict with the rate-setting authority of the FCC. Courts have applied the filed rate doctrine strictly in order to ensure that Congress’s goal of uniformity and reasonableness in rates, “which lies at ‘the heart of the common-carrier section of the Communications Act,’ ” is not undermined. Cent. Office Tel., 524 U.S. at 223, 118 S.Ct. 1956 (quoting MCI Telecomms., 512 U.S. at 229, 114 S.Ct. 2223).

### Court Politics

#### Conservatives will destroy the admin state to resuscitate *Lochner*, even if it takes a while and it’s not through one case.

Needham ’21 [Lisa; Adjunct Professor at Mitchell Hamline School of Law; December 7; Balls and Strikes, “The Supreme Court’s Slow-Motion Assault on Modern Government, Explained,” https://ballsandstrikes.org/legal-culture/west-virginia-v-epa-preview-qa/]

With a 6-3 supermajority on the Supreme Court, the conservative justices have jumped feet-first into their favorite culture wars this term, taking on cases that could allow them to eviscerate the constitutional right to abortion care and empower millions of people to carry guns in public. Beyond those flashy cases, though, those same justices have been methodically teeing up another legal revolution that will entail profound consequences: the slow-motion destruction of the modern administrative state.

Later this term, the Court will hear oral argument in West Virginia v. EPA, a challenge to the Environmental Protection Agency’s authority to regulate greenhouse gas emissions that will take place even as unchecked greenhouse gas emissions threaten to plunge the planet into a heat-induced death spiral. This has long been a pet project for the conservative legal movement’s luminaries, most notably Neil Gorsuch, and it’s going to be really, really, terrible when they succeed.

Below, we answer all your most pressing questions about how a significant amount of policymaking power currently vested in nonpartisan subject matter experts could soon be in the hands of six life-tenured reactionaries who are accountable to no one.

What is the “modern administrative state,” exactly?

The Constitution tasks Congress with the work of passing laws, but the executive branch is charged with enforcing those laws. Executive agencies like the EPA or the United States Department of Agriculture are empowered by Congress to create regulations to implement the laws Congress passes. The administrative state is sprawling, and includes both the 15 Cabinet-level agencies and hundreds of smaller agencies, too.

Why do conservative judges say they don’t like agencies?

The fancy legal justification revolves around the idea that Congress, as the democratically-elected body, should be the entity that oversees every aspect of the lawmaking process. Justice Clarence Thomas covered this at length—way too much length, including a trip back to discussing English law at the time of King Henry VIII—in a concurring opinion in a 2015 case about Amtrak. The Framers, he explained, drew sharp distinctions between the legislative and executive branches, from which America has now “deliberately departed” by “bowing to the exigencies of modern government.”

On its face, this seems relatively uncontroversial, in a sort of high school civics way. But it’s absurd and unworkable in practice, precisely because of the “exigencies of modern government.”

Why? Why not just have Congress do everything?

As you may have noticed, Congress is completely unable to get anything substantive done. Most major federal environmental laws came in a flurry in the early 1970s, but few of them have been routinely updated in the decades since. The Clean Air Act, for example, hasn’t had a major revision since 1990. Leaving the details of policymaking in lawmakers’ hands would leave us with no policy details at all.

Agencies are also nimbler than Congress. Legislation takes time, requires consensus-building, and is undertaken by non-experts. Agencies, by contrast, are largely staffed by non-political experts, avoiding the constant churn of faces on Capitol Hill that accompany each biannual rejiggering of power. The need for this sort of technical, specialized knowledge in the lawmaking process is one of those “exigencies of modern government” that the Framers could not have anticipated. An understanding of whether toxic substances are to be measured under a given statue using milligrams per liter or parts per million was not exactly on James Madison’s mind when he was writing the Federalist Papers.

west virginia v epa

Photo by George Frey/Getty Images

So when did this all start?

As with many things that make conservatives upset, President Franklin D. Roosevelt and the New Deal. Lifting the country out of the Great Depression required a massive infusion of government money and government oversight—hence, the increased need for agencies to oversee those processes. The New Deal era brought with it health and safety regulations and minimum wages laws, undercutting several decades of allowing companies to do whatever they wanted when it came to worker safety and pay.

Because agencies impede upon the rights of employers to do whatever they want vis-a-vis employees, conservatives view them dimly and have long pined for a return to that brand of unfettered capitalism, Justice Samuel Alito has been the most obvious cheerleader, praising on a 2018 opinion the early 20th-century era of “liberty to contract”—a euphemism for barring the government from imposing regulations on employers. It was the law of the land until 1937 when the Supreme Court upheld the constitutionality of federal minimum wage laws in West Coast Hotel v. Parrish.

What’s stopping conservatives from weakening the administrative state now?

Great question. The answer is two judge-made legal doctrines that govern when the federal judiciary, in theory, must defer to agencies’ interpretations of statutes: Chevron deference and Auer deference.

Chevron deference arose out of a 1984 Supreme Court case that is still important enough to have its own page on the Department of Justice’s web site. The case, Chevron v. Natural Resources Defense Council, was about how federal courts should review an agency’s construction of a statute that Congress gave it the authority to administer. Under the standard announced in Chevron, courts have to defer to the agency’s read as long as it is reasonable and Congress did not otherwise address it. Auer applies the same concept to regulations, requiring courts to give deference to agency interpretations of their own regulations.

Conservatives, as you might guess, don’t care for either of these doctrines. But instead of working to weaken them, many conservative judges and legal scholars are fighting to throw them out altogether, using a third concept known as the non-delegation doctrine. According to them, all congressional delegations of lawmaking authority are inherently suspect—an idea that, if it were to gain more traction, would empower judges to veto almost any agency decision they don’t like. This surfaced recently when a Trump-appointed federal judge issued a nationwide injunction against the healthcare worker vaccine mandate, arguing that Congress cannot delegate this sort of complete power to an executive agency. To let an agency create a vaccine mandate, he argued, would give them the authority “to do almost anything they believe necessary.”

Which Supreme Court justices don’t like deference?

All the usual suspects. In a speech to the Federalist Society in 2016, Alito criticized the EPA’s attempts to regulate greenhouse gas emissions for, in his words, “erasing the numbers that Congress wrote” and writing in “numbers that were more to its liking.” Thomas has taken swings at Chevron and Auer in multiple cases, writing that agency deference “precludes judges from exercising that judgment, forcing them to abandon what they believe is the best reading of an ambiguous statute in favor of an agency’s construction.” Justice Gorsuch thinks judges who defer to agencies are abdicating their job responsibilities; as a judge on the D.C. Circuit Court of Appeals, Kavanaugh complained that it encouraged aggressiveness on the part of the executive branch. (God forbid any of the big brains of the Supreme Court ever have to defer to actual scientists and policy experts.)

Okay, but why? Why do conservatives hate the administrative state so much?

Because regulations make it harder for the unfathomably rich people who prop up the Republican Party and the conservative movement to remain unfathomably rich. Whether they restrict where coal mining can occur or protect essential workers during the pandemic, regulations protect corporate giants from getting to do whatever they want without facing consequences.

Second, and perhaps even more importantly, weakening the administrative state shifts power to the federal judiciary. Given that conservatives control the Supreme Court and six of the federal courts of appeals, this is exactly the result they want: If agencies are no longer owed any deference, the life-tenured ideologues on those courts get to decide what the laws and regulations mean—or, perhaps, to throw out the whole concept of binding regulations altogether.

So what’s going to happen this Supreme Court term?

Probably bad things! West Virginia v. EPA, which the Court will hear this term, is about challenges to the EPA’s ability to regulate carbon dioxide emissions from power plants—a lengthy regulatory fight spanning the Obama and Trump administrations. The Obama administration’s plan set forth detailed targets for each state but was put on hold by the Supreme Court in 2016. Trump replaced it with his own plan calling for less-comprehensive changes, but again, the courts stepped in: The D.C. Circuit Court of Appeals blocked that plan earlier this year.

A decision in favor of the various challengers in the four now-combined cases could gut the ability of the EPA to enforce the Clean Air Act when it comes to greenhouse gases. And the conservatives have lots of routes to get to that result: Four justices—Gorsuch, Alito, Thomas, and Kavanaugh—have already made their positions on the subject clear. Chief Justice John Roberts, who often casts himself as the conservative wing’s more moderate member, has written things like “A court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference.” During Justice Amy Coney Barrett’s confirmation hearings, she refused to answer a question about climate change because, she explained, doing so would amount to “soliciting an opinion” about “a matter of public policy” rather than acknowledging that climate change is a scientific fact. None of this bodes well for people who think breathing clean air is an important goal for which government should strive.

What would this mean beyond West Virginia v. EPA?

If agencies are less able to issue binding regulations, as Thomas and company would prefer, a lot more, in theory, could be on the chopping block: workplace safety rules, food additives rules, building materials rules, and so on. More will be left to a dysfunctional, gerrymandered Congress—and, if some piece of progressive legislation that delegates power to agencies does somehow sneak through, there remains the ever-present possibility of a judicial veto. This is the future the conservative legal movement has long dreamed of. They are closer than ever to realizing it.

#### Antitrust is invisible.

Baum ’21 [Lawrence and Neal Devins; July; Political Science Professor at Ohio State University; Law Professor at William & Mary; the Company They Keep: How Partisan Divisions Came to the Supreme Court, “The Supreme Court and Elites,” Ch. 2, p. 29–30]

For assessment of the linkage between public opinion and the Court’s decisions, awareness of decisions is more important than basic knowledge about the Justices’ names or the Court’s institutional attributes. It is clear that the great majority of Supreme Court decisions are essentially unknown to the general public.72 These decisions get little coverage in the news media,73 and the public receives little information about them through other channels. As a result, a great deal of the Court’s work is essentially invisible to the public. This is especially true of the mass public; polling data suggest that elites are far more aware of the Court and its handiwork.74

(p.30) This point should be underlined. Decisions in fields such as antitrust and patent law can have powerful effects on the economic system, but there is little reason to think that there is much awareness of those decisions among the general public. Even the unusually visible and salient Microsoft antitrust trial in 1998 and 1999 received attention from only a small proportion of the public.75

Another example, more directly relevant and more striking, concerns the Rehnquist Court’s revival of state powers under the Constitution. Between 1992 and 2006, the Court invalidated eleven federal statutes on federalism grounds.76 In doing so, it shifted the balance between the federal government and the states substantially. These decisions were the subject of considerable commentary in law reviews, and they received attention in the elite news media.77 Still, those decisions appeared to have low political salience. Of 229 Gallup Poll questions that explicitly referred to the Supreme Court during the period in which the decisions were handed down, there was not a single question about these decisions—or, for that matter, about any other decisions in which the Court invalidated federal statutes.78 The choice not to ask such questions reflected the reality that few voters knew much about these decisions.

Even when people are aware of decisions, they do not necessarily have strong views about the desirability of those decisions. They may be ambivalent, or the issues in question may not be salient to them. When either condition exists, Justices would not seem to have reason to fear adverse public reactions to their rulings.79

#### No triple 3 court.

Lithwick ’21 [Dahlia; December 1; JD at Stanford, clerked for Judge Procter Hug on the United States Court of Appeals for the Ninth Circuit; Slate, “SCOTUS Will Gaslight Us Until the End,” https://slate.com/news-and-politics/2021/12/scotus-will-gaslight-us-until-the-end.html]

Despite all of the precious actions of Roberts and Barrett and, yes, Kavanaugh, this was never a 3–3–3 court. It was a 6–3 court of which half of that six are sometimes slightly cautious about the rates at which they are willing to push their own ideological agendas under the threat of public illegitimacy. It seems that the issue on which they are prepared to do so is, as it has always been, women’s health and safety and equality and dignity.

But even as they do it, they will hold on to this idea that they have been moderate until the end. After all, pro-choice senators confirmed them. Academics at Ivy League law schools promised they believed in precedent. And when they rule for Mississippi’s 15-week ban and overturn (or hollow out) Roe, they’ll have cover to justify it. They’ll probably point to Texas’ S.B. 8, a six-week ban that has already been in effect for three months, which these same justices allowed to take effect when they didn’t have to sign their names to an order. But they’ll strike down that one, declaring that Texas cannot undermine judicial supremacy, and a six-week ban tied to vigilante justice is too, too much. And when they do, it will be yet another way for them to pretend to be scrupulously neutral on abortion and deeply worried about workable tests while they are really sailing through their own personal 24-hour drive-thru Overton window.

When that happens, you will hear more about the much-vaunted 3–3–3 court and its incremental moderates. That too will be gaslighting. Your call whether you want to fall for it.

#### Conservatives only care about their friends.

DeVeaux ’21 [Amelia Thomson-DeVeaux; 2021; citing Lawrence Baum, a political science professor at Ohio State University, Neal Devins, a professor of law and government at the College of William & Mary, and Michael Salamone, a political science professor at Washington State University; 538, “Why The Supreme Court Probably Doesn’t Care What Most Americans Think About Abortion Or Gun Rights,” https://fivethirtyeight.com/features/why-the-supreme-court-probably-doesnt-care-what-most-americans-think-about-abortion-or-gun-rights/]

It's also possible that Supreme Court justices mostly care about their reputation among a select group of Americans. Baum and Neal Devins, a professor of law and government at the College of William & Mary, have argued that Supreme Court justices are more interested in how they’re regarded by elites.

This is significant for understanding why the conservative justices’ behavior has become more predictably right-wing. Baum and Devins argue that as elites have grown more politically polarized, the justices’ partisan tendencies have hardened as well. In other words, the people influencing the conservative justices' thoughts are probably much more right-wing than the public at large. On top of that, some of the justices may be willing to risk backlash for the outcome they believe is correct. “Is legitimacy something that’s enough to get a justice to move away from something [he or she] strongly feels?” Baum told me. With the possible exception of Roberts, who is particularly focused on the court’s image, Baum doesn’t think the public’s views will be enough to sway a justice who cares deeply about the issue they’re deciding.

# 1AR

## Energy ADV

## Economy ADV

#### Nuke wars cause extinction.

Trevithick and Rogoway ’19 [Joseph and Tyler; February 27; Military Analyst, M.A. in Conflict Resolution from Georgetown University, B.A. in the History and Policy of International Relations at Carnegie-Mellon University; Defense Journalist; The Drive, “Yes, India And Pakistan Could End The World As We Know It Through A Nuclear Exchange,” <https://www.thedrive.com/the-war-zone/26674/yes-india-and-pakistan-could-end-the-world-as-we-know-it-through-a-nuclear-exchange>; RP]

In addition, Nuclear Winter is just one of the potential things that might happen following a nuclear exchange between the longtime foes. A detonation of dozens of nuclear weapons, even small ones, would throw hazardous nuclear fallout [into the air](http://thedrive.com/the-war-zone/19450/u-s-training-for-arctic-nuclear-satellite-disaster-amid-russian-weapons-developments) that, depending on the weather pattern, could carry that material [far and wide](https://futureoflife.org/background/us-nuclear-targets/?cn-reloaded=1#nukemap), causing both near- and short-term health impacts. The various [ground zeroes](https://nuclearsecrecy.com/nukemap/) themselves would be irritated and potentially hazardous for many years to come.

Depending on where the detonations occur, a nuclear exchange could potentially cut people off from critical water and food supplies, putting increased and potentially unsustainable strains on uncontaminated areas.  After the Chernobyl nuclear power plant, situated in Ukraine, [melted down and exploded](https://en.wikipedia.org/wiki/Chernobyl_disaster) in 1986, authorities established a 1,000 square mile restricted access "[exclusion zone](https://en.wikipedia.org/wiki/Chernobyl_Exclusion_Zone)" that remains in place today.

There would also be a major danger of second-order "spillover" effects, as individuals fled affected areas, putting economic and political strains on neighboring regions. This could inflame existing tensions not directly related to the inter-state conflict between India or Pakistan or lead to all new and potentially violent competition for what might already be limited resources. India has already threatened to [weaponize water access](https://www.nytimes.com/2019/02/21/world/asia/india-pakistan-water-kashmir.html) in its latest spat with the Pakistanis.

Any serious impacts on food and water supplies, or other economic upheavals as a direct or indirect result of the conflict, would have cascading impact across South Asia and beyond, as well. The very threat of a potential India-Pakistan war of any kind already caused [some negative reactions](https://www.cnbc.com/2019/02/27/indian-air-force-plane-crashes-in-kashmir-says-indian-police-official.html) in regional financial markets. Those markets would certainly collapse after an unprecedented nuclear exchange actually occurred, and that is before the long-term physical impacts of such an event would even manifest themselves.

Overall, we are talking about a sudden and dramatic geopolitical, financial, and environmental shift that would change our reality in a matter of hours. Even then, the darkness, both figuratively and literally, that could propagate over the weeks, months, and years would be far more damaging.

How great is the risk?

So far, India and Pakistan have not made any clear indications that the fighting is close to crossing their nuclear thresholds. Pakistan's warnings about the [risks of escalation](http://thedrive.com/the-war-zone/26642/pakistan-promises-retaliation-makes-nuclear-threats-after-indian-jets-bomb-its-territory) seem more calculated to try and prompt India to back down.

India itself has a so-called "no first use" policy, which means it has publicly pledged to use its nuclear weapons only in retaliation to a nuclear strike. However, experts have increasingly called into question whether this is truly the case and whether India might be developing delivery systems more suited to a first strike should there be a need to shift policies.

Pakistan, however, does not have a no first use policy and has insisted on its right to employ nuclear weapons to defend itself even in the face of purely conventional threat. Pakistani officials have, in the past, [specifically cited this policy](https://www.cfr.org/event/promoting-us-pakistan-relations-future-challenges-and-opportunities) as way of deterring India, which has a much larger and in some cases more advanced conventional force, and preventing larger wars.

The concern, then, is that this policy appears to have failed, at least to some degree, with India's strike on undisputed Pakistani territory on Feb. 26, 2019. India, however, did not target Pakistani forces in that instance and exchanges between the two countries have been limited, at least so far, to the disputed Jammu and Kashmir region, where violent skirmishes occur semi-regularly without precipitating a larger confrontation.

We can only hope that the two countries will find a diplomatic solution to this latest conflict and avoid any further escalation. If things were to spiral out of control and lead to the use of nuclear weapons, it would be something that would threaten all of humanity.

#### Clary relies on REE – it’s systemically biased against wars.

Allison ’12 [Paul; 2012; Ph.D., Professor of Sociology at the University of Pennsylvania; Statistical Horizons, “Logistic Regression for Rare Events,” <http://statisticalhorizons.com/logistic-regression-for-rare-events>]

Prompted by a 2001 article by King and Zeng, many researchers worry about whether they can legitimately use conventional logistic regression for data in which events are rare. Although King and Zeng accurately described the problem and proposed an appropriate solution, there are still a lot of misconceptions about this issue.

The problem is not specifically the rarity of events, but rather the possibility of a small number of cases on the rarer of the two outcomes. If you have a sample size of 1000 but only 20 events, you have a problem. If you have a sample size of 10,000 with 200 events, you may be OK. If your sample has 100,000 cases with 2000 events, you’re golden.

There’s nothing wrong with the logistic model in such cases. The problem is that maximum likelihood estimation of the logistic model is well-known to suffer from small-sample bias. And the degree of bias is strongly dependent on the number of cases in the less frequent of the two categories. So even with a sample size of 100,000, if there are only 20 events in the sample, you may have substantial bias.

## FERC CP

#### Agencies lack experience and expertise.

Gorodetsky ‘9 [Julia; Winter; Corporate securities lawyer for Andrews Kurth LLC; *Tulane Environmental Law Journal,* “Analogy By Necessity: The Filed Rate Doctrine and Judicial Review of Agency Inaction,” <https://www.jstor.org/stable/pdf/43294073.pdf?refreqid=excelsior%3A40dc35292abcd134d36ab5a0d941bbc6>; KS]

Despite current judicial deference, FERC's limited authority to impose penalties in deregulated markets, as well as its lack of expertise in competitive markets, makes FERC a poor institution to deter market power abuse and manipulation.247 Thus, unless Congress acts to expand FERC's legislative authority to impose meaningful penalties, the filed rate doctrine will continue to shield violators of the Sherman Act and conceal poorly made administrative decisions from judicial oversight.248 This legislative expansion of punitive authority, however, is unwise, because FERC does not have the much-needed expertise to police the newly deregulated and competitive markets, so the ability to punish effectively will only resolve part of the problem.249

#### Prefer comparative evidence.

Vaheesan ’19 [Sandeep; October 25; Legal director at the Open Markets Institute. Vaheesan previously served as a regulations counsel at the Consumer Financial Protection Bureau, where he helped develop and draft the first comprehensive federal rule on payday, vehicle title, and high-cost installment loans; “MOTION OF OPEN MARKETS INSTITUTE FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT,” <https://static1-squarespacecom.proxy.lib.umich.edu/static/5e449c8c3ef68d752f3e70dc/t/5eaa1d9d2790182e187cc171/1588207017816/19-1678_Documents-as-filed.pdf>; KS]

Second, the full application of the antitrust laws, including through private enforcement, complements FERC market oversight and is necessary to ensure competitive market-based prices in gas and electricity. FERC’s oversight of these markets has important limitations and cannot be counted on to root out all collusive, exclusionary, and other unfair conduct or compensate purchasers harmed by such practices. The enforcement of the antitrust laws, including through lawsuits brought by injured consumers and businesses, is critical to ensuring that the market-based pricing of gas and electricity serves the public.

## Court Politics DA

#### Roberts votes for West Virginia, but his vote is also irrelevant.

King ’21 [Pamela; November 3; reporter; E&E News, “Where Supreme Court justices stand on EPA, climate,” https://www.eenews.net/articles/where-supreme-court-justices-stand-on-epa-climate/]

The chief justice has also indicated that he would favor a rebirth of the nondelegation doctrine.

Roberts has in recent environmental and administrative law cases sided with his liberal colleagues in 5-4 cases. But the addition of Justice Amy Coney Barrett to the court last year means that the court’s liberal wing now needs at least two conservative allies to form a majority.

#### Alito wants to delete EPA authority.

King ’21 [Pamela; November 3; reporter; E&E News, “Where Supreme Court justices stand on EPA, climate,” https://www.eenews.net/articles/where-supreme-court-justices-stand-on-epa-climate/]

Alito

Although legal experts do not expect the justices to use the upcoming climate case to overturn Massachusetts v. EPA, Justice Samuel Alito is among the conservatives calling for the court to revisit that precedent.

The justice, who dissented in the 2007 case, expressed that view in his minority opinion in the 2014 case Utility Air Regulatory Group v. EPA , which said that while the Clean Air Act definition of “air pollutant” includes greenhouse gas emissions, EPA is not required to include them every time the statute mentions air pollutants.

“I believed Massachusetts v. EPA was wrongly decided at the time,” Alito wrote, “and these cases further expose the flaws with that decision.”

#### Thomas is impossible to win.

King ’21 [Pamela; November 3; reporter; E&E News, “Where Supreme Court justices stand on EPA, climate,” https://www.eenews.net/articles/where-supreme-court-justices-stand-on-epa-climate/]

Thomas

Clarence Thomas, the Supreme Court’s most conservative justice, is widely expected to favor reining in EPA’s power to issue climate regulations.

He voted with the dissent in Massachusetts v. EPA and has joined his conservative colleagues in calling for invoking the nondelegation doctrine and limiting Chevron deference to curb federal agencies’ powers.

#### Kavanaugh will restrict GHG authority.

King ’21 [Pamela; November 3; reporter; E&E News, “Where Supreme Court justices stand on EPA, climate,” https://www.eenews.net/articles/where-supreme-court-justices-stand-on-epa-climate/]

Kavanaugh

Justice Brett Kavanaugh, a potential swing vote in the EPA climate case, was sitting on the D.C. Circuit when the Clean Power Plan litigation came up before the bench in 2016.

During those arguments, he said that an emergency like global warming was not a “blank check” for executive action. He referred to the Clean Air Act as a “thin statute” that “wasn’t designed” to address climate change.

Kavanaugh has a record of questioning EPA authority on Clean Air Act issues. In another D.C. Circuit case, he ruled against another EPA air program for pollution that crossed state lines, ruling that the agency had not “stay[ed] within the boundaries Congress … set.”

That ruling was later reversed by the Supreme Court in an opinion from the late Justice Ruth Bader Ginsburg (Greenwire, April 29, 2014).

Kavanaugh is also among the members of the Supreme Court who have expressed interest in reviving the nondelegation doctrine (Energywire, Dec. 9, 2019).

#### One ruling is insufficient.

DeVeaux ’21 [Amelia Thomson-DeVeaux; 2021; citing Lawrence Baum, a political science professor at Ohio State University, Neal Devins, a professor of law and government at the College of William & Mary, and Michael Salamone, a political science professor at Washington State University; 538, “Why The Supreme Court Probably Doesn’t Care What Most Americans Think About Abortion Or Gun Rights,” https://fivethirtyeight.com/features/why-the-supreme-court-probably-doesnt-care-what-most-americans-think-about-abortion-or-gun-rights/]

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

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

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

#### Antitrust doesn’t undermine court legitimacy.

Crane ’13 [Daniel; May 2; Law Professor at the University of Michigan; Columbia Business Law Review, “Antitrust and the Judicial Virtues,” no. 1]

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