# 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.

#### 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.

#### 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.

#### Circuit splits over the filed rate doctrine makes enforcement incoherent.

First ’12 [Harry and Christopher Sagers; November 28; Law Professor at NYU; Law Professor at Cleveland-Marshall; Brief of Antitrust and Economics Professors, “McCray v. Fidelity National Title Insurance Company,” http://sblog.s3.amazonaws.com/wp-content/uploads/2013/02/McCray-Final-File-Copy-as-Filed.pdf]

Some courts, though not all, have found that this complex of theoretical considerations has no relevance as soon as a state adopts the simple expedient of a rate-filing system, even if it is identical to the unreviewed, file-and-use system that Ticor found so lacking. They do this on their view that the filed rate doctrine should apply in such cases, and in their view the filed rate rule precludes private remedies even where the agency engages in no actual review of rates filed.3 Amici are eager to undo this extraordinary elevation of form over theoretical substance, and to bring consistency to all cases in which states attempt to limit federal antitrust.

Footnote 3.

3 Not all courts so hold, and the Circuits are accordingly split. Compare Brown v. Ticor Title Ins. Co., 982 F.2d 386, 394 (9th Cir. 1992) (rejecting filed rate protection for state-filed rates), with Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 20 (2d Cir.1994) (finding filed-rate protection for state-filed rates), H.J. Inc. v. Nw. Bell Tel. Co., 954 F.2d 485, 494 (8th Cir.1992) (same), and Taffet v. S. Co., 967 F.2d 1483, 1494 (11th Cir. 1992) (same).

Footnote 3 ends.

To be clear, Amici stress as the justification for certiorari not the lack of “active supervision” in and of itself, but the expansion of the heavily disfavored filed rate doctrine to state-filed rates, an expansion that creates serious theoretical tension. If “a doctrine [so] indefensible . . . should be narrowly construed,” as one leading antitrust authority has said, HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 19.6 (4th ed. 2011) (emphasis added), then there can be no call for expanding it in this way, beyond any traditional basis in the intent of the federal Congress, and in a way so far at odds with this Court’s theory of antitrust federalism. Accordingly, while there may be support for the view that federally filed rates can enjoy filed rate protection without actual review, and while some such support was cited below,4 it is inapt to this case.

Amici will explain three related reasons that the theoretical conflict renders certiorari appropriate. First, only this Court is likely to restore consistency across factual contexts that some lower courts have taken to be distinct and unrelated. Failure to find that consistency causes there to be inexplicably and undesirably different antitrust treatment of state regulatory regimes that do not differ in any respect relevant to any value of federalism or federal antitrust. Second, this Court will consider another matter this Term raising importantly similar issues, Federal Trade Commission v. Phoebe Putney Health Sys., Inc., 663 F.3d 1369 (11th Cir.), cert. granted 2012 WL 985316 (2012) (No. 11-1160). Consideration of both matters would complement one another, as they raise the same fundamental concern: what precisely should be required of state governments before they excuse private persons from federal antitrust liability. And finally, confusion of this central theoretical point caused the court below explicitly to break with a decision of the Ninth Circuit on essentially identical facts, Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992). Amici submit that Brown properly applied this Court’s larger framework for balancing state regulation and federal antitrust.

III. REASONS FOR GRANTING THE PETITION

This case is not, as the court below took it to be, about minor points of detail within the widely disparaged “filed rate” doctrine, commonly associated with Keogh v. Chicago & Nw. Ry. Co., 260 U.S. 156 (1922). It has little to do with the since-repealed federal statute at issue in that case, or with any similar federal statute, or with Justice Brandeis’s views of the largely defunct Progressive-era rate and-entry regulatory regimes of which those statutes were a part.

Instead, this case is about federalism. Specifically, it is about what should be required before a state government excuses private persons from the federal antitrust laws. The court below forgot that “a state”—unlike the federal Congress— “does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . .” Parker v. Brown, 317 U.S. 341, 351 (1943).

The opinion below crystallized the central problem in the following, nearly hidden observation: while not denying that some of this Court’s state action cases seem hard to square with its decision, the court simply found “no apparent requirement to reconcile the filed rate and state action doctrines . . . .” McCray v. Fidelity Nat’l Title Ins. Co., 682 F.3d 229, 238 n.6 (3d Cir. 2012). The court gave no explanation for that view, cited two circuit opinions for it that are logically irrelevant,5 and was evidently unaware of judicial6 and academic7 authority for the seemingly self-evident point that antitrust scope doctrines should be consistent with one another. In fact there is a need for theoretical consistency, and certiorari is made appropriate by the court’s failure to seek it.

A. Serious and Unexplained Theoretical Conflict in the Scope of Antitrust

The decision below, when taken together with this Court’s Ticor decision, gives rise to the following puzzle. If State X and State Y both had title insurance regimes like those at issue in Ticor, then title insurers in both states would be fully subject to government antitrust remedies. Ticor so held. But the effect of a ruling like that below is to bar private damages remedies. So if State X did not have a ratefiling requirement, then private plaintiffs could challenge price-fixing by State X title insurers, but a rate-filing requirement in State Y would bar private challenges there, even though in every other respect the regulatory regimes remained identical. Nothing seemed relevant to filed rate protection below except for the tariff filing itself. In its absence, the filed rate doctrine would not apply, and Ticor would preclude state action immunity, making private damages actions possible.

The same result would hold even if both states’ regulators had the same power to enforce the same reasonable rate and non-discrimination rules, and even if both states explicitly authorized price-fixing by statute. Filed rate protection would still be unavailable, and Ticor would still deny state action immunity from private remedies. And it would be so even though the State Y filing system were exactly like the one found inadequate in Ticor—a file-anduse system in which the regulator never actually uses its power of post-filing review. The Third Circuit would preclude the federal remedies of Clayton Act § 4 in State Y but not State X, even though the only difference between them is State Y’s requirement to file a piece of paper that no one ever looks at.

This result is at odds with seventy years of this Court’s elaborate balancing of state and federal interests in antitrust cases, a framework that began in Parker in 1943. Where the Court has permitted states to deviate from the federal competition mandate, it has been solely to respect their sovereign interests in regulating trade within their borders. The states have no such interest in cases in which they do not in fact regulate. Accordingly, antitrust is relaxed in light of state policy only where the state itself has actively used its regulatory power. Ticor, 504 U.S. at 639-40; Midcal, 445 U.S. at 105-06.

Ticor, this Court’s last statement on the issue, remains its fullest theoretical elaboration. As Ticor explained, on a thorough canvass of the Court’s prior decisions, the Court’s purpose has never been “to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices.” The Court asks only “whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, [and] not simply by agreement among private parties.” Ticor, 504 U.S. at 634-35; see also id. at 633 (“Immunity is conferred out of respect for ongoing regulation by the State, not out of respect for the economics of price restraint.”). And the Court judges the degree of the state’s “independent judgment and control” by measuring precisely the variable that the court below said was irrelevant: the Court requires evidence of “[a]ctual state involvement, not deference to private price-fixing arrangements under the general auspices of state law . . . .” Ticor, 504 U.S. at 633. Critically, the Court added that:

state officials [must] have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party’s anticompetitive conduct promotes state policy, rather than merely the party’s individual interests.

504 U.S. at 634 (quoting Patrick v. Burget, 486 U.S. 94, 100-01 (1988)).

Therefore, the result in this case should not stand unless there is some difference between the filed rate doctrine, applied below, and the state action doctrine explained in Ticor, and the difference serves some relevant policy goal important enough to justify radically different exposure to liability in otherwise similar contexts. But the only difference in consequence between the two doctrines is that the state action immunity precludes all antitrust and the filed rate rule ordinarily precludes only some private remedies. No policy goal of either antitrust or federalism is served by precluding private federal remedies in only one of two markets identical except that one observes a pro forma state-law filing requirement.

First, the policy values on which Keogh and other filed rate cases are justified have no force where rates are filed with a state agency.8 The goal of preventing price discrimination among customers—the filed rate doctrine’s “paramount purpose,” Square D Co. v. Niagara Frontier Tariff Bur., 476 U.S. 409, 417 (1986) (quoting Keogh, 260 U.S. at 163)—has no relevance here. First of all, as petitioners observe, Delaware’s regulatory regime explicitly permits varying prices and contemplates that they may be set competitively. Compl. ¶ 34 (quoting Del. Code Ann., Tit. 18, § 2501). But even if Delaware did prohibit discrimination, a state non-discrimination rule should be no basis for disregard of federal antitrust laws. A mere state government desire to prevent price discrimination—which is an ordinary feature of many healthy, competitive markets— should receive no more federal deference than any other state intrusion into normal competition. It would be no different than when a state “simply authorizes price setting and enforces the prices established by private parties.” 324 Liquor Corp. v. Duffy, 479 U.S. 335, 344-45 (1987) (quoting Midcal, 445 U.S. at 106). Especially where the state engages in no actual oversight of the rates set, it would do no more than “cast[ ] . . . a gauzy cloak of state involvement over what is essentially a price-fixing arrangement.” Id.

Likewise, mandating deference to regulatory authority, the other major policy goal commonly associated with filed rate protection, would make little sense here, for that is precisely the value precluded by Ticor. A state government cannot by mere fiat declare that antitrust does not apply. No policy goal of antitrust or federalism would make that more true simply because a state has adopted a pro forma rate-filing requirement.

Second, it is no reply that filed rate protection leaves open federal enforcement. Ticor stressed the danger, in terms of the lost values of healthy competition, were states allowed to displace antitrust by fiat. See 504 U.S. at 632 (“The preservation of the free market and of a system of free enterprise without price fixing or cartels is essential to economic freedom. . . . A national policy of such a pervasive and fundamental character is an essential part of the economic and legal system within which the separate States administer their own laws for the protection and advancement of their people.”). It follows that if private remedies are needed for the actual preservation of those values, then private remedies too cannot be dispensed with by state fiat.

### Econ – 2AC

#### 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.

#### 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.

## T

#### Antitrust laws are laws that prohibit stuff.

CMR ’21 [Code of Maine Rules; current through the March 31, 2021; Maine Weekly Rule Notice, “Section 1. Definitions,” Code Me. R. tit. 10-144 Ch. 500, § 1]

1.1 ANTITRUST LAW means federal or state laws that prohibit contracts, combinations or conspiracies in restraint of trade; monopolies; mergers and acquisitions which tend to substantially reduce competition; and unfair methods of competition, as well as unfair acts and practices in the conduct of trade or commerce. See 10 M.R.S.A. Chapter 2

## Nationalization CP

#### Nationalization means FERC controls the agency, they fail.

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

#### Filed rate has become a judicial bypass for enforcement.

Rossi ’3 [Jim Rossi; 2003; Law Professor at Florida State University; Vanderbilt Law School, “Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era,” vol. 56]

B. Antitrust Defenses and Immunities

Modern antitrust defenses and immunities provide courts an opportunity to safeguard the public interest in deterrence - largely ignored by the filed tariff shield - in the context of federal antitrust litigation. To be sure, per se defenses provide an important set of protections against judicial overreaching on the basis of antitrust law into competitive markets. 236 However, allowing the filed tariff doctrine to become an independent, firm-specific antitrust defense - as courts have - is unnecessary and harmful, given other doctrines that protect agency discretion and state jurisdiction while also providing courts the flexibility to evaluate dual enforcement issues. Courts should independently assess whether tariffs qualify for immunity from antitrust enforcement, using traditional antitrust law doctrines, rather than using filed tariffs as a shorthand way of bypassing the antitrust laws. In contexts in which in the filed rate bar has been raised, antitrust defenses arise in two distinct scenarios: 1) horizontally, in instances where federal regulators, rather than federal courts, might assert jurisdiction over allegedly anticompetitive conduct; and 2) vertically, in instances where federal regulators approve one tariff and state regulators approve another tariff, and hence a jurisdictional conflict arises because the allegedly [\*1647] anticompetitive conduct is arguably within the realm of state regulators or falls into a jurisdictional gap. In both scenarios, antitrust law already provides ways to respect the agency regulatory process, making the filed tariff doctrine redundant.

1. Horizontal Jurisdictional Conflicts: Regulatory Compliance and Primary Jurisdiction

In the horizontal scenario, courts since Keogh have invoked the filed tariff shield to bar most antitrust claims, but do recognize certain exceptions. 237 Nearly twenty years ago, Judge Friendly called the doctrine into question in this context. 238 Although in Square D the Supreme Court refused Judge Friendly's invitation to overturn Keogh, Justice Stevens and a majority of the Court were notably sympathetic to his critique. 239 Given the more prevalent emergence of market norms, Judge Friendly's critiques resound even more clearly today. Although recent Ninth Circuit cases refuse to allow deregulation to threaten the application of the filed tariff doctrine, these cases are solidly preemption cases rather than cases applying the basic principles of Keogh. 240 Federal courts have yet to fully assess Keogh's fate against the backdrop of electric power and telecommunications deregulation.

Where federal regulators have approved all tariffs related to allegedly anticompetitive conduct, the continued rationale for allowing the filed rate doctrine to bar antitrust liability is questionable. The strongest rationale for invoking the filed rate doctrine in this context is out of respect for the expertise of agency regulators, reflected in the deference strand of the filed tariff doctrine. In Town of Norwood, the First Circuit characterized the legal foundations of the filed rate doctrine as "extremely creaky," 241 but when invoked as a bar to antitrust enforcement, the filed rate doctrine is also incoherent. To begin, as with state contract and tort law claims, if misconduct requires modification of tariff terms, regulators could easily accommodate this need in future rate cases. 242 But also, as the court [\*1648] itself noted in Norwood, in the context of the tariff approval action, FERC had waived requirements that filed rates or tariffs be accompanied and justified by cost-of-service data. 243 Such data would be necessary for the agency itself to evaluate the price squeeze claim.

Notwithstanding the fact that the agency lacked sufficient data to evaluate a claim of price squeeze, the court in Norwood concluded that "it is the filing of the tariffs, and not any affirmative approval or scrutiny by the agency, that triggers the filed rate doctrine." 244 This is dangerously broad language. By focusing on the filing of tariffs by regulated firms, the court privileges private behavior rather than the actual or anticipated actions by regulators that traditional deference concepts evaluate. It is difficult to reconcile invocation of the filed rate doctrine in the context of price squeeze claims - as the court struggled with in Norwood - with other antitrust claims, in which the filed rate doctrine has not been successfully invoked as a bar to litigation. For example, mergers and sales of assets by utilities have been subject to antitrust challenge even though the resulting rates were subject to federal regulation and the merger or sale had been approved by regulators. 245 Since Otter Tail, which allowed antitrust claims when an agency had some jurisdiction, the simple filing of tariffs has not precluded antitrust claims, even where regulators have partial jurisdiction over conduct. 246 In a deregulated market, courts have a particular responsibility to carefully assess tariffs in order to help ensure that anticompetitive and otherwise illegal private conduct does not "escape scrutiny" of applicable legal standards. 247 Otherwise, as Judge Boudin (who penned Town of Norwood) warned in an earlier-published article, through the repeated use of the filed tariff doctrine the "metaphor is likely to exhaust itself," 248 undermining the very competitive process it is designed to protect.

#### Causes jurisdiction hunting. State action immunity makes it coherent.

Rossi ’3 [Jim Rossi; 2003; Law Professor at Florida State University; Vanderbilt Law School, “Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era,” vol. 56]

2. Vertical Jurisdictional Conflicts: State Action Immunity

Modern antitrust jurisprudence also potentially extends the filed tariff doctrine's reach to a second context, vertical, in which both federal and state regulators have approved tariffs relating to allegedly anticompetitive conduct. In this context, it is conceivably the state-approved tariff that makes antitrust enforcement unnecessary. Some states do not explicitly endorse the filed tariff doctrine, as a matter of state law, 261 but, regardless of whether a state independently does so, state action immunity serves functions similar to those the filed tariff doctrine purports to serve, again making it unnecessary.

State action immunity is designed to accommodate the federal antitrust interest in promoting competition with state interests in regulation. When state regulation works to restrict competition, these two interests may collide. In Parker v. Brown, the United States Supreme Court addressed this conflict in reviewing the potential antitrust liability of state officials enforcing a program that fixed raisin prices and restricted competition between growers. 262 The Court held that the Sherman Act was not intended to restrain "state action," effectively creating absolute immunity for pure state actors, but the Court did not address the potential liability of private parties operating under the auspices of state law. 263

Later cases extended state action immunity to private parties whose allegedly anticompetitive acts were the product of, or approved by, state action. As the Supreme Court stated in California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., immunity for private actors exists only if the challenged restraint is taken pursuant to a ""clearly articulated and affirmatively expressed … state policy'" 264 and is subject to active state [\*1653] supervision. 265 The clear articulation requirement does not require a defendant to show that state law compelled the challenged actions, 266 but instead only that the state affirmatively contemplated the type of activity challenged. 267 Given this low threshold, the active supervision requirement does most, if not all, of the heavy lifting in determining whether state action immunity applies to private actors. 268 Courts have held that this requirement is not automatically met when the state "simply authorizes price setting and enforces the prices established by private parties" because such a broad authorization would merely "cast[] … a gauzy cloak of state involvement over what is essentially a price-fixing arrangement." 269

In the context of dual rate regulation schemes, state action immunity can have the same effect as the filed rate doctrine at the state level, while also providing courts flexibility to evaluate the deterrence implications of declining jurisdiction. In Town of Concord v. Boston Edison Co., then-Judge Breyer assessed a price squeeze claim brought under these circumstances. 270 FERC regulated Boston Edison's wholesale electric power rates, while its retail rates were regulated by state authorities. 271 Municipal utilities, such as the Town of Concord, challenged Boston Edison's wholesale prices as anticompetitive, on the grounds that the utility's wholesale price increases, approved by FERC, had not been matched by corresponding retail price increases at the state level. 272 The municipality claimed that the disparity between the two rates put the towns in a price squeeze, making retail customers more likely to purchase directly from Boston Edison and thus placing the municipal customer base at risk. 273 Properly declining to apply the filed rate shield - because this basis for refusing jurisdiction is particularly problematic in the context of price squeeze claims, where sometimes neither the federal [\*1654] nor state regulator has authority to rectify an antitrust violation 274 - Judge Breyer reasoned that Boston Edison enjoyed no express immunity from the application of the antitrust laws, but recognized that careful analysis of the price squeeze claim is necessary in the context of regulated industries. 275 Regulators continue to monitor the reasonableness of rates, as well as the relationship between utilities and their competitors. 276 In addition, Judge Breyer noted that regulation makes it less likely that a price squeeze would drive independent distributors from the marketplace, since the permission of regulators is required to take on new customers. 277 He further observed that supporting a price squeeze claim in such circumstances is at odds with the goals of price competition to the extent that it would encourage greater retail rates, and that there were potential institutional concerns with courts telling regulators what rate to apply under the circumstances. 278 Judge Breyer concluded that "a price squeeze in a fully regulated industry such as electricity will not normally constitute "exclusionary conduct' under [the] Sherman Act … ." 279

Judge Breyer's analysis addressed the price squeeze claim on its merits. This is understandable given that, in the context of this specific price squeeze claim, it was unclear whether the anticompetitive conduct was the wholesale rate, the retail rate, or both. 280 However, on similar facts - where the state regulates retail rates and the allegedly anticompetitive conduct is at the retail level [\*1655] only - state action immunity might allow a more complete analysis of the deterrence benefits of allowing an antitrust claim to go forward. 281 If a state actively supervises the regulation of retail rates, for example, this could implicate state action immunity in price squeeze and other antitrust claims. 282 Thus, if courts are satisfied with the monitoring provided by state regulators (including their ability to deter wrongdoing by regulated firms), there may be no need to address the merits of antitrust claims, creating the same effect as the filed tariff shield - even in instances where a state lacks its own state-law version of the doctrine.

Such an approach has significant advantages over the filed rate doctrine, as it focuses on the degree and effectiveness of overlapping state supervision, rather than on the simple act of filing or approving a tariff. Courts have yet to fully determine how state action immunity will apply in a full or partially deregulated environment. It is fair to predict, though, that as market norms emerge in formerly regulated industries, state action immunity will likely be available less often than was previously the case. 283 For example, in a recent case involving a utility's offer of a discounted rate to a customer that was conditioned on the customer's agreement to forego development of its own generation plant, a United States District Court agreed with the Department of Justice's Antitrust Division that such conduct was not protected from antitrust attack by state action immunity. 284 Although the New York state legislature had authorized reduced rates to "prevent loss of … customers," and the New York Public Service Commission had approved the reduced rate contract, the court held that the state legislature did not foresee or intend the anticompetitive [\*1656] features of this arrangement, particularly to the extent it resulted in the removal of a competitor. 285

None of these doctrines - robust federal preemption, primary jurisdiction, or state action immunity from antitrust enforcement - was available early in the twentieth century, when federal courts first developed the filed tariff doctrine to help protect customers against discrimination in rates. 286 The filed tariff doctrine was questionable even before these doctrines developed, but today it is even more unnecessary. Further, by encouraging perverse behavior by private actors that is largely beyond the reach of the judiciary - thus widening the jurisdictional gap in enforcement of market norms - the doctrine is harmful. Using the filed tariff doctrine as an independent legal reason to preempt state law claims, or refuse jurisdiction over antitrust and other federal claims, gives short shrift to the public interest in the context of dual regulatory enforcement. In a dual enforcement regime, the jurisdictional inquiry must focus on the relationship between the agency and the courts, or the agency and state law, rather than on the deceptively simple act of filing a tariff with a regulatory body. These alternative doctrines provide federal courts the flexibility necessary to do this. Similarly, in states that recognize the doctrine, an analysis of primary jurisdiction would suffice to protect agency discretion.

#### Chills telemedicine which would solve the aging crisis.

Sklar ’20 [Tara and Christopher Robertson; 2020; Health Law Professor at the University of Arizona; Law Professor at the University of Arizona; American Journal of Law and Medicine, “Telehealth for an Aging Population: How Can Law Influence Adoption Among Providers, Payors, and Patients?” vol. 47]

Notwithstanding these avenues of reform, many states continue to restrict healthcare providers from practicing telemedicine by requiring a full license in the state of service.102 These states often define “the practice of medicine broadly to include phone calls, e-mails, and on-line discussions, circumscribe[ing] the use of the new technology.”103 To the extent that these state licensing laws are designed to favor local providers, they may arguably be subject to challenge under the dormant commerce clause of the U.S. Constitution,104 or under federal antitrust laws.105 Regardless, Congress should consider affirmatively preempting them as hindrances to interstate commerce and federal spending, such as Medicare. Likewise, Congress preempted state doctrines around corporate practice of medicine, to the extent that they interfere with the work of Health Maintenance Organizations (“HMOs”).106

Similar to when and how a healthcare relationship should be established, states may claim that strict licensure laws improve standardization and quality of care,107 but if the benefit is slim, then it may not offset the chilling effect of the on cross-border practice, and hence, provider participation and patient access. In fact, state licensure laws do not vary substantially, and a more ambitious alignment seems to be a promising path forward.108

C. REIMBURSEMENT OF COSTS

\*322 In this section, we describe current approaches by insurers, including Medicare, Medicaid, and private carriers, to reimburse for telehealth services. We discuss related state laws, and suggest how to optimize reimbursement for greater telehealth adoption.

On the private payor front, 40 states and the District of Columbia have laws governing reimbursement for telehealth.109 These laws either require coverage parity, which ensures that a service is reimbursed if provided through telehealth, or payment parity, which ensures that reimbursement is at the same rate as when care is delivered in-person.110 If the policy goal is to increase use of telehealth, then payment parity can reassure doctors that telehealth will not undercut their revenues. However, payment parity laws can defeat the policy advantage of telehealth to reduce costs.111

Because the majority of states have private-payer reimbursement laws of some sort, the current practice is to amend a law to expand its applicability to additional specialties.Minnesota, for example, did this when it expanded its private-payer law to cover dental coverage, while Utah's expansion singles out telepsychiatry services,112 and Washington allows telemedicine to be offered from “any location determined by the individual receiving the service.”113 It is important to question whether these private-payer laws are necessary to expand reimbursement efforts given increasing market demand. A Milbank report documented interviews in six states that did not have parity in payment laws, yet found that almost all private health insurers covered telehealth services and paid the same rate as in-person services.114

The aforementioned expansion of MA plans to cover telehealth could be an excellent natural experiment to compare before and after 2020. The clear implementation date could determine whether and how much reimbursement changes are improving overall utilization, access to care, better health outcomes, and lower costs when compared to the traditional Medicare population, in essence the control group. Comparisons between states may also be striking as most MA enrollees, forty percent, reside in six states (Florida, Hawaii, Minnesota, Oregon, Pennsylvania, and Wisconsin) and Puerto Rico, and, by contrast, rural states have lower rates of MA enrollees.115

MA's expansion into the telehealth may create additional market pressure for private insurers (who often also administer MA plans) to voluntarily reimburse for telehealth services. Traditional Medicare may follow the pathway that MA is starting with a bipartisan bill that was reintroduced on October 30, 2019 entitled Creating Opportunities Now for Necessary and Effective Care Technologies “CONNECT” for Health Act, which is currently pending in the Senate Finance Committee.116 This bill would reduce geographic and site-specific requirements for traditional Medicare so \*323 that these beneficiaries would also receive telehealth delivered care directly in their homes.117 This pending legislation could make an enormous impact on telehealth utilization nationwide where the pool of patients would surge to nearly 60 million people.

The MA move may also influence Medicaid, especially as the largest payor for long-term care in America. There are over six million older adults on Medicaid who have both Medicare and Medicaid coverage (aka “dual-eligibility”), and this is largely attributable to them going through their savings paying for some form of long-term care.118 In an effort to extend personal finances, a phenomenon of “aging in place” is gaining primacy as the preferred long-term care model, rather than a nursing home or institutional setting.119

Telehealth coverage and reimbursement in state Medicaid programs vary considerably. Almost all states (49) and the District of Columbia have some coverage for telehealth, and nearly all reimburse for live video telehealth.120 Some state Medicaid programs impose restrictions such as limits on the sort of facilities where telehealth care can be received, by what type of healthcare provider, and geographic restrictions.121 As of 2016, eight state Medicaid programs reimbursed for telehealth under their home health services, but this number more than doubled to 19 states by 2019.122 Patients are eligible for these Medicaid services if they have two or more chronic conditions, one chronic condition and are at risk for a second, or have one serious and persistent mental health condition.123 Given the prevalence for chronic conditions and mental health among older adults, as previously discussed, many will be able to meet the eligibility requirement.124

States are removing some of these restrictions, for instance, the majority of state Medicaid programs no longer have rural requirements that must be met for telehealth reimbursement.125 Additionally, a number of states are demonstrating innovative efforts with funding support from the federal government, namely through grants and waivers for home health programs.126 With the consent of the U.S. Department of Health and Human Services, Alabama, Iowa, Maine, New York, Ohio, and West Virginia have all used state plan amendments that include telehealth coverage in their home health proposals.127 Similarly, Kansas, Pennsylvania, and South Carolina have used waivers to cover remote patient monitoring for long-term care services.128

Across all these domains of insurance, the quick expansion of telehealth coverage may be worrisome if it forces patients who would otherwise prefer an in-person visit to only have access to care via telehealth. One option to help curtail this \*324 issue is for insurance regulators to require that insurers maintain an in-person option for members. Nonetheless, such insurance mandates may wreak inefficiency, if they do not reflect consumer preferences.

CONCLUSION

Telehealth is increasingly important to the future practice of medicine, but poses a unique set of challenges for state lawmakers as they attempt to navigate interstate practice. Additionally, state and federal lawmakers are being confronted with how to provide high-quality, affordable care for an aging population that will live for an average of two decades with multiple chronic conditions.129

It is clear that law plays a substantial role in how quickly telehealth operators can achieve the scale necessary to provide care for an older population in their homes. Fortunately, state licensure laws are actively reducing some of the administrative burdens that had limited cross-border practice with support for an interstate compact.130 But much more can be done on this front; the fragmentation of state-based licensure likely does not promote quality or efficiency compared to a unified or seamless system. Furthermore, the CMS rule to allow MA plans to reimburse for care received in the home is an essential move for telehealth to suddenly reach a much broader and older population where utilization has been disproportionately low compared to other age groups.131 This federal-private insurer effort combined with the work already underway via state Medicaid programs should continue nationwide growth for telehealth adoption.

An area that continues to remain variable across states is the establishment of a healthcare relationship. The position of the AMA and the states that follow it reflect a presumption that in-person interactions should remain the baseline for healthcare standards. Also discussed, to require an in-person visit for patients who cannot leave their homes without substantial difficulty, and for conditions where the standard of care would not require a physical exam, seems unnecessarily onerous and costly for all parties. A more flexible, forward-looking approach would be for lawmakers to allow alternatives or exceptions that recognize telehealth's unique capabilities and the patients that would most benefit from this form of care.

#### The aging crisis causes extinction.

Vladev ’20 [Ivaylo and Rositsa Vladeva; July 1; Konstantin Preslavsky University of Shumen, Faculty of Natural Sciences; Sciendo, “The Demographic Problem – One of the Main Problems of Contemporary,” vol. 7, no. 2]

The aim of the present study is to analyze the essential features of the global problems of the contemporary stage in the development of human society and to highlight the place of the demographic problem as an objective factor for the existence of modern civilization.

To realize the goal it clarifies the criteria for determining a problem as a global one and makes classification of the global problems from a geographic point of view. It identifies the causes for the demographic problem, analyses and specifies its different dimensions at the global, regional and national levels.

Materials and Methods

In order to study the processes of globalization and the specific features of the demographic problem, comparative analysis, content analysis and quantitative methods are applied. In order to clarify the criteria for determining a given problem as a global one, methods of systematization and classification from a geographic point of view are applied.

Results and Discussion

One of the essential characteristics of the modern development of the society is its globalization. It is known as international integration on a large scale in all areas of economics, culture and society. The processes of globalization should be explored in the context of the relationship of the planetary problems with some aspects of economic and social life on a global, regional and national level [2].

Globalization is a complex process that provokes many controversies, but also determines the overarching changes in our times. According to U. Bek, „globalization is certainly the most commonly used - the wrongly used - and the most rarely defined, probably the most vague, the most fuzzy and the most politically influential word in the last but also in the coming years“ [1, p. 42]. Most researchers regard globalization as an inevitable process of forming common principles of current civilization development and common criteria for the qualitative assessment of the development.

We can therefore accept globalization as a complex integrative process, characterized by the following main features:

- universality - a tendency towards integration of all economic, social, political, cultural, environmental and demographic processes in their entirety and interdependence;

- democracy - engaging and actively participating in the process of globalization of all social strata;

- spontaneity - absence of an external source as a special moderator;

- chaoticity - inconsistency of the ongoing integration processes and presence of random fluctuations.

Globalization is a phenomenon, but it is not an ideal process as well as its results and it affects differently individuals, social communities, countries, regions, and the planet as a whole. It has its positive and negative consequences, encompassing socio-economic, demographic, natural-geographic processes, transforming human relationships into a state of globality.

Globality as a problem is also associated with the global problems of civilization. During its development the human society frequently encounters complex problems originating from its local nature and cover significant parts of the globe. According to P. Lakov, „the global problems are provoked by the chronological unity and the rapid rate of destruction of the balance between nature and society and should therefore be considered as an undivided system of dynamically changing interdependent phenomena in the space“ [3, p. 24].

The global problems of the contemporary stage of the development of the world civilization are already fully manifested in the second half of the 20th century, but from the end of the 1990s to the present day as a result of the introduction of the new information and communication technologies and the enhanced processes of economic and political integration a kind of „globalization boom“is observed. Therefore, the studying of the global problems is necessary to take into account both the general patterns and trends in the development of the world economy, as well as the action of the social factors of development, including the rapid growth of the population of the planet, the strengthening of interaction and interdependence between states.

According to their origin, the global problems are the result of the processes of globalization that are taking place in today's world and play the role of drivers for the development of the world system. Because they arise from the functioning of the global systems and their interaction, they can not be considered in isolation, but their unity and interrelation must be taken into account.

The global problems are wide ranging and continually create hazards for the existence and development of human society. The world of the 21st century inherited from the 20th century poverty, economic problems, resource shortages, mass diseases and nationalism and religious fanaticism, dozens of „hot spots“ and international terrorism. The old dangers in the form of weapons of mass destruction are complemented by new ones.

Though diverse in nature, the global problems have a common specificity that separates them from the other processes and phenomena in world development and they are distinguished by certain features:

- they endanger the future of all human civilization;

- they are an objective factor for the world development;

- targeted and coordinated actions of much of humanity are needed to overcome them;

- failure to resolve them can lead to serious and irreversible consequences for the whole of humanity. Some authors believe that the global problems are the result of the following inconsistencies:

- between the unlimited production factors entering the system „technically“ and the limited reproduction capabilities of the system of nature;

- between the „industrial“ system widely used in the technics and the other „small craft“ and „,partly craft“ system under the name „human“;

- between the unique products of the „classical culture“ and the unrestricted circulation of „mass culture“ products;

- between the global balances according to which the stability of processes in nature and society depends on the degree of their balance [4, p. 280-281].

The territorial character of the global problems could be pointed out as their specific feature. Geographically they cover the whole of the world, but at the same time they are manifested at the regional level as well, with local indications in different countries. This proves the relationship between the categories: „common“(global) – „special“(regional) – „individual“(local).

In order not to identify the public, regional and local problems with global ones, it is necessary to specify criteria that can define a given problem as a global one (Figure 1).

[FIGURE 1 OMITTED]

It should be noted that these criteria together can only establish the global nature of a given problem, because each of them can not be a decisive factor. At the same time, we must emphasize the high dynamism of every global problem caused by the combination of many different factors and their state in specific historical conditions and geographic regions.

There is a wide variety of views regarding the classification of global problems: depending on their severity, the time of their emergence, their nature, the actual real dependencies between them, the sequence of decision-making to overcome them, etc. Their grouping according to certain attributes helps to identify the existing links, to specify the priorities, to determine the degree of exacerbation of objectively existing global problems and to rank the sequence of the actions for their solution.

In order to realize the purpose of the study and to clarify the essence of the global problems, an attempt was made to create a geographical classification. Without claiming to be exhaustive, we formulate fourteen global problems on the basis of their relevance, severity and importance. They are grouped into three large groups depending on the spheres in which they appear and prove the trinity of nature – man – society. Accordingly, the groups are geodemographic, population-related; natural-geographic, arising from the components of the natural environment and socio-economic, related to the economy, the social sphere, the culture, the social development (Figure 2).

Based on the classification, the following conclusions can be made:

- Global problems increase their number and sphere of manifestation;

- The greatest number of global problems (1/2 of all classified) occurs in the contact areas of interaction;

- Regardless of the conditional and relative nature of the proposed classification, the occurrence of the global problems is in close interdependence and interrelation;

- Most of the global problems has a complex nature because they occur under the influence of two (3, 4, 6, 8) or three main groups (2, 5, 7);

- Due to their complex nature the global problems require a system of comprehensive measures to resolve them.

From these examples it can be summarized that the assignment of one or another problem to a given group is conditional and depends on the criteria of partitioning, the degree of relevance of the individual problems and the regional view of the authors on them. Therefore, the proposed classification should be seen not as a definitive solution to the issue but as a possible way of reconstructing the complex system, helping to better understand the essence of the interrelations between the global problems.

[FIGURE 2 OMITTED]

1. Demographic

2. Food-related

3. Healthcare problems

4. Educational problems

5. Preservation of world peace

6. Problems of international security

7. Ecological

8. Depletion of natural resources

9. Global warming

10. Water-related

11. Global catastrophes and natural disasters

12. Socio-economic conflict between poor and rich countries

13. Social inequality

14. Spiritual and moral crisis of humanity

Every global problem should be seen from three main points: what is the present situation, where, how and why the situation has become dangerous and how we can try to change it for the better by applying different strategies. The choice and the decision depend to a great extent on the social-ethical and moralhumanistic norms created in society, which is also the goal of its development [5, p. 12].

It is known that the problem is a scientific or public issue that has to be investigated and solved. It is caused by a certain inconsistency in the course of a natural, social or demographic process, the carrying out of some human activity and the lack of the expected result.

The demographic problem is a leading among the global problems of our time, because its emergence and solving influence the solution of food problems, the environmental problem, the preservation of the world peace, the problems of the international security, the health care and the education.

Demographic problems arise in the reproduction of the population and the level of compliance of resources for the development of humanity and of individual peoples and societies. The main criterion for assessing the course of demographic processes is the ability to carry out normal and appropriate reproduction of the population according to the conditions and resources. Demographic development is not limited only to the process of increasing the number of inhabitants of the planet, but also includes the problems of increasing population in relation to the natural resource potential of the territory, the condition and quality of the environment, hindering the food supply of the population, urbanization, inter-ethnic relations, refugees, lack of employment. All this proves that the interrelations between demography, economy and politics are complex and multilayered.

Therefore, the demographic problem is the mismatch between the level of socio-economic development, the resource availability for the economy, food and commodity production and population growth. Generally speaking, the demographic problem is that the population is rapidly growing due to the high fertility rate and life expectancy, the shortage of natural resources and production capacities for food and consumer goods.

Today, the effects of relative and absolute population growth become so topical that they are becoming a global problem. The dynamics of population growth in the world, presented in Table 1, is very distinctive.

The point of 1 billion is exceeded at the beginning of the 19 century. While the first doubling after 1810 required 110 years, the second one was in 40 years (1920 – 1960), the third one in 14 years (1960 – 1974) and the last one in 12 years (1999 – 2011). For the last 18 years, the population has increased by more than 1.5 billion and 94.5% of the growth is in the developing countries and only 5.5% of the developed ones. At the end of 2017, the world population reached 7.5 billion.

[TABLE 1 OMITTED]

The rate of population growth is the rate at which demographic indicators change. The highest rates of population growth in the world occurred in the 1970s and 1980s – about 2% average annual growths. Then they began to decline and in the first decades of the 21st century they were set at 1.2%. It is expected that in the middle of the 21st century they will increase again to 2.8%.

According to estimates of UN experts, the world population by 2025 will reach 8.2 billion, by 2040 – 9.2 billion, by 2050 – 9.7 billion and by 2055 – almost 10 billion. Population growth, according to the expected trends for this period, will be formed by developing countries in a ratio of 97: 3.

Much or little is the present world population of 7.5 billion people? The world population itself, however significant, can not be considered as large or little, isolated from the natural and human resources and the established political and socio-economic conditions.

Scientists maintain two different opinions and carry on intensive discussions. Some of them believe that the Earth is still far from absolute overpopulation and unlikely to reach it. Another part of them believe that the Earth is already overpopulated. Reason for this opinion is the misery, malnutrition and hunger, avalanche escalation of environmental problems in overpopulated areas.

Very often, population growth is seen as one of the factors not only hindering the fulfilment of life needs, but also threatening the viability of human civilization. Together with the increased consumption of natural resources, technical and energy equipment, the amount of waste resulting from human life and production activity is constantly increasing. Moreover, the socio-demographic situation in developed and developing countries is diametrically opposed, denoted by the term „demographic division of the world“.

In different countries and regions, the demographic problem has different dimensions. In developed countries, the demographic problem is mainly reflected in the aging of the population and the reduction of human resources for the economic development of the countries. In developing countries, the demographic problem is reflected in a predominant increase of the population to the basic necessities of life and the occurrence of significant difficulties in feeding the population, its health care and the development of education. The extent and the nature of the demographic problem in individual countries depend to a large extent on their socio-economic development and the stage of the demographic transition they are on. At a regional and national level, demographic problems, depending on the type of reproduction of the population, have different dimensions – demographic explosion, demographic stagnation and demographic crisis. Human development across individual regions and countries is assessed through the two problems – a demographic explosion and a demographic crisis.

The rapid increase in population in the world, in a particular geographic region or in a particular country is defined as a demographic explosion. It is characterized by a high birth rate, a sharp drop in mortality, and especially child mortality and increased life expectancy. This is an unfavourable demographic situation because it reduces the opportunities for most people to feed, the opportunities for health care, education, jobs, etc.

The accelerated growth of the world population is now predominantly determined by the developing countries. Due to the high relative share of the population at sub-working age (1/4 of the population up to 16 years old) these countries will preserve the high growth rate of their population. Demographic explosion has a restraining effect on the country and region's development prospects. It is characteristic for the most countries in Africa, some countries in Asia and Latin America. At present the epicentre of the demographic explosion is in Africa.

High birth rate is the main prerequisite for triggering the demographic explosion. It, under the conditions of decreasing mortality, ensures the large population growth. The most significant birth rates occur in the continent of Africa and mostly in the West, Central, East and partially in South Africa.

In 2017, 43 African countries had birth rates above 30‰. The highest figures are in Niger (50‰), Chad (48‰), Angola (46‰), Democratic Republic of Congo (46‰), Central African Republic (45‰), Mozambique (45‰), Mali (44‰), Somalia (44‰), Burkina Faso (44‰), Burundi (43‰), Zambia (43‰) and others. The countries in Asia are with high birth rates too. 5 of them have a birth rate above 30‰: the Democratic Republic of Timor – Leste (36‰), Afghanistan (34‰), Yemen (33‰), Tajikistan (33‰), Iraq (31‰); and in 34 of them the birth rate is between 20 and 30‰. Haiti, Bolivia, Guyana and Guatemala in Latin America have a birth rate of between 25 and 30‰.

The decreasing overall mortality is the second most important prerequisite for the demographic explosion. It is mainly due to the development of healthcare and medicine and to the raising living standards of the population. Under this influence is the mortality rate in most European countries, East Asia, North America, the Gulf region (Oman, UAE, Qatar, Bahrain, Kuwait, Saudi Arabia). Decreasing mortality rate in these countries leads to an increased average life expectancy and aging of the population. The lower mortality rate in a number of countries is due to the age structure of the population with a strong predominance of younger generations (25-30% of the population up to 16 years old) and is denoted by the term „demographic spring“. This applies to most African countries.

The mortality rate is in close relation with the average life expectancy. The latter grows almost continuously. This is due to the increased living standards, the way of life and the improvement of health care.

According to UN data in 2017, the expected average life expectancy in the world is 69 years, for men 67 years and for women 71 years [6]. The highest average life expectancy is in the developed countries: Monaco (89.4 years), Japan (85.5 years), Singapore (85.5 years), Iceland (83.1 years), Israel (82.7), Switzerland (82.7), Malta (82.7 years), the Republic of Korea (82.5 years), the Australian Union (82.4 years), Italy (82.4 years), Luxembourg (82.4 years) and others.

Geographical regions with the highest average life expectancy are Western Europe and North America. For men, life expectancy is the highest in Monaco (85.5 years), Singapore (82.8 years), Japan (82.2 years) and Iceland (80.9 years). Women have the highest life expectancy in Monaco (93.4 years), Japan (89 years), Singapore (88.3 years) and Republic of Korea (85.8 years). The lowest life expectancy is in the poor African and Asian developing countries, such as Mozambique (54.1 years), the Central African Republic (53.3 years), Somalia (53.2 years), Zambia (53 years), Lesotho (53 years) and Afghanistan (52.1 years). Decreasing child mortality in developing countries and the high birth rates have an impact on the population growth and hence on the demographic explosion. At the end of the 20th century, child mortality in the world was about 54‰ and in 2017 it declined to 32.9‰. Thus, while in 2000 the continent with the highest child mortality rate in the world, Africa, it ranged from 87‰ (West Africa) to 140‰ (Central and Eastern Africa), in 2017 there was no African country with child mortality over 100‰.

Today, it varies in a wide range from 20 to 93‰ and decreases as a result of measures to combat diseases, hunger and malnutrition and to improve healthcare. Over the last decades, the child mortality rates in Arab countries rapidly decrease, especially in the Persian Gulf region (below 8‰), where it has reached the level of the most developed countries.

Analyzing the demographic situation in the world in the context of the demographic explosion, we should note that the larger population has a stronger impact on the environment and increases the „demographic burden“ on the territory.

It is simultaneously influenced by several factors: the absolute population growth, the extent of consumption (lifestyle, income, and infrastructure development), the social inequality of the population, and the level of technology used. The development of the modern economy requires the use of an increasing amount of natural resources. The acuteness of the problem is related not only to the depletion of the limited resources, but also with the nature of their impact on the environment during use. The increase of the population in the world and its migration intensify this impact by preventing the stabilization of the unemployment problem; make it difficult to solve the problems of education, healthcare and social welfare. Consequently, any socio-economic problem includes a demographic problem as well.

Decreasing the population in a particular geographic region or country forms the situation of a demographic crisis. It is due to low birth rates, average mortality rates, aging of the population, negative or zero natural growth and shortage of labour resources.

As a global problem it is still considered the demographic explosion, not paying due attention to the upcoming demographic problems as depopulation, narrowed reproduction of the population and its aging, which will cause irreversible negative social and economical problems and demographic crises, especially among the small nations.

The aging of the population forms an unfavourable demographic situation, consisting in increasing the number and relative share of people in over-working age, reducing the number of people in sub-working age and limiting the labour resources. It is especially distinctive for most countries in Europe, Japan and others.

The aging of the population is characterized by the average age of the population (a characteristic of the age structure of the population, which is calculated as a weighted average value of the population in all age groups). It reveals the level reached in the process of population aging in the world and countries.

In 2017, the average age of the population in the world is 30.6 years. It ranges from a low age of 15.5 to 16 years in the African countries of Niger, Mali, Chad, Uganda and Angola up to 43 years or more in some European countries and Japan. The countries with high living standards and high life expectancy have the highest average age like Monaco (53.8 years), Japan (47.7 years), Germany (47.4 years) and Italy (45.8 years). The high average age is a feature of countries with a very high level of emigration of young people, such as Slovenia (44.2 years), Lithuania (44), Latvia (43.9 years), Croatia (43.3 years), Bulgaria (43 years), Estonia (43 years) and others [6].

Thus, the relative share of the population in over-working age in 2025 in these countries will account for over 1/4 of the total population, which will cause significant losses for health care and social security. At the same time, the birth rate in most economically developed countries can no longer provide for simple reproduction of the population. This process is called „demographic winter“.

The phenomenon of the demographic crisis is primarily centred on the countries of Eastern Europe and is not yet typical for the developed countries. It becomes topical to the researchers of the population from the mid-1990s when the most unfavourable parameters of the demographic situation are reached – very low birth rates, high total mortality and high mortality in the individual age groups, old age structure, emigration, high unemployment, etc. About 80% of the natural population growth of the EU member states since 1994 is due to emigrants. According to demographic projections, almost all countries in Europe are expected to be covered by a demographic crisis in 2025.

The demographic crisis has its strongest manifestations in countries like Bulgaria, Latvia, Lithuania, Estonia, Hungary, Romania, Croatia and others. It is due to the negative natural growth and mass emigration of young population to Western Europe and North America. The term „demographic crisis“ can be interpreted as a profound violation of reproduction of the population. In 2017, Lithuania (14.8‰), Bulgaria (14.5‰) and Latvia (14.5‰) are at the top of the world's highest mortality rates, followed by Ukraine (14.3‰), Serbia (13.6‰), Belarus (13.2‰) and others. The lowest birth rates are in Japan (7.5‰), Puerto Rico (8‰), Portugal (8.2‰), Greece (8.3‰), Bulgaria (8.5‰) 5‰), Germany (8.6‰).

Since the beginning of the 21st century, the continent of Europe has a negative natural growth, with the highest negative figures being in Bulgaria (-6‰), Lithuania (-5‰), Latvia (-4.9‰), Serbia (-4, 7‰), Ukraine (-4.2‰), Hungary (-3.9‰), Croatia (-3.6‰). Thus, due to the low birth rates and high mortality, there is a disruption of the normal reproduction of human generations. The demographic crisis naturally reduces the population of a given country or region to a different extent, with a severe disruption of the basic demographic structures.

The demographic crisis is characterized by the fact that the real growth (the total value of the natural and mechanical growth) of the population in these countries is negative and forms a reduction of the population. In 2017, the reduction of the population is most pronounced in Lithuania (-11.1‰), Latvia (- 11‰), Moldova (-10.8‰), Bulgaria (-6.3‰), Estonia (-6‰), Croatia (-5.3‰), Serbia (-4.7‰), Ukraine (- 4.2‰), Romania (-3.5‰), Montenegro (-3.4‰), Hungary (-2.6‰), Belarus (-2.5‰) and others. The reduction of the population in each of these countries is not only related to higher mortality rates and lower birth rates but also to the significant emigration rates. The demographic crisis exists in Puerto Rico (-16‰) and Lebanon (-11.3‰) and the European countries Germany, Poland, Italy, Portugal, Greece are entering the crisis as well as Japan in Asia.

Many countries in the world are characterized by demographic stagnation. Its typical feature is maintaining the constant population. The actual growth is zero or around zero. This demographic situation is formed at and is characteristic for countries on different stages of demographic transition and different levels of socio-economic development. This group includes mainly developed countries with almost zero natural growth and a positive mechanical population growth, such as Austria, the Czech Republic, Slovakia, Slovenia, Finland, Spain and others.

The indicated negative trends in population development cover all developed and highly developed countries. The consequences for the society and the demographic systems in the developed countries are similar, but they vary in intensity over time. As the demographic crisis in these countries is largely blunted by immigration and increasing the average life expectancy.

Conclusions

Based on the report we can formulate the following results:

- The processes in the globalizing world are generating the global problems of today. They act as driving forces in the development of the world system.

- On the basis of their relevance and significance, in order to prove the trinity of nature – man – society, fourteen global problems are formulated in three large groups, depending on the spheres in which they manifest.

- Problems related to the dynamics of the human population affect the whole world and in some parts of the planet there is overpopulation, which can lead to depletion of natural resources as well as poverty and malnutrition.

- Global efforts to resolve the global demographic problem are contrary to the interest of countries that have unfavourable demographics including Bulgaria.

- There are countries with decreasing birth rates and increasing life expectancy everywhere in the world. The aging population leads to higher healthcare and pensions costs, and the number of workers and tax payers is steadily decreasing. As a result, these countries are at risk to become „demographic bombs“ which means a crisis due to too few people working.

- The demographic picture of the world is highly contrasting and moves between the two extremes - a demographic explosion and a demographic crisis. The factors that determine it affect the socio-economic development, income distribution, employment, unemployment, social security, health care, education, housing and the sources of water, food, energy, raw materials as well as environmental conditions and climate change.

- Stabilizing the population of our planet and resolving the demographic problem in the future is not an end in itself but a means of improving the lives of the present and future generations.

## FTC DA – 2AC

#### Plan is the FERC.

Farmer ’88 [Kiplyn; American lawyer specializing in personal injury, criminal law, and worker compensation; “FERC WAIVER OF THE FILED RATE DOCTRINE: SOME SUGGESTED PRINCIPLES,” <https://www.eba-net.org/assets/1/6/31_9EnergyLJ497(1988).pdf>; KS]

On April 22, 1988 the D.C. Circuit, on rehearing, affirmed that the Fed- eral Energy Regulatory Commission (FERC)1 is free to consider whether it has the authority to waive the "filed rate doctrine.' 2 This determination was the result of a suit brought by Columbia Gas Transmission Corporation (Columbia), a gas purchaser, after the FERC authorized five pipelines to col- lect a surcharge over and above the rates which were filed with the Commis-sion at the time of sale.3 The FERC maintained that it has implied authority to waive the filed rate doctrine4 under the Natural Gas Act (NGA) and that its authority was upheld in City of Piqua v. FERC.6 Although the court over- ruled the Commission's decision in ColumbiaGas7 because the affected parties were not on notice as to the increase in rates caused by the waiver,8 it opened the door to the possibility of allowing the FERC to establish guidelines regard- ing the circumstances in which it could waive the filed rate doctrine in the future. If the FERC is to retain authority to waive the doctrine when it determines that such a waiver is required in order to carry out its statutory mandate that rates and charges be just and reasonable,1" it must establish cri- teria consistent with the principle that the FERC is prohibited from retroac- tive rate-making.'1 This article focuses on the issue of the FERC's authority to waive the filed rate doctrine by permitting rate changes to be made effective retroactively and recent judicial interpretations of the doctrine which the FERC will be required to consider in establishing its guidelines.

#### FTC overload now.

Burke ’21 [Henry and Andrea; May 28; B.A. in Political Science and Labor Studies from the University of California at Los Angeles; Research Assistant, B.A. in Economics from the University of Maryland; Revolving Door Project, “Hobbled FTC Lacks Budget to Combat Corporate Buying Spree,” <https://therevolvingdoorproject.org/hobbled-ftc-lacks-budget-to-combat-corporate-buying-spree/>]

Even if the will to stop it exists, the FTC doesn’t have the funding to stop this boom. In fact, it hasn’t had the funding to keep up with a steady uptick in mergers in years. Aside from the recent spike, the total number of premerger filings [increased](https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019_0.pdf) by 80 percent over the last 10 years. In 2010, corporations filed 1166 premerger notifications. By 2019, yearly filings almost doubled to 2089.

While the number of transactions the FTC is charged with regulating has increased steadily, the number of enforcement actions — challenges to anticompetitive mergers or conduct — has stagnated.  A 2020 paper from Equitable Growth showed that while the number of [enforcement actions](https://equitablegrowth.org/wp-content/uploads/2020/11/111920-antitrust-report.pdf) from both the FTC and DOJ hovered at about 40 challenges per year from 2010 to 2019, even as the number of corporations seeking merger approval grew. The FTC’s enforcement actions over the past ten years show the agency hasn’t kept up with increased HSR filings: while FY 2010 saw 22 enforcement actions for 1166 reported mergers, a ratio of approximately one enforcement action for every 53 mergers, FY 2019 saw a mere 21 enforcement actions for 2089 mergers, meaning there was only one FTC enforcement action for every 99 mergers.

Overall funding and staffing levels at the FTC have similarly stagnated. Then-FTC commissioner Rebecca Slaughter said in 2020 that it is an “[indisputable](https://www.ftc.gov/system/files/documents/public_statements/1583714/slaughter_remarks_at_gcr_interactive_women_in_antitrust.pdf)” fact that FTC funding has not kept up with market demands; according to Slaughter, the FTC budget has only increased by 13% since 2010 and the employee headcount decreased. This budget increase has not come from increased discretionary appropriations from Congress however, but from a massive increase in merger filings and their accompanying fees. Startlingly, Slaughter notes that “the FTC had roughly 50% more full-time employees at the beginning of the Reagan Administration than it does today.” The situation has become so dire that increased budgets for the enforcement agencies has become a rare [bipartisan](https://www.law360.com/articles/1368496/klobuchar-says-congress-has-rare-shot-at-antitrust-overhaul) issue in the Senate.

#### No resources and thumpers.

Kades ‘21 [Michael; July 28; Director of Markets and Competition Policy, former attorney at the Federal Trade Commission; Equitable Growth Foundation, “Competitive Edge: Congress needs to restore the Federal Trade Commission’s authority to seek monetary remedies when companies break the law,” <https://equitablegrowth.org/competitive-edge-congress-needs-to-restore-the-federal-trade-commissions-authority-to-seek-monetary-remedies-when-companies-break-the-law/>]

As the report explains, “Rather than deter anticompetitive behavior, current legal standards do the opposite: They encourage it because such conduct is likely to escape condemnation, and the benefits of violating the law far exceed the potential penalties.” In the face of such warnings, it is a particularly bad time for the Supreme Court to unanimously reject 40 years of lower court rulings and conclude that the Federal Trade Commission can neither force companies to give up the profits they earned by violating the law nor compensate the victims of those violations. (The first remedy is called disgorgement, and the second remedy is called restitution.)

Whether the Supreme Court in April correctly interpreted the statute at issue in the case, AMG Capital Management LLC v. Federal Trade Commission, is less important than its implications. Professor [Andy Gavil discusses a potential silver lining](https://equitablegrowth.org/competitive-edge-the-silver-lining-for-antitrust-enforcement-in-the-supreme-courts-embrace-of-textualism/) in the Supreme Court’s decision—the glass-half-full approach. He argues that if the Supreme Court faithfully applies its approach to statutory interpretation, then it could open the door to broader application of the antitrust laws.

I look at the direct impact of the decision—the glass-half-empty approach. I argue that the decision deprives the antitrust agency of a critical, albeit imperfect, weapon that has deterred anticompetitive conduct particularly in the pharmaceutical industry. Although it has used disgorgement in competition cases sparingly, those awards have deterred the entire industry from engaging in the challenged conduct.

Before the recent Supreme Court decision, the disgorgement awards in competition cases went far beyond the impact in a single case. The savings include benefits from the conduct that did not occur. If the commission cannot seek monetary remedies, then companies will keep the rewards of their illegal conduct. Perversely, the companies causing the greatest harm will benefit the most from April’s decision.

The impact reaches even further. Without the threat of a disgorgement award, companies are more likely to drag out litigation and tax the FTC’s limited resources. Because the commission will spend more resources on egregious cases to reach weaker results, it will have fewer resources to challenge anticompetitive conduct in other areas and, for example, could affect enforcement in merger cases or in the high-tech industry.

#### Courts will stonewall FTC initiatives.

McLaughlin ’21 [David; June 23; Reporter; Bloomberg Businessweek, “Antitrust Crusader Lina Khan Faces a Big Obstacle: The Courts,” <https://www.bloomberg.com/news/articles/2021-06-23/tech-antitrust-lina-khan-faces-courts-as-challenge-to-ftc-s-progressive-agenda>]

Instead, hours after the Senate confirmed her, Biden put the 32-year-old Khan—one of the [most prominent antagonists of big business](https://www.bloomberg.com/news/articles/2020-10-26/how-big-is-bad-has-become-a-big-big-deal)—in charge of the agency, where she’ll be responsible for challenging mergers and taking on companies when they use their market muscle to snuff out competition.

Now comes the hard part: putting her agenda into action. The biggest hurdle, say antitrust experts, is a judiciary that has made it very difficult for competition watchdogs to win ambitious cases. And to make any change of consequence, whether breaking up a monopoly or stopping a takeover, enforcers must prevail in court.

“None of that is easy, and it’s particularly not easy when courts are very conservative, as they are today,” says Stephen Calkins, a law professor at Wayne State University and a former general counsel at the FTC. “She’s certainly talked about breaking up companies but, my golly, that’s incredibly hard to do.”

Khan made her mark in 2017, with a [law review article](https://www.yalelawjournal.org/note/amazons-antitrust-paradox) she wrote while still a student at Yale Law School. Titled “Amazon’s Antitrust Paradox,” it traced how the online retailer came to control key infrastructure of the digital economy and how traditional antitrust analysis fails to consider the danger to competition the company poses. The paper was widely talked about in antitrust circles and was read by senior enforcement officials.

U.S. tech titans are at the center of the antitrust debate in Washington. They are ever more powerful, with [Apple Inc.](https://www.bloomberg.com/quote/AAPL:US), [Amazon.com Inc.](https://www.bloomberg.com/quote/AMZN:US), [Alphabet Inc.](https://www.bloomberg.com/quote/GOOGL:US), and [Facebook Inc.](https://www.bloomberg.com/quote/FB:US) among the top 10 largest companies in the world, by market value. A House of Representatives investigation last year accused the companies of [abusing their dominance](https://www.bloomberg.com/news/articles/2020-10-06/house-panel-calls-for-sweeping-antitrust-reforms-for-big-tech) to thwart competition, and lawmakers are considering a [raft of bills](https://www.bloomberg.com/news/articles/2021-06-11/u-s-tech-giants-would-have-to-exit-businesses-under-house-plan) to impose new rules on how the companies operate. Federal antitrust enforcers and state attorneys general have sued Google and Facebook for what authorities say are monopoly abuses.

Khan, who was counsel to the House antitrust committee during its probe, was one of the main authors of the House [report](https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf). It recommended a series of reforms to antitrust laws that she and anti-monopoly activists have long championed, like restricting which markets the companies can operate in and requiring them to treat other businesses on their platforms fairly and without favoritism.

Khan’s work helped revolutionize competition-policy debates and shift support for a more forceful approach that abandoned the playbook inspired decades ago by Robert Bork, the conservative legal scholar and judge. That framework came to be known as the consumer welfare standard and relies on price effects as the measure of competitive harm. Khan argued in her paper for a new approach, focused on the competitive process and the structure of markets, that she said would more fully capture harms that the consumer welfare standard misses.

Once considered on the fringes of antitrust thinking, Khan and her acolytes—often dubbed the New Brandeis School, after Supreme Court Justice Louis Brandeis—are now firmly mainstream with Khan’s appointment as FTC chairwoman.

The FTC has suffered some stinging defeats recently. Last year, the agency lost a major monopoly case filed against chipmaker [Qualcomm](https://www.bloomberg.com/quote/QCOM:US). In April, a unanimous Supreme Court eliminated a tool used by the FTC to recover money for defrauded consumers. Later this month, a federal judge in Washington is expected to rule on whether the agency’s monopoly lawsuit against Facebook can proceed.

Still, there’s widespread agreement that the status quo is no longer tenable. Over the last two decades, concentration has risen in industries across the economy. Some economists say dominant companies can use their market power to suppress wages, for example, exacerbating inequality. The worries are bipartisan. Republicans and Democrats alike are pushing for antitrust reforms to rein in the biggest tech platforms, and Khan was confirmed by the Senate with significant Republican support.

Big losses in the courts would eventually hurt Khan’s authority and demoralize her staff, says William Kovacic, a former FTC chairman who now teaches at George Washington University Law School. “You become like a sports team that is known to its opponents as unable to win,” he says. But defeats also could provide the foundation for the kind of sweeping antitrust legislation that Khan and her supporters want.

“If you want to change the world, at some point it goes to the courts or it goes to the legislature,” Kovacic says. “But you can’t do it by yourself.”

#### Plan increases funding – it’s a virtuous cycle.

Evenett et al ’16 [Simon; July; Professor of International Trade and Economic Development, University of St. Gallen, Switzerland; Coordinator, Global Trade Alert; and a former nonresident Senior Fellow, Economic Studies, Brookings; Alexander Lehmann; German citizen, joined Bruegel in 2016 and is now a non-resident fellow. His work at Bruegel focuses on EU banking sectors and how private debt and non-performing loans can be addressed in the aftermath of recessions; Benn Steil; Senior Fellow and Director of International Economics at the Council on Foreign Relations; *Brookings,* “Antitrust Policy in An Evolving Global Marketplace,” <https://www.brookings.edu/wp-content/uploads/2016/07/antitrust_global_chapter.pdf>; KS]

Finally, holding constant factors such as the general level of economic activity and agency caseloads, there is a positive relationship between for- eign competition and funding for the Federal Trade Commission and the Antitrust Division of the Justice Department.\*® This would appear to indi- cate that antitrust, rather than being solely driven by consumer welfare con- siderations, is at the service of domestic firms adversely affected by imports. If trade stimulates antitrust, particularly targeted at foreign firms, the po- tential for direct conflict of laws and lobbying interests across borders can only grow as economic globalization progresses.

#### FTC fails.

Vittorio ’20 [Andrea; December 16; Reporter at Bloomberg Law; *Bloomberg Law,* “FTC’s Demand for Tech Company Data Shows ‘Underutilized’ Power,” <https://news.bloombergtax.com/privacy-and-data-security/ftcs-demand-for-tech-company-data-shows-underutilized-power>; KS]

Company Response

The nine tech companies could fight back by seeking to limit how much information must be handed over or by trying to quash the information orders in court, according to Van Loo. The companies have 45 days from the date they received the FTC orders to respond.

NetChoice, a trade association that represents companies including Amazon, Google, and Twitter, called the orders an arbitrary use of the FTC’s study authority.

“The Federal Trade Commission’s 6(b) orders are nothing more than a fishing expedition and a prime example of government overreach,” Carl Szabo, NetChoice’s vice president and general counsel, said in a statement Monday.

Szabo said agency orders have historically been used to study common practices across an industry. But the latest orders target “well-known but widely different businesses,” from online retailer Amazon to ByteDance Ltd.'s popular video streaming service TikTok.

The trade group’s comments echo those of FTC Commissioner Noah Phillips, who was the only one on the five-member agency to vote against issuing the information orders.

Phillips said in a statement Monday that the orders are too broad and intended to give “the appearance of action on a litany of gripes with technology companies.”

#### CFPB fills in.

Parker ’21 [Wilson; April 27; J.D. at the University of Virginia; Cov Financial Services, “Supreme Court Ruling Complicates FTC's Ability to Obtain Consumer Redress,” https://www.covfinancialservices.com/2021/04/supreme-court-ruling-complicates-ftcs-ability-to-obtain-consumer-redress/]

In the short term, this decision may also prompt the Consumer Financial Protection Bureau (“CFPB”) to be more assertive in areas where the two agencies share jurisdiction, such as regulating the debt collection industry. The CFPB has broad power to seek consumer relief. As long as the FTC’s ability to seek consumer relief is complicated by AMG Capital Management, the CFPB may take the lead in more cases where it can use its power to pursue consumer relief directly.

#### No impact. AI won’t be that intelligent.

**Naudé ’21** [Wim; 2021; Economics Professor at University College Cork, Ireland, Visiting Professor in Technology, Innovation, Marketing and Entrepreneurship at RWTH Aachen University, Germany; Economics of Innovation and New Technology, “Artificial intelligence: neither Utopian nor apocalyptic impacts soon,” vol. 30, no. 1]

5.1. An Abacus

A first point is whether or not the term artificial intelligence (AI) (introduced during an optimistic period in 1956) is perhaps a misnomer and should be ditched. As was explained, this narrow or domain-specific AI consists of **deep learning techniques**, using large volumes of data. This is **not intelligence**, even though the answers it can provide can be pretty impressive. It is rather the case that ‘**current and foreseeable smart technologies**have the **intelligence of an abacus**: that is, **zero**’ (Floridi 2018, p. 157). Some have more disparagingly described narrow AI as ‘**glorified statistics**’. A joke about AI making the rounds40 goes like this: ‘When you're fundraising, it's AI. When you're hiring, it's ML. When you're implementing, it's logistic regression '.

AI is however more than just glorified regression or optimization because of the ability of the software to get better by learning from data. Moreover, precisely how deep learning takes place and how predictions come about is an unknown. This black box quality of the results from deep learning could very well lead to the even slower diffusion of AI over time, for at least two reasons: one is due to given the tightening of regulations on data use, such as the GDPR in the EU41 and the European Commission's ethical guidelines for trustworthy AI, which includes the requirement of traceability and auditability of AI decisions (EC 2018). Another reason is the growing concern about the use of deep learning in science because results often cannot be adequately explained or replicated.42

5.2. The singularity can be cancelled

A second point (which is related to the first) is that an AGI is **remote**, placing hopes and speculations about a super-intelligence and Singularity in the realm of **science fiction** rather than **of fact**. The **core problem** is that scientists cannot replicate the human brain or human intelligence and consciousness because they do not fully **understand it** (Meese 2018). Penrose (1989) has (controversially) argued that **quantum physics** may be required to explain human consciousness. Koch (2012) provides a **rigorous criticism** from the point of biology of those claiming the **imminence** of a **singularity** or **super-intelligence**, stating that they do **not appreciate** the **complexity of living systems**. Dyson (2019) believes the future of computing is analogue (the human nervous system operates in analogue) and not digital. Allen and Greaves (2011) describe a ‘complexity brake’ applying to the invention of a super-intelligence, which refers to the fact that ‘As we go deeper and deeper in our understanding of natural systems, we typically find that we require more and more specialized knowledge […] although developments in AI might ultimately end up being the route to the singularity, again the complexity brake slows our rate of progress, and pushes the singularity considerably into the future '.

## Court Clog DA

#### Courts perma clogged.

Solomon '21 [Aron; 6/4/21; head of digital strategy for Esquire Digital and an adjunct professor of business management at the Desautels Faculty of Management at McGill University; "The Viral Court Backlog and How to Dig Out Post-Pandemic," https://www.law.com/thelegalintelligencer/2021/06/04/the-viral-court-backlog-and-how-to-dig-out-post-pandemic//]

Just over a year ago, if you would have asked an experienced judge or lawyer to imagine the litigation and jury trial backlog if a global pandemic were to sweep through the nation, they first would have probably told you that your morbid scenario wasn’t funny and that the courts would never be able to dig out.

This is precisely where we find ourselves today. Throughout state and federal courts, for both civil and criminal cases, we are in an infinitely worse position than we were when the pandemic began. The threshold issue today is how we dig ourselves out before the system implodes.

In New Jersey, the court system has a massive backlog that isn’t going to be cleared anytime soon. Michael J. Epstein, founder of New Jersey-based The Epstein Law Firm, has seen the dramatic effect the pandemic has had on the New Jersey court system.

“Earlier this year, the backlog in New Jersey courts was twice what it was before the pandemic. There is a better chance that the backlog will double once again before it improves, yet there is really no easy answer to get our courts out of the current situation. It’s not just civil cases— there is also a backlog in New Jersey for criminal cases as well.”

Part of the problem is that jurisdictions such as New Jersey that have already relaxed restrictions on court appearances are now dealing with an aggressive third wave of the virus, with a fourth wave has begun to take hold in some parts of the world. When its effects are felt in the court system, it could again grind things to a complete halt and make the backlog exponential.

There are ways technology can play an expanded role this time around, compared to the slow start we had in 2020. But, especially in criminal matters, technology is limited by what it can’t replicate—the guarantees afforded people to appear in person at a trial. Many jurisdictions (including parts of Texas and California) are neither technologically equipped to handle remote jury trials nor can make them happen without the consent of defendants.

While courts and judicial systems have improved over the past year at planning, training their staff, and even investing in the right technologies to keep things moving when and where possible, no courts are equipped with functional crystal balls. Yet the power of accurate foresight is what is needed most to get things back on track in our national system of functional and fair trials.

Perhaps there is no better national example of how the gears powering the court systems have ground to a halt than in the city of New York. The New York Times reported in December that there have been only nine criminal trials in nine months. If that seems like a very small number, it is—the norm would be around 800 trials.

The direct cost of this is obviously much more severe in criminal proceedings. As highlighted in the New York Times piece, there is a profound human cost to these delays:

“Is it fair for people to be languishing in pretrial detention and presumed innocent with no prospect of a trial in the future for them?” said New York’s chief administrative judge, Lawrence K. Marks. “A criminal justice system cannot be, in any sense of the word, fully functioning, if it is not conducting jury trials.”

The logistical nightmares aren’t going away soon and they are going to take the daily hard yards that attorney Epstein describes. “I know that New Jersey lawyers are able and willing to help in any way that we can and I would expect my colleagues in other states to feel exactly the same way. Our clients can’t afford further delays, as this deeply impacts justice.”

This is the case throughout the nation, as the same factors that have created the backlog persist. In both civil and criminal trials, the absence of critically important participants in the case because of lockdown and illness may get worse before it gets better.

#### Criminal courts already clogged---wrecks rule of law.

Smith ’21 [Patrick Smith; July 13; reporter; National Public Radio, “As the Nation's Courthouses Reopen, They Face Massive Backlogs In Criminal Cases,” https://www.npr.org/2021/07/13/1015526430/the-nations-courthouses-confront-massive-backlogs-in-criminal-cases]

Criminal courthouses across the United States are confronting massive case backlogs as they begin slowly reopening after long pandemic shutdowns. It has some prosecutors preparing to drop so-called "low-level cases" because they will not be able to handle the expected crush of speedy trial demands.

Prosecutors in Chicago, for example, are preparing to drop a large number of criminal cases when the courts fully reopen later this year.

Thousands of criminal cases have built up in Cook County over the past 15 months, as the county's massive court system has been all-but shut down because of the COVID-19 pandemic. That means thousands of people locked up in jail, on electronic monitoring or out on bond have essentially had their cases on hold. But the waiting caused by the pandemic could mean many people accused of nonviolent crimes will get off scot-free.

"I think we should be prepared for a system that is going to be overwhelmed," Cook County State's Attorney Kim Foxx said.

Foxx said that will likely mean dropping a large number of lower-level cases in order to prioritize cases involving violent crime.

"We cannot allow for violent cases to fall through the cracks," Foxx said. "And so using that calculus, [we have to make] sure that those cases that could be dealt with outside of the system are in fact purged from the system so we can focus our attention on violence."

Courthouses are likely to see a steep increase in speedy trial requests

The Illinois Supreme Court announced June 30 that courthouses will return to normal in October, and defendants will once again be able to assert their Constitutional right to a speedy trial, a right the Illinois Supreme Court suspended in March 2020 amid COVID-19.

Chicago-based defense attorney Adam Sheppard said he expects to see "a flood of speedy trial demands" across the system.

"It is gonna be overwhelming," Sheppard said.

Foxx said there is no way her prosecutors — or the court system overall — will be able to deal with that coming crush.

"In a scenario where everyone demands [a trial], potentially 30,000-plus cases needing to go to trial within the span of several months, and the reality is our court system, I don't think there's any court system in the world that would be prepared to have that many trials just logistically, staff wise, all of it, it would overwhelm the system," Foxx said.

That pattern could be repeated in jurisdictions across the country, as courthouses try to return to normal with thousands of people who have been waiting months or more for their day in court.

Dropping cases sends the message that "you don't matter"

Meg Garvin, executive director of the National Crime Victim Law Institute at Lewis and Clark Law School, said she's heard of other jurisdictions that are also considering dropping a large number of cases because of backlogs. She's concerned about the message that could send to victims.

"What that says to communities is that you don't matter as much," Garvin said. "And when you are told by a system, 'you don't matter,' you stop turning to the system."

#### Civil and criminal clog.

**Petersen ’21** [Melody; April 12; Investigative reporter covering healthcare and business for the Los Angeles Times; *Los Angeles Times,*“Coronavirus Today: Court Shutdowns and Constitutional Questions,” <https://www.latimes.com/science/newsletter/2021-04-12/courts-backlog-criminal-trial-coronavirus-today>; KS]

The pandemic has **shut down federal jury trials** for **13 months** in much of Southern California, **disrupting** the **prosecution**of hundreds of accused drug dealers, tax cheats, cybercriminals, child porn purveyors and health insurance swindlers.

The **closure** has **clogged the courts** with an **unprecedented backlog** of both **criminal** and **civil cases**, write my colleagues Michael Finnegan and Maura Dolan.

While many of those charged with crimes have been free on bail as they await trial, others have **remained behind bars**, enduring **long stretches of solitude** as detainees are **kept apart** to **minimize spread** of the virus.

That didn’t sit well with U.S. District Judge Cormac J. Carney. So he has begun throwing out criminal charges against some of the accused.

Ronald Ware spent five months in a Santa Ana jail awaiting trial after his arrest in Brea last summer on a federal gun charge. Carney dismissed the case in January, saying the emergency rules that shut down jury trials denied Ware his right to a speedy trial.

“Nowhere in the Constitution is there an exception for times of emergency or crisis,” Carney wrote in the ruling that set Ware free.

So far, Carney has tossed criminal charges against a jewelry-store robbery suspect and defendants in three other cases for the same reason: The decision to shut down all jury trials, he found, was **excessive**.

Prosecutors have **appealed** Carney’s decisions. But an **increasing number of defendants** are **alleging violations**of their **rights**, **casting uncertainty** over their **cases**.

## Sua Sponte

#### Illogical:

#### 1 – There’s a test case.

Covey ’21 [J. Tyson; February 17; Attorney at Duane Morris LLP; *Lexology,* “Court Declines to Apply Filed Rate Doctrine to Rates Dictated By Statute,” <https://www.lexology.com/library/detail.aspx?g=4d350169-887b-4d9d-949f-d40fe4d87e3e>; KS]

The filed rate doctrine (also called the filed tariff doctrine) is a century-old cornerstone of regulated-industries law that, generally speaking, bars claims where the effect would be to allow a customer to receive service, or the carrier to provide service, on rates, terms, or conditions that differ from the carrier’s tariff filed with the relevant regulatory agency. Central Office Tel., Inc. v. AT&T Corp., 524 U.S. 214, 222-23 (1998). The rule is strict and, where it applies, unyielding. Id. The recent district court decision in Smith v. FirstEnergy Corp., No. 2:20-cv-03755 et al., 2021 WL 496415 (S.D. Ohio, Feb. 10, 2021), however, declined to apply the filed rate doctrine where the rates at issue were set directly by legislation.

In the summer of 2020, former Speaker of the Ohio House of Representatives Larry Householder and his political associates were indicted for an alleged $60 million-dollar federal racketing conspiracy. The criminal complaint asserted that Householder and others, in exchange for large bribes from FirstEnergy Corp., collaborated to pass House Bill 6 (HB 6), a near billion-dollar nuclear power plant bailout that would benefit FirstEnergy. HB 6 required that a monthly surcharge be added to ratepayers’ bills (capped at 85 cents for residential customers and $2,400 for commercial customers), along with other adjustments that would increase rates. Ratepayers sued FirstEnergy on behalf of a proposed class, asserting federal claims under RICO and other statutes and a state-law claim under the Ohio Corrupt Practices Act. The alleged injury was having to pay costs and fees set forth in HB 6, and the plaintiffs sought both prospective relief (to stop enforcement of HB 6) and retroactive relief for charges already paid as a result of HB 6.

FirstEnergy moved to dismiss on various grounds, including that the RICO claim was barred by the filed rate doctrine. As FirstEnergy noted, the filed rate doctrine bars claims for refunds based on excessive filed rates, even when the rates allegedly were obtained through bribery or fraud. E.g., Leo v. Nationstar Mortg. LLC, 964 F.3d 213, 215-17 (3d Cir. 2020); Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 20-21 (2d Cir. 1994). In Smith v. FirstEnergy, however, the district court declined to apply the doctrine to dismiss the RICO claim. Focusing on the assertion that the rates at issue were “not filed by the carriers but specifically mandated by the legislature,” and that HB 6 “overrode the normal rate-filing process,” the court stated that application of the filed rate doctrine depends on the filing of rates or tariffs, and that without such filing the doctrine does not apply. Id. at \*5. In reaching this conclusion, the court disagreed with FirstEnergy’s point that under HB 6 the state public utility commission “will ultimately utilize its discretion to dictate the allocation and structure of the surcharge and hence set the rate,” because, according to the court, that point “do[es] not address the filing of the rates.” Id. The court also believed that the two core policies that support using the filed rate doctrine to dismiss claims – namely that court intervention in ratesetting matters risks creating discriminatory rate application or improperly intruding on an agency’s ratesetting function – did not apply where a statute dictates the rates to be charged. Id.

The question whether the filed rate doctrine applies to rates set by the legislature, as opposed to rates filed by a utility with a regulatory agency, appears to be novel. Neither the district court nor the parties’ briefs on the motion to dismiss identified any case that was directly on-point. Moreover, the district court’s analysis leaves some open questions. In particular, there are two main policy concerns behind applying the filed rate doctrine to bar claims that seek to deviate from filed tariffs. One is non-discrimination, which seeks to ensure that all similarly-situated customers pay the same amount. If relief is granted to the plaintiffs and not all rate payers equally, the non-discrimination policy would be violated. The second policy is non-justiciability, which seeks to ensure courts do not invade the exclusive province of expert agencies with respect to setting the proper rate and recognizes that courts are not well-suited to address ratesetting issues. The court in First Energy concluded that neither policy applies when a legislature, rather than an agency, sets rates, but it did not spell out its rationale. The court also gave no weight to FirstEnergy’s argument that the state public utility commission does have a role in implementing HB 6, in that it determines the method of allocation of surcharges and sets the “level and structure of the charge” (see Ohio Rev. Code § 3706.46(A)(2)), but did not explain why the agency’s involvement in setting the level and structure of the charge would necessarily be irrelevant in this context. It also is unclear from the opinion whether the surcharge or other rate increases required by HB 6 would eventually be reflected in any tariff.

Although situations where a legislature is deemed to directly set rates may not arise often, the apparently novel issue in Smith v. FirstEnergy certainly could arise again. In particular, there is a pending case in Illinois state court involving the major electric utility, Commonwealth Edison, and allegations that bribery or fraudulent conduct led to passage of an Illinois statute regarding adjustments to electric rates. Kuhn v. Commonwealth Edison Co., No. 2020-CH-05138 (Cook County Circuit Court). The Illinois statute is quite different than the Ohio statute, of course, but Commonwealth Edison has raised the filed rate doctrine as a defense and it is possible the plaintiffs will respond by asserting, as in Smith v. FirstEnergy, that the rate increases were more the product of a statute than of regulatory action.

#### Qualified immunity thumps.

Brown ’20 [Ruth; June 8; partner at Loevy & Loevy; In the Supreme Court of the United States, “BRIEF OF PROFESSORS OF CIVIL PROCEDURE AND FEDERAL COURTS AS AMICI CURIAE IN SUPPORT OF PETITIONER,” no. 19; KP]

This Court has been clear: qualified immunity is an affirmative defense that defendants themselves must invoke and plead. Gomez v. Toledo, 446 U.S. 635, 640 (1980); Crawford-El v. Britton, 523 U.S. 574, 587 (1998); Harlow v. Fitzgerald, 457 U.S. 800, 815 & n.24 (1982). Nonetheless, the Eighth Circuit disposed of the appeal below by asserting qualified immunity sua sponte on behalf of the defendants and then resolving the issue in defendants’ favor.2 See Pet. at 5. In so holding, the Eighth Circuit joined a minority of appellate circuits that permit appellate courts to invoke sua sponte a qualified immunity affirmative defense not raised below. See Pet. 10- 13. This Court should intervene to resolve the inter-circuit split in accordance with foundational principles of federal appellate procedure.

A court’s sua sponte invocation of an affirmative defense violates the central tenets of the adversarial model: that courts act as passive and neutral decisionmakers, reviewing only the legal and factual disputes presented for adjudication by the parties. It also circumvents rules governing waiver and forfeiture of non- jurisdictional affirmative defenses on appeal, transforming the appellate courts into courts of first view rather than courts of review. That the affirmative defense invoked in this case was qualified immunity—a judicially-imposed restriction on statutorily-authorized civil rights actions—makes the sua sponte invocation a particularly problematic expansion of the judiciary’s role.

#### Hunstein thumps.

Jackman 11-18 [Stefanie; November 18; Ballard Spahr LLP; *JDSupra;* “Eleventh Circuit Orders En Banc Rehearing in Hunstein,” <https://www.jdsupra.com/legalnews/eleventh-circuit-orders-en-banc-7331893/>; KS]

In a surprising turn of events this morning, the U.S. Court of Appeals for the Eleventh Circuit issued an order sua sponte to rehear Hunstein v. Preferred Collection and Management Services, Inc. en banc. The sua sponte order was issued after an Eleventh Circuit judge requested a poll on whether the case should be reheard en banc and a majority of the active judges voted in favor of the rehearing. The order also expressly vacated the existing substitute opinion issued by the panel earlier this month, meaning that the opinion is no longer binding precedent in the Eleventh Circuit and should not be cited as having any precedential value within the Eleventh Circuit or beyond.

Today’s order to rehear the case en banc follows the panel’s 2-1 decision last month, in which the panel issued a substitute opinion in response to the first effort to obtain rehearing by the defendant. In the substitute opinion, the majority affirmed its original April 2021 holding that the plaintiff had Article III standing and sufficiently pled a claim but also included analysis of the U.S. Supreme Court’s intervening decision in TransUnion v. Ramirez in the panel’s standing analysis. Because the panel’s substituted opinion has been vacated, it no longer has any precedential value in the Eleventh Circuit or outside of the Eleventh Circuit.

The next step will be for the Eleventh Circuit to state the specific issues on which it requests briefing and establish the timing for rehearing en banc. We are hopeful that the full court will agree to consider not just the standing issue on which the panel divided, but also the broader issue of whether any FDCPA claim can exist under the circumstances in light of the plain language of the FDCPA and other considerations, all of which were briefed extensively in prior amicus petitions supporting the defendant’s original rehearing effort earlier this year.

#### Current docket guarantees judicial legitimacy destroyed.

Brescia ‘21 [Ray; December 3; Professor at Albany Law School and the author of "The Future of Change: How Technology Shapes Social Revolutions;” *The Washington Post,* “Cases This Term Will Shape the Supreme Court Far More than Biden’s Commission,” <https://www.washingtonpost.com/outlook/2021/12/03/cases-this-term-will-shape-supreme-court-far-more-than-bidens-commission/>; KS]

Flash forward 70 years. A series of decisions during the 2010s, on everything from voting rights to redistricting to labor rights, has left many with a sense that the court is a partisan political actor. The justices did refuse entreaties from former president Donald Trump to overturn the 2020 election, bolstering its legitimacy. But over the past year, it has reignited these claims by jumping into charged political controversies, including, most recently, by not blocking a polarizing Texas law banning most abortions after approximately six weeks from conception.

The backlash over that decision prompted three separate justices, from different wings of the court, to undertake the unusual move of proclaiming publicly that the court is not a political institution. But the court’s decisions this term, far more than the protestations of the justices, will determine whether it maintains its legitimacy or whether calls to adjust its size or composition continue to grow. Critical cases, including those affecting abortion access, pandemic response, gun rights and government intervention in the economy, among others, are now in the justices’ hands.

In recent expedited oral arguments on the Texas antiabortion law — a reversal from the court’s earlier refusal to step in — several of the potential swing justices on this issue seemed most troubled by a threat to their own power: the legislation’s attempt to effectively immunize the statute from judicial review itself by incorporating novel private enforcement mechanisms.

Still, during oral arguments Dec. 1, the court appeared inclined to uphold Mississippi’s abortion law, which would undermine Roe v. Wade. “Will this institution survive the stench this creates in the public perception, that the Constitution and its reading are just political acts?” asked Justice Sonia Sotomayor. “If people believe this is all politics, how will we survive? How will this court survive?” She recognized that the biggest threat to the court’s power comes from the risk that it completely loses the faith of the public. In the same oral argument, Justice Brett M. Kavanaugh referenced West Coast Hotel as evidence that the court has reversed its own precedents in important moments in its history. He failed to note, however, that it has done so to preserve its legitimacy, not to undermine it.

In statehouses across the country, legislators are enacting voting restrictions, antiabortion laws and other legislation designed to push the constitutional envelope. As a result, fundamental constitutional rights, even democracy itself, will continue to be on the court’s docket for years to come. How the court responds will probably shape its fate.

#### Judicial legitimacy is dead – polls prove.

Liptak ‘21 [Adam; December 4; Covers the Supreme Court and writes Sidebar, a column on legal developments. A graduate of Yale Law School, he practiced law for 14 years before joining The Times in 2002; *New York Times,* “Critical Moment for Roe, and the Supreme Court’s Legitimacy,” <https://www.nytimes.com/2021/12/04/us/mississippi-supreme-court-abortion-roe-v-wade.html>; KS]

As those dueling perspectives reflect, there is no consensus about what legitimacy means. Richard H. Fallon Jr., a law professor at Harvard and the author of “Law and Legitimacy in the Supreme Court,” said there were two primary definitions.

One is moral, expressing a judgment about whether the court deserves to be respected. The second is sociological, based on whether people trust the court to make fair and unbiased judgments. Only that second sense, he said, can be captured in public opinion polls.

Recent polls — taken after the court allowed a Texas law that bans abortions after six weeks to take effect in September, but before Wednesday’s arguments — suggest that Justices Sotomayor and Breyer were right to worry about the court’s standing.

A Quinnipiac University poll last month found that 61 percent of Americans said the Supreme Court was mainly motivated by politics, while 32 percent said it was mainly motivated by the law. Three years ago, the corresponding numbers were 50 and 42 percent.

A Gallup poll in September found that only 40 percent of Americans approved of the job the court was doing, the lowest rate since 2000, when Gallup first posed the question.

A Marquette Law School poll found a 12-point drop in public approval of the Supreme Court, from 66 to 54 percent, in a little more than a year.

Charles Franklin, a law professor and political scientist at Marquette who oversaw the poll, said the plummeting numbers were a threat to the court’s authority.

# 1AR

## Dedev

### AT: Soil Erosion

#### Tech will restore soil by 2060.

Bailey ’18 [Ronald; February 18; Science correspondent for Reason and the author of the books The End of Doom: Environmental Renewal in the Twenty-first Century (July 2015) and Liberation Biology: The Moral and Scientific Case for the Biotech Revolution (Prometheus, 2005). His work was featured in The Best American Science and Nature Writing 2004; Reason, “Is Degrowth the Only Way to Save the World?” <https://reason.com/2018/02/16/is-degrowth-the-only-way-to-save-the-wor/>; KS]

Water? Most water is devoted to the irrigation of crops; the ongoing development of drought-resistant and saline-tolerant crops will help with that. Hectares per capita? Humanity has probably already reached peak farmland, and nearly 400 million hectares will be restored to nature by 2060—an area almost double the size of the United States east of the Mississippi River. In fact, it is entirely possible that most animal farming will be replaced by resource-sparing lab-grown steaks, chops, and milk. Such developments in food production undermine the researchers' worries about overconsumption of biomass.

And humanity's material footprint is likely to get smaller too as trends toward further dematerialization take hold. The price system is a superb mechanism for encouraging innovators to find ways to wring ever more value out less and less stuff. Rockefeller University researcher Jesse Ausubel has shown that this process of absolute dematerialization has already taken off for many commodities.

After cranking their way through their models of doom, O'Neill and his colleagues lugubriously conclude: "If all people are to lead a good life within planetary boundaries, then the level of resource use associated with meeting basic needs must be dramatically reduced." They are right, but they are entirely backward with regard to how to achieve those goals. Economic growth provides the wealth and technologies needed to lift people from poverty while simultaneously lightening humanity's footprint on the natural world. Rather than degrowth, the planet—and especially its poor people—need more and faster economic growth.

### AT: ME

#### 2 – Middle East war is unlikely.

Karlin & Wittes 19 Mara Karlin, International Studies Professor at John Hopkins University, Nonresident Senior Fellow at the Brookings Institution, and U.S. Deputy Assistant Secretary of Defense for Strategy and Force Development 2015-2016, & Tamara Cofman Wittes, a Senior Fellow in Foreign Policy at the Brookings Institution and U.S. Deputy Assistant Secretary of State for Near Eastern Affairs from 2009-2012. [America’s Middle East Purgatory: The Case for Doing Less, Foreign Affairs, January/February 2019, 98(1)]

LESS RELEVANT REGION In response to the Iraq war, the United States has aimed to reduce its role in the Middle East. Three factors have made that course both more alluring and more possible. First, interstate conflicts that directly threatened U.S. interests in the past have largely been replaced by substate security threats. Second, other rising regions, especially Asia, have taken on more importance to U.S. global strategy. And third, the diversification of global energy markets has weakened oil as a driver of U.S. policy. During the Cold War, traditional state-based threats pushed the United States to play a major role in the Middle East. That role involved not only ensuring the stable supply of energy to Western markets but also working to prevent the spread of communist influence and tamping down the Arab-Israeli conflict so as to help stabilize friendly states. These efforts were largely successful. Beginning in the 1970s, the United States nudged Egypt out of the pro-Soviet camp, oversaw the first Arab-Israeli peace treaty, and solidified its hegemony in the region. Despite challenges from Iran after its 1979 revolution and from Saddam Hussein’s Iraq throughout the 1990s, U.S. dominance was never seriously in question. The United States contained the Arab-Israeli conflict, countered Saddam’s bid to gain territory through force in the 1990–91 Gulf War, and built a seemingly permanent military presence in the Gulf that deterred Iran and muffled disputes among the Gulf Arab states. Thanks to all these efforts, the chances of deliberate interstate war in the Middle East are perhaps lower now than at any time in the past 50 years.

#### Clary ad their authors are wrong – Comprehensive analysis including ‘rare events regression’ finds decline exacerbates the worst, most escalatory conflicts.

Tir ’10 [Jaroslav; April 2010; Ph.D., Professor of Political Science at University of Colorado at Boulder; Journal of Politics, “Territorial Diversion: Diversionary Theory of War and Territorial Conflict,” vol. 72]

Hypothesis 1 thus receives strong support via the unpopularity variable but only weak support via the economic growth variable. These results suggest that embattled leaders are much more likely to respond with territorial diversions to direct signs of their unpopularity (e.g., strikes, protests, riots) than to general background conditions such as economic malaise. Presumably, protesters can be distracted via territorial diversions while ﬁxing the economy would take a more concerted and prolonged policy effort. Bad economic conditions seem to motivate only the most serious, fatal territorial confrontations. This implies that leaders may be reserving the most high-proﬁle and risky diversions for the times when they are the most desperate, that is when their power is threatened both by signs of discontent with their rule and by more systemic problems plaguing the country (i.e., an underperforming economy).

Next, I conduct a series of follow-up tests suggested by an anonymous Reviewer; results based on the reanalysis of Model 1 are presented in the online appendix. Evaluating the implication that territorial diversions are indeed more likely to result from diversionary conditions than nonterritorial diversions, I set up a multinomial logit model that contrasts the initiation of territorial MIDs versus nonterritorial MIDs (base outcome). The results show a positive and statistically signiﬁcant coefﬁcient for the government unpopularity variable (ﬁrst column of Table 3), meaning that higher levels of government unpopularity are more likely to produce territorial rather than nonterritorial MIDs. Further checks include performing rare events logit (King and Zeng 2001) and population-averaged logit analyses to verify whether the rare events nature of the dependent variable or cross-sectional characteristics of the data alter the ﬁndings, respectively. The ﬁndings for the two independent variables remain unchanged (see Table 3, columns two and three). Finally, protesting behavior in more populous countries could be considered more ‘‘normal’’ and less threatening to the government, potentially lowering the incentive to divert. Dividing the government unpopularity variable by the log of country’s population (from the Correlates of War National Capabilities data set, Singer 1987) reveals that the population size-standardized government unpopularity variable remains positive and signiﬁcant; see Table 3, ﬁnal column.

Concerning the control variables, the effects of power and distance are consistent with expectations and across the Models in Table 1. Democracy, alliance ties, and trade coefﬁcients have mostly the expected dampening inﬂuence on territorial conﬂict initiation; but only trade exhibits a signiﬁcant impact and only when the dependent variable is the fatal territorial MID (i.e., in Models 3–4). 16 These results are somewhat surprising, but the reader is reminded that the effects of alliance are highly contested (see Maoz 2000), while the impact of trade has not been established in the domain of territorial conﬂict. Similarly, recent research shows that the democratic peace weakens considerably in the context of territorial conﬂict (James, Park, and Choi 2006) and that the democratic peace may be epiphenomenal to territorial peace (Gibler 2007). 17 Importantly, the control variable results imply that some of the related interests (e.g., security, regime ties) may indeed be subordinated to the territorial diversion impetus.

Revisiting the link between regime type and diversion, some scholars argue that democratic leaders have a greater motivation—due to the need for popular support—for diversion (e.g., Gelpi 1997; Russett 1990; Smith 1996). Yet, others (e.g., Downs and Rocke 1994; Miller 1995; Pickering and Kisangani 2005) assert that authoritarian leaders need popular support in order to appear legitimate. Because they cannot derive legitimacy from democratic institutions and elections, they look to diversions to help them achieve this goal. Autocrats can also divert with greater impunity due to the lack of institutional checks and balances. In follow-up tests available from the online appendix, Table 4, I restrict the set of initiator countries in Model 1 to democracies only, autocracies only, all nondemocracies, and all nonautocracies. That the ﬁndings hold suggests that both democratic and autocratic leaders value territorial diversions. Nevertheless, resolving the broader debate is beyond the scope of this study.

#### Growth stops extinction – combats Iran, ISIS, Russia, and China war AND transnational risks.

Haas ‘17 [Richard; January 10; President of the Council on Foreign Relations, former Director of Policy Planning for the US State Department (2001-2003), and President George W. Bush's special envoy to Northern Ireland and Coordinator for the Future of Afghanistan; Penguin Press, “A World in Disarray: American Foreign Policy and the Crisis of the Old Order,” Print]

A large portion of the burden of creating and maintaining order at the regional or global level will fall on the United States. This is inevitable for several reasons, only one of which is that the United States is and will likely remain the most powerful country in the world for decades to come. The corollary to this point is that no other country or group of countries has either the capacity or the mind-set to build a global order. Nor can order ever be expected to emerge automatically; there is no invisible hand in the geopolitical marketplace. Again, a large part of the burden (or, more positively, opportunity) falls on the principal power of the day. There is more than a little self-interest at stake. The United States cannot remain aloof, much less unaffected by a world in disarray. Globalization is more reality than choice. At the regional level, the United States actually faces the opposite problem, namely, that certain actors do have the mind-set and means to shape an order. The problem is that their views of order are in part or in whole incompatible with U.S. interests. Examples would include Iran and ISIS in the Middle East, China in Asia, and Russia in Europe.

It will not be an easy time for the United States. The sheer number and range of challenges is daunting. There are a large number of actors and forces to contend with. Alliances, normally created in opposition to some country or countries, may not be as useful a vehicle in a world in which not all foes are always foes and not all friends are always friendly. Diplomacy will count for a great deal; there will be a premium on dexterity. Consultations that aim to affect the actions of other governments and their leaders are likely to matter more than negotiations that aim to solve problems.

Another reality is that the United States for all its power cannot impose order. Partially this reflects what might be called structural realities, namely, that no country can contend with global challenges on its own given the very nature of these challenges. The United States could reduce its carbon footprint dramatically, but the effect on global climate would be modest if India and China failed to follow suit. Similarly, on its own the United States cannot maintain a world trading system or successfully combat terrorism or disease. Adding to these realities are resource limits. The United States cannot provide all the troops or dollars to maintain order in the Middle East and Europe and Asia and South Asia. There is simply too much capability in too many hands. Unilateralism is rarely a serious foreign policy option. Partners are essential. That is one of the reasons why sovereign obligation is a desirable compass for U.S. foreign policy. Earlier I made the case that it represents realism for an era of globalization. It also is a natural successor to containment, the doctrine that guided the United States for the four decades of the Cold War. There are basic differences, however. Containment was about holding back more than bringing in and was designed for an era when rivals were almost always adversaries and in which the challenges were mostly related to classical geopolitical competition.1 Sovereign obligation, by contrast, is designed for a world in which sometime rivals are sometime partners and in which collective efforts are required to meet common challenges.

Up to this point, we have focused on what the United States needs to do in the world to promote order. That is what one would expect from a book about international relations and American foreign policy. But a focus on foreign policy is not enough. National security is a coin with two sides, and what the United States does at home, what is normally thought of as belonging to the domestic realm, is every bit as much a part of national security as foreign policy. It is best to understand the issue as guns and butter rather than guns versus butter.

When it comes to the domestic side, the argument is straightforward. In order to lead and compete and act effectively in the world, the United States needs to put its house in order. I have written on what this entails in a book titled Foreign Policy Begins at Home.2 This was sometimes interpreted as suggesting a turn away from foreign policy. It was nothing of the sort. Foreign policy begins at home, but it ends there only at the country’s peril.3

Earlier I mentioned that the United States has few unilateral options, that there are few if any things it can do better alone than with others. The counterpart to this claim is that the world cannot come up with the elements of a working order absent the United States. The United States is not sufficient, but it is necessary. It is also true that the United States cannot lead or act effectively in the world if it does not have a strong domestic foundation. National security inevitably requires significant amounts of human, physical, and financial resources to draw on. The better the United States is doing economically, the more it will have available in the way of resources to devote to what it wants and needs to do abroad without igniting a divisive and distracting domestic debate as to priorities. An additional benefit is that respect for the United States and for the American political, social, and economic model (along with a desire to emulate it) will increase only if it is seen as successful.

The most basic test of the success of the model will be economic growth. U.S. growth levels may appear all right when compared with what a good many other countries are experiencing, but they are below what is needed and fall short of what is possible. There is no reason why the United States is not growing in the range of 3 percent or even higher other than what it is doing and, more important, not doing.4

#### Decline catalyzes global nuclear war.

Liu ’18 [Qian; November 13; PhD in Economics from Uppsala University, Former Visiting Researcher at the University of California, Berkeley, Managing Director for Greater China at The Economist Group, Guest Lecturer at New York University, Tsinghua University, the Chinese Academy of Social Sciences and Fudan University; World Economic Forum, “The Next Economic Crisis Could Cause a Global Conflict. Here's Why,” <https://www.weforum.org/agenda/2018/11/the-next-economic-crisis-could-cause-a-global-conflict-heres-why>]

The next economic crisis is closer than you think. But what you should really worry about is what comes after: in the current social, political, and technological landscape, a prolonged economic crisis, combined with rising income inequality, could well escalate into a major global military conflict.

The 2008-09 global financial crisis almost bankrupted governments and caused systemic collapse. Policymakers managed to pull the global economy back from the brink, using massive monetary stimulus, including quantitative easing and near-zero (or even negative) interest rates.

But monetary stimulus is like an adrenaline shot to jump-start an arrested heart; it can revive the patient, but it does nothing to cure the disease. Treating a sick economy requires structural reforms, which can cover everything from financial and labor markets to tax systems, fertility patterns, and education policies.

Policymakers have utterly failed to pursue such reforms, despite promising to do so. Instead, they have remained preoccupied with politics. From Italy to Germany, forming and sustaining governments now seems to take more time than actual governing. And Greece, for example, has relied on money from international creditors to keep its head (barely) above water, rather than genuinely reforming its pension system or improving its business environment.

The lack of structural reform has meant that the unprecedented excess liquidity that central banks injected into their economies was not allocated to its most efficient uses. Instead, it raised global asset prices to levels even higher than those prevailing before 2008.

In the United States, housing prices are now 8% higher than they were at the peak of the property bubble in 2006, according to the property website Zillow. The price-to-earnings (CAPE) ratio, which measures whether stock-market prices are within a reasonable range, is now higher than it was both in 2008 and at the start of the Great Depression in 1929.

As monetary tightening reveals the vulnerabilities in the real economy, the collapse of asset-price bubbles will trigger another economic crisis – one that could be even more severe than the last, because we have built up a tolerance to our strongest macroeconomic medications. A decade of regular adrenaline shots, in the form of ultra-low interest rates and unconventional monetary policies, has severely depleted their power to stabilize and stimulate the economy.

If history is any guide, the consequences of this mistake could extend far beyond the economy. According to Harvard’s Benjamin Friedman, prolonged periods of economic distress have been characterized also by public antipathy toward minority groups or foreign countries – attitudes that can help to fuel unrest, terrorism, or even war.

For example, during the Great Depression, US President Herbert Hoover signed the 1930 Smoot-Hawley Tariff Act, intended to protect American workers and farmers from foreign competition. In the subsequent five years, global trade shrank by two-thirds. Within a decade, World War II had begun.

To be sure, WWII, like World War I, was caused by a multitude of factors; there is no standard path to war. But there is reason to believe that high levels of inequality can play a significant role in stoking conflict.

According to research by the economist Thomas Piketty, a spike in income inequality is often followed by a great crisis. Income inequality then declines for a while, before rising again, until a new peak – and a new disaster. Though causality has yet to be proven, given the limited number of data points, this correlation should not be taken lightly, especially with wealth and income inequality at historically high levels.

This is all the more worrying in view of the numerous other factors stoking social unrest and diplomatic tension, including technological disruption, a record-breaking migration crisis, anxiety over globalization, political polarization, and rising nationalism. All are symptoms of failed policies that could turn out to be trigger points for a future crisis.

Voters have good reason to be frustrated, but the emotionally appealing populists to whom they are increasingly giving their support are offering ill-advised solutions that will only make matters worse. For example, despite the world’s unprecedented interconnectedness, multilateralism is increasingly being eschewed, as countries – most notably, Donald Trump’s US – pursue unilateral, isolationist policies. Meanwhile, proxy wars are raging in Syria and Yemen.

Against this background, we must take seriously the possibility that the next economic crisis could lead to a large-scale military confrontation. By the logic of the political scientist Samuel Huntington, considering such a scenario could help us avoid it, because it would force us to take action. In this case, the key will be for policymakers to pursue the structural reforms that they have long promised, while replacing finger-pointing and antagonism with a sensible and respectful global dialogue. The alternative may well be global conflagration.

#### Every hotspot explodes.

Lewis ’18 [Patricia; November 10; Research Director for International Security at Chatham House, PhD in Nuclear Physics from Birmingham University, Former Deputy Director and Scientist-in-Residence at the Center for Nonproliferation Studies at the Former Monterey Institute of International Studies, Former Director of the UN Institute for Disarmament Research, Former Director of the Verification Research, Training and Information Centre, Graduated in Physics from Manchester University; World Economic Forum, “How to Prevent World War 3,” <https://www.weforum.org/agenda/2018/11/how-to-prevent-world-war-3>]

Since the ‘war to end all wars’ − as H G Wells so wrongly predicted a century ago − the world has seen the ‘peace to end all peace’ lead to the horrors of the second world war, proxy wars through the Cold War and, today, violent conflicts that increasingly affect civilians disproportionately and cross the red lines laid by the laws of armed conflict. The machinery of war and the available firepower has increased dramatically. The risks of a third world war are enormous. If we add in all the means and methods of warfare − conventional, nuclear, cyber, drones, and so on − we have the military potential to destroy ourselves entirely.

Violence is raging in the Middle East, Europe and Russia are poised on the edge of conflict over Ukraine, the United States is once more engaged in military action in Iraq and, as NATO pulls out, Afghanistan is vulnerable. Other flashpoints over disputed islands in the South China Sea, tensions on the Korean peninsula and over Kashmir are just some of the easily identified points of escalation.

In the past 100 years, we have, however, learned a great deal about how to prevent conflict. After the Second World War, we established the United Nations with the primary purpose of saving succeeding generations from the scourge of war. The European Union grew over decades from a trade treaty to an organization that won the Nobel Peace Prize for its part in transforming Europe from a continent of war to a continent of peace. NATO has had its part to play in shoring up the transatlantic alliance that bonded many European countries in a common cause. Today war between Germany and France is almost impossible to imagine.

Other regional organizations have been established in Africa, Asia, the South Pacific and the Americas. International bodies have been established to implement disarmament and security treaties and civil society expertise has been channeled through universities and think tanks − including Chatham House, conceived in 1919 with a view to preventing future wars.

According to the Uppsala Conflict Data Program, 254 armed conflicts have been fought since 1946 of which 114 are classed as wars (defined as more than one thousand battle-related deaths per annum). Since the end of the Cold War, the numbers of armed conflicts have dropped dramatically. Of the 33 armed conflicts listed in 2013, only seven were classed as wars – a 50% reduction since 1989.

Many factors have supported the reduction in armed conflicts including the withering of proxy wars, UN sponsored peace processes and economic development. Research by the Human Security Report demonstrates that peace negotiations and cease-fire agreements reduce violent conflict even when they fail.

Six peace agreements were signed in 2013 and four were agreed in 2012. Over recent years, despite common perceptions, we do seem to have learned how to create, keep and enforce the peace.

The laws of armed conflict and human rights laws along with the international criminal court, war crime tribunals, economic and military sanctions and domestic justice commissions serve to protect civilians. Although nuclear weapons possession or use, outlawed for most countries, are yet to be globally forbidden, international law has proscribed the possession and use of devastating weapons systems such as chemical and biological weapons, antipersonnel landmines, cluster munitions and blinding lasers.

Academic disciplines that study war and peace have developed a rich body of research that helps us understand how wars start and how they can be prevented or ended. No approach or system is perfect, of course, but we understand how resource scarcity, environmental change, economic stress, refugee flows and racism all fuel the engendering of conflict. We understand the importance of history and culture, the role of gender and the ways in which different political systems exacerbate or diminish the risks of conflict.

In a study for the European Strategy and Policy Analysis System (ESPAS), Chatham House and FRIDE predicted that the world in 2030 will be more fragile and governments and international institutions will struggle to cope with the twin trends of increased interdependence and greater fragmentation. Most significantly, we realized that the risks of inter-state wars are rising and a major inter-state war cannot be ruled out in the near future.

In the lead up to the First World War, many foolishly imagined that Europe was ‘too civilized’ to go to war. Prior to the Second World War people hoped that the aggression from Nazi Germany could be contained. In so many cases of war, we tend to be overly optimistic about the length of time (‘we’ll be home by Christmas’), the scale and the outcome of the conflict.

It is time that we put aside complacency and become more realistic about war and peace and ourselves. We know a great deal about how to prevent war. We owe it to all others who sacrificed their lives and families to put into action all that we have learned and ensure peace in Europe, the Middle East and Asia for forthcoming generations. Otherwise, there will be few left to hear our excuses.

### AT: Unsustainable

#### Growth is sustainable.

Harford, 20—economics columnist for the Financial Times, citing Diane Coyle, Bennett Professor of Public Policy at the University of Cambridge, Vaclav Smil, Distinguished Professor Emeritus in the Faculty of Environment at the University of Manitoba, Chris Goodall, English businessman, author and expert on new energy technologies, alumnus of St Dunstan's College, University of Cambridge, and Harvard Business School, and Jesse Ausubel, Director and Senior Research Associate of the Program for the Human Environment of Rockefeller University (Tim, “Two cheers for the dematerialising economy,” <https://www.ft.com/content/04858216-322e-11ea-9703-eea0cae3f0de>, dml)

If past trends continue, the world’s gross domestic product will be about twice as big by 2040 as it is today. That’s the sort of growth rate that translates to 30-fold growth over a century, or by a factor of a thousand over two centuries.

Is that miraculous, or apocalyptic? In itself, neither. GDP is a synthetic statistic, invented to help us put a measuring rod up against the ordinary business of life. It measures neither the energy and resource consumption that might worry us, nor the things that really lead to human flourishing.

That disconnection from what matters might be a problem if politicians strove to maximise GDP, but they don’t — otherwise they would have hesitated before imposing austerity in the face of a financial crisis, launching trade wars or getting Brexit done. Economic policymaking has flaws, but an obsession with GDP is not one of them.

Nevertheless the exponential expansion of GDP is indirectly important, because GDP growth is correlated with things that do matter, good and bad. Economic growth has long been associated with unsustainable activities such as carbon dioxide emissions and the consumption of metals and minerals.

But GDP growth is also correlated with the good things in life: in the short run, an economy that is creating jobs; in the long run, more important things. GDP per capita is highly correlated with indicators such as the Social Progress Index. The SPI summarises a wide range of indicators from access to food, shelter, health and education to vital freedoms of choice and from discrimination. All the leading countries in the Social Progress database are rich. All the strugglers are desperately poor.

So the prospect of a doubling of world GDP matters, not for its own sake, but for what it implies — an expansion of human flourishing, and the risk of environmental disaster.

So here’s the good news: we might be able to enjoy all the good stuff while avoiding the unsustainable environmental impact. The link between economic activity and the use of material resources is not as obvious as one might think. There are several reasons for this.

The first is that for all our seemingly insatiable desires, sometimes enough is enough. If you live in a cold house for lack of money, a pay rise lets you take off the extra cardigan and turn up the radiators. But if you win the lottery, you are not going to celebrate by roasting yourself alive.

The third reason is a switch to digital products — a fact highlighted back in 1997 by Diane Coyle in her book The Weightless World. The trend has only continued since then. My music collection used to require a wall full of shelves. It is now on a network drive the size of a large hardback book. My phone contains the equivalent of a rucksack full of equipment.

Dematerialisation is not automatic, of course. As Vaclav Smil calculates in his new book, Growth, US houses are more than twice as large today as in 1950. The US’s bestselling vehicle in 2018, the Ford F-150, weighs almost four times as much as 1908’s bestseller, the Model T. Let’s not even talk about the number of cars; Mr Smil reckons the global mass of automobiles sold has increased 2,500-fold over the past century.

Still, there is reason for hope. Chris Goodall’s research paper “Peak Stuff” concluded that, in the UK, “both the weight of goods entering the economy and the amounts finally ending up as waste probably began to fall from sometime between 2001 and 2003”. That figure includes the impact of imported goods.

In the US, Jesse Ausubel’s article “The Return of Nature” found falling consumption of commodities such as iron ore, aluminium, copper, steel, and paper and many others. Agricultural land has become so productive that some of it is being allowed to return to nature.

In the EU, carbon dioxide emissions fell 22 per cent between 1990 and 2017, despite the economy growing by 58 per cent. Only some of this fall is explained by the offshoring of production. (For a good summary of all this research, try Andrew McAfee’s book More From Less.)

Can we, then, relax? No. To pick a single obvious problem, global carbon dioxide emissions may be rising more slowly than GDP — but they are rising nevertheless, and they need to fall rapidly.

Yet the fact that dematerialisation is occurring is heartening. We all know what the basic policies are that would tilt the playing field in favour of smaller, lighter, lower-emission products and activities. Adopting those policies means we might actually be able to save the planet, preserve human needs, rights and freedoms — and still have plenty of fun into the bargain.

#### Dematerialization is proven globally.

Lokshin, 21—Lead Economist with the Office of the Chief Economist for Europe and Central Asia, World Bank (Michael, “Dematerialization, degrowth, and climate change agenda,” <https://blogs.worldbank.org/developmenttalk/dematerialization-degrowth-and-climate-change-agenda>, dml)

These are not isolated examples of the intensity of modern agriculture. The total crop tonnage in the United States tripled since the 1970s, but the cropland area shrunk from about 472 million to 390 million hectares by the 2010s, saving an area three times larger than the United States’ total urban area. Productivity gains in animal agriculture dramatically reduced the environmental footprint of livestock production in the US. Similar reductions in farmland accompanied by large increases in output are seen in countries of Europe, Latin America, and East Asia. The global footprint of agriculture has “started decreasing in size during the past two decades.”

US agriculture, having a positive trade balance, consumes 25 percent less fertilizer than it did in 1999, and the volume of water used for irrigation has decreased by 22 percent since then. Raising the average world farm productivity to the levels seen among US farmers would allow enough food to be grown to feed 10 billion people an American-type diet on half the land currently used for farming. The land released would exceed the area of Amazonia (7 million square kilometers).

Most developed countries are now in the stage of “forest transition,” when a country gains forest area. Europe is greener now than it was 100 years ago; the size of US forest resources remained constant over the 20th century and increased over the last decade. China is adding almost 2 million hectares (about 1 percent) of forests a year. And rates of global forest loss have been slowing since 1980.

At the same time, forestry has become more productive. Shifting wood harvest from the north to the southeast, where the forests are twice as productive, decreased the United States’ logged area by 3.1 million hectares. Forest plantations are much more productive than unmanaged forests: Brazilian eucalyptus plantations provide at least 10 times more timber per hectare per year than northern forests do. The consumption of wood is also declining. Ships and railroads are no longer built of wood. Globally, the use of wood for fuel and construction dropped sharply since the 1960s; the global demand for paper has been stagnant, decreasing across the developed countries over the last two decades. The footprint of the developed world on the planet, as an area occupied by human activities, is shrinking.

There has also been a marked decline in US consumption of the most economically important minerals. According to the US Geological Survey (USGS), since the end of the 20th century, US consumption of metals has fallen by 15 percent for steel, 30 percent for aluminum, and 40 percent for copper. The decline reflects increased efficiency. Aluminum soda cans are six times lighter than they were in the early 1960s, and cars weigh 30 percent less than they did. The introduction of high-strength steel framing, reinforced concrete, and stronger and lighter glass have reduced consumption of cement, stone, sand, and gravel in construction. US energy use has plateaued for more than a decade. Similar trends are observed in the UK, which began to reduce its consumption of physical resources between 2001 and 2003. Even individual caloric intake is falling in the UK, mainly because of the decline in most environmentally damaging meat consumption.

Off-shoring could affect the local consumption of national resources. Country statistics, which rely on a territorial perspective of material use, might fail to account for the global patterns of material consumption. What looks like “green growth” might be just an artifact of globalization. For example, some intermediate metal consumption might be hidden in imported finished merchandise like cars or trucks. While these are valid concerns, the reduction of materials used in agriculture, forestry, and construction appears to be largely isolated from such measurement issues. Actual consumption of these materials in developed countries is dropping; whether the material is imported or not is irrelevant.

The concept of dematerialization refers to an absolute or relative reduction in the quantity of materials required to serve economic functions in society. Unlike the traditional `end-of-pipe’ measures, dematerialization is an input-oriented strategy intended to reduce environmental damage at the source. The production and consumption of products, the so-called “industrial” and “social metabolisms,” could harm the environment. Reducing the volume of material and energy used to produce goods and services diminishes the environmental impact. But in contrast with the degrowth movement, which is based on the premise that environmental damage rises with population and economic growth, the proponents of dematerialization argue that societal metabolism might exhibit an inverted U-shaped relationship with economic growth. A country’s environmental impact rises as its national income grows but then declines after a (very) high level of GDP is reached. Similar argument is made by the recent literature on growth and pollution conversions.

If we believe these trends, the reduction (both relative and absolute) of material consumption observed in developed countries might have important policy implications. Growth in developed countries might not necessarily cause environmental distress and natural resource depletion. Advanced economies may be able to decouple economic growth and growing volumes of resource use. The new technologies are making the economic growth in developing countries greener and less material-intensive compared to the growth the now rich countries experienced at comparable income levels decades ago.

Several factors drive dematerialization. Technological progress improves efficiency and reduces the consumption of resources in manufacturing. The digital economy “swaps bits for atoms,” replacing physical goods and services with their digital versions; 3D printing shifts technologies toward custom-designed components with little or no waste. Competition encourages companies to cut costs and use less materials. Citizens and governments are increasingly putting premiums on the environment, embracing policies to reduce social metabolism.

### AT: Ag

#### Farming is becoming sustainable – new innovations are key.

Shellenberger ‘20 [Michael; Founder and President of Environmental Progress, Former President of the Breakthrough Institute; “Apocalypse Never: Why Environmental Alarmism Hurts Us All,” ISBN: 0063001705,9780063001701]

s technology becomes more available, crop yields will continue to rise, even under higher temperatures. Modernized agricultural techniques and inputs could increase rice, wheat, and corn yields five-fold in sub-Saharan Africa, India, and developing nations.26 Experts say sub-Saharan African farms can increase yields by nearly 100 percent by 2050 simply through access to fertilizer, irrigation, and farm machinery.27

If every nation raised its agricultural productivity to the levels of its most successful farmers, global food yields would rise as much as 70 percent.28 If every nation increased the number of crops per year to its full potential, food crop yields could rise another 50 percent.29

Things are headed in the right direction regarding other environmental measures. Water pollution is declining in relative terms, per unit of production, and in absolute terms in some nations. The use of water per unit of agricultural production has been declining as farmers have become more precise in irrigation methods.

High-yield farming produces far less nitrogen pollution run-off than lowyield farming. While rich nations produce 70 percent higher yields than poor nations, they use just 54 percent more nitrogen.30 Nations get better at using nitrogen fertilizer over time. Since the early 1960s, the Netherlands has doubled its yields while using the same amount of fertilizer.31

High-yield farming is also better for soils. Eighty percent of all degraded soils are in poor and developing nations of Asia, Latin America, and Africa. The rate of soil loss is twice as high in developing nations as in developed ones. Thanks to the use of fertilizer, wealthy European nations and the United States have adopted soil conservation and no-till methods, which prevent erosion. In the United States, soil erosion declined 40 percent in just fifteen years, between 1982 and 1997, while yields rose.32

#### Innovations drive improvements in every metric.

McGrew ’20 [Alison; March; Writer for Illinois Farm Families; Watch Us Grow, “3 Myths About Sustainable Agriculture,” https://www.watchusgrow.org/2020/03/02/3-myths-about-sustainable-agriculture/]

Myth #1: Today’s farms are less sustainable than they used to be.

Fact: Simply put, farmers today are doing more with less. Here are a few examples:

* Compared to 1977, today’s beef farmers produce the same amount of beef with 33% fewer cattle.
* Pig farms now use 75.9% less land than in 1960.
* Over the last 40 years, soybean farmers have nearly doubled how much they grow while using 8% less energy.
* Dairy farmers have reduced greenhouse gas (GHG) emissions by 63% over the past 60 years.
* Corn farmers have increased yields while reducing pesticide and fertilizer use, thanks in part to biotechnology.

Sustainable agriculture may look different on each farm, but the goal is always the same: make the farm better for tomorrow and for future generations while providing a safe, sustainable food supply.

Myth #2: Going meatless will solve climate change.

Fact: A popular idea right now is that cutting meat, like beef, out of your diet is the best thing you can do for the planet. What you might not know is that U.S. beef producers are the global leader in sustainability. According to the USDA, greenhouse gas emissions from beef cattle account for only 3.3% of emissions in the U.S.

By comparison, energy use like transportation and electricity generation makes up 56% of total emissions. In fact, a peer review of studies shows going vegetarian would only cut an individual’s CO2 emissions by 2%.

How we raise livestock continues to become more sustainable as technology advances, so we can keep providing an important, versatile protein for a growing world.

Myth #3: Farmers apply too many pesticides on their fields, which impacts water quality.

Fact: Today’s farmers use fewer pesticides than generations past, thanks to technology advancements:

* Smarter crop protection tools – today’s chemicals are precise, effective and leave virtually no residue on the soil, water or crop.
* Better with biotech – some GMO crops have been genetically engineered to fight off pests, so farmers don’t have to use as many chemicals.
* More accuracy – instead of spraying entire fields for weeds and pests, farmers can use equipment and machinery with variable rate technology to spray precisely where needed.

As mindful as we are about what’s happening in our fields, we also care what happens around them. It’s why many farmers choose to use cover crops, reduce tillage and plant vegetation around nearby bodies of water – all to keep the soil healthy and where it belongs.

### Decoupling

#### Yes decoupling---best and most recent studies AND leakage is wrong.

Zeke Hausfather 21, Director, Climate and Energy at The Breakthrough Institute, "Absolute Decoupling of Economic Growth and Emissions in 32 Countries," Breakthrough Institute, 04/06/2021, https://thebreakthrough.org/issues/energy/absolute-decoupling-of-economic-growth-and-emissions-in-32-countries.

The past 30 years have seen immense progress in improving the quality of life for much of humanity. Extreme poverty — the number of people living on less than $1.90 per day — has fallen by nearly two-thirds, from 1.9 billion to around 650 million. Life expectancy has risen in most of the world, along with literacy and access to education, while infant mortality has fallen. Despite perceptions to the contrary, the average person born today is likely to have access to more opportunities and have a better quality of life than at any other point in human history. Much of this increase in human wellbeing has been propelled by rapid economic growth driven largely by state-led industrial policy, particularly in poor-to-middle income countries.

However, this growth has come at a cost: between 1990 and 2019, global emissions of CO2 increased by 56%. Historically, economic growth has been closely linked to increased energy consumption — and increased CO2 emissions in particular — leading some to argue that a more prosperous world is one that necessarily has more impacts on our natural environment and climate. There is a lively academic debate about our ability to “absolutely decouple” emissions and growth — that is, the extent to which the adoption of clean energy technology can allow emissions to decline while economic growth continues.

Over the past 15 years, however, something has begun to change. Rather than a 21st century dominated by coal that energy modelers foresaw, global coal use peaked in 2013 and is now in structural decline. We have succeeded in making clean energy cheap, with solar power and battery storage costs falling 10-fold since 2009. The world produced more electricity from clean energy — solar, wind, hydro, and nuclear — than from coal over the past two years. And, according to some major oil companies, peak oil is upon us — not because we have run out of cheap oil to produce, but because demand is falling and companies expect further decline as consumers increasingly shift to electric vehicles.

The world has long been experiencing a relative decoupling between economic growth and CO2 emissions, with the emissions per unit of GDP falling for the past 60 years. This is the case even in countries like India and China that have been undergoing rapid economic growth. But relative decoupling alone is inadequate in a world where global CO2 emissions need to peak and decline in the next decade to give us any chance at limiting warming to well below 2℃, in line with Paris Agreement targets.

Thankfully, there is increasing evidence that the world is on track to absolutely decouple CO2 emissions and economic growth — with global CO2 emissions potentially having peaked in 2019 and unlikely to increase substantially in the coming decade. While an emissions peak is just the first and easiest step towards eventually reaching the net-zero emissions required to stop the world from continuing to warm, it demonstrates that linkages between emissions and economic activity are not an immutable law, but rather simply a result of our current means of energy production.

In recent years we have seen more and more examples of absolute decoupling — economic growth accompanied by falling CO2 emissions. Since 2005, 32 countries with a population of at least one million people have absolutely decoupled emissions from economic growth, both for terrestrial emissions (those within national borders) and consumption emissions (emissions embodied in the goods consumed in a country). This includes the United States, Japan, Mexico, Germany, United Kingdom, France, Spain, Poland, Romania, Netherlands, Belgium, Portugal, Sweden, Hungary, Belarus, Austria, Bulgaria, El Salvador, Singapore, Denmark, Finland, Slovakia, Norway, Ireland, New Zealand, Croatia, Jamaica, Lithuania, Slovenia, Latvia, Estonia, and Cyprus. Figure 1, below, shows the declines in territorial emissions (blue) and increases in GDP (red).

To qualify as having experienced absolute decoupling, we require countries included in this analysis to pass four separate filters: a population of at least one million (to focus the analysis on more representative cases), declining territorial emissions over the 2005-2019 period (based on a linear regression), declining consumption emissions, and increasing real GDP (on a purchasing power parity basis, using constant 2017 international $USD). We chose not to include 2020 in this analysis because it is not particularly representative of longer-term trends, and consumption and territorial emissions estimates are not yet available for many countries.

There is a wide range of rates of economic growth between 2005-2019 among countries experiencing absolute decoupling. Somewhat counterintuitively, there is no significant relationship between the rate of economic growth and the magnitude of emissions reductions within the group. While it is unlikely that there is not at least some linkage between the two factors, there are plenty of examples of countries (e.g., Singapore, Romania, and Ireland) experiencing both extremely rapid economic growth and large reductions in CO2 emissions.

One of the primary criticisms of some prior analyses of absolute decoupling is that they ignore leakage. Specifically, the offshoring of manufacturing from high-income countries over the past three decades to countries like China has led to “illusory” drops in emissions, where the emissions associated with high-income country consumption are simply shipped overseas and no longer show up in territorial emissions accounting. There is some truth in this critique, as there was a large increase in emissions embodied in imports from developing countries between 1990 and 2005. After 2005, however, structural changes in China and a growing domestic market led to a reversal of these trends; the amount of emissions “exported” from developed countries to developing countries has actually declined over the past 15 years.

This means that, for many countries, both territorial emissions and consumption emissions (which include any emissions “exported” to other countries) have jointly declined. In fact, on average, consumption emissions have been declining slightly faster than territorial emissions since 2005 in the 32 countries we identify as experiencing absolute decoupling. Figure 2, below, shows the change in consumption emissions (teal) and GDP (red) between 2005 and 2019.

There is a pretty wide variation in the extent to which these countries have reduced their territorial and consumption emissions since 2005. Some countries — such as the UK, Denmark, Finland, and Singapore – have seen territorial emissions fall faster than consumption emissions, while the US, Japan, Germany, and Spain (among others) have seen consumption emissions fall faster. Figure 3 shows reductions in consumption and territorial emissions for each country, with the size of the dot representing the size of the population in 2019.

[Chart omitted]

Absolute decoupling is possible. There is no physical law requiring economic growth — and broader increases in human wellbeing — to necessarily be linked to CO2 emissions. All of the services that we rely on today that emit fossil fuels — electricity, transportation, heating, food — can in principle be replaced by near-zero carbon alternatives, though these are more mature in some sectors (electricity,