# 2NC---Run for the Roses---Round 1

## CP---Remand

### Solvency---2NC

#### The effect is law creation while avoiding an initial ruling without a case at hand---that’s comparatively more solvent.

Bruhl ’20 [Aaron-Andrew; November 2020; J.D. from Yale Law School, Rita Anne Rollins Professor of Law at the William and Mary Law School; Notre Dame Law Review, “The Remand Power and The Supreme Court’s Role,” vol. 96]

Whether to remand at all, and how much instruction to give the lower court, obviously can affect the resolution of the specific dispute at hand, and [\*174] some remedial decisions, like the one in Brown, have serious social consequences. But practices regarding appellate remedies also have systemic effects on the operation, and ultimately the character, of the whole judiciary. Remands distribute judicial work and delegate the authority and responsibility to apply the law. A general practice of open-ended remands allows an appellate court to focus on pure questions of law rather than the messy details of law application and case resolution. The modern Supreme Court's heavy reliance on remands both reveals and facilitates its self-conception as a law-declaring court.

The Supreme Court's power to remand cases is confirmed by a federal statute of extraordinary breadth. It authorizes federal appellate courts to affirm, reverse, vacate, or modify a judgment or to remand for further proceedings with no apparent limitation except that the chosen remedy "be just under the circumstances." 4Using this authority, the Court remands in a wide range of circumstances. Most of these remands are uncontroversial, for they simply require the lower court to do the work of applying newly clarified law to the case at hand, but certain types of remands have attracted criticism on the grounds that they overstep the proper appellate role. 5The remands that attract criticism tend to involve cases in which the Court vacates and remands without identifying error in the ultimate judgment under review or, sometimes, even identifying a material error in the reasoning of the decision under review. More specifically, the controversial remands can be organized into two categories, which we could call law-shepherding remands and justice-ensuring remands. As we will see, the two categories are quite different and are subject to criticism and defense on different grounds.

An example of a law-shepherding remand is a case in which the Supreme Court requires the lower court to reach a different ground of decision - to decide the case on the basis of one issue instead of another - in circumstances in which there is no mandatory sequence of decision and without finding the lower court's initial ground to be incorrect. 6A striking example of such a remand for resequencing is Beer v. United States, the lawsuit brought by federal judges complaining that Congress's failure to grant cost-of-living increases amounted to a cut in pay in violation of Article III's Compensation Clause. 7The U.S. Court of Appeals for the Federal Circuit turned away the judges' suit based on circuit precedent that had previously rejected the same argument. 8The Supreme Court then summarily vacated and remanded for the Federal Circuit to consider an alternative ground for dismissing the case, namely that the judges' lawsuit was barred by issue preclusion [\*175] based on their participation in prior litigation. 9"The Court considers it important that there be a decision on the [preclusion] question," the terse order read, "rather than that an answer be deemed unnecessary in light of [the Federal Circuit's] prior precedent on the [constitutional] merits." 10Justice Scalia dissented based on his view that the Court "[has] no power to set aside the duly recorded judgments of lower courts unless we find them to be in error, or unless they are cast in doubt by a factor arising after they were rendered." 11

A few things are clear about Beer, but other aspects of the case are obscure. Clearly the Supreme Court had jurisdiction. It could have addressed preclusion, as the issue had been pressed by the government in the lower court. It is also clear that the Court's decision did not conclude that the Federal Circuit's ruling on the Compensation Clause was wrong on the merits. And, though this is perhaps a bit less certain, the Federal Circuit did not err by relying on circuit precedent rather than addressing preclusion, a nonjurisdictional issue. 12One thing that is obscure, by contrast, is the Court's reasoning, as the order was only a few sentences long and cited no authorities. Also unclear is the Court's motive for the remand, though it looks like the Court hoped to delay and perhaps avert a clash with Congress over judicial salaries.

As Beer reveals, law-shepherding remands are hard to classify into familiar (if troubled) categories of activism and restraint. The decision in Beer was not activist in the sense of unduly reaching or hastening the resolution of weighty questions. But it was not passive either, at least not in the sense of taking the cases as they come. Instead, and as it does with other procedural tools and doctrines at its disposal, 13the Court is using remands to maximize its control over the timing and circumstances of the judiciary's exercise of its law-declaring function. That is the sense in which the remand in Beer, and other cases like it, shepherd the development of the law.

### Solvency---Supreme Court---2NC

#### The result is nationalized law that’s comparatively more credible.

Gewirtzman ’12 [Doni; February 2012; Associate Professor of Law at the New York Law School, Skadden Fellow at Lambda Legal Defense and Education Fund, J.D. from the University of California-Berkeley, B.A. from Wesleyan University; American University Law Review, “Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System,” vol. 61]

While discretionary space may create problems for the precedent model, it provides a terrain for lower courts to make constitutional policy. This policymaking function serves a competing set of constitutional values, most of which are summarily dismissed in models of how lower courts should exercise the discretion they have. This suggests the need for a new approach to lower court constitutionalism, one that recognizes the full set of normative values advanced by an interpretive system that empowers lower courts to make choices about constitutional meaning.

A. Policymaking and Error Correction

The precedent model advances the circuit courts' primary constitutional function: error correction. 117 This function requires appellate courts to ensure that decisions made by trial courts and agencies within their jurisdiction comply with established law and contain no clearly erroneous findings of fact.

The precedent model, and the corresponding hierarchical relationship between the Supreme Court and the circuits, enables circuit court judges to perform their error correction role efficiently. 118 To "correct" errors, there must be some benchmark of what constitutes a "correct" interpretation. 119 Within constitutional law, there are numerous potential sources of authority with no consensus about how to prioritize or interpret those authorities. 120 The precedent model focuses lower courts on a single source of authority and interpretive methodology: the application of Supreme Court precedent through common law reasoning. 121 This dramatically shrinks the scope of relevant authority and allows appellate court judges to apply the same familiar methodology used in other areas of law. For lower courts, the model resolves the critical questions of constitutional interpretation - what authority to use and how to interpret that authority - in a clear and efficient way.

If the precedent model is a way of structuring organizational relationships to help lower courts fulfill their error correction function, discretionary space helps them perform a second institutional function: policymaking. 122 Unlike the error correction function, which creates law from the top down, the policymaking function envisions law made from the bottom up, created through a dialogue between different levels of the federal judiciary.

In areas where the Supreme Court has not spoken, or where it is unclear whether or how existing law applies, circuit courts act as "percolators" for the development of constitutional law. Before the Court chooses to nationalize a particular constitutional rule, it gets a chance to see how the rule "writes," 123 and the opportunity to use lower courts as smaller "laboratories" 124 for experimentation to assess the rule's consequences. 125 [FOOTNOTE] 124 See McCray v. New York, 461 U.S. 961, 963 (1983) ("It is a sound exercise of discretion for the Court to allow [lower courts] to serve as laboratories in which the issue receives further study before it is addressed by this Court."). [END FOOTNOTE] Through the percolation process, the federal judicial system harnesses the benefits of "the wide diversity of skills, experience, and backgrounds" among lower courts to produce optimal rules, 126 as well as internalizing the benefits of the deliberation that occurs among lower courts as they respond to one another's decisions. 127 [FOOTNOTE] 127 See Estriecher & Sexton, supra note 123, at 699 n.68 (proposing that percolation "encourages the courts of appeals to examine and criticize each other's decisions, which … can generate solutions that are not obvious on a first or second look"). [END FOOTNOTE] Indeed, the release of a new Supreme Court opinion often ushers in a "period of learning within the circuits," in which different lower courts follow different doctrinal paths, culminating in the Supreme Court selecting one of the alternatives and nationalizing it. 128 Once the process is completed, it has the potential to bring added legitimacy to judge-made constitutional law. When judges on multiple diverse courts converge on the same outcome, the rule is more likely to be seen as the correct one. 129

#### 2. LEGITIMACY PULL---near-universal lower court adoption forces Supreme Court follow-on.

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The Court in Reynolds v. Sims did not expressly cite numerous federal and state court decisions as authority for its own resolution, as it did in Obergefell. As just noted, however, the Court did lean on federal and state court decisions in documenting the scope of the “problem . . . that is perceived to exist.” The Court did not acknowledge that Baker likely played a role in producing that perception, even as the Court observed that those decisions were rendered after Baker. As Professor Gordon Baker reported, moreover, “the ‘consensus of lower courts’ in moving toward representative equality” was a major theme of oral arguments in reapportionment cases that term.139 Thus, the reapportionment cases appear to be another instance in which the Court intervened in stages and interacted dialectically, not simply hierarchically, with other federal (and state) courts.

In another way, the majority opinion in Reynolds v. Sims quietly sought to ameliorate threats to the Court’s public legitimacy. Chief Justice Warren offered the reassurance that controversies over reapportionment did not simply involve “urban-rural conflicts,” notwithstanding how they “are generally viewed.” This was because “fast-growing suburban areas . . . are probably the most seriously underrepresented in many of our state legislatures,” and because “malapportionment can, and has historically, run in various directions.”140 Those observations were irrelevant to the constitutional question, as Warren acknowledged.141 But he included them anyway.142

#### Unions and employees will cite those cases in a flood of lawsuits, bypassing ideological opposition---that’s Siegel.

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Although “[s]ome commentators criticized the Court for laying down no more specific guidelines for lower courts to follow,” Professor Gordon Baker, writing in 1966, opined that the Court’s forbearance “may have been a calculated and perceptive move.”120 “By letting state and lower Federal courts tackle the specific problems in particular states,” Baker explained, “the supreme tribunal would be able to gauge the reactions—both political and judicial—before moving farther.”121 He added that the Court “must have been impressed with the ensuing flood of litigation,” as well as with “the alacrity with which many lower court judges moved to correct alleged malapportionments.”122 Political scientist Martin Shapiro was less pleased with the Court, opining that it “has, in a sense, not kept its word to those of its defenders who have relied on the initially limited arguments” and that “[i]t remains to be seen whether or not the tactical advantage gained by its ‘delayed action’ approach will compensate for the Court’s loss of that precious political asset, a reputation for candor.”123

Judging from the inside account of the Court’s deliberations recently offered by Professor J. Gordon Smith, however, the reason the Court decided only the issue of justiciability in Baker appears to have had much to do with unstable internal Court dynamics.124 Justice Brennan initially needed Justice Stewart’s vote in order to secure a majority, and Justice Stewart did not want to decide more than the issue of justiciability. Whatever the reasons for Justice Stewart’s minimalism (among other possibilities, perhaps Justice Frankfurter’s lobbying took a toll), Justice Brennan no longer required Justice Stewart’s vote when Justice Clark changed his mind after unsuccessfully attempting to write a dissent. What is more, Justice Clark expressed willingness to decide not only the issue of justiciability, but also the merits. After talking with Chief Justice Warren, however, Justice Brennan decided not to redraft the majority opinion so late in the term. Perhaps Justice Brennan did not push for a broader ruling at least in part because he perceived strategic advantage in delay— whether because he had intended reciprocal legitimation in mind, or because he did not want to alienate Justice Stewart. It also seems likely, however, that the Court would have issued a broader ruling had Justice Clark initially joined the majority. Moreover, there were not yet five votes for “one person, one vote,”125 so the Court could not then have been proceeding with that ultimate objective in mind.

Whatever the best explanation for the limited nature of the Court’s intervention in Baker, the “short-term response” to it was “nothing short of astonishing.”126 Writing in 1962, Professor Robert McCloskey observed that “not only federal judges, but state judges as well, have taken the inch or so of encouragement offered by the Supreme Court and stretched it out to a mile,” for “legislatures all over the country have been bidden to redistrict or to face the prospect of having the judiciary do the job for them.”127 In all, there were “more than seventy legislative and congressional reapportionment lawsuits filed in forty states in the aftermath of Baker v. Carr.”128 Baker set in motion a process, the next phase of which entailed federal and state judges leaning on its authority in moving toward population equality.

#### 3. STATISTICS---peer-reviewed statistical research confirms borrowing AND deference are likely.

Bowie ’23 [Jennifer, with seven others; September 4; Assistant Professor in the Department of Politics at Oberlin College; Journal of Law and Courts, “Lower Court Influence on High Courts: Evidence from the Supreme Court of the United Kingdom,” vol. 12]

Although we do not expect ideology to play a meaningful role in the justices’ decisions to incorporate lower court language within their own opinions, they should intuitively be more inclined to borrow language when they are affirming a lower court decision. Bowie and Savchak offer that, “when affirming a judgment below, a justice may look to lower court opinions for shortcuts in useful language that may be helpful for explaining their own legal rationale” (Reference Bowie and Savchak2022, 11). We might expect UK Supreme Court justices to frequently consult and borrow language from lower court opinions when they affirm because upholding a lower court decision reflects a mutually agreeable outcome that likely involves overlapping or highly similar legal justifications between the two levels of the judiciary. However, if the Supreme Court reverses a lower court decision, the justices have to articulate original arguments that explain why the lower decision is problematic and why an alternative rationale is needed to justify the legal outcome. In such an instance, it is highly unlikely for the justices to extensively borrow language from the lower court opinion. Therefore, we expect justices to have a greater propensity to borrow language from opinions when they agree with the lower court outcome.

Hypothesis 2 Justices on the UK Supreme Court will borrow more language from the Court of Appeal opinion when they affirm the lower court decision.

Finally, the size of the reviewing Supreme Court panel should play a considerable role in the justices’ choices to borrow lower court opinion language. We address two theoretical explanations that explain this expectation. First, larger panels reflect comparatively more important decisions (Hanretty Reference Hanretty2020). Although the justices typically make decisions in pseudo-random panels of five, the Court employs larger panels of seven, nine, or even eleven justices when a case is particularly consequential.Footnote9 The UK Supreme Court notes within its rules that cases assigned more than five justices indicate, among other things, “a case of great public importance.” We expect that justices will devote more time to crafting original opinions in salient cases given their gravity and heightened likelihood of public attention (Corley Reference Corley2008; Corley, Collins, and Calvin Reference Corley, Collins and Calvin2011; Hanretty Reference Hanretty2020). Second, compared to the standard five-justice panel, larger panels provide the justices with comparatively more opportunities to deliberate amongst each other, which should reduce the need to borrow from lower court opinions. As such, we expect borrowing rates to be higher when the Supreme Court panel consists of the standard, five-justice configuration as opposed to panels greater than five.

Hypothesis 3 Justices on the UK Supreme Court will borrow more language from the Court of Appeal opinion when their panel composition consists of five justices.

In addition to the Supreme Court attributes discussed above, casespecific characteristics at the appellate level – outside of the control of the justices – may also impact language borrowing tendencies within the UK. First, Supreme Court justices may be more inclined to borrow lower court language when a lower court panel decides a case unanimously. Research demonstrates that judicial decision-makers sitting on courts of last resort (Corely, Steigerwalt, and Ward Reference Corley, Steigerwalt and Ward2013) and lower courts (Hansford and Spriggs Reference Hansford and Spriggs2006; Masood, Kassow, and Songer Reference Masood, Kassow and Songer2019; Masood and Kassow Reference Masood and Kassow2023) are more likely to adopt legal rationales in the absence of a counter signal by a dissenting judge (Beim, Hirsch, and Kastellec Reference Beim, Hirsch and Kastellec2014). Dissenting opinions also provide judicial decision-makers with additional avenues from which to borrow language that might be more persuasive than the content of the lower court majority opinion. The absence of dissenting opinions removes such opportunities that may dissuade justices from borrowing language from the majority opinion.

Previous research also finds that the type of opinion influences whether a higher court borrows from the resulting opinion (Corley, Collins, and Calvin Reference Corley, Collins and Calvin2011). For instance, split decisions may signal to the justices that there is ideological divisiveness or disagreement over the legal justifications on which the decision is based (Masood and Lineberger Reference Masood and Lineberger2020). Such disagreements should decrease the likelihood for the Supreme Court to borrow lower court language, particularly due to the importance that the justices attach to precedent rather than ideological considerations. Because unanimous decisions in the lower court provide justices with a single avenue from which to adopt language and signal that the decision is grounded in legal rationale based on consensus, we expect to see higher rates of borrowing in instances where lower court decisions are unanimous.

Hypothesis 4 Justices on the UK Supreme Court will borrow more language from unanimous Court of Appeal opinions.

Finally, an additional Court of Appeal case characteristic that should impact Supreme Court language borrowing is the length of the lower court opinion. Lengthier opinions, by definition, provide more content for the justices to potentially incorporate within their own opinions. Opinion length might also be indicative of a more thoughtful and deliberative process of crafting an opinion (Leonard and Ross Reference Leonard and Ross2016; Hinkle Reference Hinkle2017). As such, the justices might be more willing to adopt language from lengthier opinions because longer opinions may, in the aggregate, better justify the logic of a lower court decision compared to shorter, less precise lower court justifications. This could be due to the fact that lengthier opinions may be better embedded within existing doctrine and are therefore more persuasive or informational. Lengthier opinions are also arguably applicable to a wider set of factual situations if we assume that longer opinions discuss the applicability of the legal reasoning more thoroughly. For instance, Masood and Lineberger (Reference Masood and Lineberger2020) demonstrate that lengthier opinions supply more information to judicial actors in the UK compared to shorter opinions. Beyond this finding, the justices might view longer opinions as more legitimate because length could imply greater attentiveness and care in articulating the decision. For these reasons, we expect Supreme Court justices to borrow language more extensively from lengthier appellate decisions compared to opinions that are comparatively shorter.

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Hypothesis 5 Justices on the UK Supreme Court will borrow more language from Court of Appeal opinions as the length of those opinions increase. Data and methods In order to empirically assess how the United Kingdom’s career-based judiciary and institutional norms affect the degree to which justices borrow language from Court of Appeal opinions, we collect data from multiple sources to construct several new and original datasets. First, we collect data from the British and Irish Legal Institute (BAILII) websiteFootnote10 to identify the universe of cases decided by the UK Supreme Court between the years 2009 and 2019.Footnote11 The final dataset includes 548 judicial decisions, where our unit of analysis is the Supreme Court majority opinion – Court of Appeal opinion dyad.Footnote12 To create our dependent variable, we utilize BAILII’s case history functionFootnote13 to access higher and lower court opinion texts. After locating each Supreme Court opinionFootnote14 and the accompanying appellate court decision under review, we convert each opinion into a text format and use WCopyfind 4.1.5Footnote15 – software which identifies language similarities – to assess the degree to which the lower court opinion words and phrasing were replicated, or “adopted,” in the UK Supreme Court opinion (Corley Reference Corley2008; Corley, Collins, and Calvin Reference Corley, Collins and Calvin2011; Bloomfield Reference Bloomfield2016; Savchak and Bowie Reference Savchak and Bowie2016; Bowie and Savchak Reference Bowie, Savchak, Sterett and Walker2019; Bowie and Savchak Reference Bowie and Savchak2022).Footnote16 Our dependent variable is the percentage of a Supreme Court opinion’s language that is borrowed directly from the lower court decision. We set the shortest phrase match to ten words, which tells the software to ignore language matches of nine words or less. This provides more conservative estimates than the frequently used six-word match.Footnote17 The dependent variable ranges from 0 to 42 percent. Table 1 provides an example of the type of borrowing reported by the WCopyfind program. Returning to the case of R v. Gnango, the Supreme Court’s lead opinion highlights that the account of the case facts comes “almost verbatim [from the] judgment of the Court of Appeal.”Footnote18 This direct incorporation of the lower court’s language into the Supreme Court opinion does not, however, end with a summary of the facts. Table 1 illustrates one of the many instances of word-for-word language adoption interspersed throughout the Supreme Court’s majority opinion. As the Gnango example demonstrates, the language used in opinions is essential to the judicial process for identifying the issue, clarifying legal doctrine, and establishing guidelines for judges to follow when adjudicating similar cases (Corley, Collins, and Calvin Reference Corley, Collins and Calvin2011). Table 1. Language Borrowing in R v. Gnango We include explanatory variables to account for the Supreme Court level attributes and Court of Appeal case characteristics detailed in the theory. Three independent variables capture effects of Supreme Court level attributes on language borrowing. Although we believe that the judiciary in the United Kingdom is predisposed to “getting the law right,” nevertheless, it is necessary to assess whether ideological preferences at the Supreme Court and Court of Appeal level exert any influence on decision-making in the UK Supreme Court. Ideological Congruence measures the ideological similarity between the Supreme Court’s opinion author and the opinion author of the Court of Appeal. Each judge’s ideology is determined by the party of the appointing prime minister.Footnote21 A value of 1 indicates ideological congruence between the Supreme Court’s lead opinion author and the lead author of the Court of Appeal opinion, and a value of 0 indicates otherwise.Footnote22 To assess whether UK Supreme Court justices have a preference toward borrowing lower court opinions when they are affirming a decision, we include the Affirm variable that is coded as 1 when the lower court decision is affirmed, and 0 otherwise. We expect a positive estimate for this variable, demonstrating that the justices are more likely to borrow when they are in agreement with the lower court about the application of the law. In addition, we include a variable to capture whether the size of the Supreme Court panel influences whether the justices adopt language from the Court of Appeal opinion. To be consistent with existing measures, Panel Size equals 1 if the case is decided by the standard panel of five justices and 0 if the panel includes more than five justices (Hanretty Reference Hanretty2020; Masood and Lineberger Reference Masood and Lineberger2020).Footnote23 The panel size variable should be signed in the positive direction, as justices should be more apt to borrow language in cases that are considered more routine and less salient to the public. We also include two variables to capture appellate level case characteristics. Unanimous equals 1 if the decision from the Court of Appeal is unanimous, and 0 otherwise. We expect this variable to be positively signed, suggesting that justices tend to borrow more language from the lower court opinion when they are certain there is decisional and jurisprudential agreement among the lower court judges. Finally, we include an Opinion Length variable in order to account for the length of each lower court decision. We first determine the number of words within each appellate opinion and then transform the variable by calculating the natural logarithm of the total number of words. This approach allows us to account for any nonlinearity or variation within the values of the variable (see Randazzo, Waterman, and Fine Reference Randazzo, Waterman and Fine2006; Bowie and Savchak Reference Bowie and Savchak2022). We expect the estimate of this variable to be signed in a positive direction, as it would indicate that justices borrow more language from lengthier opinions compared to those that are less verbose. Beyond the key variables of interest, we account for several confounders. At the Supreme Court level, we include a control for whether a Supreme Court justice is new to the Court. Freshman Justice equals 1 if the UK Supreme Court opinion writer is within the first two years of serving on the Supreme Court, and 0 otherwise.Footnote24 We expect a positive estimate, which would account for an initial period of acclimation to the work of the higher court (Hagle Reference Hagle1993; Bowen Reference Bowen1995). Next, we include a control for the Supreme Court’s caseload because a disproportionately higher number of decisions may reduce the amount of time a justice can dedicate to crafting an opinion and increase his or her likelihood to borrow language from the lower court. The Caseload variable is coded based on the number of cases adjudicated by the Supreme Court in each term. Given nonlinearity in the values of this variable, we take the natural logarithm of the total number of cases by term. Finally, we control for two key factors at the Court of Appeal level that may shape how much (or little) a justice borrows from the Court of Appeal decision. Prior scholarship demonstrates that writing clarity is an important factor affecting the judicial process, as higher levels of opinion clarity increase the transparency and perceived legitimacy of the ruling at hand (Goelzhauser and Cann Reference Goelzhauser and Cann2014; Black et al. Reference Black, Owens, Wedeking and Wohlfarth2016; Nelson and Hinkle Reference Nelson and Hinkle2018; Bowie and Savchak Reference Bowie, Savchak, Sterett and Walker2019; Bowie and Savchak Reference Bowie and Savchak2022). As such, lower court opinions that are clearly written may be more strongly perceived as rationally grounded decisions, meaning we should see higher rates of borrowing from those opinions. To account for these effects, we gauge the clarity of an opinion by taking into account its reading ease as well as the extent to which the opinion uses the passive voice. It stands to reason that it should be easier to decipher and understand the logic of an opinion that is written absent difficult language. Similarly, the absence of passive voice language in legal writing maximizes opinion clarity and decreases the ambiguity of judicial decisions (Wydick Reference Wydick1998; Bowie and Savchak Reference Bowie and Savchak2022). We gather data for two variables meant to capture lower court opinion clarity. The first is Reading Ease and the second is Passive Voice. We collect both pieces of information by copying the lower court opinion text into a Microsoft Word document and running the text through the software’s automated readability tests. Word calculates reading ease using the Flesch-Kincaid readability test, which assigns the document a score between 0 and 100. Higher scores for Reading Ease indicate easier material to read, whereas lower scores indicate more difficulty. The Passive Voice variable reports the percentage of sentences in each lower court opinion that use the passive voice. Empirical results Do UK Supreme Court justices frequently borrow language from the opinions of lower court judges? The short answer is yes. We find that justices on the UK Supreme Court directly incorporate some language from the opinions of Court of Appeal judges in over 90% of cases. This suggests an overwhelming embrace of language adoption by the Supreme Court.Footnote25 We also discover that UK Supreme Court justices adopt, on average, approximately 9% of the language directly from lower court opinions. To better understand how frequently the justices borrow language from lower court opinions, Figure 1 presents the percentage of Supreme Court majority opinions that include borrowed language by justice. The data show that 11 out of 26 justices in our data (42%) borrow language in every opinion for which they are the lead opinion writer. The remaining 15 justices incorporate borrowed language in at least 80% of the majority opinions they author.Footnote26 The data on language borrowing tendencies are clear: it is the exception – rather than the rule – for a justice to fail to adopt language from lower court opinions. Figure 1. Percentage of UK Supreme Court Majority Opinions with Borrowed Language, by Author, 2009–2019. To more systematically explore the factors that influence language borrowing tendencies in the UK Supreme Court, we estimate linear regression models. The estimates presented in Table 2 include three specifications. Model 1 includes justice fixed effects to account for within-group variation among the justices. Model 2 includes justice and year fixed effects to account for both within-group variation among justices and unobserved heterogeneity among Supreme Court terms. Model 3 includes justice and year fixed effects with block boot-strapped standard errors to preserve the original clustering structure while simultaneously accounting for the small number of group level units (Cameron, Gelbach, and Miller Reference Cameron, Gelbach and Miller2008). The results are robust across all model specifications. Table 2. Regression Models of Language Borrowing at the UK Supreme Court, 2009–2019 Note: The unit of analysis is the UK Supreme Court–Court of Appeal opinion dyad. The dependent variable is the percentage of the lower court opinion that is borrowed by the UK Supreme Court opinion with the shortest phrase match set at ten words. Model 1 includes Justice fixed effects. Model 2 includes Justice and Year fixed effects. Model 3 includes Justice and Year fixed effects with bootstrap standard errors from 1000 block-bootstrap replications given the relatively small number of clustering units (Cameron, Gelbach, and Miller Reference Cameron, Gelbach and Miller2008). \*p < .05 (one-tailed tests). Given the UK judiciary’s unique institutional structure that emphasizes career-based elevation and an apolitical appointment process, we hypothesized that ideological compatibility between opinion authors at the Supreme Court and lower court level should have little to no effect on opinion-borrowing tendencies, all else being equal. The coefficient estimate for Ideological Congruence is not statistically significant. Consistent with our expectation, we find that ideological congruence between higher and lower court opinion authors exerts no meaningful effect in either increasing (or decreasing) the extent to which Supreme Court justices adopt language from lower court opinions. In other words, we find no evidence to indicate that justices on the UK Supreme Court are borrowing language from lower court judges with whom they are ideologically aligned. The absence of ideological influences on language borrowing tendencies corroborates our intuition that a nonpolitical, career-based judiciary seems to minimize the pervasiveness of ideological considerations in both the decision-making and opinion writing processes. The absence of ideological motivations suggests that judges and justices in the UK may prioritize legal or case-specific considerations over ideology, even at the highest tier of the judicial hierarchy. Next, although we hypothesized that the justices should borrow more language from the lower court opinion when they are affirming that decision, we do not find evidence to support this expectation. The positive yet statistically insignificant coefficient estimate for Affirm suggests that Supreme Court justices borrow language from the appellate court regardless of whether the Court agrees with the lower court’s outcome. This unexpected finding indicates that mere agreement with the legal outcome at the lower court level does not effectuate higher levels of opinion content adoption by UK Supreme Court justices. Instead, the result suggests that justices are just as likely to borrow language from lower court opinions whether they uphold or overturn the lower court decision. Our final Supreme Court level attribute gauges the impact of a standard versus larger Supreme Court panel. The coefficient for Panel Size is statistically significant and signed in the positive direction. Recall that this variable is coded as 1 when the Supreme Court employs a standard panel configuration of five justices. The results indicate that opinion authors borrow more language from lower court opinions when the Supreme Court panel size is composed of five justices rather than larger panels of seven, nine, or eleven. The standard five-justice panel produces opinions where, on average, approximately 9.1% of the language is borrowed from the lower court opinion. Panels of more than five justices, however, produce opinions where approximately 6.8% of the language comes from the lower court opinion. Because larger panel sizes indicate that a case is of great public importance (i.e., salient), this finding is consistent with research on the American courts showing that Supreme Court justices tend to rely less on lower court opinions in cases that address salient issues (Corley, Collins, and Calvin Reference Corley, Collins and Calvin2011). Turning to the Court of Appeal level attributes, we do not find any evidence that UK Supreme Court justices borrow more language from unanimous lower court opinions compared to opinions that are nonunanimous. The variable Unanimous has a positive coefficient, yet it is statistically indistinguishable from 0, meaning that agreement among the full panel of lower court judges regarding the outcome of a case does not motivate the justices to borrow more language from the lower court opinion compared to when the lower court decision includes a dissenting opinion.Footnote27 This result suggests that neither lower court consensus nor the availability of alternative rationales by dissenting judges has any discernible effect on language borrowing tendencies among Supreme Court justices in the UK. We do, however, find evidence supporting our expectation that the length of a lower court opinion should affect Supreme Court language borrowing patterns. The estimate for Opinion Length is statistically significant and positively signed. Consistent with research showing that US judges borrow more language from longer lower court opinions, so too do UK justices (Corley, Collins, and Calvin Reference Corley, Collins and Calvin2011; Bowie and Savchak Reference Bowie and Savchak2022). Figure 2 illustrates the substantive effect of lower court opinion length on Supreme Court language borrowing.Footnote28 The results demonstrate that going from the minimum to the maximum value of the Opinion Length variable results in roughly a ten-percentage point increase in language borrowing, which represents a large effect. This result suggests that, ceteris paribus, lower court opinions codified in lengthy expositions and justifications of the outcome increase the tendency among Supreme Court justices to adopt the content of lower court opinions. Figure 2. Impact of Opinion Length on Language Borrowing in the UK Supreme Court. Note: The effects are based on the estimates from Model 3. To plot these effects, we generate the predicted probability across all real values in the data. The solid line represents the predicted opinion percentage borrowed by the UK Supreme Court from the UK Court of Appeal. The shaded area represents the 95% confidence intervals. Finally, turning to our control variables, neither Supreme Court level controls – Freshman Justice and Caseload – reach conventional levels of statistical significance. These results indicate that justices who are newer to the Supreme Court do not experience acclimation effects such that they incorporate lower court language more extensively within their majority opinions compared to their more experienced peers.Footnote29 Relatedly, the number of cases that the Supreme Court reviews in a given term does not affect language borrowing patterns. This suggests that inevitable variations in the number of cases adjudicated by the Supreme Court, from one term to another, is not consequential in impacting the tendency of the justices to borrow language from lower court opinions. The two Court of Appeal-level controls are also statistically indistinguishable from 0 across all model specifications. Neither Reading Ease nor Passive Voice influence language borrowing patterns, suggesting that neither the textual clarity nor the readability of lower court opinions lead UK Supreme Court justices to borrow more or less language from lower court opinions.Footnote30 Discussion The practice of language borrowing is an area of study attracting increasing attention from judicial scholars, as the extent to which higher court justices use language from lower court opinions in crafting their own decisions offers important insights into factors affecting the behavioral dynamics of the judicial hierarchy on both individual and institutional levels. However, although the most prevalent study finds that the US Supreme Court borrows extensively from Courts of Appeal decisions (Corley, Collins, and Calvin Reference Corley, Collins and Calvin2011), opinion borrowing tendencies have not previously been explored outside the American context. Given this apparent gap in the literature, our study contributes to the literature by systematically assessing whether opinion borrowing patterns are transferable across comparative settings, and if so, under what circumstances. By exploring how UK Supreme Court justices incorporate lower court language within their own opinions, we offer new insights into opinion borrowing tendencies and bottom-up influences, more broadly, from a comparative perspective. Our results demonstrate that justices on the UK Supreme Court borrow language from lower court opinions at higher rates compared to the justices on the US Supreme Court. Yet, the factors that motivate opinion borrowing in the US judiciary are not always directly analogous to the UK judicial system, and for good reason. The UK judiciary emphasizes a career-based path for elevation and a strong deference to the principle of stare decisis, both of which form the basis of the theoretical framework through which we attempt to understand language borrowing practices by the UK Supreme Court. There are key institutional idiosyncrasies that increase language adoption tendencies in the UK, including the fact that elevation to the higher courts is predicated on lengthy judicial experience, the UK Supreme Court’s ability to oversee a comparatively small Court of Appeal, the requirement for pseudo-random panels for review created from a Supreme Court with low membership stability, and the potential for forming strong networks of peer judges all working within the same city and building (Masood and Lineberger Reference Masood and Lineberger2020).

<<PARAGRAPH BREAKS RESUME>>

At the same time, our results show that language borrowing tendencies do not always manifest in different ways in the UK compared to the US context. We find that justices in the UK are not particularly motivated to borrow at greater rates when the lower court issues a unanimous decision. And, simply affirming the lower court decision does not lead to larger amounts of language borrowing at the Supreme Court. Both of these results reflect findings from scholars researching language borrowing among the US federal and state courts. Our findings are also consistent with findings on the American courts because the justices in both countries distinguish cases of great importance by crafting original opinions in order to address the most pressing issues of the day. Despite differences in both the size of each country’s judiciary and the extent to which politics may infiltrate the judicial process, case salience is uniformly seen as a priority among these two sets of common law justices. Meanwhile, Supreme Court justices across judicial systems – including those in the UK – are more inclined to borrow language from longer lower court opinions.

Our analysis of opinion borrowing in the United Kingdom offers a number of contributions to the study of law and courts. Our work offers a unique account into bottom-up influences within comparative courts. In doing so, we believe that our results highlight the importance of continuing to explore language use in written opinions, as we find both similarities and differences in the factors motivating opinion borrowing tendencies among judicial systems. Second, we bring to light empirical evidence demonstrating that although opinion borrowing is common in the UK judicial system, what motivates language adoption is not the ideological factors that seem to define opinion borrowing in the US. Rather, factors grounded in the institutional norm of deference to existing precedent motivate language borrowing. This finding should provide an opportunity for future work to consider additional factors that affect borrowing throughout the UK judiciary in order to improve our understanding of how institutional norms and constraints might motivate higher court judges to adopt lower court opinion language. As such, our analysis should serve as a catalyst for further examinations on how factors such as judicial specialization, issue area, an opinion author’s identity characteristics, and the availability of precedent may also influence language adoption from lower court decisions into higher court opinions. Finally, this study can provide a useful roadmap for scholars to analyze opinion borrowing and judicial behavior more generally across other countries beyond the US and UK. Despite important advances in comparative courts, there remain critical gaps in our collective understanding of institutional norms and judicial decision-making outside of the US courts. Our work demonstrates that it is critical for scholars to consider country-specific idiosyncrasies in research designs exploring hierarchical interactions within judiciaries.

From a comparative perspective, the data from our study indicate that opinion borrowing by the court of last resort is a practice ubiquitous within the United Kingdom. Yet, our work also demonstrates that there is a more nuanced distinction that must be drawn between the UK and other national judicial systems: namely, that the ideological predilections that incline justices to borrow language from the Courts of Appeals in the US do not motivate opinion borrowing in the United Kingdom. The lack of influence that ideology has on the likelihood for UK justices to borrow from lower court opinions has two important implications. First, it suggests that ideology does not play an outsized role in the decision-making or opinion writing process for judicial actors in the UK, as justices show no indication of extensively incorporating the language of lower court judges with whom they share similar ideological leanings. Second, the absence of meaningful support for ideological congruence corroborates our theoretical expectation that opinion borrowing in the UK is more prominent than it is in the US, as the presence of a career-based judiciary that relies on experience rather than partisanship or ideology as the key determinants for membership leads to a norm in which judicial decision-makers focus on adhering to legal doctrine rather than evincing tendencies of policy entrepreneurs.

#### 4. RATIONALITY---granting interpretive power to lower courts prevents forum shopping and delay.

Bruhl ’20 [Aaron-Andrew; November 2020; J.D. from Yale Law School, Rita Anne Rollins Professor of Law at the William and Mary Law School; Notre Dame Law Review, “The Remand Power and The Supreme Court’s Role,” vol. 96]

Despite the predominance of its law-declaring function, the Supreme Court is not prepared to abandon error correction altogether.48 And in addition to occasionally correcting an egregious error, the Court tries more generally to keep up professional standards in the lower courts it supervises.49 Several distinct categories of remands can be understood as an Olympian court’s attempts to handle these needful subsidiary tasks in a relatively painless way

Consider in this regard the scenario of the “apparently overlooked argument.” That is a decision that appears, based on the opinion below, to have overlooked one of the losing party’s facially plausible contentions. It would be time-consuming for the Court to figure out whether the overlooked contention actually has merit and would materially affect the outcome—and not worth a certiorari court’s time to do so—but it is easy enough to vacate and remand for the lower court to address the matter (or clarify that it already did). Some of the remands that have attracted the ire of the Court’s conservatives fit this pattern of requiring a second look in order to address the suspicion of error.50.

Remands can serve as a modest check on the lower courts’ use of summary, unreasoned orders.51 One-line appellate affirmances may be appropriate when there is nothing useful to say, and so the Court is not about to require busy lower courts to write a full opinion in every case. But unreasoned affirmances can also raise red flags when a case contained a colorable claim of error. An occasional remand for explanation of a facially questionable order requires less of the Court’s time than trying to figure out just what was decided and occasionally reversing for error.

A desire to do justice, but without spending too much time doing it, can also explain the modern Court’s handling of confessions of error. The Court will vacate and remand in light of the government’s concession that the lower court erred in some aspect of its ruling, without making its own independent determination that there really was error or that the purported error affected the judgment.52 There are a number of reasons for this practice, but at least one of them is likely that summarily vacating and remanding in such cases is both less laborious than scrutinizing the merits and more palatable than denying certiorari and thereby countenancing a criminal conviction that even the prosecutor now doubts.

Olympianism is facilitated even by the ordinary and largely uncontroversial GVR, which the Court uses to clear out pending cases that may be affected by one of the Court’s newly announced argued cases.53 These GVRs have the benefits of functionally expanding the Court’s small argument docket and reducing inequity among litigants, while serving the practical imperative of sparing the Court the chore of applying its new ruling to the diverse circumstances presented by other pending cases.54

Given the Court’s Olympian trajectory, we can expect decisions like those categories described in this Part to persist and expand, at least unless the remand skeptics persuade another colleague that some of the categories above are illegal. All of this heightens the importance of understanding the proper scope of the remand power.

#### 5. INFO ACCUMULATION---empirics prove that bypasses controversy.

Re ’16 [Richard; October 18; Professor of Law at Harvard Law School; SCOTUS Blog, “Legal Scholarship Highlight: When Lower Courts Don’t Follow Supreme Court Precedent,” https://www.scotusblog.com/2016/10/legal-scholarship-highlight-when-lower-courts-dont-follow-supreme-court-precedent/]

Moreover, the high court might actually benefit from narrowing from below even when the justices don’t consciously invite it. In many cases, I’ve argued, narrowing from below “helpfully informs the Court of the consequences of updating the law in one direction or another.” The court often has a great deal to learn from the way that lower courts choose to narrow. And a more informed Supreme Court may be better equipped to set wise national precedent. So, in many situations, narrowing from below actually enhances the Supreme Court’s effectiveness.

Recent Fourth Amendment case law supplies a good example. In a Fourth Amendment case from 1973, the court set a fairly categorical rule allowing for searches of persons incident to their lawful arrest. That rule may have been defensible when issued, but technological changes eventually rendered it defective. Today, most people carry a large part of their lives in their smartphones, making personal searches highly intrusive. In response to that development, a number of lower courts construed the 1973 decision narrowly, so that it didn’t apply to smartphones. These decisions were highly controversial, and there was a strong argument that they contravened the best reading of an avowedly categorical precedent. But when the Supreme Court ruled on the issue in 2014 in Riley v. California, it criticized decisions that had “mechanical[ly]” adhered to the 1973 case and praised lower courts that had stretched the case law to update it.

### Solvency---Supreme Court---AT: Rogue Court---2NC

#### 1. FACE-SAVING---remanding allows them to duck the question.

Bruhl ’20 [Aaron-Andrew; November 2020; J.D. from Yale Law School, Rita Anne Rollins Professor of Law at the William and Mary Law School; Notre Dame Law Review, “The Remand Power and The Supreme Court’s Role,” vol. 96]

The cases described above involve the Court issuing an opinion that falls far short of resolving the whole dispute. Such tentative opinions might reflect various motivations, such as a desire to conserve effort, avoid error, or avoid deadlock. Another category of cases, which partially overlaps with the one above, involves the Court's remanding for reasons that might be described as saving face.

One example is Spokeo v. Robins. 387The case concerned whether Spokeo's publication of inaccurate information about a consumer, which violated the Fair Credit Reporting Act, sufficed to give the consumer Article III standing to sue. More precisely, the question on which the Court granted review was whether the mere violation of the plaintiff's statutory right, without a further showing of harm (such as lost job interviews), was sufficient to confer standing. 388This was an extremely important question. The case attracted dozens of amicus briefs and was regarded as a potential blockbuster. 389Instead, it fizzled. The Court did not make any major ruling on standing, nor did it issue a narrow opinion that at least applied to the plaintiff's particular facts, but instead, in an opinion that won the assent of six of the eight participating Justices, vacated because the court below had produced an "incomplete" standing analysis by "failing to fully appreciate the distinction between concreteness and particularization." 390The Court therefore remanded for the Ninth Circuit to consider whether the plaintiff's alleged injury was "concrete" as well as particularized. 391

Intervening between the oral argument in Spokeo and the decision's announcement came the death of Justice Scalia, a hawk on standing. It is plausible that his absence prevented the formation of a five-Justice conservative majority that would have issued a broad opinion taking a hard line on [\*244] standing in cases involving statutory rights. It is also plausible that the absence of a big statement simply reflected the fact that the case was genuinely hard, and the Court did not know how to answer. Indeed, the question of standing for bare violations of statutory rights was so difficult that a fully staffed Court had, a few years before, dismissed as improvidently granted (DIG) another case that presented the same issue. 392The speculation at the time was that Court may have been unable to come up with a workable approach to this vexing problem. 393That history of a DIG on the same question a few years earlier might have made it embarrassing for the Court to DIG again in Spokeo. Thus, the inconclusive opinion.

The same eight-member Court issued an even stranger decision in another closely watched case the same day. In Zubik v. Burwell, which concerned religious objections to the Affordable Care Act's "contraception mandate," the Court vacated and remanded for the lower courts to consider what to do in light of the "clarified views" expressed by the parties in supplemental briefing filed after oral argument. 394At first blush, this might look like a remand for further consideration in light of a new factual development or a party's confession of error - and the Court's brief per curiam opinion in Zubik cited such cases. 395What complicates that explanation is that the parties' "clarified views" came in response to the Court's request for supplemental briefing that sought the parties' views on a sort of compromise that the Court, acting as amiable compositeur, had interposed on its own initiative. 396(And you thought it was trial judges who had abandoned the role of passive adjudicator in order to "manage" cases toward settlement.) 397

In assessing cases like these, it is well to keep in mind the alternative dispositions available, for there are many. Big cases can, obviously, be decided by a closely divided Court over vehement dissents, as many big cases are. If a short-handed Court is split 4-4, the Court can and does affirm without opinion, thus leaving the legal question open for future resolution in a different case. 398If a case poses unanticipated challenges, the Court can dismiss as improvidently granted, leaving the case in the same position as the thousands that are denied review every year. Issuing a decision vacating and remanding for further proceedings is therefore a choice, not an inevitability.

[\*245] Is it, then, a good choice, a prudent one that serves the ends of justice? The Court has said that "[the] GVR power should not be exercised for mere convenience," 399and dispositions aimed at avoiding the embarrassment of DIG'ing or evenly dividing look self-serving. Other dispositions look more appropriately system-regarding, such as when a DIG or 4-4 deadlock would leave in place an intolerable circuit split but in which a vanishingly narrow opinion at least resolves something or advances the system toward some ultimate resolution. But even the decisions that look merely "convenient" or selfish might look better when one considers the Supreme Court's role in the judicial and, frankly, political system. "Saving face" can more favorably be described as preserving the Court's institutional capital and credibility. There is value in such an effort, perhaps especially in a time of extreme, pervasive partisan division. Or at least an anxious Chief Justice and some institutionally minded colleagues might reasonably so think.

#### 2. CONSISTENCY---remands aggrandize power towards the Supreme Court.

Bruhl ’20 [Aaron-Andrew; November 2020; J.D. from Yale Law School, Rita Anne Rollins Professor of Law at the William and Mary Law School; Notre Dame Law Review, “The Remand Power and The Supreme Court’s Role,” vol. 96]

Another category of remands also helps the Court control the pace and circumstances of its law-declaring work. These are cases in which the Court deems a lower court's interpretation of a statute wrong but declines to announce the correct interpretation, let alone determine whether the judgment is supportable on the correct interpretation. In Elonis v. United States, for example, the majority determined that mere negligence was not a sufficient mental state to support a conviction under a federal criminal statute. 40 But the majority did not determine what mental state was required - in particular, whether recklessness sufficed - much less determine whether the conviction could be affirmed under whatever the proper standard turned out to be. 41It instead left all that for the lower court to sort out on remand. 42 Elonis and other similar cases presented questions of law and did not require any further development of the record. 43 Marbury v. Madison tells us that it is the judiciary's duty "to say what the law is." 44As Justice Alito quipped in his separate opinion in Elonis, here the Court used its power only to say what the law isn't. 45

This sort of minimalism at first seems at odds with Olympianism, but in fact they are compatible. The Court's justification for leaving so much undecided in Elonis was that avoiding the tough question would better position the Court to correctly determine, in a future case, what mental state the statute really did require. 46Given that the Court now decides few cases on the merits, the Court needs to make sure that all of its decisions are the best they can be.

### Solvency---AT: Certainty---2NC

#### Once the Supreme Court affirms, the effect is indistinguishable.

Re ’16 [Richard M.; April 2016; Assistant Professor at the UCLA School of Law, JD from Yale Law School, MPhil from the University of Cambridge, AB from Harvard University; Georgetown Law Journal, “Narrowing Supreme Court Precedent from Below,” vol. 104]

If limited to situations of precedential ambiguity, narrowing from below would actually reinforce important features of higher court control over the creation of legal uniformity. When the higher court wants to flex its managerial muscle, it may do so by being clear in its precedents, 118 thereby precluding legitimate narrowing from below. By contrast, the existence of ambiguity in a higher court precedent can itself be regarded as a meaningful message to lower courts, suggesting that the higher court deliberately postponed resolution of certain issues. Higher courts realize that disuniformity can sometimes be helpful in fostering "percolation"--that is, experimentation and reflection on what might otherwise be stale legal rules. 119 And once percolation has run its course, the higher court can intervene to issue a clear ruling and establish uniformity. Some temporary disuniformity, after all, may be preferable to permanent, uniform error.

#### *Jarkesy* AND judicial erraticism makes all CBRs uncertain.

Baker ’24 [Casey, Marjorie McInerney, and Kevin G. Knotts; October 2024; Assistant Professor of Legal Environment in the Department of Accountancy and Legal Environment at the Lewis College of Business; Professor of Management at Marshall University; Assistant Professor in the Management and Health Care Administration Department at the Lewis College of Business; ABA, “More Questions than Answers: NLRB Enforcement Actions in a Post-Jarkesy World,” https://www.americanbar.org/groups/business\_law/resources/business-law-today/2024-october/nlrb-enforcement-actions-post-jarkesy-world/]

Thus, there is a historical American legal tradition of looking to statute to define lawful and unlawful collective bargaining rights and duties. The Act does just that, assigning the adjudication of such rights and duties to the NLRB as permitted by the public rights exception. 36 But the Jarkesy majority cautioned that the public rights exception is an exception, 37 with Article III courts presumptively the appropriate forum even where an argument can be made in support of the exception’s application. 38

Thus, while we believe the stronger argument is that the public rights exception applies to NLRB actions, there is insufficient certainty in existing case law to make a definitive determination. The Court in Jarkesy cautioned that its jurisprudence on the public rights exception is an “area of frequently arcane distinctions and confusing precedents,” with no definitive distinction between public and private rights. 39 While Jones & Laughlin Steel is precedent holding that NLRB-imposed remedies are not subject to the Seventh Amendment, 40 the Court has shown its willingness to cast aside long-standing precedent to rein in administrative authority. 41

#### ‘Certainty’ is offense:

#### 1. PUBLIC ACCEPTANCE---reaffirmation is far more credible to all parties AND embeds the plan as a societal norm---that’s Siegel.

<<FOR REFERENCE>>

Relatedly, the Court may affect public opinion in ways that it later invokes in order to maintain constitutional commitments it had previously made. An example is the Court’s invocation in Grutter v. Bollinger of a widespread societal commitment to “diversity,”81 an ostensibly non-remedial justification for affirmative action that Justice Powell fashioned in Regents of the University of California v. Bakke82 at a time when universities were expressly defending affirmative action admissions programs on remedial grounds.83 Another example is the Court’s reaffirmation of Miranda v. Arizona84 in Dickerson v. United States. 85 The Court there declared—in a majority opinion by Chief Justice Rehnquist, no previous friend of Miranda—that “Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture.”86

AND

Before beginning the case studies, it is important to note that whether the words of a judicial opinion have any particular empirical effect, such as enhancing the public legitimacy of the issuing court, depends upon what Professor J.L. Austin called the perlocutionary force of those words. Austin observed that the perlocutionary force of speech turns on “what we bring about or achieve by saying something, such as convincing, persuading, [or] deterring.”92 The perlocutionary force of a judicial opinion is a matter of contingent causality that depends, among other things, upon how exactly the court speaks. For the Court’s speech to affect its public legitimacy, it is not necessary to assume that the public carefully parses Supreme Court opinions. Rather, it is necessary to assume only that the content of the Court’s opinion is relevant to the perlocutionary effect of its speech. It is no doubt true that the meaning of the Court’s opinions is conveyed to the public in complex, highly mediated ways.

#### 2. RELIANCE---a sudden, unilateral ruling disrupts settled expectations, which is far more uncertain---that’s Bridgens.

<<FOR REFERENCE>>

Reliance interests cannot be described as a neat set of criteria that are easily identified. Due to their nuance and often-backward-looking nature, reliance interests regularly go unconsidered. However, reliance interests play a rather large role in stabilizing other legal functions and can play a similar role in stabilizing regulatory judicial review. For instance, reliance interests are a well-understood element of “stare decisis,” the legal concept that a court “should adhere to [the] rules [of] its prior decisions.”164 Reliance interests embody the idea that “private parties may . . . shape their behavior around [regulatory and] judicial precedent such that sudden or significant change in . . . applicable legal rules [may] be costly [or] unfair.”165 While it would be reasonable to say that a private actor should expect regulations to change, it is not reasonable that the change should happen under wildly erratic or frequently recurring conditions.166 Accordingly, reliance interests should be understood to protect against changes in rulemakings that, due to their irregular or sudden nature, implicate the unrealized investments of private parties in that regulation.

Perhaps the foremost argument for consideration of reliance interests is that considering the impact of a regulatory action on real stakeholders promotes stability in the law. Individuals and institutions operate around and build upon official representations of the law. That is, “private parties can and do shape their behavior around administrative regulations and adjudicative orders.”167 Generally, private stakeholders are incapable of managing the risk of legal change in a rational and effective manner, as they are unable to inoculate themselves against unforeseeable, broad swings in policy.168 This is particularly true in a hyperactive regulatory environment, where regulated entities expect that they will at least have the opportunity to comply with a regulation, let alone benefit from it over time. Stability in regulation promotes efficiency, transparency, and ensures accountability upon departure from the status quo.169 Judicial consideration of reliance interests thus functions to protect private stakeholders against those regulations that are both sudden and drastically alter the status quo.170 While there may be a time and place for sudden or drastic regulations, regulatory procedures, such as data publishing requirements and the notice-and-comment rulemaking processes, indicate that this sort of agency action ought not be the norm. Regulation, when necessary, should be deliberate and inclusive.

#### Ruling without a specific case that first originates in trial courts bypasses the established process for legal resolution---that obliterates clarity.

Steinman ’12 [Joan; 2012; Distinguished Professor of Law at the Chicago-Kent College of Law, Illinois Institute of Technology, A.B. from the University of Rochester, J.D. from Harvard University Law School; Notre Dame Law Review, “Federal Courts, Practice & Procedure: Article: Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts' Resolving Issues in the First Instance,” vol. 87]

We traditionally defend the division of function between trial and appellate courts on functional and institutional grounds. Despite some evidence that our beliefs about the relative superiority of particular decision makers are not always accurate, 6 as a society we generally believe and historically we generally have believed that trial courts - judges and juries - have advantages in making fact findings, so we allow appellate courts to review fact-findings but only to avoid severe aberrations, violations of duty, and clear errors that would result in injustice to the parties. We make the review deferential to give effect to our belief that judges and jurors who were firsthand witnesses to the testimonial evidence and arguments usually have a superior ability to accurately find the facts. 7 For reasons of consistency and in deference to trial court experience and expertise in fact-finding, we take the same tack, making review deferential - although perhaps not to exactly the same degree - even when all of the evidence is documentary or is otherwise available to appellate court judges in the same form in which it was presented to the trier of fact. Technological advances that can put appellate judges in shoes that very much resemble those of jurors and trial judges raise questions about whether appellate courts should defer to judges and juries as they traditionally have done, but thus far, and for the most part, appellate courts have remained deferential. 8

Appellate courts utilize varying degrees of deference when reviewing matters that are within the district courts' discretion, depending on the reasons that discretion is afforded and sometimes based upon other policy considerations.

Finally, appellate judges typically are authorized and expected to review questions of law de novo because, as a society, we believe that appellate judges have advantages over trial judges in deciding what the law is or should be. As Professor Chad Oldfather, among others, has recognized, de novo review has been thought to be appropriate for questions of law based on beliefs that appellate court judges are more competent (than trial judges) to answer questions of law and to formulate new law when necessary. 9 We have reason to believe that three interacting heads are better than one and that appellate court judges will bring more expertise than trial judges to the task of law-making, based both on their greater experience and on advantages that appellate judges enjoy, such as more and better law clerks and greater time to devote to research, contemplation, writing, and editing. Moreover, appellate courts are better positioned in the judicial hierarchy (than are trial courts) to enforce uniformity and improve predictability in the law. But again the norm is that appellate courts address questions of law only after a tribunal that is inferior (hierarchically and perhaps qualitatively) has addressed those questions and has given the appellate court an analysis that can inform its own. 10

<<TEXT CONDENSED, NONE OMITTED>>

Is there any place in our system for appellate courts to rule on issues upon which no inferior court has ruled? In fact, appellate courts, including the United States Supreme Court, sometimes do this. There are, indeed, a surprising number of occasions on which courts of appeals, including the United States Supreme Court, address and decide questions that a trial court judge did not decide. On those occasions, the appellate courts are not reviewing the decision of another tribunal. The Supreme Court has declared that intermediate federal courts of appeals ("IFACs") have discretion to decide when they will address such issues. For ease of reference, I will describe questions that no inferior court has ruled upon as "new issues" or "new questions." This reality raises a great many questions. Preliminarily, there are what one might call definitional lines that need to be drawn. Parties are free to raise, in the appellate court, legal authorities that they did not cite below, without violating any general rule against appellate courts entertaining new issues. The line between new "arguments" or "theories" that may be raised for the first time on appeal without need of an exception to the general rule and new "issues" that may not be raised for the first time on appeal without need of an exception to the general rule is less clear. 11 There is no bright line for determining whether a matter was raised below, and there is likely a spectrum from old issues to new issues, rather than the two being polar opposites. Important though these line-drawing problems are, I will not dwell on them in this Article. I will focus on situations in which it is posited that a new issue is proffered. Beyond this threshold matter, questions one might ask include: Do Article III or Congressional statutes speak to federal appellate authority to address new issues - and, if so, what do they say? What guidance has the Supreme Court given with respect to appellate courts' proper role with regard to new issues? What is the proper role of appellate courts with regard to new issues? When, if ever, is appellate courts' taking the "first stab" appropriate, and why? Do intermediate appellate courts and supreme courts vary in their responses to new questions, depending upon the different ways in which the new issues arise or based upon other parameters? What are those other parameters, and should appellate courts' responses vary with them? What do appellate courts' acceptance and decision of new questions say about the roles and capacities of appellate versus trial courts, and about how we design appellate systems? In this Article, I attempt to explore many of these questions and propose some answers.

<<PARAGRAPH BREAKS RESUME>>

Introductory Notes address the scope of this Article and of prior literature on aspects of its subject, and distinguish between raising issues and resolving issues. Part I explains the importance of the issues raised here and discusses sequencing theory because of the light it sheds on that importance. Part II explores Article III, Congressional legislation, and pronouncements and decisions by the Supreme Court concerning the power of the Supreme Court and of intermediate federal appellate courts to take the first stab at issues. It also makes the point that the scope of appellate jurisdiction before and after final judgment constrains what new issues appellate courts may hear. Part III shifts the focus from power to judicial discretion and examines the realities in the Supreme Court and in the federal intermediate appellate courts. It categorizes and discusses both cases in which the Supreme Court or IFACs did consider new issues and cases in which the Supreme Court or IFACs declined to consider new issues. In so doing, it categorizes the kinds of issues and the circumstances in which the Supreme Court and IFACS have been inclined to address new issues on appeal and the reasons they have given for declining to do so. Part IV evaluates these realities, exploring the circumstances in which appellate courts should and should not exercise their power to decide issues that were not ruled upon in the district courts. I am interested in seeing how explicitly and how satisfactorily case law addresses the circumstances under which appellate courts will decide issues not decided below. Just as in other areas of the law, case law developed over time ideally should tend toward greater clarity and certainty, as it develops theoretically and practically defensible answers to the questions when appellate courts should decide new issues and when appellate courts should utilize mechanisms to have trial judges or adjuncts to the appellate branch make initial determinations that appellate courts can review. The Article offers a proposal to govern the circumstances under which a new issue should be heard on appeal. It considers whether and when the Supreme Court should have more leeway than IFACs. The Article then concludes.

#### 3. UNITY---the CP’s resulting congruence between levels of courts sends a stronger signal.

Ortman ’16 [William; 2016; Assistant Professor of Law at the Wayne State University Law School, JD from the University of Chicago Law School, BA from Swarthmore College; Alabama Law Review, “Rulemaking's Missing Tier,” vol. 68]

If there is no good reason to treat rulemaking litigation and other closed-record cases differently, there are only two possible implications. Either we often use too many judicial tiers, or we use too few in rulemaking cases. In light of the epistemic advantages of two- over one-tier systems, the latter is more likely. This Article identifies and explores four such advantages. First, as the Supreme Court recognizes when it denies certiorari notwithstanding a circuit split, legal questions benefit from percolation. 21 Two-tier judicial structures allow legal questions to percolate within individual cases. 22 Second, two-tier legal systems feature accountability, as the prospect of appeal makes the lower tier accountable to the higher tier. 23 If first-tier judgments matter to ultimate outcomes--which they certainly do when they are not appealed and likely do more generally--two-tier systems harness that accountability in a way that one-tier systems cannot. Third, two-tier structures enjoy the epistemic advantages of diversity. By involving more judges in a case, they can better access the "wisdom of crowds" and bring more viewpoints to bear on legal questions. 24 Finally, agreement or disagreement between tiers of courts provides signals to outside decisionmakers, such as the Supreme Court and Congress. 25 These are general advantages of two-tier systems, but there are good reasons to expect that they could apply in the particular context of rulemaking litigation. 26 If so, our process for adjudicating the validity of agency rules may leave epistemic value on the table. The likely result is unwarranted error.

### Perm: Delay---2NC

#### It severs ‘should’---that’s immediate.

Stetler ’18 [Russell; 2018; National Mitigation Coordinator for federal death penalty projects, based in the Office of the Federal Public Defender in Oakland, California; Hofstra Law Review, “The Past, Present, and Future of the Mitigation Profession: Fulfilling the Constitutional Requirement of Individualized Sentencing in Capital Cases,” vol. 46]

By the mid-1980s, there was increasing recognition of the need for multidisciplinary teams, including nonlawyers, who would give fulltime attention to social history investigation. 66 Not surprisingly, the first defense bar organization to attempt to set out standards in capital defense was the nation's leading association of counsel for the indigent, the National Legal Aid and Defender Association ("NLADA").67 After circulating preliminary drafts over a period of years, NLADA first published its Standards for the Appointment of Defense Counsel in Death Penalty Cases in 1985.68 Standard 11.4.1 (D)(3)(C), Investigation, noted the potential use of mitigation specialists-a historic first acknowledgment of mitigation specialists as capital defense team members. 69 The introduction to the 1985 Standards stressed that the word "should" had been used as a mandatory term: "what counsel 'should' do is intended as a standard to be met now, not an ideal to be attained at a later time." 70

<<FOOTNOTE 70 BEGINS>>

70. 1987-88 NLADA PERFORMANCE STANDARDS, supra note 68. Both the Original ABA Guidelines and the 2003 revision adhere to the same view of counsel's duties. As summarized in the Guidelines, these duties are not aspirational, but reflect what counsel ought to do now based on prevailing norms. See ABA Revised Guidelines, supra note 2, at 919 n. 1 ("As in the first edition 'should' is a mandatory term.").

<<FOOTNOTE 70 ENDS>>

### Reliance---Internal---CP Key---2NC

#### Declaration is a sea change, affirming reliance as a prior question through mandate AND future precedent---that’s Siegel and Bridgens.

<<Siegel FOR REFERENCE>>

When the Court leverages judicial precedent as justification for further expansions, it may seem relatively obvious (although see below) that the Court is responsible for having caused previous changes in the doctrine because the Court is citing itself. Likewise, the Court’s emphasis on reliance interests as one of several considerations in decisions about stare decisis transparently exemplifies the feedback loop discussed here. The Court explained in Planned Parenthood of Southeastern Pennsylvania v. Casey that when it reexamines a previous decision, “its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case.”65 Among other questions, the Court asks “whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation.”66 The Court is thus candid about its own previous role in causing other actors to behave in ways that it is currently taking into account in preserving a particular result.

<<Bridgens FOR REFERENCE>>

Most importantly, the Court ought to designate triggering circumstances which would require the assessment of reliance interests in judicial review. When the Supreme Court says that it will give weight to reliance interests in cases where rules have engendered them, it should do exactly that. Rather, the Court has eschewed reliance interests at nearly every opportunity, creating a patchwork of decisions which offer little-to-no clarity on how reliance interests will be assessed.177 As such, this Comment proposes that a court should examine, and an agency be required to address, reliance interests in the following cases:

#### Trial courts with unique fact-finding expertise must be the point of origination. The plan’s abstract ruling looks unhinged and abrupt.

Steinman ’12 [Joan; 2012; Distinguished Professor of Law at the Chicago-Kent College of Law, Illinois Institute of Technology. A.B. from the University of Rochester, J.D. from Harvard University Law School; Notre Dame Law Review, “Federal Courts, Practice & Procedure: Article: Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts' Resolving Issues in the First Instance,” vol. 87]

There are good reasons for appellate judges to be cautious about raising new legal questions at this late stage of the litigation. An issue that turns on facts that are not in the record or not fully developed would be better left unmentioned for fear of prejudice to the parties. Moreover, any question of law that requires development of new facts would likely be tangential to the questions the court is asked to resolve, and thus would not qualify as a case in which issue creation was essential to avoid erroneous statements of law. 36

I would note, moreover, that even if an appellate court has power to raise new issues and would not abuse its discretion in doing so in a particular case, 37 the appeals court that raises a new issue could remand the case to the district court to address the newly identified issue in the first instance, rather than taking the first stab at it. Such a remand would result in some disappointment to litigants who hoped for a quicker end to the litigation, and it would entail some delay and disruption, but these might be prices worth paying in order for the trial court to play its customary role of decider in the first instance and for the appellate court to adhere to its customary role of reviewing court. After all, some disappointment and delay would ensue even if it were the appellate court that required the parties (or intervenors or amici) to address the newly identified issue. As the discussion below will demonstrate, federal intermediate appellate courts do not limit themselves to deciding new issues in the circumstances in which Professor Frost finds that it would be appropriate for them to raise new issues. But, as noted earlier, the two are not the same; an appellate court can raise a new issue but not decide it in the first instance, and an appellate court can decide a new issue that it did not raise, but a party did, for the first time, in the court of appeals.

I. The Importance of the Issues Raised Here

The subject of this Article is important. It affects who decides issues; what issues are decided; at what point in the course of a case (when) they are decided, where (by what courts) they are decided; and potentially how those issues are decided. Issues may be decided differently when they are decided in the first instance by appellate courts, rather than by trial courts, in part because such appellate resolution of issues affects the standards of decision that an appellate court uses. Whenever a court of appeals decides an issue that was not decided by an inferior court, it is acting de novo, not correcting only clear error in fact-findings or abuses of discretion, and not deciding issues of law with the benefit of the thinking of the lower court. This activity goes to the heart of the role and function of appellate courts, and of how our judicial system is designed. Constitutional, statutory, prudential, and functional considerations all are involved.

Sequencing Theory

Sequencing theory reinforces the importance of the subject explored in this Article by shedding light on additional consequences of the order in which courts resolve issues in litigation. Professor Peter Rutledge opines that "the order in which courts decide issues has a significant and underappreciated impact on the law;" 38 this order influences the parties' behavior in litigation, the incentives they have to settle, and the development of the law - that is, which areas of law get more attention and which get less - and in turn influences the investment of judicial resources. 39 Horizontal sequencing rules, which "determine the sequence in which a single decision-maker … determines issues," apply to an appellate court, as they apply to trial courts, and they thus influence how (i.e., on what grounds) a case will be resolved. 40 As a result, horizontal sequencing rules also affect the outcomes of future cases. In addition, vertical sequencing rules, which determine when reviewing courts can review particular decisions of inferior tribunals, obviously influence the relationship between trial courts and appeals courts, and also can influence the parties' behavior in litigation and the incentives they have to settle, the development of the law, and the amount and allocation of investment of judicial resources. 41 Thus, for example, the immediate appealability of denials of motions to dismiss based upon qualified immunity allows defendants to require an investment of resources by the appellate courts, evokes precedential decisions from the appellate courts, and enhances the settlement position of defendants. 42 Moreover, both horizontal and vertical sequencing rules can be rigid or flexible and thus affect the degree of discretion that a court has in sequencing the decisions of the issues it faces. 43

What relevance does Rutledge's decisional sequencing theory have to the issues raised in this Article? When an appellate court takes the first stab at an issue it is not reversing the normal and expected vertical sequence of decision, because the district court is not going to follow the appellate court, in time, and review the appellate court's work. However, for the appellate court to take the first stab typically changes the sequence in which decisions are made at the same time that such "first stabs" constitute a re-allocation of authority from the district court to the appellate court, which in turn changes the question that the court of appeals will address. No longer will the question be whether the district court erred in deciding the issue through its misunderstanding of the law or its clear error in determining the relevant facts or its abuse of discretion. The questions will be de novo: What is the law on this issue? What do the facts in the record establish as to this issue? How will the appellate court exercise discretion as to a particular matter? This Article will consider the circumstances under which such a reallocation of decision-making authority may be acceptable and when it would not be, 44 but Rutledge helps us to appreciate several additional consequences of this reallocation of authority. For instance,

(a) The reallocation might be regarded as problematic in that the usual consequences of a district court decision, had it been made in a timely manner, will be changed by the alteration of the time frame in which the decision is made, as well as by the status of the decision maker. For example, if no party raises forum non conveniens ("fnc") in the district court, with the result that that court does not address the issue but proceeds to decide the case on the merits, the investment that the district court makes in the case increases, and a defendant that loses on the merits in the district court has less settlement leverage than it would have had if the court had dismissed on fnc grounds. If the fnc issue is raised for the first time on appeal and the appeals court decides the issue and orders the case dismissed without prejudice, the judicial investments, the settlement dynamics, and the law that has been announced all differ from what they would have been had the district court dismissed on fnc grounds.

The extent of delay before resolution of an issue that is first presented to a court of appeals and the change in the sequence of the rulings made by the trial and appellate courts may be influenced by whether the appellate court takes on an issue raised for the first time on appeal or sends the new issue back to the trial court. If proceedings in the trial court have not been stayed pending appeal, the trial court may continue to issue rulings while the appellate court is considering the issue newly raised there, whereas the trial court might address the "new issue" raised on appeal before it ruled on other matters, if the appeals court remanded the new issue for the trial court's consideration. The order in which the district court addresses the issues presented to it after remand, including whether it regards the appellate court as having commanded it to address initially the issue that was raised for the first time on appeal and was remanded, again may affect the extent of judicial investment, the settlement dynamics, and the law that is announced.

If an appellate court chooses to address an issue that is raised for the first time on appeal rather than remand the case back to the district court, that choice also may change the nature of the decision to be made because, on remand, the parties might re-frame the issue or offer the district court alternative grounds on which it could decide the case. It seems more likely that this would occur in the district court on remand than that it would occur in the court of appeals.

Recognizing these facts in the abstract does not say anything about whether the court of appeals should proceed to decide the new issue itself or remand the case so that the district court will take the first stab at it. In a particular fact setting, however, a court of appeals might consider the different effects when choosing its course of action.

(b) More obviously relevant is the fact, discussed below, 45 that the appellate court as an institution may be more or less competent than the trial court to address the new issue. To the degree that a new issue requires fact finding based on oral testimony or an exercise of discretion as to a matter that trial courts often deal with and appellate courts seldom deal with, an appellate court presumably will be less competent than the trial court would have been.

#### It puts reliance interests on notice, allowing a gradual shift that’s not disruptive.

Siegel ’17 [Neil; May 2017; Professor of Law and Political Science at Duke University, Ph.D. in Jurisprudence and Social Policy from the University of California, Berkeley, J.D. from the University of California, Berkeley, M.A. in Economics from Duke University; Vanderbilt Law Review, “Reciprocal Legitimation in the Federal Courts System,” vol. 70]

All that said, the complexity of the normative question eludes a simple admonition that the Court should be forthright in every respect in every case. One need not agree with Professor Martin Shapiro that "[c]ourts and judges always lie," or that "[l]ying is the nature of the judicial activity," 243 to register that judicial opinion writing (and joining) is a genre of communication engaged in by individuals who are performing a particular institutional role with its own sometimes subtle rules and expectations. For example, the Court does not generally regard itself as permitted to acknowledge that it makes law even though many observers understand that it has little choice but to make law in significant respects. 244 Accordingly, it can be difficult to determine what kinds of forthrightness about which issues are required in a judicial opinion.

In addition, it has long been recognized that the Brown Court's narrow focus on education, as opposed to the relationship between segregation and equality more generally, was not a model of candor, nor were the subsequent unreasoned per curiams. 245 That concern, however, may have been the least of the Court's problems. Brown exemplifies the truth that complete candor is not always the best policy in law or life. 246 A scholar who saw this before others is Professor Jan Deutsch, who passed away while this Article was being written. Deutsch intervened in the late 1960s in response to the criticisms of the Court's segregation and reapportionment decisions by both Professor Herbert Wechsler (wielding his "neutral principles") and Professor Martin Shapiro (wielding his "political jurisprudence"). 247 Deutsch brilliantly observed that "the Court, as an institution, has certain institutional needs--for example, the needs to ensure survival and operate efficiently," and "those needs are necessarily reflected in the form and content of its work." 248 Those needs, he added, preclude fully candid judicial opinions. 249

The Court sometimes finds itself operating in a fallen world--that is, a world in which important constitutional rights have yet to be protected due to public and professional opposition. 250 In such a world, the Court may have its work cut out for itself as it seeks to secure the public legitimacy of divisive decisions that vindicate basic constitutional values. If, as Professor Akhil Amar has suggested, "the judicial province and duty is not merely to say what the law is, but also to make the law real," 251 then Brown's professed narrowness is potentially supported by sufficient justification. Demanding full candor is sometimes asking too much of government officials, including Justices, who may be trying in good faith to execute their responsibilities in circumstances in which others are undermining their ability to do so for reasons that are themselves difficult to defend.

In less extreme circumstances, a Court whose view of the law warrants a relatively maximalist response to a legal question may nonetheless write a relatively minimalist opinion for a variety of potentially worthwhile reasons that it is not prepared to announce publicly, because doing so would be self-undermining or would appear political. For example the Court may be seeking to maintain collegiality within the Court, which may be essential to its efficient functioning well beyond the case under review. 252 Or the Court may be trying to maintain some measure of solidarity in American society, which may be threatened to a greater extent by more decisive judicial interventions. 253 Or the Court may be trying to put stakeholders on notice that a substantial change in the law is coming, thereby reducing reliance interests in a gradual way. Such rationales for relative minimalism, even if they are not publicly articulated, seem distinguishable from situations in which the Court is simply trying to insulate itself from professional criticism by presenting itself as more restrained than it is or intends to be.

### Reliance---Link---2NC

#### Employers have financial interests in current labor law---sudden modifications upend stability.

Schmidt ’16 [Chris; 2016; Research Professor at the American Bar Foundation, Professor of Law at Chicago-Kent School of Law; Institute for Law and the Workplace, “A Ticket to Ride? Not so Fast: Members-Only Collective Bargaining as a Possible State Response to a Judicially Recognized Right to Work,” https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=1053&context=louis\_jackson]

Despite the merits of members-only bargaining, the model would also come with at least three primary drawbacks. 127 First, overhauling organized labor would create a host of administrative problems. As Justice Kagan noted in her Harris dissent128 and will likely bring up again in Friedrichs, transforming organized labor and uprooting established contracts is not a task to be undertaken lightly. The bulk of this burden would fall on the employer—the state—as employees holding the same position would be under different contracts.129 Entities with non-unionized labor manage to juggle this problem, but the sheer size and scope of governments as employers make it different than even the largest corporations. That said, given the fact most teachers are now non-union members130 it may be a problem that’s coming regardless of whether states impose a requirement that government units bargain in good faith with minority unions. Another administrative problem would be the enormous reliance interests it would upset.

#### Declaring law invalid without considering reliance interests collapses business faith in the Court.

Savage ’21 [Rachel; 2021; J.D. from the University of Maryland King Carey School of Law; Maryland Law Review, “Department of Homeland Security v. Regents of the University of California: The Supreme Court’s Disinterest in Reliance Interests,” https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1076&context=endnotes]

Moreover, the Court appears to contradict itself when discussing whether DHS was required to weigh the reliance interests at all.289 The Court explicitly notes that “DHS was not required” to weigh the reliance interests, then later in the same paragraph states that DHS “was required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.”290 This apparent contradiction in whether DHS was required to weigh reliance interests indicates that the Court improperly weighed their importance, especially considering the massive impact of recission on DACA recipients and the country as a whole.291 Although the Court notes that “hardship to DACA recipients” should be considered, the Court ultimately rests its decision exclusively on the agency’s failure to provide a reasoned analysis.292

This improper weighing could also be viewed as the Court avoiding its responsibility to address the merits of the respondents’ claims. Here, both DHS and the Court were required to at least consider DACA recipients’ reliance interests.293 The Court—despite its holdings in Encino Motorcars, 294 Fox Television Stations, 295 and Smiley296—skirted the issue of weighing reliance interests altogether by punting the responsibility of weighing these interests back to DHS alone.297 In other cases where significant reliance interests were at stake,298 the Court addressed these concerns, weighed them, and then based on that analysis determined whether the agency action was valid.299 By refusing to address the merits of the rescissions and focusing only on Secretary Duke’s reasoning, the Court left open the possibility for DHS to rescind DACA at a later date despite Dreamers’ serious, reasonable reliance on the program.300 Thus, the Court did just what it chastised DHS for: failed to address the reliance issues at stake.

V. CONCLUSION

In Department of Homeland Security v. Regents of the University of California, the Supreme Court held that DHS’s attempted rescission of DACA was arbitrary and capricious in violation of Section 706 of the APA.301 The Court correctly determined that the flawed reasoning in the Duke and Nielsen memoranda rendered the rescission arbitrary and capricious, but incorrectly dismissed Dreamers’ reliance interests.302 Failing to articulate adequate reasons for agency action will render agency action arbitrary and capricious,303 but so too will failing to address legitimate reliance interests.304 In dismissing the many reliance interests at stake in the program’s rescission as not “dispositive”305 of arbitrariness or capriciousness, the Court incorrectly applied the analysis required by Section 706 of the APA.306 DHS’s failure to weigh the serious reliance interests of both Dreamers and the country as a whole could have alone rendered the rescission arbitrary and capricious.307 Hundreds of thousands of Dreamers like Abigail built their lives on the promises of DACA and enriched their communities in the process.308 The APA mandates that their reliance be taken into account.309

#### Overturning established precedent cascades to obliterate reliance.

Krishnakumar ’15 [Anita; 2015; Professor of Law at St John’s University School of Law, J.D. from Yale Law School; Fordham Law Review, “Longstanding Agency Interpretations,” vol. 83]

Another significant justification underlying strict adherence to judicial precedent in general, and statutory stare decisis in particular, is that adherence to precedent promotes stability and predictability in the law and protects private and congressional reliance interests. Private parties may, over time, shape their behavior around a judicial precedent such that a sudden or significant change in the applicable legal rule could be costly and unfair to them. Similarly, Congress itself may rely on a judicial interpretation of a statute when formulating related legal rules. That is, Congress may build upon the legal rule established by an existing judicial interpretation.158 Overruling an established judicial interpretation could, therefore, “unsettle a vast cluster of public and private expectations.”

Both of these reliance concerns are implicated by longstanding agency interpretations as well. Private parties can and do shape their behavior around administrative regulations and adjudicative orders. They arguably should be aware that agency policies can change, so that a well-ventilated, prospective change in an agency rule—one that occurs after a full noticeand-comment procedure or with the benefit of other warnings, and that does not apply retroactively—might be fair game. But a sudden, unexpected judicial rejection of a longstanding agency interpretation implicates all of the same private reliance concerns as an overruling of one of the Court’s own statutory precedents.

Similarly, Congress is aware of existing agency practices and rules and sometimes shapes new statutes or amends existing ones to reflect longstanding agency interpretations. In addition, other administrative agencies, both on the federal and state levels often shape their rules to work alongside the established, longstanding interpretation of an agency with jurisdiction over similar matters.160 In such cases, a court’s refusal to defer to a longstanding agency interpretation of a statute could upset multiple related legal frameworks.

There is, of course, an important flip side to the reliance-based justification for adherence to statutory precedents: the underrepresentation of certain groups in the legislative process and the possibility of agency capture. As public choice scholarship has emphasized, interest groups influence much of the legislative—and administrative—agenda.161 Moreover, our political system tends to respond best to wealthy, well-organized interests and to ignore or pay little attention to the needs of disadvantaged and diffuse groups who lack political clout.162 These political realities combine to create the possibility that (1) the reliance interests protected by deference to longstanding agency interpretations will be one-sided, and (2) neither the legislature nor the relevant administrative agency will be motivated to change a statutory interpretation that harms a diffuse or politically disadvantaged group. In such cases, the institutional competence and soundness assumptions would be compromised and a judicial or agency statutory interpretation could be left in place for years— becoming longstanding—despite having pernicious consequences. Further, there is a danger that an agency might become beholden to wealthy interests under its regulatory jurisdiction and seek to adopt statutory interpretations that protect those interests at the expense of the interests of politically disadvantaged or unorganized groups. These public choice insights raise important concerns about the appropriate scope of any presumption in favor of longstanding agency statutory interpretations. But such concerns can be addressed, to some extent, by permitting the precedential effect of longstanding agency interpretations to be rebutted by evidence showing that a particular longstanding interpretation has had negative consequences for an underrepresented group.163

#### Progressive expansion of rights signals retroactive disruption of settled expectations.

Chen ’16 [Huiyi; 2016; J.D. from the University of Chicago Law School; The University of Chicago Law Review, “Balancing Implied Fundamental Rights and Reliance Interests: A Framework for Limiting the Retroactive Effects of Obergefell in Property Cases,” vol. 83]

The development of the retroactivity doctrine from Linkletter to Reynoldsville Casket tempts one to hypothesize that, in eras of explicit judicial activism and progressive expansion of rights, judges may be more willing to acknowledge that they are actually making laws.201 During these periods, the technique of nonretroactivity is useful to protect reliance interests and to avoid administrative costs that may prove to be overwhelmingly burdensome. Once the dust settles, however, courts may revert to the tradition of retroactivity, which promotes fairness and consistency, especially in constitutional law. After all, if a previous violation is of a constitutional nature, it seems unfair and inconsistent to deny relief to some of those harmed by the violation, while vindicating others.

Obergefell can be distinguished from the Court’s retroactivity jurisprudence of the past five decades in one important respect: it is a case based primarily on implied fundamental rights of individuals under the Fourteenth Amendment’s Due Process Clause,202 while the previous civil cases concerned either statutes of limitations (Chevron Oil and Reynoldsville Casket) or tax refunds (American Trucking, Beam, and Harper).203 Marriage is a status to which a great variety of rights and obligations are attached,204 and the examples in the Introduction showcase several of the “myriad circumstances in which the question [of retroactivity] might arise.”205

As O’Connor observed in Beam, “the broader the potential reach of a new rule, the greater the potential disruption of settled expectations.”206 While retroactive application to tax refund and statute of limitations cases may have a defined scope of disruptive effects (generally limited to the parties in the cases), retroactive application of Obergefell may disturb justified expectations of countless third parties. Such a great disruption caused by announcing new individual rights is familiar—the Warren Court era of expansion of criminal procedural rights, with the ensuing anxiety over the possibility of numerous legal prison breaks, is quite similar.207 The Court in Linkletter resorted to nonretroactivity techniques to avoid such a significant disruption.

From the perspective of legal realism, it is not unfathomable that the justices today would repeat their predecessors’ choices. Liberal justices have an incentive to keep a low-key attitude toward the application of such a groundbreaking decision to avoid strengthening its divisive effect, while conservative justices des­ire to do damage control for a decision that they do not like.208 If one looks at the voting split in the previous retroactivity cases and the composition of the Court today, this possibility may seem even more plausible: at least three justices (Kennedy, Justice Stephen Breyer, and Justice Ruth Bader Ginsburg) would likely be in favor of some leeway in the full retroactivity rule, as shown in the majority opinion of Reynoldsville Casket.209 The situation is complicated in the wake of Justice Scalia’s death, but arguably with one or two more votes, the silent return of Linkletter and Chevron Oil may be possible, even if the return is limited to Obergefell and future cases that involve the announcement of an implied fundamental right.

The analogy to the Warren Court era, however, is ultimately not viable. First of all, in Loving v Virginia,210 a scenario very similar to the Obergefell problem, the new rule of allowing interracial marriage was applied retroactively to set aside convictions under miscegenation laws even on collateral attack.211 This is significant given that this case was decided in the Warren Court era and after Linkletter was newly minted—in other words, when the Court was embracing the possibility of nonretroactivity. As Justice Harlan argued in his Mackey v United States212 opinion, it is precisely because a new rule announces substantive due process rights that it should be given full retroactive effect to redress previous grave deprivations of fundamental constitutional rights.213

### Reliance---Link---AT: Turn---2NC

#### Even if reliance interests support the plan, those expectations are settled---overturning longstanding precedent is a greater disruption.

McFerran ’24 [Lauren; November 8; Former Chair of the National Labor Relations Board; NLRB Research, “Siren Retail Corp. Starbucks and Workers United Affiliated With Service Employees International Union,” https://nlrbresearch.com/pdfs/09031d4583e8feb6.pdf]

First, we recognize the reliance interest of the parties on preexisting law. In 1985, the Tri-Cast Board announced what was almost immediately understood as a broad categorical rule covering a wide swath of employer campaign statements. Accordingly, for nearly 40 years, Tri-Cast’s broad rule has been in effect. Employers thus reasonably came to rely on the fact that predictions specifically about unionization’s consequences for the employer-employee relationship were lawful, however anomalous that may have been under the standard that governed their other predictions. Accordingly, there are relatively strong employer reliance interests weighing against retroactive application.

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

#### The perm short-circuits the sequence of prior trial court review that’s essential to perceptions of impartiality.

Nash ’19 [Jonathan Remy; May 2019; Robert Howell Hall Professor of Law at the Emory University School of Law, Director of the Emory University Center for Law and Social Science, Co-Director of the Emory Center on Federalism and Intersystemic Governance; Notre Dame Law Review, “Federal Courts, Practice and Procedure: State Spending: State Standing for Nationwide Injunctions Against the Federal Government,” vol. 94]

Fourth, the availability of nationwide injunctions might short-circuit the ordinary "percolation" of issues up to the United States Supreme Court. 37 Percolation tees up issues for the Court, and is seen to improve the Court's resolution of cases. 38 Percolation allows the Court to consider an issue once numerous lower courts have had a chance to weigh in. Whether they agree or not, the Court benefits from the input of the lower courts: if the lower courts largely agree, then the Court has a strong suggestion that the shared resolution enjoys considerable support. 39 On the other hand, to the extent that the lower courts disagree, the Court receives the benefit of the lower courts having engaged the issue and debated one another over the proper outcome. 40

The issuance of a nationwide injunction may tend to reduce the opportunity for percolation, perhaps especially cases brought by states against the federal government. On the one hand, if an initial decision by one court to issue a nationwide injunction binds other courts, then the decision by the lower courts is set inexorably in stone with no opportunity for percolation. Indeed, the Court relied on precisely this consideration to conclude that another procedural device - offensive nonmutual collateral estoppel - should not apply in suits against the federal government. 41 [FOOTNOTE] 41 In United States v. Mendoza, 464 U.S. 154, 160 (1984), the Court explained: A rule allowing nonmutual collateral estoppel against the Government … would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari. For discussion, see Morley, supra note 28, at 627-30. Some commentators argue that Mendoza should be read narrowly, see Alan M. Trammell, Demystifying Nationwide Injunctions, 98 Tex. L. Rev. (forthcoming 2019) (manuscript at 32), https://papers.ssrn.com/sol3/papers.cfm?abstract id=3290838 ("The better reading of Mendoza … is that it did not categorically prohibit using nonmutual preclusion against the government."), or overruled altogether, see Zachary D. Clopton, National Injunctions and Preclusion, 118 Mich. L. Rev. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract id=3290345##. [END FOOTNOTE] On the other hand, even if other lower courts remain free to disagree with the first lower court's ruling, still in the context in which we are interested - states suing the federal government - it may likely be that the issuance of a nationwide injunction raises such important stakes that percolation is not a practical option. (One should note, however, that that well may be the case even if the injunction the court issues is not nationwide.)

### Perm: Do CP---2NC

#### ‘Announcing support’ for the new rule is encouragement, not a legal requirement---that’s Siegel.

<<FOR REFERENCE>>

Much scholarship in law and political science has long understood the U.S. Supreme Court to be the "apex" court in the federal judicial system, and so to relate hierarchically to "lower" federal courts. On that top-down view, exemplified by the work of Alexander Bickel and many subsequent scholars, the Court is the principal, and lower federal courts are its faithful agents. Other scholarship takes a bottom-up approach, viewing lower federal courts as faithless agents or analyzing the "percolation" of issues in those courts before the Court decides. This Article identifies circumstances in which the relationship between the Court and other federal courts is best viewed as neither top-down nor bottom-up, but side-by-side. When the Court intervenes in fierce political conflicts, it may proceed in stages, interacting with other federal courts in a way that is aimed at enhancing its public legitimacy. First, the Court renders a decision that is interpreted as encouraging, but not requiring, other federal courts to expand the scope of its initial ruling.

#### It’s technically non-binding.

Steinman ’13 [Adam N.; December 2013; Professor of Law and Michael J. Zimmer Fellow at the Seton Hall University School of Law, L.L.M. from the Georgetown University Law Center, J.D. from Yale Law School, B.A. in Economics and International Studies from Yale University; Virginia Law Review, “To Say What The Law Is: Rules, Results, and The Dangers of Inferential Stare Decisis,” vol. 98]

2. Non-Binding Law's Influence

In examining what it means to declare that some piece of law is binding, it is also worth keeping in mind that legal materials can be quite influential even if they are unquestionably not binding. 211 [FOOTNOTE] 211 See, e.g., Charles A. Sullivan, On Vacation, 43 Hous. L. Rev. 1143, 1196-1206 (2006) (examining how non-binding authorities can be persuasive). [END FOOTNOTE] Dictum in a judicial opinion - even a Supreme Court opinion - is not formally binding on future courts. Yet such dictum is cited quite frequently. 212 One could make similar points about the tendency of judges to value support from outside the relevant jurisdiction: different circuits or districts, different state courts, even different countries. Even in civil law countries, where there is no formal doctrine of stare decisis, judges often rely on prior judicial decisions 213 - so much so that practitioners have characterized it as a "nearly mandatory rule." 214

#### ‘CBRs’ are statutory.

Schnitzer ’25 [Justin; May 5, Lead Attorney and Founder at the Law Office of Justin Schnitzer; FedeLaw, “Collective Bargaining Agreements for Federal Employees,” https://www.fedelaw.com/collective-bargaining-federal-employees/]

What Are Collective Bargaining Rights for Federal Employees?

As a federal employee, you have the statutory right to organize, form unions, and negotiate collective bargaining agreements that govern working conditions, though with significant restrictions that don’t apply to private sector workers. Your rights, established under Title 5 of the U.S. Code, specifically exclude bargaining over wages, benefits, and certain management decisions that are fixed by law rather than negotiation.

#### ‘Substantial’ requires action.

Words & Phrases ’64 [40W&P 759]

The words" outward, open, actual, visible, substantial, and exclusive," in connection with a change of possession, mean substantially the same thing. They mean not concealed; not hidden; exposed to view; free from concealment, dissimulation, reserve, or disguise; in full existence; denoting that which not merely can be, but is opposed to potential, apparent, constructive, and imaginary; veritable; genuine; certain: absolute: real at present time, as a matter of fact, not merely nominal; opposed to form; actually existing; true; not including, admitting, or pertaining to any others; undivided; sole; opposed to inclusive.

#### ‘Should’ is mandated.

Powell ’22 [Anthony; January 7; Judge on the Kansas Appeals Court for Sedgwick County; Kansas District Court, “State v. Aurelio Renato Marmolejo,” Lexis]

Marmolejo also quibbles with the language of the district court's admonishment. Marmolejo complains the district court used the word "should" instead of "must," suggesting the instruction was just an encouragement and optional rather than mandatory. We disagree. Admittedly, the district court's instruction is cloaked in polite language rather than as a strict command to the jury. But no matter how the district court phrased its admonishment, it did instruct the jury to "disregard any comments or behavior that you may have observed or heard as those people were asked to leave the courtroom." This admonishment, coupled with the jury instruction to consider only the admitted evidence, was a sufficiently curative instruction.

#### “Government” is a collective noun, denoting the entire body.

Todd ‘5 [Loreto; 2005; Professor in International English at the University of Leeds, author of over twenty books on linguistics and English usage, Ph.D. from the University of Leeds; International English Usage, p. 133]

The term collective noun refers to a singular noun that has a plural implication (e.g. [for example,] government) and is used when the whole body (and not the constituent members) is being considered. The category *collective nouns* is not discrete, and it can be argued that some usages are midway between collective and mass nouns. For example, *team* is clearly a collective noun and *butter* is clearly a mass noun but it is not so easy to decide the status of such nouns as: hair linen royalty.

#### The ‘U.S.’ is indivisible.

Miller ’86 [Arthur; Summer 1986; Distinguished Visiting Professor of Law at Emory University; Review of Politics, “Congress, the Constitution, and First Use of Nuclear Weapons,” vol. 48]

Three other points merit mention in this discussion of collective decision-making. First, both the formal and the secret constitutions allocate power over foreign relations and defense to the central government, to, that is, the United States of America visualized as a single entity. What, however, is "the" United States? The question has never been definitively answered; and indeed has seldom been asked in judicial opinion or scholarly discourse.42 Asked another way, the question is this: Where does sovereignty lie in the American polity? The formal constitution is supposedly based on popular sovereignty, with ultimate power resting in the people. That, however, is far from accurate. Proof positive that sovereignty lies in the "state" came when General Robert E. Lee surrendered at Appomattox: "the people" of the South were not to be permitted to exercise their "sovereignty." The powers of the national government are supposedly only those delegated to it, either expressly or impliedly. But that is scarcely accurate, as 200 years of constitutional development attest. The Framers of the formal constitution established a governmental system that, as Justice Robert Jackson commented, would ensure that the dispersed powers of the federal government would be integrated into a workable government. "Separateness but interdependence, autonomy but reciprocity" was the constitutional command.43 The meaning is unmistakable: "the" United States is a single metaphysical entity, encompassing state, society, and government in one artificial being. These terms are not synonymous. The state is the fundamental entity; government its apparatus; and society is composed of the individuals and groups governed. Much like the business corporation, the state-"the" United States-is an artificial construct, more a method than a thing. It exists in constitutional theory-in, for example, the state secrets privilege in litigation-even though judges and commentators alike often confuse the term with government and with society. A legal fiction that by itself can do no act, speak no work, and think no thought, the state (like the corporation) has "no anatomical parts to be kicked or consigned to the calaboose; no soul for whose salvation the parson may struggle; no body to be roasted in hell or purged for celestial enjoyment." 44 Despite loose language to the contrary from executive branch lawyers and even the Supreme Court, "the" state or "the" government—or "the" United States—is not to be equated with the executive branch. Nor with any one branch, for that matter; each branch is part of an indivisible whole

### Perm: Other Issues---2NC

#### 3. EDUCATION---the devil’s in the details for collective bargaining.

Kochan ’98 [Thomas; Spring 1998; Co-Director, Institute for Work and Employment Research, Massachusetts Institute of Technology; University of Pennsylvania Journal of Labor and Employment Law, “Labor Policy for the Twenty-First Century,” vol. 1]

A primary objective of national policy should then be to promote the development and broader diffusion among employees and employers and their organizations of the capabilities needed to internalize responsibility for enforcing employment law and for adapting regulations to fit their particular circumstances. Those employers and employees with effective self-governance systems should be granted greater flexibility in how they meet the goals and standards contained in various employment regulations.

C. Supporting Experimentation and Learning

These new principles require considerable institutional innovation, especially if they are to address the needs of those workers who are not employed full-time for an extended period by a single employer at a fixed work site. Unions and/or other associations need to develop the strategies and capabilities to represent workers as they want to be represented. Government enforcement agencies, neutrals, the courts, and the parties to employment disputes all need to develop fair procedures for resolving disputes privately. Employers need to create workplace environments and policies that win and sustain the trust and support of employees and add economic value to the enterprise. These efforts will require a process of experimentation and learning. Fostering this experimental learning process should be an explicit goal and high priority of labor policy makers and administrators.

III. IMPLEMENTING THE PRINCIPLES: A TWO-TRACK PROPOSAL

Principles are fine; however, as with any policy, the action (or the devil) is in the details. Therefore, I want to outline here a set of specific legislative and administrative actions that would put these principles to work and begin the testing and learning process. The basic proposal is to create a flexible self-governance option for adapting and internalizing enforcement of workplace laws and regulations that would be available for those employers and employees that have instituted state-of-the-art employee participation practices and dispute resolution systems. This self-governance option would be built on the foundation of other necessary reforms to labor and employment law that would apply to all employment relationships. However, participants of the self-governance option would be encouraged to meet some of their legal requirements through practices adapted to fit their particular circumstances that produce equivalent or better results.

### Emerging Tech---Impact---2NC

Sauer ’24 [Tom; December 16; Associate Professor of International Politics at the University of Antwerp; Toda Peace Institute, “The Potentially Revolutionary Impact of Emerging and Disruptive Technologies and Strategic Conventional Weapons on Nuclear Deterrence,” no. 204]

Central to this paper is the question of how EDTs will impact nuclear deterrence and, at least according to the proponents of nuclear deterrence, stability. Crisis stability (including first-strike stability) means that nuclear forces and doctrines are geared in such a way that the chances of nuclear weapons being used in a crisis are minimized and they are not likely to be used out of fear that the other side will strike first, destroying one’s own second-strike capability.

There are numerous ways in which EDTs can have a negative effect on crisis stability, by neutralizing or at least minimizing the so-called stabilizing effect of nuclear weapons.[5] Back in 2017, observers warned that ‘changes in technology . . . are eroding the foundation of nuclear deterrence’.[6] Today, the main danger is that EDTs make nuclear weapons more vulnerable, as they can make it easier and more credible to attack the enemy’s nuclear forces and key nuclear infrastructure (e.g. command-and-control and early-warning systems).[7] Indeed, experts note that: ‘States investing in strategic non-nuclear weaponry today could potentially give themselves the option to consider preemptive strikes that knock out an adversary’s nuclear capabilities, thereby completely altering the military dynamics of a conflict in the future’.[8] The result—crucially—is that the enemy will be aware of this vulnerability and may be under pressure to use their (sometimes small number of) nuclear weapons in a preemptive, destabilizing ‘use them or lose them’ way.[9]

EDTs are particularly useful for attacking three types of strategic targets related to nuclear weapons: (a) early-warning systems; (b) the nuclear forces themselves; and (c) command-and-control systems. First, early-warning systems in the form of radars and (sometimes) satellites are crucial for nuclear-armed states. Depending on the state, early-warning systems could potentially be neutralized by EDTs, either in a non-kinetic way through jamming (generating noise to interfere with satellite signals) and spoofing (broadcasting a false signal) via electromagnetic interference (by radio waves), cyberattacks (targeting data) or accurate modern conventional missiles against radars.[10]

Second, both cyber and hypersonic weapons can be used to attack and neutralize the nuclear forces of the enemy. The latter action—to neutralize—is the main declared goal of deterrence by denial postures. ICBMs, in particular, are cyber-sensitive, but even submarines (regarded as almost invulnerable nowadays) may be vulnerable to hacking.[11] Moreover, as a result of big data and AI, the exact location of mobile ICBMs or submarines may become available in the future, which would be nothing less than revolutionary.[12] Submarines are regarded as having substantially contributed to strategic stability and are generally seen as the most secure component of a second-strike capability. ‘Invulnerable’ submarines, however, may become vulnerable due to sensors on underwater drones or swarm robotics that operate in an autonomous way.[13] This could be destabilizing, as it may put more pressure on nuclear-armed states to use their vulnerable nuclear weapons sooner rather than later.

Third, cyberattacks and/or kinetic attacks can be used to disrupt the nuclear command-and-control systems of the enemy.[14]

Nuclear-armed states are, of course, aware of the vulnerabilities caused by these EDTs. The main danger is that they will be under immense pressure to safeguard their own nuclear forces and systems in crisis, and as a result use them, possibly even in a preemptive way.[15] In the ongoing war in Ukraine, for example, this would apply to a possible cyberthreat by the USA against Russia, which ‘could in practice make [nuclear] use [by Russia] more likely’.[16]

There are numerous clear and direct ways in which EDTs can have a negative impact on crisis stability. As the old nuclear world order disappears, it seems that the new one may be keeping a deterrence by denial posture; (c) living with (limited or unlimited) EDTs, but switching to a nuclear deterrence by punishment posture (i.e. minimum deterrence); and (d) banning nuclear weapons (multilaterally) while maintaining EDTs and strategic conventional weapons.60 This paper argues that the f irst three strategies do not substantially mitigate the problem of the destabilizing effect of EDTs on strategic stability. (even) more unstable. In fact, due to the ongoing deployment of EDTs, the use of nuclear weapons may be more likely in future crises.

V. HOW TO MITIGATE THE DESTABILIZING EFFECT OF EDTS ON NUCLEAR DETERRENCE?

Four different mitigating strategies could, at least theoretically, be imagined: (a) banning EDTs (multilaterally) while maintaining the existing nuclear deterrence by denial posture (i.e. maximum deterrence); (b) limiting these weapon systems while First, in principle one could ban EDTs (or some of them). In practice, however, that is extremely unlikely to happen. Due to the overall civilian benefits of AI, for example, a ban on it is more or less unthinkable. China, Russia and the USA are also all carrying out cyberattacks, and no progress has been made to ban such attacks.61 While not impossible, it is highly unlikely that these EDTs will be banned in the short or medium term.

Second, a less radical solution consists of trying to limit the destabilizing effect of EDTs, while maintaining the existing nuclear deterrence by denial postures.62 That is partly what is happening today. Track-1 (e.g. United Nations Groups of Governmental Experts and UN Open-Ended Working Groups) and track-2 multilateral diplomacy try to create norms with respect to the use of cyber and AI. One problem is that the lack of trust and confidence between states will complicate the implementation of anything that is agreed, especially in times of geopolitical tensions. Another problem is that technology is always evolving. Furthermore, ‘countries do not need significant numbers of hypersonic missiles in order to use them effectively and still undermine strategic stability, making numerical limits on missiles and warheads less useful than other measures’, as one expert observes.63 In short, the destabilizing effect of EDTs on nuclear deterrence will likely prevail. Another problem is that the conventional–nuclear entanglement risk will not be resolved. This refers to the risk that a missile attack with a conventional warhead, for instance against the nuclear command-and-control system or early-warning systems of an enemy, is perceived as a prelude to a nuclear attack, or that a conventional attack is misinterpreted as a nuclear attack, leading to inadvertent escalation.64 Lastly, the overarching risks related to nuclear weapons will remain.

A third solution consists of living with EDTs and moving from a nuclear deterrence by denial to a nuclear deterrence by punishment posture. EDTs are currently destabilizing for countries with a deterrence by denial posture (e.g. France, Russia, the UK and the USA, and increasingly China), because they may be able to neutralize (part of) the nuclear forces and nuclear infrastructure that are needed for a posture geared towards launching nuclear weapons at short notice, as deterrence by denial postures prescribe. The easiest way to become less dependent on nuclear forces on high alert and the potential destabilizing effect of EDTs would be to move to lower alert levels, and towards a deterrence by punishment posture.65 In this regard, it should be noted that regardless of the impact of EDTs, many observers have always preferred a deterrence by punishment instead of a deterrence by denial posture.66 At the end of the cold war, US President Ronald Reagan and Soviet General Secretary Mikhail Gorbachev agreed that ‘a nuclear war cannot be won and must never be fought’.67 A similar statement was repeated for the first time by all five permanent members of the UN Security Council (China, France, Russia, the UK and the USA; the P5) at the beginning of 2022.68 Such statements arguably take away the motive of possessing a deterrence by denial posture.69 That said, the USA and Russia have not moved to a deterrence by punishment posture (yet), and there are indications that China is moving away from such a posture.70

In addition, even if one believes that deterrence by punishment is less risky and less dangerous than deterrence by denial and could be perceived as being as (or even more) credible than deterrence by denial, it still does not resolve the potential vulnerability problem of mobile systems (e.g. mobile ICBMs and submarines) as a result of EDTs. On the contrary, one could argue that these mobile systems become even more important as a second-strike option in a deterrence by punishment posture because there are fewer assets under such a posture and because these mobile systems are the least vulnerable. As EDTs may potentially be able to neutralize invulnerable submarines, the resistance to move to a deterrence by punishment posture will in all likelihood only grow. Finally, as long as there are dual-capable missiles (meant for both nuclear and conventional warheads), the conventional–nuclear entanglement problem remains. While some of the nuclear risks will be mitigated by a minimum deterrence posture, the danger of a relatively large-scale nuclear war remains.

## P---ASPEC

## CP---CBR PIC

## T---Should

### Fairness---2NC

### Violation---2NC

## ADV---Poetry

### AT: Poetry---2NC

## ADV---Contention 3

### Opportunity Costs---2NC

#### You should consider opportunity cost.

Caldwell ’24 [Austin; April 1; Oracle, “What Is Opportunity Cost?” https://www.netsuite.com/portal/resource/articles/accounting/opportunity-cost.shtml]

Economic theory refutes the notion of "having it all" when resources are limited. The simple truth is, no matter how advantageous the outcome of any business decision may be, rejection of competing options — including doing nothing — implies other benefits were sacrificed. The value of those other benefits is called opportunity cost, and its assessment plays an important part in the overall decision-making process.

What Is Opportunity Cost?

The opportunity cost is the value the company forgoes when choosing one option over another, whether the loss is monetary or use of time (productivity) or energy (efficiency). When a company decides to allocate resources to one activity or area, it also decides not to pursue a competing activity. Opportunity cost is an especially important calculation for smaller businesses, which by definition have more limited resources and funds than their larger counterparts. It involves weighing which decision will potentially provide the greatest return on their investments and with the least risk, helping managers make better decisions.

Key Takeaways

Opportunity cost is money or benefits lost by not selecting a particular option during the decision-making process.

Opportunity cost is composed of a business's explicit and implicit costs.

### Theory---Conditionality---2NC

## ADV---Contention 4

## ADV---Democracy

### Civil War---2NC

#### States are filling in regulatory gaps now.

Taylor ’8-5 [Ashley, Clayton Friedman and Michael Yaghi; August 5; JD, Co-leader of Troutman Pepper Locke LLP’s state attorneys general practice; JD, partner in Troutman Pepper Locke LLP’s state attorneys general and regulatory investigations, strategy and enforcement (RISE) practice groups, nationwide teams that advise clients on consumer protection enforcement matters and other regulatory issues; Reuters, “State attorneys general step up enforcement with regulatory shift of Trump administration,” https://www.reuters.com/legal/litigation/state-attorneys-general-step-up-enforcement-with-regulatory-shift-trump-2025-08-05/]

August 05, 2025 - In the wake of the November 2024 elections, the United States has experienced a significant shift in regulatory focus, largely due to the fallout from the Trump administration's broad deregulatory agenda. This shift has prompted state attorneys general to step up their enforcement efforts, effectively filling what they perceive to be the regulatory void seemingly created by the federal agencies' shifting priorities.

The Trump administration's deregulatory stance was clear from the beginning. As set forth in Executive Order 14192, dated Jan. 31, 2025, President Trump stated "It is the policy of my Administration to significantly reduce the private expenditures required to comply with Federal regulations[.]"

This was followed by the Federal Communications Commission's ("FCC") initiative titled "In Re: Delete, Delete, Delete," which solicited public comments on the potential modification or elimination of regulations deemed unnecessary or overly burdensome. FCC March 12, 2025, Public Notice, GN Docket No. 25-133.

Federal agencies also appear to have shifted their litigation priorities. For example, in April the Consumer Financial Protection Bureau ("CFPB"), formed in 2008 and tasked with policing financial firms and consumer financial laws, requested it be removed as a plaintiff in CFPB v. Credit Acceptance Corporation. The case alleged the defendant, a subprime auto lender, incentivized dealerships to inflate vehicle prices and add expensive add-on products, effectively concealing the true cost of the loan from consumers in violation of the Consumer Financial Protection Act. It is predicted that the case could have widespread impact on the secondary auto finance market; thus, the CFPB's request may signal a retreat from active enforcement.

In another instance, the administration announced that it would be suspending federal enforcement of the Foreign Corrupt Practices Act ("FCPA"). Executive Order 14209 of Feb. 10, 2025.

Increased use of state consumer protection statutes

As federal agency priorities shift, state action has indicated that any perceived void in federal regulation will be filled by enforcement of state consumer protection statutes. For example, after the presidential administration announced it would be suspending FCPA enforcement, California's Attorney General Rob Bonta affirmed in a press release that FCPA violations remain actionable under the state's unfair competition law.

In response to the shifts at the CFPB, New York City Comptroller Brad Lander issued a report urging city and state leaders to strengthen local consumer financial protections. His report called for the passage of the FAIR Business Practices Act, proposed by Attorney General Letitia James and enacted by the New York Legislature on June 20, 2025.

The FAIR Business Practices Act, if signed into law by Gov. Kathy Hochul, would address alleged weaknesses in New York's consumer protection statute that currently only safeguards consumers against business acts or practices that are deemed "deceptive." The FAIR Act seeks to bring "unfair" and "abusive" acts by businesses, banks and other financial services companies — e.g., auto lenders, mortgage and student loan servicers — within its purview. Additionally, Lander advocates for full funding of relevant state and city departments to investigate harmful practices and protect consumers, as well as the creation of a Consumer Protection Restitution Fund.

States are also using novel ways to regulate areas traditionally left to the Food and Drug Administration ("FDA") by bringing enforcement actions using consumer protection statutes. For instance, Texas issued a Civil Investigative Demand to General Mills concerning General Mills' labeling of ingredients. Texas investigated General Mills for potential consumer protection violations regarding allegedly misrepresenting its food products were "healthy" and "nutritious" despite containing artificial dyes.

In another example of a consumer protection statute being used to regulate health claims, Connecticut's Attorney General filed a lawsuit against companies selling GLP-1 drugs, a class of drugs used to manage type 2 diabetes and, more recently, for weight management. Connecticut Attorney General William Tong claims the defendant violated the Connecticut Unfair Trade Practices Act by selling these drugs without proper approval.

States enforce federal law

In addition to using state laws to increase enforcement, state attorneys general have brought regulatory action for alleged violations of federal laws. In one instance, Maryland's Attorney General Anthony G. Brown settled with three property management companies the state accused of violating the Fair Housing Act. The Fair Housing Act has traditionally been enforced by the Department of Housing and Urban Development ("HUD").

The Federal Trade Commission ("FTC") is also undergoing leadership shifts and a refocusing of enforcement priorities. However, state attorneys general are stepping in to address perceived gaps in federal enforcement. Michigan's Attorney General sued Roku for alleged violations of the Children's Online Privacy Protection Act ("COPPA") and the Video Privacy Protection Act ("VPPA"). These federal privacy laws have traditionally fallen within the FTC's enforcement powers.

Looking ahead

The trend of increased state enforcement in the consumer protection space is likely to continue. The recent passage of H.R.1, commonly referred to as "The Big Beautiful Bill," shifted funding away from several federal agencies. This transfer of funding will likely result in additional shifts to federal enforcement priorities.

As federal agencies scale back their involvement, state Attorneys General are poised to play a more significant role in the consumer protection space. This shift has potential to lead to a patchwork of state regulations, creating challenges for businesses operating across multiple jurisdictions. However, it also presents an opportunity for states to innovate and tailor consumer protection measures to address local needs effectively.

The current landscape of consumer protection is marked by a dynamic interplay between federal deregulation and state enforcement. As states amplify their role, they may also be setting new standards for consumer protection. The coming years will likely see further developments in this area, requiring businesses to adapt to the evolving regulatory environment.

#### No solvency. Trump won’t listen to experts, even if he can’t fire them.

Shapiro ’20 [Stuart; October 29; professor and director of the Public Policy Program at the Bloustein School of Planning and Public Policy at Rutgers; The Hill, "Listening to experts isn’t perfect, but ignoring them is far worse," https://thehill.com/opinion/white-house/523279-listening-to-experts-isnt-perfect-but-ignoring-them-is-far-worse/]

Last week, President Trump said of his opponent, Vice President Biden, “he’ll listen to the scientists.” In case you’re confused, this was meant to be an insult.

Indeed, the president seems to take pride in the extent to which he has ignored the advice of experts of all different stripes. From economists on trade, to scientists on handling the pandemic and climate change, to intelligence officials on foreign threats, Trump has preferred to “go with his gut.”

#### No ‘polycrisis.’

Smith ’22 [Noah; November 13; Writer and economist, Ph.D. in Economics; Noahpinion, “Against ‘polycrisis’,” https://www.noahpinion.blog/p/against-polycrisis]

I generally enjoy big-think like this. (If I didn’t, I would be somewhat of a hypocrite, given that my recent post about decoupling was entitled “The end of the system of the world”!) But I’m just not sure if the challenges and risks the world faces today are as mutually reinforcing as Tooze and the other “polycrisis” enthusiasts believe.

The polycrisis illusion

For one thing, it’s always very easy to think that we live in an era uniquely chock-full of risks, disasters, and problems. This is because of something called the availability heuristic — we tend to think the things we read about are typical of the world at large. And both the news media and the social media shouters who crave our eyeballs have long ago realized that “no news is good news” — i.e., negative news is uniquely good at grabbing our attention. So the more we’re engaged with current events, the more we’re likely to see the world as defined by things that alarm us — this is the subject of the song “We Didn’t Start the Fire”, quoted at the top of this post.

This is not to say the world is free of crises and risks; there are plenty out there. Nor is it to say that our current era has less than others; this is very hard to judge. But the idea that these crises are all related may be a case of apophenia — our natural human tendency to perceive connections that don’t actually exist, or are far weaker than we think.

Just because we can draw arrows between news items does not mean that the items are strongly coupled. For example, Tooze’s diagram draws an arrow from China to the Russian gas boycott, but China didn’t join the boycott. He draws an arrow between “Biden administration & GOP risk” and the Lend-Lease bill, but there’s no reason to think Lend-Lease was motivated by U.S. domestic politics, and the support for Ukraine has so far remained bipartisan. He draws an arrow from oil prices to the climate crisis, but — as I’ll talk about in a bit — the former actually helps address the latter.

When crises aren’t really strongly coupled, they can act as low-correlation assets in a diversified financial portfolio — when one problem is getting worse, another problem somewhere else is likely to be getting better.

In fact, though, I think there’s an even more important reason to be skeptical of “polycrisis”: buffer mechanisms. The global economy and political system are full of mechanisms that push back against shocks. Supply-and-demand is a great example — when supply falls, elastic demand cushions the short-term impact on prices (this is a little like Lenz’s Law in physics). Political backlashes are another mechanism — people don’t like it when you try to deny elections or invade your neighbors, and they get mad and push back. Policy responses are a third buffer — when central banks see inflation, they restrain it with higher interest rates. And so on.

The reason this makes a polycrisis less likely is that the buffer mechanisms often push back against problems in addition to the ones they were designed to push back against. There are plenty of historical examples of this. The New Deal didn’t just fight the Depression; it finally implemented a long-needed social insurance system that has served us well to this day. The victory over the Axis in WW2 also prompted decolonization and the creation of a global economic system that has allowed most of the world to flourish in the century since. More recently, the 2008 financial crisis led to needed infrastructure spending, Obamacare, and the intellectual revival of industrial policy.

In other words, sometimes instead of a polycrisis we get a polysolution.

<<TEXT CONDENSED, NONE OMITTED>>

Today, I can see a number of examples where the various crises that newsreaders worry about are leading to responses that will help address the others. Buffer mechanisms in the global political economy of the 2020s As I mentioned before, one very simple example of a buffer mechanism is supply and demand. In the past year, China’s economy has slowed dramatically due to a combination of a real estate bust, the Zero Covid policy, and various regulatory crackdowns. Normally, a recession in the world’s biggest trading nation would be a cause for global alarm, but in this one it’s more likely a source of relief. A collapse in Chinese demand is helping to restrain oil prices, keeping them at around the same level as the early 2010s: <<CHART OMITTED>> That in turn is blunting the impact of the Ukraine war and Russia sanctions on Europe’s economy (and America’s, and Japan’s, etc.). A combination of China’s economic slowdown and Russia’s military fiasco in Ukraine also seem to have reduced the chance of U.S.-China conflict, at least in the short term. Seeing Russia fail to conquer a smaller country must have given even Xi Jinping pause about launching a similar military adventure to conquer Taiwan, while economic struggles distract policymakers’ attention. Though it’s too early to tell, the results of last week’s midterm elections in the U.S. — which were a victory for stability and bipartisanship and a loss for election-denialists — might also have been prompted in some minor way by the Ukraine war and the threat of geopolitical competition with China, which should remind Americans that there are enemies in the world more dangerous than other Americans. Meanwhile, the war in Ukraine will spur the fight against climate change. Disruptions to Russian energy supplies, especially in Europe, create incentives for the rapid deployment of renewable energy. This is from May: The Commission proposed that 45% of the EU’s energy mix should come from renewables by 2030, an advance on the current 40% target suggested less than a year ago. Officials also want to cut energy consumption by 13% by 2030… “It is clear we need to put an end to this dependence and a lot faster before we had foreseen before this war,” said Frans Timmermans, the EU official in charge of the green deal. Just a few days ago, the European Commission followed through with a temporary emergency regulation to speed the adoption of renewables. (The war is leading to minor outbreak of sanity on energy in general; Germany is keeping its nuclear plants open, at least for a while.) The rapid adoption of renewables will, in turn, drive down their price, through a mechanism known as learning curves — the more you build, the more cost goes down, creating an incentive to build even more. So the increased adoption of renewables in Europe and other Russia-sanctioning countries in response to the Ukraine war will also make renewables more attractive in China, India, and other countries that aren’t joining in the sanctions. All this will help the fight against climate change. But it will also help address another longstanding economic problem in the rich world: slow growth. Due to massive continuing cost drops, renewable energy increasingly isn’t just green energy — it’s cheap energy. The forecasters who study learning curves believe that technologies like solar, batteries, and hydrogen are much more susceptible to learning effects than fossil fuel technologies or even nuclear. That means that renewables are going to give us cheaper energy than we’ve ever had in our history as a species. And that in turn will help the developed world shake off the creeping stagnation in productivity and wages that it has endured for most of the time since the oil shocks of the 70s. Cheap energy is highly complementary to human labor — armed with cheap energy, we can rebuild much of our world. This is not to say that there are no cases in the world where one problem is exacerbating another. Higher interest rates, for example, are sure to cause capital flight and currency depreciation in some developing countries, making it harder for them to buy food and energy. But the global free-market system built in the last three decades is looking more resilient than many expected; most developing countries are doing OK. Dark Brandon vs. polycrisis

<<PARAGRAPH BREAKS RESUME>>

In other words, I look out in the world and I don’t see a polycrisis; I see an emerging polysolution. The looming threats of climate change and authoritarian revanchism, combined with the shocks of Covid and inflation, have stirred both policymakers and businesses to action. And many of those actions will end up addressing multiple crises rather than just one. Nor am I alone in my feeling that the narrative of the world suddenly seems to be improving:

#### No civil war.

Reich ’23 [Robert, June 12; Professor of Public Policy at the University of California, Berkeley, former United States Secretary of Labor; The Guardian, “There will be no civil war over Trump. Here’s why,” https://www.theguardian.com/commentisfree/2023/jun/12/trump-civil-war-chances-documents-indictment]

Violence is possible, but there will be no civil war.

Nations don’t go to war over whether they like or hate specific leaders. They go to war over the ideologies, religions, racism, social classes or economic policies these leaders represent.

But Trump represents nothing other than his own grievance with a system that refused him a second term and is now beginning to hold him accountable for violating the law.

In addition, the guardrails that protected American democracy after the 2020 election – the courts, state election officials, the military, and the justice department – are stronger than before Trump tested them the first time.

Many of those who stormed the Capitol have been tried and convicted. Election-denying candidates were largely defeated in the 2022 midterms. The courts have adamantly backed federal prosecutors.

Third, Trump’s advocates are having difficulty defending the charges in the unsealed indictment – that Trump threatened America’s security by illegally holding (and in some cases sharing) documents concerning “United States nuclear programs; potential vulnerabilities of the United States and its allies to military attack; and plans for possible retaliation in response to a foreign attack”, and then shared a “plan of attack” against Iran.

Republicans consider national security the highest and most sacred goal of the republic. A large number have served in the armed forces.

Trump’s own attorney general, Bill Barr, said on Fox News Sunday that he was “shocked by the degree of sensitivity of these documents and how many there were, frankly … If even half of it is true, then he’s toast. I mean, it’s a very detailed indictment, and it’s very, very damning. And this idea of presenting Trump as a victim here, a victim of a witch-hunt, is ridiculous.”

None of this is cause for complacency. Trump is as loony and dangerous as ever. He has inspired violence before, and he could do it again.

But I believe that many who supported him in 2020 are catching on to his lunacy.

#### No nuclear populism impact.

Rajagopalan ’22 [Rajeswari Pillai; September 20; PhD, Resident Senior Fellow at the Australian Strategic Policy Institute; The Nonproliferation Review, "Rajeswari Pillai Rajagopalan, Director, Centre for Security, Strategy and Technology, Observer Research Foundation, New Delhi," vol. 28]

In their essay “Upsetting the Nuclear Order: How the Rise of Nationalist Populism Increases Nuclear Dangers,” Oliver Meier and Maren Vieluf highlight some important aspects of nationalist-populists’ decision-making styles and argue that they could lead to greater nuclear danger and undermine the global nuclear order. The authors also challenge the traditional notion of responsible and irresponsible nuclear-weapon states. These aspects of nationalist-populist leaders’ influence on nuclear decision making have not been studied in any detail before; the article thus represents an important contribution to the academic literature on nuclear decision making and nuclear danger. Despite its importance as a first cut, there are a number of drawbacks in the argument.

It is undoubtedly true that nationalist-populist leaders have shown a distinct attitude toward foreign and defense policies and choices. But whether this also impacts nuclear-weapons decision making is a bit more uncertain because that decision-making remains a significantly distinct arena for policy makers. More significantly, the choice of nationalist-populist leaders—former US President Donald Trump, UK Prime Minister Boris Johnson, Indian Prime Minister Narendra Modi, and Russian President Vladimir Putin—is questionable. That Chinese President Xi Jinping is not categorized as a nationalist-populist leader is surprising. While there may not be an electoral process that keeps Xi and the Chinese Communist Party (CCP) in power, Xi and the CCP appear conscious that the legitimacy of the party is maintained by the policies of Xi and his party. They have carefully used populism in pushing their policies, even if the manner in which Chinese public perceptions are managed may be different. Xi’s anti-corruption drive, for instance, was propelled primarily by careful use and nurturing of public anger. In foreign policy, the CCP has again carefully nurtured and managed public opinion to gain support for policy. The manner in which China responded to South Korea after the latter’s decision to deploy the American THAAD (Terminal High Altitude Area Defense) missile-defense system is a case in point: China aroused popular anger against South Korean supermarkets such as Lotte. Therefore, the authors’ suggestion that China does not “rely on an internal in-group versus out-group dichotomy to justify their leadership” may need to be reconsidered. The absence of Pakistan from the authors’ categorization of nationalist-populist leadership because the civilian leadership does not hold much influence in nuclear decision making is also puzzling because the military leadership in Pakistan has also been careful to nurture its role and use public opinion for both domestic and foreign-policy purposes. Meier and Vieluf's analysis essentially implies that a country with a democratic leader who has a populist style is far more dangerous than a country that has an authoritarian leader or has a military that controls nuclear weapons for narrow institutional reasons. As we see from the Russian invasion of Ukraine, as well as many other cases, such narrowly based leadership can potentially make far greater mistakes in foreign and security policies than democratic leaders whose popular base is much wider. In the Russian case, the issue may not as much be about populism as authoritarianism.

There has definitely been some loose talk about the use of nuclear weapons by nationalist-populist leaders, but the consequence of such loose talk should also not be exaggerated. For instance, Modi’s 2019 campaign was primarily focused on demonstrating that he was tough on national security by invoking India’s conventional military retaliation to Pakistan’s terrorist attacks without focusing on nuclear threats. In other words, threats of nuclear escalation were not characteristic of his “tough on national security” persona. There was only one offhand, oblique remark regarding nuclear weapons. Nevertheless, Indian analysts also have raised concerns about the statement from Prime Minister Modi in which he said that India was not keeping nuclear weapons “for Diwali” (an Indian festival that features firecrackers). Indian analysts such as the respected former foreign secretary Shyam Saran have criticized the reference, writing that any reference to nuclear weapons must be carefully made because it could otherwise lead to misinterpretation and misunderstanding among external observers.

But more significantly, there is little indication that such rare statements have led to any change in India’s nuclear strategy or nuclear posture, or led to a higher alert status. Moreover, potential adversaries did not respond to these as might be expected in a case of heightened nuclear danger. While loose talk about nuclear weapons is certainly not advisable, conflating that with rising nuclear dangers is exaggerated. In the cases of both Modi and Trump, we did not see any subsequent heightening of nuclear danger or any revelation of change in their respective nuclear postures. This suggests that the role and use of such rhetoric is to impress domestic audiences and that external actors understand it as such.

This is not to suggest that the threat of nuclear proliferation and heightening of nuclear dangers should be minimized. But there is no reason to exaggerate the threat either. This brings me to the point of evidence. Have we seen any new state pursuing nuclear weapons in response to such populist rhetoric? The answer is categorically negative. On the other hand, we have seen that other factors are pushing states to develop or acquire nuclear weapons—in particular, the increasingly aggressive behavior of some nuclear powers. For example, there is increasing discussion about and consideration of the nuclear-weapons option in countries such as Japan, South Korea, and even Saudi Arabia and Australia,Footnote1 all of which are being driven by actual security concerns as a consequence of aggressive behavior by countries such as China, North Korea, and Iran. The Ukraine crisis vividly illustrates why small states might be tempted to develop or acquire nuclear weapons. Similarly, China’s continued aggressiveness toward Taiwan could lead other currently non-nuclear-weapon states to consider nuclear weapons if China conducts a successful invasion of the island state. These would appear to be much more important and consequential drivers of nuclear decision making than the rhetoric of a few populist leaders who do not appear to be taken seriously.

Assertions by Meier and Vieluf about nationalist populist leaders’ greater reliance on nuclear weapons by linking populism to the 2018 US Nuclear Posture Review (NPR) are also potentially problematic. The reality is that NPRs have always been ideologically and politically controversial in the context of US domestic politics. There have been associated controversies about what goes in and what does not, but that happens irrespective of who the leader is and what kind of leadership the United States has at a particular point in time. So, for example, nuclear experts associated with Democrats have wanted a shift in US nuclear policy toward a no-first-use (NFU) policy, while those associated with the Republican party have wanted greater emphasis on nuclear weapons in US strategy. It is quite likely that even if a non-nationalist, non-populist Republican president had come to power in 2017, there would have been efforts to shift US nuclear policy toward greater emphasis on nuclear weapons. The unfortunate part is that nuclear policy has become somewhat politically partisan, but it may have nothing to do with Trump as a nationalist-populist leader.

Similarly, Meier and Vieluf argue that the Russian emphasis on nuclear weapons is the result of the influence of the Russian Orthodox Church, with the 2019 US Missile Defense Review as an additional factor. While both of these may play some role and could be used by Russia to legitimize the importance of nuclear weapons in its military strategy, a more important factor is Russia’s conventional military weakness, which has accentuated the importance of nuclear weapons. At best, these additional factors may bolster decisions that appear to have fairly easily understandable material roots in this weakness.

Questions about the credibility of America’s commitment to its alliance partners because of Trump’s repeated questioning of the relevance of the NATO or asking its East Asian partners to pay more for American protection reveal nothing more than Trump’s ignorance and crassness, and they have had relatively little real-world effect on US alliances. There have always been concerns among US allies about American commitments, but that is well known as a feature of alliance politics. It predates Trump and will remain a concern in the future. But the consequence is also easily judgeable, even if not measurable: US alliances have remained strong and are flourishing because their fundamental purpose is security, and security concerns are rising as a consequence of aggressive actors such as China and Russia. It is honestly difficult to look at the growing tightness of US alliances and partnerships in Europe and the Indo-Pacific today and correlate it with the concerns expressed in this essay.

Looking specifically at India’s nuclear doctrine, it is worth noting that there has been opposition to the NFU policy since the time India formally presented it in 2003. Nevertheless, Indian nuclear doctrine has not changed, and Indian officials have repeatedly reconfirmed the doctrine formally in multiple statements in a variety of international settings. The 2014 manifesto of Modi’s Bharatiya Janata Party promised a relook at India’s nuclear doctrine, but Modi himself backtracked on it fairly quickly after being elected. Though some analysts have suggested that India is developing capabilities that could lead to a counterforce doctrine, India's actual force development has been fairly sedate. India still maintains a slow-growing nuclear force that is slightly smaller than even Pakistan’s, which does not suggest that India is considering any such dramatic changes. While Modi may be a nationalist populist, this does not appear to be influencing Indian nuclear doctrine in any visible manner. Considering that he has been in power for almost a decade, this stability and consistency in Indian nuclear policy calls into question arguments about how nationalist populism could impact nuclear policy.

The consequences of nuclear-policy changes are grave, and we must be careful in assessing possible dangers. This might suggest that even minor indications of future changes be treated seriously, and the authors are correct to flag potential dangers from nationalist-populist leaders. Nevertheless, there is also a risk in exaggerating the danger. Most importantly, we must not ignore more important sources of nuclear danger and proliferation. In the contemporary world, this danger is rooted in aggressive authoritarian states that are increasing the insecurity of their smaller, weaker neighbors, thus leading to greater consideration of nuclear weapons for self-defense in East Asia and the Middle East. Focusing on the wrong danger may prove to be more problematic for nuclear stability.

#### No populist wars.

Destradi ’21 [Sandra; 2021; professor in political science at the University of Freiburg; Comparative European Politics, “Populism and Foreign Policy: A Research Agenda,” vol. 19]

Amenability to compromise

Among foreign policy observers and in the media, one common assumption about populist actors is that they will adopt a less compromising posture in foreign policy as compared to that of non-populist governments and, overall, anecdotal evidence tends to confirm this impression. In theoretical terms, different approaches to populism would also lead us to expect populists in power to pursue a more confrontational foreign policy as compared to their predecessors. Populists’ Manichean worldview, highlighted by the ideational approach (Hawkins 2009: 1043) will lead them to depict the world in highly moralistic terms, as a battle of good vs. evil, black vs. white. This, together with populists’ claim to be the only possible representatives and defenders of the ‘true people’ (Müller 2016: 3) might make them less amenable to compromise in international disputes. The literature on populism as a political style also highlights that populists will tend to conjure up crises (Moffitt 2017) and employ an antagonistic, rather than consensual discourse (Ostiguy 2017). Similarly, the discursive approach suggests that the populist logic of articulation rests on the permanent discursive construction of an ‘other’ or ‘enemy’, whether internal or external. This is likely to translate into a confrontational rhetoric towards (certain) other international actors and to shape antagonistic representations of identities. Finally, the politico-strategic approach highlights that populists, after forming governments, need to keep mobilizing their followers. International crises may be particularly suitable to generate domestic support, as is highlighted by the literature on the diversionary theory of war and the ‘rally around the flag effect’ (for an overview and a criticism of existing scholarship, see Tir 2010). Indeed, after they have themselves become part of the governing elite, populists need to keep constructing enemies. Yet, previous research suggests that shifts to populist governments do not automatically lead to foreign policies that are indiscriminately more conflictive or less amenable to compromise. Relying on operational code analysis, Özdamar and Ceydilek (2019) find that while European Populist Radical Right leaders tend to be more conflictual in their worldviews, they tend to be as cooperative as average world leaders when it comes to their ‘instrumental approaches’. Insights from the Global South suggest that populist governments will pursue a more conflict-prone foreign policy only vis-à-vis countries that are directly associated with a particular section of the population that populists exclude from their definition of the ‘true people’ (Destradi and Plagemann 2019). Finally, the picture is mixed as regard populist parties’ attitudes towards the use of force and intervening in other states’ internal affairs. In the realm of defence, their degree of support for military capabilities and solutions appear largely mediated by their thick ideologies and by national strategic cultures: for instance, most populist radical right party support higher defence spending while left-wing populist parties generally adopt pacifist postures, and while most populist parties tend to favour territorial defence, some support external force projection and military interventions against terrorist groups (Falkner and Plattner 2020; Coticchia and Vignoli 2020; Henke and Maher 2021; see also Wagner et al. 2018).

#### Democratic peace is empirically bankrupt and spurious, BUT democracies are more war prone.

Bakker ’24 [Femke; March 22; Assistant Professor at the Institute of Political Science at Universiteit Leiden, Ph.D. in Political Science from Leiden University; Hawks and Doves: The Flawed Microfoundations of Democratic Peace Theory, “What About Democratic Peace?” Ch. 8]

Contribution to democratic peace theory

The findings of this study contribute in several ways to our understanding of normative and institutional democratic peace theory. These explanations for the democratic peace assume that specific political structures, the formal and informal structures of liberal democracy, influence decision-makers significantly and subsequently alter their behaviour. However, these assumptions are normative and grounded on specific political-philosophical ideas rather than being empirical facts. Yet democratic peace theory uses these assumptions as if they were empirical facts. As an explanation, democratic peace theory thus rests on normative foundations. I tested these assumptions, the actual micro-foundations of democratic peace theory, and showed that these are empirically unsupported.

First of all, liberal norms exist not only in liberal democracies but also within other regime-types. The liberal-democratic samples showed to have the highest level of liberal norms on average, as is expected by democratic peace theory, but the other regime-types also show to have, on average, positive levels of liberal norms. Liberal norms are thus not absent within other regime-types. The distribution of liberal norms within all three samples varies in similar patterns, which indicates that, within different regime-types, liberal norms fluctuate similarly. Furthermore, liberal norms neither influence the willingness to attack of decision-makers of liberal democracies nor decision-makers of other regime-types. The only, rather small but significant, influence of higher levels of liberal norms (in all three countries alike) was on the willingness to negotiate.

These results indicate that the philosophical idea that liberal democracy morally teaches its citizens to become better people does not find support in the empirical world. Liberal norms are internalised in people irrespective of the regime-type and its socialization processes. Liberal norms seem to be human norms that are capable of developing in all people, regardless of the regime-type they are born in. The results indicate that the internalisation of liberal norms happens as part of the process of self-development and not as a result of socialisation within the structure of a political regime. Therefore, liberal norms could better be called liberal values.

Earlier experimental studies of the democratic peace (Geva et al. 1993; Geva and Hanson 1999; Johns and Davies 2012; Z. Maoz and Russett 1993; Mintz and Geva 1993; Rousseau 2005; Tomz and Weeks 2013) have instrumentally assumed liberal norms to be present and influential within liberal democracies. They did not measure whether norms were actually present, and they did not test whether they indeed exerted influence as hypothesized. Neither did they compare the levels and influence of liberal norms in liberal democracies with evidence from autocracies. If the results of the current study suggest anything, it is that the theoretical underpinnings of these earlier studies need to be revisited.

Secondly, regime-type showed to have no influence on the willingness to attack, or the willingness to choose other relevant policy options, of decision-makers in all three samples alike. Regime-type thus did not influence decision-makers from liberal democracies significantly, as would be expected by democratic peace theory. This non-finding is not in line with earlier micro-level studies. These studies showed that regime-type did influence the willingness to attack: individuals from liberal democracies were more willing to attack autocracies over democracies (Bakker 2017; Geva et al. 1993; Geva and Hanson 1999; Johns and Davies 2012; Mintz and Geva 1993; Rousseau 2005; Tomz and Weeks 2013).

The question is how the findings of this study relate to previous scholarship. An investigation of the results showed that the non-influence of regime-type was not an artifact of the research design. Participants received the treatment of regime-type as intended, which indicates that they incorporated the information about the regime-type of the opponent in their decisionmaking process.

Four aspects might explain the differences in outcomes. Firstly, this study disconnected regime-type from the perception of threat by providing the information about the regime-type separately from other factors surrounding the conflict that might, in themselves, trigger a threat. As the studies of Johns and Davies (2012) and Geva and Hanson (1999) showed, it is hard to pinpoint the exact effect of regime-type when socio-cultural factors are part of the mix and might interact implicitly with regime-type. By separating the behaviour of the opponent (in this case, invasion and the use of hard power) from regime-type, the findings of this study might indicate that it was not regime-type that triggered participants in earlier studies, but another threat from the conflict scenario itself.

Second, and related to the former point, is the measurement of regime-type. This study used a hypothetical scenario about hypothetical countries, to make sure that participants would not be influenced by their specific preconceptions about real-world conflicts and countries. Most of the earlier studies (Bakker 2017; Geva et al. 1993; Johns and Davies 2012; Mintz and Geva 1993; Rousseau 2005; Tomz and Weeks 2013) used non-hypothetical countries and, moreover, relied (to a greater or lesser degree) on plausible real-world conflicts in their scenarios. Their scenarios might have triggered responses based on real-world perceptions, not only about the regime-type of the countries but possibly also about other features of these countries.

Thirdly, another point related to measurement. In this study, the regime-types were indicated by a neutral description of the practices of a liberal democracy and an autocracy, rather than by explicitly naming such regimes. No negative words were used to describe their practices, to make sure that no possible bias was triggered that might increase the perception of threat. The participants responses to subsequent questions showed that they perceived the regime-types as intended, which means that they understood what type of regime was meant, even although no specific or negative wording or con- notation was used. Most studies (Bakker 2017; Geva et al. 1993; Geva and Hanson 1999; Johns and Davies 2012; Mintz and Geva 1993; Rousseau 2005; Tomz and Weeks 2013) measured the regime-type of the opponent by explicitly naming the regime-type: democratic and autocratic/dictatorship, respectively. These words have strong and possibly negative connotations that might have triggered threat responses that are less connected with what a specific regime-type entails.

Lastly, the relevance of including other explanatory factors within the design should be explained. This study built on a previous study (Bakker 2017), in which the willingness to attack an autocracy over a democracy was tested and compared between the results of individuals from a liberal democracy with the results of individuals from an autocracy. This comparison proved to be fruitful:

The democratic experimental group showed to be more peaceful towards other democracies, just like previous studies showed. However, the comparative perspective brought a new insight: because the autocratic citizens were overall more peaceful towards all regime-types the comparison showed that actually the democratic participants were not more peaceful towards other democracies, but rather more war-prone towards autocracies. These findings are important in the light of theoretical refinement, and show that we cannot simply assume autocratic individuals to be war-prone, as democratic peace theory does. (Bakker 2017, 538).

However, multivariate analysis showed that the significant influence of regime-type on liberal-democratic individuals disappeared and did not have any explanatory value when the analysis controlled for other factors. In other words: the influence of regime-type lost its salience and showed to be marginal and not significant, because the multivariate analysis showed that the perception of threat of the conflict mattered, as well as actor-centric factors such as hawkishness (2017, 539).

Earlier micro-level studies did not compare the results for liberal democracies with the results for autocracies. They measured regime-type in several explicit ways that might have triggered different threat responses, for which no control was implemented. Moreover, they did not disentangle regime-type from other potential threatening factors. Although these studies are valuable for our understanding of democratic peace theory, all in all, this study shows that the factor regime-type as a reason for choosing to go to war should be considered more carefully.

#### Democracy makes disease scenario impossible.

Landman ’23 [Todd and Matthew Smallman-Raynor; October; Professor of Government and Director of the Institute for Democracy and Conflict Resolution at the University of Essex; Professor of Analytical Geography, Faculty of Social Sciences at the University of Nottingham; Political Geography, “The politics of COVID-19: Government response in comparative perspective,” vol. 106]

Across this great variety of regime types there are thus fundamental questions of governance during crisis involving authority, legitimacy, and capacity to respond to the COVID-19 pandemic. Many democracies lack the necessary ‘emergency’ clauses in their national constitutions and defined the threat from COVID-19 differently (Kettemann & Lachmayer, 2022), while others do not provide sufficient freedoms that allow for publics to question and critique government response. Some democracies saw the pandemic as an external and indiscriminate threat, while others, such as Germany, initially saw it as an ‘internal’ problem (Thielborger, ¨ 2022). The separation of powers and the difference between unitary and federal systems meant that there were significant coordination and command and control challenges that slowed the marshalling of state resource needed to combat the virus and minimise its community transmission (Rich, 2021). The United Kingdom faced significant challenges in its approach to ‘virus governance’ across its devolved authorities in England, Wales, Scotland, and Northern Ireland (Baldwin, 2021; Thomas, 2022). Democracies also faced the challenge of mass publics and popular opinion, which were variously influenced by scientific information, misinformation, and conspiratorial disinformation, which proliferated across social media platforms (Kellerman, 2021). Mass publics accustomed to freedom of movement, economic enterprise, and public participation in events and gatherings reacted negatively to prolonged periods of lockdown, facemask guidance, and vaccine distribution. Democracies thus faced significant trade-offs between fundamental freedoms (e.g., speech, assembly, access to information, peaceful protest and demonstrations, and privacy), concerns for public health, and maintaining their economies. Arguably, autocracies were in much a better position to respond quickly to the threat from the virus, where they have more immediate control over state resource, the ability to repress and control popular dissent, and a weaker tradition of public opposition to state authority, particularly during times of national crisis. They also have political incentives to under-report COVID data and/or manipulate data to appear more competent during the pandemic.

#### Democracy is existential---political ignorance, irrationality, and short-termism obstruct effective response.

Porter ’24 [Joseph and Adam Gibbons; July 31; Visiting Scholar of Ethics and Assistant Director of Academic Services at the Janet Prindle Institute for Ethics at DePauw University, Ph.D Philosophy, University of North Carolina at Chapel Hill; professor of philosophy at Lingnan University, Ph.D. Philosophy, Rutgers University; Asian Journal of Philosophy, “Existential risk and equal political liberty,” vol. 3]

Paradigmatic examples of possible existential catastrophes include natural extinction events such as asteroid impacts, naturally occurring pandemics, supervolcanic eruptions, and stellar explosions; anthropogenic extinction events such as nuclear holocausts and engineered pandemics; and extinction events arising from both natural and anthropogenic factors such as tail risks of runaway greenhouse effects.6 All these catastrophes would eliminate our species and (a fortiori) destroy our ability to develop our moral powers. But existential catastrophes need not involve extinction. On our account (like Ord’s), the emergence of a dystopic system of universal human oppression from which we could never recover would also constitute an existential catastrophe, even if it did not literally wipe us out (Ord, 2020: 145–155).7

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Naturally, we are and should be interested in mitigating risks of all sorts. But x-risks are especially grave. While humanity could potentially recover from a non-existential catastrophe, a true existential catastrophe precludes any possibility of recovery. Hence, x-risk mitigation is a wholly proactive endeavor. In assessing different political systems’ capacities to mitigate x-risk, we should bear in mind three features of most x-risks: Long timescales: Many existential catastrophes are unlikely to occur for many thousands—or even millions—of years. For example, an asteroid impact may not threaten humanity with extinction for several million years, because there is an inverse relation between asteroid size and frequency of impact (with more dangerous impacts occurring much less frequently). Low probabilities: Relatedly, most—though not all—existential catastrophes are individually unlikely. For instance, the probability of an existentially catastrophic stellar explosion within the next century is only 1 in 1,000,000,000 (Ord, 2020: 167). Complexity: Many x-risks cannot be adequately understood without a firm grasp of several complex technical subjects. For example, the risk of value-misaligned artificial intelligence cannot be adequately understood—let alone minimized—without a good grasp of computer science, decision theory, and other cognitively demanding fields of study. In short, most x-risks (though not necessarily all) involve far-off, low-probability, and complex events. Consequently, it is easy to underestimate the threat they pose to humanity. But x-risk is no minor concern. Although the individual probability within the next century of any one existential catastrophe may be quite low, the cumulative probability of all such catastrophes—the total x-risk—may be worryingly and surprisingly high. (Ord (ibid.) estimates it to be roughly 1 in 6.) X-risk is therefore both especially important and especially hard to mitigate. Unfortunately, we cannot directly study which political systems minimize any given individual x-risk. For obvious reasons, it is impossible to wait until after an existential catastrophe has occurred to learn from experience which political systems dealt with it best. Thus, in assessing different systems’ relative x-risk-mitigating capacities, the best we can do is to study the extent to which a given system promotes informed, rational, and long-term decision-making in general. Plausibly, systems which do not effectively promote such decision-making are ill-suited to deal with problems like x-risk. Of course, such an indirect method can hardly be definitive—one reason we do not claim to know which systems would minimize cumulative x-risk. But it can still be quite fruitful.

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2.2 Three pathologies of democracy

Is democracy always best suited to deal with problems like x-risk involving far-off, low-probability, or complex events? We doubt so, because democratic decision-making is compromised by at least three pathologies: voter ignorance, voter irrationality, and democratic short-termism.8

First, democratic decision-making is compromised by voter ignorance. Since becoming politically well-informed is highly costly and only minimally beneficial to individual voters, most democratic voters are rationally ignorant (Downs, 1957: 207–219). Decades of research confirm that typical voters are ignorant of even basic facts about the structure and function of political institutions, the identity and platforms of political candidates, and much more.9 Unsurprisingly, most voters are also ignorant of important social-scientific subjects relevant to democratic politics—not to mention the many other complex subjects relevant to x-risk mitigation.

Voters’ widespread ignorance has two mutually reinforcing consequences. On the one hand, ignorant voters often support candidates endorsing harmful policies. On the other hand, both prospective and current legislators are incentivized to respond to ignorant voters’ preferences.10 The joint effect of these two consequences is the frequent implementation of laws and policies which go against citizens’ interests—including their interest in x-risk mitigation. A salient recent example is contemporary democracies’ ineffective response to the COVID-19 pandemic (Winsberg et al., 2020). If COVID-19 had been much deadlier, the ensuing pandemic could have become a genuine existential catastrophe for which most democracies—and most extant non-democracies—would have been terribly underprepared.

Second, and similarly, democratic decision-making is compromised by voter irrationality. Just as becoming politically well-informed is highly costly and only minimally beneficial to individual voters, so too is conforming to normal standards of epistemic rationality in political belief formation. In fact, in many partisan environments, epistemic rationality can even be penalized. Within some ingroups, for instance, rationally moderating one’s beliefs may result in ostracization and other social costs. Hence, most democratic voters behave in paradigmatically epistemically irrational ways in the political domain. Indeed, most voters are rationally irrational: (practically) rational in their (epistemic) irrationality (Caplan, 2007). Naturally, rationally irrational voters incentivized to form irrational political beliefs are not especially well suited to deal with political problems of any kind. X-risk is no exception.

Third, and maybe most importantly, democratic decision-making is compromised by short-termism. A large body of work in political science suggests that democracies focus unduly on short-term problems at the expense of long-term ones.11 Of course, short-termism is not a problem for democracies alone. Some determinants of short-termism are general and pose a challenge for all political systems. For example, many cognitive biases can lead us to neglect long-term issues. In conditions of informational uncertainty about the future, we often discount the value of actions with long-term benefits relative to actions with more certain short-term benefits (Frederick et al., 2002). In addition, we are often more responsive to salient and visible risks than to risks apparent only from abstract reflection or extrapolation from data (Weber, 2006).12 But salient, visible, and short-term risks are not necessarily the most threatening ones, and in any case, most x-risks are neither salient, visible, nor short-term. Consequently, most members of any political system can be expected to neglect long-term problems like x-risk, because psychological determinants of short-termism predispose them to biased short-term thinking.

More striking than psychological determinants of short-termism, however, are the institutional determinants of short-termism specifically in democracies (John & MacAskill, 2021: 49–50). These determinants prevent the formation and implementation of long-term policy, undercut political actors’ motivation to mitigate long-term risk, and hinder our capacity to gather information about such risks and reason appropriately about them. If democratic institutions themselves further incentivize us to neglect the long term, then democracy will arguably mitigate x-risk less effectively than other (more long-termist) political systems.

Foremost among institutional determinants of short-termism in democracies are electoral incentives. Because politicians want to be (re-)elected, they tend to prioritize policies which offer constituents visible short-term benefits, since they can benefit politically from implementing such policies while imposing their costs on later generations who cannot sanction them for doing so (Nordhaus, 1975). But electoral incentives are far from the only institutional determinants of short-termism in democracies. Politicians also have financial incentives to be short-termist, because they are often economically dependent on organizations which want them to focus on the short term (Caney, 2016: 143). These and other institutional determinants strongly incentivize democratic political actors to neglect long-term problems—including x-risk.

## ADV---Contention 5

### Admin State---2NC

#### Admin state fails.

Beek ’22 [Michael Van; July 23; Director of Research for the Mackinac Center for Public Policy, The Hill, “Pandemic failures expose problems of the administrative state,” https://thehill.com/opinion/healthcare/3570569-pandemic-failures-expose-problems-of-the-administrative-state/]

State governments used an unprecedented level of executive power to respond to the COVID-19 pandemic. Governors and other state officials tried to control entire state economies and even our private interactions. The impact these measures had on overall public health is not yet known, but there were many blunders made along the way. These failures expose some inherent problems of the administrative state — the vast landscape of departments and agencies that make up the executive branch of government.

One must separate intent from reality to understand how the administrative state functions. These bureaucracies are meant to enforce the laws the legislature creates. They should be focused on carrying out the policy goals pursued by these elected representatives. In reality, bureaucrats get their marching orders from governors.

This explains why, when governors issued controversial orders in response to the pandemic, the administrative state supported them unequivocally. Although staffed by experts who claim that they are impartial and guided only by evidence, state bureaucrats generally just went along with whatever policies their governors chose. Given their radically different responses to COVID-19, it was as if each state bureaucracy followed its own unique version of “the science.”

This highlights an important shortcoming of the administrative state: It is highly susceptible to groupthink. Governors call the tune and bureaucrats fall in line. There are no mechanisms to ensure opposing viewpoints are heard, much less considered. This feature might be useful in the rare instances when emergency action is required, but it is disastrous as a standard operating procedure.

This groupthink helps make sense of the pandemic policies that made no sense. Remember when former Mayor Bill de Blasio reopened beaches in New York City but prohibited swimming in the waters lapping those shores? Barbecuing was also specifically outlawed. For a few weeks in Michigan, Gov. Gretchen Whitmer allowed the use of boats — except those powered by a motor. She permitted people to walk a golf course — but not while carrying and occasionally swinging golf clubs. The rest of this page could be filled with examples of nonsensical policies that were obviously pointless and performative.

It is difficult to imagine how governors and their bureaucratic advisers came up with these bizarre rules. The administrative state may operate in a bubble where blatantly bad ideas receive little or no substantial pushback. State officials seem disconnected from reality when they issue arbitrary orders that are unlikely to make a difference when applied in the real world.

Another problem with letting governors and the administrative state run the show is that they are susceptible to the pleading of special interest groups. One reason that schools remained closed for so long in many states and cities was the influence of teachers unions. They have a long-established, cozy relationship with government officials. Unions can more easily persuade public officials than could, say, a group of concerned but politically unsophisticated parents.

### Disease---2NC

#### Public health response solves.

Thorstad ’23 [David; August 12; PhD, Assistant Professor of Philosophy at Vanderbilt University; Reflective Altruism, "Exaggerating the risks (Part 10: Biorisk: More grounds for doubt)," https://reflectivealtruism.com/2023/08/12/exaggerating-the-risks-part-10-biorisk-more-grounds-for-doubt/]

2. Public health response

One of the strongest lessons from the COVID-19 pandemic is that simple non-pharmaceutical interventions such as masking, social distancing, and travel restrictions, can be highly effective if governments have the will to enforce them. For example, a study in Nature of early COVID measures in mainland China found that non-pharmaceutical interventions reduced cases by a factor of 67 by the end of February 2020. Here are their estimates for the course of the outbreak in Wuhan (b) and Hubei (f) with and without intervention.

That is not to say that non-pharmaceutical interventions are a panacea. They work less well when they are not consistently enforced. And in the case of China, they ultimately failed to counteract the effects of insufficient vaccination among the elderly. But used properly, non-pharmaceutical interventions are a remarkably effective tool in slowing the spread of disease.

Another novel feature of the COVID-19 pandemic is that, for the first time, an active pandemic was brought to an end through real-time development and deployment of vaccines. Although vaccines took over a year to bring to market, serviceable vaccines were quite quick to develop, and a society facing existential catastrophe might well bring a serviceable vaccine to market far more quickly, on a scale of months or even weeks, and advances in medical technology might bring further improvements beyond this. This would be particularly true if societies were willing to loosen restrictions on human trials and regulatory approval, which a society facing existential catastrophe might well do.

#### Human dispersal and countermeasures solve.

Thorstad ’23 [David; July 8; PhD, Assistant Professor of Philosophy at Vanderbilt University; Reflective altruism, "Exaggerating the risks (Part 9: Biorisk – Grounds for doubt)," https://reflectivealtruism.com/2023/07/08/exaggerating-the-risks-part-9-biorisk-grounds-for-doubt/)

In the meantime, I want to give some initial reasons for skepticism about existential biorisk. That is not to say that the bulk of the case against existential biorisk rests on these reasons for skepticism – it rests, instead, on the inability of effective altruists to provide plausible arguments in support of their risk estimates. But it does seem appropriate to begin by saying why many are skeptical of existential biorisk claims.

3. The difficulty of the problem

The main reason why scientists and policymakers are skeptical of existential biorisk is that it is terribly hard to engineer a pandemic that kills everyone.

First, you would need to reach everyone. The virus would have to be transmitted to the most rural and isolated corners of the earth; to antarctic research stations; to ships at sea, including nuclear submarines on uncharted, long-term and isolated paths; to doomsday preppers in their bunkers; to hermits and uncontacted tribes; to astronauts in space; to each new child born every second; to island nations; and so on. And you would need a transmission mechanism that could spread the virus this far without being detected: otherwise, those with the means would be whisked away to safety and might well survive.

Second, you would need a virus that was virtually undetectable until all, or nearly all humans had been infected. That conflicts in a stark way with the goal of producing a virus that is 100% lethal, since lethal viruses tend to leave a trace as they spread through a population.

Third, you would need a virus that is unprecedentedly infectious. The virus would need to be capable of being transmitted, without fail, to every human being on the planet, in sufficient quantities to actually make them sick. It would need to avoid respirators and other forms of protective equipment. And it would have to maintain its transmissibility throughout many generations of mutation.

Fourth, you would need a virus that is unprecedentedly lethal, killing not 90%, 99%, or 99.999% but effectively all of those infected by it, no matter their age, health, or genetic makeup. This lethality would need to be preserved even against the best medical treatments, including quite possibly vaccines or synthesized antibodies. And it would have to be maintained throughout many generations of mutation despite selective pressures towards less lethal variants.

Fifth, you would need to find a way to evade basic public health measures such as masking and social distancing. This isn’t as easy as it sounds. How do you transmit a virus to someone who doesn’t leave their house?

#### Dispersion, sanitation, and genetic diversity.

Taylor ’23 [Noah; March 22; lecturer in the M.A. program in Peace, Security, Development, and International Conflict Transformation at the University of Innsbruck; Existential Risks in Peace and Conflict Studies, “Peace, Pandemics, and Conflict,” p. 85-108]

Pandemics alone may not be an actual existential risk. A pandemic alone is unlikely to bring about the extinction of the human species. Humanity has survived many plagues in the past. There are many reasons to believe that, as a species, humanity would likely survive most global pandemics (Snyder-Beattie et al. 2019; Ord 2020). Humans are spread out across the planet, with some groups primarily isolated from the rest of the world, making it possible that some groups would remain unaffected. Given the scale of the global population, it is likely that some groups of people will have greater resistance to a particular disease than others. Modern sanitation practices and advancements in preventative and curative medicine have significantly reduced the transmission of communicable diseases in many parts of the world. Though sometimes not operated in the most efficient manner, medical systems worldwide have significant capacity to mitigate the terminal spread of a pandemic disease.

#### The risk is below one percent.

Noy ’22 [Ilan and Tomas Uher; January 15; Chair in the Economics of Disasters and Climate Change at the Victoria University of Wellington, PhD from the University of California, Santa Cruz; Ph.D. and Professor at Masaryk University; Economics of Disasters and Climate Change, “Four New Horsemen of an Apocalypse? Solar Flares, Super-volcanoes, Pandemics, and Artificial Intelligence,” vol. 6]

High-Mortality Pandemics

A naturally occurring pandemic (i.e., not from an engineered pathogen) that would threaten human extinction is a very small probability event. However, historical accounts point to several instances where disease spread played an important role in causing very significant decline of specific populations. For example, the introduction of novel diseases to the Native American population during the European colonization of the Americas had deadly consequences. It is difficult to distinguish the effects of the diseases that came with the Europeans from the war and conflict they also brought with them. Nevertheless, during the first hundred years of the colonization period, the American population may have been reduced by as much as 90% (Ord 2020).

Moreover, two major pandemic events, the Justinian Plague in the sixth century and the Black Death in the fourteenth century appear to have been severe enough to cause a significant population decline of tens of percent in the populations they affected. Both events are believed to have been caused by plague, an infectious disease caused by the bacteria Yersinia Pestis (Christakos et al. 2005; Allen 1979). While there is a certain degree of uncertainty involved in studying these events’ societal impacts, historical accounts in combination with modern scientific methods provide us with some valuable insights into the effects they may have had on the societies of the time.

With respect to the possibility of a future catastrophic global pandemic, it appears that this risk is increasing significantly along with the advances in the field of synthetic biology and the rising possibility of an accidental or intentional release of an engineered pathogen. While some of the scientific efforts in the field of synthetic biology are directed towards increasing our understanding and our ability to prevent future catastrophic epidemic threats, the risk stemming from these activities is non-trivial, and may outweigh their benefits.

The Justinian Plague

The Justinian Plague severely affected the people of Europe and East Asia, though estimates of its overall mortality vary. Focusing exclusively on the first wave of the pandemic (AD 541–544), Muehlhauser (2017) suggests the pandemic was associated with a 20% mortality in the Byzantine empire. This estimate is based on the mortality rate estimated for the empire’s capital, Constantinople, by Stathakopoulos (2007) to produce a death toll of roughly 5.6 million. For a longer time span, AD 541 to 600, which included subsequent waves of the plague, scholars estimate a higher mortality rate of 33–50% (Allen 1979; Meier 2016).

The demographic changes associated with this high mortality led to a significant disruption of economic activity in the Byzantine empire (Gârdan 2020). A decline in the labour force caused a decline in agricultural production which led to food shortages and famine (Meier 2016). Trade also collapsed. Decreased tax revenues caused by the population decline initiated a major fiscal contraction and consequently a military crisis for the empire (Sarris 2002; Meier 2016). In the longer run, however, the massive reduction of the labour force appears to have had a positive economic effect for the surviving laborers, as the increased marginal value of labour caused a rise in real wages and per capita incomes. These beneficial effects for the survivors were also observed after the Black Death (Pamuk and Shatzmiller 2014; Findlay and Lundahl 2017).

The mortality and the disruption of activity the plague caused in the Byzantine empire also led to further direct and indirect cultural and religious consequences. Meier (2016) particularly highlights the plague’s indirect effect of an increase in liturgification (a process of religious permeation and internalization throughout society as defined by Meier 2020), the rise of the Marian cult, and the sacralization of the emperor.

The direct and indirect effects of the plague also appear to have had far-reaching and long-term political repercussions. The societal disruptions caused by the plague are believed to have significantly weakened the position of the Byzantine empire and arguably led to the decline of the Sasanian empire (Sabbatani et al. 2012). Interestingly, the pandemic indirectly favoured the nomadic Arab tribes who were less vulnerable to the contagion while traveling through desert and semi-desert environments during the initial expansion of Islam (Sabbatani et al. 2012).

Of note is the absence of a scientific consensus on the severity of the Justinian Plague’s impacts. For example, Mordechai and Eisenberg (2019) and Mordechai et al. (2019) argue against the maximalist interpretation of the historical evidence described above. They suggest that the estimated mortality rate of the plague is exaggerated, and that the pandemic was not a primary cause of the transformational demographic, political and economic changes in the Mediterranean region between the sixth and eighth century. Recently, White and Mordechai (2020) highlighted the high likelihood of the plague having different impacts in the urban areas of the Mediterranean outside of Constantinople.

The Black Death

The Black Death which ravaged Europe, North Africa, and parts of Asia in the middle of the fourteenth century is considered the deadliest pandemic in human history and potentially the most severe global catastrophe to have ever struck mankind. With respect to its mortality, Ord (2020) argues that the best estimate of its global mortality rate is 5–14% of the global population, largely based on Muehlhauser (2017).

The plague created a large demographic shock in the affected regions. It reduced the European population by approximately 30–50% during the 6 years of its initial outbreak (Ord 2020). It took approximately two centuries for the population levels to recover (Livi-Bacci 2017; Jedwab et al. 2019b). As the mortality rates appear to have been the highest among the working-age population, the effects on the labour force were acute (Pamuk 2007).

The plague's mortality, morbidity and the associated societal disruption led to a major decline in economic output both in Europe (Pamuk 2007) and the Middle East (Dols 2019). In Europe, however, this decline in economic output was smaller than the decline in population; output per capita began to increase within a few years of the initial outbreak (Pamuk 2007).

The large demographic shock caused by the plague led to a shift in the relative price of labour which, similarly to the Justinian Plague, had a positive impact on wages. With a reduced labour force, real wages and per capita incomes in many European countries increased and were sustained at higher levels for several centuries (Voigtländer and Voth 2013a; Jedwab et al. 2020; Pamuk and Shatzmiller 2014). Scott and Duncan (2001) point out that real wages approximately doubled in most countries of Europe in the century following the plague.

An additional insight into the long-run relationship between the Black Death’s mortality and per capita incomes in Europe is offered by Voigtländer and Voth (2013a). Using a Malthusian model, they suggest that over time, the rise in income caused by the plague’s mortality led to an increase in urbanization and trade. Furthermore, the increased tax burden (per capita), combined with the contemporary political climate, increased the frequency of wars. Consequently, higher urbanization and trade led to an increase in disease spread which along with a more frequent war occurrence caused a long-term increase in mortality and a further positive effect on per capita incomes. In this way, the Black Death appears to have created a long-lasting environment of high-mortality and high-income specifically in Western Europe, functioning as an important contributing factor to its economic growth in the next centuries (Alfani 2020). However, while in Western Europe incomes remained elevated over the next centuries, in Southern Europe they began to decline as the Southern European population started recovering after AD 1500 (Jedwab et al. 2020).

Apart from the positive effects on wages, the increased marginal value of labour combined with other factors had further economic and social implications. A decreased relative value of land and the lack of workforce to use it effectively caused land prices and land rents to decrease (Jedwab et al. 2020; Pamuk 2007). A decreased marginal value of capital assets in general led to a lapse in the enforcement of property rights (Haddock and Kiesling 2002). Interest rates and real rates of return on assets also decreased (Pamuk 2007; Jedwab et al. 2020; Pamuk and Shatzmiller 2014; Jordà et al. 2021; Clark 2016).

Higher wages in combination with a relative abundance of land increased people’s access to land/home ownership, likely reducing social inequality (Alfani 2020). On the other end of the income distribution, decreased incomes for landowners led to an overall decrease in income inequality (Jedwab et al. 2020; Alfani and Murphy 2017).

With respect to the effects on agriculture, the structure of agricultural output moved away from cereals to other crops following the plague. Furthermore, the workforce shortages and the incentives to increase the labour supply are believed to have caused a shift from male-labour intensive arable farming towards pastoral farming, consequently raising the demand for female labour (Voigtländer and Voth 2013b). However, while the Black Death appears to have caused certain structural agricultural changes, Clark (2016) finds no effect of the plague on agricultural productivity in the long run.

In terms of other social consequences, the evidence suggests that the plague's mortality reduced labour coercion, particularly throughout Western Europe (Jedwab et al. 2020; Haddock and Kiesling 2002; Gingerich and Vogler 2021). The increased bargaining power of labour caused by the plague’s demographic shock contributed to and accelerated the decline in serfdom and development of a free labour regime. Gingerich and Voler (2021) further argue that these effects may have had long-lasting political implications and that a decline of repressive labour practices (such as serfdom) permitted the development of more inclusive political institutions. They find that the regions with the highest mortality were more likely to develop participatory political institutions and more equitable land ownership systems. They find that centuries later, In Germany, the populations in these high-mortality regions were less likely to vote for Hitler’s National Socialist (Nazi) Party in the 1930 and 1932 elections in Germany.

However, the positive effects on the emergence of freer labour did not take place in Eastern Europe, where serfdom was sustained and even intensified. Robinson and Torvik (2011) attempt to explain this asymmetry arguing that these differential outcomes may have been caused by the varying power and quality of institutions. The authors suggest that opportunities generated by the increased bargaining power of labour, in an environment of weak institutions, were less likely to lead to a positive effect than in the case of regions with stronger institutions (with more robust rule-of-law or less corrupt or predatory practices).

Apart from causing a negative demographic shock to the affected populations, the Black Death appears to have caused further indirect demographic changes, particularly in Western Europe. The increased employment opportunities for females caused by worker shortages and a higher female labour demand led to a decline in fertility rates and an increased age of marriage (Voigtländer and Voth 2013b). This demographic transition to a population characterized by lower birth rates likely helped to preserve the high levels of per capita incomes and contributed to further economic development of certain parts of Europe, enabling it to escape the “Malthusian trap” in the following centuries (Pamuk 2007). Siuda and Sunde (2021) confirm the pandemic’s effect on the accelerated demographic transition empirically, as they find that greater pandemic mortality was associated with an earlier onset of the demographic transition across the various regions of Germany.

Unfortunately, the Black Death also led to an increase in the persecution of Jews (Finley and Koyama 2018; Jedwab et al. 2019a). Interestingly, Jedwab et al. (2019a) were able to estimate that in the case of regions with the highest mortality rates, the probability of persecution decreased if the Jewish minority was believed to benefit the local economy.

It is important to highlight that the long-term repercussions of the Black Death were highly asymmetrical. While in Western Europe the pandemic appears to have led to some long-term dynamic shifts associated with increased wages, decreased inequality and a decrease in labour coercion, this was not the case for other regions. A decrease in wages was observed for example in Spain (Alfani 2020) and Egypt. In Spain, the plague's demographic impact on an already scarce population caused a long-lasting negative disruption to the local trade-oriented economy. The workforce disruption in Egypt led to a collapse of the labour-intensive irrigation system for growing crops in the Nile valley, with consequent disastrous effects on the rural economy (Alfani 2020). Borsch (2005) argues that the economic decline in Egypt caused by the Black Death “put an end to the power in the heartland of the Arab world” (p. 114) and to the impressive scientific and technological developments that came out of this region.

A consensus for an explanation of the Black Death’s varied impacts across regions, and their determinants, does not appear to exist. However, several researchers attempt to provide partial insights. For example, Alfani (2020) considers the differential outcomes to be broadly dependent upon the initial conditions in each region. More specifically, both Robinson and Torvik (2011) and Pamuk (2007) propose that the asymmetry of impacts can largely be explained by the differences in the institutional environments of the affected societies.

It is argued that the Black Death defined the threshold between the medieval and the modern ages, similarly to the way the Justinian Plague did for antiquity and the Middle Ages (Horden 2021). Furthermore, the differential long-term outcomes of the Black Death likely provided a significant contribution to the so-called “Great Divergence” between Europe and the rest of the world and the “Little Divergence” between North-western and Southern and Eastern Europe (Jedwab et al. 2020; Pamuk 2007).

From this perspective, it would seem rational to conclude that apart from causing substantial and long-term demographic, economic, political, and cultural changes, both the Justinian Plague and the Black Death likely significantly altered the course of human history.

Considering the above, it is not unreasonable to expect that a pandemic of a similar magnitude to these past catastrophes would do the same in the present day. However, what societal impacts a pandemic of similar or higher mortality would inflict in the twenty-first century has not really been the subject of any study, as far as we were able to identify. A possibility exists, given the newly developed capacity of humanity to create new pathogens, that the outcomes of a future catastrophic pandemic will be even more adverse than those of the Justinian Plague and the Black Death.

Probability

In terms of the probability of naturally occurring pandemics, an informal survey of participants of the Global Catastrophic Risk Conference in Oxford in 2008 shows that the median estimate for a probability of a natural pandemic killing more than 1 billion people before the year 2100 was surveyed to be 5%, and the probability of such pandemic to cause human extinction was 0.05%. Ord (2020) uses a slightly broader definition of existential risk, which apart from human extinction also includes a permanent reduction of human potential. He estimates the probability of an existential risk stemming from a natural pandemic in the next 100 years to be 0.01%.

#### History denies AND interconnectedness reduces the risk.

Halstead ’20 [John; updated December 2020; Applied Research at Founders Pledge, Doctorate in Political Philosophy from the University of Oxford; Founders Pledge, “Safeguarding the Future: Cause Area Report,” p. 1-67]

The risk of natural pandemics

For most of human history, the greatest risk of mass fatalities has stemmed from natural pandemics. In the 1300s, the Black Death plague outbreak killed 30–50% of the European population.86 The 1918 ‘Spanish flu’ killed 50 million to 100 million people,87 more people than died in World War One. These events are outliers, but history is punctuated by episodes of mass death from disease outbreaks.

However, there are some reasons to think that naturally occurring pathogens are unlikely to cause human extinction. Firstly, Homo sapiens have been around for 200,000 years and the Homo genus for around six million years without being exterminated by an infectious disease, which is evidence that the base rate of extinction-risk natural pathogens is low.88 Indeed, past disease outbreaks have not come close to rendering humans extinct. Although bodies were piled high in the streets across Europe during the Black Death,89 human extinction was never a serious possibility, and some economists even argue that it was a boon for the European economy.90

Secondly, infectious disease has only contributed to the extinction of a small minority of animal species.91 The only confirmed case of a mammalian species extinction being caused by an infectious disease is a type of rat native only to Christmas Island.92 For humans, who are geographically dispersed, genetically diverse and capable of a rational response to problems, the risk therefore appears small.

Having said that, the context may be importantly different for modern day humans, so it is unclear whether the risk is increasing or decreasing. The risk may be increasing due to : (1) global travel, which allows more rapid pathogen spread; (2) increased population density; and (3) more close contact with animal populations due to both densely packed factory-farms and expansion into uninhabited areas lead to higher rates of emergence.93 On the other hand, interconnectedness could also increase immunity by increasing exposure to lower virulence strains between subpopulations.94 Moreover, advancements in medicine and sanitation limit the potential damage an outbreak might do. It is overall unclear how high the level of natural risk is today.95 In our view the global catastrophic risk this century from natural pathogens is likely much lower than that of engineered pathogens, but the risk of natural pathogens may well have increased over the last 200 years. Our two recommended biosecurity charities each work to reduce the risk of both natural and engineered pathogens, so this debate does not appear to have important practical implications for the purposes of this report.