### Notes

Civil war defense not about forever

Soft power low now (Greenland)

## Offcase

**1NC – CP - Distinguish**

#### The United States federal government should hold that people are entitled to accommodations when federal law substantially burdens exercise of their sincere religious beliefs unless the federal law is the least restrictive means of furthering a compelling government interest, overturning NLRB v. Catholic Bishop of Chicago and limiting the Noerr doctrine via First Amendment rights to increase scrutiny of corrupt and deceptive political practices, then statutorily allow religious exemptions from mandatory collective bargaining.

**Solves their precedent advantage without linking to topic DAs.**

Daniel B. **Rice &** Jack **Boeglin 19**, Rice is Associate, Institute for Constitutional Advocacy and Protection, Georgetown University Law Center; Boeglin is Associate, Covington & Burling LLP, London, UK, “Confining Cases to their Facts,” 105 Va. L. Rev. 865, June 2019, WestLaw

Perhaps this hypothetical is not as far-fetched as it seems. Through the little-known practice of "confining a case to its facts," courts can achieve the near-equivalent of overruling with only a fraction of the trouble. Under our definition, when a court engages in confining, it repudiates the legal principle underlying a case, replacing it with a new, "correct" principle. 5 In this respect, confining is very much like overruling. But unlike overruling, confining preserves the precedential force of a repudiated principle for future cases presenting the same facts as the one being confined. 6 Confining thus splits a doctrinal area in two. When a confined case's facts recur, the case will continue to be treated as good law. In all other factual scenarios, however, the confined case will be regarded as having been overruled. 7

[\*868] How, one might ask, does creating this doctrinal fissure reduce the costs of overruling? Remember first that courts' desire not to disturb reliance interests ordinarily functions as a brake on legal correction. 8 Confining eases off this brake by enabling certain reasonable expectations - those formed in reliance on the particular facts of the confined case - to remain unaffected by a principle's repudiation. Under certain conditions, then, confining can permit a court to move the law in its preferred direction and avoid overly disrupting reliance on an earlier decision.

Of course, respect for reliance interests is not the only reason courts maintain fealty to precedent. The pace of legal change is slowed, too, by the formal constraints courts have imposed on themselves when deciding whether to overrule a case. Confining has found use as an effective mechanism for casting off these constraints. Consider the Supreme Court's avowed commitment to overruling a case only when it can articulate a "special justification" for doing so - one that transcends mere disagreement with the case's reasoning. This requirement has not been understood to apply to confining, 9 even though confining eviscerates everything a case stands for except its precise result. 10 Similarly, although each federal [\*869] court of appeals forbids three-judge panels from overruling circuit precedent, panels have frequently gutted earlier decisions through the use of confining. 11 By labeling these deviations from precedent "confining," in short, courts have successfully skirted the formal requirements of stare decisis.

Confining likewise enables federal courts to sidestep the Supreme Court's prohibition on "prospective overruling" - i.e., continuing to treat a case as good law only with respect to conduct predating its overruling. 12 During the Warren Court era, prospective overruling was often called upon to soften the blow to reliance interests occasioned by the Court's doctrinal course-corrections. 13 The Court's retroactivity doctrine has since made clear, however, that federal courts may not apply new principles selectively in order to accommodate reasonable expectations. 14 But this is precisely what happens with confining. 15 This discrepancy - oddly - appears to have gone unnoted by jurists and scholars alike.

Finally, courts may have engaged in confining precisely because it is so poorly understood. Judge for yourself the more eye-grabbing headline: "Supreme Court Overrules Smith v. Jones" or "Supreme Court Confines Smith v. Jones to Its Facts." Confining's relative lack of name recognition has allowed courts to quietly sweep aside disfavored precedents. A [\*870] confining judge can say "with a straight face, "I didn't vote to overrule it. I simply limited the earlier decision to its facts.'" 16

Confining can thus embolden courts to depart from precedent even when overruling might come at too dear a price. But the very features of confining that make it so appealing to judges also pose considerable - and strangely underexplored - threats to a judicial system predicated on principled adjudication. By providing a method for courts to carve out exceptions to generally applicable doctrinal rules, confining encourages judges to decide cases based purely on pragmatic concerns, rather than on principle. By creating an easy workaround to the formal obligations that attend overruling precedent, confining dangerously loosens the constraints of stare decisis. And by allowing courts to undermine precedent in a low-visibility manner, confining impairs the public's ability to oversee the work of the judiciary.

Confining also runs headlong into fundamental concerns about the nature and scope of judicial authority. 17 The practice of confining entails a marked departure from the ordinary judicial role in two key respects. First, it causes courts to decide future cases in a concededly unprincipled manner. Once a case has been confined to its facts, the operative question becomes whether a new case is factually distinguishable from it in any respect - even if the cases cannot be distinguished in any principled manner. And second, confining requires courts to continue applying principles that they have already held to be invalid. In this way, confining causes incompatible legal principles to coexist with one another, with each regarded as "good law" in some sense. No other method of treating precedent calls upon courts to engage in purely fact-bound adjudication, or to construct a jurisprudence at war with itself. 18

### 1NC – DA – Politics

#### Full defense appropriations are on track, but every minute counts---failing to resolve differences forces a CR.

Courtney Albon 1/15, Albon is space and emerging technology reporter at Air & Space Forces Magazine covering military space and defense budget since 2012, "What to Watch as Lawmakers Race to Pass 2026 Defense Budget by Jan. 30," Air & Space Forces Magazine, 01/15/2026, https://www.airandspaceforces.com/defense-budget-bill-2026-what-to-watch/

This year's total defense spending is on track to reach $1 trillion for the first time ever. U.S. Navy Photo by Musician 1st Class Jesse Saldana

House and Senate lawmakers say they’re hopeful Congress will pass a defense appropriations bill in the coming weeks to avoid a repeat of last fall’s government shutdown, with only having a handful of working days remaining before the Jan. 30 deadline.

Yet legislators still have to release a compromise version of defense spending legislation, which will have to sort through major differences between the House and Senate versions advanced last summer.

Leaders in the House and the Senate expect to release that compromise bill this weekend as part of a larger spending package, according to multiple media reports. House Appropriations Committee Chairman Tom Cole (R-Okla.) told reporters the defense bill would be part of a package that includes funding for the Departments of Transportation, Labor, Health and Human Services, Education, and possibly Homeland Security. Senate Appropriations Committee Chair Susan Collins (R-Maine) said the deal should be released the night of Jan. 18.

“The negotiations are still going on, but we’re down to a limited number of issues,” she told reporters.

A spokesperson for House Appropriations defense subcommittee Chair Ken Calvert (R-Calif.) told Air & Space Forces Magazine the chairman is hopeful the defense spending package will clear both chambers by the end of this month.

Congress set the Jan. 30 deadline in mid-November, after a standoff over healthcare subsidies led to a 43-day government shutdown. Members of the military and some civilian employees deemed “essential” worked despite the funding lapse, but only the troops received paychecks during that period. The Pentagon furloughed 334,000 employees.

While lawmakers have about two weeks to complete the federal spending bills to avoid another shutdown, the Senate is on recess next week, and the House is out of session the following week. Lawmakers could pass another continuing resolution in a crunch, but Cole said that discussion isn’t yet on the table.

#### Floor revolts on labor consume legislative oxygen, derailing funding negotiations.

Calen Razor 1/14, Razor is Congressional reporter at POLITICO covering appropriations and budget issues, "Capitol agenda: More floor meltdowns threaten funding bills," POLITICO, 01/14/2026, https://www.politico.com/live-updates/2026/01/14/congress/gop-floor-meltdowns-appropriations-funding-bills-00727200

Speaker Mike Johnson’s essentially unworkable margin doesn’t bode well for Wednesday’s floor vote to advance a two-bill funding package.

House GOP leaders are losing control of the floor to non-stop intraparty revolts ahead of the rapidly approaching deadline to avoid another shutdown.

Speaker Mike Johnson needs his ranks united in order to keep federal operations afloat after Jan. 30. But the stark reality is settling in that Republicans are stuck with an essentially unworkable margin that could derail not only their government funding plans but their entire legislative agenda.

— Hard math warning signs: “We’re totally in control of the House,” Johnson insisted Tuesday. Yet six Republican defectors sunk a bill earlier that afternoon designed to incentivize employers to offer more training and education programs — at the expense of having to offer some overtime pay, Lawrence Ukenye reports.

The measure’s collapse led leadership to scrap scheduled votes on two other labor-related bills Tuesday evening. Leaders are now expected to cancel consideration of yet another measure slated for Thursday — related to franchise stores’ liability for employee working conditions — that Republicans privately say will also fail.

It comes as Republicans have been dealing with a series of absences tightening their already threadbare majority. Rep. Jim Baird (R-Ind.) has returned after recovering from a recent car crash, but Reps. Derrick Van Orden (R-Wis.) and Greg Murphy (R-N.C.) will not be in Washington for at least the rest of the week, adding up to a harrowing single-vote margin for the speaker. They’re also running a deficit following the sudden death last week of Rep. Doug LaMalfa (R-Calif.).

None of this bodes well for Wednesday’s floor vote to advance the State-Foreign Operations and Financial Services funding package, as rule votes are typically party-line affairs.

— The Homeland fight: Republican leaders are on a separate uphill climb to reach a deal with Democrats on the fiscal 2026 spending bill for DHS, which stalled after an ICE agent shot and killed a U.S. citizen in Minneapolis last week.

Top Democrats are feverishly working to put new guardrails on immigration enforcement agencies and curb President Donald Trump’s immigration agenda. They’re facing the reality that the only way to do so is by working through the process to fund DHS.

They’re hoping that Republicans who also have hesitations about the DHS bill will team up with them on provisions to enforce new rules for ICE agents, like requiring them to use body cameras and banning masks.

It’s unclear, however, what concessions GOP leaders are willing to make, as there are unsavory results for each party if lawmakers can’t strike a deal. Nobody wants an extended stopgap funding measure that maintains the DHS status quo without new funding levels and policy changes.

#### Rapid follow-through on appropriations implements the NDAA’s PAC-3 missile authorization---CR would leave production frozen. Key to deter China.

Anne Lord 12/24, Lord is Director of Government Affairs and Defense Policy for Vandenberg Coalition, former staffer for Senator Ben Sasse with master's in strategic studies from University of St. Andrews, "Win-Wins: Multiyear Procurement in the NDAA," RealClearDefense, 12/24/2025, https://www.realcleardefense.com/articles/2025/12/24/win-wins\_multiyear\_procurement\_in\_the\_ndaa\_1155242.html

In keeping with tradition of 65 consecutive years, Congress passed the National Defense Authorization Act (NDAA) for fiscal year 2026 this week. Though Congress missing the unofficial October 1st deadline and holding on the Defense Appropriations bill which actually provides funding for fiscal year 2026 does not inspire confidence, the NDAA’s unfailing passage each year demonstrates that providing for the common defense remains a priority for the legislative branch.

The bill includes some hard won battles like the inclusion of the BIOSECURE act and outbound investment restrictions which are, rightfully, garnering much attention from their champions. While these provisions certainly deserve victory laps, there is one which has received less fanfare but is equally deserving. The multiyear procurement provision of Section 804 creates a new authority to enter into multiyear contracts for critical munitions and other high-demand systems which will be transformative for our ability to get the warfighter what they need and when they need it.

Experts have routinely warned that in the event of a conflict, such as one with China over Taiwan, our stockpile of long-range munitions dries up alarmingly fast. This is not an ideal place to be in the event of a sustained protracted war and certainly will not deter our enemies and prevent a future conflict. Especially alarming given these shortages should be China’s increasing missile production. Moving with alacrity to ensure we have an adequate stockpile of long-range munitions by scaling up production is essential.

Despite simmer tensions across the globe, the United States government has been a less-than-ideal partner to our friends in the defense industrial base, making it difficult for them to fill our supply chests. The consequences of Congress’s inability to fund the government on schedule and an overreliance on continuing resolutions as funding stop gaps has been detrimental to our ability to arm ourselves. Without a reliable source of funding and a clear and stable demand signal, it’s not surprising our defense industrial base is both an unwilling partner and unable to produce to fill our needs. Though continuing resolutions ensure funding remains available, they freeze funding at levels from the year prior. This does not account for inflation and leaves a gap in funding that once again results industry looking warily at the government’s ability to be a good partner.

The multiyear procurement model avoids both of these challenges by allowing the government to use a single contract spanning for two to five years’ worth of procurement without having to exercise a contract option each year. This mitigates the financial risks for defense companies, making them more likely to be able to produce what we need. Multiyear procurement contracts have also been used for other large-scale procurements like ships and planes. Now, the FY26 NDAA includes multiyear procurement for the standard missile-3 (SM-3), Terminal High Altitude Area Defense (THAAD), Tomahawk Cruise Missile, the Long-Range Anti-Ship Missile (LSRASM), Patriot Advanced Capability (PAC-3), and other critical munitions.

Multiyear procurement is mutually beneficial to defense companies and the Department of War. Defense companies become less risk averse meaning they are better able to respond to the demand from the Department of War. As our defense industrial base adequately responds, the Department of War is better ability to navigate planning efforts. As we restock our munitions shelves thanks to this new provision, we become better able to a deter a potential conflict.

With the Administration’s renewed focus on Acquisition reform and Congress’s steps in this year’s NDAA to codify these reforms, we are taking serious steps in the right direction. Our challenge must now be to focus on implementation and ensuring industry is able to meet the demand. As we send a clear demand signal to industry, we are also signaling to our adversaries that we are able to face their challenge.

#### Goes nuclear.

Eyck Freymann & Harry Halem 26, Freymann is Scholar focusing on China and US foreign policy; Halem is Defense analyst specializing in deterrence and military strategy, "The Arsenal of Democracy: Keeping China Deterred in an Age of Hard Choices," Texas National Security Review, Winter 2026, https://tnsr.org/2025/12/the-arsenal-of-democracy-keeping-china-deterred-in-an-age-of-hard-choices/

The US faces a new era of tripolar nuclear competition, for which its doctrine, planning, and strategy are not adjusted. China is engaged in a stunning nuclear breakout. Its stockpile has surged from under 100 warheads a decade ago to over 600 today. The Pentagon projects that China will surpass 1,000 warheads by 2030 and could reach 1,500 by 2035. China is also developing a credible second-strike capability, along with intermediate-range delivery systems and low-yield warheads—capabilities it has never fielded at scale. Russia still poses a nuclear threat as well. China and especially Russia field nonstrategic nuclear forces that raise different challenges.

The shift to tripolar competition fundamentally alters the strategic stability calculations that governed the Cold War. Bipolar competition between the US and Soviet Union created relatively predictable deterrence dynamics and enabled arms control. Adding a third major nuclear power with an unclear doctrine complicates this dynamic. Each side must now consider not only bilateral exchanges but also how nuclear use might affect relationships with the third party. The stress of nuclear tripolarity, moreover, is more acute for the United States than for Russia or China. The Moscow-Beijing relationship may break down, but for now, China and Russia need only focus on modifying American deterrence calculations, not each other’s. Nor do China and Russia need to act in a coordinated fashion to place extreme stress on core US deterrence priorities.

“The shift to tripolar competition fundamentally alters the strategic stability calculations that governed the Cold War.”

China’s nuclear modernization extends beyond warhead numbers to delivery systems and doctrine. The PLA Rocket Force has deployed new mobile intercontinental ballistic missiles, nuclear-powered ballistic missile submarines, and dual-capable intermediate-range systems that place US allies and forward-deployed forces at risk. China’s nuclear doctrine appears to be evolving from a purely retaliatory posture toward options for limited nuclear use, potentially including theater nuclear weapons to deter US intervention in a Taiwan conflict.

Nuclear deterrence is not just a question of arsenal size. Still, the United States must continue its ongoing nuclear modernization, which consists mainly of replacing aging command-and-control and delivery systems. If China’s nuclear breakout continues, it may become necessary for the US to deploy additional nuclear forces in the region, including the Sea-Launched Nuclear-Armed Cruise Missile (SLCM-N). SLCM-N would provide theater commanders with flexible response options and complicate PLA targeting by distributing nuclear capabilities across multiple platforms. Additionally, as Vipin Narang has argued, deploying more lower-yield weapons in the Indo-Pacific would free up Trident-armed submarines to focus on strategic deterrence missions.

Closer nuclear planning dialogues with South Korea and Japan will also be necessary to ensure alliance cohesion. Washington may eventually need to consider NATO-style nuclear sharing, which involves allies more directly in nuclear operations without proliferating the technology itself. The credibility of US extended deterrence depends on allies’ confidence that Washington would risk nuclear escalation to defend them. As China’s capabilities grow, maintaining this confidence will require new and creative approaches.

The strategic balance matters not because a US-China war would necessarily involve nuclear use, but because it shapes crisis dynamics. If China initiates a war, it is plausible it would contemplate nuclear use. To control escalation, America needs to match China in strategic flexibility. This strategy requires nuclear forces capable of limited, discriminate use—not just massive retaliation—and command-and-control systems that can operate in degraded environments.

The strategic balance matters for crisis dynamics. If China chooses to initiate a war, it is not unthinkable that it would contemplate nuclear use as well. If Washington wants to control escalation, it will need to match China in strategic flexibility.

Conclusion: The Arsenal of Democracy Redux

Maintaining a force that can defeat China in a kinetic war helps to deter not only war itself, but a broad range of Chinese armed coercion. As this article has shown, US forces face challenges in preparing for such a war—but so do China’s. The PLA has never fought a major naval war. Its officer corps is largely untested and rarely exercises in realistic conditions. Beijing knows the United States enjoys key qualitative advantages, particularly in C4ISR. Before risking a devastating defeat, Beijing will want substantial confidence in its all-around superiority. Strengthening deterrence, therefore, means increasing China’s uncertainty while preventing it from miscalculating that any single advantage could prove decisive. This calculus requires the US to look at deterrence as a system, by identifying the US military’s greatest systemic vulnerabilities, along with areas in which it can gain fundamental long-term advantages.

The fastest path to US defeat is the collapse of its scouting and logistics networks. Munitions, drones, and submarines are the most time-sensitive industrial investments, while satellite and drone ISR systems must become more networked and redundant. These are largely industrial challenges. Procurement reform should focus on evolving the force, not searching for disruptive “killer apps.” The existing deterrence system must adapt faster, and the engine of that adaptation must be an allied defense industrial base that can produce what an evolving force needs.

Ultimately, the hardest choices about force design will be made by Congress, including by members outside the Armed Services committees. These members need to understand the deterrence system, the costs of inaction, and the trade-offs involved. Congress doesn’t want a wish list; it wants to understand the mission and the required trade-offs. It is the Pentagon’s job to explain them.

Deterring China to secure the Western Hemisphere does not require a politically impossible doubling of the defense budget. The US needs to spend more, but more importantly, it must make hard choices to prioritize key programs and spend smarter. Budgets must align resources with the primary challenge: an air-naval conflict in the Pacific. National security professionals should spend less time admiring specific capabilities and more time debating and fixing the weakest links in the deterrence system. Demanding that allies spend more on defense makes little sense without coordinating those investments to meet shared production needs. Deterrence is a system of strategic, industrial, and institutional choices. It is not too late to shore up the system, but the clock is ticking, and America’s margin for error is shrinking. A moment like this requires the broadest possible consensus on what needs to be done and why.

The United States should take inspiration from 1940, when Franklin D. Roosevelt realized a crash effort was needed to arm the world’s democracies against the Axis powers. In his famous “arsenal of democracy” fireside chat, FDR told Americans: “We must discard the notion of ‘business as usual.’” The tragic irony is that Roosevelt was right—but he moved too late. Deterrence failed in 1941. Today, the world’s democracies must not repeat that mistake.

**1NC – CP - Coercion**

State Coercion CP

**The fifty states and relevant subnational United States actors should informally communicate to regulated parties that their business activities will be thwarted by relevant laws of general applicability unless those parties negotiate private agreements with employees of religious institutions replicating the requirements of collective bargaining rights without religious exemptions. In the event that preemption is relaxed, these actors should impose these requirements formally.**

**The CP conditions favorable non-labor state policy on employee consent to binding contractual agreements that replicate the plan. That solves the case, is federally enforcable, and avoids preemption.**

Benjamin I. **Sachs 11**, Assistant Professor of Law, Harvard Law School, "Despite Preemption: Making Labor Law in Cities and States," Harvard Law Review, 03/21/2011, https://harvardlawreview.org/print/vol-124/despite-preemption-making-labor-law-in-cities-and-states/

II. A LABOR LAW NUTSHELL: MOTIVES FOR REFORM, PREEMPTION, AND PRIVATE ORDERING

A. The Call for State and Local Innovation

In order to ground the discussion that follows, it is useful to understand what motivates certain states and cities — and unions in those states and cities — to seek a redesign of the NLRA rules of organizing and bargaining. For more than three decades now, the labor movement and leading labor law scholars have been withering in their criticism of the NLRA. Writing in 1983, Professor Paul Weiler commented that “[c]ontemporary American labor law more and more resembles an elegant tombstone for a dying institution.”20 In 1984, the House Subcommittee on Labor-Management Relations released a report on “The Failure of Labor Law,” observing that the NLRA “has ceased to accomplish its purpose.”21 And in 1996, Professor James Brudney argued that “[s]ixty years after the National Labor Relations Act . . . was passed, collective action appears moribund.”22

The primary substantive critique of the NLRA is that the federal rules of organizing and bargaining render employees’ statutory rights to form and join labor organizations, and to bargain collectively with management, ineffectual.23 Scholars have repeatedly noted the central problems. When it comes to the rules of organizing, the regime provides employers with too much latitude to interfere with employees’ efforts at self-organization, while offering unions too few rights to communicate with employees about the merits of unionization.24 The NLRB’s election machinery is dramatically too slow, enabling employers to defeat organizing drives through delay and attrition.25 The NLRB’s remedial regime is also too weak to protect employees against employer retaliation.26 And, with respect to the statute’s goal of facilitating collective bargaining, the regime’s “good faith” bargain- ing obligation is rendered meaningless by the Board’s inability to impose contract terms as a remedy for a party’s failure to negotiate in good faith.27

These pathologies in the NLRA have given rise to repeated calls for reform, both among scholars and in Washington, but none of the proposed reforms have succeeded.28 In 1977, for example, Congress took up legislation that would have, first, minimized the opportunity for employer interference in organizing drives by mandating a shortened schedule for union elections,29 and, second, rebalanced communicational opportunities by providing union organizers “equal access” to the workplace.30 The bill also would have strengthened the collective bargaining obligation by allowing the Board to impose make-whole remedies when employers violated their duty to bargain in good faith.31 Although the House passed its bill by a vote of 257 to 163, the Senate version was blocked by a five-week filibuster and died after six failed cloture votes.32 The most recent federal labor reform bill responded to the same concerns about employer interference in organizing drives and the weakness of the statutory bargaining obligation. Thus, to minimize employer involvement in union organizing efforts, the Employee Free Choice Act33 would have required that the Board certify unions based on a card check, thereby allowing unions to avoid the NLRB’s notoriously slow election process.34 To ensure compliance with the bargaining obligation, the bill also dictated that if the parties are unable to reach agreement on a first contract within four months, an arbitrator would determine the appropriate content of the contract.35 Although the House of Representatives passed the Employee Free Choice Act in 2007, the bill was blocked by a threatened senatorial filibuster.36

Accordingly, it is the conjunction of these pathologies in the federal law and the inability to reform the statute in Congress that explains the motivation for state and local reforms. As Professor Michael Gottesman explains:

The impetus for [a] reexamination of preemption law will be evident to those familiar with the present state of collective bargaining under the NLRA. . . . [T]he NLRA is not working effectively and the institution of collective bargaining is in decline. The defects in the law have been identified with some precision, but Congress has shown itself too politically paralyzed to make repairs.37

B. Prohibiting State and Local Reform: A “Rule of Total Federal Preemption”

Attempts at state and local reform, however, must contend with the doctrine of federal labor preemption. Although there is no express preemption clause in the National Labor Relations Act, the NLRA’s preemption regime is unquestionably and remarkably broad.38 Prompted in part by a series of articles by Professor Archibald Cox in the Harvard Law Review, 39 the Supreme Court has built a preemption doctrine meant to vest exclusive regulatory authority in the federal government and to preclude state and local governments from varying the rules of organizing and bargaining.40 In 1950, Cox first argued for what he called “an integrated public labor policy”41 derived entirely from the National Labor Relations Act, and he warned that “enforcement of . . . state regulation will thwart the development of federal policy.”42 Four years later he argued for a “rule of total federal preemption,”43 in order to ensure “uniformity.”44

Shortly after Cox began writing, the Court set out what would become the conceptual framework for its future labor preemption cases. In 1953, the Court held that:

Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. . . . Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.45

Then, in its sweeping 1959 decision San Diego Building Trades Council v. Garmon, 46 the Court ruled that states may not regulate activity that is even “arguably” protected or prohibited by the federal law.47 As such, employee activity protected (or arguably protected) by section 7 of the NLRA — including, for example, employees’ rights to form and join labor unions or to bargain collectively with their employers — is off limits to state or local regulation. So, too, is employer speech about unionization, which enjoys protection under section 8(c) of the statute.48 Similarly, because collective bargaining is both protected by section 7 and policed by section 8’s unfair labor practice clauses, bargaining rules and obligations are also beyond the reach of state and local law.49

Although Garmon preemption is extremely broad,50 in its 1976 decision Lodge 76, International Ass’n of Machinists v. Wisconsin Employment Relations Committee, 51 the Supreme Court extended the reach of federal labor preemption even further. There, the Court took up the permissibility of state regulation of union activity that, while part of the collective bargaining process, was neither protected nor prohibited by the federal law.52 The Court reasoned that Congress’s decision to leave certain activity unregulated by the NLRA implied a congressional intent that these forms of union and employer conduct be left entirely unregulated.53 Thus, according to Machinists, the absence of federal regulation implied that “Congress intended that the conduct involved be . . . left ‘to be controlled by the free play of economic forces’”54 and “not to be regulable by States any more than by the NLRB.”55

Garmon and Machinists form the two primary strands of labor preemption doctrine, but two other cases extend the doctrine further still. The first is Golden State Transit Corp. v. City of Los Angeles, 56 which involved a strike by Teamsters Union employees at a Los Angeles taxi cab company. At the time of the strike, Golden State Transit needed to renew its operating license in order to continue providing taxi service. The renewal required approval by the Los Angeles Board of Transportation Commissioners and, ultimately, by the Los Angeles City Council.57 Although Golden State was “in compliance with all terms and conditions of their franchise[],”58 the city council rejected the renewal request.59 The Supreme Court held that the council’s de- cision was designed to pressure Golden State to settle the Teamsters’ strike and was, for this reason, preempted.60 According to the Court, the Teamsters’ right to strike, and Golden State’s attempt to withstand the strike, were the kinds of economic weapons that Congress had intended to leave free of regulation and up to the “free play of economic forces.”61 By refusing to renew Golden State’s franchise until the company settled the strike, Los Angeles “imposed a positive durational limit on the exercise of economic self-help”62 and thereby impermissibly intruded into a collective bargaining process that Congress intended to be free of such regulatory intervention.63

The second case is the Court’s most recent labor preemption decision, Chamber of Commerce v. Brown, 64 which struck down a California statute that prohibited employers from using state funds to “assist, promote, or deter union organizing.”65 Noting that “California plainly could not directly regulate noncoercive speech about unionization by means of an express prohibition,” the Court held that it was “equally clear that California may not indirectly regulate such conduct by imposing spending restrictions on the use of state funds.”66 That is, because employers’ right to engage in noncoercive speech about unionization is protected by section 8(c) of the federal law, states may neither directly restrict employer speech rights nor explicitly predicate the receipt of state benefits on an employer’s agreement to refrain from exercising these rights.67

While these cases establish a broad preemption regime, the Court has created one relatively significant exception to the rule: when a state or local government acts as a market participant, it enjoys the same freedom to structure its labor policies as a private party and is immune from preemption scrutiny. As the Court put it in its 1985 Boston Harbor68 decision: “When a State owns and manages property, for example, it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption by the NLRA, because pre-emption doctrines apply only to state regulation.”69

gulation.”69 Despite the potential breadth of the proprietary exception,70 the Supreme Court and the courts of appeals have established its limits. To start, the basic fact that a state or city acts pursuant to its spending power, rather than through regulation, does not exempt the action from preemption review. Indeed, the Court has dismissed as a “distinction without a difference” the fact that a state acts by spending rather than regulating.71 Instead, the applicability of the market participant exception requires that the state or locality demonstrate that its intervention is “specifically tailored to one particular job,” and that the intervention is directly aimed at advancing the government’s proprietary interest by, for example, “ensur[ing] an efficient project that would be completed as quickly and effectively as possible at the lowest cost.”72

In sum, after surveying the labor preemption field, Professor Cynthia Estlund concluded that the Supreme Court’s preemption cases “virtually banish states and localities from the field of labor relations,”73 and that “[m]odern labor law preemption essentially ousts states and municipalities from tinkering with the machinery of union organizing, collective bargaining, and labor-management conflict.”74 Most recently, Professor Henry Drummonds summarized the current view by writing: “[The] broad federal labor relations preemption doctrines ensnarl all states in a stifling and exclusive . . . federal labor law regime.”75

C. Facilitating Private Reordering

Although the NLRA prohibits state and local governments from intervening in union organizing and bargaining, the law affirmatively facilitates the private reordering of organizing and bargaining rules by unions and employers. As construed by the NLRB, “[n]ational labor policy favors the honoring of voluntary agreements reached between employers and labor organizations,”76 and accordingly the Board “will enforce such agreements, including agreements that explicitly address matters involving union representation.”77 Thus, so long as their agreements do not waive or violate employee rights, unions and employers are free to depart from the NLRA’s rules and to adopt alternative procedures regarding union organizing, recognition, and bargaining procedures.78 For example, although employers are not statutorily obligated to recognize a union on the basis of signed authorization cards,79 an employer may contractually agree with a union to do so.80 Similarly, although the statutory regime affords employers significant opportunities to communicate anti-union messages to employees, employers may agree to waive or limit their own right to speak about unionization during organizing drives.81 Employers also may — and frequently do — agree to allow union organizers access to the workplace, although employers almost never have a statutory obligation to provide for such access rights;82 to provide unions with lists of employees’ names and addresses prior to any legal obligation to do so;83 and to submit first contract disputes to final and binding arbitration, although the NLRA never requires that employers reach agreement in collective negotiations with a union.84

When unions and employers agree to alternative organizing and bargaining rules, moreover, these agreements are “contracts between an employer and a labor organization,” which, by virtue of section 301 of the Labor Management Relations Act,85 are enforceable in federal district court.86 And, indeed, federal courts have routinely enforced contracts through which unions and employers agree that union recognition will be based on a card check, that employers will remain neutral on the question of unionization (or will significantly restrict their communications on that question), and that union organizers will be entitled to access employer property for the purpose of convincing employees to support the organizing effort.87

The private reordering of organizing and bargaining rules that the NLRA permits often occurs without state or local governmental intervention of any kind — through what we might think of as bipartite labor lawmaking. That is, by facilitating private ordering, labor law enables unions to use multiple sources of leverage to encourage employers to depart from the federal rules and adopt alternative ones; local political power is one source of leverage, but it is not the only one.88 Indeed, the most straightforward way that unions secure such organizing agreements is through the traditional collective bargaining process: where unions already represent some segment of an employer’s workforce, they can incorporate clauses in existing collective bargaining agreements requiring that additional employees of the same employer be organized according to privately negotiated rules like card check and neutrality.89 In other instances, employers enter into private organizing agreements in order to avoid costs that unions could otherwise impose. These costs can come from traditional union actions like strikes and picketing. Or they can be imposed through less traditional tactics including “comprehensive campaigns” in which unions, for example, encourage pension funds to withhold investment capital from targeted firms.90 Thus, the type of political exchange involved in tripartite labor lawmaking can be understood as an example of this broader phenomenon, an example in which unions leverage their state and local political power — rather than their economic power — to se- cure employer agreement on an altered set of organizing and bargaining rules.

Regardless of the source of leverage used to secure these agreements, private organizing agreements erode some of the uniformity that labor law’s preemption regime is committed to securing. In this respect, the NLRA is in tension with itself even in the absence of state and local intervention: while the preemption regime aims to ensure a uniform set of organizing and bargaining rules derived exclusively from federal law, the solicitude for private ordering implies that unions with sufficient bargaining power will be able to secure departures from these national defaults. But unions’ ability to leverage state and local political power to secure private agreements on organizing rules is of particular relevance to the preemption regime. Indeed, the existence of this form of political exchange reveals that state and local governments are an important source of labor law variation and a viable forum for the types of reform that have been impossible to achieve at the federal level — possibilities that preemption is intended and understood to foreclose.91

In sum, the NLRA intends to prohibit state and local government intervention into the rules of organizing and bargaining, while at the same time allowing for private reordering of those rules. As the next Part will describe, although labor law intends to distinguish between reorderings effected by local governments and those effected by private parties, contemporary developments are characterized by the interdependence of these two sources of authority.92

III. TRIPARTITE LAWMAKING

There is no question that labor law’s exceptionally expansive preemption regime precludes state and local governments from attempting directly to achieve at a local level the reforms that have been blocked in Congress. A state law or city ordinance mandating that private sector employers recognize unions based on a card check,93 or grant union organizers access to employer property,94 or remain neutral during organizing drives,95 would be flatly preempted by the NLRA. So too would a local law mandating that collective bargaining disputes be submitted to an arbitrator.96 Neither could state and local governments achieve these same labor policy goals simply by substituting public spending restrictions for regulation: requiring employers to recognize unions based on cards, to remain neutral, or to grant access to organizers in order to access state funding streams would also run afoul of the preemption regime.97 But understanding the way preemption operates in practice requires that we look beyond preemption doctrine itself.

To this end, this Part will describe in some detail the ways in which organizing and bargaining rules are being redesigned in states and cities today through political exchanges involving the public acts of local governments and the private agreements of unions and employers. The Part begins by providing four examples of tripartite labor lawmaking. It then clarifies the government’s role in these examples, and it concludes with a discussion of partial analogues to tripartite lawmaking by drawing on both international and domestic sources.

A. State and Local Labor Law

This section describes four instances of tripartite labor lawmaking in U.S. states and cities and briefly notes where other examples, not developed here, may lie. Although tripartite lawmaking has several variants, each involves a political exchange. The arrangement is predicated on an employer, or group of employers, seeking state or local government action on an issue unrelated to labor relations and union organizing. The union party to the tripartite arrangement desires to replace the NLRA’s rules with procedures that better facilitate unionization and collective bargaining. Tripartite lawmaking involves the exchange of the governmental actions sought by the employer for private contractual agreements through which the employer binds itself to the new rules of organizing and bargaining that the union seeks. In some examples, the state or local government is an explicit partner in tripartite negotiations: the government agrees to act in the way the employer desires if and only if the employer agrees to new organizing and bargaining rules. In other cases, the state or local government does not participate in three-way negotiations, but rather enacts the employer’s desired reforms in response to the union’s political influence — influence brought to bear because of the employer’s agreement on organizing and bargaining rules. In all cases, the end result is a set of organizing and bargaining rules that differs dramatically from the NLRA’s and that, as discussed above, is fully enforceable as a matter of federal labor law.

**The combo of ossified federal law with the CP's experimental tripartite bargaining drives unions into the local lawmaking process---that revitalizes participative local democracy.**

Andrew **Elmore 21**, Associate Professor, University of Miami School of Law, "Labor's New Localism," Southern California Law Review, vol. 95, 12/01/2021, pp. 253

A rejuvenated labor localism also has important effects on labor and employment law. It permits the reawakening of mass protests, including those that might otherwise be unprotected or unlawful under the NLRA. Connecting strikes and other protests by local labor-community coalitions to translocal labor policy experimentation expands protections against employer retaliation and remedies for violations. Participation by unions and worker centers in the direct democracy mechanisms of local government to bargain for and enforce workplace standards can provide a form of worker representation to unions and worker centers outside the NLRA while also improving workplace regulation that relies on' worker participation. Centering matters of local economic inequality enables subordinated groups, especially poor people, women, immigrants, and people of color, to exercise power in dynamic, inclusive protests and forms of bargaining that can advance democratic values in labor and local law.24

This Article's account of how labor-community coalitions have broadly advanced workplace standards and facilitated unionization and collective bargaining through local law builds on labor law scholarship that examines local law strategies by unions and worker centers,25 [FOOTNOTE 25 BEGINS] 25. See, e.g., Catherine L. Fisk & Michael M. Oswalt, Preemption and Civic Democracy in the Battle over Wal-Mart, 92 MINN. L. REV. 1502 (2008). It builds especially from the work of Scott Cummings, who has comprehensively examined local labor lawmaking in Los Angeles. See SCOTT L. CUMMINGS, BLUE AND GREEN: THE DRIVE FOR JUSTICE AT AMERICA'S PORT 17-25 (2018) [hereinafter BLUE AND GREEN]; SCOTT L. CUMMINGS, AN EQUAL PLACE: LAWYERS IN THE STRUGGLE FOR LoS ANGELES 4-8 (2021) [hereinafter EQUAL PLACE]; Scott L. Cummings & Steven A. Boutcher, Mobilizing Local Government Law for Low-Wage Workers, 2009 U. CHI. LEGAL F. 187, 221-45. Benjamin Sachs has discussed the role of local governments in facilitating private-sector collective bargaining with government actions unrelated to labor law, driving local law into opaque areas to promote collective bargaining despite National Labor Relations Act preemption. Benjamin I. Sachs, Despite Preemption: Making Labor Law in Cities and States, 124 HARV. L. REV. 1153, 1164-69 (2011). While local lawmaking can lack accountability, I draw attention to recent, transparent forms of local labor lawmaking and collective bargaining as a new form of localism. [FOOTNOTE 25 ENDS] and the democratic value of public sector unions.26 While scholarship about subfederal workplace regulation has focused on federal law preemption, 27 few labor scholars have considered state preemption, 2 8 and this Article is the first to assess the recent calls for home rule reform to protect local labor lawmaking. 2 9 This Article also contributes to scholarship about the social movement transformation of law.30 Its thick description of local legislative campaigns by translocal, federated networks of unions and worker centers offers an important example of the organizational strategies and structures developed by the labor movement to build and sustain workplace and political power.3 1

While recent local law scholarship seeks to engage with adjacent areas,32 labor law is a muted area of concern among local law scholars. 33 This is surprising given that labor law and local law raise similar questions about democracy 34 and the allocation of power to prevent domination. 35 This Article contributes to the recent debate about home rule reform by offering localism as vital to advance the democratic values underlying labor and local law. Public participation in local government is also a form of local accountability that can be more effective than state supervision, 36 which can strengthen and lift workplace standards. 37 These benefits suggest durable roles for localism in reforming labor law and safeguarding democratic norms, despite the inarguably broader coverage and preemptive power of federal and state government.

This Article proceeds as follows. Part I explains the current weaknesses of labor and employment law in the United States as attributable to the lack of political influence of the nonaffluent in federal and state government. It will introduce the shift of labor-community coalitions to local government to advance labor lawmaking as a form of decentralized, direct democracy. Part II first explores the effects of labor-community coalitions channeling social movement energy into local protest and lawmaking. This has pushed labor-community coalitions to become broader and more inclusive, and to advance local lawmaking translocally, or across local jurisdictions. It then considers the rise of state preemption as a threat to local labor lawmaking. It finds that labor-community coalitions have often managed this threat by engaging in state-level lawmaking and pivoting to adjacent areas. It assesses the current debate about home rule reform, concluding that labor localism advances democratic values and can improve local accountability, and requires only modest home rule reform to improve its stability and reach. Part III demonstrates how labor localism can counteract longstanding weaknesses in labor law and advance democratic values in labor and local law, without harming the institutional strength of unions or encouraging capital flight. Part IV assesses the value of a decentralized approach to labor and employment law given the primacy and broader reach of federal and state standards. It concludes that by building and channeling social movement energy into policy experimentation across cities, labor localism can revitalize federal labor law and advance the democratic values of labor and local law.

I. LABOR LOCALISM AND THE DEMOCRATIC DEFICIT IN FEDERAL AND STATE GOVERNMENT

Nearly half of workers report that they lack voice in the workplace and would join a union if they could.38 But unions represent only about ten percent of the United States workforce and a vanishingly small number of low-wage workers in many sectors.39 This is because the NLRA excludes millions of low-wage workers40 and makes it exceedingly difficult for other workers to join unions and collectively bargain with employers without fear of reprisal. Private-sector employers often can hire permanent replacements for strikers,4 1 lock out employees to press a bargaining position,42 and ignore union demands to bargain for "non-mandatory" issues, such as employer decisions to close part of a business. 43 Even if an employer egregiously violates labor law, the typical remedy is the widely criticized make-whole remedy of reinstatement and damages,44 which is unavailable to employees who lack authorization to work.45 The duty to mitigate in backpay awards and administrative delays in reinstating employees fired for union support often render even these remedies futile. 46

In contrast to the deference federal labor law affords employers, the NLRA tightly constricts a union's right to protest "secondary" employers 4 7 and imposes far more onerous administrative duties on unions than those imposed on other entities. 48 As Catherine Fisk and Diana Reddy explain, these union restrictions can channel unions "into weaker and less disruptive activities, . . . blunting union activism." 49 States have further weakened labor law by codifying a "right to work," or the right to refrain from paying unions for the costs of representation. 50 The Supreme Court constitutionalized the right to refrain as a First Amendment right in publicsector workplaces in Janus v. American Federation of State, County, and Municipal Employees, Council 31.51

For decades, labor law scholars have called for and the labor movement has sought federal law reform to address the weaknesses and gaps of the NLRA.52 But labor law reform ultimately depends on political influence to enact it. Unions have traditionally formed the primary national interest group in the United States seeking to lift and strengthen workplace standards. 53 The political economy of the United States, however, is primarily responsive to the priorities of the affluent, 54 a trend that has accelerated with the decline of the labor movement to counterbalance the representational gap in national and state politics."

This Part will first explain the lack of labor rights in the United States as driven by a democratic deficit for workers. It will then describe the growth of local labor lawmaking as a response to this absence of "equality of voice,"56 through labor-community coalitions that seek to build worker power through cities.

A. THE DEMOCRATIC DEFICIT AT THE HEART OF WEAK WORKPLACE RIGHTS

For democratic theorists, a democratic polity requires political systems that encourage the broad participation of society in decision-making over matters of everyday life. 57 Democratic reformers beginning in the Progressive Era have understood the importance of civic participation in democratic institutions, with unions as potential training grounds for democracy. 58 As K. Sabeel Rahman cautions, Progressive Era reformers did not attend, however, to the "the challenges of activating and empowering voices that might normally be marginalized." 59 Political scientists have consistently found that the affluent have disproportionate influence in politics. 60 The political inequality favoring the affluent is reflected in interest organizations lobbying the federal government.6 1 With its dwindling membership and waning resources, labor unions cannot match the influence of the business lobby, particularly in securing economic rights such as labor law reform.62

And while there is little evidence that interest groups can advance major federal legislation, 63 they can block federal policies they oppose.64 This entrenches a pro-business tilt and status quo bias in federal policymaking in ways that can lack transparency. 65 The weakened state of unions and the dominance of the business lobby help to explain why there has been no significant change to federal labor law in over fifty years and to employment law since the Family and Medical Leave Act of 1993.66 Even the federal minimum wage has remained fixed at $7.25 an hour for over a decade, the longest period without change since the Fair Labor Standards Act was enacted in 1938.67

While the success of the business lobby at the federal level has primarily been in preventing legislative reform, the pro-business lobby has radically transformed state law over the past decade. Forming an alliance with business groups and conservative donors through the American Legislative Exchange Council (ALEC), movement conservatives have successfully lobbied for uniform, pro-business lawmaking throughout the states, 6 8 enabled by opaque state governments 69 and inexperienced, underfunded legislators. 70 ALEC pioneered a form of "functional entrenchment," 7 1 or the undermining of political opposition by using law other than election lawin this case, labor law. 72 A chief accomplishment of ALEC has been a national campaign for states to enact right-to-work laws in order to disable public sector unions, a key constituent of the Democratic Party. 73 The most high-profile example of these laws was enacted in Wisconsin in 2011, causing state public sector union membership in that state to steeply decline from fifty percent to under twenty percent by 2017.74 Hobbling unions in these states led to a parallel, successful effort in 2018, with Janus, to hollow out public-sector unions.75

In sum, the political economy of labor law reform is shaped by the dominance of the business lobby over federal and state politics, while unions have declined as a political counterweight. This has foreclosed federal reform, while undermining labor unions through state right-to-work laws. While polls consistently show that the median voter supports labor unions, raising the minimum wage, and employer-provided paid family and sick leave,7 6 these 'economic interests are contrary to the interests of the affluent, and the nonaffluent lack the political influence to advance them.

B. LOCALISM AS LABOR'S RESPONSE TO THE DEMOCRATIC DEFICIT

Labor law exclusions and rules permitting aggressive employer responses to union elections have foreclosed unionization for many and have eroded the ability of those workers in unions to engage in effective collective bargaining or political advocacy. As Benjamin Sachs argues, blocking off a meaningful pathway for many workers to join unions and collectively bargain has the hydraulic effect of "forc[ing] open alternative legal channels." 77 One such hydraulic is to push labor unions, often in coalition with worker centers and other community organizations, toward localism. Here, "labor localism" refers to a channeling of social movement activism by unions and worker centers into local government to improve workplace standards, using local law instead of or in addition to federal labor law. 7 8

Democratic reformers since the Progressive Era have viewed localism as a response to the democratic deficit in federal and state politics.79 To counteract barriers to group mobilization that can reinforce the biases that favor the political influence of the affluent, democratic theorist Robert Dahl proposes a decentralized version of pluralism. 80 Decentralized pluralism "provide[s] a high probability that any active and legitimate group will make itself heard effectively at some stage in the process of decision." 81 As Gerald Frug explains, this can advance the community-building value of local government with democratic participation, public policy experimentation, and "the energy derived from democratic forms of organization." 82

**Relocalizing worker protection enables distributed responses to existential risk.**

Peter **McColl 25**, Former Rector of Edinburgh University, Geography graduate from University of Edinburgh, Former Vice President of Edinburgh University Students Association, "Even when it's a Grand Challenge the solution is often local: Thoughts on solidarity and subsidiarity in the face of radical change," Substack, 03/12/2025, https://substack.com/home/post/p-158921506

And the thinking about Grand Challenges very often, focuses on a range of approaches that involve equally grand thinking. Grand schemes, like a National Care Service – long on ambition but worryingly short on detail. These approaches too often ignore the very personal relationships needed to meet the challenge. While we need to create universal standards for care and sectoral deals for workers on pay and conditions, we also need to think about how we can get citizens involved in creating a response to the challenge.

The best social care systems are very local. All the international experience points to decentralised care working best. Of course, this should be balanced with the need to protect workers and avoid bad care practices.

Tackling the symptom, not the cause

Our current Councils are in a very difficult position here: too large to connect with communities, too small to be genuinely strategic. Part of the answer to the question is to bring government local to people. To have genuinely local government.

In other areas, the government has tried to address this problem using workarounds. Identifying a lack of engagement in local democracy, the Scottish Government has done excellent work to encourage schemes such as encouraging participatory budgeting, which allows citizens to propose and develop projects. The community then gets to choose which of the projects gets resources. These are good things in themselves but fail to address the core problem.

In social care, people have focused on care cooperatives as a workaround for our oversized Councils. These are inspired by the ‘Buurtzorg’ cooperatives that have been successful in the Netherlands. Just as with other workarounds, these have failed to take off in Scotland. Where participatory budgeting has worked it has not expanded beyond the areas where it was introduced, no substantial care cooperatives have developed in Scotland, and the ambition to transform social care with cooperative approaches seems as far away as ever.

How could relocalising help?

The failure to develop these approaches points to the need to do something different. One reason why there is such reluctance to relocalise our Councils is the failures of previous reorganisations. But these were imposed by governments Scotland did not vote for, and the reorganisation that gave us the current 32 Councils was a model of bad practice, based largely on achieving party political outcomes, rather than improving how our Councils work. We should not let the scars of a bad, top-down council reorganisation stop us from demanding better, more local Councils. And, as with the Campaign for a Scottish Parliament, the demands of a campaign from below will naturally better reflect the demands of citizens and communities.

Truly local Councils would be well-placed to deliver the benefits of participatory budgeting, and a solution to the challenge of care, capturing the opportunities of localised care cooperatives. Care commissioned and delivered by distant public authorities misses the ability of local communities to pull together and deliver the high-quality care we really need. By combining roles in local areas we can help to address understaffing, by better understanding the needs of citizens we can better deliver care that meets those needs.

While our Covid response shows we can still roll out a vaccine very effectively, it has become even clearer that we need to adopt new approaches to address problems that are more complex, and more fundamentally social in their character. It often feels like we are trying to treat every challenge like it is rolling out a vaccine – something that can be tackled by experts and professionals alone. That is why we find it so difficult to get citizens involved and engaged in addressing challenges.

If you have a hammer in your hand you will be tempted to see everything as a nail. That has been getting in the way of more effective solutions for problems that have social causes. ‘Call the Midwife’ showed successes in vaccine delivery, but the stories are profoundly social and the reason so many people watched the series was the attractiveness of those stories. We need structures that allow us to deal with those problems.

Avoiding the mistakes of previous reorganisations

There are lots of ideas about how we can avoid the complexity and multiplication of effort that are often cited as concerns when reorganisation is discussed. Dave Watson identifies the ‘single public worker’, with conditions and sectoral bargaining as a way to avoid Unions having to negotiate with many more Councils. Where in the 1990s the reorganisation of local government was scarred by discontinuity from the old Councils to the new, we must learn those lessons. This offers an opportunity as well as an assurance. It would require mapping and understanding of what functions local authorities have, where those are located and how they interact with other public services. If we can be clearer about where different tasks are located it will allow better engagement with citizens.

Applying the learning to other Grand Challenges

There are a range of other grand challenges where we can learn these lessons. Dealing with the climate crisis requires action at all levels – from global to local. And the lack of real local government will hamper our response, especially where we need to adapt to climate change. Anyone who lives close to the coast will know that the increased volatility of weather has had a range of devastating effects on beaches and increased coastal erosion. The response needs to be local, and too often the needs of different areas are being played off against one another. The best answer to the question of who should be the priority for coastal defence is to give that power to communities themselves. Of course coastal defence requires coordinated action, so the planning should be at regional level – it is the delivery that should be relocalised.

While we face more grand challenges, we need to resist the temptation to be drawn into a ‘race to the top’ in the responses to those crises. We have mostly solved the challenges that can be solved with centralisation. We need to develop the structures that might help us to deliver solutions to the challenges we face. Localisation offers us a way to tailor solutions to these more social, more complex challenges. In this way we can balance the needs of democracy, workers and citizens more effectively and in sympathy to people’s lives as they live them.

**1NC – DA – Bankruptcy**

**Corporate debt burdens are sustainable---unexpected deterioration in credit conditions triggers rapid systemic collapse, especially for chemicals.**

Sarah **Limbach et al. 12/3**, Limbach is Primary Contact at S&P Global Paris; Barbara Castellano is Primary Contact at S&P Global Milan; Roberto H Sifon-arevalo is Primary Contact at S&P Global New York, "Refinancing Risk: What If The Wind Changes?" S&P Global Ratings, 12/03/2025, https://www.spglobal.com/ratings/en/regulatory/article/refinancing-risk-what-if-the-wind-changes-s101660722

Corporates are already adjusting to higher refinancing costs, but unexpected increases could pose challenges for companies at the lower end of the rating scale. Sovereigns appear more resilient to potential significant shocks in financial markets.

How this will shape 2026

Maturities seem manageable amid higher refinancing costs. About $1.35 trillion of nonfinancial corporate debt will mature in 2026, as of Oct. 1, 2025, 10% higher than at the same time in 2025. That said, the weakening dollar during the first half of 2025 increased the value of non-dollar denominated debt, when converted into USD. A significant portion of upcoming maturities were issued in the low-interest rate environment of 2020/2021. Consequently, European and U.S. corporate issuers with fixed-rate 2026 maturities may face higher funding costs, of about 150 basis points across the board, if refinancing at current yields.

Pockets of risk exist among the weakest-rated issuers. Most issuers have been able to roll over their debt in recent years despite higher funding costs, but those with weaker financial or economic fundamentals could face increased pressure in 2026. Recent strong speculative-grade issuance has pushed back maturities, though refinancing risk among issuers rated in the 'CCC' to 'C' categories is evidenced by their 2026 maturities, which are more than double that of 'B-' rated issuers, as of Oct. 1, 2025. What's more, bond prices in the secondary market for bonds rated 'CCC+' to 'C' with upcoming maturities reflect a more bearish view from investors on that category.

Sovereign issuers will maintain access to financing. Even during periods of liquidity stress, such as after the global financial crisis and during/after the pandemic, sovereigns largely maintained access to funding, albeit with varying terms and conditions. Should 2026 prove turbulent, the critical role of sovereign debt as a relatively stable source of capital will once again come to the fore. We expect sovereign entities, often supported by central banks, to continue to be key players in financial markets, particularly if conditions deteriorate.

What we think and why

We anticipate that corporates will continue refinancing maturities, barring a triggering event. Potential catalysts for such an event include escalating geopolitical tensions, a marked deterioration in economic conditions, or disruptions coming from specific sectors that spread through financial markets.

Worsening credit metrics are likely to exacerbate refinancing pressure in some sectors. Excluding the financial sector, the automotive industry has the highest amount of debt maturing in 2026--over $170 billion, with nearly half stemming from European issuers. It is also the sector with the highest negative bias (issuers assigned a negative outlook or placed on CreditWatch negative). The sector's downgrade risk points to a deterioration in funding conditions going forward. Telecommunications and chemicals, packaging, and environmental services carry an elevated risk of future credit deterioration while also holding the highest amount of debt rated in the 'CCC' to 'C' categories that matures in 2026.

Beyond existing maturities, the substantial funding needs associated with AI data centers are expected to add volatility to the debt market in 2026. The scale of funding needed for these projects, coupled with uncertainty surrounding their valuations, is already generating some market volatility.

What could change

Continued geopolitical or economic tensions may lead to a moderate deterioration in financing conditions. If financing costs rise significantly, investors will likely be more selective in the lower end of the rating scale. Industries that are already facing challenges--such as automotive and basic chemicals--would likely be most affected. Conversely, sectors benefiting from AI and data center investments--including high-tech, automation, electrification, and parts of the real estate and construction sectors--could maintain better access to debt, even under less favorable conditions.

A more extreme scenario--driven by the exacerbation of existing tensions or a "black swan" event--is unlikely at this stage but could trigger a market shutdown. The most immediate risk would be a liquidity crunch, disproportionately affecting corporates with weaker credit ratings, imminent refinancing needs, or significant operating losses and cash burn. Investment-grade issuers typically have liquidity buffers and access to bank facilities and private loans. However, access to these funding channels may also be constrained in such a scenario, and a prolonged shutdown would challenge even the most resilient issuers' ability to refinance. Companies in non-essential goods and services sectors--such as leisure, durable goods, and autos--are most exposed to rapid contractions in demand. Business-to-business companies, such as auto suppliers or capital goods manufacturers, would also be indirectly exposed to a decline in end-demand, particularly those with high fixed costs, where a sharp drop in advance payments or a sudden reduction in accounts receivable would add pressure. Some sectors such as telecommunications and utilities have historically proven resilient, but idiosyncratic stresses could arise such as difficulties in reducing large investment programs or direct exposure to the disruptive event.

**The plan crashes corporate bond markets---increased union power in bankruptcy makes restructuring less efficient and more likely to fail.**

Murillo **Campello et al. 18**, Campello Johnson Graduate School of Management Cornell University, Jiaping Qiu DeGroote School of Business McMaster University, Janet Gao Kelley School of Business Indiana University, Yue Zhang Universite Catholique de Louvain, “Bankruptcy and the Cost of Organized Labor: Evidence from Union Elections,” The Review of Financial Studies, Volume 31, Issue 3, March 2018, Pages 980–1013, https://doi.org/10.1093/rfs/hhx117

Despite their declining prominence, labor unions still shape workers’ participation in corporate activity. Over eight million private-sector workers in the U.S. today are represented by unions and of the largest 100 industrial firms, 33 have a unionized work force. Unions are known to use collective bargaining power to protect workers’ interests such as wages, health care, and job security (Freeman (1980) and Lewis (1986)), but less is known about the role they play in bankruptcy. At the time when workers’ investment in firm-specific human capital is most threatened, the U.S. Bankruptcy Code only safeguards wages and benefits for work already performed.1 To protect their members’ long-term interests, unions must become active parties in bankruptcy states (Haggard (1983)).

Unions are able to protect their members’ interests in several ways in bankruptcy and this paper shows that worker unionization bears significant wealth consequences for other stakeholders of the firm. As recognized creditors, for example, unionized workers may be eligible to seats on unsecured creditors’ committees under Chapter 11.2 Those committees are favored by the courts and have broad powers to (1) formulate reorganization plans, (2) request the replacement of managers, (3) block asset sales, and (4) move to convert the case into Chapter 7. Non-unionized workers with separate, small claims are not eligible to seats on creditors’ committees.3

Beyond receiving debtor-like recognition under Chapter 11, unions resort to other tactics to empower workers in bankruptcy. They organize strikes, boycotts, and public denouncements with the goal of forcing managers to acquiesce to their demands, so as to avoid disruptions that invite creditor control (Atanassov and Kim (2009)). When convenient, unions use their leverage in court so that bankruptcy proceedings allow for disruption of absolute priority rules (APR), whereby unsecured creditors’ claims lose seniority (Adler (2010)). Unions can also make bankruptcies last longer, using the courts to force parties into repeated, costly negotiations over workers’ demands. In securing continued employment for their members, unions often favor inefficient reorganizations in lieu of liquidation (Korobin (1996)). This is a key concern since firms that emerge from reorganization often re-enter bankruptcy, as unions resist asset sales and worker layoffs.

We study the impact of worker unionization on corporate creditors by looking at the price reactions of publicly traded bonds to union elections. Bond prices represent a unique value metric with which to gauge the impact of unionization onto financial stakeholders of the firm. Unlike other creditors (e.g., banks and syndicated lenders), it is difficult for investors of diffusely held bonds to renegotiate with borrowers. Bond investors, instead, dispose of their securities in the market in response to innovations to the expected value of their claims. Given the concave structure of bond payoffs (capped at the issue face values in non-bankruptcy states), bond prices are sensitive to expected losses in bankruptcy states. In particular, as their claims are senior, yet unsecured, bondholders’ expected wealth declines sharply in the face of high bankruptcy costs.4 Deviations from an orderly bankruptcy process will increase expected bankruptcy costs and lead to declines in the secondary market price of corporate bonds.

Union elections are conducted through secret ballot voting. Once a union wins over 50% of the workers’ votes, it attains legal recognition. Union rights are protected by the National Labor Relations Act and a successful election significantly increases the bargaining power of workers. Naturally, both the occurrence and the results of union elections are influenced by a number of factors. As such, the average union-win firm might differ from its average union-loss counterpart on several dimensions (both observable and unobservable). To identify our tests, we resort to a regression discontinuity design (RDD) that exploits local variation in the vote share of elections that can lead to discrete shifts in union legal status. In short, our tests contrast bond price reactions to closely won union elections with bond price reactions to closely lost union elections. Workers in close-win elections gain legal representation status while those in close-loss elections do not; yet firm characteristics and workers’ support for unions are ex-ante similar across the two groups. Given the nature of the voting process, it is unlikely for individuals or firms to precisely anticipate or manipulate the outcome of close union elections. Under these regularity conditions (which we verify in the data), relative differences in bond price reactions to close union election results can be plausibly attributed to the effect of unionization.

We conduct our analysis on a sample of 721 bond issuers witnessing worker unionization attempts between 1977 and 2010 using records from the National Labor Relations Bureau (NLRB). In short, our tests show that worker unionization negatively affects the wealth of senior, unsecured creditors. Results from RDD estimations imply that closely won union elections lead to a negative 210 (470)-basis-point average cumulative abnormal return (CAR) over a 3-month (12-month) time window.5 Closely lost elections, in contrast, are associated with economically insignificant CARs.

From a pricing perspective, the decline in bond values that we report could arise from increases in default risk or in bankruptcy costs. We next look for evidence of those effects in our data. DiNardo and Lee (2004) find no relevant impact of worker unionization on firms’ profitability or survival rates, implying negligible changes in firms’ default risk following unionization. Consistent with those authors’ results, we find no evidence that close union winners perform worse, become more likely to enter distress, or are more likely to file for bankruptcy than close union losers for several years after the vote.

We then set out to investigate the effects of unionization on bankruptcy costs. This is a difficult task and our analysis is limited by the fact that we focus on explicit bankruptcy costs. The examination necessitates data from actual bankruptcy events and we first expand our dataset to include information from the UCLA-LoPucki bankruptcy database. In this investigation, we use non-local linear regressions to compare the duration, costs, and outcomes of court proceedings across bankrupt firms with unionized workers and those without. We find that unionized firms experience more prolonged court proceed ings and are also more likely to go through inefficient reorganizations, as evidenced by a higher likelihood of emerging from bankruptcy and refiling for bankruptcy shortly thereafter. Unionized firms are also more likely to reorganize under debtor-in-possession (DIP) financing.6 In addition, firms with labor unions incur significantly higher expenses and fees paid in bankruptcy court. The results we report are consistent with the notion that unionization is associated with higher in-court bankruptcy costs. Admittedly, nonetheless, these tests could allow for a non-causal interpretation.

We thus set out to more granularly identify the welfare costs of labor unions in bankruptcy court by exploiting statutory variation in the number of seats assigned to unions on unsecured creditors’ committees (UCCs). Section 1102(a) of the Bankruptcy Code charges the U.S. Trustee with the duty of organizing a committee composed of the largest unsecured creditors of the bankrupt firm (including both unionized workers and bondholders). Following this guideline, the Trustee shall assign union representatives to seats on UCCs if they represent labor claims whose amount ranks among the largest liabilities of the firm. It is difficult to ascertain and calculate the claims of various corporate creditors, and as a result there is considerable degree of variation regarding the number of UCC seats eventually assigned to unions — seats that come at the expense of other unsecured creditors. We use this source of variation to gauge the marginal effect of unions’ empowerment in bankruptcy court onto bondholders’ wealth in bankruptcy. We collect information on the composition of UCCs of firms filing for bankruptcy between 1988 and 2010 and combine it with Moody’s data on in-court loss given default (LGD) rates. Our tests show that bondholders’ losses monotonically increase with the assignment of seats to unions on unsecured creditors’ committees. Notably, the LGD rates of secured creditors on the same firms are found to be insensitive to the number of UCC seats assigned to unions.

We also exploit firm and union heterogeneity in our RDD framework to help characterize how unionization affects bond values through expected bankruptcy costs. First, we compare subsamples of financially distressed and financially healthy firms, expecting bond price reactions to news of unionization to be particularly pronounced for firms in distress. We consider several measures of financial distress, including Altman’s Z-Score, Ohlson’s O-Score, Merton’s distance to default, as well as Moody’s credit ratings. Consistently across all measures, RDD results show that unionization has a much greater impact on the bonds of distressed firms. We also look at the funding status of firms’ pension plans. Unionized workers’ pensions are entitled to the same (high) priority assigned to their wages in bankruptcy. As such, underfunded plans will aggravate bondholders’ expected bankruptcy costs. We partition our sample based on firms’ pension funding status and find the effect of unionization to be significantly stronger for firms with underfunded plans. Finally, we examine the argument that the value impact of unions is related to their bargaining powers. The adoption of right-to-work (RTW) laws by some state legislatures allows non-union workers to enjoy the benefits of collective bargaining without paying union dues. These laws constrain unions’ financial resources, diminishing their powers (Holmes (1998)). Partitioning our sample according to whether a union election is held in a state with RTW laws, we find that the negative impact of unionization on bond values is much weaker in states with RTW laws in place (where unions are weaker).

There is a growing literature on the interplay between human capital and corporate financing. Papers in this literature often focus on the effect of labor force bargaining power (e.g., union coverage) on firms’ leverage ratios. Studies such as Bronars and Deere (1991) and Matsa (2010) document a positive relation between labor power and leverage (see Dasgupta and Sengupta (1993) and Perotti and Spier (1993) for theoretical models). The underlying theme of this stream of work is that firms increase their leverage as a way to enhance shareholders’ bargaining power over the labor force.7 Other studies propose a different argument: firms may reduce leverage to preserve workers’ human capital. Berk et al. (2010) propose a theory in which firms’ leverage is influenced by the higher wages workers demand in exchange for exposure to job loss in default states. Along this view, Simintzi et al. (2015) show that firms in countries with higher union coverage have lower leverage (see also Ellul and Pagano (2017)).

Our analysis relates to the existing literature in that our results speak to conflicts between labor and suppliers of financial capital to the firm, creditors in particular. As unionization empowers workers by preserving their human capital in default states, “displaced creditors” (unsecured bondholders) observe a change in the value of their claims. Our paper on union voting and bond price dynamics differs from existing studies in important ways, nonetheless. While most previous studies build on contrasts between unionized and non-unionized firms (regardless of a vote occurring or its outcome), our contrasts focus on firms in which workers attempted to unionize. By the nature of its test design, our study may not rule in or rule out existing views on the relation between labor and leverage ratios, as the bankruptcy dynamics that we consider do not apply to the entire schedule of debt contracts in firms’ balance sheets. We can only speak to the pricing of bonds, the claims held by creditors that are displaced by unions under the U.S. Bankruptcy Code.

**Spiking yields set off a corporate debt bomb in 2026---causes systemic crisis, bank failures, and 60+% economic contraction.**

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Corporate Debt Wall and Impact on Margins

Over $2.5 trillion of U.S. corporate debt matures before the end of 2027. Seven hundred billion is due in 2025. More than $1 trillion is due in 2026. Global corporate debt maturities peak at $2.78 trillion in 2026, according to S&P Global.

The coupon shock is similar to Treasuries but more severe for lower-rated issuers. The median coupon for BBB-rated bonds maturing in 2025 was 3.8 percent. Refinancing will require yields of 5 to 6 percent. This is a 120-180 basis point spread increase on the coupon. For a company borrowing $1 billion, this translates to $12-18 million in annual incremental interest cost.

For S&P 500 companies, the result will be slightly tighter margins and probably a valuation reset. It is the smaller, unprofitable companies that are in big trouble, in my opinion.

U.S. high-yield debt trades with credit spreads at 315 basis points. Historically, this is a warning sign of credit stress during slowdowns. The recipe is set: higher refinancing costs, lower revenues, compressed margins, and rising defaults on new loans made at higher rates.

Profit margins already face headwinds. Consumers are squeezed. Delinquencies on auto loans are at 5.1 percent, the highest outside the Financial Crisis and COVID. When consumers default, they spend less. When they spend less, companies sell less. When companies sell less, margins compress even before the debt refinancing cost hits them.

Small companies without a strong private lending relationship face a massive problem refinancing in the next few years, in my opinion, again, unless there is enough QE fast enough. With the run-up in the Russell 2000 recently, it pays to be very careful of company-specific risk. And I say that as a very regular small-cap investor for the past 25 years.

I think IWM is heading towards lower support levels, perhaps all the way to the solid red line in the next year or three.

Can IWM break higher towards $300? Certainly, markets can be irrational for long fits of time. That is why I maintain some catalyst driven stock positions, but would not touch IWM with a ten-foot wallet.

Corporate debt trends are a harbinger of stock market volatility looming if history is a guide.

Tariffs Are Weird

Tariffs have not had the inflationary impact that many supposed. The idea about tariffs raising prices is not theoretically wrong; however, inventory and front-running offset potential price increases. As supply chains move, the inflationary impact would dissipate anyway, most likely.

Think "long and variable time lags." Atlanta Fed President Raphael Bostic said American firms reported that 40 percent of their unit cost growth in 2025 and 2026 comes from tariffs. How does that play out?

Where tariffs could cause a real problem, though, is if supply chains do not build fast enough and we instead see an economic slowdown for any number of reasons already discussed and other potential reasons.

Recessions are deflationary, and we are seeing a large part of the non-AI related economy suffering right now. I do not think we should dismiss the volatility in prices that could be coming, in both directions, sequentially and differently depending on sector, service and product. I think we are likely to have a very mixed bag the next several years.

Beyond tariffs, the Trump Administration has floated a number of policy ideas, edicts, and executive orders that are too many to cover today. But, I would simply say that certain ideas, while sounding good in populist messaging, might not have the intended impacts.

Japan Matters

I think the international macro to watch most is Japan. They are the 4th largest economy in the world, and they are facing fiscal and monetary issues similar to what the U.S. has coming as Boomers retire, but they start from a low resource position and growing competition for their manufacturing. If you think American issues are severe, Japan seems worse to me.

Japan's government budget for fiscal 2026 is expected to exceed 120 trillion yen, surpassing the current record of 115.2 trillion yen from fiscal 2025. Debt-servicing costs are expected to hit a fresh record, surpassing 28.2 trillion yen for the current fiscal year.

Half of the new spending will be funded by new bond issuance. Japan's deficit-to-GDP ratio will worsen to 3.2 percent in 2026 and 3.7 percent in 2027, according to forecasts. They are trying to do that without being the global reserve currency.

The Bank of Japan is reducing its monthly purchases of government bonds. Beginning next quarter, purchases will fall from 3.705 trillion yen to 3.3 trillion yen. This is the central bank scaling back its support of the government bond market, QT, aka, Quantitative Tightening, precisely when the government is issuing more debt. Think about 2022 in the U.S., then add a multiplier.

CGTN reported that Japan's debt-servicing costs for interest payments have risen to 28.2 trillion yen annually, further widening fiscal imbalances and amplifying financial risks. With outstanding government debt exceeding 1,300 trillion yen, every one-percentage-point rise in interest rates raises annual interest payments by more than one trillion yen. Again, they are doing this without being the global reserve currency.

Worsening inflation from yen depreciation. Higher prices are reducing household purchasing power. The government was forced to issue even more debt to support households. Rising rates are crushing household finances with mortgage payments and forcing further rate hikes from the Bank of Japan to stabilize the yen.

It's a potentially devastating cycle that could have a global impact due to all the securities tied to Japan and Japanese-influenced financing.

The parallel to the U.S. is obvious. The U.S. is on a similar trajectory. The only advantage the U.S. has is reserve currency status. That advantage erodes if fiscal discipline is abandoned into the Boomer retirement, which comes with major societal expenses.

Japan teaches us how this ends: trapped in deflation, not inflation, with structurally unsustainable debt ratios.

Interestingly, I do think there is a specific fix for the United States that involves a "lockbox." I'll discuss that another time.

International Investors Will Impact Stocks Too

U.S. stocks have seen a massive surge of investment from international investors since Covid. Money printing, aka QE, has clearly been a catalyst for stock buying. I have posted Apollo Global data about that a few times.

The chart below, I think, looks nice on first glance, but I would suggest looking at the image I put below it.

I would suggest that international investors have a level of sophistication at least similar to U.S. accredited investors. And, we should remember, a lot of that money is institutional.

In an era where budgets and pensions (which a lot of the rest of the world still has) are facing crunches, a sell-off, or at least a flattening of international demand for U.S. assets, I think, is likely.

Again, I point to the midterms. You can rebel against the idea that there are political motivations for international investors to sell, but I think that is naive.

I think that international investors can be thought of as marginal pricing power in the stock market. Remember your lessons on economics. Marginal pricing pressure is the last dollars in or out. What if international demand for U.S. stocks flattens or falls? The answer is obvious in my mind.

Stock Market Scenarios

I'm going to cover my 3 potential scenarios for the stock market this year. And it really applies to the next few years since I think we have entered an overvalued period full of "unknown unknowns."

Valuations are high on the S&P 500 (VOO). By now everyone should know that.

Sure, there's an argument that corporate profits are high and valuations should be higher. But consider this: if debt has a problem, then corporate profits have a problem. There's a massive correlation between debt, corporate profits, and stock prices.

Understand that chart. As public debt increased, it flowed to corporations. Is that really in all of our best interests at those extremes?

That means there is a risk that the S&P 500 (SPY) could fall dramatically or have an extended period of low returns. I'm in both camps, though there are multiple ways things can play out, and nobody can tell you which ahead of time with any precision. The best we can do is be prepared to respond in real time and maintain the risk levels appropriate for our own finances.

In my scenarios to follow, I break each piece—bullish, base, and bearish—into 20% pie slices. The one I plan for is the one that is most likely, which I put at 60%, like a good poker player does. The others I try to be ready for and mitigate my exposure accordingly.

The Bullish Blowoff Top Scenario

If policy works well and liquidity does not fall, then GDP growth above 3% could happen. If it does, then I would expect bullish animal spirits to surge again.

In this scenario, credit conditions ease. Liquidity expands. Defaults remain contained. The S&P 500 rallies to $7,500 to $8,500 by year-end. Valuations expand further. This requires not just economic acceleration but deliberate policy choice to prioritize asset inflation over currency stability.

This scenario works if AI adoption is as transformative as expected and is quick about it. If the productivity gains are real and material. If management teams deploy capital efficiently. It is possible. But it requires execution and a benign policy environment. History shows both are rare.

I put the bullish blowoff top scenario at 20%.

The Base Scenario Bear Market Scenario

Economic growth meanders at 1.5 to 2.0 percent as AI slows and the rest of the economy is flattish.

In this scenario, the Fed delivers one or two 25-basis point rate cuts for a total of 50 basis points in H1 before the change in Federal Reserve Chairman. This is insufficient to materially ease financial conditions given the debt wall. It thwarts the effectiveness of the U.S. Treasury rolling debt in any attempt to meaningfully save interest expenses.

In this case, the Treasury maturity wall pressures long-term yields higher as foreign buyers remain flat to diminished. Corporate hiring slows due to uncertainty around tariffs and geopolitical risk. The stock market corrects 20 to 30 percent, testing the October 2023 lows near 4,500 to 5,500 on the S&P 500.

This is a base case because it fits historical precedent. Late-stage bull markets correct 20 to 30 percent when valuations are extreme and liquidity inflects. The correction flushes momentum speculators and resets valuations closer to historical norms of 18-20x earnings.

As I believe "all roads lead to QE" there is a rebound at some point. Unless the next scenario is playing out, I expect to be a heavy buyer of quality S&P 500 stocks in a "run-of-the-mill" 20-30% bear market.

I assign a 60% probability here.

The Bearish Scenario Financial Crisis

The convergence of Treasury refinancing pressure, CRE defaults, Fed leadership transition, and foreign capital exodus creates a credit event severe enough to break market confidence.

A major regional bank fails, or possibly even one of the large national banks if we see a full-blown crisis. I am on record as saying I do not trust Citibank's (C) underwriting. In this scenario we see REIT defaults as the CRE crisis accelerates.

The Fed cannot mount a credible rescue without announcing massive QE, which signals loss of independence and commitment to the currency. However, the administration, committed to fiscal responsibility, attempts regulatory forbearance rather than decisive intervention. A quasi-form of austerity with deferred debt emerges. Credit markets freeze, and we get a deflationary event.

The S&P 500 collapses 40 to 60 percent, falling to $3,000 to $4,000.

This scenario reflects genuine tail risk if policy errors accumulate faster than the Fed can respond. It happened in 2008. It almost happened in March 2020 before they overreacted. Either can happen again.

I have the odds of this at 20%. That is high for me. Usually, this scenario gets "almost zero chance." I have not seen the potential for this scenario so high since 2007.

**Crash causes global nuclear war.**

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NEW YORK – As we enter the second quarter of the twenty-first century, slow economic growth will remain the world’s most persistent challenge, transcending national borders and affecting developed and developing countries alike.

The economies of the United States, the European Union, and Japan are all projected to grow by less than 3% per year for the foreseeable future – the threshold needed to double per capita income within a generation (25 years). At the same time, large emerging economies like Brazil, Argentina, and South Africa are also expected to experience sluggish growth over the next decade.

While total global GDP has increased to $110 trillion, progress remains unevenly distributed, threatening to erode living standards. Worse, the world economy faces powerful headwinds that could stifle growth, innovation, and investment, triggering political and social instability.

Governments and business leaders must adjust their models and assumptions accordingly. In the face of significant policy shifts, investors will need to rethink their investment and allocation strategies to navigate an era defined by uncertainty and uneven growth.

Looking ahead, eight risks to global GDP growth stand out: geopolitical fissures; divisive domestic politics; technological disruption and the rise of artificial intelligence; demographic trends; rising inequality between and within countries; natural-resource scarcities; government debt and loose fiscal policies; and deglobalization. Taken together, these headwinds will be a persistent impediment to economic growth in the coming years.

No World Order

The first drag on global growth is the escalation in geopolitical tensions – particularly among the US, China, and Russia – compounded by additional threats from Iran and North Korea. As the rift between developed and developing economies widens, developing countries are increasingly joining economic alliances like the BRICS bloc, which expanded from five members at the start of 2024 to nine by the end of the year. In the near term, there is a growing risk that this geopolitical tug-of-war could escalate into an all-out military conflict.

Over the past 50 years, the world economy has gone from being a positive-sum game to a negative-sum game. The positive-sum era, driven by economic and global cooperation, reached its zenith during the Washington Consensus period, which was highlighted by the fall of the Berlin Wall in 1989 and China’s accession to the World Trade Organization in 2001. But following the 2008 financial crisis, the world entered a negative-sum period, marked by declining growth, intensifying competition, and rising international tensions, further heightened by the COVID-19 pandemic, Russia’s invasion of Ukraine, and the Gaza War.

Widening geopolitical fissures have laid bare deep vulnerabilities. China, for example, is one of America’s largest foreign creditors, holding more than $770 billion in US Treasuries. This gives it significant leverage over the US, whose policymakers increasingly regard it as a political and ideological rival. Against this backdrop, the intensifying race between China and the West for technological dominance in AI, quantum computing, and semiconductors has fractured the digital economy, giving rise to a balkanized “splinternet.”

As decades of multilateral cooperation give way to economic fragmentation, new cross-country alliances have weakened the US-led international order and the Bretton Woods institutions, such as the World Bank and the International Monetary Fund. The expanded BRICS bloc – led by Brazil, Russia, India, China, and South Africa – is the most significant of these alliances, representing more than 40% of the world’s population and 36% of global GDP.

Meanwhile, so-called “swing states” like Turkey, Saudi Arabia, and other Gulf Cooperation Council countries are reshaping global trade routes, reconfiguring supply chains, and redirecting investment flows, altering the distribution and pricing of key commodities such as foodstuffs and critical minerals.

Beyond stifling global GDP growth, these geopolitical rifts are hindering collective efforts to tackle climate risks, as developed and developing economies remain deeply divided over the urgency, scope, and aggressiveness of the regulatory and policy reforms required to combat climate change and advance the clean-energy transition.

Populism and Domestic Politics

Many advanced economies are also grappling with deepening political polarization at home. US President-elect Donald Trump’s return to the White House – much like Brexit and Trump’s first election victory in 2016 – heralds a period of widespread uncertainty and major political transformations.

Amid these populist gales, developed economies’ budgets are increasingly strained by expanded welfare programs. In 2022, for example, the EU spent €3.1 trillion ($3.3 trillion) – 19.5% of its GDP and nearly 40% of its total expenditures – on social protection.

As demands on government budgets grow, worsening fiscal positions will make it increasingly difficult for many countries to provide essential public goods like health care, education, and infrastructure. The resulting fiscal pressures will likely deepen polarization and lead to more policy volatility.

**Refinancing key to chemical sustainability---extinction!**

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Introduction

Chemistry is the study of matter – it is the study of everything. The periodic table contains the ingredients for making just about anything. This is also reflected in our economy: More than 95% of manufactured products rely on chemicals (European Commission, 2017). The European Union recognises the sector as an enabling industry which may play a “pivotal role” (European Commission, 2023a).

Yet at the same time, the chemical sector is the single biggest industrial energy consumer (IEA, 2023). The emissions stemming from the sector’s use of heat, steam, and power for compression and cooling account for roughly half of its total fossil fuel related emissions. The other half is linked to using fossil fuels as input to chemical reactions, for products such as plastic or fertilizer. Overall, the chemical sector takes third place in the ranking of industry subsectors when it comes to direct carbon dioxide emissions.

Given the urgent need to reach net zero and commitments such as the 2015 Paris Agreement and the EU Green Deal, the pressure for the chemical industry to decarbonise is mounting. In business terms, this means that so called transition risk, one form of climate risk, is building up. To demonstrate its materiality, looking at cost originating from the European Union Emission Trading System (EU ETS) is telling: Forecasts see costs quadrupling by 2030 (ICIS, 2021). Here, very obviously, reducing emissions is not only doing good for the planet, but also has direct financial benefits. Still, some chemical companies choose to further deepen their ties with fossil fuels by buying petrochemicals business from energy majors who are selling the assets as part of their transition efforts (Bousso, 2020; BBC, 2017) and continue to invest in them (Reuters, 2022; Ineos, 2018).The International Energy Agency’s (IEA) Fatih Birol has called the petrochemicals business a “key blind spot” while examining their future (IEA, 2018). The IEA sees the sector not on track, stating that carbon dioxide intensity has been stable over recent years for primary chemicals, yet the et Zero Emission by 2050 Scenario requires an 18% absolute emission reduction compared to 2022 by 2030, despite increasing production (IEA, 2023). This means decoupling emissions from production is urgently needed.

Sustainability and the chemical sector

“Chemistry is, well technically, chemistry is the study of matter. But I prefer to see it as the study of change” (IMDB, 2008)

And indeed, the chemical industry could be a key driver for transforming the real economy. In the TV show “Breaking Bad” Walter White goes one step further than portraying chemistry as the study of everything, by adding a forward-looking perspective to it. Given that chemical products are the basis for nearly all manufactured products, they need to be accounted for under so-called Scope 3 emissions for the respective manufacturers. The Greenhouse Gas Protocol, the most common emission classification system for corporate emission reporting, distinguish three scopes: Direct emissions (Scope 1), indirect emissions from purchased energy (Scope 2) and lastly emissions outside of a companies own boundaries, related to its value chain (Scope 3).

Up until today, most efforts and pledges revolve around Scope 1 and 2, often dubbed core emissions. Yet there is increasing attention shifting towards Scope 3[1] – not the least because they make up the majority share of all emissions and in fact the vast majority for most sectors (Hoepner & Schneider, 2022a). Indeed, Deloitte specifically lists sustainability as their number 1 trend and specifically mentions the carbon footprint of supply chains as their top 3 for the chemical sector (Deloitte, 2022). The chemical industry is in a unique position to drive major supply chain decarbonisation and thereby support Scope 3 emission reductions globally. Moreover, the transition involves a range of opportunities for chemistry, including batteries but also ammonia for shipping.

https://www.high-endrolex.com/5

Thus, it is little surprising that firms in the sector signal their sustainability ambitions via bold claims in their corporate reporting and public statements. Table 1 gives an overview of different sustainability statements made by senior executives of firms from the sector. It becomes obvious, that statements vary in their level of ambition but also scope and time perspective. It is important to recognise differences in forward-looking (plans and pledges) and backward-looking (actually achieved performance, that can be evidenced) claims. Some firms may choose to highlight their standing relative to their peers, others make absolute claims. The distinction between relative emission targets, in the form of intensities (ie emission reduction per revenue or unit of output) and absolute ones is likewise crucial.

Yet any claim needs to translate into tangible actions, otherwise firms run risk of engaging in greenwashing. The table above is part of the GreenWatch[2] database, which compares corporate claims across sectors with actual emission performance. For alignment with the Paris Agreement and the 1.5°C target absolute emissions must be reduced 7% year on year. Anyone making bold sustainability claims should at least meet this basic metric. At GreenWatch, Artificial Intelligence (AI) is used to classify sustainability claims in terms of their boldness and then compared to absolute core emission reductions. A differentiation between no claim, a moderate claim and a bold claim and between an emission reduction in line with the Paris Agreement, a weak emission reduction and an emission increase is made. Importantly, carbon offsets are not factored in[3]. Should a company make a strong sustainability claim while in fact increasing their absolute emissions, a high likelihood of greenwashing is assigned.

Today many forms of greenwashing have developed. Given the obvious commercial incentive to be perceived as green, sophisticated strategies to mislead customers and investors have evolved. PlanetTracker portrays greenwashing as a beast with many heads in their Hydra report. The analysis outlines six distinct types of greenwashing (PlanetTracker, 2023, p.3-8):

“Greencrowding is built on the belief that you can hide in a crowd to avoid discovery; it relies on safety in numbers. If sustainability policies are being developed, it is likely that the group will move at the speed of the slowest.

Greenlighting occurs when company communications (including advertisements) spotlight a particularly green feature of its operations or products, however small, in order to draw attention away from environmentally damaging activities being conducted elsewhere.

Greenshifting is when companies imply that the consumer is at fault and shift the blame on to them.

Greenlabelling is a practice where marketers call something green or sustainable, but a closer examination reveals that their words are misleading.

Greenrinsing refers to when a company regularly changes its ESG targets before they are achieved.

Greenhushing refers to the act of corporate management teams under-reporting or hiding their sustainability credentials in order to evade investor scrutiny.”

A lot of the greenwashing that is happening in the market is not explicitly illegal and hard to proof. But climate litigation is growing in momentum and posing a real risk to climate offenders. And these lawsuits have very material financial risk for the respective companies: Sato et al. (2023) find that climate litigation filings or unfavourable court decisions on average lead to reduction in firm value by -0.41%. These lawsuits can also result in transparency and climate action obligations (Weller and Tran, 2022).

While climate litigation for the moment focuses on energy firms and the carbon majors, the chemical industry is also subject to substantial pressure due to environmental concerns. Pollution prevention is an additional key environmental objective as recognised by the European Commission (European Commission, 2023b). Around 40 laws regulate chemicals in the EU, which reflects ongoing concern among EU Citizens: 90% of Europeans worry about the impact of chemicals in everyday products on the environment and 84% about its impact on their health (European Commission, 2023c).

One class of chemicals has recently received considerable amounts of attention[4]: Per- and polyfluoroalkyl substances (PFAS), commonly referred to as “Forever Chemicals” which are used when manufacturing fluoropolymer coatings and products that resist heat, oil, stains, grease, or water. The EU is taking actions to phase out their use where it is not essential (European Commission, 2023d). American multinational 3M announced the end of their PFAs production for 2025, which will incur initial cost of up to $1 billion and more later on. Yet longer-term legal liabilities are estimated to be over $30 billion This compares to the roughly $1.3 billion in annual sales generated from PFAs at 3M (Kary & Beene, 2022). Needless to say, PFAS litigation is not limited to 3M. DuPont and Chemours settled to pay $670 million in a lawsuit filed by thousands of people in Ohio (Maher & McWhirter, 2017) and $1.18 billion following complaints from drinking water providers (Flesher, 2023). In total, DuPont has been named in over 6000 PFAS related lawsuits (ChemSec, 2022). Other cases involve Tyco Fire Products LP and Chemguard Inc (SEC, 2020).

Following the idea of a carbon footprint, NGO ChemSec published chemical footprint for the 54 biggest chemical firms. In 2022, only four of them published a strategy to phase out hazardous chemicals from their product portfolios (ChemSec, 2022).

This risk is not going unnoticed by investors. In November 2022, 47 asset managers with a combined $8 trillion assets under management issued a call to phase-out PFAS. Besides the financial and litigation risk, the call cites the danger it poses to future generations (ChemSec, 2022).

Given that the most recent update on planetary boundaries established that the safe boundary for chemical pollution, “novel entities”, has been crossed (Richardson, et al., 2023), the pressure can only be expected to increase going forward.

Defining a path to sustainability

While there are many challenges to be overcome, most solutions don’t require major breakthroughs. For example, it is already feasible to produce plastic bottles with emissions-free chemicals at a price increase of those bottles by 1% (Energy Transition Commission, 2020). Overall, Deloitte postulates that 15 technologies can abate 90% of industry emissions (Deloitte, 2022).

Still, developing solutions at the scale and speed we need require significant investments. While there is growing investor appetite, it creates the need to be able to distinguish credible transition plans from greenwashing to avoid capital misallocation.

The first step is defining what green or sustainable really means. That is exactly what the EU Taxonomy for Sustainable Activities sets out to do (European Commission, 2020). The EU Taxonomy focuses on environmental sustainability, covering six objectives: Climate change mitigation, climate change adaptation, sustainable use and protection of water and marine resources, transition to a circular economy, pollution prevention and control, and protection and restoration of biodiversity and ecosystems. By design, all environmental objectives are equally important. The EU Green Taxonomy is designed to act as a market transparency tool and transition enabler. It is rooted in EU law as part of the EU sustainable finance framework; the Taxonomy Regulation went into force in July 2020.

Technically, the EU Taxonomy allows to assess the sustainability of economic activities, which means that entities can be assessed as a sum of their often numerous activities. It is important to note, that Taxonomy reporting will be mandatory for a large number of firms, but that does not mean that companies must comply with the criteria nor that investors must invest in a specific manner. Taxonomy reporting is carried out in terms of revenue, operating expenses (opex,) and capital expenditure (capex). If an economic activity meets all the criteria set out in the regulation, it is considered “aligned”. A company may for example report that it generates X% of its revenue from taxonomy-aligned activities or that it spends Y% of its capex on taxonomy-aligned activities.

The first step to alignment is checking whether an activity is included in the Taxonomy regulation, termed “eligibility”. If an activity is not (yet) included in the EU Taxonomy, there are no criteria to compare against and an activity cannot be aligned. Activities not covered remain out of scope for now. Once eligibility is established for an activity, three levels must be passed in order to achieve alignment. First, substantial contribution to at least one of the six environmental criteria must be proven by complying with activity specific criteria. Next, “Do No Significant Harm” (DNSH) criteria must be passed for all the other environmental objectives of the EU Taxonomy. This is to ensure that while the activity may support progress in one area it does not jeopardize achieving the other. Lastly, even though the EU Taxonomy focuses on the environment, minimum social safeguards must be met. In total, the process therefore encompasses four stages that an activity must pass to demonstrate EU Taxonomy alignment: Eligibility, substantial contribution to at least one objective, no significant harm to the other objectives and meeting minimum social safeguards. It is noteworthy that “not aligned” does not mean harmful, it simply equals not meeting the criteria to be considered substantially contributing to environmental objectives.

The European Commission offers the EU Taxonomy Compass tool for easy access and navigation of criteria. For the chemical sector, a range of activities is eligible. Figure 1 shows the substantial contribution criteria for climate change mitigation from the EU Navigator for the manufacture of organic basic chemicals. Other examples include the manufacture of plastics in primary form, the manufacture of soda ash, chlorine, aluminium, or ammonia.

In advance of the pollution prevention delegated act for the EU Taxonomy being published in 2023, the Investor Initiative on Hazardous Chemicals (IIHC), representing some of the biggest institutional investors, published an open letter addressed to the European Commission calling for robust chemical criteria (IIHC, 2023). Lobbying to weaken policy is found across sectors. For example, in the UK, lobbying efforts have been noted on fracking and exempting the chemicals sector from climate taxes (ClientEarth, 2023). InfluenceMap compiles a lobbying scorecard by analysing engagement from corporations and industry associations on climate policy. Of the 25 assessed corporations none got the highest score A, only one firm was scored B (InfluenceMap, 2023). Naturally, the EU is not alone in creating a classification system for sustainability in this regard. Indeed, in 2022 around 20 countries were at different stages of developing their version of a taxonomy. These vary widely in scope, design, and level of ambition. A noteworthy exception among the 20 countries is the US. Other large players such as China, Russia, Brazil, Canada, and Australia as well as smaller players such as the Dominican Republic or Mongolia have been more proactive.

Facilitate transition: Sustainable Finance

Corporate net zero pledges for 2050 are becoming popular; globally around 70 chemical firms have set targets (Deloitte, 2022). The UN Race to Zero Data Explorer offers a concise platform to explore the net zero targets of 500 firms globally. The tool allows to view the year when a firm aims to reach net zero and distinguishes between absolute emissions and emission intensities. A net zero emission intensity target takes the form of a “per unit” pledge, for example revenue or product. This approach may lead to a firm’s absolute emissions increasing despite intensities decreasing if the company grows. From a climate science perspective, we need absolute net zero in order to halt global warming.

Besides the pledge, the tool also contains information on whether the firms that pledge do have a transition plan on how to achieve their goals. Additionally, it gives an indication of progress on proceeding with the plan by showing emission reduction trends for Scope 1 and Scope 2 emission, and how many Scope 3 emission subcategories are disclosed. Alignment numbers for revenue, capex and opex are available as well.

While transition plans are needed to understand how a company envisions to be part of the future net zero economy, forward looking plans are no guarantee. Greenrinsing (PlanetTracker, 2023), where a firm silently drops a target which it previously published, is unfortunately emerging as a greenwashing practice. Only relying at backwards- looking measures such as past emission reductions likewise is not optimal for gauging future performance.

A big concern for both, companies with robust transition plans is therefore how to credibly communicate these. On the flipside of the coin, investors looking to invest in firms that will be profitable in a net zero economy need a way to ensure investee firms indeed transition.

This is where sustainable finance can offer remedy. Different innovative financial instruments have evolved in the green and sustainable finance space. The general idea is instead of just publishing words and plans, to “put your money where your mouth is” and link financing to sustainability.

A more established instrument are green bonds, which are supposed to directly finance green activities. Academic research finds that these are considered a credible instrument to communicate commitment to the environment (Flammer, 2021). Flammer (2021) finds benefits both on the environmental side – lower emissions and higher environmental ratings – as well as on the financial side, in the form of a diversification of the investor base and more long-term ownership.

One particularly suitable instrument for transitioning is sustainability-linked debt. First it is noteworthy that the debt market has a key role to play in supporting the transition as primary market transactions occur periodically, according to refinancing cycles. This is not the case for equity, where the majority of transactions occur between investors on the secondary market. In this case, the corporate cash flow is not directly affected (Hoepner & Schneider, 2022b).

Sustainability-linked bonds (SLBs) are one type of sustainability-linked debt, which the International Finance Corporate (IFC, World Bank Group) recently called “one of the fastest-growing corners of finance” (IFC, 2023). Their unique feature is that future sustainability targets are directly linked to cost of capital through coupon step up (or down) payments. Effectively that means that a borrower commits to certain sustainability targets in the future and incurs a financial penalty when missing them. For the investor on the other hand, it means that in case the issuer does not follow through on their promise they get financially compensated. Table 2 shows an example of a sustainability-linked bond from the chemical industry.

SLBs are general purpose financial instruments and differ conceptually from green bonds, which are use-of-proceeds type of instruments. The difference in design allows sustainability-linked bonds to be applied more generally and to finance the transition of not yet green activities (forward looking Key Performance Indicators for sustainability performance). On the other hand, the proceeds of a green bond must be allocated to activities which are already green (backwards looking). This likewise means that while a SLB can be used for refinancing of any maturing security, a green bond can only refinance green activities. Overall, the hypothetical amount of issuance for SLBs is unlimited – any bond issued could be sustainability-linked – while the amount feasible to be issued as green bonds is limited to the volume of existing green activities. Other important differences include how the greenness is priced: While the Greenium for green bonds is determined in the market, SLBs have step up (or down) or penalty payments as legally enforceable covenants. Covenants are by no means a new concept in finance, predating their use in SLBs, and therefore easily applicable.

Still, in the nascent markets greenwashing concerns are not negligible. Unambitious or irrelevant targets may delay real progress. For climate change, especially in energy related sectors, all three emission scopes should be addressed. Absolute emission reductions should be prioritized over emission intensity improvements. In Signalling Theory (Spence, 1973), a signal must be costly to be credible.

Thus, imposing substantial penalties for missing targets are key. Here the devil may be in the detail: Do payments occur throughout the duration of the bond and accumulate when targets continue to be unmet or is there only a once off payment close to maturity? Ul Haq and Doumbia (2023) point out structural challenges while Erlandsson et al. (2022) offer a risk-neutral present value scenario approach for the pricing of step-down structures.

There are some support resources available to foster SLB uptake and ensure their integrity, though so far these are voluntary. For example, the International Capital Market Association (ICMA) has published Sustainability-Linked Bond Principles including an illustrative KPIs registry (ICMA, 2023). It is notable that the language around penalties for missing targets is soft and indicates optionality, despite being recognised as a key feature:

“The cornerstone of an SLB is that the bond’s financial and/or structural characteristics can vary depending on whether the selected KPI(s) reach (or not) the predefined [Sustainability Performance Target(s)], i.e. the SLB will need to include a financial and/or structural impact involving trigger event(s).“ The Climate Bonds Initiative (CBI) also issues guidance for sustainability-linked bonds as transition finance instruments (CBI, 2022a). These specifically stress the importance of strong structures around call dates and KPI observation dates.

Increased scrutiny can be observed as the sustainable debt market is maturing. This is for example evident in increasing amount of green bonds being rejected by CBI because of quality concerns (CBI, 2022b): 1 in 4 US Dollars did not meet their standards. The majority of the excluded bonds originated from China.

Yet the bond market is not the only place where sustainability metrics get linked to cost of capital. Sustainability- linked loans (SLLs) are similarly becoming popular. In 2019, specialty chemical firm Kemira agreed on three sustainability KPIs for its five year 400 mio EUR revolving credit: emission efficiency, generating half its revenue from products enhancing customers’ resource-efficiency and maintaining the highest rating from external rater EcoVadis (Kemira, 2019). Other examples of industrial firms taking SLLs include DSM, Indorama Ventures, Solvay, and Stora Enso.

The flexible design of linking capital cost to sustainability indicators naturally allows to factor in different facets of sustainability, beyond climate change mitigation. For the chemical industry, indicators revolving around recycling and pollution prevention seem sensible – a conceivable KPI could be the phase out of PFAS. The example of Lanxess’ 1 bn EUR revolving credit facility demonstrates that also social goals are feasible: Interest rates are not only linked to the successful reduction of its CO2e emissions (Scope 1) but also raising the share of women on the top three management levels (Lanxess, 2021). This case also highlights that multiple targets can easily be featured in the same sustainable debt instrument.

Even if a company does not participate in the sustainable finance market, the traditional corporate financing of a firm will also be affected by sustainability. “ESG” – the acronym for environmental, social, and governance factors – is considered by rating agencies when assessing credit worthiness (see for example Moody’s scorecard (Moody’s, 2022).

Conclusion

Overall, the chemical industry could play a key enabler role in the sustainable transition of our economy. While there are many challenges to be resolved, the chemistry underlying supply chains especially in the manufacturing industries could be the engine of innovation.

Greenwashing poses a real threat and must be managed as a risk. The underlying targets for sustainability-linked debt must be ambitious and relevant, and penalties for missing targets substantial. While the sector in the past had been “a blind spot” (Hawker, 2021) for investors, the increased interest will also bring more scrutiny. Additionally, changing regulation is adding to pressure in transition risk.

To unlock the power of the sector, significant investment is needed. Innovative sustainable finance instruments when applied appropriately could hereby be a catalyst for change. Sustainability-linked debt has successful been obtained by firms in the sector. It could be a key tool to both raise funds for the transition and credibly communicate transition plans to capital providers.

### 1NC – CP - Equity

Equity CP

#### The United States federal government should substantially strengthen its protection of collective bargaining in equity for employees of religious institutions.

#### Protecting collective bargaining in equity solves the case better by providing a flexible framework to defeat employer opportunism.

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Companies utilize postemployment restrictions in order to prevent competitors and employees from appropriating confidential information and customer relationships.9 The public policy benefits derived by enforcing these covenants are the protection of proprietary interests, facilitation of investment in research, and the encouragement of development in human capital (personnel).10 The public policy costs of enforcing restrictive covenants include the potential of limiting competition, impeding the dissemination of information, and retarding the economic mobility of employees.11 These conflicting concerns have been the motivating factor in continued judicial scrutiny of restrictive employment covenants.12 This article will explain the evolution of restrictive covenants in the employment setting and then analyze an overlooked aspect of covenant-not-to-compete enforceability—the role of equitable doctrines.

Part II of this article describes the genesis of postemployment restrictions and the surrounding jurisprudence.13 Part III of this article examines the case of UZ Engineered Products Co. v. Midwest Motor Supply Co., Inc. (Kimbell-Midwest).14UZ Engineered Products Co. is a case of first impression in which one employer argued the unreasonableness of restrictive covenants in a competitor's employment agreements. The novelty of the case is that the challenging party utilized identical covenants with its employees. This ingenuousness implicates the theories of equity discussed in Part IV. Part IV reviews the different types of equitable defenses and assesses their availability to bar a business from challenging the validity of the restrictive covenants of a competitor when its own employees are bound by restraints with the same or similar terms. The discussion involves three distinct, but related doctrines of estoppel, along with the doctrines of implied waiver and “clean hands.”15 By tracing these doctrines through three centuries of jurisprudence, the article explores the applicability of the canons of equity to modern-day business relations.

Part V proposes the implementation of an equitable ban to bar challenges to the enforceability of restrictive covenants in competitor-versus-competitor cases. Given the overriding public policy concern of protecting the ability of employees to pursue their livelihoods,16 however, prudence is suggested in considering the wholesale importation of equity into the existing legal framework. The article concludes by offering guidance on the convergence of law and equity in a way that pragmatically incorporates modern ideas about the role of ethics, the value of human capital, and the economic and social advancement of society.

II. LAW OF RESTRICTIVE COVENANTS

This section outlines the evolution of the law of restrictive covenants in employment from the apprentice system of the Middle Ages through the American Revolution and to the present. The use of restrictive covenants in the employment relationship began during the English guild system. They were primarily used to bind apprentices to their masters for unreasonably long periods of time. The illicit use of restrictive covenants explains the long-standing judicial hostility toward them. The erosion of the guild system led to the adoption of a reasonableness analysis during the industrial revolution that became the law in the American colonies. This approach allowed courts to stay true to freedom of contract principles while at the same time allowing them to scrutinize the enforcement of restrictive covenants. During the last century, application of the rule began to shift slightly from concerns of employees to employer protection.

A. Apprentice System in England: Public Policy of Employee Protection

Employers began utilizing restrictive covenants in England as early as the fifteenth century.17 During this era, the craft guilds were the prevalent means of entering a trade and earning employment.18 The guilds serviced their communities not only as a particular form of economic organization, but also by embodying “‘a whole social system’ sanctioned ‘by the force of public opinion and the pressure of moral and social conventions.’”19

The classes of members that constituted the guild system included masters, journeymen, and apprentices.20 Apprentices learned their trade by indenturing themselves to master craftsmen for a customary period of years.21 Upon completion of tenure for nominal or no wages, the apprentice would be free to practice his trade for hire until he could gain entry to the elite group of craftsmen.22 For safety and social reasons, master craftsmen usually set up their businesses in the same town in which they had served as an apprentice.23

In addition to significant entry barriers to employment, difficulty of relocating geographically, and lack of flexibility in changing trades, the labor market became increasingly competitive during the late medieval period.24 As a result, master craftsmen devised strategies to delay the members of the two lower classes from advancing to the next level on the hierarchy.25 One such stratagem used by enterprising masters was to bind apprentices to longer than customary periods of servitude.26 This tactic was, in effect, a self-enforced covenant not to compete. Whether to alter the erosion of traditional practices or to protect the apprentice from unethical masters engaging in anticompetitive activity, courts held that the longer periods of indenture were illegal per se.27

B. The Industrial Revolution: Development of a “Rule of Reason”

Gradually, over the course of the next three hundred years, the British economy began its transition to free market capitalism in the wake of colonial expansion and the industrial revolution.28 With the changed industrial scene, the widespread reliance on the guild system of the late medieval period dissipated.29 Indentures binding apprentices to longer than customary periods of servitude were replaced with contracts limiting future competition by former employees.30

The prevalence of factory work lowered entry barriers to particular career paths as aspiring workers traded years of service through the apprenticeship system for minimal training in specialized factory jobs.31 The physical dangers and economic risks of travel lessened so that individuals in search of work were able to pursue greater geographic mobility.32 Because of the breadth and scope of factory operations, however, personal relationships between master and servant weakened.33 Without the long-standing social bond, workers became more dependent than ever on their chosen occupations.34

It was against this laissez-faire economic background that the black letter law declaring all personal restraints of trade void as against public policy was transformed to a doctrine of reasonableness.35 In applying this new standard, English judges balanced the interests of the employer, employee, and society on a case-by-case basis.36 Essentially, the courts examined the reasonableness of the restraint in terms of time and scope in relation to the employer's purpose for requiring the covenants.37 The articulation of the reasonableness doctrine eventually came to be known as the “rule of reason.”38

In comparing the benefit to the employer against the burden to the employee within the context of the existing social and economic system, judges were no longer reacting with the same degree of paternalism once exhibited toward apprentices in the guild system.39 Rather, courts in the industrial age adapted the rule of reason to modern conditions and the philosophical ideas of economic liberalism.40 Consequently, when employees bound themselves to contracts that limited their economic liberty, the courts were faced with the need to balance the preeminent societal values of freedom of the market against freedom of contract.41

C. Restrictive Covenants in America: Adoption of the Rule of Reason

The British approach to the enforceability of restrictive employment covenants was ultimately adopted in United States after the Revolutionary War.42 As the U.S. economy shifted from agrarian to industrial-based, evolving American legal principles reflected the increasing importance of economic liberty.43 Nevertheless, the reigning freedom of contract philosophy did not fully dominant the specialized area of restrictive employment covenants and the reasonableness test stood as a counterweight to unfettered freedom of contract in the employment area.44 In applying the standard to covenants against competition, American courts were more sensitive than those in England to the burdens placed on employees.45

American courts, however, did acknowledge that the altered labor market following industrialization eliminated many of the objections to enforcing restrictive covenants of employment.46 Despite the decline in employee bargaining power due to the demise of the craft unions and their monopoly on skilled labor,47 judges examining the validity of postemployment restraints frequently noted the ease of changing careers, the shortage of labor, and the expanding opportunities to engage in commercial activities.48 Thus, even prior to the New Deal legislation that alleviated the burdens of individual workers,49 cases upholding covenants not to compete were becoming more common.50

The pendulum began to swing in favor of workers during the decade of the Great Depression. The rise of the industrial organization had led to a concentration in the ownership of productive property and greater inequalities in private economic power.51 An increasing number of individuals without significant productive property became dependent on industrial employment.52 Management of these large-scale companies had seized control of the production processes and redesigned them in an attempt to eliminate the problems of unskilled labor and diminished loyalty.53 As public confidence in business collapsed with the stock market crash of 1929,54 the application of the rule of reason was marked by greater caution and more careful scrutiny of restrictive covenants.55

Following the Great Depression, a human resource policy known as “scientific management” gained popularity.56 It was characterized by defined job duties, promotion and retention policies, and longevity-linked benefit packages.57 Even with the prevalence of lifetime tenure at most major companies by mid-century, however, the existence and enforcement of covenants not to compete were a matter of public concern.58 While continuing to engage in an interest balancing analysis under the rule of reason, many courts were still rooted in notions of worker protection.59

During its hundred-year history in America, the rule of reason was refined from random interest balancing to a more structured “ends–means” analysis.60 As an initial matter, courts assessed the purpose for which the employer sought protection from competition by its former employees.61 Only if the employer was deemed to have a protected interest that the law acknowledged would the court then proceed to evaluate the content of restrictions for their reasonableness.62

Precedent soon established that employers had two interests worthy of protection in the form of a covenant not to compete in the employment situation.63 First, courts held that an employer had a legitimate interest in retaining its customer base.64 A company was entitled to the protection of its customer base in industries characterized by indistinguishable products, competitive prices, and heavy reliance on personal selling.65 Second, courts repeatedly ruled that an employer had a legitimate interest in restraining the dissemination of its trade secrets and other confidential information.66 Covenants with conditions that extended beyond the use of such knowledge and client influence were not enforced.67

D. Recent Developments: Enforcement and Employer Protection

The economic output of the country shifted from manufacturing products to services during the final quarter of the last century.68 At the same time, the United States entered what has since been deemed the “information age.”69 Unlike the prior transformation from agrarian to manufacturing, where business relied primarily on physical labor and workers moved from farms to factories, the new knowledge-based economy utilizes mental labor and creativity as the primary sources of production.70

In order to keep pace with growing competition from abroad and the speed of technological change, the scientific management structures of the large manufacturing firms have begun to dismantle.71 Limited positions of entry, hierarchical job ladders, and long-term employment have increasingly been replaced with short-term employment, lateral mobility, general training, and skill development.72 Organizational behavior theories such as “competency-based organizations” and “total quality management” have been espoused to replace “scientific management.” Company strategies emphasize organizational flexibility, product quality, speedy delivery of goods and services, and adaptability to customer desires.73 This shift in the nature of production has been described as the “new workplace” involving “just-in-time production, just-in-time product design, and just-in-time workers.”74

The recognition of individual skills and knowledge as a source of competitive advantage has made it difficult to distinguish between the employee and his or her work product. “The transmission of skills, experience, and composite knowledge … [has become] inextricably bound up with the employees themselves.”75 The development of the worker as an employer-generated composite of knowledge and skills has been coupled with an increase in career mobility.76 Technological advances and remote computer networking additionally provide increased geographic flexibility as individuals pursue “boundaryless” careers.77 This dynamic environment has changed the employment relationship not only physically, but also psychologically.78 An emerging “social” or “psychological” contract of employment has been used to describe modern employment relationships.79 Employers are recruiting employees by offering human capital development.80 Employees, in turn, increasingly measure the value of employment in terms of the market value of human capital development being offered and not by the older notion of job security.81 Notwithstanding these changing attitudes and conditions in the labor market, the English rule of reason remains the doctrinal scheme in a majority of states in this country.82

Notions of substantive fairness, implicated by increased investments by employers in employee development and the subsequent trading by employees of their human capital to the highest bidder, has opened the pro-employee slant of the reasonableness analysis to criticism.83 Some commentators have emphasized an economic perspective in analyzing restrictive covenants and advocate greater judicial enforcement.84 It is clear that businesses will continue to utilize contracts restraining competition in an effort to police faltering employee loyalty and to retain their competitive edge.85 The judicial trend also seems to be toward favoring employers in the protection of company-developed human capital and legitimate proprietary interests.86

III. A CASE OF FIRST IMPRESSION: UZ ENGINEERED PRODUCTS CO.

UZ Engineered Products Co.87 represents the first case in the country to prohibit a challenge to the validity of postemployment conditions based upon principles of equity. UZ Engineered Products Co. (UZ) and Kimbell-Midwest compete in the maintenance, repair, and operations (MRO) industry.88 They are among ten highly competitive businesses that sell nuts, bolts, and other small parts to a variety of companies engaged in the maintenance and repair of equipment throughout the country.89 The companies in the MRO industry primarily sell their products through sales representatives who work solely on commission and make personal calls on active and potential customers.90

The importance of the sales force in the industry compels each company to expend significant effort and money training its sales personnel in customer development, company products information, and selling techniques.91 The competitive nature of the industry, however, creates a high attrition rate for sales employees lured away by competitors.92 As a result, MRO companies attempt to protect their customer bases and investments in personnel by executing contracts with employees containing temporal and geographic postemployment restrictions.93

A. The Facts

Over a one-year period, Kimbell-Midwest hired six salespersons of UZ and assigned them to geographic territories that substantially overlapped their previous sales territories at UZ.94 Kimbell-Midwest knew that all six employees were bound by employment contracts with UZ containing noncompetition and nonsolicitation covenants.95 The covenants specified that for a period of two years after leaving UZ, the salespersons would refrain from competing in their former sales territories and from soliciting UZ customers or other UZ employees.96

Kimbell-Midwest's interference with the contracts of UZ employees began with the hiring of Jeffrey Moore.97 Mr. Moore worked for UZ as a sales manager for nearly two decades before accepting a similar position with Kimbell-Midwest.98 The territory assigned to him was the same as the one he had managed for UZ.99 After joining Kimbell-Midwest, Mr. Moore began soliciting UZ employees in violation of the nonsolicitation covenant.100 As a result of his efforts, five other employees quit their jobs with UZ and began working with Kimbell-Midwest.101 Kimbell-Midwest placed the former UZ employees in exactly the same territories that they had worked for UZ in violation of the noncompete clauses in their employment contracts.102 In further violation of their restrictive covenants, these employees began calling on their former customers.103

B. The Lawsuit

Given the highly competitive nature of the industry, the investment in training, and the significance of personal selling, Kimbell-Midwest's successful solicitation of six members of the UZ sales force in violation of their restrictive covenants caused UZ to suffer significant financial losses and harm to its reputation.104 UZ sued Kimbell-Midwest seeking compensatory and punitive damages.105 In its complaint, UZ alleged claims of unfair competition and tortious interference with contract and business relations against Kimbell-Midwest for inducing the unlawful actions of its former employees.106

Kimbell-Midwest asserted various affirmative defenses.107 It also counterclaimed for a declaratory judgment that UZ's noncompetition and nonsolicitation agreements were unreasonable and unenforceable.108 UZ replied to the counterclaim and maintained, inter alia, that Kimbell-Midwest should be precluded from contesting the restrictive covenants because its own employment agreements contained the same restrictions.109

At the trial, the president and owner of Kimbell-Midwest testified that restrictive covenants were “important” to the MRO industry.110 He further conceded that his company not only had the same restrictive terms as UZ in its own agreements, but that it also enforced those conditions.111 Kimbell-Midwest's president additionally admitted that his company had confessed as part of a settlement with another competitor that the same restrictions were reasonable and enforceable.112

The court determined as a matter of law that all of the restrictive covenants in UZ's contracts were enforceable as written.113 It concluded that the time and geographical restrictions imposed on UZ's former employees were reasonable and appropriate to protect its interests in the MRO industry.114 In fact, the trial court declared that “[u]nder no circumstances is this agreement unreasonable.”115

In reaching its decision to enforce the postemployment restrictions, the court declined to consider the fact that Kimbell-Midwest executed similar agreements with its own employees.116 As such, the doctrine of estoppel was not addressed by the court in assessing the validity of the restrictive covenants.117 The trial court explained:

[I]t's very difficult for this court to believe that [plaintiffs] should be able to sit here with their own agreements and argue that other people's agreements are invalid and they continue to use their own. But I don't think that's a factor that's supposed to be taken into consideration by me in making that determination.118

In its verdict, the jury found Kimbell-Midwest liable for tortiously interfering with the contracts between UZ and its former employees.119 It awarded both compensatory and punitive damages.120

On appeal, Kimbell-Midwest challenged the jury award of damages as well as the trial court's determination that the restrictive covenants were reasonable and valid.121 UZ asserted a cross-assignment of error that its contract conditions were additionally enforceable pursuant to the doctrine of estoppel.122 UZ urged that an equitable ban was justified due to Kimbell-Midwest's contradictory conduct in challenging the negative employment covenants of UZ while having and enforcing its own.123

The appellate court agreed. It opined that “the trial court properly could have considered the effect of estoppel in evaluating the reasonableness or enforceability of the noncompete agreements.”124 Persuasive to the court in finding Kimbell-Midwest estopped from challenging the enforceability of UZ's postemployment conditions were the “virtually identical” territorial and time restrictions, an admission during trial by the company president that Kimbell-Midwest enforces its contract restrictions, and its prior settlement with another MRO company agreeing that the restrictive covenants were reasonable and enforceable.125 Accordingly, the court of appeals adopted equity and precluded Kimbell-Midwest from seeking to void UZ's restrictive covenants on grounds of public policy.126

IV. EQUITABLE DEFENSES

When two competitors require their employees to execute identical postemployment restrictions, should maxims of equity preclude the defendant from challenging the enforceability of those restrictions in the plaintiff's contracts? The equitable principles applicable in such a situation are estoppel, clean hands, and implied waiver. Developed by judges more than two centuries ago using broad notions of fairness, these principles are applied to defeat the assertion of inconsistent positions in a court of law.127 Because the doctrines rest on common ethical precepts and public policy rationales, one or more of these equitable defenses can be used to remedy contradictory positions in litigation.128 The power granted under these doctrines permits both plaintiffs and defendants to block issues, claims, and, in some circumstances, entire cases.129

A. Doctrines of Estoppel

There are many equitable doctrines designated as “estoppel.” Even those with the same label have different formulations or applications depending on the factual circumstances.130 By their very nature, estoppel doctrines are not susceptible to fixed rules and formulaic application. As a result, courts frequently blur the distinctions between the estoppel doctrines and use the terms interchangeably.131

Notwithstanding the confusion in name and application, a number of estoppels are available to bar companies and their counsel from insisting, at different times, on the truth of two conflicting positions.132 Four of these—equitable estoppel, judicial estoppel, collateral estoppel, and quasi-estoppel—are discussed below.

1. Equitable Estoppel

Equitable estoppel or estoppel in pais “can be traced to the English kings who ‘estopped’ the enforcement of decisions by the medieval ‘courts of the common law.’”133 Equitable estoppel originated in contract cases and is frequently invoked under the name of “promissory estoppel.”134 Scholars have also recognized the doctrine of equitable estoppel as an extension of the duty of good faith and fair dealing imposed upon each party to a contract.135 The obligation is violated by “dishonest conduct such as … asserting an interpretation [of the contract] contrary to one's own understanding or falsification of facts.”136 Invariably, “this principle, so equitable and legal, runs throughout all the transactions and contracts of civilized life.”137

Equitable estoppel generally provides that a party may not take a position in litigation when that position is inconsistent with earlier conduct and the change would unfairly burden the other party. The object of equitable estoppel “is to prevent the unconscientious and inequitable assertion or enforcement of claims or rights which might have existed or been enforceable by other rules of law, unless prevented by the estoppel.”138 The court in Blake v. Irwin139 listed a number of prerequisites for the application of equitable estoppel:

(1) an admission, statement, or act (including silence or inaction) is inconsistent with the claim that is later asserted and sued upon; (2) an action taken by second party on the faith of the admission, statement, or act [reliance]; and (3) an injury occurs to the second party if the first party is permitted to contradict or repudiate his admission, statement, or act.140

In assessing whether the foregoing three requirements have been met, courts have remained vigilant in protecting the rights of litigants against whom the doctrine of equitable estoppel is asserted. Courts have warned that the doctrine “should be applied with care and caution and only when all elements constituting estoppel clearly appear.”141 Other courts, however, view the doctrine as furthering the truth-seeking mission of the court and regularly invoke the doctrine to estop the assertion of inconsistent positions.142

In addition to actual reliance on the inconsistency, many jurisdictions mandate that the reliance be reasonable under the circumstances.143 Notably, the requirement of “reliance” itself necessarily implies a prior relationship between the two parties to the litigation.144 Therefore, a stranger to a transaction cannot assert or be bound by an estoppel that arises therein.

A litigant averring equitable estoppel must ordinarily show the party to be estopped had asserted the contradictory position willfully or through culpable negligence.145 While the scienter element is not a model of clarity, it appears that negligence, reckless disregard, or knowledge are sufficient, and that bad faith or fraud are not required.146 Thus, the doctrine of equitable estoppel is operative although the one making the representation believes the statement to be true.147

Courts have long viewed equitable estoppel as a flexible doctrine to be applied or denied as weighted by the equities between the parties.148 The Ohio Court of Appeals' invocation of “estoppel” in UZ Engineered Products Co. to bar a challenge to the validity of employment restrictions evidences this philosophy.149 Despite the facts that UZ had no knowledge of the terms of Kimbell-Midwest's restrictive covenants during the period of time that Kimbell-Midwest was raiding the UZ sales team and that there was no prior relationship between the two litigants to support a claim of reliance, the court still applied estoppel against Kimbell-West.150

2. Judicial Estoppel

Judicial estoppel, sometimes known as “the doctrine of preclusion”151 was originally established in the United States during the Civil War era.152 While judicial estoppel does not possess the universal acceptance of equitable estoppel,153 those jurisdictions that do recognize it apply the doctrine to prevent a litigant from arguing inconsistent positions in the same or different proceedings.154

The conduct or statements to which the doctrine applies is narrower than equitable estoppel in that a party must make the prior inconsistency during a judicial155 or quasi-judicial156 proceeding.157 Moreover, some courts limit judicial estoppel to only sworn oral or written statements.158 Equitable estoppel applies regardless of whether the party asserted the prior position was in litigation or another context.

However, in contrast to equitable estoppel which typically estops only conflicts of fact and, occasionally, opinions, the maxim of judicial estoppel has been invoked to bar contradictory positions of law as well.159 Additionally, judicial estoppel applies without regard to the requirements of privity160 or reliance161 required by the doctrine of equitable estoppel.162

The differences between equitable and judicial estoppel reflect the differences in their underlying purposes.163 While the doctrine of equitable estoppel is directed to the relationship between the parties, the rule of judicial estoppel is intended to prohibit improper use of the judicial process.164 Judicial estoppel prevents the perversion of the judicial system by protecting “the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories.”165

The U.S. Supreme Court recently identified three criteria that typically inform the decision to apply judicial estoppel: (1) whether the two positions are clearly inconsistent, (2) “whether the party succeeded in persuading the court to accept its earlier position,” and (3) whether “the party … assert[ing] [the] inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party.”166

In ascertaining the meaning of a “clear inconsistency,” courts have explained that the “truth of one must necessarily preclude the truth of the other.”167 Some courts, however, are careful to look beyond any apparent inconsistency to ensure that the positions are truly inconsistent.168

On the issue of what constitutes “acceptance” in the prior proceeding,169 courts have refused to elevate that requirement to “prior success” on the merits.170 In fact, courts have found judicial acceptance by the mere consideration of the earlier position171 or if the party gained a settlement based on the prior position.172

In analyzing the element of “unfairness,” many jurisdictions have required the inconsistency to be intentional in nature.173 One commentator states that the “gravamen of judicial estoppel … is the intentional assertion of an inconsistent position that perverts the judicial machinery.”174 Hence, judicial estoppel is inapplicable when a party's prior position was based on inadvertence or mistake.175 A change in the facts and circumstances has also been held to constitute reasonable grounds for asserting inconsistent positions.176

Despite the doctrinal framework provided by the Supreme Court's three criteria,177 courts have observed that “[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle.” Although courts recognize that there is “no pat formula for applying judicial estoppel,”178 all three criteria possess long-standing acceptance in the common law.179

In asking for judicial estoppel, UZ would have avoided the necessity of proving reliance and mutuality (prior relationship) usually required by equitable estoppel.180 The fact that the president of Kimbell-Midwest admitted during the trial that his company enforced similar terms in its own agreements and that such covenants are important to the MRO industry provided compelling support for the application of judicial estoppel.181

The strongest argument against the application of the doctrine in restrictive covenant cases is the difficulty of proving clear inconsistency in a party's positions. This is because the validity of the conditions depend on the case-specific facts, such as the length of employment of the individual employee, the type of training provided by the employer, and the ability of the employee to find work in another industry or geographical area.182 Nevertheless, the flexibility and adaptability of the doctrine of judicial estoppel should allow it to be used in order to prevent the manipulation of the judicial process exhibited in UZ Engineered Products Co.

3. Collateral Estoppel

Collateral estoppel is another doctrine employed to avert the threat that inconsistent positions pose to the integrity of the judicial process.183 A species of the res judicata doctrine, it is commonly referred to as issue preclusion. Issue preclusion or collateral estoppel refers to the effect of a prior judgment in precluding subsequent litigation of the same issue of fact or law.184

Issue preclusion applies whether or not the issue arises on the same or a different claim.185 The issue decided in the earlier proceeding must be identical to the issue given preclusive effect in the subsequent proceeding.186 Issues are considered “identical” when the same facts and evidence will support a finding in both cases.187 The fact that the second litigation involves a different contract than the first litigation does not preclude estoppel if the two contracts have the same or similar terms.188 However, the doctrine ordinarily requires that the litigant estopped be the same party or in privity with the party to the former action.189

The collateral estoppel doctrine may be utilized offensively or defensively against an opposing litigant. Defensive use estops a plaintiff from relitigating issues that the plaintiff previously litigated against another opponent.190 Offensive use estops a defendant from relitigating issues that the defendant previously litigated against another opponent.191 Due to the potential unfairness that may result from offensive collateral estoppel, courts require proof that the defendant had sufficient incentive and opportunity to litigate in the first case.192 While the preclusive effect of collateral estoppel is usually given to a former losing position, courts have also applied it to bind a litigant from controverting a former prevailing position.193

Unlike judicial estoppel, collateral estoppel requires the party in the previous lawsuit to have had a full and fair opportunity to litigate the issue that was relevant to the underlying position.194 Additionally, collateral estoppel requires the litigation to have been the subject of a final judgment as compared to judicial estoppel, which prevents inconsistent positions whether or not they were the subject of a final judgment.195 Similar to judicial estoppel, collateral estoppel attaches to court decisions as well as quasi-judicial decisions of administrative agencies and arbitration panels.196 The policies advanced by collateral and judicial estoppel are also the same. The U.S. Supreme Court explained that the objective of the doctrine of collateral estoppel is to “‘foster … reliance on judicial action by minimizing the possibility of inconsistent decisions' and to protect the judicial system from acquiring the ‘aura of [a] gaming table.’”197

When a competitor's position on the enforceability of restrictive covenants is incorporated into a judgment, the doctrine of collateral estoppel may apply to bar the company from litigating a contrary position.198 In UZ Engineered Products Co., for example, the confession of judgment in the settlement of the prior lawsuit constituted a basis for collateral estoppel.199 While the admission that the terms in another competitor's contract were reasonable and enforceable did not have a judicial imprimatur, the Restatement (Second) of Judgments allows a former settlement to be considered a “final judgment.”200 Case law also confirms that the issues are “the same” if the contract terms are identical, regardless of whether those terms arose in the restrictive covenants of UZ or another competitor.201

4. Quasi-estoppel

Courts have acknowledged principles analogous to equitable estoppel that fall under the rubric of quasi-estoppel, which is also referred to as “estoppel by acquiescence” or “estoppel by election.”202 The concept of quasi-estoppel was recognized by the U.S. Supreme Court at the end of the nineteenth century in Simmons v. Burlington, Cedar Raids & Northern Railway Co.:203

“He who seeks equity must do equity,” and “He who comes into equity must come with clean hands.”“Even when it does not work a true estoppel upon the rights of property or of contract, it may operate by analogy to estoppel—may produce a quasi estoppel—upon the rights of remedy.”204

Similar to the other estoppel concepts, quasi-estoppel is invoked when “the conscience of the court is repelled by the assertion of rights inconsistent with a litigant's past conduct.”205

Like judicial estoppel, quasi-estoppel does not apply if the litigants based the prior inconsistent conduct on mistake or inadvertence.206 In contrast to traditional notions of equitable estoppel, however, no reliance is necessary for the application of quasi-estoppel.207 Furthermore, unlike judicial estoppel and collateral estoppel, the prior contradictory position need not have been asserted in a judicial setting.208 Notwithstanding the minimal evidentiary requirements as compared with other estoppel doctrines, courts have described the doctrine of quasi-estoppel as requiring the inconsistent conduct to either benefit the party acting inconsistently or cause some detriment to the opposing party.209

The change of positions must also yield a consequence that the court deems “unconscionable.”210 The Supreme Court of Wyoming described the concept of unconscionability as “a form of fraud recognized in equity.”211 Similar to the defense of unconscionability under contract law,212 the fraud should be “apparent from the intrinsic matter and subject of the bargain itself; such as no [person] in his senses and not under delusion would make on the one hand, and as no honest and fair [person] would accept on the other.”213 A textbook example of quasi-estoppel occurs when litigants seek to challenge the validity of a contract or other document when they had previously relied on its validity to their advantage.214

Whether the invocation of quasi-estoppel arises in a contract or other setting, it is a flexible doctrine that courts apply to prevent injustice in those jurisdictions that recognize it.215 As is true with other estoppel doctrines, quasi-estoppel provides the flexibility that allows courts to intervene to prevent a litigant from contradicting its position regarding the enforceability of postemployment restrictions. The omission of “voluntariness” as an element of quasi-estoppel further allows its application to restrictive covenant cases even where the former employees claim that they had no choice but to sign such agreements.216

B. Doctrine of Implied Waiver

A litigant may establish the equitable defense of implied waiver by implication through intentional conduct inconsistent with asserting a legal right.217 Waiver and estoppel are related but distinct concepts.218 The intent to relinquish a right is a necessary element of waiver, but not estoppel, while detrimental reliance is a necessary element of equitable estoppel but not waiver.219

The doctrine of implied waiver has been raised in a variety of factual settings220 and litigants most often use it in cases concerning contracts.221 Because “[i]mplied waivers are generally not favored in the law,”222 the requisite intent to waive a legal right must be found by clear, decisive, and unequivocal conduct.223 The Supreme Court of Alabama stated that “waiver requires the intentional relinquishment of a known right, and that intentional relinquishment must be shown in an unequivocal manner.”224 For example, an employer may not intend to forever bar future challenges to the validity of certain restrictive covenants by entering into a settlement conceding the reasonableness of such restrictions. A court may deem a company, however, to have intended to relinquish the right to challenge the validity of restrictive covenants when those same terms are incorporated in its own agreements. Evidence of any attempted or actual enforcement of those same terms would provide further confirmation of intent sufficient to invoke the doctrine of implied waiver. Accordingly, when a competitor has the same or similar employment agreements, the doctrine of implied waiver provides an additional ground to bar the competitor from challenging the restrictive covenants in other companies' agreements.

C. Doctrine of Clean Hands

Since the English barrister Richard Francis first coined the phrase,225 it has been a well recognized canon of equity jurisprudence that “[a]ny party seeking equitable relief must come to the court with ‘clean hands.’”226 The U.S. Supreme Court declared:

[T]hat whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.227

The clean hands doctrine is distinguishable from the equitable maxim that “one seeking equity must do equity.”228 The latter principle is “concerned primarily with the rights and duties of the parties.”229 The clean hands doctrine is “concerned primarily with protecting the [integrity of the judicial process] from improper action by a party.”230 The maxim is grounded on the historical concept that a court of equity represents the collective conscience of the public.231

In determining what constitutes “unclean hands,” courts have declared that the “misconduct need not necessarily have been of such a nature to be punishable as a crime or as to justify legal proceedings of any character.”232 Instead, courts agree that “[a]ny willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for invocation of the maxim.”233 In applying the doctrine, courts have described the required level of misfeasance as being “inequitable,”“unconscionable,” or deriving from a “bad motive.”234 The kind of conduct that lacks a proper equitable nature includes conduct that does not conform to “minimum ethical standards” in business.235

Courts of equity apply the clean hands doctrine only where the unconscionable act has a direct relation to the matter in controversy.236 In other words, the violations of conscience must affect the equitable relations between the parties concerning “something brought before the court for adjudication.”237 While it is difficult to reconcile those cases determining if misconduct is related to the lawsuit or merely collateral, litigants may invoke the doctrine even if they have not suffered from the misconduct of their opponent.238 Indeed the relevancy limitation does not wash a party's hands clean simply because the harm is to a third person or to the public.239 Courts have liberally invoked the clean hands maxim to bar relief due to conduct that is in any way related to the lawsuit.240 For instance, in a case between business competitors, a New York District Court invoked the maxim even where the deception constituting unclean hands worked no fraud on the defendant.241

In comparison to the equitable principles of estoppel, the clean hands doctrine is broader in application.242 The doctrine is neither restricted in its use to a particular kind of prior conduct, such as in the case of judicial estoppel, nor does it require reliance on previous acts as a predicate to relief.243 The absence of the requirement of prejudicial reliance allows the principle of clean hands to operate notwithstanding the lack of prior dealings between the parties.244

The clean hands doctrine is also more expansive than the equitable principle of implied waiver. Under the former principle, there is no need to prove that the party to be estopped intended to abandon a right asserted in the case by its previous conduct. In fact, the principle of clean hands does not mandate the establishment of any kind of intent or scienter.245 Rather, courts may apply the clean hands doctrine to conduct deemed to smack of injustice.246“This maxim necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant.”247 Conduct that does not measure up against both public and private standards of equity increases the likelihood that a court will justify dismissal by resort to the doctrine of clean hands.248

The familiar maxim in equity of “he who comes into equity must come with clean hands” is instructive in a case between business competitors for tortious interference with contract. While not limited to precluding inconsistent positions, a party can avail itself of the doctrine to defend against a challenge to the validity of its agreements when a competitor required its own employees to execute identical agreements. Moreover, a competitor's duplicity in enforcing its own agreements while challenging those of a competitor reaches the threshold of unfairness for a court to find the challenging party to have unclean hands.

V. USE OF EQUITY IN DETERRING UNETHICAL BUSINESS PRACTICES

The role of equity in advancing good business practices has a long history in the Anglo-American legal system.249 The use of the doctrines of estoppel, implied waiver, and clean hands to deter employees from disregarding the restrictive covenants of their former employers or to preclude a competitor from challenging the reasonableness of the covenants is aligned with this tradition.250 In evaluating the use of equity in competitor-versus-competitor noncompetition cases, equitable defenses employed in other contract cases can be applied by analogy.251 The Supreme Court of Ohio stated 150 years ago:

I care not how his want of equity may be designated. Let it be said his words, his acts, or his silence, have equitably estopped him. Or, if some strict definition of estoppel forbid such an expression, … [ ] add a new name to the body of legal nomenclature. [It is n]ot the name by which it may be distinguished, but the substance of equity which supports it …252

Given this instruction, the Ohio court in UZ Engineered Products Co. embraced equity to estop a challenge by a party that the restrictions in a competitor's employment agreements were void as against public policy.253

The applicability of the UZ Engineered Products Co. decision to future noncompetition cases, however, should be approached with caution.254 An equity-based inquiry should focus not only on the parties at bar, but it should consider other interests as well.255 For instance, consideration should be given to the economic impact and anticompetitive effects of denying challenges to enforceability.256 In assessing the economic impact of the application of equitable principles in this area, the growing contributions of the field of economics to the law of noncompetition agreements should be utilized.257 It is crucial that any such analysis be industry-specific in order to best assess the benefits of knowledge spillover, incentives for innovation,258 and whether economic efficiencies may be outweighed by other interests.259 Ultimately, however, the role of equity in the enforceability of postemployment restraints will continue to rest on the demonstration of employer and employee good faith.260

If all companies are utilizing similarly worded negative covenants, the diminished bargaining leverage of the employee should also factor into the fairness equation.261 Because the special treatment of covenants not to compete under the law of contracts developed from the recognition that employees do not truly have freedom of contract,262 allowing an industry custom to result in the de facto enforcement of restrictive covenants merits concern in the application of equitable defenses.263 The invocation of the doctrines of equity may also depend upon the availability of other devices, such as the judicial admissions doctrine, to impeach the credibility of the party asserting the inconsistent positions.264

The extent to which courts expand upon the legacy of UZ Engineered Products Co. will turn on the degree to which they view their roles in this area as protecting employees265 or protecting the proprietary interests of employers.266 A court's pro-employee or pro-employer propensity, however, seems less important in the competitor-versus-competitor scenario. One court framed the concern as covenants may be used “as a shield to protect the employer from the unfair competition by the former employee, but … [not] as a sword to defeat the efficient competitor.”267 Even in those jurisdictions with a tradition of judicial intervention on behalf of protecting employees,268 the changing American economy provides the impetus for a more liberal use of equity to deter unethical business behavior.269

The use of equitable doctrines in this area should also be judged by their ability to provide greater predictability and consistency in the common law's reasonableness analysis.270 The certainty of enforcement or nonenforcement of restrictive covenants will facilitate strategic planning and encourage the efficient settlement of disputes.271 Consequently, while the historic common law tension between the regimes of law and equity has often been characterized as a choice between the certainty of law and equity's ad hoc rendering of justice, banning inconsistent positions concerning restrictive covenants provides an example where equity can be used to make law more predictable and consistent.

A more common use of equitable preclusion may additionally force companies to narrow the restrictions in their covenants to increase their chances of defending them against such claims. The incentive to avoid the denial of challenging a competitor's restrictive covenant would result in less onerous postemployment conditions and, correspondingly, a more competitive labor environment.

Meanwhile, without prescience and based on imperfect knowledge,272 courts have the delicate task of deciding when a challenge to the validity of a restrictive covenant should yield to equity.273 Because judges are the persons who must confront the gap between the rules of law and the values of society,274 the equitable powers historically granted to the judiciary provide the means to bridge this gap in individual cases.275 The rule of reason itself encourages courts to embrace paradox and to integrate conflicting policies by looking critically to the circumstances of each case in the exercise of the court's judgment.276 While the foregoing considerations may not satisfy notions of tidiness and symmetry in the consideration of equity in noncompetition cases,277 it is the common law's characteristic inductive methods of analysis that allows the rules of law to be exposed and apply justly in real-world disputes.278

VI. CONCLUSION

The use of equitable doctrines to prevent a challenge to the legality of a noncompetition agreement reflects the inherent tension that underlies the American advocacy system. Despite the adversarial nature of the process, the judicial proceeding is a quest for truth and justice. To be effective, however, it depends on the integrity and honesty of its participants. Equitable doctrines developed to deter a litigant's chameleonic arguments advanced at the expense of judicial integrity and the rights of other litigants.279 By applying equitable canons, such as unclean hands, implied waiver, and estoppel, courts have shown an unwillingness to “countenance the devolution of the judicial system into a forum of ‘mere gamesmanship.’”280

While the case of UZ Engineered Products Co. underscores the growing judicial sensitivity to employer claims in evaluating the enforceability of restrictive covenants, it is also important in that it reminds us of the often forgotten role of equity in maintaining the integrity of law. Despite uncertainty over the role of ethical values in the current legal landscape, courts will and should continue to employ equitable principles to prevent hypocrisy in our courts and contradictions in our case law. Cases like UZ Engineered Products Co. illustrate how reliance on equitable principles to prevent inconsistent positions supports the view that ethics should play an important role in legal and business decisions.

#### Redeploying equity a meta-legal corrective to flawed labor law, rather than fusing it into a duplicative legal standard, revives its use as a steam-valve to manage complexity and opportunism in other contexts.

Henry E. Smith 21, Fessenden Professor of Law, Harvard Law School, "Equity as Meta-Law," Yale Law Journal, vol. 130, 03/01/2021, p. 1050, Lexis

[\*1054] INTRODUCTION

No aspect of law is as pervasive and as misunderstood as equity. Doctrines from unconscionability to estoppel, defenses sounding in unclean hands and disproportionate hardship, remedies like injunctions and much of restitution, entire areas including trusts and corporate law, and much of our system of civil procedure all trace back to the courts of equity. As if that were not a sprawling enough menagerie of law, the whole idea of equity, associated as it was with courts that drew their share of justified criticism, was engulfed in the process of fusion, 1 which unified the court system and placed the distinctiveness of equity in a harsh and unflattering light. Common-law legal systems have been trying to digest equity ever since.

With limited success. After a century or so of fusion, equity refuses to be consigned to the dustbin of history. For all the efforts to diffuse it throughout the legal system, to assimilate it into law, or to abolish it altogether, equity hangs on by its fingernails. In this country, culprits for the delay include the federal constitutional requirement of jury trial in civil cases, 2 which leads courts to distinguish legal issues that fall under this requirement from equitable ones that do not. Beyond that, equity is regarded as a mere hanger-on, benefiting from inertia rather than doing anything special to justify its continued existence.

This Article challenges that view. Contrary to the deflationary view of equity, a major theme of equity was, and is, to solve complex and uncertain problems by going to a new level of law. Equity is law about law, or meta-law.

What does it mean for equity to be meta-law? In the theory of language and in the theory of complex systems, orders are defined in terms of the domain of their operation. A meta-language takes a lower-order language as an input. Thus, when we talk about language, we need to use a meta-language. 3Likewise, [\*1055] a second-order component systemacts on the output or the structure of the first-order system, but not vice versa. 4Thus, a temperature-control module will take input information on temperature from a first-order component and act on the rest of the system in response. In terms of its operation, the temperature-control module presupposes the rest of the system, but the rest of the system operates without reference to temperature control. Similarly, some law regulates other law and needs to take it as an input. This Article will argue that meta-law in this sense is a theme of equity.

Going meta is usually done for functional reasons, and equity is no exception. 5Like other meta-systems, equity addresses a special class of problems--those of high complexity and uncertainty, which lack foreseeability. By "complex," I do not mean complicated or having many parts. A system is complex when it is so interconnected that system behavior is difficult to trace to individual elements. 6In complex systems such as brains, social networks, economies, and ecosystems--and the law--the action is in the connections, and not in the elements themselves. 7

Problems combining high complexity and uncertainty are those best suited for meta-law. Increased variance at one level can be better handled by going to a higher level through another system that acts on the first-order system from outside. 8Everything from safety systems to thermostats work this way. In law, [\*1056] complexity and its attendant uncertainty stem from at least three major phenomena isolated and explored in this Article. First, some problems involve many densely interacting elements and so are multiparty, multipolar, or, as is sometimes said, "polycentric." Multiple parties with conflicting customary rights and potential third-party effects would be a prime example. 9 Second, conflicting presumptive rights that are each context-dependent lead to complexity and uncertainty, as in situations of good faith purchase or nuisances in which activities clash in a particular setting. 10 And third, and quite characteristically for equity, deliberately caused or exploited uncertainty and complexity stem from the problem of opportunism, in which an actor takes unforeseen advantage of a rule that works under normal circumstances. 11The traditional heading for this phenomenon was "constructive fraud" and included much of unconscionability and violations of custom.

All of these types of problems--polycentricity, conflicting rights, and opportunism--are defined functionally. They are special because multiplex interactions lead to hard-to-foresee results. It is exactly here that law, in its normal aspirations of ex ante certainty, is at its weakest. As Aristotle put it, equity intervenes when law fails because of its generality. 12Courts have long cited this Aristotelian account, 13especially when it comes to the question of when equity will intervene. The question thus becomes: When does law fail and why would it fail because of its generality?

The account offered here allows us to fill in this picture: because regular law seeks generality and ex ante certainty, it cannot handle situations in which intense interactions can lead to unforeseen and undesired results. Equity is a second system that corrects these problems from without and thereby allows law to be more general and certain than it otherwise could be. Despite equity's reputation as a wild card, a combination of distinct law and equity can promote the law's ends--including rule-of-law values--better than could a more homogeneous legal system.

The account of equity this Article offers is functional, rather than jurisdictional or historical. While equity jurisdiction has left traces all over the law, and although equity is a major strand of the history of legal systems in the English-speaking world, the theory offered here focuses on a functional inquiry into what equity does. The jurisdiction and the history are relevant because they are the [\*1057] partly contingent vehicle through which a more basic function expresses itself. It is for that reason that we can speak of an "equitable" function rather than some anodyne "System II" of law that solves uncertain and complex problems with law's "System I."

This Article's reconstruction of equity goes against the grain in another way. Simply put, complexity is seen as the weakness of equity. 14And indeed equity's opponents have stressed its arbitrariness, epitomized by the "Chancellor's foot." 15I will argue that this view of equity gets things exactly backwards. Equity is part of law's response to the world's inevitable complexity. Explaining and justifying equity requires being clear on what functions it does and does not serve. The conventional view of equity is tenacious because it is plausible. Commentators are correct that not everything denominated "equitable" can receive a unified justification. And it is true that only by being justified functionally does equity deserve to survive. Putting these criticisms together, it would be hopeless to give a unified functional explanation of even a broad swath of such a seemingly variegated collection of legal odds and ends.

And yet. Nothing in the pages that follow will require us to fetishize the label "equity," to engage in empty formalism, or to be ruled by the dead hand of the past. On the contrary, equity in American law is a response to universal problems [\*1058] in legal systems and human institutions generally. Equity serves a vital and dynamic function in the law and should be better understood.

This Article does not just fill the equity-shaped gap in our understanding of the law; it shows that there is such a gap in the first place. Although this Article focuses more on the theory of equity as a function that every legal system serves in some way, it sheds unique light on our system and where it comes from. The fusion of law and equity half obscured the essential role of equity, which now requires some excavation. Part of that process is overcoming reflexive skepticism that equity could be serving a characteristic function that does more good than harm. Thus, in this Article I focus on those aspects of equity that are the most resistant to making sense in our bottom-line-oriented, post-Realist age. As a major testing ground, I consider the maxims of equity. The maxims are as central to equity as they are dismissed as empty and malleable. 16I will show that the role of the maxims is orthogonal to our expectations: rather than serving as clumsy rules or vague standards, they are signals that meta-law reasoning is occurring--a process that needs to be brought out in the open in order to understand equity in the first place. More generally, I will integrate much previous work on equity and show that it hangs together--as meta-law.

This Article reconstructs equity along functional lines. It begins in Part I with how equity developed as meta-law and where the current state of fusion leaves us today. It also sets out how equity as meta-law pervades the interstices between property and contract, and lays out equity's domain and structure and how these have functioned and still do function as meta-law. Part II turns to a theoretical account of the specialization of equity as meta-law, drawing on notions of specialization and emergence in complex adaptive systems. This analysis shows that a combination of equity that specializes in solving complex, uncertain problems and regular law that focuses on providing relatively simple guidance can be superior to a homogeneous model that tries to do everything in an undifferentiated fashion. Part III tackles some of the biggest challenges for any account of equity's specialness: the maxims of equity, varieties of fraud, equitable defenses, and remedies. With this positive picture in hand, Part IV turns to the place of equity in the legal system today. Seeing equity as meta-law allows us to understand why equity is so misunderstood as being reducible to standards, discretion, contextualized interpretation, public law, and, perhaps most commonly, "mere" [\*1059] remedies. All of these misconceptions can be traced to the misfiring of fusion, giving rise to the polarization and exaggeration of certain problems and the obscuring of others. The Article concludes after some thoughts on the prospects for revitalizing equity as meta-law.

I. THE NATURE OF EQUITABLE INTERVENTION

The current state of equity provokes skeptical questions about what "equity" is and what an account of equity should provide. Equity responds to some universal problems in human institutions, but it does so in historically contingent ways. It also responds to the very problemof generality in law in a particularized fashion. It is therefore easy to misunderstand. The history and philosophy of equity contain strands of meta-law, and its basic structures of domain, triggers, and ex post principles work together as a meta-system to solve problems of high uncertainty and complexity.

A. The Tides of Equity

Theorists of equity frequently trace its origins to the Court of Chancery. By the early fourteenth century, a process was underway whereby the Lord Chancellor, dispensing justice as the "keeper of the King's conscience," began to act as a judicial official, and the Chancery to function as a court. 17Among its functions was to entertain petitions by those seeking justice unobtainable in the law courts--in other words, those asking the Chancellor to do equity. Part of the Exchequer Court also developed an equity jurisdiction. The officials in charge of these courts were originally clerics, and they drew on civil and canon law in formulating their approach to equity. 18The equity court had one power: to act against the person and hold the person in contempt.

Equity courts would not change the law, but they could prevent people from enforcing legal judgments that were inequitable. So, for example, if someone accepted payment on a debt and promised not to sue, but the debtor did not secure the formality of a cancellation of the debt, the equity court would enjoin [\*1060] an action at law or a judgment on the debt as against conscience. Just this kind of intervention eventually led to a showdown between the law courts and the Chancery--pitting Edward Coke against Thomas Edgerton (Lord Ellesmere) and Francis Bacon--in the early seventeenth century. 19While equity ultimately prevailed, the equity courts developed doctrines of self-restraint to prevent further backlash.

In the seventeenth and eighteenth centuries, the equity courts adopted a kind of stare decisis, and much of equity became regularized. 20Nevertheless, equitable principles remained more open ended and were associated with "natural justice," 21even if the exact relationship has always been controversial. 22Although common-law courts were also concerned with justice (with an occasionally defensive tone about it), the rigidities of the writ system and common-law procedure left much room for equity's modulation. The problem with the common law at that time was not that it lacked the resources of meta-law altogether, but rather that it was unable to supply sufficient meta-law. In a sense, common-law reasoning contains elements of higher-order control: it is law which shapes and produces law at a primary level. 23Nor was the "conflict" between law and equity always a genuine one. The development of the trust, which started out as law about law, and retains that formal structure, was not unwelcome in the law courts. 24Procedurally, equity would exercise an auxiliary jurisdiction that [\*1061] allowed for collection of evidence from parties (e.g., affidavits, discovery) that were not possible at the time in the common-law courts. 25

In the United States, law and equity started out more distinct in some places than in others. The U.S. Constitution affords the judicial branch equity power, which was originally vested in single courts with separate jurisdictions. 26Some states, such as New York, had separate equity courts. Others had a single court with separate equity jurisdiction. 27States tracing back to colonists with a suspicion of royal power tended to downplay equity, but were still not able to eliminate it altogether. 28

Over time, the separateness of courts (or jurisdictions) became difficult to maintain, especially as matters became more complex. Cases would sometimes require the involvement of multiple courts, and the perils of choosing the wrong court could be severe. In the course of the nineteenth century, clamor grew for merger, and after some initial steps in that direction, England passed the Judicature Acts. 29In this country, New York led things off with the Field Code of 1848, which many states imitated. 30The nineteenth-century legislation provided that in situations of conflict the rule from equity would govern. Merger at the federal level followed in stages over the twentieth century, culminating in the Federal [\*1062] Rules of Civil Procedure. 31The Federal Rules generally adopted equitable devices and an equitable style of notice pleading and liberal discovery.

In the late nineteenth and early twentieth centuries, fusion preoccupied legal reformers, who not only sought to overcome the jurisdictional clumsiness of two courts but promised thereby to solve virtually every ill in the legal system. 32 The merger of law and equity in the United States reached its culmination in the Legal Realist era. The Legal Realists were suspicious of equity largely because they saw injunctions as a dangerous tool that courts had wielded overenthusiastically in labor and speech cases. 33 [FOOTNOTE 33 BEGINS] See, e.g., FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 47-53 (1930); DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 169-73 (1999). [FOOTNOTE 33 ENDS] As time went on, equity skeptics also pointed to the inconveniences of the dual-court system and the intricacies of the rules at their interface. 34As equity was seen as less extraordinary towards the end of the nineteenth century, it tended to slip its principles-based self-restraint, and started to produce strange situations of conflicting injunctions in corporate cases. 35

Finally, and perhaps of most enduring significance, was the Realist effort at caricaturing the common law as "formalist" as part of a program to recast it in more policy-oriented terms. The Realists made their critique of formalisme asier by playing down the traditional role of equity, an attitude foreshadowed by [\*1063] Oliver Wendell Holmes, Jr., who emphasized the unreasonable formalism of law by dismissing equity as a peripheral relic of clerical influence. 36

In practice, conflict came to replace the creative tension of law and equity. Because the fusion of law and equity occurred in an era when the law's formalism was increasingly unmoored from natural rights and natural law, the structures of common law and equity alike were regarded in increasingly positivist and reductionist terms. The law was treated as a collection of rules and flattened out. This reductionism, which seems almost like second nature now, can likewise be traced to the fount of modern thinking on the subject, Holmes's Path of the Law. He avers that "a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words." 37 This reduces law to a heap of rules with no synergistic effect. 38 Rule and purpose have to be matched directly, leaving little room for doctrines to act in concert or for the law to exhibit a more articulated structure.

[\*1064] After fusion and the rise of common-law reductionism, what we are left with is a half-submerged, diffuse, and flattened equity. The rationale for equity as a separate system is hard to discern. So Maitland could say that the only thing unifying equity was a set of courts that no longer existed:

Equity is a certain portion of our existing substantive law, and yet in order that we may describe this portion . . . we have to make reference to courts that are no longer in existence. . . . The only alternative would be to make a list of the equitable rules and say that Equity consists of those rules. . . . [But] if we were to inquire what it is that all these rules have in common and what it is that marks them off from all other rules administered by our courts, we should by way of answer find nothing but this, that these rules were until lately administered, and administered only, by our courts of equity. 39

Later, on this side of the Atlantic, Zechariah Chafee took the expansive post-Realist view that "[e]quity is a way of looking at the administration of justice; it is a set of effective and flexible remedies admirably adapted to the needs of a complex society; it is a body of substantive rules." 40Yet ultimately, he took Maitland's idea "even farther" to say that "[e]quity is that body of rules which would be taught in courses called equity if there were any such courses." 41

Equity is submerged enough that many argue forcefully for complete fusion (with spirited pushback from some Australians). 42 Law and equity have been [\*1065] likened to having two sets of rules and umpires, red and green, in a soccer-like game. Substantive fusion stands for the idea that having one completely separate set of rules (purple) would be better than any other way of combining two potentially conflicting and necessarily incoherent sets of rules. 43Most challenging is Glanville Williams's idea that two systems are inherently ridiculous:

Equity thus worked "behind the scenes" of the common law action; the common law principles were theoretically left intact, but by means of this intricate mechanism they were superseded by equitable rules in all cases of conflict or variance. The result justified the sarcasm of the critic who said that in England one court was set up to do injustice and another to stop it. 44

Generally speaking, common-law countries share an impulse to assimilate law and equity to produce a unified set of rules. On the Holmesian and "modern" American view, the law was regarded as a single-tiered device for solving problems as they arose. In the United States, fusion thus became an occasion to mix law and equity together and to prefer equitable-style contextualism, but without either constraints or the second-order aspect. Instead, considerations of commercial morality, fairness, and policy would in principle inform the development and application of rules across the board. By partial contrast, in England, equity retained its separate character to a greater extent, but there too it was increasingly placed on one plane with the regular law. However, instead of allowing equitable contextualism and discretion to slip its traditional bounds, English courts developed ever more baroque doctrines to solve the problems of polycentricity, conflicting rights, and opportunism on a single level. 45

Equity has been further obscured because of its dynamic relation to law over time. A common fusionist objection to theories of equity is that the label "equity" and the equity courts' jurisdiction both varied over time. What was once equity has sometimes become law. For example, some varieties of fraud were first [\*1066] handled by equity before gradually being brought under the heading of common-law fraud. 46If we focus on which specific problems and which particular rules were associated with "equity" at various times, the associations look arbitrary. If, as I will argue, we focus on equity's role in tackling new problems and domesticating them through meta-law, we begin to see that these associations are rather the byproduct of a coherent function. 47

Not everyone is a fusionist. Before very recently, equity traditionalists, particularly in Australia, have argued for equity's distinctness from law. They term the expectation that unified courts should produce uniform law the "fusion fallacy." 48They are onto something here, and likewise when they aver that "[e]quity can be described but not defined." 49However, in their pronouncements that "[e]quity is not a set of rules but a state of mind," 50noninitiates hear impenetrable mysticism. The holism endorsed by equity's defenders is not misplaced--those aspects of equity that are meta-law cannot easily be reduced to a first-order concept without losing something. But since a definition of equity as a first-order concept will be inaccurate or hopelessly vague, the fusionists and traditionalists are speaking past each other. Their views are orthogonal, almost literally.

More recently, moderate fusionist positions and moderate nonfusionist positions have also come into play. For example, based on policy reasons specific to context, Leigh Anenson would extend unclean hands in a limited way to damages actions at law, 51whereas Samuel Bray performs a similar kind of analysis to conclude that laches should be confined to equitable claims and remedies. 52Seeing a role for meta-law will allow us to differentiate functionally between [\*1067] situations calling for fusion of law and equity, and those contexts where they should be kept distinct conceptually, if no longer institutionally. 53

B. The Roots of Equitable Meta-Law

For an aspect of the legal system that has been semiobscured through fusion's influence on our post-Realist system of law, equity has strikingly long and deep roots within the Western intellectual tradition. This tradition and many other tributaries which feed into modern equity bear the signs of meta-law.

In his Nicomachean Ethics, Aristotle summed up the nature of equity ( epieikeia) as "a rectification of law where law is defective because of its generality." 54Indeed, there are hints in Aristotle of a meta-law function for equity: equity is a correction ( epanorthōma), a term he uses repeatedly and which denotes something second order. 55 At any rate, equity is distinct from law and corrects the law--not the other way around.

This tradition extends through the Middle Ages into the modern era. 56In The Earl of Oxford's Case, which set off the jurisdictional crisis of the early [\*1068] sixteenth century, Lord Ellesmere echoes Aristotle in averring that "The Cause why there is a Chancery is, for that Mens Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances." 57Courts and commentators continue to cite the Aristotelian notion to this day. 58

A notion of equity as meta-law has been implicit in the equitable tradition. That equity acts in personamis often shorthand for how equity is apart from the law and only works on it indirectly. At times, equity as meta-law comes through more clearly. Robert Chambers, Blackstone's successor at Oxford, dealt with equity in his four final Vinerian Lectures in collaboration with Samuel Johnson. 59In a much more sympathetic treatment than Blackstone's, 60Chambers elaborates on the kind of uncertainty that gives rise to the problem of law's generality and how that calls for what we might call meta-law:

The end of all law is suum cuique tribuere, to give to every man that which he may justly claim, and the design of all juridical maxims and institutions is to adjust and satisfy the various degrees of right which may arise in [myriad circumstances]. These combinations, being indefinitely variable and increasing every day as new schemes of action produce new relations among men, could never be all foreseen by any legislator, and therefore cannot have been all comprehended in any law. It will therefore sometimes happen that those rules which were made to secure right would if they were closely observed establish wrong, because they would operate in a manner not foreseen when they were made. Upon these occasions the aid of equity is solicited, not properly to control or supersede the law, but so to regulate its operation that it may produce the effect which the law always intends. The decisions of equity as contradistinguished from those of law are not contra legem but praeter legem [not [\*1069] against law but beyond law], they do nothing which the law forbids, they do only what the law desires but cannot perform. 61

Chambers goes on to echo Aristotle in making the measure of the equitable what the legislator would have wanted. Interestingly, Chambers also extends Aristotle by specifying why law fails on account of its generality, and in particular points to the combinatorial power of interacting shifting circumstances, almost in the terms of modern complex-systems theory. Further, Chambers (perhaps Johnson) brings out the nature of the second-order quality of equity, that it "regulates" the law without changing it, altering its application to serve its ends. 62

In the United States, reflections on equity contain hints of meta-law. In Federalist 83, Alexander Hamilton argues for separate equity courts, citing the desirability of keeping exceptions segregated from the "general" rules. 63Later in the federalist tradition were other prominent proponents of equity, James Kent and James Story, the latter of whom supported separate courts for reasons similar to Hamilton's. 64One can discern an implicit meta-law in these sophisticated defenses of the two-court system. And in his description of the two-court system, Oliver S. Rundell gives perhaps the clearest formulation of equity as meta-law:

The common-law courts . . . acted in general with bland disregard of equity's doings. Equity, on the other hand, acted in the light of a full recognition of the activities of the common-law courts and of the rules of the common law which it admitted were binding upon it, though often frustrating those [\*1070] activities and nullifying those rules by denying to individuals brought before it the right to take advantage of them. 65

Even Maitland, who was skeptical about any substantive theme of equity, recognized that equity presupposes the law and not vice versa. As he put it: if equity had been abolished, "in some respects our law would have been barbarous, unjust, absurd." 66And yet, by contrast, abolishing common law would have meant "anarchy," because "[a]t every point equity presupposed the existence of common law." 67In his famous formulation, "Equity without common law would have been a castle in the air, an impossibility." 68There can be no metalaw without law.

Equity's role in modifying the law through individualized moral analysis also arises in legal systems over time. 69Abuse of right in civil-law systems partially serves the functions of equity in our system. 70Parts of the common law can be regarded as "equitable" in our functional sense. Examples include quasi-contract and aspects of nuisance, which were legal in jurisdiction but equitable in style. 71 [\*1071] Even an adversary of jurisdictional equity like Coke saw "discretion [as] a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections." 72As we will see, this rationale of discretion is not inconsistent with equity as meta-law.

The aspect of equity as meta-law can be found implicitly in its long history. The structure of separate equity courts allowed the idea of correction or regulation of the law to come to the fore. Later, in the process of merging law and equity courts, there was no reason in principle for this equitable meta-law to disappear, but a combination of Realist-inspired skepticism of doctrine and a lack of appreciation of meta-law woven in among the strands of equity has led to the semiobscuring of equity as meta-law. The legal system still contains meta-law, and its association with "equity" has not disappeared, but equity has sometimes been displaced by less apt substitutes such as multifactor balancing tests or has been recast as amorphous discretion. There is a better way to handle certain kinds of uncertainty and complexity, and I will argue that reviving equity as meta-law should be part of such reform.

C. Functional Equity

The functional account of equity offered here is grounded in the special kinds of problems that meta-law is suited to solve. Problems involving a high degree of variability and uncertainty call for meta-law, just as such problems call for higher-order "control" systems in a wide variety of settings, from industrial temperature management to software design to administrative regulation. 73As we will see in Part II, allowing for meta-law to address these problems at a higher level in a specialized fashion allows the rest of the law to be simpler and more general than it otherwise could be. The resulting system can work better than can a single homogeneous law.

1. The Problems of Equity

Certain problems of high variability and uncertainty are characteristic of legal settings. Without claiming to be exhaustive, we can include on this list polycentric tasks, conflicting presumptive rights, and opportunism.

(a) Multipolar Problems and Polycentricity. Polycentric tasks are those that involve many items (people, objects, activities) and many interdependencies, leading to complexity. As a classic polycentric legal problem, Lon Fuller offered the [\*1072] division of a collection of paintings left under a will to two museums in the absence of further instructions. 74What makes the problem polycentric is that the value of any painting to either museum depends on which other paintings the museum gets. As the number of paintings increases, so does the difficulty of allocation. With dense interconnection, computational complexity increases exponentially with the size of the problem. 75

Equity's role in solving these multiparty problems gave rise to devices like joinder and the class action, and is the source of the devices for complex litigation familiar in the Federal Rules of Civil Procedure. 76Equity also plays an important role in complex, multiparty situations like water disputes under prior appropriation. 77Such settings connect equity and public law, of which equity's longstanding relationship with administrative law is a particular example. 78

Polycentric problems pervade the field of equity. A clear example is multiparty litigation with multiple interlocking claims. One difference between an [\*1073] equitable action for accounting and a legal action for tort damages is that in the former the elements of a situation must be adjusted with respect to each other on both sides of the balance. 79Should, for example, efforts by a defendant fiduciary count against gains subject to "disgorgement"? Whereas damages are keyed to losses sustained by plaintiffs, an accounting involves investigation with a view to bringing about the defendant's performance of duties. The accounting looks to both sides of the ledger and isolates net profits--the illicit gains minus legitimate costs in producing them. 80

Perhaps most familiar is the remedy of injunction. Despite a tendency to see it simply as a supracompensatory remedy--as a property rule rather than a liability rule 81--the injunction is actually multidimensional (along time and activity) and responds to interdependent actors in a flow chart of decisionmaking that depends on the type of situation. 82

(b) Conflicting Rights. Equity as meta-law is also well suited to resolving situations of conflicting rights. Where two or more parties hold presumptive but conflicting rights, one solution is to define rights better ex ante. An even better alternative is often to leave the presumptive rights in place and to reconcile them ex post based on an equitable, context-sensitive style of reasoning. 83That is, dealing with the problem at the second order is simpler and more transparent than trying to build a solution into the system at the first level.

A paradigmatic case of conflicting rights comes from the law of nuisance, in which a contextualized inquiry forms the basis for resolving conflicts over resource use between two parties who have a prima facie "right" to do what they are doing. 84Consider the traditional principle sic utere tuo ut alienum non laedas (use what is yours so as not to injure another's). Principles such as these reflected a natural-rights approach in which one would work out the mutual rights and duties that would maximize mutual freedom and autonomy in a symmetric [\*1074] fashion. 85Traditional nuisance analysis involved reconciling conflicting rights using second-order analysis. First, a court would ask how the complained-of activity compared to what was expected in the locality. It would then consider factors like avoidability, good faith, priority, and disproportionate hardship, all the while under the constraint that the resultant packages of rights should be symmetric. 86The idea was to create an interface between parcels that would protect landowners in a freedom-maximizing way.

While maintaining a second-order style of nuisance law does not require natural-rights or natural-law foundations, the loss of those moorings for nuisance led to the futile search for a single-level replacement for nuisance's two-tier structure. The Legal Realists made it conventional wisdom that sic utere is an empty question-begging phrase, 87good in principle but useless as a grounds for decision because it does not determine any right or obligation. 88Much has been made of how pre-Realist law supposedly had no theory of "harm without [\*1075] injury." 89As a result, the analysis of nuisance has become a mystery, devolving into a multifactor balancing test. 90This is symptomatic of equity gone wrong. Any attempt to reduce nuisance analysis to a single level will leave it hopelessly confused and complex.

To take another example, consider the doctrine of "coming to the nuisance." 91Should someone be able to complain of a nuisance that was already there when she bought her land? A flat-out "no" is a problem, because then landowners could acquire what amount to prescriptive rights just by being first. A simple "yes" is also a problem, because there are situations in which people could easily avoid nuisance but may act deliberately to court one. Overall, we want each party to take the other's behavior into account and in a way that avoids opportunism. A law-and-economics analysis invariably sees this as a first-order problem, but specifying a set of general first-order rules that can fully account for all possible situations is difficult to impossible. 92

In equitable fashion, the presumption that coming to the nuisance is not a defense can be overcome if the second mover takes too much account of the behavior of the first party in the wrong way. This requires a second-order analysis. [\*1076] So, where someone buys a nearly valueless parcel with an inadvertent nuisance simply in order to threaten an injunction, a court should deny the injunction to deprive the plaintiff of the leverage it would afford. 93In the multilevel system of analysis, there is no longer any need for across-the-board specification of inefficient threats. 94

Interestingly, those parts of the law that involve second-order resolution of conflicting rights are among the most difficult for rules-based legal analysis. It is here that equity can play a crucial role in allowing for context-sensitive outcomes.

(c) Opportunism. Finally, equity has always had a special role in combatting opportunism. Historically, this went under the banner of "constructive fraud"--activities that might not technically be fraud but that carried a danger of the same kind of harm. 95In everything from unconscionability, to denials of injunctions, to unclean hands, equity has been an important defense against hard-to-foresee misuses of the law by the sophisticated and unscrupulous. Opportunists often achieve their objectives by creating uncertainty, as is familiar in the problem of compliant noncompliance by regulated parties in complex environments. 96An extreme example is where avoidance shades off into evasion in tax law. Not surprisingly, antiavoidance doctrines in tax law--which, like equity, are ex post--employ holistic analysis and emphasize substance over form. 97

[\*1077] Traditionally, equity judges and commentators had some idea of equity's antiopportunism function. For example, Justice Story recognized that equity must be open textured in light of the ability of parties to opportunistically evade their obligations: "Fraud is infinite" given the "fertility of man's invention." 98Story quotes the somewhat hyperbolic statement of Lord Cowper in Dudley v. Dudley, which contains the germ of the antiopportunism theory. In that case the Chancellor prevented an heir from invoking a technicality that at law would delay a widow's dower rights for ninety-nine years:

Now equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the law, and is an universal truth; it does also assist the law where it is defective and weak in the constitution (which is the life of the law) and defends the law from crafty evasions, delusions, and new subtilties, invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless; and this is the office of equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law. Equity therefore does not destroy the law, nor create it, but assist it. 99

Functionally, equity is part of the law broadly conceived but remains outside the more formal part of the law. Equity draws on morality, but in a constrained fashion. 100

[\*1078] In law and economics, Nobel laureate Oliver Williamson famously defined opportunism as "self-interest seeking with guile." 101The problem then reduces to what guile is and why it is bad. Guile is related to fraud, which is a knowing misrepresentation that is intended to induce another to part with an entitlement and that succeeds in doing so. 102Fraud is uncontroversially regarded as morally wrong; it is also generally social-welfare decreasing, reinforcing the case for a general ban. 103Accordingly, everyday morality has a clear view of fraud: bad.

While legally fraud is narrowly defined, there is a larger set of misrepresentations that have an effect similar to fraud. Nineteenth-century equity jurisprudence featured a sophisticated notion of "near fraud" or "constructive fraud": behavior that seems infected with fraud but is not provable as such, which can be deterred by withholding enforcement for the party responsible for the [\*1079] unconscionability. 104The practical problem thus becomes not how to define opportunism with exactitude, but how to find visible proxies that are closely associated with opportunism.

Perhaps the most salient feature of opportunism is the difficulty of defining it in advance. Nonetheless, one can offer definitions of opportunism that allow us to identify it with hindsight. The irreducible need for some hindsight is at the heart of equitable decisionmaking.

Definitions of opportunism in law and economics tend to be broad, making many nervous about their vagueness and sweep. For example, opportunism is often identified with immoral conduct. 105We need, therefore, to ask more about what is immoral, and which moral norms we want to enforce in the law. Indeed, historically, a major controversy over equity focused on the question of how far equity should enforce morality. 106Others would define opportunism as trying to regain an opportunity that one has contracted away. 107This still requires a method for figuring out the scope of what has been contracted away as opposed to left open for acquisition. Finally, "opportunism" can mean doing something that does not violate the literal terms of a contract but that contradicts the other party's legitimate expectations. 108Opportunism is exploiting the law against its purpose. 109

[\*1080] These definitions of opportunism get at something, and further refinement can avoid the criticisms of both those alarmed at the expansiveness of the notion and those inclined to see it as nothing special. What is needed is a multistep procedure: we need to define the domain of concern--opportunism--and then set up proxies and presumptions that will allow equitable intervention to do more good than harm once in that domain.

Let me propose that opportunism is undesirable behavior that cannot be cost-effectively defined, detected, and deterred by explicit ex ante rulemaking. Opportunism is residual behavior that would be contracted away if ex ante transaction costs were lower. Not coincidentally, it often violates moral norms, which are incorporated into the ex post principles that deal with opportunism. As we will see, opportunism resists taming by tailored ex ante rules. This leaves us with ex ante untailored rules, ex post tailored standards, and ex post untailored standards. Ex ante untailored rules deal with opportunism with broad prophylactic prohibitions on self-dealing by fiduciaries. 110The second category, ex post tailored standards, includes most of the equitable "safety valves" aimed at opportunism. The final category, ex post untailored standards, are the most threatening: an announcement of "do the right thing" or else the chancellor will rewrite contracts and statutes according to a personal sense of morality. This broad ex post approach is not just chilling but destabilizing and inimical to the rule of law. Thus, equity has always aimed for either tailoring (ex post) or ex ante announcement (prophylaxis), and it seeks to avoid broad blunderbuss invocations of ex post fairness and morality. Equity as meta-law includes a theory of how equity can manage this feat by employing a set of proxies and presumptions--which happen to accord closely with strains of the equitable tradition.

Opportunism is not the same thing as fraud. Fraud can be defined ex ante, and a high penalty can make up for the low probability of detection. 111Opportunism is different. It often consists of behavior that is technically legal but is done to secure unintended benefits that are usually smaller than the costs they impose on others.

To prevent opportunism, the law could attempt to anticipate every type of evasion ex ante. But announcing a clear list of ex ante rules enables evaders to exploit their knowledge of where the bright line is. Plugging nine out of ten holes is sometimes no better than plugging none. As the next Section discusses, equity as meta-law enables a more targeted and ex post intervention against [\*1081] opportunism that leaves less room for sophisticated actors to take advantage of the rules or the legal system overall.

Even ex post, the law need not define opportunism directly. As we will see, it employs proxies and presumptions that are aimed at opportunism. The idea is to impose enough of a cost ex post on a somewhat hard-to-predict set of actors who are highly likely to be engaged in opportunism--and to send them a message. If successful, such a system can obtain more benefit in preventing rent seeking and the chilling effect of opportunists on other people's behavior than it imposes costs in chilling legitimate behavior and destabilizing expectations.

2. Equity's Structure

Equity as meta-law responds to problems of high complexity and uncertainty in a characteristic way. Within an overall domain of potential problems (fraud, accident, and mistake), it applies triggers or proxies for switching modes into meta-law. Neither the domain, nor the triggers, nor the principles applied once we are in equity should be mistaken for first-order rules or standards. Thus, when they serve as triggers for equity, notions like bad faith and disproportionate hardship are not direct descriptions of potential legal intervention but the occasion for beginning an evaluation of a new kind of intervention from equitable meta-law.

(a) Traditional Definitions of Equity's Domain. The equitable tradition has defined a domain of complex and uncertain problems using traditional formulations in the Aristotelian spirit. In these formulations, equity has always contained broader and narrower strands. As we have seen, Aristotle defined equity as an invocation of justice where law fails on account of its generality. 112On one reading, this means that equitable decisionmakers will engage in all-purpose ex post fix-alls when a law does not seem to be furthering its purpose. Any gap between a law's letter and its purpose or spirit calls for intervention. The widest versions of the controversial "equity of the statute," especially those advanced by some of the Legal Realists, fit in this expansive mode. 113

[\*1082] Other courts and commentators define the potential domain of equity more narrowly, invoking the triad of "fraud, accident, and mistake." 114Thomas More, the first lawyer to serve as Chancellor, bridges the triad and the notion of conscience: "Three things are to be helpt in Conscience, Fraud, Accident and things of Confidence." 115Equity does not always intervene where there is fraud, accident, or mistake, but it is these situations in which complexity and especially opportunism are a danger. Story made much of the open-endedness of fraud in explaining the nature of equity. 116His writings reflect an awareness of what we would call opportunism and equity's role in countering it. 117In the overview of equity in his treatise, he starts with trust (and confidences), working outward to "mistake, accident, and fraud," and then adding:

[M]any cases of penalties and forfeitures; many cases of impending irreparable injuries, or meditated mischiefs; and many cases of oppressive proceedings, undue advantages and impositions, betrayals of confidence, and unconscionable bargains; in all of which Courts of Equity will [\*1083] interfere and grant redress; but which the Common Law takes no notice of, or silently disregards. 118

Story is in general quite cautious, but he was willing to endorse the idea that equity protects the law against "crafty evasions." 119Moreover, he connects the nature of this domain to equity's characteristic features as a response to general law:

Accident, mistake, and fraud, are of an infinite variety in form, character, and circumstances; and are incapable of being adjusted by any single and uniform rule. Of each of them, one might say, Mille trahit varios adverso sole colores ["Drawing a thousand shifting colors across the facing sun"]. The beautiful character, or pervading excellence, if one may so say, of Equity Jurisprudence, is, that it varies its adjustments and proportions, so as to meet the very form and pressure of each particular case, in all its complex habitudes. 120

Further, the rise of industry and the development of commerce create more multipolar problems and conflicting sets of rights, heightening the possibility for opportunistic invocations of the letter of the law. 121Story goes on to elaborate on the notion of fraud, accident, and mistake:

[W]e may now turn to other subjects in which [equity jurisdiction] will forever operate with a constant and salutary influence. These are cases where relief becomes necessary from accident or mistake of the parties; cases of complicated accounts, whether between partners, or factors, or merchants, or assignees, or executors and administrators, or bailees, or trustees; cases of fraud, assuming myriads of vivid or of darkened hues, and as prolific in their brood, as the motes floating in sunbeams; cases of trust and confidence, spreading through all the concerns of society, and [\*1084] sinking their roots deep and firm through all the foundations of refined life and domestic relations; cases where bills of discovery are indispensable to promote public justice; and lastly, cases where bills of injunction are the only solid security against irreparable mischiefs and losses. 122

Story then goes on to say that while courts of law do sometimes take these matters into account, the equitable function is so special that it makes sense to have specialized courts to serve it. 123

Thus, when equity's domain is announced to be fraud, accident, and mistake (or even opportunism), skeptics object that those are broad and ill-defined categories and trying to address them directly would be destabilizing. Just so. Equity need not "define" them directly because they are not part of equity: they are the domain within which equity may operate if triggered. The kind of definition that would be required for a first-order "rule" dealing with fraud, accident, and mistake would indeed require clearer boundaries and certainly be destabilizing. That is not equity on our account. Fraud, accident, and mistake--or polycentric problems, conflicting rights, and opportunism--are only the domain over which equity might apply, rather than the ills which equity seeks to cure directly.

(b) Triggers. Once we are in the domain of equity, there are certain triggers for shifting to meta-law. In this Section, I focus on three proxies: violation of a custom or other very clear tenet of commercial morality, good faith and notice, and disproportionate hardship.

First, equity has always been closely associated with custom, since ancient Rome. 124While custom also informs equitable reasoning once one is in equity (in earlier times identified as "natural equity"), 125it serves as a useful trigger [\*1085] because a violation of custom is a relatively concrete signal that a party may be acting opportunistically or that unforeseen complications have arisen, 126in a fashion related to bad faith (our next topic). Even equitable procedural devices like the class action originated as a way for groups (such as common-pool-resource users and parishioners) to enforce their customary rights. 127

Custom alone is not a foolproof trigger. As with other equitable devices, custom could itself be used opportunistically by self-serving liars, especially those falsely claiming the existence of a custom. 128Traditionally, though, custom was [\*1086] well defined, and equity courts had a special role in enforcing it. 129Further, custom itself may be a ground-level solution to a complex multipolar problem.

Neither were equity courts all that unique in employing custom. The common-law courts did as well, and the common law at one time was thought of as a general custom. 130Even today, parts of the law of negligence turn on custom. Moreover, sometimes even when courts appear to be taking a freewheeling and wholesale approach to adopting custom, what they are really doing is using it in a limited way to test good faith, our next proxy. 131

Second, as another trigger for equity, good faith can signal that equity as meta-law is an appropriate framework. This trigger too is subject to myriad interpretations. 132Broader interpretations border on "do the right thing." Other courts rely on an "excluder approach" in which they use the negative notion to identify instances of bad faith. There are those who think the notion has no content, 133and those who argue the duty of good faith is underenforced. 134In the following, I will not focus on the duty of good faith but on its role as a proxy that triggers presumptions against putative opportunists.

As a proxy for opportunism, good faith takes on different meanings depending on the type of situation and the presence of other proxies. As noted earlier, violation of a clear commercial custom is presumptive evidence of bad faith. Likewise, in situations of disproportionate hardship, knowledge of consequences adds to the probability that a party is acting in bad faith. Generally speaking, the more unambiguous the bad, the lower the threshold for bad faith. Thus, going over the boundary line in building encroachments is clear. If [\*1087] someone encroaches knowing where the line is, that is bad faith. 135Slightly more complex is good faith purchase, where knowledge of a prior claim or certain forms of constructive notice (inquiry, record) can constitute bad faith (or defeat good faith). 136In some situations, knowledge of another party's mistake or their vulnerability to exploitation, for example as a result of drunkenness, will constitute a lack of good faith. 137

Third, disproportionate hardship is a key, but much misunderstood, proxy for triggering equity. Often coupled with the vulnerability of another party, the idea was that very surprising and skewed results raised the danger of opportunism, triggering closer scrutiny. 138Very skewed results can also be an indicator that complexity has gotten out of control ("surprise"): a meta-system is triggered when the primary system exceeds certain levels of key variables.

Because it is so associated with a targeted kind of unconscionability and often tags complex interdependent behavior, disproportionate hardship is related to the "constructive fraud" at the heart of traditional equity. Constructive fraud is central to Story's account in his treatise, which provides a (partly dated) near-definition:

[\*1088] In this class [of constructive or legal, as opposed to actual intentional, fraud] may properly be included all cases of unconscientious advantages in bargains, obtained by imposition, circumvention, surprise, and undue influence over persons in general; and, in an especial manner, all unconscientious advantages, or bargains, obtained over persons, disabled by weakness, infirmity, age, lunacy, idiocy, drunkenness, coverture, or other incapacity, from taking due care of or protecting their own rights and interests. 139

In his classic treatment of unconscionability, 140Leff put it this way:

[T]here are two separate social policies which are embodied in the equity unconscionability doctrine. The first is that bargaining naughtiness, once it reaches a certain level, ought to avail the practitioner naught. The second is directed . . . against results, and embodies the doctrine . . . that the infliction of serious hardship demands special justification. 141

The disproportionate-hardship proxy was often keyed to the characteristics of the potentially exploited party. Leff correctly notes that equity courts focused their attention on stock characters like the old, the young, and the ignorant. 142In such cases, courts would presume against the other party by refusing, in the absence of further justification, to enforce their deals with specific performance. 143Once the triggers for unconscionability are activated, courts will take a closer and contextualized look at overall fairness. As Seana Shiffrin and Carol [\*1089] Rose note in their different defenses of ex post vagueness, often the focus is on the vulnerability of the victim. 144

In other words, skewed results or shady dealings coupled with vulnerability are a proxy for opportunism that triggers a presumption against the putative opportunist. And, picking up on traditional notions of "near fraud," Richard Epstein points out that certain classes of transactions carry with them such great dangers of fraud and so few benefits on average that it makes sense to ban them entirely, or at least to subject them to stricter scrutiny. 145As with the Statute of Frauds and the defense of incompetence, the question is whether refusing to enforce such transactions minimizes decision and error costs, including the costs of not enforcing legitimate deals. 146

Which combination of these and other elements constitutes a trigger for equity depends on what type of situation is at issue. Thus, in building encroachments, an injunction to tear down a building will issue unless there is disproportionate hardship--the encroachment is small and the injunction would harm the encroacher far more than it would benefit the movant. However, bad-faith encroachers cannot benefit from this defense and will be enjoined. 147By contrast, the mix of bad faith and hardship required to merit relief is different in unconscionability; combinations of some hardship and minimal or suspected bad faith can trigger greater scrutiny.

(c) Equitable Standards. The last feature of equity is its most familiar. Once in equity, the style of legal reasoning is more open textured and more directly oriented to fairness and morality than is usually the case in the rest of law. As we have seen, the burden of justification is often on the party seeking to benefit from a lopsided or otherwise suspect result. Howto address that burden and to engage in equitable decisionmaking will be illustrated in Part III, especially in conjunction with invocations of the maxims of equity.

If equity is meta-law, it involves a more articulated legal structure made up of its domain, its triggers, and the standards it applies within equity proper. Much of the misunderstanding about equity flows from focusing on one of these elements in isolation, rather than on all of them and their joint operation.

[\*1090] The key is how we get to use the standard (triggers) and what goes into the standard (among other things, primary-level law and its results). Once we are in equity, it has a semifamiliar, semispecial character. That equity is ex post and based on fairness and morality is the most familiar. Again, if we leave the metalaw out of it, the standards used--the equitable principles--look a lot more far ranging and more destabilizing than they need to be.

D. The State of Equity Today

Equity occupies a kind of limbo in current law. The labels "equity" and "equitable" are still employed, and equity has not ceased to function as meta-law altogether. And yet in our post-fusion, post-Realist legal system, the sense of equity as meta-law is being lost in important areas of private law. Equity is now often associated with mere discretion or coercive remedies. In this Section, I will show how equity once explicitly helped overcome the limitations and misfirings of the law in situations involving uncertainty and complexity, and in particular at the property/contract interface where rights in rem (against others generally) and rights in personam (rights availing between specifically identified parties) interact in an uneasy fashion. These areas include privity, misappropriation and hot news, good faith purchase, and trusts. In each case, I will suggest that a greater attention to meta-law could improve the law in these areas. At the very least, as new problems turn up in such pockets of special complexity in private law, equity as meta-law can potentially do better than mono-level law alone.

1. Privity and Its Discontents

Privity is often perceived as having a bad formalist odor. Privity requirements, which still play a role in the law, have come to stand for a formalism that needs to be overcome in the name of justice, fairness, or good policy. Privity is not an unmitigated evil though, because it does reduce information costs. Like asset partitioning, 148it allows private actors to focus on a subset of the world, for both good and ill. For present purposes, privity is a good case study for how equity as meta-law regulates the law when it fails on account of its generality--and how it might continue to do so if given a chance. In earlier times, equity served as the main tool for limited loosening of privity requirements. However, now when postfusion and post-Realist courts and commentators seek to overcome privity, they tend to do it very differently--without meta-law and on one [\*1091] messy level, haphazardly and often based on notoriously amorphous multifactor balancing tests. The question of overcoming privity becomes one of balancing the policies for and against widening, using a multiplicity of incommensurate and often conflicting factors. This is notoriously true in the area of lawyer liability to third parties where multifactor balancing tests have been termed "equitable" even though they replace, rather than replicate, a more constrained metalaw style of equity. 149These flattened solutions run the risk of misuse by opportunists (if the rules are spelled out) or of making the structure of liability highly uncertain. Although a full treatment of privity across areas is not possible here, I will suggest that equity as meta-law could even now provide better tools for modulating the effects of privity requirements.

Equity most famously overcame the limits of privity in real servitudes. Covenants at law could only be enforced against those with privity; in England this requirement was almost fatally strict. 150Privity reduces information costs, because those outside the deal, such as subsequent purchasers, may not know what will bind them. But this informational convenience comes at a severe cost in terms of the usefulness of covenants, which can be easily dissipated or even evaded if they do not run to successors. The courts of equity stepped in to allow enforcement against a subsequent purchaser who had notice, as long as the servitude was intended to run and touched and concerned the land. 151Here, the requirement of privity is overridden in a limited way that navigates between the purely in personam and in rem, to enforce a useful device in light of the circumstances and to prevent opportunistic violations of the original agreement.

Equity's procedural devices often facilitated suspension of the limits of privity. As time went on, interpleader and bills of peace could be used to establish connections where older notions of privity, even extended notions in older equity, would not have sufficed. 152Indeed, the moderate strain of Realism used equitable-style reasoning to overcome privity in tort law as well. 153

[\*1092] Equity could serve as meta-law in this area more explicitly. In his recent comprehensive treatment of privity problems in private law, Mark Gergen notices the inadequacy of various solutions when multiple parties are involved. When should an exculpatory term in a contract bind a third party? Interestingly, he reaches for the classic equitable solution--the doctrine of notice--and advocates employing it beyond the law of real-property servitudes. 154While the kind of notice required will have to limit people's duties to be informed in order to prevent information costs from ballooning, the doctrine of notice from equity is a classic method of loosening up privity without going fully in rem. 155

2. Misappropriation and Quasi-Property in Hot News

The doctrine of misappropriation and hot news exemplifies the misunderstandings that arise from combining in rem and in personam badly. It also highlights the potential for improvement by re-recognizing the role of equity. Misappropriation of hot news is an area in which equity played a crucial role which has become obscured over time. Many of the reasons subsequent judges and commentators have regarded the decision with suspicion stem from mistaking it as a case more about property than equity. Conversely, some of the doctrine's bad reputation might be alleviated by resuscitating the equitable meta-law strand of misappropriation, especially as technology develops further.

The leading case and fountainhead for modern misappropriation doctrine, International News Service v. Associated Press, 156has been taken as a dangerous generator of intellectual-property rights. The Supreme Court, however, drew from equity to hold that one news service misappropriated the other's hot news. The Court characterized this claim as "quasi-property," meaning something less than fully in rem. 157As the Court summed up: "The transaction speaks for itself and a court of equity ought not to hesitate long in characterizing it as unfair competition in business." 158

In affording a remedy here for a violation of commercial morality or custom, especially if the predicate sounds as well in unjust enrichment among multiple [\*1093] participants in the same industry, 159equity is serving a limited role as meta-law. It is solving a multipolar problem among those directly competing in the same news business, and shoring up a vulnerable custom against potential opportunism by would-be-violators. 160If taken seriously, this approach does not conflict with the cautionary themes in Justice Brandeis's dissent, especially the one about information being "free as the air to common use." 161

In misappropriation, we can also see the aftershocks of the fusion of law and equity. The fact that until very recently International News Service has been treated as a property case is symptomatic of the effacement of equity. 162Moreover, the first-order replacements for equitable meta-law show telltale strains. 163To date, the best restatement of misappropriation in property-like first-order terms is Judge Winter's opinion in National Basketball Ass'n v. Motorola, Inc., 164which seeks to capture hot-news misappropriation in a five-prong test:

(i) The plaintiff generates or collects information at some cost or expense;

(ii) the value of the information is highly time-sensitive;

(iii) the defendant's use of the information constitutes free-riding on the plaintiff's costly efforts to generate or collect it;

(iv) the defendant's use of the information is in direct competition with a product or service offered by the plaintiff;

[\*1094] (v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened. 165

This test requires a lot of information but does not key off custom and first-order law in an in personam way, as envisioned in International News Service. As is often the case postfusion and post-Realism, economic policy at a single level substitutes for the two-tiered structure that could respond more indirectly to such concerns arising from the complex evasion of the first-order norms. Although well formulated, the NBA v. Motorola test is both complex and closer to a property right, rather than being targeted to opportunism where it is needed most. 166The equitable approach would do better at cabining the attempts by news sites to shut down aggregators, given the relevant background customs of the internet. 167

3. Good Faith Purchase

Nowhere do problems of polycentricity, conflicting rights, and opportunism present themselves more systematically than in good faith purchase. Good faith purchase sits at the crossroads of contract, property, unjust enrichment, and even tort law, and the law's response to good faith purchasers has been profoundly shaped by equity as meta-law.

Good faith purchase presents structures of rights that involve multiple parties and their complex interactions with ample room for opportunism. If B steals X from A and then enters a transaction to sell X to C, C receives nothing. B had nothing to give: nemo dat quod non habet ("one cannot give what one does not have"). 168If, however, B obtains X from A by fraud and enters a transaction to sell X to C, C can obtain good title vis-à-vis A if C was in good faith and gave value. If C knew of the fraud or if C did not give value--was a donee, for example--then C does not get good title. These days, under the UniformCommercial [\*1095] Code (UCC), a fraudster B is said to have voidable title, which means A can reverse the transaction but B can give good title to a good faith purchaser for value (GFPV). 169And the UCC entrustment provisions--where an owner entrusts goods to a merchant dealing in that type of good--are treated as largely superseding earlier notions of estoppel. 170

In earlier times, and still sometimes in real-property law, good faith-purchaser doctrine was framed in terms of equity. 171When B defrauds A, A retains an equitable interest in X such that A can force anyone who comes to possess X to reconvey to A. However, a good faith purchaser for value takes X free of competing equities. Because of equity's unwillingness to act against a good faith purchaser, the good faith purchaser for value became known as "equity's darling." 172In his treatise, Joseph Story treats the good faith-purchase problem and its intersection with "constructive fraud" as a multipolar, and potentially multisided, problem of opportunism. 173

As originally conceived, the good faith-purchase problem was not just a creature of equity jurisdictionally; it was also an example of meta-law. Problems of sequential possession and title involve multiple parties and conflicting potential rights, 174and are rife with possibilities for opportunism. Is the purchaser really in good faith? Where does lack of notice end and willful blindness begin? When does the original owner's carelessness become so unavoidably misleading as to bring estoppel into play?

The concept and mechanisms of the good faith purchaser were also equitable. It was rarely thought to be just to take property from the GFPV when the GFPV had relied without any reason not to. By contrast, lack of value given means no reliance (or change of position), and notice means that the purchaser is an opportunist. Outside this safe harbor, equity would apply: estoppel might prevent an owner from winning even when the title was void or voidable, as in the law of real property today. 175After some equitable intervention in the earliest [\*1096] periods, the recording acts crystalized the good faith purchaser and have relatively stably interacted with notions like estoppel ever since. 176

During the twentieth century however, good faith-purchase doctrine, especially in personal property, was significantly flattened. Legal Realists such as Karl Llewellyn, the drafter of the UCC, and Grant Gilmore, the drafter of Article 9, drew on earlier pressure campaigns by commercial interests to push for a sweeping rule in favor of good faith purchasers. 177The UCC drafters pushed through ideas of good faith purchase even in the face of recalcitrant early twentieth-century case law that left the door open for equitable balancing. 178Interestingly and also ironically for Realists, this throwback nineteenth-century approach resulted in a rather acontextual rule.

The quest for certainty in commercial law has contributed to the flattening of equity. This flattening of good faith purchase has shown some strains, just where we would expect. Even the UCC drafters, rule oriented as they were, nevertheless included a provision allowing for background equity, 179and recent commentators have taken the flattening out of equity further by criticizing the few cases that integrate equity within the GFPV rules. 180For example, where the [\*1097] plaintiff is the ex-wife of a partner whose unrecorded security interest competes with that of a lead partner who knowingly commits a breach of fiduciary duty to sneak ahead in recording, equity has a clear answer. 181Forcing the fiduciary to do the right thing is quite compatible with recording--without having to resort to litigation in tort or contract. Likewise, in the most spectacular recent misfire of equity, a simple error in discharging a security interest led to the loss of $ 1.5 billion in the later-famous General Motors bankruptcy, when there had been no reliance by other creditors on the incorrect record. The numerous lawyers for the losing bank all framed the question in terms of the statute and authorization, rather than as a (garden-variety) mistake calling for reformation. 182As a few voices in the wilderness have noted, the hyperformalism of such an approach would have shocked earlier generations of lawyers and judges. 183

[\*1098] Solving the good faith-purchase problem will not be attempted here. I will merely note that in the process of fusing law and equity, courts and commentators lost the thread of meta-law, putting some potentially beneficial subtleties beyond the reach of private law. This Article challenges us to reconsider this move, and argues that the lens of equity as meta-law has the potential to diagnose some systematic and recurring problems with this controversial area of law and to reframe the institutional-design question.

4. Trusts

If there is any legacy of equity that retains its salience it is the trust. Whether trust law retains an equitable flavor post-fusion is an open question. Its metalaw character, however, remains quite evident. 184

The trust arose out of the two-court system. The law courts would only recognize legal title, and the equity courts would in addition recognize beneficial interests (sometimes misleadingly called "equitable title"). 185This overlay was "meta": without any conflict, the law courts could enforce legal title, and the equity courts took that as an input to the more complete and complex picture. The equity courts enforced duties in the legal titleholder, the trustee, to exercise the rights and powers associated with legal title for the benefit of the beneficiary, most prominently through the duty of loyalty. Such arrangements were both complex and multipolar, and were rife with dangers of opportunism. Unlike equity generally, this called for prophylactic rules that told the trustee not even to consider self-dealing or engaging in other conflicts of interest and duty. 186

As with other parts of the law with origins in equity, trust law is ambiguous in the degree to which it retains a meta-law character. Often the beneficial [\*1099] interest is treated as "carved out" of ownership (in a version of the bundle-of-sticks picture of property), and often one hears of legal and equitable title. More recently, commentators have developed more appreciation of a structural version of meta-law in trusts. Ben McFarlane and Rob Stevens argue that equitable property is a right against a right: the beneficiary has no property in the asset except in the right of the trustee to the asset. 187In a somewhat more orthodox vein, James Penner defends the view that the trustee has a legal title subject to duties to exercise the powers of title for the beneficiary--which at least sees trusts as two tier. 188The trust combines aspects of in rem and in personam (despite efforts to flatten it into one or the other), 189but the jury is still out on whether and to what extent trust law and fiduciary law more generally still present novel forms of uncertainty and complexity that call for meta-law in a robust sense. 190

In all these areas--privity, misappropriation, good faith purchase, and trusts--equity served as meta-law at the creation of the doctrine. In all these areas, complexity and uncertainty had arisen through the interaction of incommensurate aspects of private law (in rem and in personam, property and contract), which equity helped reconcile through meta-law, especially against a background of changing commerce and technology. Whether and to what extent meta-law should remain a vital part of these areas--as opposed to a worked-out version of first-order rules and standards--is a question worthy of attention not generally received these days. I suggest that the optimal amount of meta-law here is greater than what we currently have. However, it is now time to evaluate meta-law in general and on its own terms.

[\*1100] II. THE SPECIALIZATION OF LAW AND EQUITY

The real "fusion fallacy" has been to overlook how law is indeed a system of systems and to assume--wrongly--that law has to operate at a single homogeneous level. This Part offers a theory of a function of equitable meta-law and, by extension, a partial account of equity itself. On this theory, equity and law benefit from specialization of function. Law as relatively simple and general and equity as contextual and focused work in tandem and produce synergies not attainable by one component alone. This type of synergy is familiar from complex-systems theory (CST). CST posits that systems characterized by organized complexity can sometimes benefit from specialized subsystems. 191This "systems of systems" theory allows us to consider when the benefits of subsystemspecialization make it worth the cost of creating multiple systems, as well as provides a mechanism for the limited interaction of these subsystems. 192

A. Varieties of Specialization

Equity as meta-law sees law and equity as distinct and standing in a special relationship for a reason: by working in tandem they produce effects of efficiency, fairness, and justice, not feasible by either operating alone or through any other single-tier system. This synergy should not be surprising as it arises in all sorts of economic, social, and political systems. Yet conventional views ignore the possible benefits of specialization in the case of equity.

How does specialization work in law versus equity? To begin with, law and equity do different things. Law provides general guidance over many cases in a simpler way. Equity bores in on specific problems and identified actors ex post, employing a great deal of contextual information. Law is a first cut at guiding behavior, and equity is the fine-tuning--the ex post adjustment where the first cut doesn't work well.

Where equity is contextual and targeted, law can be more formal and general, covering many cases at low cost to both law's creators and law's audiences. The benefits of equitable treatment are applied only where they are needed, thus interfering less with law than if equity were always applicable. A homogenous system saves the cost of toggling between the two modes, but it would tend [\*1101] toward some uniform level of formality. Moreover, without the specialization of equity, the contextualism in law has the potential to bleed out beyond where it is optimal. Further, by putting this equitable function in a modular system of meta-law, equity's benefits can be achieved in a more effective fashion. When a homogeneous single-level law tries to tackle problems of high uncertainty and complexity, it must either itself become complex and fragile, or it must fail to provide meaningful guidance (as with multifactor balancing tests).

Equity, then, contributes to specialization in the law. Specialization and division of labor are central to economics and the theory of production in particular. 193There is a "greater than the sum of its parts" aspect to treatments of specialization and the division of labor going back to at least Adam Smith. 194Most representative of the spirit of modern complexity theory is Allyn Young's idea that complexity--"an increasingly intricate nexus of specialised undertakings . . . inserted . . . between the producer of raw materials and the consumer of the final product"--is the source of the gains from specialization. 195The advantages of specialization come from a better combination of a wide array of interacting advantages, such that "[w]hat is required is that industrial operations be seen as an interrelated whole." 196In the same spirit, Xiaokai Yang pioneered an endogenous approach to specialization, which sees increasing returns as the result of decisions to specialize, with specialization being related not to economies of scale but rather to diseconomies of scope of activity. 197In such models, [\*1102] sufficient transaction efficiency is a necessary condition, and one limit on specialization is the cost of coordination. 198In the case of law and equity, such coordination costs arise from devising and maintaining the proxies for toggling between the two systems. 199

Law-like systems dealing with particularly complex and opportunism-prone activities bear out the expectations of specialization models. Tax law presents a compelling example. It governs particularly well-informed actors, and because of the dangers of opportunism, some role for standards is inevitable. 200These standards take the form of antiavoidance doctrines, which back up formal rules against the possibility of their being gamed. The antiavoidance doctrines are couched in terms strikingly similar to equity, including substance over form, the step-transaction doctrine, and the sham-transaction doctrine. The triggers for antiavoidance--skewed results and an inkling of intent--and the way they range over first-order results makes the parallels to equity even closer. 201

[\*1103] Finally, we can get a sense of the role of specialization in equity from organizational theory on how to group tasks. 202Organizational theory shows us that law and equity can be grouped together in the same court in such a way as to reap the benefits of specialization. Consider David Weisbach and Jacob Nussim's analysis of whether spending through tax expenditures should be administered by the same agency that collects the taxes. 203Among the relevant factors are those relating to specialization (promoting separation) and coordination (promoting bundling). 204With some modification for what specialization and coordination mean, similar considerations apply to bundles of tasks, roughly law and equity, administered in one court with two hats, or more simply with two separate modes. As Weisbach and Nussim's work implies, tasks can be grouped together even if they are not assigned to separate divisions of economic agents. 205

Grouping of tasks is pervasive in legal design. The regulatory literature provides other examples of specialization in the face of polycentric, complex, or opportunism-prone areas. Some argue that principles (standards) create more certainty when the activity is complex in a changing environment. 206Standards can counteract the problem of compliant noncompliance, that is, satisfying the letter but not the purpose of a rule; illustrations come from the regulation of industries like nursing homes. 207Moreover, where a complex action comes with high stakes, a hybrid of rules and principles can be better than rules or principles alone. 208For example, the accounting industry, which is closely related to tax, has long featured a debate about rules and principles, with some arguing that [\*1104] principles are needed as part of the mix because of complexity and the dangers of opportunism in compliant noncompliance. 209

Among the more explicit treatments of synergy in legal doctrine itself is Einer Elhauge's analysis of the sale-of-control doctrine in corporate law. 210Normatively, disagreement centers on whether minority shareholders should share in the gains of the sale of a controlling block of shares. Descriptively, the doctrine is a muddle. Elhauge argues that the no-sharing or sharing approaches "are good at different things." 211He then shows how the doctrine triggers sharing when the sale of control is likely to lead to abuses. Indeed, we might say that the sharing approach is an analogue of equity in that it shows second-order features. 212Other areas of law that show such toggling include administrative law and even tort law. 213Again, the special connection of equity to administration and the theme of the system of equity that it requires a more managerial approach are strongly suggestive of the benefits of specialization. 214

B. Synergies and Meta-Law

The specialization of law and equity is complementary and structured. Equity makes it possible for law to be more general, and law makes it possible for equity to focus. The partial separateness of the two modes allows this joint effect to be achieved with less cross-talk. And higher-order standards are a way to control uncertainty without introducing more ambiguity in the process. Systems [\*1105] theory captures benefits of specialization that go beyond the basics: structuring tasks in a hierarchy can be better than putting them on the same plane.

Systems theory emphasizes emergence and feedback, both of which are important in equity. The benefits to a hierarchical task structure with different modules for each system are not reducible to the separate benefits of the two systems. In modular systems, the point is to organize a system so that interactions are intense within modules and sparser (but not zero) at the interfaces between modules. 215Changes in a module can then be tracked more easily than if everything were in principle interconnected. Equitable meta-law is highly interconnected within itself, but the interface between it and law is stylized through the triggers and their proxies. Because of this structure, we can predict the effects of equity better than if it were a ubiquitous wild card or deus ex machina.

Treating the choice between formalism and contextualismas a homogeneous mix of elements at one level is unlikely to make either element as effective as it could be. For these purposes, formalism is relative invariance to context (a notion of formalism useful across many domains, from natural language to artificial languages to scientific theorizing to law). 216The benefits of formalism increase with generality. The point of formalism is to capture generalizations with the minimum contextualized apparatus. 217The rule of law sees a simple general set of rules as an ideal. Unfortunately, the costs of inaccuracy also increase with generality. So, taken only on one level, the question is how far to push formalism in light of diminishing net benefits. On the other hand, contextual rules usually sacrifice breadth to achieve depth. For contextual rules to achieve benefits, often part of the context must be misleading.

Putting contextualism in law at a second order may allow these tradeoffs to be managed better than they could be all at one level. By placing contextual parts of the system at a higher level, formalism at the primary level can be more general than it otherwise would be. And contextualism at the second level can be deeper because it can target contextualized intervention where it is needed most. The remaining question is whether the benefits from specialization at two levels exceed the costs of setting up a second level which targets contextualized intervention. This is the true tradeoff that should inform the choice of what scope to give the second-order equitable function.

[\*1106] One aspect of the specialization of law and equity is their characteristic--and different--modes of communication. Equity strikes a version of the communicative tradeoff faced by all law--between the intensity of the message and the extensiveness of the audience. 218The modularity of equity permits a special hybrid of formalism and contextualism. Like other social practices dependent on communication, law strikes an informational tradeoff between intensiveness and extensiveness. The information intensiveness of a communication is the amount of information conveyed per unit of production cost, the former measured by the metrics of information theory and the latter by more conventional economic metrics. 219

This communicative tradeoff is pervasive in the law 220and can be illustrated by natural language. Sociolinguists have long known that speech styles vary in formality depending on social context and that the factors characterizing more formal styles--more pausing, more editing, and greater explicitness--involve higher production costs. 221Indeed, speakers shift their style depending on the social distance between them and their audience. 222One aspect of informal speech is implicature, as where someone can make a request like, "because you are standing close to the window and I am uncomfortable, please close the window" by saying "it's cold in here." 223The key is the shared knowledge that comes from a common social context. Various measures quantify reliance on context, [\*1107] based on the relative frequency of nouns, determiners, and prepositions versus pronouns and adverbs, with a high ratio of the former to the latter indicating formality. Linguists have shown that such formality correlates systematically with the social distance of audiences. 224

Law and equity show something like this tradeoff as well, in terms of formality and generality versus context sensitivity and particularity. Law aspires to generality and explicit rules. 225In comparison, equity leaves more implicit. This is partly what is meant by discretion and is one reason why equity courts for a long time did not have any doctrine of stare decisis. 226The whole idea of discretion, while not unbounded, is one dimension of the context dependence and consequent lack of formalism in equity.

In specialization models, intensiveness and extensiveness can be traded off in different combinations, allowing the value of overall production to increase in this respect in particular. 227Similarly, a hybrid of law and equity can outperform homogeneous law. Doing so requires recognizing that the communicative tradeoff can be improved and partially overcome by allowing parts of the legal system to specialize. In personam aspects of law (those holding between identified persons) tend to be less formal than those involving in rem(impersonal and anonymous) audiences. 228Law and equity--or more precisely first- and second-order law--are directed at different audiences and can accomplish their goals in different ways.

This model captures a special kind of "acoustic separation" in equity. Meir Dan-Cohen developed the idea of acoustic separation for areas of law that send one message to primary actors and a different one to legal decisionmakers. 229Criminal law might send a tough message against would-be criminals but direct judges to show leniency. 230The separation comes in where the message to judges [\*1108] does not make it out to the public: the lenient message does not undermine the tough one, so the law can maximize deterrence without punishing as much as its letter would seem to require. 231

Equity's audiences may show a different kind of acoustic separation. 232Equity sends the same message, sounding in commercial norms and conventional morality, to two audiences. For those not seeking to exploit the law, this is reassuring to the extent such people pay attention to the details of the law. By contrast, the opportunists will hear the same message as a threat: deviation from basic moral norms can lead to countermeasures from courts of equity. 233

The relationship of the workings of equity to the features of the legal system as a whole is less than immediate or direct. Rather it is the interaction between levels--and the structure of that interaction--that determines the features of the system as a whole. Again, in systems theory, the use of meta-systems in a "system of systems" is the subject of rules of thumb and incremental tinkering, itself made possible by the modular structure. 234

C. The Dynamism of Equity

Finally, another emergent phenomenon has to do with feedback and evolution in the combined system of law and equity. Because of its modular structure, equity can respond rapidly to new conditions without destabilizing the system. This, more than raw discretion, may be the real source of equity's flexibility. Equity is an open-ended system that responds to an open-ended set of problems. Opportunism in particular is inherently open ended: evasion can take new forms. Even multipolar problems and conflicting rights can present new problems with minor but kaleidoscopic changes in background conditions, because of the complex interactions involved. Once equity has tamed a problem, [\*1109] however, it may be suitable for first-order treatment. If so, there is no reason at that point not to specify first-order law in the form of a rule or standard that addresses the problem directly. As is often noticed, equitable interventions have often become crystalized into law, as happened with certain kinds of good faith purchase and responses to categories of fraud. 235This then becomes the new law for equity to act upon. 236

By dealing with a swath of cutting-edge problems, equity is a moving frontier even if its function remains constant. Thus, while rules and standards--or crystals and mud--may oscillate, equity sometimes solves a problem and passes it along to law, resulting in sedimentation. 237Once sedimented, "equity" is no longer open ended and is not meta-law in an active sense, which makes equity's function that much harder to discern.

The kind of complexity faced by equity includes efforts by actors to evade it, and we see from software that evasion sometimes requires extraordinary meta-responses. Thus, traffic control for self-driving vehicles can be evaded by compliant noncompliance, which could be met by better first-order constraints or by going meta to adapt. 238More generally, this dimension of equity is reminiscent of adversarial machine learning, in which the AI has to be able to handle efforts at fooling it, in a meta-process of improving itself. 239

[\*1110] The widespread use of meta-systems in software is an analog for equity. Some of the same considerations come into play: a meta-system can control variation at the primary level while introducing less variation in the process. Furthermore, using a higher-order module to diagnose problems and make repairs at the first order is easier than trying to disentangle the function at the primary level. This is especially true for a distributed function like equity, which ranges over the entire legal system.

More general considerations suggest complex-systems theory is the right set of tools for equity. The kind of complex polycentric problems that face equity falls between two familiar poles. At one end, systems with few elements or very homogenous elements are susceptive to direct analytical methods. At the opposite extreme are large numbers of elements, especially operating randomly, which can be dealt with using statistical methods. For "middle n" problems the methods of complex-systems theory are most apt (if not easy to apply). 240

The effects of specialization cannot be isolated in either law or equity but in their structured interaction. The features of the system, in terms of (un)certainty, (in)efficiency, and (un)fairness, only apply at the system level, i.e., the legal system as a whole, even though they arise out of local applications of equity to law. 241That is, they are emergent properties. This emergence is relevant when we return to how equity supports the rule of law.

In another form of feedback, equity is itself recursive. It applies to itself. Part of equitable analysis is making sure that equity does not produce inequity. Equitable rules of thumb must be set aside in a case if they produce the kind of injustice equity aims to prevent. When we consider the maxims and their associated equitable reasoning, we will encounter courts explicitly applying equitable considerations to the application of equity itself. We could call this "meta-meta-law" and so on. There is nothing vicious about this regress, as long as the system is an open one and we know on what to draw. This, I will argue, is how equity fits into the rule of law. 242

D. Comparisons

Whether equity as meta-law is justifiable depends on how it compares to realistic alternatives. These possibilities can be single level or bilevel and can be more formal or more contextualist.

[\*1111] Single-level models of law posit a system that applies directly to fact situations and eschews context and open-endedness. If further tailoring is desired, the law must change from without through legislation or common-law judicial decisionmaking. More contextual versions of the single-level approach are less determinate and typically employ concepts like reasonableness and balancing to tailor results to situations. This is the familiar rules-versus-standards debate. 243 After the fusion of law and equity, notions of unconscionability, good faith, and the like have exactly this feature. 244 Equitable areas of law are captured as multi-factor tests, as with "hot news" misappropriation. 245 All of these operate on one level: there is no need for one component of the law to refer to another. The allowance of meta-level intervention makes the system more powerful, but without more, unconstrained. An unconstrained system may not accord with the rule-of-law virtues of stability and consistency. I return to the concern of unbounded equity in Part III.

Other critics of a dual equity-and-law system have proposed other reasons a meta-law system would be inferior to the status quo. This framework allows us to see which of those problems with equity are real and which are only pseudo-problems at best. Among the latter is the False Generalization, which posits that all equity in the legal system might well be worse than all law. In effect this is what the New Formalists in contract are arguing. 246This, however, is a false comparison. The real question is whether some hybrid of equity and law is better than equity or law alone. And, as we have seen, there is good reason to think that some such hybrid is indeed superior to homogeneous law.

Another related misfire is the Domain Fallacy. Opponents of equity misinterpret equity as bearing directly on the problems it addresses. By missing the second-order aspect of equity, they treat equity as a clumsy version of law. Thus, when it comes to combatting opportunism they interpret equity as a rule--or, rather, a first-order standard--amounting to don't be opportunistic or else. 247This [\*1112] ignores the need for a proxy trigger to get us into equity and the various self-limiting aspects of equity itself. Equity is not designed to root out every last bit of opportunism, nor is it meant to displace clear instructions from informed contracting parties (or legislators). It is designed to work in tandem with law to tamp down the problem of unforeseen, and sometimes, unforeseeable, complexity and opportunism. This can take the form of interventions to keep in check bilateral opportunism in the contracting process itself. 248

A more sophisticated version of the Domain Fallacy focuses on the margin. It posits that the costs and errors of the last application of equity compared with the last application of law reveal equity to be inferior to law. This is related to the counsel of despair about judges' inability to root out opportunism. While there is no reason to be complacent about equity, this pessimism about equity is based on a false comparison as well. Equity and law should not be evaluated in isolation, because they work in tandem. At the current margin of law and equity, law may be more effective than equity or vice versa, but the real point is this: if pushing equity to a certain point garners benefits not just in its direct application but in allowing law to be more formal, it is worth incurring the administrative and error costs of doing so. Again, the optimal combination of law and equity is an empirical question that we can confront only indirectly, by some combination of analogy and evolutionary arguments, if not rough guesses. No amount of seemingly rigorous measurement at one margin obviates these difficult decisions.

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Equity is a response to complexity, but it is the complexity of equity that allows it to be a response. Equity does not capture complexity by mirroring the world piece by piece. Instead, the pieces of equity--its domain, its triggers, its contextualism--work together to produce something greater than the sum of its parts. This is the paradox of equity: to understand it as a whole requires a non-reductive account of its moving parts. By contrast, conventional views on equity are either vacuously holistic (mystic discretion)--or myopically technical (just a label for historic courts). If equity is to function as meta-law, we may not need separate courts, but we do need separate equity.

[\*1113] III. EQUITY IN ACTION

In this Part, I address some central but apparently challenging aspects of equity. The aspects of equity elucidated here are selected exactly because they are either difficult for existing approaches to equity or because they are so characteristic of equity--or often both. These include the maxims of equity, varieties of fraud, defenses, and remedies. Each of these aspects looks empty or arbitrary if they are taken to be rules or standards at the primary level of law. As meta-law, they can be seen as doing something much more important.

A. The Maxims of Equity

We begin with the equitable maxims. 249The maxims are familiar, if not as familiar as they once were, 250but they are easily misunderstood. Most commentators now see little value in them, and a few courts even deny they exist or that they operate in any meaningful sense. 251The criticism is that, like the canons of statutory interpretation, 252they are too vague and uncertain, they sometimes conflict, and they don't constrain judicial decisionmaking. 253The maxims are variously regarded as inadequate rules or empty and contradictory aspirations. 254But such criticisms misunderstand the nature of maxims. They are not designed to be rules or standards like the prudent-person standard in torts or the foreseeability rule for contract damages. Instead, they are signals that we are [\*1114] in equity land, and as such they relate to the equitable decisionmaking mode as a whole. 255

I will show that the maxims are best seen not as rules of law but rather as indications of equity as meta-law at work. The following is a reconstruction of the maxims, or perhaps a gloss on them, which brings out their potential as meta-law--a potential they probably once served and could serve better by being brought to the surface. Their status as meta-law is implicit in their operation, and they substantively address polycentricity, conflicting rights, and opportunism. As meta-law, they should work as an integrated whole; earlier commentators likened the maxims to proverbs and saw them as "interdependent" and as presupposing a wisdom in application. 256Taken as a whole in the light of metalaw, the maxims can be part of a revitalization of equity. If, as I have argued, more explicit attention to meta-law can add focus and context to the law's current muddled approach to combining generality and formalism, then the maxims could play more of a role in shaping the hybrid law-equity system.

In this Section, I also provide a novel organization of the maxims into categories. Organizing the maxims into categories is a little artificial because, as I am arguing, the various features of equity work together holistically to act as a system of meta-law in solving complex and uncertain problems. Nevertheless, certain themes relate to the structure of equity and how we get into it, and others characterize the style of reasoning once we are there. Individual maxims can partake of more than one theme, and multiple maxims can overlap.

1. Cabining Maxims

In this and the next subsection, we start with maxims that limn equity itself. The starting point is to recognize that equity is exceptional and supplements the law when the law falls short. Thus, the list of maxims often begins with what equity is not. These limits express how equity is targeted, and are crucial for meta-law to be exceptional rather than routine.

[\*1115] (a) Equity follows the law. The maxim, "equity follows the law" often leads the list of maxims, and it theoretically constrains the domain of equity. 257Because much of equity is meta-law, the threshold question is whether we are in its domain. 258In the days of separate equity courts, this threshold question had jurisdictional implications.

At first blush, it would seem that "equity follows the law" is no limiting principle at all. If one pairs "equity follows the law" with "equity will not suffer a wrong to be without a remedy," a court can reach any result it wants. But if equity is meta-law, "equity follows the law" acquires a different gloss. If the law is clear and the legal rule anticipated the bad behavior, there is no need for equity to backstop the law. Conversely, if an opportunist has outsmarted the law, especially in a novel way or one made possible by an unanticipated change in conditions, then equity strengthens the law by not following its letter. Recall the commentators and judges, including Story, whom we surveyed earlier: equity protects the law against crafty evasions and artful contrivances by not following the law exactly. It is a way of following the law, but loosely.

Conversely, the comprehensiveness of a statutory scheme may limit equity. For example, consider a statute that specifies remedies where a public authority exercises eminent domain but then abandons the planned project for lack of funds. Even if the former owners wish to repurchase the property at the price agreed to under threat of condemnation six months earlier, equity cannot supply a duty to reconvey to the old owners. 259The statute has created a new ownership with no such strings attached, even though the public authority is acting very shabbily--and, one suspects, spitefully. 260

[\*1116] The maxim that "equity follows the law" is also reflected in the notion that injunctions were not to be granted unless the legal remedy was inadequate--equity begins when law ends. Some commentators such as Douglas Laycock have questioned whether irreparable injury is truly a requirement. 261Per Laycock, the irreparable-injury cases--in which damages are found to be inadequate, thus paving the way for an injunction--are all over the lot. It is hard to point to a type of situation that would be worth litigating that some court or other has not found to meet the criteria for irreparable injury. 262But if equity is, as I argue, a decisionmaking mode that is directed against hard-to-prove opportunism and complex problems involving conflicting rights, we should not be asking for an ex ante rule in the first place. The irreparable-injury rule is best understood not as a rule, but as a marker for the toggle between law and equity which need not be fully spelled out with precedential force in appellate decisions.

Even more interestingly, Laycock's proposed replacements for the irreparable-injury rule are implicitly second order--they are meta-law. Based on his reading of the cases, Laycock suggests that courts should be clear about what they are trying to accomplish. Laycock sets out standards for injunction based on, for example, "[u]ndue [h]ardship," "[b]urden on [i]nnocent [t]hird [p]arties," and "[i]mpracticality," which all make reference to the law and adjust it, often using context involving complex interactions and multiple parties. 263

If "equity follows the law" indeed functions as a maxim rather than as a rule, this presents an obvious empirical challenge. How do we know that two cases--one in which the legal remedy is found inadequate and the other in which it is found adequate--differ in that the former contains, say, opportunism or complexity-induced surprise and the latter does not? In some cases, there are hints of opportunism, and we might be able to design test scenarios. But by and large, the evidence for equity as meta-law will have to rely on something more indirect: Does the pattern of principles and cases, and in particular the system of proxies and presumptions, fit the theory of equity as meta-law as a whole?

(b) Equity acts in personam, not in rem. Another maxim that distinguishes equity from the common law and which originally had a jurisdictional dimension [\*1117] is the maxim describing the in personam character of equity. 264The focus on the individual allows for moral evaluation of personal conduct, even more so than in parts of the law like negligence that turn on reasonableness. In contrast to the "reasonable person" standard, equity can zoom in on opportunism in its hard-to-foresee guises. Thus, seeing equity as directed towards multipolar problems, conflicting rights, and especially opportunism is consistent with James Barr Ames's further observation that "[e]quity lays the stress upon the duty of the defendant, and decrees that he do or refrain from doing a certain thing because he ought to act or forbear. It is because of this emphasis upon the defendant's duty that equity is so much more ethical than law." 265

An equity court could order a person within its geographical jurisdiction to do something under threat of being held in contempt. 266Originally, courts of equity could only give in personam remedies. Injunctions themselves cannot be in rem, and generally can only bind those who were specifically named and those acting in concert with them. 267Gradually this principle was loosened for certain categories of cases and trivial ministerial acts that the court could then perform directly. For example, statutes were enacted to give courts power to transfer property within their jurisdictions with in rem effect, 268and courts have made creative use of equitable liens. 269

Nonetheless, there are functional reasons not to lose sight of the maxim that equity acts in personam. We would expect in personam effects to give rise to lower third-party information costs than in rem commands, and that a version of equity that produces in rem effects would be destabilizing and complex and present higher information costs. The interventions discussed in Section I.D--in privity, misappropriation, good faith purchasers, and trusts--all make use of the in personam mechanism to achieve a wider effect.

[\*1118] The in personam character of equity also reinforces its meta-law nature. Equity does not act directly against the law writ large, but from without, through orders to the person upon which the law also acts.

(c) Equity will not aid a volunteer. This maxim is related to the officious intermeddler and what counts as unjust enrichment. 270Again, the presence of a legal obligation is important. The officious intermeddler, such as the proverbial person who paints your house while you are on vacation, is likely to be an opportunist.

Consider the well-known equitable doctrine of the "common fund." 271If someone, often a lawyer, sues on behalf of others, whether they can benefit from a common fund can be conditioned on their paying a proportionate share of the costs. Because the fund would not exist but for these costs, a person who partakes without contributing would be unjustly enriched. But equity courts will also prevent officious actors from using a common fund to thrust benefits on others, to prevent the possibility of unjust enrichment in the other direction. 272Likewise, someone who pays a liability for someone else (for example, an insurance company) is subrogated to the claim, but not if they paid officiously or as a volunteer. 273

2. Disproportionate-Hardship Maxims

Disproportionate-hardship maxims are one of equity's main proxies for opportunism and an entrée to considering conflicting rights. 274Situations of disproportionate hardship correlate with opportunism because one party may be using extreme leverage against the other. This becomes problematic when it happens in a way that would be contracted away (or, alternatively, that one would not approve of behind the veil of ignorance). Disproportionate hardship is especially problematic if it occurs unexpectedly, as we therefore suspect that [\*1119] one party is simply taking unfair advantage of the other. A highly skewed result may also reflect polycentricity gone awry.

(a) Equity abhors a forfeiture. Here too the focus is on unjust-looking results, but opportunism or unforeseen complexity may be the real culprit. The antiforfeiture maxim comes in broader and narrower versions. The broader one is the familiar ex post effort to rescue people from dire consequences. The narrower and more targeted version sees the core of the antiforfeiture maximas those cases in which extreme consequences--disproportionate hardship--are the result of sharp dealing, misleading behavior, and other forms of opportunism. As Carol Rose notes, forfeitures are situations of disproportionate hardship that often involve "mopes" or "ninnies" on one side and "sharp dealers" on the other waiting to "take advantage." 275If the virtue of the maxim is that such opportunism need not be proved or spelled out in an opinion, that is also its weakness: it gives judges a lot of discretion, it is easily misunderstood as broader than it is, and it is difficult to test empirically.

If so, another hypothesis worth exploring is that mistake and fraud, which are also triggers for equity, are related to the antiforfeiture doctrine. All three target unforeseen complexity and its exploitation from different angles. 276Unexpected ex post situations featuring disproportionate hardship also tend to call forth self-serving, overreaching behavior.

(b) Between equal equities the law will prevail. Equity is not about balancing and equipoise, but instead it concerns itself with problems where the law is unlikely to be adequate for reasons of complexity and uncertainty. 277In cases of equal equities, there is no opportunist. 278

[\*1120] 3. Direct-Operation Maxims

The in personam aspect of equity also relates to another important feature: its direct action upon the person, fashioned for a particular problem. Injunctions, the quintessential equitable remedy, act against named parties (and those acting in concert with them) and can be finely tailored, both in their specificity and their breadth, to the problem at hand. Several maxims express the direct nature of equity's interventions.

( a) Equity will not suffer a wrong to be without a remedy. This maxim captures much of the nature of equitable intervention. 279And, to the extent it is a maxim of the common law, it expresses its creative, even "meta," aspect. This equitable maxim was especially important historically, when the complexities and technicalities of the common law often left remedial gaps. 280Opportunists could take advantage of gaps in the common-law system of remedies. More recently and more controversially, it is problems of extreme complexity, and often advantage taking, that prompted courts to develop the structural injunction. 281

( b) Equity regards as done that which ought to be done. This applies where one person is under an obligation to act but has failed or refused to do so. 282Under this maxim, a court can combat opportunism by undoing it directly. Some cases involve the opportunistic refusal to perform an act. If the court can use a fiction that the act has been done, the opportunism will not have its effect. Thus, the [\*1121] equitable reformation of a deed can be ordered when a divorced wife's name had not been listed as joint tenant because she was underage at the time of the conveyance. 283

The maxim also expresses a method of dealing with complexity by recharacterizing a situation in terms of a final result. It is closely associated with the doctrine of equitable conversion. 284In a land-sale contract, title does not pass immediately. During the executory period, between the signing of the contract and the closing, the seller is the legal owner of the real estate and the purchaser is the legal owner of the money, but in equity the purchaser is the owner of the land and the seller is the owner of the funds. This has far-reaching consequences in situations of death and reflects the importance of specific performance in real-estate transactions.

(c) Equity imputes an intent to fulfill an obligation. This maxim is related to the one that declares that equity regards as done that which ought to be done. 285Again, it allows courts to deny bad faith a scope for action.

By the same token, this maxim can be used to restrain equity by not getting involved in anticipating opportunism too early. 286Thus, a court will not entertain a claim of preferential treatment by a receiver if no distributions have yet occurred. 287Equity reserves the threat for truly imminent harm.

4. Contextualizing Maxims

Within its domain, equity is less formal and more open to contextual information than is the common law. This helps it deal with complex problems not suitable for single-tier treatment. Multipolar interactions, conflicting rights, and opportunism require more context and more interrelations among pieces of context than regular law can readily provide. Further, equity seeks individualized justice in which opportunism has no scope to exploit the defects of the law that stem from its generality.

[\*1122] (a) Equity regards substance rather than form. One tactic of opportunists in environments of high complexity is to invoke form over substance. 288This is very familiar from tax law, where one antiopportunism device is the doctrine of substance over form. 289This often occurs in tandem with other equitable maxims, as where an installment sale of land is interpreted as a mortgage to prevent forfeiture. 290The idea is that substance is less manipulable than form. As mentioned earlier, in a simple modular structure, form will diverge from substance, giving rise to opportunism. 291

Courts are well aware that technicality is the friend of the opportunist, Aristotle's "stickler in a bad way." 292As one court put it, "it is said that equity looks to the substance and not the shadow, to the spirit and not the letter; it seeks justice rather than technicality, truth rather than evasion, common sense rather than quibbling." 293

While "substance over form" is most interestingly applied against opportunism, it is worth pointing out that it is also a method of dealing with uncertainty and complexity more generally. Multipolar problems and conflicting rights can [\*1123] benefit from recharacterization as well, which becomes clearer in conjunction with closely related maxims.

(b) Equity delights to do justice and not by halves. This maxim is even harder to classify than the others, because it relates to several themes at once. 294Conventionally it is thought to reinforce the idea that a wrong will not be without a full remedy. It also resonates with equity procedure which aimed at getting all interested parties before the court and addressing the entire conflict: think inter-pleader and class actions as well as the ability of equity courts to hear legal claims incidental to equitable ones. 295It thus resolves polycentric problems as a whole and does not allow opportunists to promote a partial and misleading picture.

Finally, the limits of this maxim can be prescribed by legislation. If a statute explicitly sets out a different procedure for a given problem, there is no scope for equity jurisdiction, or for functional equity--the problem has been foreseen. 296

5. Moralizing Maxims

As is well known, equity relies directly on basic morality. Historically, the courts of equity were "courts of conscience," and the early Chancellors were clerical officials. 297As we will see, notions of right and fairness are not totally freeform. Rather, equity receives much of its substance from everyday moral disapproval of deceptive behavior.

(a) Equity will not allow a wrongdoer to profit from his own wrong. Equity will not apply a remedy that furthers wrongdoing, and it will apply other equitable [\*1124] remedies to find alternatives to the wrong-furthering remedy that is now off limits. This maxim is almost a statement of the antiopportunism principle. 298

The maxim is best illustrated with über-chestnut Riggs v. Palmer, 299the case of the murdering grandson. Francis Palmer, a widower, had two years earlier made a will leaving bequests to his daughters, and the rest of his estate to his grandson Elmer, subject to the support of the testator's mother. 300When Francis remarried, he entered into a prenuptial agreement that obligated him to amend the will to provide lifetime support from his farm (in lieu of dower) for his new wife. 301Wanting to prevent these changes, Elmer killed his grandfather by poisoning him. 302The sisters sued for an injunction to prevent title from passing to Elmer.

The court applied principles of equity both to the interpretation of the wills statute and to the will itself, and it resoundingly stated that "[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime." 303The problem was not just that the grandson committed an evil act, but that he did so with a view to how it would redound to his advantage under the laws of wills and inheritance. 304Elmer's act was both evil and opportunistic: he murdered his grandfather so that no new will could be written, in order to get his full inheritance in accordance with the law.

The dissent argued that the statute made no such exception and should be applied according to its plain terms, especially in the area of wills, where stability and notice are important. Criminal law would take care of Elmer. The dissent has remained a rallying cry for formalists to this day. 305

[\*1125] Riggs illustrates how historically and aspirationally--and, I argue, functionally--equity applies in a narrow domain, but potentially stringently within that domain. This no-profit maxim relates not just to when equity will intervene, but also how. The remedial arsenal of equity is keyed to wrongdoing. Under the constructive trust, the wrongdoer is treated as an "as if" trustee for the victim of the wrongdoing. 306The sometimes-extreme rules of tracing, giving the victim every benefit of the doubt vis-à-vis the wrongdoer, operate in furtherance of this moralizing maxim. 307

(b) Equality is equity. This maxim sounds in fairness. 308Opportunists can be regarded as trying to undermine equality, although what constitutes equality may be context specific. One virtue of equality as a presumptive baseline is that if people share widespread intuitions about what equality requires in given situations, it is less open to manipulation than more artificially constructed benchmarks. 309Also, if an opportunist has to share gains proportionally with others as mandated by an "equal" system, there will be less incentive to engage in opportunism.

But as is often the case, the potential for opportunism is two sided. In the case of an ex ante unanticipated windfall, there is reason not to use all-or-nothing rules, especially ones keyed to manipulable variables, in light of the danger that multiple parties will try to capture the windfall. 310In the end, this maxim [\*1126] gives a court some leeway for intervening against opportunism without having to justify itself in detail. The advantages and disadvantages of deciding this way are characteristic of equity.

(c) Between equal equities the first in order of time shall prevail. As we saw in Part II, multipolar problems and conflicting rights require reconciliation; this maxim combines the balance of justice with deference for law. 311Like equality, priority is a focal point, and in many situations--but not all--it is less susceptible to manipulation. So prior in time wins, as long as there is no imbalance of equities.

This maxim also relates to a highly complex body of law dealing with the priorities of various equitable estates, interests, and liens. 312The idea that the earlier equity wins can be regarded as a tiebreaker based on the probabilities of opportunism or as a rule that minimizes the temptation to engage in it. It also resolves complexity in a broad class of situations.

(d) She who seeks equity must do equity. This maxim relates obviously to opportunism but is also a principle governing the whole mechanism of equity. 313It is related to estoppel and clean hands and can be found in very early sources. 314

One method of dealing with opportunism is to deny equitable remedies and defenses to those whom the court views as opportunists. For example, one cannot ask for the equitable remedy of a resulting trust where the purpose and effect is to defraud creditors. 315Requiring one who seeks equity to do equity helps prevent equitable remedies from themselves becoming tools of opportunism.

This maxim served at one point to deal with an important class of opportunists: husbands seeking to take advantage of the common law of marriage to the detriment of their wives. Before the mid-nineteenth century, the common law [\*1127] regarded husband and wife as a unit, with the husband as decisionmaker. 316This led to all sorts of possibilities of misfeasance by the husband, not remediable by the common-law courts. Courts of equity got around the form of the common law by allowing women to hold equitable interests and to bring suits in equity for constructive fraud by the husband. The maxim "equity regards as done that which ought to be done" was frequently invoked to force a result that the husband could otherwise avoid at common law. 317

One might conjecture that this maxim is also a high-level expression of a hydraulic aspect of equity: not allowing equitable intervention on behalf of one who will not do equity moves behavior to a better equilibrium overall, even if opportunism is not directly involved.

(e) He who comes into equity must come with clean hands. "Unclean hands" is a fairly direct proxy for opportunism, and this proposition is also considered an equitable defense. 318It is worth noting that unclean hands, like other equitable determinations, is far less of a balancing test than one might think. While some assessment of the severity of the opportunistic behavior may be occurring sub rosa, the unclean-hands maxim and the unclean-hands defense are complete obstacles to using equity. In this it is very similar to (but potentially broader than) "she who seeks equity must do equity" and is often cited in tandem. Again, the danger is letting equity itself become a tool in the hands of opportunists. 319For [\*1128] example, someone near the age of majority who repudiates a contract opportunistically is under no legal obligation, but a court will not afford the repudiator an injunction against interference with the new contract. 320

Also limiting the maxim is the principle that opportunism in the transaction in question is all that counts. 321Thus, if someone lies to another and seeks specific performance, the defense applies. If someone is a liar, a thief, or a notorious bad actor in general but not in a given transaction, equity is still available to that person. This keeps equity more cabined, as a safety valve or refinement of the modular structure of rights.

(f) Equity aids the vigilant and diligent. Like unclean hands, this maxim is related to a defense--that of laches. 322It is characteristic of equity to try to match the consequences of uncertainty and complexity with the party who created them. Opportunism may be at the edge of the picture here too. 323Unreasonable delay in asserting one's rights calls forth reliance on the part of others. The danger is that the delay may be deliberate, that is, opportunistic. Again, courts do not like to become instruments of oppression, which brings us to our final and in some ways most intriguing category.

6. Maxims as Meta-Meta-Law

As I have alluded to above, these maxims can feed into each other in their applications. The maxim "she who seeks equity must do equity" is recursive in the sense that equity depends on an application of equity. We might then ask: Is there any evidence that maxims reflect meta-meta-law (and higher)? Can equity as a whole be subject to (meta-)equity?

[\*1129] Even in terms of maxims, we do find such meta-meta-law. It is sometimes proposed as a maxim that "[a]n equitable principle should not be invoked to defeat equity." 324Or even more generally, "[a] court of equity is not to be made an instrument of wrong," 325or "[t]he function of courts of equity is to do justice, not injustice." 326

Thus, when someone raises the unclean-hands defense against someone asking for cancellation of a deed, a minor falsity on the petitioner's part will not lead unclean hands to apply if that would produce an injustice overall. 327Likewise, this is a check on granting specific performance. 328And in general, the procedures of equity will themselves be modulated by equity to prevent the court from itself being made into an instrument of injustice. 329This is meta-meta-law.

[\*1130] \* \* \*

In sum, the maxims are neither first-order rules nor empty moralistic slogans. They are guides and expressions of what happens after equity is triggered, within the realm of meta-law. They are, after all, at the heart of equity.

B. Legal and Equitable Fraud

The notion of fraud is a particularly instructive illustration of how law and equity relate in a two-level system. As we have seen, much of substantive equity went under the heading of "constructive fraud," which was wider and more contextualized than regular fraud. 330

Equitable fraud is nothing if not protean. It relates to all aspects of transactions. In Earl of Chesterfield v. Janssen, Lord Hardwicke listed kinds of equitable fraud: fraud "arising from facts and circumstances of imposition," fraud "apparent from the intrinsic nature and subject of the bargain," fraud "presumed from the circumstances and condition of the parties contracting," and fraud "from the nature and circumstances of the transaction" which deceives third parties. 331We can see in this catalog the kind of combination of bad faith and disproportionate hardship that are the triggers for equity. And the moral concepts involved are not irrelevant to the evaluation in equity once we get there. Indeed, equitable fraud is both the superset of unconscionability and, as noted earlier, a more constrained approach to it. 332

The development of some kinds of equitable fraud into categories of legal fraud confirms that equitable fraud is suited to meta-law treatment. Meta-law is best at dealing with new and creative forms of fraud and those kinds of fraud that, for whatever reason, the law has difficulty handling. Such at one time was fraud in the inducement, in which the fraudster deceives another as to the context of the transaction--in contrast to fraud in the execution, in which someone deceives another as to the nature of a document she is signing. Over time, the law started to recognize known types of fraud in the inducement. 333As fraud in [\*1131] the inducement became a familiar problem, the regular law began to treat it at the first order, and equity remained on the lookout for new forms of fraud.

C. Defenses

Equity is associated with an array of defenses, some of which, like laches and disproportionate hardship, feature in related maxims. What is often controversial about equitable defenses is their persistent pairing up with equitable remedies and doctrines. On one view of the fusion of law and equity, a defense is a defense to liability and should not track the old jurisdictional divide. Yet, defenses are associated with equitable remedies like injunctions and reformation (and doctrines like unconscionability). What about any of these "equitable" remedies justifies their being paired with certain defenses, and why are certain "equitable" defenses limited to aspects of the law identified with equity instead of being generalized? Equity as meta-law contributes to a clearer picture of which equitable defenses should be generalized in the process of substantive fusion, and which should not.

The reasons for special equitable defenses are related to the specialness of equity, both in its exceptional quality and its specialized function. Equitable defenses can be shown to mirror the rest of equity in acting as meta-law. 334If equity as meta-law involves the free use of context and severe methods, equitable defenses are likewise contextual and soften the hard edge of the equitable remedy. For example, an injunction can cause harm to the enjoined party out of all proportion to the rights violation. Moreover, the equitable defenses themselves respond to problems of polycentricity, conflicting rights, and opportunism that are characteristic of equity as meta-law.

Take as one example the defenses to an injunction. The problem with injunctions is that opportunism can occur on both sides. The one seeking an injunction may be trying to exploit holdup power. On the other hand, someone trying to avoid an injunction may be trying to exploit the inadequacy of remedies, as by cherry picking an asset that will be undervalued by a court or by dragging their feet in a negotiation over a license. The various defenses of disproportionate hardship, laches, and unclean hands police the potential for bad behavior on both sides. Moreover, the traditional approach to injunctions was well suited to polycentric problems, conflicting rights, and interdependent behavior, because an injunction is itself multidimensional and can be tailored to context. 335It can [\*1132] be delayed or conditioned on other behavior--"one who seeks equity must do equity"--and the like. 336

Where equitable defenses have become or could be made less second order than they once were, there is a strong case for assimilating them into the rest of the law. Thus, where estoppel can remedy the opportunistic use of jurisdictionally legal remedies, there is no reason not to apply estoppel outside of "equity." 337Unclean hands is a closer case, with some courts allowing it in damages actions. 338As with estoppel, with which it partially overlaps, there is a moderate fusionist case to be made that unclean hands can provide positive benefits when applied to certain damages actions. Here, disagreement focuses on whether the modulation inherent in damages and the danger of equity slipping its bounds (including the invasion of the province of the jury) would counsel against such a step. 339

By contrast, laches largely responds to problems inherent in the equitable remedies and so is better kept paired with them. 340More generally, the equitable function can give us some purchase on otherwise hidden patterns in equitable defenses. 341

D. Remedies

Equity's relationship to remedies is its most familiar, and contested, aspect. As with defenses, the question is whether there is anything special about equitable remedies. And for the question of meta-law: Is there anything particularly meta about equitable remedies?

[\*1133] Because equitable meta-law is targeted in the application of law to a particular situation, it is naturally paired with remedies. This has led some commentators to reduce equity to its arsenal of remedies. But equity is effaced when it is regarded as merely remedial. 342

Equitable remedies are often severe and blunt in some ways and finely tuned in others. It is no accident that equitable defenses often soften the severity and allow for fine tuning when necessary--something not needed for damages, which have their own built-in sliding scale. 343

As Samuel Bray has shown, equitable remedies often involve complex directions to parties, adjustments, and a general managerial aspect often not shared by legal remedies, especially damages. 344 These managerial devices are well suited to problems of uncertainty and complexity in general and to problems of polycentricity, conflicting rights, and opportunism in particular. A court contemplating injunctions must consider the effect on third parties and the intricate possibility of two- (or more-) sided opportunism. 345Other remedies, like accounting and (as we have seen) reformation for mistake, share these features. 346Most dramatically, we have seen that the open-endedness of equity in the presence of complexity and potential misuses is entwined with equitable remedial meta-law.

To illustrate the meta-law-of equitable remedies, consider another dichotomy that often replaces law and equity: property rules and liability rules. 347A liability rule sets an official price on an entitlement, whereas a property rule provides a remedy that is intended to be robust enough to force a duty holder to respect an entitlement or bargain for a consensual transfer. Liability rules are often associated with compensatory damages and property rules with both injunctions and supracompensatory remedies like punitive damages. This already says a great deal: in the law-and-economics framework, remedies are aimed at deterrence (and to a lesser degree compensation), and the property rule is treated as a bigger stick for entitlement holders to wield along a single dimension of liability. What [\*1134] this leaves out are all the ways in which injunctions are keyed to different aspects of behavior (such as good faith and disproportionate hardship) and can be tailored to achieve specific remedial goals (such as timing and conditions). Injunctions can be used to guide behavior and come down hard on opportunists while giving a break to good faith actors. 348Thus, while it is true that liability rules prevent a kind of strategic behavior on the part of holdouts who can use "property rules" to extort or otherwise prevent valuable transactions, 349actual injunctions leave room for a defense of undue hardship on the part of those who violate a right in good faith. Further, the system of damages (liability rules) can itself be manipulated by the unscrupulous, as where would-be takers of entitlements will search out assets likely to be undervalued by courts. 350

To see how the notion of property rules misses what's important about injunctions, consider the gloss that meta-law places on another recent framework for thinking about remedies. This framework classifies remedies as replicative, reflective, or transformative. 351A replicative remedy simply orders that a duty be carried out and so does not involve discretion as to either the goal or the content of the remedy. A reflective remedy, often in the form of damages, requires a court to exercise discretion as to the content but not the goal of the remedy. Neither of these first two remedies presents problems that cannot usually be handled by single-tiered law. By contrast, the transformative remedy requires a court to exercise discretion over both the content and the goal of the remedy, thereby creating "a legal relation that significantly differs from any legal relation that existed before the court order was made." 352What is most striking in Rafal Zakrzewski's survey of remedies in common-law systems is that all of the transformative remedies he identifies trace back to equity. While some historically equitable remedies may not be second order, all second-order remedies are equitable, even in the technical sense.

This typology of remedies has been applied to the constructive trust, and here too the role of meta-law is apparent. Ying Khai Liew finds that constructive [\*1135] trusts potentially come into play in all three types of remedies: replicative, reflective, or transformative. 353The transformative version of the constructive trust (often known as the remedial constructive trust) 354is more accepted in the United States (as well as Canada and Australia) than it is in England. 355If, for example, someone commits a wrong or would be unjustly enriched, a court can exercise discretion to impose a remedy in the form of a trust on the subject matter or in contravention to the property rights that would normally hold. In second-order fashion, the court reworks the primary entitlement employing a wide range of context, including proportionality, protection of third-party creditors, and the prevention of wrongful gains. 356The remedial regime shapes the primary level of law.

IV. EQUITY REVISITED

The fusion of law and equity leaves plenty of unfinished business. Picking up the thread of meta-law can shape the course that fusion takes. Historically, equity's role of correcting law when it is out of whack on account of its generality was close to the surface of judges' and commentators' awareness. After fusion and waves of Legal Realism, equity retained only a loose association with discretion and injunctions, with proponents and opponents lining up for or against judicial power. At the same time, as the residue of equity has sometimes been translated into substitutes for meta-law--multifactor balancing tests, complex rules, and standardless discretion at the primary level of law--equity has, to some extent, been flattened. The equitable distinctions and formulas are still there, but they are invoked like incantations unmoored from this major theme of equity. And yet the meta-role of equity was there for a reason: all legal systems have to address different audiences, combine elements of formalism and contextualism, achieve some generality without exploitation and unfairness, and keep things humming while being ready for the unexpected. Meta-law should be part of the toolkit for addressing these questions, and the fragments of equity can be reassembled to do the job.

[\*1136] A. Distortions of Equity

Equity's twilight existence threatens the coherence and effectiveness of the law. Addressing uncertainty and complexity without meta-law is sometimes--perhaps often or always--possible, but the substitutes employed tend to be worse overall. The advantages of specialization captured in the model of Part II cannot be achieved as effectively. With a submerged or suppressed element of meta-law, the legal system will face a worse tradeoff between formalism and contextualism, and between generality and individualized justice, than it would if equity clearly maintained its status as meta-law. In this Section, I draw out some particular downsides of flattening through fusion: the proliferation of multifactor-balancing tests and the polarization of formalism and contextualism.

First, misbegotten fusion has contributed to the rise of the notorious multifactor balancing test. An overemphasis on multifactor balancing shows up exactly where equity as meta-law has traditionally addressed complex and uncertain problems. 357Recent reformulations of the hot-news misappropriation doctrine, which was explicitly equitable and designed to deal with opportunism and conflicting rights, have inevitably taken the form of multiprong tests. 358Even the Supreme Court's eBay decision can be seen as a multiprong test if not a multifactor-balancing test of sorts. 359

Second, Realist-inspired contextualism has led to a formalist backlash in private law. From the New Formalism in contract to textualism in statutory interpretation, some courts and commentators have advocated for restricting the kinds of context that judges can use. 360For contracts, prohibited context includes course of dealing and commercial custom, and for legislation, background information and especially legislative history. Because equity tends to be associated with discretion and its limits (triggers, presumptions, and self-imposed restraint) have been obscured, formalism has appeared more attractive than it would be if it had to compete with a more measured employment of context, filtered through the structures of equity as meta-law. From unconscionability to the equity of the statute, an earlier generation of Realist-inspired contextualists invoked equity to give their approach the patina of history. 361So when the [\*1137] backlash to contextualism comes, the formalist's rallying cry includes the familiar anti-equity rhetoric, replete with references to the Chancellor's Foot.

The polarization between formalism and contextualism is characteristic of the U.S. Supreme Court's "new equity" jurisprudence. 362The starkest example is the set of dueling opinions in Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 363which showcased diametrically opposing approaches to federal equity. In an opinion by Justice Scalia, the majority held that a federal court lacked power to issue preliminary injunctions to freeze unrelated assets where the plaintiffs were only seeking money damages. 364For Justice Scalia, such preliminary injunctions were outside the federal-equity power because equity courts did not issue such injunctions at the time of the Federal Judiciary Act of 1789. 365In dissent, Justice Ginsburg offered the fully contextualist and potentially unbounded version of equity. She argued that preliminary injunctions to freeze assets should be available because they solve a problem by employing equity's flexibility and generativity. 366Her opinion at most gestured to the test of injunctive relief without giving much sense of any limits. Employing equity only when it can be justified is not much of a restraint.

On the account offered here, we can chart a different path. Like Justice Ginsburg, we recognize equity's generativity, but without throwing the doors wide open. The preliminary injunction deals with a gap in complex procedural devices and their vulnerability to opportunism. It also preserves the integrity of the litigation, especially against judgment-proofness--traditional targets of equity--in a focused way. Indeed the traditional equity as meta-law approach covers the problem in Grupo without having to generalize very far. A similar dichotomous dynamic is playing itself out now in the controversy over nationwide injunctions, [\*1138] with the arguments leading to all-or-nothing results and the analysis not making full use of the content of equity itself. 367

More generally, as I have argued elsewhere, there is a version of equity that undergirds the entire legal system, and these large uses of equity raise a question that is in a sense beyond the Constitution itself. 368Equity has never and can never do more than people can stomach politically; the pushback from other courts, legislatures, and the people has been in a sense the ultimate check on equity courts. Equity draws on the same Fullerian morality as the rule of law itself and can survive only as long as that culture permits. 369

B. Equity Reductionism

Because equity has been distorted, it is commonly regarded as something--almost anything--else. As a result of this reductionism, equity is variously treated as being solely about standards, discretion, publicness, or remedies. Reducing equity to any of these plausible but inadequate single-level substitutes impairs or even effaces its function as meta-law.

First, while standards bear many similarities to equity, they are not central to equity. Standards can be first- or second-order. The classic standard--"drive reasonably under the circumstances"--does involve a lot of context. Accounts of standards indirectly get at something about equity but cannot capture its meta-law aspect.

Standards are ex post. Under Louis Kaplow's formulation, a standard calls for content to be filled in later than it would be under rules, often at the point of [\*1139] application, after a relevant event occurs. 370As we have seen, equity does this, but also much more. Like standards, equity is contextual and ex post much of the time. This is because many of the problems equity solves cannot be well anticipated, due to the inherent uncertainty to which complexity gives rise. In the case of opportunism, the problems equity solves should not be anticipated, as anticipation will give rise to fresh opportunism. Deciding something later and using more information allow courts to meet opportunists on the larger playing field they inhabit and thereby gain the second-mover advantage. The more targeted the intervention, the less that equity messes up ex ante incentives. We are not worried about chilling opportunism, only about chilling what might mistakenly be taken for opportunism. The easier it is to get into equity the more likely such false positives become.

Equitable standards are closely associated with fairness and interpersonal morality. Duncan Kennedy in his Form and Substance in Private Law Adjudication also gives an account of standards based on moral visions. 371According to Kennedy, rules are more individualistic and standards more altruistic. American law has moved since the earlier nineteenth century through waves of formalism, realism, and beyond. While some doctrines like unconscionability are cited to support this picture, Kennedy never invokes equity as such. Kennedy's insight about standards captures equity's concern for fairness and its focus on justice between the parties. But equity as meta-law allows us to see what Kennedy's picture leaves out. Standards may seem more altruistic if invoked for reasons of fairness, but they can be navigated by the well-heeled and well advised in an inegalitarian way. By contrast, equity's domain allows it to tailor its response more carefully. Law is the general case and equity is meta-law (sometimes as a safety valve) when it is called for. The law is neither formalism nor contextualism all the time. It is not even a mélange of the two, but rather a hybrid with its own structure of triggers and rules of thumb. It is possible that equity can be more effective in promoting morality and fairness, precisely because it is focused where it is needed the most.

Even less promising as an interpretation of equity is identifying it with judicial discretion. It is certainly the element of judicial discretion that gets the most attention, and it is not surprising that, once equity's limits were removed in our realist-inspired version of the fusion, judicial discretion would loom even larger. The identification of equity and discretion is so prevalent that courts and commentators will identify discretion as being equitable and assume that anything [\*1140] "equitable" involves almost unbridled discretion. 372On the reconstruction of equity here, discretion is important, even essential, but not unbridled. Instead, it is filtered through the structures of meta-law.

A related but theoretically distinct version of standards and discretion traces to Ronald Dworkin's theory of legal decisionmaking. 373Dworkin was not interested in legal categories, but many of the precedents he drew on as protoexamples of what he had in mind are equitable in some sense. Consider again Riggs v. Palmer, 374the case of the murdering heir. Dworkin, like many others who have made Riggs into a Rorschach blot of jurisprudence, 375makes this a central case study in legal decisionmaking and interpretation. 376The debate between the opinions in that case has become a touchstone for theories of statutory interpretation, 377tracing back to the Legal Process School and beyond. 378

[\*1141] The reasoning in the case is equitable in the meta-law sense, and what is more striking is that second-order classic remedial solutions would have accorded better with that reasoning, as Ames was among the first to point out. 379One advantage is that the constructive trust better solves the multipolar problem of potential good faith purchasers from the wrongdoer. Broadly speaking, the theories and the cases reflect an enthusiasm for an equity shorn of its limits and traditional preoccupation with opportunism on the one hand, and on the other a formalist backlash that would seek to do away with the remnants of equity altogether. Riggs is a cautionary tale about the semieffacement of equity rather than high theoretical disagreement or the proper common-law rule.

From a very different perspective, it has been doubted whether equity is part of private law at all. For Ernest Weinrib, private law is inherently bipolar (right holder and duty bearer, plaintiff and defendant). 380Coming from a Canadian perspective, Weinrib is attuned to the jurisdictional origins of equity and sees it as an intervention from outside. So far, so good. But for him the idea is that equity is a public-law wild card because it does not fit his bipolar model of private law. It is no different from policy-infused regulation or any other extrinsic institution that might bear on private law. 381This view of equity obscures as much as it illuminates. While equity bears some similarity to administrative law--as noted earlier, the pioneers of administrative law sometimes styled it as the new equity 382--regarding equity as purely public law ignores its institutional setting in courts. Equity is neither purely private nor purely public law. It cross-cuts both, and works somewhat differently in public than it does in private law. 383

[\*1142] Perhaps the most fundamental misunderstanding of equity is to label it remedial. The term "remedial" itself is highly misleading. Equity was indeed associated with particular remedies because equity had different powers (contempt) and because intervening in law without "disturbing it" called for that set of powers (and vice versa). Yet, as we have seen, equity is not simply a set of remedies but a whole structure and style, a system of law itself. Paul Miller shows how thinking of equity in overly remedial terms has obscured its role as a supplement to law. 384Indeed, it is by labeling equity as remedial that the strong antiformalist emphasis in Langdell's teaching and scholarship has been overlooked in favor of the caricature of a wooden deductive formalism. 385

To be sure, equity is tightly interwoven with remedies, and remedial considerations certainly impinge on substantive equity. Thus, for example, unconscionability is at its strongest when an equitable remedy is in view. And yet strikingly, despite much effort to assimilate legal and equitable remedies, certain fundamental differences persist.

C. The Road Ahead

Equity as meta-law helps clear up lingering confusions about what equity is. Now the question remains: What at this late date is to be done? One might think that re-establishing equity courts would be the answer to our current confusions and discontents resulting from fusion gone wrong. Besides being utterly impractical--and inadvisable for all the reasons that fusion was so attractive (if oversold) in the first place--bringing back equity courts is unnecessary.

The great attraction of reconstructing equity partially and along functional lines is that it suggests feasible solutions. As we have seen, that part of equity that served as a meta-level check and supplement on the law is not gone. The precedents, the doctrines, the maxims--they are all there, if somewhat misunderstood. Understanding them better can help complete fusion the way it was meant to be.

What this does require is a nontrivial effort to infuse the law with some structure. After Legal Realism and its offshoots--which still form the bulk of our conventional wisdom--seeing law, especially private law, as having a structure goes against the grain. Nevertheless, we have the resources. From antidiscrimination to antitrust, we have familiarity with shifting presumptions and triggers to [\*1143] toggle between modes of legal decisionmaking. 386And equally importantly, the meta-law nature of much of equity has been underplayed rather than abolished.

The bigger challenge for equity is not whether it can serve as meta-law but how much it can do so. Behind the "production frontier" for equity is some degree of consensus on commercial morality, fairness, and a culture of the rule of law. Whether commercial morality and fairness is subject to less consensus than it was in earlier eras of equity--or whether it is simply a different consensus--will determine how far equity can be pushed. There is good reason to think that the morality and fairness behind equity is still fairly established socially. But even if it were not, the consensus that exists could form the basis for equity as meta-law. 387 It is unlikely that society is so close to the state of nature that a corner solution of no equity is optimal. And as I have argued elsewhere, the problems of equity never disappear. Ultimately rule-of-law values require a spirit of equity as part of a culture of the rule of law, whether we realize it or not. 388

For these reasons, we should regard equity's twilight not as an occasion for nostalgia or dread but as one for hope--for a new dawn for equity.

CONCLUSION

Shedding light on equity will be essential. For now, equity is the dark matter of our law. It is barely visible, and yet exerts a gravitational pull on many aspects of the legal system. Equity often appears to be a collection of historical curiosities on the one hand and a catch-all justification for contextualism and judicial discretion on the other. It has led in this country to a proliferation of multifactor balancing tests and provoked a formalist backlash.

There is a better way. Fusion went off the rails when equity lost some of its character as meta-law. Under the banner of fusion, law became increasingly homogeneous, without triggers and second tiers. The idea that equity might contain within it a functional theme became harder to discern as equity diffused--and dissipated--throughout the law.

Among its many facets, equity is meta-law. It solves problems of high complexity and uncertainty that law, owing to its aspirations to generality, cannot easily handle at one level. These problems include polycentricity, conflicting [\*1144] rights, and opportunism. Using defined triggers based on deception, bad faith, vulnerability, and hardship, equity prescribes a closer look using more context, based on widely accepted notions of fairness and morality. It is not a roving commission to do good but rather a specialized, and therefore highly targeted and effective, supplement and corrective to the regular law. Indeed, law itself has pockets of meta-law, from a functional point of view. By having specialized structures to achieve formality and generality sometimes, and contextualism and focus at other times, the legal system can achieve important synergies and perform better than can an undifferentiated and homogeneous law--the kind that is usually assumed to be the only one possible. Because the problems that equity as meta-law can best address will always be with us, we need to bring equity back to center stage.

**Restoring the primacy of independent equitable jurisdiction creates a lever for waste cases to restrain unsustainable pollution---extinction.**

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In the United States, the climate policy debate has been an extraordinarily unproductive partisan affair, despite the enormous implications for the health of the planet and future generations of human beings.3 Political leaders cannot even reach consensus on the existence of the climate change threat,4 let alone agree on who ought to have jurisdictional control or which tool we ought to use to address the problem. Much of the discussion in recent years has focused on the stated goal of “sustainable development” among the majority of those who have accepted the prevailing science.5

Unfortunately, “sustainability” as a broad-based policy standard or legal doctrine has no widely accepted definition.6 Most perceive it as a relatively modern concept, dating it to the oft-cited United Nations General Assembly Resolution of 1987.7 That definition’s vagueness and modernity has invited constant criticism and reworking from various perspectives.8 This article will use the legal lens of the waste doctrine to illuminate the differences and inform the choice between two prominent conceptions of sustainability—referred to in the discipline as “weak” sustainability and “strong” sustainability.

The goal of this article is to provide a new framework for analyzing sustainability, and climate policy in general, through the use of an old framework: the property law waste doctrine. Although numerous scholars have scrutinized the legal implications of climate change in tort, especially public nuisance, none yet have attempted to ground a legal obligation of sustainability in the traditional property law concept of waste. Premising the climate change policy decision on an old, non-contentious doctrine will perhaps cut through the partisan bickering surrounding the policy debate and the use of tort law in the climate change context.9

The doctrine of waste in Anglo-American property law has long been a vehicle for those with an interest in the future to restrict resource-depleting activities in the present,10 serving as the manifestation of sustainability as a concrete legal obligation. Put another way, the doctrine of waste protects future interest holders from detrimental acts of present interest holders. Specifically, the doctrine of waste governs the competing interests of life tenants and remaindermen, attempting to incentivize the life tenant to not exploit the natural resources exclusively for his own present benefit and leave the future interest worthless.11 This core concept should help to determine the nature of the current generation’s obligations as holder of the present interest in the earth’s resources.

Part II will survey the discourse concerning equitable obligations to future generations in moral philosophy as it interacts with the waste doctrine and contemporary notions of sustainability.

Part III will examine in depth the doctrine of waste, analyzing its roots and establishing its relevant connection to the current environmental crisis. The doctrine of waste has a long and rich history in the common law systems of the United States and England.12 Studying the birth and evolution of the doctrine will help shed light on how its core purpose aligns with sustainability as an obligation to future generations.

Part IV will connect the historical with the contemporary, aligning the tests applied by common law courts in the United States and England hundreds of years ago with the competing approaches to sustainability that could provide the basis for policy in the near future.

Part V will bring the final piece of analysis by drawing on the judicial determination of appropriate remedy in the waste context to provide unbiased and reasoned guidance for decision-making of policymakers confronting the climate change problem. This Part will suggest how trends in the former can help to break the partisan gridlock currently holding up the latter, providing a useful practical application of the theories espoused herein.

II INTERGENERATIONAL EQUITY

The underlying moral philosophy concerning intergenerational resource allocation provides the ethical foundation for both the legal obligations of the waste doctrine and modern sustainability theories.13 The philosophical discussion concerning intergenerational equity has existed for literally thousands of years, preceding by many generations the development of the waste doctrine and any notion of sustainability.

A. Sustainability as a Problem of Equity

The starting point for modern policy formation must be the ethical roots of sustainability, which establish obligations toward future generations and presuppose some type of intergenerational equity.14 At the core of the policy debate is a theoretical disagreement over the extent, and perhaps even the existence, of intergenerational obligations.

Bald economic conceptions of sustainability, based on the growth theory, express intergenerational equity as nothing more than a constant stream of consumption per capita for an infinite amount of time.15 Perhaps the founding father of this line of thinking, Robert Solow, advanced a model that was premised on finding an intertemporally efficient allocation of environmental resources through price corrections based on individual preference values.16 This view acknowledges some obligation not to deplete total capital stock, but makes no generation accountable for the depletion of specific resources and entitles no future generation to those resources. The issue is less about equity and more about best business practices, ensuring a constant stream of non-declining returns.

Some economists have strayed from this standard position and argued that sustainability is more a matter of ethical, rather than fiscal, obligations. These critics assert that the obligation to act sustainably does indeed flow from rights of future generations as well as from sound economic practice.17 Sustainability cannot simply be a matter of economic efficiency. Because sustainable development seeks to ensure that future generations are at least as well off, on a welfare basis, as current generations, it is, even in economic terms, a matter of intergenerational equity.18 Advocates of this position view sustainability policy as a form of intergenerational social contract.19

The idea that intergenerational resource allocation is a question of morality, rather than economic efficiency, can be traced to the teachings of the world’s major religions.20 In the Judeo-Christian tradition, according to Genesis, “God gave the earth to [H]is people and their offspring as an everlasting possession, to be cared for and passed on to each generation.”21 Edith Brown Weiss argues that this passage is understood by Christian and Jewish morality as an obligation on each generation not to use more than necessary and to pass the earth on to the next generation in equal or better condition.22 Though some biblical scholars have cited practice to contest this interpretation,23 Weiss’s reading is textually sound and so should warrant consideration in the larger debate over the existence of a universal moral principle of intergenerational equity.

Furthermore, under Islamic law, the earth is considered “ni’amah” (God’s bounty), and is to be held in trust for future generations and Allah.24 Indeed, the Qur’an repeatedly preaches intergenerational equity in natural resource use, and the Prophet Muhammad is believed to have encouraged sustainable use of scarce fertile lands as well as active management of unused parcels.25 Edith Brown Weiss’s retelling of Islamic teaching even more closely echoes the principles of sustainability in the doctrine of waste; the present generation is entitled to the use of earth’s resources to meet its needs, but must not prejudice the ability of future generations to use it to meet their needs.26

African tribal customs also operated much like the later developed doctrine of waste, often treating the members of the present generation as mere tenants on the land, with obligations to both future and past generations.27 The oft-cited nontheistic religions of Asia have for centuries invoked related principles, such as respect for the natural world and the needs of future generations. It has even been argued that intergenerational equity stands as a universal concept that bridges the philosophical gap between individualism in Western religions and traditions and communitarianism in their Eastern counterparts.28 Regardless of whether or not this lofty claim of universality holds fully true, there can be no doubt that some semblance of regard for future generations exists at the core of the moral teachings of a preponderance of the world’s major religions.

Others still have pointed to an even more ancient source of intergenerational equity—biology. Biology provides a basis for the obligation from one generation of a species to the next because of the evolutionary relationship between those groups. The contention is that the human brain is hardwired with respect to preservation of the species, particularly of close family lineage, and people have no choice but to care about future generations; it is in our nature. This natural inclination results from the Darwinian dynamic, which, while often misconstrued as a struggle for mere existence, is really a struggle for reproductive success. In this struggle, each subgroup of the human race strives to prolong the continued existence of particular genes.29 Actions taken in concern for future generations then become an essential part of success in natural selection. This biological conception of such obligations has the advantage of appealing to the very essence of our being and avoiding any taint from affiliation with a particular religious tenet or attitude towards nature. The challenge of relying on this reasoning is substantial. Primarily, there is the necessary premise that moral obligations flow from biological inclinations rather than an attempt to combat or mitigate such instincts. Accepting this controversial premise, and taking it to its logical conclusion, leads to some very uneasy results. Take, for example, the situation of overpopulation. Under this biological moral reasoning, not only would it be acceptable for one subgroup to eliminate the offspring of another in the interest of long-term preservation; it would be morally required for them to do so. Because dealing with this difficult issue is beyond the scope of this article, it is important to simply note that our natural inclination supports the positive moral theory advanced by the aforementioned religions and the subsequently referenced philosophers; whether the natural inclination alone carries moral weight need not be decided here.

There have also existed, for quite some time, writings that rely on philosophical reasoning, rather than biology or religion, to support the proposition that intergenerational moral obligations exist. In John Locke’s The Second Treatise of Government, he reasoned that when a man labors to extract common resources, labor is the property of the laborer and so the laborer alone is entitled to its fruits; however, he wrote, because he has taken from the commons, this principle applies only where at least there is enough (quantity), and as good (quality), left for others (presumably to use in the future).30 Locke’s approach to shared resource use has exactly the intergenerational backstop argued for in this work. The reasoning is sound; if a resource is meant to be shared and used by each who is entitled to some, it should not be morally permissible for one actor (a generation in this case) to take so much as to deprive the others of the same resource in terms of quantity and quality. No one generation’s entitlement trumps the other. This reasoning closely parallels Social Contract Theory, which was echoed by Bruce Ackerman when he helped to rekindle philosophical discussion of intergenerational equity in the 1970s.31

Ackerman wrote “all citizens are at least as good as one another regardless of their date of birth.”32 If one accepts this rather uncontroversial premise, it follows that no generation has rights superior to others, past or future, and the reasoning above concerning each entitlement holds. A few years prior to Ackerman’s work, John Rawls propounded a similar theory of intergenerational justice based on capital accumulation. Rawls contended that no generation should be placed in a worse position than the preceding generation. He saw this principle as involving the maintenance and preservation of both specific cultural resources and undefined “capital.” He wrote that “[e]ach generation must not only preserve the gains of culture and civilization, and maintain intact those just institutions that they have established, but it must also put aside in each period of time a suitable amount of real capital accumulation.”33 These conceptions of intergenerational equity fit neatly with the aforementioned biblical and biological arguments, as well as with the existence of a legal doctrine that recognizes concrete obligations to future generations.

B. Intergenerational Rights and Duties

As the discussion above makes clear, operationalizing the concept of intergenerational equity requires relying on the existence of some duties, or obligations, and rights. The duties owed by each generation to the next are what sustainability theory seeks to define, often through the use of economic models. In simple terms, the obligations on the current generation are most commonly summarized as: (1) a duty to pass on the earth and its natural resources to the next generation in the same or equivalent condition as it was when that generation first received it and (2) a duty to repair any damage caused by a failure of any previous generation to do the same.34 These obligations would fall on each successive generation, in turn, as a class or group rather than on particular individuals.

If the present generation has the above-described duties, corresponding rights may vest in future generations. The most elementary of such rights is the right to demand that the present generation use the earth and its resources sustainably;35 or, couching the right not in terms of the claim against persons but in terms of the property or the environment itself, a right to inherit the earth and natural resources in a state comparable to the previous generation.36 Regardless of the precise conception, the mere contention that a right exists raises several difficult questions. The logically first query is whether this right necessarily flows only from the existence of a corresponding obligation. If not, there is no reason to discuss the difficulties of to whom precisely the right attaches. A conception that avoids such a simplistic logical out instead argues that the rights arise out of a contract between generations, presumably providing adequate consideration to the present for carrying out the aforementioned obligations.37

One need not delve into the difficulties of intergenerational contract law to find the conclusion that duties must be accompanied by rights. In the early twentieth century, the esteemed jurist Wesley Newcomb Hohfeld succinctly reasoned that in order to ascribe a “definite and appropriate meaning” to an asserted right, a “correlative ‘duty’” must exist.38 Conversely, this logic suggests that without the actionable claim of rights, duties are hollowed out to the point of moral irrelevance. Put another way, if no one has a right to demand some specific thing (a “claim” to it), no one has a real obligation to provide that thing.39 In the intergenerational context, it is thus argued that no obligations exist because justice intrinsically requires this type of reciprocity with other individuals, and the whole idea of having reciprocal relations with persons who do not yet exist is illogical.40 There are two ways to dispel this flawed conclusion. The first is to dispose of the notion that obligations or duties cannot exist without corresponding rights. Second, even if one cannot be persuaded by the first premise, the presumption that rights attach only to individuals can be soundly rejected.

Obligations without reciprocal rights have been part of our social construct for hundreds, if not thousands, of years. John Austin identified a class of absolute duties, which prescribe actions toward parties who are not determinate persons, such as members generally of society and of humankind at large; he envisioned no correlative rights attaching to these obligations.41 This is a perfectly logical way to describe the type of obligation that exists between generations, where the duty is also to indeterminate persons. The problem persists, however, with regards to where the responsibility, or even the power, to enforce these obligations lies. Traditionally the answer has been with the state—specifically the liability and property rules of the legal system.42 Without a legal rule protecting their interests, future generations would fall victim to the flawed decision principle of “might makes right,”43 as present generations are necessarily stronger and hence their interests would always win preference.44 Fortunately, society has wisely chosen to adopt legal rules that modify the default principle, so even the weaker physical or political interest will at times prevail.45 The waste doctrine embodies such a situation.

Outside the context of actions towards indeterminate persons, one can also find examples in practice of legally recognized obligations without corresponding rights in the beneficiary. One such example is the execution of a person’s last wishes or a will. The rights in this case would necessarily be in a past person, which is just as “illogical” as rights vesting in a future person. Assuming that a past person can him or herself take no action to assert an alleged right, if society still recognizes the obligation to carry out the deceased’s wishes, which it certainly does,46 it must also then accept that those obligations can exist without reciprocal rights.

Perhaps more compelling still is the notion that reciprocity between generations as groups is much less problematic than on an individual scale. Reciprocity in the group context means only that each generation is afforded the same protection from environmental harms so long as each fulfills its duty. This reciprocity comes from the fact that by respecting, or neglecting, future generation’s environmental rights, the present generation strengthens, or weakens, its own claim to those same rights. Even if the rights of future generations burden the present, they nevertheless strengthen current rights to a safe environment by offering support for environmentally conscious policies.47 Because each generation necessarily feels the effects of how it treats its obligations to the next, reciprocity is maintained. Although this may not be the precise type of reciprocity imagined by critics, it serves the function of preserving justice nonetheless. Perhaps no one specific future person can, practically speaking, hold one current person accountable for neglect of his duty, but the next generation as a group does compel the present generation’s actions morally and should also have the ability to do so legally, relying on the doctrine of waste.

In sum, although the philosophical debate is far from settled, claims of a moral obligation to future generations have ancient roots and are supported by sound reason. This counsels against denying the existence of a moral component to contemporary sustainability analyses. Furthermore, the very existence of historical equitable claims supports the proposition that intergenerational considerations were not ignored in the formation of the law, especially the doctrine of waste, which explicitly focused on intertemporal resource allocation.

III THE DOCTRINE OF WASTE

A. Roots of the Doctrine

Most legal reference texts simply define the doctrine of waste as the principle that the present owner should not be able to use property in a manner that unreasonably interferes with the expectations of the future owner.48 However, the doctrine’s rich history must inform one’s reading of such contemporary definitions.

The English doctrine of waste predates, and in fact formed the basis for, the American version. Despite its common roots, there exists a distinguishing philosophical conception at the heart of the English doctrine that did not survive the transplant to the New World. English law conceived the protected interest of the future owner to have a normative social component as well as an economic one. This almost certainly results from the influence of the feudal system on the formation of the legal rule.

The English rule dates to the year 1267 (if not earlier), when the first reference to waste was penned in the Statute of Marlborough, which proclaimed, “[farmers], during their terms, shall not make [w]aste . . . .”49 Over time, as landlords invoked the doctrine, the common law surrounding it evolved in a uniquely European way. The rich law became a set of prerogatives, proscribing certain actions as waste per se.50 Courts held that, as a matter of law, present interest holders were strictly forbidden from specific activities, regardless of their effect on the value of the estate. In this way, the nature and character of the estate were preserved, not simply the profits generated therefrom. William Blackstone described the rule as forbidding “a spoil and destruction of the estate . . . by demolishing not the temporary profits only, but the very substance of the thing . . . .”51

When the colonies began to assimilate the common law of England, doctrines were frequently adapted to suit the needs of the new country. The doctrine of waste was one such legal principle, and so the American version was born. The American doctrine of waste represented a transformation from a British rule that emphasized the present interest holder’s subordinate position in a feudal hierarchy and inferior social status to a new rule that embraced the republican theme in American property law, which conceived of landholding without the strict caste structure of feudal European empires.52

There were two common components to the law of waste in nineteenth century America, which were sometimes read as separate definitions.53 The first held the present interest holder to the standard of husbandry, deeming an action not to be waste if it were consistent with the actions a prudent owner would take; the second, and more commonly cited idea, was based on the standard of material injury, which forbid a permanent injury to the inheritance.54 Many states formulated their own variations on these general doctrinal themes.55

The instrumental case in interpreting the new American standard was Jackson v. Brownson,56 decided in 1810. In that case, the plaintiffs contended that the clearing of forest constituted waste under the English rule, while the defendant denied that clearing timber to make way for cultivation could count as waste.57 A majority of the New York Supreme Court58 ruled that the action did constitute waste, but relied upon the defendant’s interpretation of the doctrine to reach their conclusion, holding that actions that did “a permanent injury to the inheritance” constituted waste.59 This ruling solidified a stark operational difference between the English and American rules; while the English doctrine of waste evolved as a set of definite prerogatives, the American version would be defined only by adaptable standards.

Jedediah Purdy contends that the American courts created a distinct law of waste for three primary reasons,60 which all help in understanding how the doctrine should govern our present-day interactions with the environment and natural resources. First, the American judiciary wanted to promote efficient use of resources that the English rule would have inhibited,61 chiefly ameliorative waste— actions that changed the character of the land but increased the value of the estate.62 Secondly, the newly interpreted doctrine aimed to advance an idea of American landholding as a republican enterprise.63 Thirdly, American courts were attempting to advance the belief that a natural duty to cultivate wild land underlay the Anglo-American claim to North America.64 For these reasons, and undoubtedly unexplored others, the American doctrine began as a standard rich in the language of economic preservation and purposely devoid of any indication of normative social preservation.

As the history of the doctrine indicates, there exists a very real tension between a purely economic understanding of what constitutes waste—one that looks for a diminution in the market value of the property—and an understanding founded on the normative prerogative of the future interest holder to dictate what changes can or cannot be made to the property.65 Put another way, the distinction runs deeper than American versus English; it is a philosophical choice between a purely utilitarian model of waste and a social formulation of waste.66 This philosophical debate manifested itself in the distinct rules on each side of the Atlantic: the United States courts put future and present estates on equal footing with respect to use decisions while the courts in England protected the wishes of the “superior” future estate.67

Because the Americans adapted the rule from the British, however, the tension between economic and social value preservation remained when the courts interpreted the American doctrine. The First Restatement of Property reflected this tension by adopting two seemingly conflicting definitions of actions that could constitute voluntary waste: section 138 stated that a life tenant has a duty not to diminish the ‘market value’ of the subsequent interests, and section 140 held a life tenant to “a duty not to change the premises . . . in such a manner that the owners of the interests limited after the estate for life have reasonable ground for objection thereto.”68 Because the doctrine of waste exists at common law, the degree to which American courts recognize the dual motivations for the original doctrine can shift, and has shifted, depending on the historical context and specific rationale.

From a purely economic perspective, waste law addresses the problem of inefficient incentives faced by present interest holders.69 Under this reasoning, the law should dictate an efficient management strategy that will maximize the present discounted value of the estate’s entire expected earnings stream rather than just the earnings for the length of the tenancy.70 Without such a coordinating rule, the present interest holder’s perverse incentive will lead to premature harvesting of natural resources and to neglect of both manmade and natural resources, the incremental decay of which has no effect on present earnings prospects but diminishes the long-term value of the estate.71 Facing this inefficiency, a coordinating rule is preferable to a free market solution because efficiency-seeking, Coasian bargaining is unlikely to occur between parties who are typically locked into bilateral monopolies laden with high transaction costs.72

The coordinating rule most staunchly advocated for by economists is actually a standard that would hold the tenant to an obligation to act as if he or she were the owner in fee simple.73 This is essentially the American definition of waste in its most extreme form. This standard is guided purely by the market value of the land and thus treats land as nothing more than a commodity with a monetary value that must be preserved.74

As noted, the original English doctrine, and consequently the common law basis for the American rule, not only served an economic goal but also performed a normative status-confirming role. And despite the best efforts of some “manifest destiny” era judges and economists,75 a social value-preserving component did exist even in American courts. Distinguishing between similar cases with opposite holdings illuminates judicial hesitation to permit a tenant to impose a qualitative change in land use on a future interest holder, even when the change arguably improved the overall value of the estate.76 In at least one respected property law treatise, the influence of the English normative rule still rears its head in the form of the “intention approach.”77 These interpretations of the American law suggest that the doctrine of waste protects more than a quantitative economic interest; it must protect some qualitative components of the estate as well.

B. Sustainability

Despite the different motivations behind the English and American waste doctrines with respect to social hierarchy, both have long had a secondary motivation that very closely resembles the “modern” concept of sustainability.78 These doctrines, as attempts to preserve an estate for future use and prevent deterioration, are in essence concrete legal rules of sustainability.

The most telling example of the concrete law of sustainability in practice comes from the English courts, which held that tenants could take from the land only the timber that was necessary for maintaining buildings, making tools, and warming themselves in winter.79 Notice that the courts had no problem limiting the present interest holder’s ability to grow the estate or make excessive profits; he or she was to take only what was truly needed to sustain a way of life. This sounds remarkably similar to modern advocates of no-growth or steady-state economics in the interest of resource preservation.80 Perhaps counterintuitively, American courts even more directly advocated for no-growth economics: the Supreme Court of North Carolina wrote in 1888 dicta that “it may be proper to fix a limit to the denudation, that it do not exceed the annual increase from natural growth which replaces that portion of the trees removed.”81

Notwithstanding these and other prominent references, Purdy notes that historically the principle of sustainable use tended in practice to remain fairly abstract, with courts resolving most waste cases by a conventional American standard analogous to “permanent injury” or “material prejudice.”82 Furthermore, John Sprankling and other natural resource scholars contend that an instrumentalist view of nature, together with a perceived imperative to bring the new continent under the axe and plough, drove the early American law of waste to develop not fully along the lines of sustainable use, but rather towards a supposed good husbandry standard, which allowed clearing and developing land in the interest of advancing cultivation.83 Because of this observation, Sprankling sees in traditional American waste doctrine a lack of proper regard for the land’s intrinsic worth in an unspoiled state.84

As a constantly transforming doctrine, American waste law has been influenced over time by the sustainability principles at its core. Indicating this influence, the study of the American transformation of waste law reveals three classes of values shaping the doctrine. Alongside economic efficiency and republican ideals, one finds the idea of an appropriate relationship to the natural world at the heart of the waste doctrine’s evolution, which in the nineteenth century may have encouraged productivity and improvement, but in the modern era is perhaps founded on an ethos of conservation or stewardship.85 As the country and the world move forward in dealing with an increasingly complex human/nature relationship, particularly in the context of climate change, this important doctrine must have something to say about the way to proceed.

C. The Modern Doctrine

Undoubtedly, the American doctrine of waste has some role to play in confronting contemporary environmental issues, and defining that role should become the task of modern jurists and scholars. With the historical roots of the doctrine fully exposed, the missing component for such analysis lies in understanding the modern operation of the doctrine. Unfortunately, relatively little contemporary academic scholarship has addressed the waste doctrine in depth,86 leaving the legal technician to peruse the traditional treatises and the meager case law.

According to the Second Restatement of Property, it is now generally said that in the United States a present interest holder may “make changes in the physical condition of the . . . property which are reasonably necessary in order for the tenant to use the . . . property in a manner that is reasonable under all the circumstances.”87 The doctrine of waste has taken on the all-too-familiar amorphous “reasonableness” standard that has become the poster child of American common law courts. The “reasonable use” standard in the waste context has been interpreted to require the judge, when considering whether an action constitutes waste, to consider not only the resulting changed market value of the property, but also standards of conduct imposed under the instrument creating the estate, community customs, public policy requirements, and new conditions and circumstances surrounding the proposed use.88 This suggests that environmental public policy and the drastically changed conditions as a result of climate change not only could, but must, inform the determination of actions constituting waste.

In the face of changed circumstances, courts and commentators generally claim that the possessory interest holder can make improvements, repairs, and alterations in the property, as long as these actions do not cause long-term harms or risks to the future interest holder.89 With the tendency of courts and legislators to abandon bright line versions of waste doctrine and muddy it in spasms of doctrinal transformation when facing moments of rapid and profound change, it is rather likely that the effects of climate change on the ability to use the property will weigh heavily in contemporary waste determinations.90 However, recent decisions regarding the use of timber demonstrate that American courts have not yet fully embraced the preservationist-oriented view of the doctrine, subrogating future interest holders’ pleas for selective cutting or no cutting at all in favor of the interests of short-term possessory estate holders who wish to engage in significant commercial tree farming activity.91

Development of property and contract law with respect to uses tied to other environmental concerns beyond climate change has been encouraging. The most promising example comes in the context of water law, where the doctrine of waste has long been utilized as a tool for controlling common resources.92 It would be quite reasonable to import a similar approach for the management of other important natural resources, particularly those that are threatened by or contribute to climate change.

Another environmentally progressive example comes from a long line of Louisiana mineral lease cases. The problem that has arisen in recent years is whether a mineral lessee has a duty to restore the surface of the land to its pre-lease condition at the termination of the mineral lease and, if such a duty exists, whether there are economic limits to the liability of a mineral lessee who breaches this duty.”93 Before Louisiana had adopted a specific Mineral Code, one decision had clearly recognized that the mineral lessee had a duty to restore the land’s surface, even if the lease was silent on this subject,94 but another had imposed a reasonableness limitation on the extent of those damages.95 A much more recent case came down even stronger in support of landowners and environmental restoration, resulting in a $33 million restoration award with no constraint for reasonableness when the estimated market value of the land was less than $110,000.96

What the state of the law in these contexts demonstrates is that courts, legislators, law reformers, and scholars have increasingly felt compelled to create waste standards that hold both parties to some external standards of reasonableness that are grounded, at least in part, in concern for ameliorating the external spillover effects of the parties’ behavior on the larger community.97 Considering the degree of potential harm, the most significant externality that must be considered in modern waste determinations is contribution to climate change.98

D. Climate Waste Litigation

It is a useful exercise to consider the range of potential litigation involving waste law and climate change not because success is likely through the most innovative uses of the doctrine, but instead because such uses of the law, even in a hypothetical academic context, help to inform the policy discussion.99 In order to articulate a claim, one needs to conceive of property interests in an unprecedented, but not unheard of, way. Margaret Thatcher phrased the relevant interests nicely in her 1988 Conservative Party Conference address, claiming that “[n]o generation has a freehold on this [e]arth. All we (as the current generation) have is a life tenancy, with a full repairing lease.”100 With this conception of property interests in the earth, or at least its natural resources, the next generation holds the future interest and should therefore be entitled to a waste-free tenancy on our part. This may seem far removed from the traditional notion of interests in land at property law, but conceiving the present generations’ interests as life tenancies actually closely aligns with reality. Because no deceased person can hold real property, all property currently owned must necessarily pass to someone of the next or at least continuing generation.101 However, one must acknowledge that even considering the practical argument just articulated, the rewriting of property interests in line with Thatcher’s theory would require more than legal pragmatism; it would require deeper philosophical changes regarding society’s notion of private property.102

Although the theoretical approach just articulated seems farfetched at first glance, in fact, similar doctrine already exists to facilitate the appropriate management of lands held in trust for public use;103 the hypothesized approach would simply utilize the waste doctrine to include future generations as “trustees.”104 Furthermore, one could imagine expanding the category of lands legally said to be “held in public trust” to all those lands not currently held in fee simple. Admittedly, this requires some careful manipulation of property law concepts; however, it avoids the very difficult problem of reclassifying previously fee simple interests as life estates.

As the roots of the doctrine of waste demonstrate, sustainability, as a regard for future interest holders in the use of an estate’s resources, has long been a concrete legal concept. Whether preserving economic or normative values, the doctrine of waste establishes legal obligations relating to human interactions with the environment. The question that this brief study of American and English waste law purports to answer in the affirmative is whether such obligations exist with respect to the mitigation of threatening climate change harms.

IV ANALOGS OF VARIOUS TESTS FROM THE DOCTRINE OF WASTE IN SUSTAINABILITY THEORY

The traditional American and English iterations of the waste doctrine provide a natural and tested tool for fashioning sustainability rules on a local scale. As the case law demonstrates, the problem of intertemporal resource allocation has always been central to the application of the waste doctrine in specific situations. The age-old question of what precisely must be left to remaindermen is directly analogous to the modern questions concerning sustainable development and depletion of non-renewable resources. For this reason, the tests and rules applied in the courts of the early United States and United Kingdom have a particularly useful and novel application to the modern policy discussion.

In addition to the natural fit of the waste doctrine reasoning with questions of sustainability, a deeper level of analytical significance exists because the choice between the extreme American and English versions of the waste doctrine maps quite nicely onto the debate between the concepts of “weak” and “strong” sustainability. Weak sustainability, like the American waste doctrine, focuses on the total aggregate value of capital available to successors in interest. Weak sustainability assumes complete substitutability between man-made and natural capital and therefore permits depletion of resources so long as the overall value of capital stock, including new man-made capital, is not diminishing over time.105 The American version of the doctrine of waste takes a similar approach with regards to the value of the estate.106 In contrast, strong sustainability takes the position that at least some natural capital is non-substitutable and, therefore, certain actions that deprive successors in interest of this natural capital should be strictly avoided.107 The English version of the waste doctrine holds a similar firm line against changing the nature of an estate, even if the action purportedly increases the economic value of said estate.108

This part will explore these sets of parallel reasoning further and demonstrate why something closer to the English model, and the accompanying modern concept of strong sustainability, should be preferred in law and policy. This will be accomplished through applications of the aforementioned early precedential cases and rules in the United States and England to the environmental problems presented by climate change.

A. The American Doctrine and Weak Sustainability

The historical treatment of the doctrine of waste in American common law provides a rather elementary, but strikingly applicable, test to evaluate the sustainability of a particular practice. As noted previously, the two-part test dictates that an action is waste (or unsustainable in this new context) when said action does permanent injury to the inheritance,109 and it is contrary to the ordinary course of good husbandry.110 As a survey of the early precedent indicates,111 this test focuses on the economic detriment to the estate rather than the physical nature of the estate. Settlers in the new world were encouraged, in fact, to clear land upon which they were tenants because cultivated land increased the value of the fee simple estate.112 The future owner then enjoyed increased wealth, and utility, because of the tenant’s actions that depleted one type of natural resource, usually timber.113 The logic that underlies this eighteenth to nineteenth century expansion and conversion land ethic is the very same logic that supports the modern day notion of weak sustainability. Weak sustainability is premised on the idea that actions are “sustainable” so long as they do not diminish the overall value of capital stock over time (“damage the inheritance”).114

Whether the actions of the current generation have damaged the inheritance of the next in economic terms is the question posed by both the American doctrine of waste and weak sustainability theory. With respect to climate change, this requires looking at the projected diminution in property values that will result from continued rising temperatures. Persisting in activity that intensifies, rather than mitigates, climate change would constitute waste and be unsustainable in this weak model if said activity does not provide an equal or greater increase in capital that will be available to future generations.

The potential harm to future generations in terms of pure loss of land interest just in the coastal states is enormous. The IPCC projects sea level rise of twenty centimeters by 2050, which combined with ongoing post-glacial subsidence, could result in a forty centimeter rise along the coasts of New Jersey, Delaware, and Maryland.115 Sea level rise of this magnitude will result in almost sixty meters of erosion on average in these mid-Atlantic states, which constitutes about two times the average beach width, necessarily decimating beachfront property interests.116 Such a significant loss of land, if nothing else, represents a serious devaluation of the future property interests. Estimates of the cumulative financial effect of a fifty centimeter rise in sea level on U.S. coastal property by 2100 range from roughly $20 billion to $150 billion.117 Extensive thawing of the permafrost as a result of climate change also adversely affects property interests in some Northern states. Most notably, the permafrost that underlies most of Alaska has already begun melting significantly, causing, and threatening to cause, increased erosion, landslides, sinking of the ground surface, and disruption to forests, buildings, and infrastructure.118 In some parts of the state, the erosion from this thawing has resulted in coastlines retreating more than 1500 feet over the past few decades, which will force several Alaskan coastal villages to either fortify or relocate.119 When property becomes uninhabitable, the future interest in it becomes intensely, if not completely, devalued.

As the above indicates, this determination of what is sustainable and what constitutes waste largely depends on the scale at which the policymaking calculation is made. On a local scale, the above consequences in terms of lost capital likely overshadow the additional capital generated by climate change-contributing activities in the coastal and extreme Northern regions.120 However, if the policy is examined at a national level, some significant carbon emitters could be acting “sustainably” in capital contribution terms. The American courts, in adjudicating claims of waste, have long dealt with a similar dilemma, even though interests in land are much more strictly defined. It has often been held that what might constitute waste, as applied to a piece of land in one place, might not, when applied to another, in a different place.121 The American system, and consequently weak sustainability, functions much better on a local scale because the necessary assumption of complete fungibility of capital resources with low transaction costs falls apart as the market it describes becomes larger and more complex.

Weak sustainability theory, like the American doctrine of waste, must recognize that there is some extreme lower boundary of natural capital that must be preserved, regardless of the effect depletion of that resource would have on net overall capital stock. Ever since the landmark case of Jackson v. Brownson, American courts have held that a tenant cannot fully deplete a natural resource and, instead, require that the tenant should preserve so much of the resource as is indispensably necessary to keep structures on the land in proper repair.122 A similar qualifier added on to the principle of weak sustainability would forbid the current generation from completely disregarding climate change and recklessly spewing massive quantities of carbon into the atmosphere. It would not matter if the technology produced as a result would be infinitely economically valuable to the next generation if the atmosphere were so depleted that they could not live and breathe freely. Unfortunately, weak sustainability seems not to acknowledge such a backstop level of natural capital, which is a significant and dangerous flaw.

The arguments of those who defended the American change to the ancient doctrine of waste are almost indistinguishable from those of modern advocates who support weak sustainability. It had been said that if the English version of the waste doctrine were universally adopted in this country, it would greatly impede the progress of improvement without any compensating benefit. In order to achieve a net benefit to society, it was argued, the rules of law must be accommodated to the situation of the new country.123 These are the very same arguments used by developing countries today in an attempt to shirk any kind of commitment to climate change mitigation. But policymakers in the United States rely on strains of this reasoning as well. In an environmental policy regime that now has cost-benefit analysis as a core component of almost every decision, the economic growth (increase in man-made capital) versus environmental degradation (decrease in natural capital) is an all-toofamiliar and all-too-comfortable tradeoff.

B. The English Doctrine and Strong Sustainability

In England, the doctrine of waste operated to preserve specific resources on a particular estate rather than the overall value of said estate. This is in direct contrast to the American doctrine and the concept of weak sustainability described above. To determine if a tenant’s action constituted waste in England, the test was simply whether said action changed the nature of the property, and courts established rather lengthy lists of activities that were per se prohibited, such as converting arable land into wood, or a meadow into plough or pasture land.124 Particularly apropos to the modern sustainability discussion, courts deemed mining for coal as waste where the mines were not open when the tenant came in.125

As the test and examples illustrate, the English iteration of the waste doctrine aligns theoretically with the concept of strong sustainability. Strong sustainability requires leaving the subsequent generation a stock of critical natural capital not smaller than the one enjoyed by the present generation.126 At its core, strong sustainability is essentially a “non-substitutability paradigm,”127 which is best described as the idea that there are certain functions that the environment performs that cannot be duplicated by humans. The ozone layer, for example, is an ecosystem service that would be extremely difficult for humans to duplicate. The central idea of preserving natural capital is precisely the same as the one motivating much of the age-old common law of waste in England. Actions were classified as waste (now unsustainable) if, when the subsequent possessor in interest took ownership, the fundamental natural resources of the land were no longer available to him.

In contrast to the American doctrine of waste and weak sustainability theory, the question posed by the English courts and the strong sustainability advocates is not primarily economic, but rather ecological. The focus is on determining the fundamental nature of the estate and assessing the impact of specific actions on the continuing existence of said nature for succeeding generations. With respect to the big picture of climate change, this requires maintaining a level of emissions that will not result in continuously increasing global temperatures, which are already decimating, and will continue to decimate, irreplaceable natural capital stocks. This analysis further requires classifying resources as renewable and non-renewable, as well as determining the rates at which renewable resources replenish. Persisting in activity that significantly contributes to, rather than mitigates, global warming and/or measurably depletes nonrenewable resources would constitute waste and be unsustainable under the strong model.

Just like with the application of the American test for waste to modern sustainability issues, much depends on the scale of the analysis even when using the English test as a proxy for strong sustainability. Although the difficulty with regards to economic calculation of man-made capital gain against natural capital loss falls off when using the strong sustainability model, the problem of having no instrument to define the scope of the property interests persists, as one still must assess the depletion of natural resources and determine sustainable levels of utilization. Adopting a model of strong sustainability need not require shifting to a steady-state, stationary economy, but rather only changing economic resource allocations over time at levels which will not alter the overall ecosystem beyond the point where the stability (resilience) of the system is threatened.128

The English doctrine and strong sustainability theory would forbid many climate change-inducing activities that would be potentially permissible under the American doctrine of waste and weak sustainability on most, if not all, scales of analysis. The extensive mining and use of fossil fuels presents an example of a situation where the theories diverge. If current levels of mining and resource depletion persist, future generations will be deprived of the access to those natural resources and the landscape that had to be decimated to harvest them. Under the stricter strong sustainability test, it matters not what was produced using the depleted resources, but rather what makes the activity unsustainable is the fact that it so changes the earth that future generations will not have any real ability to utilize certain types of natural resources for themselves. In the words of the English waste doctrine, the nature of the estate that the future generations inherit will be fundamentally different. This stricter test provides a similarly clear answer with respect to activities that cause sea-level rise and loss of permafrost at the levels discussed in the previous section.129 By persisting in these activities, the current generation is altering the land so significantly that it will be completely unavailable, or at the very least uninhabitable, to future generations.

Experience of the English courts with regards to waste teaches us that an obligation exists in the equitable sense even if it cannot be established at law, and even if the first generation harmed is not the immediately subsequent one. The party entitled to maintain the old common law action of waste was the person who held the immediate estate of inheritance in remainder or reversion, but courts of equity found grounds to interpose when there was an intermediate estate, and consequently there was no such remedy at law.130 Although one need not go so far as to demand a court judgment with regards to climate harms, a similar equitable situation has arisen with regards to damaging the future interest holders. All of this is to say that strong sustainability theory and the English doctrine of waste establish a firm duty on the part of the current generation to mitigate the effects of climate change by reducing emissions and other contributions to it immediately.

C. Why Sensible Policy Must Acknowledge Some Notion of Critical Natural Capital

It is certainly the case that many advocates remain on both sides of the philosophical Atlantic with regards to the sustainability debate. Weak sustainability is championed by many an economist and those who have unbridled faith in the power of technology and human ingenuity. However, the history of the waste doctrine in the United States and England demonstrates that it is unwise to deny the existence of non-substitutable natural capital. This is evidenced by a United States waste case that, in addition to providing the most applicable precedent for climate change harms, also acknowledges that some level of natural capital must be maintained, even when applying a strictly economic model for waste (or sustainability).

In the 1841 court of errors case of Livingston v. Reynolds,131 the object of the bill was to obtain an injunction against future waste,132 which is precisely what many policymakers wish to do with respect to capping carbon emissions moving forward. The court held that:

the claim of such a right, and the threat of exercising it, were of themselves, even without any overt act, sufficient to constitute a case of equitable cognizance; but when the sincerity of such claim of right, and the good will of such threat of its exercise were verified by aggravated acts of waste already committed, these were quite sufficient, not merely to justify, but to require the prompt and effective interference of equity.133

The court further held that the test of waste is not injury, but dishersion of the remainderman; the actions contested therein constituted waste because the tenant had destroyed timber, which he could not reproduce, and had carried off the demised premises soil, which he could not restore.134

The court took into account the substitutability of the resources depleted by the tenant in making its waste calculation. The holding suggests that complete depletion of such non-substitutable resources is an incalculable injury that cannot be offset. Policymakers, when considering whether and how to mitigate global warming, should similarly acknowledge that the aforementioned effects of continued high levels of greenhouse gas emissions are irreparable, and the value of the continued availability of a menu of natural resources is also at present incalculable. This simple acknowledgement would be a substantial commitment to maintain some baseline level of natural capital and not adopt a weak sustainability platform.

In addition to the waste doctrine case law, one prime example of weak sustainability actually effectuated in policy cautions strongly against taking such a course again. The government of the Pacific island of Nauru permitted increased heavy phosphate mining in order to bring businesses and jobs to the small island, but, in the process, has almost completely destroyed the island’s natural environment. As a result, the inhabitants can afford a high standard of living from the interests of their accumulated capital; however, the quality of life has not increased. In fact, many people suffer from poor health and the life expectancy of male citizens is decreasing.135 The results on Nauru provide a much-needed experimental microcosm of how global wellbeing might be impacted by a policy of weak sustainability.

Fortunately, things may be headed down a more sensible path. It has been reported that a significant number of economists worldwide now accept that a minimum stock of natural capital is critical for human survival and well-being.136 If economists, who were once the staunchest advocates of weak sustainability, can be convinced that some level of natural capital must be preserved for future generations, then policy may inch closer towards the strong sustainability end of the spectrum.

## Doctrinal Stability

### Turn---1NC

#### The aff causes a religious war. They encroach on religious rights to vaccine and other exemptions hy placing bargaining agreements above religious claims, which causes backlash by fervent evangelicals---those are the people who would start the war!

Timothy J. Aspinwall 97, Academic Fellow, MacLean Center for Clinical Medical Ethics, University of Chicago, “Religious Exemptions to Childhood Immunization Statutes: Reaching for a More Optimal Balance Between Religious Freedom and Public Health,” *Loyola University Chicago Law Journal*, 29 Loy. U. Chi. L. J. 109

The central interests in religious freedom and public health in the vaccination context are, respectively, the freedom to practice religion without interference or penalty, and that no person should suffer illness unnecessarily. The task of this section is to identify a method and examine practical alternatives by which these interests can be more optimally balanced.

Theoretically, one can approach an optimal balance between competing interests by advancing each to a point where any additional benefit to one will cause a greater burden for the other.'28 A significant difficulty in applying this theory to religious freedom and public health is that it often will involve a comparison of incommensurables. Religious and public health interests have very different guiding principles and refer to different standards to measure marginal benefit. Although each particular religion focuses on some ultimate authority to receive or develop guiding principles, public health policy refers to physical health and contingent political authority. Although it is true that religion may influence public policy, it is not contained within public policy. Stated differently, government may take into account the positions advanced by religious advocates, but public policy cannot adopt all of the policies advanced by religious and secular interests on a particular point. This leads to a tension between interest groups that cannot be resolved without a common moral understanding.

One response to this tension between religious and secular interests is an accommodationist approach as modeled in Sherbert and Yoder." Though a Court majority now holds that the Sherbert-Yoder compelling interest test no longer extends to First Amendment challenges to generally applicable laws, the cases do provide a helpful method of analysis. Under a principle of accommodation, the state remains attentive to the impact of generally applicable laws such as vaccination requirements, and it makes conscious efforts to avoid imposing burdens on religious freedom. 130 This arrangement gives religious believers maximum freedom to optimize their own interests on their own terms, permitting state interference only when necessary to advance or protect a very important state interest. Although in many cases a policy of accommodation may prevent conflict by giving conditional deference to religion, it does not resolve the problem of balancing incommensurables. Accommodation raises the question, but it does not determine whether a given secular interest is sufficiently important to justify burdening religious interests that may be at stake.

The fact that both religion and public health acknowledge different sources of authority makes it difficult to determine precisely how much weight to give a secular interest as compared to a religious claim. 3 But, a conscientious effort to balance the interests at stake gives advocates from all perspectives on a particular issue a fair opportunity to advance their objectives in terms that best express their values. The approach suggested here is necessarily a democratic process, where policy decisions are made publicly, and no position enjoys an inherent advantage. 32 A commitment to a democratic balancing process implies a willingness to respect the resulting decision, even if contrary to one's own point of view. 133 This commitment is acceptable because the balancing process permits choice between competing interests while respecting the legitimacy of both. To the extent that religious and secular interests are committed to deciding by a public balancing of interests, the commitment to the process becomes the common moral language. It is a language of mutual respect that advocates for either position are willing to listen to and accommodate the other if reason and respect suggest that they should.134 In this sense, there can be a common morality of interaction that goes beyond mere procedure. By respecting one's own position and the positions of others, religious and secular interests may be able to balance the otherwise incommensurable interests at stake.

The strongest objection to a democratic balancing of interests is that it has obvious majoritarian implications. The concerns of a small minority religion, regardless of the openness of the balancing process, may be consistently subordinated to more widely held claims. The strongest response to this is that the alternatives to democracy tend either toward anarchy or tyranny.135 But this fact provides no absolute assurance of fairness; it simply points out that an accommodationist democracy is the best of an imperfect set of alternatives. However, a balancing process based upon mutual respect suggests that a majority may, or perhaps should, defer to a minority on a point of great importance to that minority, even if the minority position is slightly offensive to the majority, and even though the Free Exercise Clause does not require accommodation. The choice of forty-eight states to provide religious exemptions to vaccination requirements reflects this sort of choice by the majority to defer to a minority. This is a laudable effort by the states to optimize the balance between religious freedom and public health. However, accommodation alone will not generate a more optimal balance if either public health or religious interests are unnecessarily compromised.

The remaining part of this section is directed toward an assessment of alternatives to optimize the balance between religious freedom and public health in the context of immunization policy, taking into account the concerns of the parties most affected: individual children, parents, and the general public. The guiding principle here is that neither religious freedom nor public health gets absolute priority. There are occasions when religious freedom must yield to the exigencies of organized society, and there are times when organized society's commitment to religious freedom requires accommodation of minority religions. With this understanding, an optimal balance is one in which religious freedom is taken as seriously and given as much respect as other important interests and fundamental rights.' 3

The first, and perhaps most likely, legislative alternative is to maintain the status quo that exists in the majority of states: a general requirement that all children receive a standard series of vaccinations before entering school, from which persons with religious objections can apply for exemption. As suggested above, this alternative causes problems for both religious freedom and public health. Public health may be poorly served if exempt children become infected and spread disease among exempt and otherwise underimmunized persons.' 37 Conversely, religious freedom may be poorly served if parents whose beliefs fail to qualify them for exemption can be subject to criminal prosecution. 3 8 The most obvious way to relieve the burden on one interest results in increasing the burden on the other interest. That is, broadening exemption eligibility to include all sincere objections minimizes the possibility that a religious objection will be incorrectly denied, but it increases the burden on public health. Conversely, repeal of religious exemptions might advance the public health, but not without increasing the burden on religious freedom. As a result, neither of these solutions improves the suboptimal status quo-they merely reallocate the burdens.

A second alternative is to repeal religious exemptions and all punitive measures for parental noncompliance with vaccination requirements. Under this alternative, the public health authorities would vaccinate school children, with or without parental consent. 39 This alternative has two benefits. First, it protects the public health by eliminating the pockets of disease vulnerability that exist among exempt populations. Second, it reduces the burden on parents who otherwise would be penalized for refusing consent for their child's vaccination. Because their consent becomes unnecessary, parents would not be forced to choose between their religious beliefs and legal interests. However, even if parental consent is not required, significant burdens remain. First, parents who anticipate a religiously objectionable vaccination might keep their child from attending school where the vaccinations most likely would be imposed. In such a case, parents could be criminally prosecuted for causing their child's truancy, thereby suffering an indirect burden on their religious practice." However, a very direct burden on religious freedom is eliminated in that parents would not be prosecuted as a direct consequence of refusing to consent. Second, and the more onerous burden, is the fact that some religions may consider vaccination to be so offensive that a vaccinated child is no longer acceptable to the parents and thus may be abandoned.' 4' Such cases are unusual; while the beliefs that precipitate such a response may be extreme, the burden imposed is also extreme. These burdens must be taken seriously in any effort to reach an optimal balance, but in the absence of a better alternative, they do not preclude a policy of vaccinating children without parental consent.

A third alternative is to permit exemption for children who engage in home-schooling or attend private schools that explicitly permit unvaccinated children. This policy would give religious parents an option to maintain their religious integrity without imposing a significant burden on them.'42 There are two significant problems with this alternative. First, it would create underimmunized subpopulations by giving parents an incentive to put their children into schools with a high proportion of unimmunized students. Children in home-schooling also would be at risk to the extent that they associate with unimmunized persons, most likely in worship or other religious gatherings. A provision permitting the public health authorities to vaccinate in the event of an epidemic would be of limited utility because the disease already has spread by the time symptoms appear.' 43 Another significant problem is that it is divisive and stigmatizing to give parents a clear incentive to segregate. When parents are forced to choose between consenting to a religiously prohibited vaccination and segregating their child, those who can afford to segregate are likely to do so. Segregationist incentives fail to optimize the public well-being, either socially or epidemiologically.

Although each of these alternatives to the status quo offer to protect one interest and mitigate the burdens on the other, neither is entirely successful. Both impose burdens upon either religious freedom or public health that are unacceptable if they can be reasonably avoided. A more optimal solution would enhance both sets of interests while imposing minimal burdens.

A legislative and executive policy that vigorously promotes voluntary vaccinations is an alternative that offers to enhance both religious freedom and public health without burdening either. This is perhaps the most obvious way to reduce the tension between religious freedom and public health because it improves one without imposing on the other. However, this solution has proven difficult to implement. This can be seen in the development of federal legislation providing free distribution of pediatric vaccines to qualifying primary care providers who may charge a fee only to cover the cost of administering the vaccine." Children qualify for these low-cost vaccines if they are on Medicaid, have no insurance coverage for vaccinations, or if they are American Indian. 4 5

There are a number of problems with the program that may explain its incomplete success. First, although a participating provider may not refuse to vaccinate a child who is unable to pay the cost of administration,6' not all financially needy parents necessarily will know this; and, even if they do know it, the prospect of asking for a fee waiver may be a deterrent itself. Another possible hindrance to the program's success is that physicians may be discouraged from participating because of the requirements that they determine whether the child qualifies for the vaccination program by inquiring with the child's parent or guardian, and that they keep records of each child's qualifying status.'47 If qualifying children are discouraged by administrative fees, and if physicians are disenchanted with administrative requirements, many children may be pushed back to the often inconvenient and overcrowded public clinics. For these and other reasons, the initiative that was intended to have increased the vaccination rate among two-year-old children to ninety percent by the year 19968 remains unfinished.

Given the incomplete success of this ambitious plan, a practical question remains as to whether voluntary vaccination programs can be reasonably expected to meet the established public health goals. The successes of earlier vaccination programs, such as the campaign against polio, shows that an adequately mobilized public can achieve remarkable results. 149 Such prior success suggests that a more efficient voluntary vaccination program could significantly improve the population immunity.

In light of this assessment, how should religious freedom and public health be balanced? A public health advocate might suggest that it would be most prudent to repeal vaccination exemptions, at least until the goal of vaccinating ninety percent of the nation's two-yearolds has been met. Although such a proposal shows admirable impulses, it permits political and administrative ineptitude to displace important religious interests."5 It is one thing to suggest that religious interests should defer to public health interests when all reasonable efforts have been made to advance the public health. It is quite another to claim that religious freedom should be subordinated to administrative and political shortcomings. A fairer policy would be to permit the exemptions to remain while public health advocates unify around the cause of voluntary vaccination. If, despite such efforts, an appreciable risk of disease remains, then the state may have a morally defensible claim to vaccinate over religious objection.

#### Only our offense---tinkering with balancing tests does nothing to solve religious conflict since it’s a deeply held and political fight---there’s only a risk the aff triggers conflict

Marc O. DeGirolami 17, Professor of Law and Associate Academic Dean, St. John's University School of Law, “Religious Accommodation, Religious Tradition, and Political Polarization, Lewis and Clark Law Review, 20(4), 2017, https://law.lclark.edu/live/files/23325-204degirolamiarticle2pdf

Might the answer then be to encourage courts to inquire more deeply into the nature of the burden on religion when adjudicating accommodation cases? Unfortunately, that is extremely unlikely to cure what now ails religious accommodation. Indeed, it is a sign of just how polarized the religious accommodation question has become that no tinkering with the applicable test is likely to help.

Consider, for example, the recent and ongoing nonprofit litigation against the federal government’s contraception mandate. Under the existing, abjectly deferential standard for assessing the quality of the burden, the vast majority of courts to address the issue found that the contraception mandate did not impose a substantial burden on the several nonprofits’ religious exercise.133 The question of the burden on the nonprofits, however, is not difficult when evaluated under a standard that would require the claimants to explain how their religious objection fits within an established religious tradition and system of belief and practice. They have explained, over and again, their view that a legally binding designation to provide contraceptive products and services implicates them in sinful behavior, the theological sources of their beliefs, and the importance of those beliefs within their own religious system and tradition of belief.134 The claimants may yet lose, but if they do it should not be because courts reject or refuse to defer to their explanation of the government’s interference with their religious exercise.

Yet they did lose on that very issue, before nearly every court of appeals to consider it and according to a standard that is said to be extremely deferential to their beliefs.135 That remarkable losing streak, when compared against the ostensible deference that courts purport to apply and generally have applied in most other contexts, strongly suggests that the standard may be a secondary consideration altogether. Courts defer when the nature of the political and cultural challenge represented by the religious exemption is unthreatening—when they don’t take the religion seriously anyway. Accommodation, as I have said, is for unserious religion. When it is threatening, and the challenge is substantial, they do not defer. We accommodate when we don’t really care as a political or cultural matter, and we find reasons not to accommodate when we do. Perhaps this also suggests that political polarization is to some extent inevitable when some religious beliefs and exercises are accommodated and some are not, and that, as in so many other contexts implicating the religion clauses, the aspiration to neutrality is a fantasy. An alternative possibility is that adopting a more stringent inquiry may be unwise and possibly counterproductive, since religious accommodation and religious liberty more broadly, particularly when it is felt to threaten or even to stand athwart vital gains in sexual liberty and equality, is at present so controversial.136 A tighter standard will not restore religion as a coherent legal category. It will more plausibly be used to defeat coherent religious claims of substantial burden.

### AT: Civil War – 1NC

#### Get off Twitter! US culture war doesn’t amount to civil war.

Damon Linker 18, Senior correspondent, consulting editor at the University of Pennsylvania Press, "If you think another civil war is imminent, get off Twitter," The Week, 09/26/2018, http://theweek.com/articles/798002/think-another-civil-war-imminent-twitter

If you think another civil war is imminent, get off Twitter

Is the United States careening toward a new civil war? A surprisingly wide array of commentators appear to think so.

In the turbulent opening months of the Trump administration, Foreign Policy magazine asked security experts about the likelihood of the country descending into widespread civil violence over the next 10-15 years, and the consensus put the odds at about 30 percent. Others, including The New Yorker and The Nation, have posed the question to historians. Meanwhile, on the right, National Review, The American Conservative, and historian Niall Ferguson have begun to take the question quite seriously, while most recently, fabled investigative journalist Carl Bernstein leavened his CNN commentary on the Brett Kavanaugh confirmation hearings by describing the Supreme Court nomination fight as "almost the Gettysburg and Antietam, the absolutely essential battles" of our "cold civil war."

Is it true? Should Americans on both sides of our ideological divide be stocking up on ammunition and preparing for the imminent outbreak of hostilities?

The answer is no.

It's true that politically engaged Democrats and Republicans, progressives and conservatives, left-wing and right-wing activists and opinion journalists increasingly despise each other and express that loathing with verbal viciousness online. But of course a digital conflagration is quite a bit different than a real one, and there is precious little evidence — actually, almost none — that our online warfare is translating into real-world violence. We also have no reason, thus far, to think this will change.

This reality can be a challenge to recognize and accept. That's because the emotions triggered by antagonists on social media are intense, and spending one's time immersed in digital battles can give the impression that the world itself is becoming a mosh pit of hatred and rage.

But it isn't. Just as one could be forgiven for concluding from his tweets that President Trump is an actual tyrant (when in fact he's a remarkably impotent president), so online mêlées feel like evidence of real-world civil unrest and looming violence. But they're not. They're the expression of the passions of a small number of highly polarized, intensely committed partisans whipping themselves into ever-greater paroxysms of rage while most of the rest of the country goes about its business largely unaware of the tumult.

If you doubt it, compare the real world of the past couple of years with any comparable span of time during the late 1960s or early 1970s. Political assassinations; widespread, large, and sometimes violent protests; race riots and burning cities; regular terrorist bombings — all of this was commonplace during those years, and all of it looks far more like the early stages of a civil war than anything happening now. Yet of course there was no civil war in America 50 years ago. Still less is one about to break out in the present.

Instead, we have a reality-show civil war played out online, on talk radio, and on prime time cable news, like a video game in which participants (some of them anonymous) succumb to furious outrage and delight in provoking it in others. The virtual reality can be so convincing and all-consuming that those immersed in it find it difficult to separate their own partially performative fury from what's really going on around them in the wider world.

Don't believe me? Consider the numbers: During prime time, somewhere between two and three million people watch right-slanted Fox News, with Rachel Maddow's left-leaning program on MSNBC in the same range. That's about six million viewers — or roughly 2 percent of the country — highly engaged with highly partisan spins on the news. Twitter, which more than anything else is what feeds the impression of a world spinning out of control, is similarly marginal. Yes, President Trump's perpetually news-making and polarizing account has over 54 million (worldwide) followers. But his most popular tweets typically garner around 100,000 likes, with many receiving far fewer than that. That's a miniscule portion of the 138 million people who voted in the 2016 presidential election.

Now, as I've written about on numerous occasions, the American electorate (along with elected officeholders) is ideologically polarized and becoming more so over time. That isn't an illusion. Democrats and Republicans increasingly view the world in profoundly different ways. That's real, and it's bad for the country.

But a civil war isn't just a function of disagreement. It's far more a function of intensity of conviction. It costs close to nothing for a liberal to fire off an insulting tweet about a right-wing statement on Twitter — or for a conservative to yell at the TV screen during Tucker Carlson's latest rant about America-hating professors. But is either partisan anywhere close to picking up a weapon, firing it in anger, and facing the prospect of being beaten or shot in response? I'll believe it when I see it.

And those are the people who care enough about political disputes to spend time surfing partisan websites or watching ideological talk shows. What about the countless millions of Americans who don't pay much attention to politics? Who have vaguely defined views on everything ranging from the Supreme Court to ObamaCare's individual mandate to Ted Cruz? Who are focused on work and love and family and find the political spectacle both extremely confusing and immensely degrading? None of them are remotely close to reaching for a rifle, to killing and risking being killed for some political cause.

Now add in the not-inconsiderable number of Americans who are addicted to alcohol or pain killers, or who have dropped out of the workforce and sunk into a personal oblivion of video games, pornography, and drugs. These people may be the least likely of all to commit themselves to an ideological fight.

Put it all together and we're left with a portrait of a country in which the vast majority is politically apathetic, disconnected, turned inward toward their private lives, more disgusted by politics than likely roused by it to acts of war — with a tiny, engaged minority seemingly on the edge of political violence, but only so long as it remains a largely spectator sport.

### Liberal Order LIO Defense---1NC

#### No liberal order or SOI impact---states won’t risk war, err towards isolation, AND mediate ties economically

John Mueller 21, Adjunct Professor of Political Science and Senior Research Scientist at the Mershon Center for International Security Studies, “The Rise of China, the Assertiveness of Russia, and the Antics of Iran,” The Stupidity of War: American Foreign Policy and the Case for Complacency, 2/17/21, Ch. 6

Complacency, Appeasement, Self-destruction, and the New Cold War

It could be argued that the policies proposed here to deal with the international problems, whether real or imagined, presented by China, Russia, and Iran constitute exercises not only in complacency, but also in appeasement. That argument would be correct. As discussed in the Prologue to this book, appeasement can work to avoid military conflict as can be seen in the case of the Cuban missile crisis of 1962. As also discussed there, appeasement has been given a bad name by the experience with Hitler in 1938.

Hitlers are very rare, but there are some resonances today in Russia’s Vladimir Putin and China’s Xi Jinping. Both are shrewd, determined, authoritarian, and seem to be quite intelligent, and both are fully in charge, are surrounded by sychophants, and appear to have essentially unlimited tenure in office. Moreover, both, like Hitler in the 1930s, are appreciated domestically for maintaining a stable political and economic environment. However, unlike Hitler, both run trading states and need a stable and essentially congenial international environment to flourish.128 Most importantly, except for China’s claim to Taiwan, neither seems to harbor Hitler-like dreams of extensive expansion by military means. Both are leading their countries in an illiberal direction which will hamper economic growth while maintaining a kleptocratic system. But this may be acceptable to populations enjoying historically high living standards and fearful of less stable alternatives. Both do seem to want to overcome what they view as past humiliations – ones going back to the opium war of 1839 in the case of China and to the collapse of the Soviet empire and then of the Soviet Union in 1989–91 in the case of Russia. Primarily, both seem to want to be treated with respect and deference. Unlike Hitler’s Germany, however, both seem to be entirely appeasable. That scarcely seems to present or represent a threat. The United States, after all, continually declares itself to be the indispensable nation. If the United States is allowed to wallow in such self-important, childish, essentially meaningless, and decidedly fatuous proclamations, why should other nations be denied the opportunity to emit similar inconsequential rattlings? If that constitutes appeasement, so be it. If the two countries want to be able to say they now preside over a “sphere of influence,” it scarcely seems worth risking world war to somehow keep them from doing so – and if the United States were substantially disarmed, it would not have the capacity to even try.

If China and Russia get off on self-absorbed pretensions about being big players, that should be of little concern – and their success rate is unlikely to be any better than that of the United States. Charap and Colton observe that “The Kremlin’s idee fixe that Russia needs to be the leader of a pack of post-Soviet states in order to be taken seriously as a global power broker is more of a feel-good mantra than a fact-based strategy, and it irks even the closest of allies.” And they further suggest that

The towel should also be thrown in on the geo-ideational shadow-boxing over the Russian assertion of a sphere of influence in post-Soviet Eurasia and the Western opposition to it. Would either side be able to specify what precisely they mean by a regional sphere of influence? How would it differ from, say, US relations with the western-hemisphere states or from Germany’s with its EU neighbors?129

Applying the Gingrich gospel, then, it certainly seems that, although China, Russia, and Iran may present some “challenges” to US policy, there is little or nothing to suggest a need to maintain a large US military force-in-being to keep these countries in line. Indeed, all three monsters seem to be in some stage of self-destruction or descent into stagnation – not, perhaps, unlike the Communist “threat” during the Cold War. Complacency thus seems to be a viable policy.

However, it may be useful to look specifically at a couple of worst-case scenarios: an invasion of Taiwan by China (after it builds up its navy more) and an invasion o

f the Baltic states of Estonia, Lithuania, and Latvia by Russia. It is wildly unlikely that China or Russia would carry out such economically self-destructive acts: the economic lessons from Putin’s comparatively minor Ukraine gambit are clear, and these are unlikely to be lost on the Chinese. Moreover, the analyses of Michael Beckley certainly suggest that Taiwan has the conventional military capacity to concentrate the mind of, if not necessarily fully to deter, any Chinese attackers. It has “spent decades preparing for this exact contingency,” has an advanced early warning system, can call into action massed forces to defend “fortified positions on home soil with precision-guided munitions,” and has supply dumps, booby traps, an wide array of mobile missile launchers, artillery, and minelayers. In addition, there are only 14 locations that can support amphibious landing and these are, not surprisingly, well-fortified by the defenders.130

The United States may not necessarily be able to deter or stop military attacks on Taiwan or on the Baltics under its current force levels.131 And if it cannot credibly do so with military forces currently in being, it would not be able to do so, obviously, if its forces were much reduced. However, the most likely response in either eventuality would be for the United States to wage a campaign of economic and military (including naval) harassment and to support local – or partisan – resistance as it did in Afghanistan after the Soviet invasion there in 1979. 132 Such a response does not require the United States to have, and perpetually to maintain, huge forces in place and at the ready to deal with such improbable eventualities.

The current wariness about, and hostility toward, Russia and China is sometimes said to constitute “a new Cold War.”133 There are, of course, considerable differences. In particular, during the Cold War, the Soviet Union – indeed the whole international Communist movement – was under the sway of a Marxist theory that explicitly and determinedly advocated the destruction of capitalism and probably of democracy, and by violence to the degree required. Neither Russia nor China today sports such cosmic goals or is enamored of such destructive methods. However, as discussed in Chapters 1 and 2, the United States was strongly inclined during the Cold War massively to inflate the threat that it imagined the Communist adversary to present. The current “new Cold War” is thus in an important respect quite a bit like the old one: it is an expensive, substantially militarized, and often hysterical campaign to deal with threats that do not exist or are likely to selfdestruct.134

It may also be useful to evaluate terms that are often bandied about in considerations within foreign policy circles about the rise of China, the assertiveness of Russia, and the antics of Iran. High among these is “hegemony.” Sorting through various definitions, Simon Reich and Richard Ned Lebow array several that seem to capture the essence of the concept: domination, controlling leadership, or the ability to shape international rules according to the hegemon’s own interests. Hegemony, then, is an extreme word suggesting supremacy, mastery, preponderant influence, and full control. Hegemons force others to bend to their will whether they like it or not. Reich and Lebow also include a mellower designation applied by John Ikenberry and Charles Kupchan in which a hegemon is defined as an entity that has the ability to establish a set of norms that others willingly embrace.135 But this really seems to constitute an extreme watering-down of the word and suggests opinion leadership or entrepreneurship and success at persuasion, not hegemony.

Moreover, insofar as they carry meaning, the militarized application of American primacy and hegemony to order the world has often been a fiasco.136 Indeed, it is impressive that the hegemon, endowed by definition by what Reich and Lebow aptly call a grossly disproportionate military capacity, has had such a miserable record of military achievement since 1945 – an issue discussed frequently in this book.137 Reich and Lebow argue that it is incumbent on IR scholars to cut themselves loose from the concept of hegemony.138 It seems even more important for the foreign policy establishment to do so.

There is also absurdity in getting up tight over something as vacuous as the venerable “sphere of influence” concept (or conceit). The notion that world affairs are a process in which countries scamper around the world seeking to establish spheres of influence is at best decidedly unhelpful and at worst utterly misguided. But the concept continues to be embraced in some quarters as if it had some palpable meaning. For example, in early 2017, the august National Intelligence Council opined that “Geopolitical competition is on the rise as China and Russia seek to exert more sway over their neighboring regions and promote an order in which US influence does not dominate.”139 Setting aside the issue of the degree to which American “influence” could be said to “dominate” anywhere (we still wait, for example, for dominated Mexico supinely to pay for a wall to seal off its self-infatuated neighbor’s southern border), it doesn’t bloody well matter whether China or Russia has, or seems to have, a “sphere of influence” someplace or other.

More importantly, the whole notion is vapid and essentially meaningless. Except perhaps in Gilbert and Sullivan’s Iolanthe. When members of the House of Lords fail to pay sufficient respect to a group of women they take to be members of a ladies’ seminary who are actually fairies, their queen, outraged at the Lords’ collected effrontery, steps forward, proclaims that she happens to be an “influential fairy,” and then, with a few passes of her wand, brushes past the Lords’ pleas (“no!” “mercy!” “spare us!” and “horror!”), and summarily issues several edicts: a young man of her acquaintance shall be inducted into their House, every bill that gratifies his pleasure shall be passed, members shall be required to sit through the grouse and salmon season, and high office shall be obtainable by competitive examination. Now, that’s influence. In contrast, on December 21, 2017, when the United States sought to alter the status of Jerusalem, the United Nations General Assembly voted to repudiate the US stand in a nearly unanimous vote that included many US allies. Now, that’s not influence.

In fact, to push this point perhaps to an extreme, if we are entering an era in which economic motivations became paramount and in which military force is not deemed a sensible method for pursuing wealth, the idea of “influence” would become obsolete because, in principle, pure economic actors do not care much about influence. They care about getting rich. (As Japan and Germany have found, however, influence, status, and prestige tend to accompany the accumulation of wealth, but this is just an ancillary effect.) Suppose the president of a company could choose between two stories to tell the stockholders. One message would be, “We enjoy great influence in the industry. When we talk everybody listens. Our profits are nil.” The other would be, “No one in the industry pays the slightest attention to us or ever asks our advice. We are, in fact, the butt of jokes in the trade. We are making money hand over fist.” There is no doubt about which story would most thoroughly warm the stockholders’ hearts.

### Liberal Order LIO Defense---Decline Inevitable---1NC

#### LIO decline inevitable---“effective competition” with authoritarian powers is impossible

Alexander Cooley 22, Director of Columbia University’s Harriman Institute and Claire Tow Professor of Political Science at Barnard College; and Daniel H. Nexon, Professor in the Department of Government and at the Walsh School of Foreign Service at Georgetown University, January/February 2022, “The Real Crisis of Global Order,” https://www.foreignaffairs.com/articles/world/2021-12-14/illiberalism-real-crisis-global-order

The election of Donald Trump in 2016 sparked a major debate over the nature and fate of the liberal international order, suddenly caught, it seemed, between the Charybdis of illiberal great-power challengers and the Scylla of a hostile U.S. president. Trump may have lost the presidency in 2020, but the liberal order remains under threat. If anything, recent events have underlined the magnitude of the challenges it faces—and, most important, that these challenges are only one manifestation of a much broader crisis endangering liberalism itself.

For decades after World War II, the dominant factions in both the Democratic and the Republican Parties were committed to the project of creating a U.S.-led liberal international order. They saw Washington as central to building a world at least partly organized around market exchanges and private property; the protection of political, civil, and human rights; the normative superiority of representative democracy; and formally equal sovereign states often working through multilateral institutions. Whatever its faults, the order that would emerge in the wake of the Cold War lifted millions out of poverty and led to a record percentage of humanity living under democratic governments. But it also removed firebreaks that made it more difficult for turmoil at one political level to spread to another—by, for instance, jumping from the subnational to the national to the regional and, finally, to the global level.

Key players in the established democracies, especially in Europe and North America, assumed that reducing international barriers would facilitate the spread of liberal movements and values. It did for a time, but the resulting international order now favors a diverse array of illiberal forces, including authoritarian states, such as China, that reject liberal democracy wholesale, as well as reactionary populists and conservative authoritarians who position themselves as protectors of so-called traditional values and national culture as they gradually subvert democratic institutions and the rule of law. In the eyes of many right-wing Americans and their overseas counterparts, Western illiberalism looks perfectly democratic.

Soon after his inauguration, U.S. President Joe Biden began talking about “a battle between the utility of democracies in the twenty-first century and autocracies.” In doing so, he echoed a widespread view that democratic liberalism faces threats from both within and without. Authoritarian powers and illiberal democracies are seeking to undermine key aspects of the liberal international order. And the supposed pillars of that order, most notably the United States, are in danger of succumbing to illiberalism at home.

Whether they want to “build back better” or “make America great again,” every American analyst seems to agree that the United States needs to first sort itself out to effectively compete with authoritarian great powers and advance the cause of democracy on the global stage. But the two major political parties have very different understandings of what this project of renewal entails. This schism is far greater than disputes over economic regulation and public investment. Partisans see the other side as an existential threat to the very survival of the United States as a democratic republic.

The United States is one of the more polarized Western democracies, but its political conflicts and tensions are manifestations of broader, international processes. The U.S. reactionary right, for example, is linked to a variety of global networks that include both opposition political movements and governing regimes. Efforts to shore up liberal democracy in the United States will have cascading and sometimes unpredictable effects on the broader liberal order; at the same time, policymakers cannot set the country’s affairs in order without tackling wider international and transnational challenges.

All of this goes way beyond giving American democracy a fresh coat of paint and remodeling its kitchen. The crisis cannot be addressed by simply recommitting the United States to multilateral institutions, treaties, and alliances. Its roots are structural. The nature of the contemporary liberal international order leaves democracies particularly vulnerable to both internal and external illiberal pressures.

In their current form, liberal institutions cannot stem the rising illiberal tide; governments have struggled to prevent the diffusion of antidemocratic ideologies and tactics, both homegrown and imported. Liberal democracies must adapt to fend off threats on multiple levels. But there is a catch. Any attempt to grapple with this crisis will require policy decisions that are clearly illiberal or necessitate a new version of liberal order.

### US Institutions Modeling Defense---1NC

#### Nobody models the US—stats

Mila Versteeg 13, Associate Professor at the University of Virginia School of Law. Model, Resource, or Outlier? What Effect Has the U.S. Constitution Had on the Recently Adopted Constitutions of Other Nations?, 29 May 2013, www.heritage.org/research/lecture/2013/05/model-resource-or-outlier-what-effect-has-the-us-constitution-had-on-the-recently-adopted-constitutions-of-other-nations

Unsurprisingly, attempting to gauge one constitution’s “influence” on another involves various conceptual and methodological challenges. To illustrate, a highly generic constitution may be generic because others have followed its lead, because it has modeled others, or simply by coincidence. That said, if two constitutions are becoming increasingly dissimilar, by definition, one cannot be following the other. That is, neither is exerting influence on the other (at least not in a positive way).¶ This is the phenomenon we observed in comparing the U.S. Constitution to the rest of the world; based on the rights index, the U.S. has become less similar to the world since 1946 and, with a current index of 0.30, is less similar now than at any point during the studied period. This phenomenon has occurred even among current American allies; among countries in regions with close cultural and historic ties to the U.S. (namely, Latin America and Western Europe); and among democracies. Only among common law countries is constitutional similarity higher than it was after World War II, but even that similarity has decreased since the 1960s.¶ Rights provisions are not the only constitutional elements that have lost favor with the rest of the world; structural provisions pioneered by American constitutionalism—such as federalism, presidentialism, and judicial review—have also been losing their global appeal.¶ For instance, in the early 20th century, 22 percent of constitutions provided for federalistic systems, while today, just 12 percent do.¶ A similar trend has occurred for presidentialism, another American innovation. Since the end of World War II, the percentage of countries employing purely presidential systems has declined, mainly in favor of mixed systems, which were a favorite of former Soviet bloc countries.¶ Finally, though judicial review is not mentioned in the U.S. Constitution, it has proved the most popular American structural innovation. But though the popularity of judicial review in general has exploded over the past six decades, most countries have opted for the European style of review (which designates a single, constitutional court which alone has the power to nullify laws inconsistent with the constitution) over the American model (in which all courts are empowered to strike unconstitutional laws). In 1946, over 80 percent of countries exercised American-style constitutional review; today, fewer than half do.¶ Reasons for the Decline¶ It appears that several factors are driving the U.S. Constitution’s increasing atypicality. First, while in 2006 the average national constitutions contained 34 rights (of the 60 we identify), the U.S. Constitution contains relatively few—just 21—and the rights it does contain are often themselves atypical.¶ Just one-third of constitutions provide for church and state separation, as does the U.S. Establishment Clause, and only 2 percent of constitutions (including, e.g., Mexico and Guatemala) contain a “right to bear arms.” Conversely, the U.S. Constitution omits some of the most globally popular rights, such as women’s rights, the right to social security, the right to food, and the right to health care.¶ These peculiarities, together with the fact that the U.S. Constitution is both old and particularly hard to amend, have led some to characterize the Constitution as simply antiquated or obsolete.

#### AND, it’s NOT an internal link – imitation’s the result of a stable foreign preference – independent of the success or failure of any particular U.S. policy – which obviously thumps

Negretto 13 (Gabriel L. Negretto, associate professor of political studies at the Centro de Investigación y Docencia Económicas, Mexico City, Ph.D. political science, M.A. international affairs with specialization in Latin American studies, Columbia University, B.A. law, University of Buenos Aires, Making Constitutions: Presidents, Parties, and Institutional Choice in Latin America, Cambridge University Press, 2013, p.48-

Once political leaders from the main parties perceive that keeping the constitution or some of its provisions is no longer viable or desirable, there is usually a more or less extended period of informal deliberation and negotiation on the general purpose of the revision, the different reform proposals, and the organization of the process. The formal initiation of constitution making entails the decision, usually made by the incumbent party alone or in coordination with other parties, to convene a constituent assembly or propose constitutional amendments. The final stage is that of deliberation, negotiation, and voting on the proposals. A political theory of constitutional choice seeks to explain why the individuals and groups involved in the design of constitutions select one particular set of institutions when any of several alternatives could be adopted. The identity of the actors participating in constitution making, the goals they pursue, and their ability to realize them should be at the center of such a theory. This is not, however, the perspective adopted by classical explanations of constitutional design, which focus on factors external to the process of constitutional change as the driving force of institutional selection. The leading classical explanation is based on the idea of diffusion, contagion, or imitation of constitutional models between countries. The central idea is that constitution makers select a constitutional model based on how many countries within a particular area of geographic, cultural, or political influence have already adopted it. In other words, the driving force for imitation is external to the environment where a particular institution is adopted. Empirical evidence in support of this theory is that certain forms of constitutional design tend to be common to countries related by geographic, cultural, and historical ties. For instance, Latin American countries have overwhelmingly opted for presidential-PR systems, parliamentary-plurality systems are concentrated in the United Kingdom and many former British colonies, and parliamentary-PR systems have spread in continental Europe (Lijphart 1991). The spatial or temporal clustering of institutions, however, is the outcome of a process that needs to be explained. A group of countries may copy one another in certain areas of institutional design because of the discovery of a new institution that may solve a common set of problems, because of the desire to conform to a particular cultural pattern, or simply because of the unacknowledged effect of a common domestic variable. In other words, it is necessary to know the reasons for imitation beyond the simple fact that a constitutional model might become fashionable among a group of countries at a certain point in time.10 Moreover, even when the diffusion mechanism is specified, it cannot account for why certain models are adopted instead of others also available at the time when institutional change takes place, or why constitution makers almost always make a selective use of foreign designs, copying some but not all the components of a given model (see Horowitz 2002, 16–17).11 A better understanding of the process by which constitution makers select institutions is provided by actor-centered theories that attribute the origins of constitutional designs to the instrumental preferences of the framers. In this view, politicians select institutions based on the outcomes they expect to obtain once these institutions are in place. There is no agreement, however, about the nature of these outcomes. In some theories, constitutional designers are presumed to pursue cooperative outcomes; other theories postulate that constitutional designers are mainly concerned with the distributional effects produced by institutions.

### Terrorism Defense---Generic---1NC

#### Terrorism isn’t existential.

Zachary Kallenborn & Gary Ackerman 23, Kallenborn is with the Strategic Technologies Program, Center for Strategic and International Studies; Ackerman is with the College of Emergency Preparedness, Homeland Security and Cybersecurity, University at Albany, "Existential Terrorism: Can Terrorists Destroy Humanity?" European Journal of Risk Regulation, vol. 14, 2023, pp. 760-768, https://doi.org/10.1017/err.2023.48

Overall, we conclude that several plausible pathways exist for terrorists to destroy human civilisation, although the likelihood at present of any of them is very low. Within the bounds of feasibility (sometimes barely so), terrorists could conceivably develop genetically engineered microbes, catalyse nuclear war or, in the future, utilise novel technologies like ASIs and nanorobotics to carry out existential attacks. However, in the near to medium term, this is likely to require significant amounts of technical and scientific expertise and resources, far beyond a typical (or even state-sponsored) terrorist organisation. Of course, future technological advances – artificial intelligence and rapid prototyping are noteworthy examples – and other factors may lower the barriers considerably. Alternatively, and far more concerning, is the potential for terrorists to spoil existential risk-mitigation measures, such as disrupting planetary defence missions. However, the effectiveness of such attempts would be dependent on an impending existential harm manifesting through other means and is thus highly contingent on extraneous conditions. The contingency dependence is again high for causing systemic harm that undermines the ability to deal with other existential risks. Like high capability thresholds, high contingency thresholds also imply lower likelihood overall.

## Hospitals

### Disease Pandemics Defense---1NC

#### Neither natural nor engineered pandemics can cause extinction.

David Thorstad 23, Assistant Professor of Philosophy at Vanderbilt University, was a research fellow at the Global Priorities Institute and Kellogg College, Oxford, did a PhD in philosophy at Harvard and BA in philosophy and mathematics at Haverford College, “Exaggerating the risks (Part 9: Biorisk – Grounds for doubt),” Reflective Altruism, 7/8/23, https://reflectivealtruism.com/2023/07/08/exaggerating-the-risks-part-9-biorisk-grounds-for-doubt/

2. Existential biorisk

We began this series with a distinction between two types of risks.

Effective altruists care deeply about catastrophic risks, risks “with the potential to wreak death and destruction on a global scale”. So do I. Catastrophes are not hard to find. The world is emerging from a global pandemic. There are ongoing genocides throughout the world. And nuclear saber-rattling is on its way to becoming a new international sport. Identifying and stopping potential catastrophes is an effort worth our while.

But effective altruists are also deeply concerned about existential risks, risks of existential catastrophes involving “the premature extinction of Earth-originating intelligent life or the permanent and drastic destruction of its potential for desirable future development”. Most catastrophic risks are not existential risks. A hundred million deaths would not pose an existential risk. Nor, in many scenarios, would a billion deaths. Existential risks are literal risks of human extinction, or the permanent destruction of our ability to develop as a species.

There should be little doubt that biological hazards (`biorisks’) pose a significant catastrophic risk to humanity in this century. The world just experienced a global catastrophe in the form of the COVID-19 pandemic and we are ill-prepared to prevent or respond to another. Catastrophic biorisks are important and neglected, and effective altruists are right to worry about that.

However, many effective altruists hold that there is a significant chance of existential catastrophe from biological causes.

In The Precipice, Toby Ord estimates the chance of irreversible existential catastrophe by 2100 due to engineered pandemics alone at 1 in 30, second only to risks posed by artificial intelligence.

Participants at the 2008 Oxford Global Catastrophic Risks Conference estimated a median 2% chance of extinction by 2100 from engineered pandemics.

In What we owe the future, Will MacAskill writes that “Typical estimates from experts I know put the probability of an extinction-level engineered pandemic this century at around 1%”.

These are very high numbers. These numbers need to be supported by a good deal of solid evidence. Later in this sub-series, I will review leading arguments for the view that biorisks pose a significant existential threat in this century. I will show that these arguments fall considerably short of grounding anything like the above estimates. Crucially, we will also see that expert consensus is far more skeptical than MacAskill suggests: MacAskill’s claim could only be justified on a view which treats effective altruists as the lone experts on existential biorisk, and dismisses leading scientists, policymakers, and biosecurity professionals as non-experts.

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?

Sixth, you would need the technological capability and equipment to synthesize the hypothesized biological agent, something it is widely agreed that humanity currently lacks.

Finally, you would need to find someone crazy enough to manufacture and deploy this biological agent, yet also competent enough to pull it off, which we have seen is no easy feat.

I am not sure if I would go so far as to say that the above is physically impossible. But without a very good argument, we should regard it as highly implausible that all of the above will come to pass by the end of the century.

### Inequality Defense---AT: Rural Economies---1NC

#### Rural economies are fine

Tonya Garcia 21, MarketWatch reporter covering retail and consumer-oriented companies. 4/28/21, “11 million birds and counting: Tractor Supply sales signal robust rebound for rural America.” https://www.marketwatch.com/story/rural-economies-recovering-more-quickly-from-covid-than-other-areas-to-tractor-supplys-benefit-11619637223

Tractor Supply Co.’s TSCO, +1.13% first-quarter results got a lift from its core customers in rural areas, which, the company says, weren’t as affected by the pandemic and are recovering more quickly than other geographies.

“The fastest growth customer segment is our core farm and ranch,” said Hal Lawton, chief executive of the retailer, during the first-quarter earnings call, according to a FactSet transcript.

“This segment is very healthy as rural economies, for the most part, were less impacted by the pandemic and are recovering at a steeper and more robust rate.”

Tractor Supply reported what Lawton called a “record performance” in the first quarter. Lawton attributed the results to a few other factors as well, including a 400-basis point shift to a younger demographic between the ages of 18 and 45 years old. This group, which had been slow to purchase homes, were “shocked” by the pandemic and began to do so.

“There continues to be a net migration out of urban areas, largely driven by the millennial segment,” Lawton said on the call. “The most robust homeownership growth is in the millennial cohort, with the growth coming in suburban and rural areas. We believe the growth in this customer segment has staying power, and could be (a) structural game-changer for us.”

Pet owners are also a strong demographic for Tractor Supply, and pet ownership soared during the pandemic. For Tractor Supply, that means sales of things like pet food and shampoo also increased. The company also saw bird sales soar.

### Climate Change Warming Defense---Top---1NC

Alt causes. Obviously.

#### No warming impact---adaptation and wealth solve, disasters are decreasing, tipping points are wrong, US not key. Reductions only reduce global greening, which is net harmful.

Harry DeAngelo & Judith Curry 25, DeAngelo is Professor Emeritus of Finance and Business Economics, Kenneth King Stonier Chair in Business Administration, Jensen Prize recipient, Golden Apple Award recipient; Curry is Former Chair of the School of Earth and Atmospheric Sciences at Georgia Institute of Technology, American climatologist, "A Critique of the Apocalyptic Climate Narrative," USC Marshall School of Business Research Paper Sponsored by iORB, 02/19/2025, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=5145310

Alarming narratives that have an aura of plausibility can be highly effective tools for shaping public opinion and public policies. When such narratives are false or seriously misleading, they can do significant damage because of unintended consequences of their policy prescriptions. For example, an alarming narrative – rooted in a false, but plausible-sounding, analogy between the risks of nuclear power plants and nuclear bombs – turned public opinion against nuclear power and thereby induced much greater use of coal over the last 50 or so years (Shellenberger (2020, chapter 8)). The substitution of coal for nuclear power shortened millions of lives (due to greater air pollution) and led to higher CO2 emissions than would have otherwise occurred.

These unintended consequences of the anti-nuclear-power narrative should make us think carefully before the U.S. goes too far down the energy path prescribed by the Apocalyptic climate narrative.

The Apocalyptic climate narrative is a deeply flawed guide for public policies because it:

• focuses on the risks/costs of global warming and ignores any benefits from warming and the myriad benefits to humanity from fossil-fuel use.

• advocates aggressive near-term suppression of fossil-fuel use without considering the huge costs that such suppression would inflict on humans.

• lacks a realistic sense of proportion about the risks/costs from continued global warming, which are manageable, not existential.

This paper details the flaws in the Apocalyptic climate narrative, including why the threat from humancaused climate change is not dire and why urgent suppression of fossil-fuel use would be unwise. We argue that sensible public policies would focus instead on developing a diversified portfolio of energy sources to support greater resilience and flexibility to respond to whatever weather and climate extremes that might occur. We identify nine principles for sensible U.S. public policies toward energy and discuss implications of the flaws in the narrative for investors and their agents.

2. Is global warming dangerous?

Hypothesized damaging consequences of global warming include (i) loss of life from greater intensity and frequency of heat waves, hurricanes, floods, droughts, and wildfires and (ii) economic losses from such extreme-weather events and from sea-level rise due to melting polar ice caps. Assessments of the impact from human-caused warming are complicated by the difficulty of determining the extent to which observed temperature increases are caused by natural climate variability – a difficulty that adds to the uncertainty in estimates of how much human-caused warming to expect over the 21st century.

Warming over the past 120 years

The question of whether global warming is dangerous (whatever its cause) can be addressed by examining the behavior of the climate since before the time human activity generated large amounts of greenhouse gas emissions. Human-caused global warming is typically measured with reference to pre-industrial times; for practical reasons in terms of the availability of data, the usual approach employs a baseline period in the late 19th century. Since the late 19th century, Earth’s average temperature has increased by about 1.3o C (2.3o F). During the same period, average global sea level has risen 8-9 inches, and there has been little or no detectable change in most types of extreme weather events when measured against the background of natural weather and climate variability.

Since the late 19th century, with 1.3o C of global warming, humanity has seen unprecedented increases in prosperity and well-being. Global population has increased from about 1.6 billion in 1900 to 8.2 billion people in 2024. In 1900, the global average lifespan was 34 years; in 2024 the global average lifespan more than doubled to 73 years. From 1961 to 2020, global agricultural output nearly quadrupled, with a 53% increase in per capita output despite a 2.6-fold increase in global population.

Since the early 1900s, per capita mortality from hurricanes, floods, droughts, and wildfires has decreased by almost 98% (Koonin (2021, page 170)). These favorable trends in weather- and climate-related mortality rates reveal that the world is now much better at preventing deaths from extreme weather and climate events than it was a century ago. The sharp reduction in death rates has been accomplished through greater wealth (driven by energy derived from fossil fuels), which provides better infrastructure, superior advance-warning technologies, and greater capacity to recover from weather-related disasters.

Although the role of higher temperatures and atmospheric CO2 concentrations in these favorable changes in mortality rates is open to debate, two aspects of the increases are unambiguously beneficial. First, satellite observations since the 1980s indicate widespread greening of the planet. The satellite data show that, over the last two decades, Earth has increased its green leaf area by approximately 5%. This greening reflects increased CO2 fertilization, warmer temperatures, and more rainfall (Chen et al. (2024)).

The second aspect relates to heat and cold extremes. An unambiguous consequence of global warming is more frequent heat extremes, coupled with less frequent cold extremes. It is well known that mortality is substantially greater (almost a factor of 10) for extreme cold than for extreme heat (Zhao et al. (2021). Consequently, rising temperatures are associated with a net saving of lives owing to the reduction of mortality from extreme cold events. Heat-related mortality is also declining over time (O’Neill et al. (2021)), owing to general improvements in health care systems, increasing prevalence of residential air conditioning, and behavioral changes – factors that have dominated any impact of a warmer planet on the risk of heat-related death.

Although the dollar value of damages from extreme weather events is now greater than it was many decades ago, this increase is the result of increasing vulnerability and exposure associated with greater population and concentration of wealth in coastal and other disaster-prone regions. A recent analysis summarizing many studies finds no evidence to support claims that any part of the overall increase in global economic losses from weather and climate disasters can be attributed to global warming (Pielke (2020, 2023)).

Prospective warming over the 21st century

What about warming over the rest of the 21st century? Is there reason to expect dire consequences for humanity going forward in time?

The Apocalyptic climate narrative and the most extreme impacts are driven by extreme emissions scenarios, with 4-5o C of warming by 2100 (above a baseline in the late 19th century). However, since 2021, the UN’s climate negotiators have abandoned extreme emissions scenarios as unrealistic for two reasons. First, they make unrealistic assumptions, especially about coal use. Second, actual emissions have been tracking well below their most extreme emission scenario, and indeed slightly below their medium emissions scenario. The UN is now working with an estimated year 2100 warming of 2.5°C (UNFCCC (2022)), while the IEA Roadmap to NetZero projects 2.4°C of warming by 2100 (IEA (2023)). When plausible scenarios of natural climate variability and values of climate sensitivity on the lower end of the UN’s IPCC likely range are considered, the expected warming could be significantly lower (Lee et al. (2021)).

If we work with 2.5°C projected warming by 2100, more than half (1.3°C) of the predicted increase in temperature has already occurred. There are good reasons to expect continued advances in prosperity and well-being over the remainder of the 21st century – and ample reasons such as AI to expect such advances to accelerate. Moreover, the so-called threshold of danger of 2o C warming since pre-industrial times is not an objective threshold of danger. Rather, 2o C is a politically negotiated target designed to motivate broadbased actions to reduce emissions (Curry (2023, page 9)).

Importantly, there is no credible case that missing the 2o C target would pose an existential risk to humanity. Humans have adapted to (and thrived in) climates extremes far worse than in the pessimistic extreme scenario, as summertime residents of Phoenix and wintertime residents of Minneapolis demonstrate every year.

Two other risk-related points are relevant here. First, a basic assumption in the socioeconomic scenarios used in formulating the UN climate-assessment reports is that vulnerability to weather and climate extremes decreases with greater wealth and economic development, as adaptive capacity increases. All of the Shared Socioeconomic Pathways (SSPs) scenarios constructed for the most recent UN climate assessment entail dramatic growth, with global GDP in 2100 between four and ten times larger than in 2010 (Dellink et al. (2017)). These scenarios do not imply any futures for humanity that are worse than today.

Second, risks from human-caused global warming are difficult to separate credibly from natural weather and climate variability and the risks are dominated by the vulnerabilities of less-developed countries and poorer populations generally. Increasing wealth and productivity will continue to reduce humanity’s vulnerability to weather- and climate-related risks.

Tipping points and surprises

Uncertainty about the impact on humans of continued use of fossil fuels is dominated by the difficulties of estimating the likelihood of catastrophic outcomes from climate tipping points that could cause severe and possibly irreversible damage.

Climate tipping points are defined as abrupt or nonlinear transitions to a different climate state, which are hypothesized to occur once some threshold has been crossed, with regional or global consequences that are largely uncontrollable and beyond our management. In other words, tipping points are points of no return, at least on the century timescale. In recent geologic history, abrupt climate change has been caused by changes in ocean circulation patterns and ice-sheet dynamics, including (i) the Younger Dryas (12,900- 11,700 years ago) when global temperatures dropped by up to 15o C in some regions, (ii) an unnamed sudden cooling event that occurred around 8,200 years ago and that lasted about 150 years, and (iii) the DansgaardOeschger Events (115,000-11,500 years ago) with a series of abrupt warmings and cooling during the last Ice Age with temperature shifts of 5-10o C occurring within decades.

The IPCC Assessment Reports have considered a number of potential tipping points associated with global warming, including ice-sheet collapse, collapse of the Atlantic Overturning Circulation, carbon release from permafrost thawing, and destruction of the Amazon rainforest and coral reefs. There are some preliminary climate model simulations for some of these conjectured tipping points. However, climate models do not include the appropriate physical, chemical, and biological processes to adequately simulate such events. Hence, these hypothesized climate tipping points have been based largely upon the consideration of imperfect analogues from the geologic past, process models, and physically based storylines.

The likelihood of any of the above types of hypothesized tipping points occurring in the 21st century under the medium emissions scenario is generally regarded as low, although there is also low confidence in any conclusions surrounding possible tipping points owing to deep (Knightian) uncertainties in our understanding of the complex climate system.

Could something genuinely catastrophic happen to the climate on the timescale of the 21st century? Yes, although continued use of fossil fuels is not the only possible cause. For example, a climate catastrophe could also be caused by nuclear war, a series of explosive volcanic eruptions, natural shifts in ocean circulation patterns, and/or shifts in ice-sheet dynamics driven by geologic processes.

It is impossible to remove all sources of climate-related risk, and it would be unwise to attempt to try to avert low probability climate catastrophes with policy actions that would themselves surely impose massive near-term costs on humanity. There is no doubt that aggressive near-term suppression of fossil-fuel use would impose significant costs on humans until such time as viable replacements for fossil fuels were found for the roles they play in the production of food, steel, cement, and plastics.

The critical implication: In terms of rational risk management, there is no case for policies that would suppress fossil-fuel use aggressively simply because something bad might happen. For such suppression to be rational, we should have good reason to think that the low probability climate catastrophe we would avoid would be far worse than the catastrophe we would surely induce by moving aggressively to net zero. We have yet to see anyone provide credible support for the latter argument.

[PARAGRAPH INTEGRITY PAUSES]

3. Fossil-fuel suppression: Shooting ourselves in the foot The Apocalyptic climate narrative incorrectly portrays CO2 emissions as inherently and unequivocally dangerous and an economic “bad” i.e., a purely negative externality. This portrayal ignores the fact that CO2 yields direct benefits (e.g., it is plant food) and the inarguable technological reality that fossil fuels are currently irreplaceable inputs for producing food (via ammonia-based fertilizer), steel, cement, and plastics (Smil (2022, chapter 3), Gates (2022, chapter 3)), which are central features of modern life. The last 150 years have seen an enormous increase in human welfare that occurred to a large degree because of the use of fossil fuels for electricity, transportation, agriculture, and the material inputs for manufacturing and infrastructure construction. Fossil fuels have enabled huge advances in medicine, food production, communications, computing, ground and air travel, and much more. They have enabled billions of people to have lives of much higher quality, longer length, and generally greater material abundance than our ancestors – most of whom lived on the Malthusian margin of survival. The 2015 Paris climate agreement set a goal of “net-zero” global emissions (a balance between greenhousegas emissions and offsetting emission removals) by 2050, which as a practical matter targets a drastic reduction in fossil-fuel use over the next 25 years. By 2024, 107 countries had adopted net-zero pledges. The U.S. entered the agreement under President Obama, exited under President Trump, re-entered under President Biden, and is in the process of exiting again under President Trump’s second administration. The problem with the Paris agreement is its urgent timeline for abandoning fossil fuels before we have viable replacements for the energy they provide and the myriad other roles they play in creating products that benefit humanity. As Vaclav Smil (2020) bluntly put it: Designing hypothetical roadmaps outlining complete elimination of fossil carbon from the global energy supply by 2050 is nothing but an exercise in wishful thinking that ignores fundamental physical realities. Failure of net-zero policies After the Paris agreement, atmospheric CO2 concentrations increased 5.0% from 401 ppm in 2015 to 421 ppm in 2023. Global emissions from burning fossil fuels increased 6.6% from 34.7 billion metric tons in 2015 to 37 billion metric tons in 2023. Today, the world is far from reaching the net-zero emissions target and the post-Paris emissions trend is away from target. In recent years, the world has spent enormous amounts on clean energy in the hope of curtailing fossil-fuel use. In every year since 2015, outlays on clean energy have been $1 trillion or more, with outlays for 2024 on track to reach $2 trillion (IEA (2024)). These efforts have succeeded in slightly lowering the percent of global energy from fossil fuels, but they have done so by expanding other sources of energy – notably solar and wind – and not by reducing fossil-fuel use. Today, the world gets 81% of its energy from fossil fuels, down slightly from 82.8% in 2010 and 81.2% in 2000. In absolute terms, global use of oil, natural gas, and coal have all increased. Although a decade of government subsidies of electric vehicles has led to less oil usage than would otherwise have occurred, absolute consumption of gasoline is now at a record high. In public discourse, capitalism and democracy are sometimes unfairly blamed for increasing emissions and the failure of net-zero policies. China has strong elements of a government-planned rather than capitalist economy and no reasonable observer would mistake it for a democracy. Yet China is the world’s largest greenhouse-gas emitter. Fossil-fuel firms are also portrayed as the root cause of global warming. If humans did not desire the products made with fossil fuels, there would be no firms producing such products. Consumption demand by individual human beings is the root cause of fossil-fuel use and greenhouse-gas emissions. Net-zero policies are failing because they do not deal with this fundamental reality. A variety of underlying economic and political considerations have played roles in the failure of the netzero policies embraced by many of the world’s governments. Most obviously, government subsidies have induced a greater supply of solar- and wind-generated energy, but a range of technical and political issues have hampered the widespread deployment of these clean-energy sources. Governments could motivate reductions in fossil fuels by enacting carbon taxes, which would penalize activities in proportion to the emissions they cause. However, proposals to enact such taxes have been very unpopular, especially in the U.S., and thus have gained virtually no political traction. Although many people say they are concerned about global warming, there is widespread resistance among the U.S. electorate to paying for climate-related actions. Voters’ resistance to a carbon tax would be especially difficult to overcome once they have a realistic understanding of its limited climate impact. If the U.S. hypothetically cut its greenhouse-gas emissions to zero today, there would be no reliably detectable effect on Earth’s weather or climate over the 21st century. If we accept the climate model projections of 1.2o C or maybe 1.3o C additional warming over the rest of the 21st century, U.S. annual emissions of about 13% of the world’s total would contribute less than 0.2o C of warming over the next 75 years. It would be a very tough sell to convince U.S. voters to incur massively higher tax bills for a small reduction in the warming trend. It would be especially tough to make that sale when China, India, and many other countries are continuing to emit greenhouse gases at prodigious rates. These problems with clean-energy subsidies and carbon taxes have led U.S. and European governments to attempt to address global warming through a variety of other tactics such as mandates, quotas, prohibitions, and regulations on specific products and activities because of their carbon footprint. These tactics include mandating electric-vehicle production through setting caps on total product-line emissions for automobile firms; outlawing the use of gas stoves; controlling the supply of fossil fuels by regulatory restrictions on permits for production; canceling oil and gas pipelines; lobbying pension funds, university endowment funds and other such organizations to divest their investment holdings of fossil-fuel firms; and use of regulatory pressure to discourage banks and other financial institutions from making loans to support investment in fossil-fuel projects, both in the U.S. around the world. These tactics have been adopted because of the urge to “do something” about a potential problem and because few people recognize that these actions will have negligible impact on global warming. Geopolitical concerns about fossil-fuel suppression Another political impediment to suppression of fossil-fuel use is that it would weaken our national security position by impeding reliable access to large amounts of energy. China, Russia, and Iran may say they will eventually reduce carbon emissions, but their incentives to do otherwise are obvious. All three countries will be stronger in military and economic terms by continuing to exploit their use of fossil fuels. The lessons of history indicate that we ignore at our peril the national security dimensions of energy policy. Consider, for example, what Daniel Yergin (2008) says about World War II in “The Prize,” his Pulitzerprize winning history of oil (with italics added for emphasis): “Petroleum was central to the course and outcome of World War II in both the Far East and Europe. The Japanese attacked Pearl Harbor to protect their flank as they grabbed for the petroleum resources of the East Indies. Among Hitler’s most important strategic objectives in the invasion of the Soviet Union was the capture of the oil fields in the Caucasus. But America’s predominance in oil proved decisive and by the end of the war German and Japanese fuel tanks were empty.” Moral concerns about fossil-fuel suppression Aggressive suppression of fossil-fuel use would be morally unconscionable under any reasonable ethical code, as it would impose costs on the more than 3 billion people who have virtually no access to electricity. This large swath of humanity would like access to abundant, cheap, and reliable fossil-fuel-based energy to help lift themselves out of poverty and to reduce the substantial health risk from long-term exposure to airborne particulate matter caused by indoor burning of dung and wood. There are now more than 6 billion people who would like to live in ways that most of us in wealthy countries take for granted, with abundant and reliable energy that few of us would willingly give up to any degree. The ostensible urgency of attaining net-zero is seriously hampering progress towards the UN’s Sustainable Development goals of no poverty, no hunger, affordable and clean energy, and the development of industry, innovation, and infrastructure. International funds earmarked to aid less developed countries are being directed away from efforts to reduce poverty, and toward emission reductions, particularly in Africa. Hunger eradication has been made more difficult by climate-mitigation efforts, including (1) restrictions on livestock and fertilizer; (2) impediments to the development of industry and infrastructure that require steel and cement, which currently require fossil fuelsfor production; and (3) continued emphasis on biofuels (because they are renewable and despite their greenhouse-gas emissions). Other economic, technological, and social impediments to fossil-fuel suppression Countries that have taken the lead in the movement toward net-zero have had disappointing track records, which discourages others from following their lead. For example, widespread implementation of government-subsidized solar and wind power has led to increased energy costs in the U.K. and Germany, contributing to a domestic industrial decline. In 2022, Sri Lanka experienced a dramatic drop in crop yields and food shortages after the government banned fossil-fuel-based fertilizers, which led to social unrest that was so serious that the president and his wife fled the country. The broader problem is that many of the technologies needed for net-zero either do not exist or are still in the demonstration or prototype phase. Substantial innovation and investment is needed to scale prototypes to be efficient and affordable for users. For solar and wind, the needs are acute. At present, there is nothing close to viable energy storage (batteries) available at scale to address the fact that these sources provide no power absent sunshine and wind. Also needed are large investments in transmission grids – not just to move power to locations far from rural points of origination, but also to accommodate the asynchronicity of power from wind, solar, and batteries. These impediments to net-zero are compounded by concerns about the enormous amounts of materials needed for solar, wind, and battery infrastructure changes, along with significant environmental impacts from mining of inputs needed for their production. A closely related impediment is that the huge land requirements for solar and wind farms are fostering conflicts with both environmentalists and residents of rural areas about issues of aesthetics, ecosystem impacts, and competing economic uses for the land. Bad energy choices Bad choices about future energy systems are a damaging consequence of the false sense of urgency that the Apocalyptic climate narrative has created about suppressing fossil-fuel use. That urgency effectively dictates that existing technologies like solar and wind must replace fossil fuels. However, overcoming the low power quality, intermittency, and synchronicity problems of solar and wind power remains an ongoing challenge that may not ever be solved in a cost-effective way. The technological reality is that solar and wind are far inferior to fossil fuels for producing energy at the needed scale and, at present, they are incapable of producing many of the materials that are responsible for the lives of remarkable abundance available to people who live in advanced industrial economies. The unfortunate result is to distract attention from the potential role of more advanced energy technologies that are under development and that are expected to provide better medium- and long-term solutions than solar and wind. The issue is not if, but when, more advanced energy technologies will emerge as practical and economically viable at scale. Meanwhile, human flourishing today requires enormous amounts of lowcost energy. That energy can come only from the technologies and systems that we know how to build right now, which are mainly fossil-fuel-based. Attempts to suppress fossil-fuel use aggressively are therefore socially destructive in that they would impose significant avoidable costs on humanity. Ever-growing demand for energy All of these impediments to net-zero exist against the backdrop of ever-growing demand for energy. There is huge pent-up demand from developing nations, many of which are mired in energy poverty and whose billions of citizens would like to lead lives with power access that is commonplace in wealthy countries. There is a remarkable degree of self-absorption among net-zero advocates in wealthy nations who personally have ample access to energy and who feel comfortable arguing that people in developed countries should exercise energy and material restraint to slow down global warming when the climate impact of such restraint will almost surely be undetectable. Greater access to electricity can help reduce our vulnerability to weather and climate through air conditioners, water desalination plants, irrigation, vertical farming operations, water pumps, coastal defenses, and environmental monitoring systems. And ever-growing amounts of electricity will be needed for humans to be able to capture the benefits from innovations in advanced materials, manufacturing, artificial intelligence, robotics, photonics, quantum computing, blockchain, electronics, and other economic arenas that are currently unforeseen or unimagined. There is good reason to fear a future without cheap, abundant fuel and the continued economic expansion that it fosters far more than to fear planetary warming from the use of fossil fuels. Degrading our energy supply by suppressing fossil fuels and forcing a move to wind and solar will restrict the lifeblood of modern society. Since there is no credible case of an impending Apocalypse from continued use of fossil fuels, we would be shooting ourselves in the foot by urgently suppressing their use. 4. Rational energy policy for the 21st century Although fossil fuels have played a critical role in generating enormous gains for humanity, there are good reasons for seeking ways to reduce our reliance on them, including geopolitical concerns, environmental degradation, and increasing costs of extraction. What then makes sense for public policies to foster development of more abundant, secure, inexpensive, and clean energy? The foundation of any reasonable approach should be: First, do no harm. That means abandoning the Apocalyptic climate narrative’s prescription of aggressively suppressing fossil-fuel use to attain net-zero CO2 emissions in the near-term. We should build on that foundation by (i) recognizing that human flourishing requires abundant and everincreasing energy, (ii) pursuing research into a broad range of alternatives to fossil fuels as energy sources and as material inputs to production (e.g., as with fertilizer and plastics), (iii) approaching the next 25 years (and perhaps longer) as a learning period grounded in intelligent trial and error, and (iv) evaluating all technologies holistically for abundance, reliability, costs calculated on an “all-in” lifecycle basis, sensible land and resource use, air-quality impact, and environmental impact generally. Implications for public energy policies We offer nine principles for operationalizing this approach to U.S. energy policies, with #3, #5, and #6 specifying actions we should take and the remainder highlighting what we should not do. 1. We should not inflict costs on U.S. citizens – reduced overall economic prosperity, constrained individual choice, and diminished national security – by adopting public policies intended to mitigate global warming that will not detectably affect Earth’s temperature in the short or long run. 2. We should not eliminate fossil fuels before we have technologically viable and cost-effective replacements for the critical inputs they provide in the production of food, steel, cement, plastics, and electricity. 3. We should use “carrots” to foster investment in innovation in energy, materials science, and agricultural science, as well as in the ability of humans to adapt to a changing climate. 4. We should not use “sticks” to punish consumption that generates greenhouse gasses (e.g., banning gas stoves, jet travel, internal combustion engines, and non-vegan food), while having no material effect on temperatures now or in the long run. 5. We should cultivate clean energy (to reduce air pollution) and energy independence (for national defense and economic security reasons) with a diversified set of reliable energy sources to hedge the risks of adverse “unknown unknowns” in the evolution of our political, economic, and physical environments. 6. We should put major emphasis on the resuscitation (and refined development) of nuclear power, which is at least as safe as solar and wind and far safer than coal and oil (based on comparisons of death rates due to both accidents and air pollution per unit of electricity generated). 7. We should not focus narrowly on solar panels, wind turbines, and biofuels. Solar and wind are problematic because of their (i) unreliability and consequent need for a stand-by power system, (ii) low energy density and consequent massive land requirements to deliver energy at scale, and (iii) negative externalities (e.g., from rare-earth mining to produce batteries to address the unreliability problem). Biofuel emissions are at least as bad as gasoline, while biofuel production uses massive amounts of cropland and played a significant role in three major food crises in the last 20 years. 8. We should not engage in backdoor regulation of fossil-fuel use by the Federal Reserve (through bank oversight) and the SEC (through ESG empowerment) that will warp the allocation of investment capital. 9. We should not use our power to impose credit policies toward developing countries (e.g., by the World Bank) that discourage fossil-fuel-based projects and thereby make it more difficult for world’s poorest people to elevate themselves out of poverty. The three proactive principles (#3, #5, and #6) reflect the physical reality that human flourishing depends critically on the abundant availability of energy and on the currently irreplaceable role that fossil fuels play in the production of food, steel, cement and plastics. Deterrent principle #7, which cautions against a narrow focus on solar, wind, and biofuels, reflects the strong technological limits of these technologies. The remaining deterrent principles (#1, #2, #4, #8, and #9) reflect the fact that it makes no sense to mandate or constrain choices that will cause humanity to bear costs when those choices will have no detectable effect on global warming in the short- or long-run. These costs have a direct component: Avoidable waste from outlays on unpromising technologies and on consumption goods that simply sound good from a carbon emissions perspective. They also have an opportunity cost component in terms of diverting resources from worthwhile causes, including investments to foster greater resilience to weather and climate extremes as well as to help wide swaths of humanity to elevate themselves out of poverty. Implications for investors and their agents The flaws in the Apocalyptic climate narrative have three important implications for the risk-management decisions of private investors and for the corporate directors and money managers who work on their behalf. • The actual risks of fossil-fuel-generated climate change are not nearly as great as portrayed in the drumbeat of worried discussions of global warming in public discourse that the Apocalyptic climate narrative has fostered. • Those who nonetheless want to do something to help mitigate global warming should realize that the long-run consequences for the planet of the ESG pursuit of a reduced corporate carbon footprint will do little, if anything, to change the climate over the course of the 21st century. • The Apocalyptic climate narrative is itself an element of investment risk. The narrative has gained such powerful traction – especially in the U.S. and other wealthy countries – that it is significantly affecting the allocation of real resources and the stock-market values of companies. The latter traction creates upside investment potential and downside risk. The upside, of course, is the potential for profits by responding to the demand for green investments. The downside risk is the possibility that many people will eventually come to realize that the importance of suppressing fossil-fuel use has been blown far out of proportion in public discourse. From a capital markets perspective, the current green-investment situation accordingly has elements of a stock-price bubble that is supported by a false narrative. One can expect that bubble to sustain or grow provided that many people continue to buy into the premise of an urgent need to transition away from fossil fuels and as governments add more subsidies to renewable-energy projects. The danger is that the bubble will pop or dissolve as it becomes increasingly clear that the Apocalyptic climate narrative is an extremely effective form of environmentalist propaganda that markedly overstates the risks to humanity of continued global warming. One might be tempted to take investment positions that effectively “short the bubble” and wait for the gains to come rolling in when the bubble pops or dissolves. The problem with such strategies is that substantial valuation errors in the capital market can take a long time to correct. Consequently, arbitrageurs who have finite capital to invest and who make strong bets against the bubble can be wiped out financially before the asset-pricing errors are corrected. The upshot is that there is no clear path to a “free lunch” of abnormal investment performance from shorting green investments. The reason is that one simply cannot be sure about whether or when the world will come to broad recognition of the flaws in the narrative.

[PARAGRAPH INTEGRITY RESUMES]

5. Bottom line: Sensible alternatives to net-zero policies

What would happen if the U.S. enforced a net-zero emissions policy? In 2100, according to climate-model projections. Earth’s average temperature would be lower (than it otherwise would be) by less than 0.2°C, which would be undetectable statistically given normal temperature variation. U.S. consumption and production of goods created with steel, cement, and plastics, and of food grown with ammonia-based fertilizer would immediately plummet because of the essential role fossil fuels play in their creation. A sharp decline in the quality of life would surely ensue.

Is it worth it? Is an undetectable reduction in the warming trend worth a huge sacrifice in the quality of life caused by an urgent move to net-zero? According to the Apocalyptic climate narrative, the answer is yes because humanity (ostensibly) faces an existential threat from global warming. However, there is no credible evidence of an existential threat from global warming. Nor, indeed, is there evidence of warmingrelated costs that cannot be addressed by humanity’s resilience and ability to adapt to extreme climates.

Public policies that enforce an urgent move to net-zero would be especially hard to sell to the U.S. electorate once voters see the costs they would bear. The resistance would almost surely grow stronger as more voters come to realize that, regardless of their personal quality-of-life sacrifices, global warming is predicted to continue because China, India, Russia, Iran, and many other countries have strong incentives to continue to use fossil fuels.

## Avoidance Adv

### AT: Legitimacy/Stare Decisis/Overrule Link

Thumped by every other court case. Trump v US, Dobbs, Loper bright, sec vs jarkesy.

**Legitimacy is structurally thumped.**

Jonathan P **Kastellec 24** – professor in the Department of Politics at Princeton University. “Is the U.S. Supreme Court Facing a Crisis of Democratic Legitimacy? A Review Article,” 10/10/2024, Political Science Quarterly, qqae112.

That last paragraph certainly falls under the category of historical trivia (though the tale of Matthews nomination is one of the more interesting ones in American history37). But the broader point is that the conditions for democratically illegitimate justices have always existed in the structure of American government. So, what changed? There are two new features of American politics that have paved the way for the current Court's democracy gap. First, as already discussed, the intense elite partisan polarization in American politics today exceeds even the levels of polarization seen in the late nineteenth century. Even in the nineteenth century periods when we saw many contested nominees who received significant opposition in the Senate, it was never the case where party line votes were regular occurrences, as they have been since 2005.38

But party-line roll-call votes alone, even if they create numerical minority justices, would not be a huge cause for concerns about democratic legitimacy if not for a core reason for the shift toward such party divisions. That reason is the second (and key) feature that distinguishes American politics broadly and Supreme Court nomination politics more specifically today: for the first time in American history, party and ideology are perfectly sorted on the Supreme Court. Democratic presidents reliably pick liberal justices, and Republican presidents reliably pick conservative justices.39 This “partisan sort” on the Court goes hand-in-hand with the shift toward more reliable judges, as I discussed above; gone on the days when a Republican president might appoint a range of justices, including some moderates or liberals (like Chief Justice Warren and Justice Souter), and when a Democratic president might appoint a range of moderates or conservatives (like Justices Frankfurter and White).

One way to think about the emergence of the partisan sort is a puzzle. But the best way to frame this puzzle is not so much why did the partisan sort emerge, but rather why did it take so long to do so? After all, Supreme Court justices have always been powerful actors, and stark conflicts between the Court and the elected branches emerged within mere years after the founding. Yet, as discussed earlier, it was not until relatively recently that parties and presidents take seriously the importance of placing reliable ideologues on the Court, thereby creating the Court. For instance, in Making the Supreme Court, Cameron and I show that party platforms did not regularly emphasize Supreme Court appointments until the 1960s.40 We argue there are several reasons for this shift in emphasis.41 First, as the federal government grew in size, the Supreme Court (with its ability to check Congress and the executive branch via judicial review) saw an increase in its power, which politicians recognized. Second, and relatedly, with the growth of the administrative state, interest groups and activists became more interested in judicial politics and increasingly pushed the parties to emphasize judicial appointments.42 Finally, as the visibility of Supreme Court nominations grew over time, presidents (and) senators increasingly saw the value of making appointments acceptable to their partisan bases.

As it turns out, all these forces crystalized at the exact moment in history when the two Republican presidents this century rode their electoral college luck into a plethora of appointments, creating the 6–3 conservative supermajority. But the sheer partisan breakdown does not tell the story. If President Trump had appointed a justice in the mold of a Stevens or Souter (or even a Kennedy or O’Connor), then Roe would almost certainly be on the books, and the Court would have not reached the conservative outcome in many of the landmark cases noted in the introduction to this essay. In this scenario, angst about the Court's legitimacy would be much more dialed down than it is now. But he did not, and here we are.

If the account of how the partisan sort came to exist is correct, there is no reason to think those same forces will not persist for at least the medium term, unless something significant changes in the overall structures of today's polarized politics (which is always possible). The current justices, of course, cannot help but be aware of the partisan sort; thus, it is likely that justices will increasingly engage in strategic retirements to ensure their seats remain within the partisan family. This, combined with the fact that justices now serve for so long, means that, barring a string of unlikely events, the conservative bloc is likely to remain in control of the Court for at least several decades.43 As McMahon correctly notes, “Age and longevity on the Court have reshaped its place in American democracy; in short, they have widened the Court's democracy gap. With the justices serving far longer than ever before, opportunities to alter the Court’s makeup through presidential elections—by voting for specific candidates to secure desirable Court appointments—are blocked, and those who want to reform the Court are diverted down long detours, waiting for justices to die or retire”.44

Democratic versus Institutional Legitimacy

Finally, it is useful to ask how the Court's apparent lack of democratic legitimacy might affect its institutional/judicial legitimacy—that is, its ability to see its decisions respected, enforced, and complied with by other political actors and the public, even if they disagree with some of those decisions.45 Early in his book, McMahon sensibly brackets his focus on democratic legitimacy from judicial legitimacy.46 For the most part, that divide holds, but, at certain points, McMahon (quite naturally) asks about the potential connection between the two:

For this reason, the democratic legitimacy of the Roberts Court is at best uncertain. The Court treads on this judicial ice. If it continues to pursue an aggressively conservative course, overturning decades-old decisions a majority of Americans still support, it may very well become the most counter-majoritarian Court in the history of American democracy. It has already embarked on this path, most especially with the Dobbs decision upending Roe. The only question is how far it will got? How far will it “stray … from the mainstreams of American life,” and how often will it overestimate its power resources?47

The question of whether the Court will overestimate its “power resources”48 is one that inherently asks whether the Court will act in a way that threatens its judicial legitimacy. Yet, although it is natural to assume that a court lacking in democracy legitimacy might see its judicial legitimacy threatened, perhaps paradoxically, the very same forces that created the current Court mean that, in practice, it is unlikely to face any significant blowback from the elected branches, which historically has been the key predictor of when the Court will back down when it finds itself out of step with either Congress and/or the president.49

Even as the Court find itself under threat and criticism from the Democratic Party, and even as public support for it has declined precipitously in recent years, particularly among Democratic partisans, Republican elites have remained steadfast in their support the Court. Given the nature of the policy process in the Madisonian system, as long as Congress remains fairly evenly divided, Republicans then are likely to be able to block any attempts to rein in the Court. (In 2021 and 2022, Democrats controlled both the White House and both chambers of Congress—albeit very narrowly—and had a theoretical opportunity to pass legislation to curb the Court, such as jurisdiction stripping or even court packing. But that would have required ending the filibuster, something most Democratic senators showed little appetite for. In addition, early in his presidency President Biden signaled little interest in significantly reforming the Court; he created a bipartisan commission to study the issue, but it seems clear his interest was in using the commission as a way to punt on the issue). Finally, despite deep disapproval with many of the Court's recent conservative decisions, most notably Dobbs, there has been little indication among Democratic politicians or the public at large that they have any intention of not complying with the Court, suggesting that its judicial legitimacy remains strong as an empirical matter.50

### AT Noerr – 1NC

No spillover. Their ev says judges misinterpret First Amendment now and Noerr immunity is overgrown. No reason plan overrides that.

### Democracy Defense---Rule of Law Defense---1NC

#### Rule of law is thumped, U.S. isn’t key, AND domestic ROL is strong.

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Creeping Authoritarianism Slows

For the sixth year in a row, a majority of countries experienced declining rule of law, driven by two sets of issues—authoritarian trends (measured by the Index factors on Constraints on Government Powers and Fundamental Rights) and struggling justice systems (measured by the Index factors on Civil and Criminal Justice). More than six billion people—76% of the world’s population–live in countries where the rule of law weakened in the past year.

Despite the persistent global downturn, the data suggest a slowing trend toward authoritarianism. Both the percentage of countries with deteriorating rule of law (59%) and the average size of the declines lessened for the second year in a row, and a diverse set of countries logged multi-year progress as they emerge from conflict, difficult transitions, and the governance challenges posed by the pandemic.

The countries with the biggest improvements in rule of law in the past year were Bulgaria (1.7%), Honduras (1.6%), Kenya (1.6%), Slovenia (1.6%) and Jordan (1.4%), with Honduras landing in the top five improvers for the second year in a row. Notwithstanding countervailing pressures from Russia, Uzbekistan, Kazakhstan, and Moldova all have made significant multi-year rule of law gains. Zimbabwe, although near the bottom of our rankings, has made notable progress since the transition from the thirty-year dictatorship of Robert Mugabe. And despite a succession crisis that ended last year, Malaysia is now resuming rule of law progress.

It is way too soon to declare an end to the global rule of law recession, and the recovery will be long and uneven. The deep erosion of fundamental rights and checks on executive authority that has occurred in recent years persists. Seventy-seven percent of countries have registered a decline in fundamental rights in the Index since 2016.

Nonetheless, the rule of law gains seen this year, even in very difficult contexts, suggest progress can be made.

Justice Systems Failing

Even as slowing authoritarian trends provide rays of hope, the WJP Index data point to mounting challenges facing justice systems across the globe, with more countries struggling to provide people with timely, affordable, and accessible justice. The Index factor with the most widespread declines in 2023 was the factor measuring Civil Justice, which fell in 66% of countries (up from 61% in 2022), while the Index measure for Criminal Justice fell in 56% of countries. Each of the sub-factors that comprise the Index measure for Civil Justice declined in a majority of countries.

Persistent delays in both civil and criminal justice systems can no longer be chalked up to the pandemic and suggest more sustained and systemic challenges facing justice systems. Previous WJP research shows that although civil justice problems are widely prevalent in countries across the globe, justice systems are failing to meet people’s everyday legal needs. In seven out of ten countries, 62% of people who need access to a dispute resolution mechanism did not find it, while in half the countries studied, at least 35% of people with legal problems cannot find adequate information to solve them, and at least 50% do not have access to appropriate assistance and representation.

The data make a compelling case for growing calls for transformation of justice systems toward people-centered justice, reorienting justice institutions to put outcomes and problem-solving for the people they serve at the center of justice policymaking. This is an approach championed by the Dutch-led growing multinational Justice Action Coalition and recently embraced by USAID in its new rule of law policy, the Summit for Democracy, and the U.S. Department of Justice’s reinvigorated Access to Justice Office, among others.

Even if reformists can beat back authoritarianism and restore checks and balances and human rights, sustained rule of law progress will require attention to struggling justice systems the world over.

U.S. Rule of Law Recovery Falters

In the 2022 Index, the United States emerged as one of the top five improvers globally, following four consecutive years of eroding Index scores. Unfortunately, that recovery appears to be stalled, as the U.S. Index score dropped slightly again this year.

With an overall ranking of 26 out of 142, the United States score fell in six of the eight Index factors this year. Tracking the global trend, it saw the sharpest deterioration in the performance of its civil and criminal justice systems. The U.S. score on Constraints on Government Power improved slightly, but this was driven entirely by positive trends in the Index measure of checks imposed by independent audit agencies, such as Inspectors General and the Government Accountability Office. The United States saw declines in all other Index measures for checks and balances, including checks by the legislature, judiciary, civil society and media, elections, and the extent to which government officials are held accountable for misconduct. The United States remains 15% below its 2016 score on these basic elements of the rule of law. At the same time, it registered notably low global rankings on the Index measures of key dimensions of its justice system, ranking 115th out of 142 countries in the Index measure for affordability and accessibility of the civil justice system. Global WJP data suggest that barriers to accessing justice are particularly acute for poor and traditionally marginalized populations. The United States ranks 106th on the Index metric for discrimination generally, and 109th and 124th on the metrics for discrimination in the criminal and civil justice systems, respectively.

### Polycrisis Defense---1NC

#### Systemic buffers contain the ‘polycrisis.’

Noah Smith 22, former Bloomberg Opinion columnist, was an assistant professor of finance at Stony Brook University, “Against "polycrisis",” Noahpinion, 11/13/22, https://www.noahpinion.blog/p/against-polycrisis

One term I see used increasingly often in the econ opinion-sphere is “polycrisis”. This term was invented by some French folks in decades past, but it has recently been popularized by Adam Tooze. Tooze, a historian at Columbia and a popular blogger, is also the author of some of my favorite history books, including The Deluge (about WW1), Wages of Destruction (about WW2), and Crashed. The latter is the best history of the early 2010s Euro crisis that I’ve ever read (or am ever likely to read), and it does a great job of explaining how problems in various different countries exacerbated each other.

So perhaps it’s not surprising that Tooze sees the world of the 2020s as a system of even larger interrelated crises. In a recent blog post, he pulls a definition of “polycrisis” from a report by the Cascade Institute:

We define a global polycrisis as any combination of three or more interacting systemic risks with the potential to cause a cascading, runaway failure of Earth’s natural and social systems that irreversibly and catastrophically degrades humanity’s prospects…A global polycrisis, should it occur, will inherit the four core properties of systemic risks—extreme complexity, high nonlinearity, transboundary causality, and deep uncertainty—while also exhibiting causal synchronization among risks.

This basically seems like a way of saying that all the bad things you read about in the news — inflation, climate change, war, political turmoil in the U.S., economic turmoil in China — are all of a piece, with the individual crises reverberating back and forth and causing a general system failure. In an earlier post, Tooze attempted to draw a picture of this system of interrelated crises and risks:

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.

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:

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

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:

I want to venture out on a limb here and say that this is not a coincidence. A lot of the buffer mechanisms I described above are political in nature, and they share the basic description of “human beings coming together in a crisis to address their collective problems”. During good times, human beings tend to seem irresolute and divided as pursue our individual goals and fight over the pie. External shocks can bring the entire system crashing down, but they can also spur humans to get serious and start working together.

### Administrative State Defense---1NC

#### Admin state fails.

Michael Van Beek 22, Director of Research for the Mackinac Center for Public Policy, "Pandemic failures expose problems of the administrative state," The Hill, 07/23/2022, 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.

#### Trump will destroy it.

Brad Plumer & Lisa Friedman 24, Plumer is a Times reporter who covers technology and policy efforts to address global warming; Friedman is a Times reporter who writes about how governments are addressing climate change, "What Trump 2.0 Could Mean for the Environment," 7/16/24, https://www.nytimes.com/2024/07/16/climate/trump-epa-regulation.html

Jason Schwartz, the legal director of the Institute for Policy Integrity, said the Trump administration’s regulatory rollbacks often ignored congressional statutes or inflated the costs of regulations on industry. Mr. Trump’s allies have presumably learned from those missteps, experts said.

“The first Trump administration came in without having been prepared to take over the government,” said Jeffrey Holmstead, a former senior E.P.A. official in President George W. Bush’s administration who now works as an energy lawyer for Bracewell LLP. “I don’t think they’ll make the same mistakes again.”

The courts could also prove more sympathetic next time around. With three Supreme Court justices appointed by Mr. Trump, the court now has a conservative supermajority that has shown a deep skepticism toward environmental regulation. The court has sometimes blocked rules that were still being adjudicated in lower courts or before they were implemented.

In June, the Supreme Court overturned the so-called Chevron doctrine, which for 40 years said that courts should defer to government agencies when a law is unclear. That ruling could undercut the regulatory authority of many federal agencies. The Supreme Court also halted E.P.A. rules that limited smokestack pollution blowing across state borders, overturned expanded protections for millions of acres of wetlands and narrowed the agency’s ability to regulate emissions from power plants.

Thomas J. Pyle, president of the American Energy Alliance, which supports the fossil fuel industry, said the Supreme Court’s decision on Chevron could help a second Trump administration revoke California’s authority to set stricter tailpipe pollution standards than the federal government, which the state is using to phase out sales of gasoline-powered cars in favor of electric models.

A second Trump administration might also find the lower federal courts to be more receptive, after Mr. Trump installed more than 200 conservative judges in his first term. Some of those appointees recently ordered the Biden administration to lift its pause on approvals for natural-gas export terminals and struck down a regulation that would have required states to measure greenhouse gases from transportation.

“It’s a much more favorable judiciary for a new Trump administration and his allies,” said Jody Freeman, director of the Harvard Law School Environmental and Energy Law Program. “They’d meet with not just less resistance in the courts, on average, but a certain appetite for doing the things they’d want to do.”