# 1nc – fullertown qtrs

## off-case

### cp – unconscionability

#### The US federal judiciary should define private sector practices that prevent litigants from effectively vindicating their statutory causes of action in antitrust suits as unconscionable market behavior.

#### The counterplan denies enforcement of procedural barriers to antitrust by claiming that agreements mandating arbitration are unconscionable contracts.

Thomas J. Stipanowich, Professor of Law @ Pepperdine, ’11, “THE THIRD ARBITRATION TRILOGY: STOLT-NIELSEN, RENT-A-CENTER, CONCEPCION AND THE FUTURE OF AMERICAN ARBITRATION” THE AMERICAN REVIEW OF INTERNATIONAL ARBITRATION [Vol. 22 2011] http://arbitrateatlanta.org/wp-content/uploads/2012/04/Stipanowich-Third-Arbiration-Trilogy-Jan-24-2012.pdf

There is, however, a very different way of looking at Stolt-Nielsen, and that involves its potential implications for judicial treatment of so-called “waiver of class action” clauses featured in predispute arbitration agreements in many consumer and employment contracts.64 Among the “grounds . . . at law or in equity” recognized by the Court is the doctrine of unconscionability.65 The defense of unconscionability has been the centerpiece of widespread efforts to avoid arbitration in recent years, usually in the context of standardized agreements for employment or consumer goods or services that exhibit certain characteristics of contracts of adhesion.66 Where a party is found to lack “a meaningful opportunity” to bargain, resulting in “unfairly one-sided” terms,67 a federal or state court may employ state principles of unconscionability to deny enforcement to all or part of an arbitration agreement, or reform the provision.68 Among the substantive grounds supporting unconscionability defenses, contractual waivers of the right to participate in a class action are among the most common.69 They have also produced conflicting rulings by courts.70 Again, much – including both the unconscionability determination and the relief granted – hinges on the applicable state law.71 It is fair to say that class-action waivers have become the single most contentious issue surrounding consumer and employment arbitration agreements.72

The Court’s decision in Stolt-Nielsen, while not a direct assault on the breastworks of unconscionability and class-action waiver doctrine, nonetheless laid the siege lines. Though Justice Alito’s opinion stops short of “decid[ing] what contractual basis may support a finding that the parties agreed to authorize class-action arbitration,”73 it was perceived by some as a clear signal of the Court’s lack of receptiveness to concerns about the impact of arbitration provisions on plaintiffs’ ability to bring class actions – especially since the question may be decided not on the basis of state law and policy, but on that penumbra of federal substantive law that the Court has found emanating from the FAA. While, as noted above, the Court has repeatedly taken the position that federal law is so supportive of agreements to arbitrate all kinds of civil disputes that it displaces state law that stands in the way of maximal enforcement,74 StoltNielsen appears to go further. Alito’s opinion presages a “second tier” of substantive arbitrability law under the FAA – a body of law that not only affirmatively enforces agreements to arbitrate, but sets federal boundaries regarding the nature and scope of consent to arbitrate. The Alito decision was taken by some as a hint that the Court is prepared to remove the state law- and policy-based underpinnings for decisions directing parties to “class action arbitration” in the absence of specific contract language providing for such procedures (language which is highly unlikely to appear in any agreement75). Some even thought the Court majority might be laying the groundwork to preempt state precedents deeming contractual provisions purporting to waive class-based relief in arbitration unconscionable.76

#### Treating market exploitation as unconscionable alone and instead of an antitrust violation solves the aff, avoids circumvention, and spills over to create norms to inequality.

HiLA KEREN, Professor of Law, Southwestern Law School, ’15, “LAW AND ECONOMIC EXPLOITATION IN AN ANTI-CLASSIFICATION AGE” [Vol. 42:313, 2015]

In the same vein, treating the exploitation of vulnerability as unconscionable market behavior can fit the profile of a dignity claim. Like the right to control our intimate life, we all should have a right to not be exploited by others when we are vulnerable. Exploitation of vulnerability in the market not only causes devastating economic damage, it also harms dignity. It shames the vulnerable party, leaving him helpless and looking pathetic and unable to take care of his own matters. Therefore, the accumulative consequences of exploitation pose a direct threat to human dignity and courts should be allowed and even encouraged to intervene. 222 Of course, dignity and equality are intertwined, and group-based protection is not really extinct.223 As Yoshino reminds us, "[i]n finding all thirteen sodomy statutes unconstitutional, Lawrence clearly helped gay people more than it helped straight people. '224 This point is pertinent in our context as well, because establishing a norm against exploitation of vulnerability in the market would clearly assist weaker market players of disenfranchised groups more than their stronger counterparts. In that sense, predatory loan agreements cannot-and should not-be divorced from their socio-economic context. Indeed, as Siegel points out, working in the space between colorblindness and classification "entails practical, contextual judgments attentive to the concerns of differently situated members of the polity.' 22

The vulnerability theory calls upon the state to be more responsive, and therefore serves as additional theoretical support for utilizing unconscionability where reverse redlining has failed. Accordingly, as a measure of help to vulnerable subjects, this theory underscores the state's deep commitment to a proactive countering of inequalities instead of a minimalistic engagement in keeping formal equality intact. Such an expectation reflects a giant step beyond what is allowed under the private/public dichotomy, where private loans are marginally scrutinized by the public legal system. Further, it echoes a belief, shared by many (albeit not all), that contract law-despite its "private" image has a meaningful public role to play in the social arena and "is a mode of social regulation whose rules ought to serve social goals. 226

Furthermore, the use of an extensive contractual doctrine, like unconscionability, is strategically advantageous in the context of economic exploitation. Using specific legislation to forbid particular kinds of abuse, such as the ban on notorious pay-day loans, does not defend against greedy market players who will simply identify loopholes and find ways to continue to profit from exploiting others' vulnerability, such as lending via the internet to avoid state regulations. 227 At least one state has explained the special value of the unconscionability doctrine as a "blanket rule," stating, "[t]he legislative process is too slow to keep up with market practices, so the courts must have power to monitor the market for the protection of all participants. '228 Although the law cannot totally stop people from trying to make more profits by taking advantage of others, it can make it harder for them to succeed and discourage them from further attempts. This goal can be achieved by utilizing the concept of unconscionability to send a clear and general message, that any form of exploitation is forbidden regardless of the concrete method used. At least one court that had dismissed a reverse redlining argument but allowed an unconscionability argument to proceed referred to this "residual" or "catch-all" attribute of the doctrine, explaining that "[i]t also seems to the court that the purpose of the unconscionability doctrine, in providing protection to vulnerable, unsophisticated parties, is to plug the gaps left open by applicable statutory provisions when they do not afford consumers adequate protections. '229 This is the known advantage of broad standards like good faith and unconscionability over specific rules: it is much harder to escape their coverage.230 A clear and general message against exploitation will support and strengthen social and moral norms that disapprove of such behavior, which can encourage stronger market players to exercise more self-restraint.

#### Inequality is ethically intolerable and poses a linear existential risk that turns every impact.

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Widening disparities in health within and between nations reflect a trajectory of ‘progress’ that has ‘run its course’ and needs to be significantly modified if progress is to be sustainable. Values and a value system that have enabled progress are now being distorted to the point where they undermine the future of global health by generating multiple crises that perpetuate injustice. Reliance on philanthropy for rectification, while necessary in the short and medium terms, is insufficient to address the challenge of economic and other systems spinning out of control. Innovative approaches are required and it is suggested that these could best emerge from in-depth multidisciplinary research supported by endeavours to promote a ‘global mind-set.’

The human development approach begins from a premise that has deep roots in liberal political theory – namely, the idea that justice is properly about the basic social structure[s] … (political, legal, social and economic institutions of a community that have a profound impact on the health status of community members) and whether these structures guarantee community members the ‘fair value’ of their most basic human capacities.1

Descriptions abound of the extent to which we live in an unjust world and of how disparities in wealth and health within and between nations have been widening inexorably over many years.2 The state of the world in the early years of the twenty first century is characterized by multiple, deep and interlinking crises in health, education, energy, water, food security, the economy and the environment that constitute an ‘organic global crisis,’ with already evident and further predictable adverse implications for the lives and well being of all globally.3 It is arguable that these crises and escalating injustice are to a considerable extent the outcome of the way in which the global political economy has been re-structured over the past 40 years,4 and that this is causally related to a value system that has failed to lead to the benefits of economic growth and scientific and medical advances (including those in public health) being applied to processes that could reduce inequities in health and human well being.5

A recent review of four prominent theories of justice (consequentialist, relational, human rights and social contract approaches) reveals general agreement on the ethical requirement for international assistance to relieve poverty and improve the health of the most deprived. An example is the widespread agreement to pursue the Millennium Development Goals (MDGs).6

However, many such approaches are arguably minimalist in the sense that they have a dominant emphasis on philanthropy, although some attention is directed to the need to rectify previous economic and other harms. It should be noted that for every $1 of Official Development Assistance (much of which is used to pay donor country staff who assist in delivering aid),7 developing countries pay about $6 in debt repayment – mostly interest on debt.8 The beneficial effects of well directed philanthropy are acknowledged, but the limited success of philanthropy in narrowing disparities, illustrated by inability to raise the resources for the MDGs, provides insights into the need for a bolder vision for poverty reduction. Briefly, achievement of the MDGs (and these are modest in terms of needs beyond the severely poor) requires about $3/4 trillion over 15 years. The sad fact is that this sum has not been raised (and that donor fatigue is increasing) while about $17 trillion (22 x as much) was mobilized in three months for the bailouts of financial institutions during the early stages of the 2008 global economic crisis. This asymmetry between the privatization of profits and the socialization of losses reflects the extent to which the lives of a minority are valued and protected while the lives of the majority are devalued and undermined. 9

Furthermore, while discussions on health and justice are conducted under the rubric ‘global health,’ they are located within what would more accurately be called an ‘international health’ approach. International health, with its focus on the provision of biomedical health care assistance, in one form or another across regional or national boundaries, has long been an item on the agendas of many wealthy countries and academic institutions. Global Health is a newer term and properly used, goes beyond international health to include acknowledgment of health in more than merely a biomedical sense, and the critical interdependence of the health of all in a world characterized, inter-alia by excessive (often wasteful) consumption of limited resources, population growth, demographic changes, porous borders and environmental and biological dangers that threaten all lives globally.10 Seeing the health of all as interconnected and intimately linked to social and economic forces, and to the values that underlie these requires a new perspective on ways of viewing ourselves and the world.

In this commentary I provide a personal view of some distortions of our values that may in part explain our predicament of persistent global injustice 11 and suggest that ignoring these prevents us from acting with the vision and wisdom to use available intellectual and financial resources to reduce injustice, improve health and ensure better lives for billions of people**.**12 I conclude by considering some attitudes and approaches that could facilitate reduction in injustice. Throughout this commentary I ask readers to keep in mind the implications of ongoing widespread poverty, depletion of limited and unrenewable natural resources, population growth, global warming and the threat of new infectious diseases as major threats to global health in the 21st century.

Distortions of Our Values

Widely and strongly held values over many centuries include respecting the lives, rights and freedoms of all within democratic systems characterized by a significant degree of social solidarity and driven by both ongoing scientific advances and well structured economies. The extent to which many of these values have become distorted, with potentially adverse effects on modern life, has long been perceived by prescient scholars,13 and it has been argued that these inter-linked distortions are underpinned by a desire and strategy for power and control through hegemonic ideas.14

Hyper-individualism

The analysis, offered here, of a variably distorted value system, centres on an ongoing process of shifting from hard-won and highly prized individualism that has enabled magnificent economic, scientific and technological advances for the benefit of individuals and many societies, to a form of hyper-individualism characterized by demands for immediate gratification and endless economic expectations by the most privileged, whose short-term horizons and lavish consumptive patterns endanger the future for us all**.** Charles Taylor has described this ‘dark side of individualism,’ as excessively focused on individuals in a way that:

… flattens and narrows our lives, makes them poorer in meaning and less concerned with others and society. [He contends moreover, that] social relationships are depersonalised by the rise of ‘instrumental reasoning’ that values specialised knowledge, the extension of technical rationality to favour calculation, systematization, formal procedures, cost-benefit evaluations, maximizing efficiency and control over nature.15

Extreme individualism and three other characteristics underpinning the economic system, (viz. unlimited desires, short-term self-interest and a form of ‘rationality’ that emphasizes calculable and measurable issues), were identified many decades previously by John Kenneth Galbraith, who predicted that these would pose long-term threats to all.16

Within healthcare systems, hyper-individualism is revealed by expectations that everything that can possibly be done for any individual comes to be incorporated into a sense of entitlement regarding what should be provided – often at little or no cost to the recipient. As a result, health care is driven by the desire to postpone death at all costs, with little appreciation of the limits of life and of medicine.17 This applies particularly when futile health care is continued with public resources in healthcare systems that aspire to be egalitarian. Patients kept alive for extended periods in ICUs, when they have multiple organ failure and large, untreatable, suppurating pressure sores exemplify this.18 As a consequence, a high proportion of health budgets in many ‘developed countries’ is spent on prolonged end-of-life treatments that have only marginal benefits. Largely ignored in the pursuit of such ‘rescue medicine’ are the lost opportunities to prioritize many effective treatments that, if promptly applied, would result in greatly improved lives for many who are relegated to long waiting lists by current health funding priorities. Under such ideological pressures, all healthcare systems are to some extent, and in varying combinations, distorted (not structured to meet local health needs), dysfunctional (driven by vested interests with money/profits as the bottom line, within increasingly corporatized frameworks) and unsustainable (costs rising more rapidly than can be afforded even in wealthy nations).

Narrow conceptions and distorted application of human rights

Human Rights, now a widespread moral language used to promote respect for life and individuals, has been remarkably successful in many complex situations. However, instead of a comprehensive approach as outlined in the Universal Declaration of Human Rights (UDHR), the focus has largely been on civil and political rights. Protection of the privacy and confidentiality of those with HIV/AIDS is a good example of successful use of this approach. However, it is notable that there has also been considerable inconsistency and selectivity in the application and pursuit of human rights. For example security threats in the USA have led to abuses of civil and political rights that Americans have long-championed and chastened others for abusing,19 with ‘significant implications for the moral authority of civil societies in more authoritarian regimes’.20

In the context of identifying and punishing individual perpetrators of human rights abuses, a narrow conception of rights and perpetrators of abuses has also neglected powerful ‘systems-based’ forces that could promote either achievement of rights or abuses of these. The role of many structural forces (including the granting of rights to corporations as ‘persons’) imposed on the global economy by wealthy nations (and their collusion with despots) that undermine the basic rights to life for billions of people is one example.21 Other distressing examples of systemic misuse of the idea of Human Rights include the many failings of the United Nations Council on Human Rights (UNCHR), as recorded by UN Watch,22 and through the Canadian experience within the UNCHR.23

Regrettably a narrow focus on human rights tends to neglect social, cultural and economic rights as integral components of the UDHR that has been widely praised and advocated as a set of ‘indivisible’ and ‘inalienable’ rights. It is gratifying that the rationale for promoting and ensuring a more comprehensive application of rights is being advanced.24

Erosion of social solidarity and of stewardship for the future

Further distortions of our value system arise from erosion of the sense of community and social cohesion required to meet aspirations for fairness and solidarity in society, thus reducing the ability to adequately protect valued public goods (highways, urban infrastructure, legal systems etc) and to reproduce caring social institutions (such as basic educational facilities, colleges, universities, and health care), universal access to which are essential for community well being.25 Indeed private (consumer) goods are increasingly viewed as having priority over essential public goods**.** A restricted concept of ‘freedom’ as ‘freedom to act’ (liberty) that focuses on narrow and short-term self-interest does injustice to the concept of freedom that should also include ‘freedom from want’, that requires a sense of obligation, duty and commitment to others.26

Dedication to economic dogma

Another major distortion stems from dedication to a poorly regulated market system that is now increasingly widely acknowledged as based on flawed economic theory and the notion of endless economic growth within practices that are riddled with corruption and fraud, propagated by obtuse bureaucratic processes, all of which increasingly pervade all facets of life.27 Galbraith has eloquently described how the modern economic system is characterized by fraud, perpetrated not necessarily by bad people, but rather under the influence of corporations28 that seem to have all the defining characteristics of psychopaths,29 and which others more recently have recognized as unsustainable.30

The still unfolding recent global economic crisis (with associated major increases in food prices) is seriously harming the lives and health of about 50% of the world's population who live on less than $3–4 per day. The middle classes in the USA, UK, Europe and elsewhere are also affected, and even in the USA millions of families are losing their homes.31 Between 1980 and 2006, the wealthiest 1% of Americans tripled their after-tax percentage of national income, while the share of the bottom 90% dropped by 20%. Between 2002 and 2006, 75% of national economic growth went to the top 1% who own 70% of national wealth. The fact that four hundred US billionaires own more than 155 million Americans combined 32 and that disparities in wealth are wider in the USA than in all other wealthy countries (with associated higher indices of morbidity, mortality, imprisonment and other social pathologies),33 speaks volumes about the distortion of values in that society – the worst of which many seek to emulate. Once a much admired nation with the intellectual and economic potential to lead the world into a more equitable and sustainable 21st century, it is arguable that the USA's opportunity to improve global health is being squandered by short-sighted policies that undermine its own citizens, and many others globally.34 Among other highly adverse effects of a pervasive market ideology is the transformation of medical care into a product for consumption in a ‘free market’.35 With increasing commodification, much else that is valued in life is demeaned, by turning ‘goods’ that should not be sold into marketable commodities.36 Moreover, the world is rendered increasingly unstable and insecure when lives are reciprocally devalued by poverty of moral imagination that ignores the concept of social justice and the role of fairer distribution of resources.37

These criticisms also apply to the new South Africa, where adoption of the above-mentioned economic dogma generally and in relation to provision of health care services specifically, combined with pervasive corruption, has led to widening disparities in wealth (Gini co-efficient increased from 0.6 in 1995 to 0.66 in 2007 and to 0.679 in 2009),38 and health.39 This has contributed to escalating social unrest, and undermining of the hope for greater equity in this new constitutional democracy.40

Most nations now have larger debts than they can easily sustain.41 Corporate goals have come to dominate in life generally and in health care specifically.42 The now threatened middle classes are coming to appreciate the fact that their plight results from the same processes that, in the past, allowed them to flourish at the expense of those lower in the chain of exploitation. It is also arguable that within the professions, greed and personal aspirations increasingly eclipse professionalism.43

The idea of living a life in which there is place for at least some degree of modesty in expectations has seemingly been suppressed. Living beyond our means and accumulating debt seems to have become a norm. Few individuals or nations seem to realize that the solution to global health problems, the economic crisis and all the other social crises we face, lies in doing better with less rather than demanding more. Of course this is also the challenge for dealing with climate change and environmental degradation.44 Whether or not this crucial message can be absorbed and internalised by those who feel the world owes them long, luxurious and safe lives, while billions of others face daily risks and premature death, is an issue that has not been adequately addressed.45

Over-reliance on science for solutions

While it is undisputed that scientific advances have provided, and will continue to provide many solutions to the manifold problems we face,46 undue faith in ‘science’ as the solution to all problems, results in selective and idiosyncratic value being placed on knowledge, with distinct preference for old knowledge over new knowledge, and preference for both new and old knowledge over wisdom in the application of knowledge.47 For example, it should be asked why there is so much emphasis on ensuring that all who could benefit from anti-retroviral drugs (ARVs) have access to these, but insufficient attention is paid to providing food to starving people (much easier to do than supplying drugs).

Another example is how, in child health research, 97% of grants are designed to develop new technologies that could reduce child mortality by 22%. If more were spent on research on effective delivery of existing treatments, child mortality could be reduced by 66%.48 In health care, new research agendas and arrangements that include explicit priority setting and allocation of resources could address the distortions, dysfunctionality and unsustainability that characterize health services everywhere.\

The Report, ‘Beyond Technology: Strengthening Energy Policy through Social Science’, notes that despite having spent over $70 billion since 1977 on research programs in the USA to develop advanced, more efficient, cleaner and more cost-effective energy technologies, these have not been widely implemented.49 Reasons given for this lack of implementation include the complexity of a diverse political milieu with multiple layers of governance and weak public understanding of energy-related challenges and opportunities.

Seeking Solutions

A decade ago we described several values that need to be widely promoted to address the moral challenges posed by global health disparities: respect for all life and universal ethical principles; human rights, responsibilities and needs; equity; freedom; democracy; environmental ethics; and solidarity.50 It seems that distortions of these values may in part account for inadequate progress. In addition to the transformative approaches we suggested at that time, some additional suggestions are provided here.

Individual level

Faced with such daunting crises, I suggest that in order to overcome feelings of helplessness, the first task for each of us, as privileged people, is to become more introspective about our privilege and to re-examine our lives. Questions we need to ask ourselves include: Who am I? What does it mean to be a privileged person? What are my goals in life? What are my academic responsibilities in relation to global health? Should the pursuit of social justice be a priority for health care professionals? Am I a citizen of the world, and should global health be a significant focus for those with an interest in bioethics?

Social level

In responding to what needs to be done at the levels of institutions, states and internationally to seek and achieve significant constructive changes, an important task is to recognize that faith in a market ‘guided by an invisible hand’ as the means of improving the lives of all, has been severely undermined by decades of widening disparities between the wealthy and the poor, and by the implications of the most recent and ongoing severe global economic and other social crises world wide.51

On one account, systematic abuses of basic human rights, including those rights that are critical for achieving a basic, decent minimum good life, are contingent on the absence (or perversion) of an ethics of virtue both in individuals and in institutions.52 Allen Buchanan provides a conceptual framework for what he calls ‘social moral epistemology’ that considers individual virtues to be either strengthened or subverted by the extent to which institutional frameworks are based on factually correct and morally virtuous concepts.53 The pervasiveness of the moral corrosion of institutions and individuals, that allows the perpetuation of harmful or evil practices, poses daunting and complex global problems.54 Addressing these may require a ‘Grand Challenges’ approach, and new depths of understanding to assist in re-framing the ways in which we see ourselves, and the world that could foster thoughtful and constructive approaches towards more sustainable life trajectories.55

A new Grand Challenges agenda

By ‘Grand Challenges’ I mean a large scale, multi-disciplinary series of research projects to explicate in some detail the workings of a complex global system that is undergoing entropy.56 Identification of ‘nodal points’ and ‘receptors’ to target for generating and amplifying change could serve as a prelude to modelling possible ways of effecting constructive changes with the potential to improve global health through structural changes to our economic and values systems. The magnitude of this task is arguably no less than the task of producing an HIV vaccine, which also requires profound understanding of the ways in which the HIV damages the immune system, and how systems' defences can be mounted to oppose such damage. There are no simple answers to either of these challenges, hence the need for a visionary research programme. Similarly suggested solutions for energy sustainability include creating a national vision for future energy use through systematic interdisciplinary social science-based research and policy formulation.57

Among the many issues that need to be pursued through such an agenda would be promotion of understanding and acknowledgment of the values and processes that have shaped the world over the past century, and of the modes of reasoning that have played a central role in framing and driving these values and processes.58 A critical, open and well-publicized re-appraisal of the currently dominant value system and of the adverse effects of the global political economy on health will require interrogation and modification of overt and covert power structures.59 Exposure and critiques of how the wealthy are deeply causally implicated in causing and perpetuating poverty and inequality, and what this implies in terms of distributive and retributive justice,60 could lead to new ways of thinking about progress through nurturing progressive values.61

These would include enhancing literacy and empowerment among women, socialization of many of the ‘risks experiences’ suffered by the global majority,62 and modification of taxation with reduction of tax avoidance and evasion mechanisms.63 Reviewing and restructuring many current institutional arrangements64 could lead to rebuilding the social commons. Within health care, re-examination of the quest for health and how health care services are structured and could be improved, would be a major task.65

### cp – states

#### The 50 states and relevant territories should establish a law that stipulates:

#### (1) No person shall enter into an agreement with an employee concerning the employee’s statutory causes of action in antitrust suits.

#### (2) Empower citizens to bring action sans a relator-injury requirement to enforce (1) above.

#### (3) Prohibit any corporation from enforcing waivers of qui tam actions in (2) above.

#### The counterplan effectively vindicates private right of action without federal action.

Sarath Sanga, Professor of Law @ Northwestern, ’19, “A NEW STRATEGY FOR REGULATING ARBITRATION.” Northwestern Law Review. 113:1121 (2019)

2. The Policy Strategy

The strategy is to craft a law that does not interfere with the arbitral process—and therefore avoids preemption. Any law must allow arbitration of civil rights claims to proceed. For example, a simple law prohibiting mandatory arbitration of sexual harassment claims—such as the one recently passed by New York184—would, if challenged, surely be preempted by the FAA.

Further complicating the issue, even if states could prohibit arbitration of all civil rights claims, it is not obvious whether they should. Some employees may prefer to arbitrate their civil rights claims, and so compelling public litigation in such cases may only compound the harm. In principle, therefore, state policy should be designed to empower employees to choose their forum after the dispute has arisen, or, equivalently, to incentivize employers to grant employees this option.

States can achieve this by first prohibiting civil rights as a subject matter for contracts. After enacting this prohibition, the law could then carve out an exemption for post-dispute agreements so that parties may still settle existing claims. An example of such a law is as follows:

(1) No person shall enter into an agreement with any employee concerning the civil rights of the employee. All such agreements are illegal and void.

(2) Section 1 shall not apply to agreements concerning existing legal claims. Private enforcement could then proceed as in the noncompete example. For example, employees could be empowered to bring a qui tam action on behalf of the state to enforce the law. Even if a state does not intervene, these actions cannot be sent to arbitration.185 To implement this, states can simply copy existing state and federal statutes that enable qui tam actions.186 This law is not preempted by the FAA for several reasons. First, the law does not “derive [its] meaning from the fact that an agreement to arbitrate is at issue.”187 Rather, it derives its meaning from the fact that the subject matter of the agreement relates to the employee’s civil rights. Indeed, employers can violate this law with or without requiring employees to arbitrate civil rights disputes; further, employers may still require employees to arbitrate civil rights disputes even under this law.

To see this, consider the following examples. Suppose an employment contract prohibits the employee from disclosing any instance of sexual harassment. This contract violates the law regardless of whether it includes an arbitration agreement, and so the employer would be subject to civil penalties. Next suppose an employment contract includes an agreement to arbitrate and the employee files suit against the employer alleging sexual harassment. Under the FAA, a court would be compelled to submit the claim to arbitration—leaving the arbitrator to decide whether the arbitration may procced. The proposed law does nothing to alter this result. Instead, it only subjects the employer to fines that the state itself may collect directly from the employer. Again, these fines are not a consequence of the arbitration agreement. They arise because the employer contracted over the employee’s civil rights.

The law also does not interfere with the “fundamental attributes” of arbitration or “disfavor[] contracts that (oh so coincidentally) have the defining features of arbitration agreements.”188 The law does not regulate any aspect of the arbitral process or enable a court to refuse to enforce an arbitration agreement under any circumstance.

Though this Article does not advocate it, it is worth considering an even simpler approach: prohibiting employment contracts altogether. There are many legal and economic arguments one might make against such a “brute force” law. Yet there is no argument that such a law would be preempted by the FAA since, as per the Supreme Court’s requirement,189 it expressly applies to “any” contract. It does not “single out” arbitration.190

Finally, it is worth observing that policies like the one suggested here— that is, prohibitions of certain classes of contracts—are commonplace. Two examples that come to mind are prohibitions on agreements to collude among competitors191 and prohibitions on bribery contracts between American companies and foreign governments.192

#### The counterplan creates a better deterrent than antitrust, solves state budgets, and sets a model for blue federalism - extinction.

Myriam Gilles, Research Chair and Professor of Law, Cardozo Law School and Gary Friedman, Attorney at Law, ’20, “The New Qui Tam: A Model for the Enforcement of Group Rights in a Hostile Era” Texas Law Review [Vol. 98:489 2020]

The federal executive and judicial posture towards rights enforcement has grown increasingly hostile. Certainly, the present Administration has openly repudiated its role in enforcing the federal statutory rights of consumers, voters, workers, and students. It has done so in myriad ways, directly and indirectly reversing course on the prior Administration’s robust enforcement policies. Meanwhile, an increasingly conservative federal judiciary has hamstrung the ability of private litigants to enforce laws through class and representative litigation.1 Federal judges today routinely enforce class-banning mandatory arbitration clauses2[\*\*Footnote 2\*\*See, e.g., Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1624–25, 1632 (2018) (upholding classbanning arbitration clause over the objection that the National Labor Relations Act § 7 guarantees workers the right to collective action); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 233– 34 (2013) (upholding class-banning arbitration clause over objection that, lacking ability to pool resources to mount antitrust challenge, plaintiffs could not vindicate their rights under the Sherman Act); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011) (finding the FAA preempts state laws that stand as an obstacle to the accomplishment of the FAA’s objectives, and enforcing class-banning arbitration clause) \*\*End Footnote 2\*\*] and impose hard-to-meet classcertification requirements, 3 among other limitations on collective litigation.

With Congress paralyzed by partisanship, the hostility of the Executive and Judicial Branches all but forecloses the possibility of rights vindication for entire swaths of the population. At the federal level then, the prospects for vigorous public or private enforcement of statutorily protected rights look awfully bleak. And statelevel enforcement has its own problems. In the consumer affairs area, for instance, state enforcers are struggling to resolve more complaints with fewer resources.4 We can reasonably expect that these developments do not go unnoticed by corporate actors, and that the deterrent force of laws designed to protect consumers, workers, and small businesses is fast losing steam. Recent scandals involving blatant and systemic violations of consumer protections, privacy protocols, and sexual-abuse reporting practices only reinforce this concern.5

As traditional enforcement methods recede—as federal enforcers signal disinterest in the rights of vulnerable communities, and as the federal judiciary forecloses private avenues for enforcing those rights—we are left with an enforcement gap. So we must ask, what are the alternative methods for enforcement? How might they work? Are they politically and fiscally sustainable? And can new or restructured methods of rights enforcement generate the deterrent and information-forcing effects of traditional agency enforcement actions and private class/collective litigation?

This Article closely examines one promising avenue for filling the enforcement gap: state legislation authorizing private citizens to bring actions on behalf of the state in the interests of consumers, workers, and other vulnerable communities.6 The mechanism for authorizing private enforcement is familiar: qui tam is an ancient device for citizen-assisted law enforcement that encourages “whistleblowers” to come forward with information of wrongdoing and authorizes them to sue on behalf of the state.7 Qui tam allows the state to conserve resources by tapping the powerful force of the citizenry as a direct agent in enforcing its laws through the courts. By offering a bounty for successful prosecution of a claim, qui tam actions promise more and better rights enforcement, providing greater deterrence against wrongdoing and adding to the state’s coffers in the form of statutory penalties.

On this model, state policy makers actively monitor litigation brought on behalf of the government to ensure its deputies are acting in the best interests of the state and its citizens. Accordingly, special procedures apply to qui tam suits to ensure the state retains the requisite control over actions brought in its name.9 The classic model is the federal False Claims Act (FCA), which authorizes whistleblowers—i.e., those with special knowledge of a public fraud, known as “relators”—to bring lawsuits in the name of the government seeking damages.10 When a relator initiates such an action, she must deliver a copy of the complaint and any supporting evidence to the government, which then has sixty days to investigate the allegations and decide whether to intervene in the action.11 If it does so, the government assumes primary responsibility for prosecuting the lawsuit or moves to dismiss, effectively putting the kibosh on the action.12 If the government declines to intervene, the relator has the exclusive right to prosecute the action13—but the government retains a significant role in the way the action is conducted.14 In either event, if the claim is successful, the relator shares in any financial recovery.15

In addition to the federal FCA, qui tam enforcement provisions appear in the “mini-FCAs” of twenty-nine states and the District of Columbia.16 Some state FCAs apply only to fraudulent claims made on Medicaid or other healthcare funds, while others apply to a broader range of state programs.17 And some states have experimented with qui tam in areas beyond false claims. For example, Illinois and California “allow private parties to bring suit in the name of the state in order to punish fraud against private insurers” 18 and the District of Columbia provides qui tam enforcement of specified tradepractices acts.19 At least four states are currently considering qui tam enforcement of tax code violations.20 And perhaps most prominently, California in 2004 enacted a “Private Attorneys General Act” (PAGA) to aid in the enforcement of state workplace-protection laws.21 In each of these contexts, legislatures have determined, as a matter of public policy, that private citizens are best situated to uncover wrongdoing.22 State enforcers report that these “million eyes on the ground” have been especially potent in deterring unlawful activity.23

Applying this basic model to a broader array of state statutory protections would authorize private citizens with knowledge of wrongdoing to bring public enforcement actions against those who violate designated provisions of state law. In advancing qui tam claims under state labor, consumer, or other statutes, the relator would assume the state’s parens patriae interest in litigating the case, pursuing statutory penalties on behalf of all the state’s residents injured by the illegality. The state attorney general or other relevant public official would retain broad authority to take control over the action, direct major litigation decisions, and approve proposed settlements. And, of course, in exchange for her efforts, the relator would be entitled to a designated portion of the civil penalties recovered, and her lawyer would be entitled to make an application for attorneys’ fees.

The “new qui tam”—a term we use to distinguish this emerging model from other statutory variants—aims to fill the enforcement gap created by current federal policies. For one, using private actors as frontline enforcers of state law violations shifts the costs of investigation and litigation onto those parties. California enacted PAGA in the employment realm precisely because severe understaffing of its public enforcement agencies allowed employers to “violate the law with impunity.” 24 Faced with shortfalls in enforcement and with no funds to hire additional staff, the state legislature decided to deputize the state’s workers, authorizing them to help enforce Labor Code violations. According to at least some attorneys who practice in the area, PAGA has markedly improved employer compliance with statutory and regulatory mandates over the past decade.25

The form these new qui tam laws might take remains contested, however, and the goal of this Article is to consider the risks and rewards of various legislative approaches. Part I begins with a high-level, aerial survey of the gap—the federal abandonment of rights-enforcement policies, the judicial restrictions on private collective action, and the challenges facing state enforcers. We also describe efforts taking shape across the country to fill the enforcement gap as progressive advocates and policy makers shift their focus to state legislatures, governors, and attorneys general as partners in countering harmful federal policies. In this way, the new qui tam resembles other “blue federalism” protections of immigrants, environmental standards, access to affordable health care, and LGBTQ rights—reflecting the newfound centrality of state legislatures in the Trump era.

#### State budgets key to prevent black swan environmental risks – extinction.

Levi Pulkkine, US News, ‘20, "States’ Climate Change Efforts Stall During Pandemic," US News & World Report, https://www.usnews.com/news/best-states/articles/2020-09-23/states-climate-change-efforts-stall-during-pandemic

Then came coronavirus. Now the future of efforts much lauded in environmental circles has been thrown into question as cash-strapped state governments look to cut spending. Pricey initiatives may prove a tough sell as legislators slash their way to balanced budgets this fall, even as weather-related disasters – Atlantic and Gulf Coast hurricanes, Midwest flooding, explosive forest fires across the West – hammer the country from coast to coast. "State budgets are busted," says Matt Rogers, a senior partner with McKinsey & Co. researching the pandemic's impacts on responses to climate change. But, Rogers and others are quick to point out, there is ample reason to believe the pandemic won't reverse the decarbonizing trend. It may not set it back at all. Much of the good news comes from the private sector. The fuel-saving shift to remote work has taken a bite out of the transportation sector's carbon emissions, which currently account for about 28% of the 6,677 million metric tons of carbon dioxide released in the United States annually. Rogers says the abundance of low-interest capital makes it "much easier and much cheaper" to install rooftop solar panels and clean up larger power systems. As he describes it, the pandemic also forced the closure of high-pollution, low-return industrial assets, including oil wells in west Texas and New Mexico that "created little economic wealth and created a lot of pollution." At the state level, states unable to pay for expensive improvements to public infrastructure or fund grants to property owners can still turn to policy shifts that don't require much investment, Rogers says. That appears to be the case in Washington state, led by Gov. Jay Inslee, who centered his bid for the Democratic presidential nomination on climate change. While Washington faces an $8.5 billion revenue shortfall, most of the state's recent attempts to cut its carbon footprint haven't been particularly expensive, says Reed Schuler, a senior policy adviser on climate change to Inslee. "There are many climate solutions that do not require large expenditures of state revenues," Schuler says. "The budget crisis will certainly tip the scales … in favor of solutions that do not have significant budget impacts." Schuler points to legislation in the state that would reduce the carbon load in gasoline sold there. The cost to state coffers would amount to $385,900 annually during the first seven years of the program, which is expected to reduce greenhouse gas emissions attributable to cars and trucks by about 10% during that time. Wildfires that have charred millions of acres in California, Washington and Oregon in recent weeks illustrate the need for climate action to continue despite the pandemic, Schuler says. "Residents along the West Coast are waking up with conditions that are apocalyptic," he says. "People are realizing that these outcomes are not natural, and that they're not predetermined." In Illinois, the disaster was the August derecho, a storm similar in power to a Category 4 hurricane that swept through the Midwest. Illinois Gov. J.B. Pritzker put forward a suite of utility reforms aimed at combating climate change (and corruption) days after the storm abated. Michigan's push toward clean energy, announced in late 2019 by Gov. Gretchen Whitmer, appears to be expanding as the state budget stabilizes. A spokesperson for the Office of Climate and Energy says funding hasn't been cut to the newly created office, but that the coming year's budget has not yet been finalized. Elsewhere, concerns over the economy are impacting state moves to address climate change that interrupt commerce or carry significant costs. In California, a bill that would've pushed oil and gas drilling back from communities stalled due to opposition from labor and industry representatives who cited economic concerns, says Annie Notthoff, a senior adviser with the National Resource Defense Council Action Fund. A bill that would fund energy efficiency improvements to state schools and expand the state's electric vehicle charging infrastructure passed the state assembly in August but has not yet been signed by Gov. Gavin Newsom. The late summer fires across the West, Notthoff says, made plain "the urgency for real climate action." California's experience, she says, demonstrates that carbon pollution can be cut while an economy grows. "Placing limits on carbon pollution … and moving away from fossil fuel production will help our country rebound from this economic recession and become healthier and cleaner while doing it," she says. Describing states as "on the frontline of the climate crisis," Notthoff notes that Oregon, Colorado, Nevada and New York have recently enacted legislation to address it. The federal government has been absent, or adversarial. California's efforts to set higher fuel efficiency standards for cars have been stymied by the Trump administration. Washington and other states have enacted laws that would adopt California's rules when litigation sparked by White House opposition is resolved. The lead lawsuit on the federal policy change is pending in the U.S. Court of Appeals for Washington, D.C. Schuler, the Washington state policy adviser, says Capitol Hill has also moved to block states from enacting rules more stringent than federal standards on greenhouse gas-producing products that cross state lines. The rationale is that a patchwork of regulations would hurt business, Schuler says, but the restrictions prevent states from going further than D.C. "The first instinct of some (in Congress) is to work to ensure that states cannot do more," he says. Some conservatives have cheered the Trump administration's actions targeting state climate initiatives as deregulatory wins. Adam Brandon, president of the FreedomWorks, a conservative advocacy organization, argued that the Constitution's 10th Amendment does not "empower individual states to set policy for the entire nation." "The California emissions regulations would impact Americans in other states who have no ability to vote those state legislators out of office," Brandon said in a statement released in September 2019, shortly after the Environmental Protection Agency moved to block California's fuel efficiency rules. "It is regulation without representation at its worst." Going forward, lessons learned during the pandemic may also inform how states respond to the changing climate. Rogers, the McKinsey researcher, notes that the pandemic and climate change are "physical shocks." They progress nonlinearly, in that the severity of their impact increases wildly when tipping points are reached. Neither, he says, can be considered "black swan" events that can't be anticipated; warnings about both have abounded for years. "In climate change as in pandemics, the costs of a crisis are bound to vastly exceed those of its prevention," he says. "Prevention is much cheaper than the cure."

### k – lpe

#### The 1AC’s construct of the firm as the locus of competitive innovation reproduces neoclassical economic orthodoxy. Antitrust is justified as an intervention to correct “market failures.” Market failure relies on the ideal of perfect competition.

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­ “[T]oo often discourse about ‘the market’ conveys the sense of something definite—a space or constitution of exchange...when in fact, sometimes unknown to the term’s user, it is being employed as a metaphor of economic process, or an idealisation or abstraction from that process.” – E.P. Thompson2 Introduction To those who study governance of the labor relationship, it is obvious that the relationship between business and labor must be governed, and that stability in this social relation is something valued by labor, business, and society writ large.3 Strangely, the idea that governance is necessary and price stability is good are both obscure interlopers to the study of competition law. To bridge the gap between these two areas of law--and incidentally give labor a greater role and stature in theorizing competition law--we aim to provide a general “market governance” framework for understanding how markets are governed in the context of the legal rules that allow and disallow certain forms of coordination. This framework draws from multiple heterodox traditions in political economy, but is particularly oriented toward building out the emerging framework of Neochartalist microeconomics.4

[Insert Footnote 4 – Turner]

Neochartalism, or Modern Monetary Theory (MMT), began as a macroeconomic framework for understanding how legal institutions produce and reproduce money and monetary value, particularly the acceptance of monetary objects in payments of taxes and court-ordered obligations. In developing over the last twenty-five years, Neochartalism has become an interdisciplinary perspective for understanding and reinterpreting a variety of social phenomena. Some scholarship, particularly the path-breaking work of the late economist Fred Lee (who we rely on in conceptualizing issues in this chapter) builds up a microeconomic framework that is uniquely consistent with--and reliant on--MMT insights. We hope others choose to follow Lee and ourselves in making contributions to Neochartalist Microeconomics and expanding the reach of Neochartalism in a variety of subfields that remain dominated by mainstream microeconomics.

While it is beyond the scope of the current chapter to identify all the ways in which our current perspective accords with unique insights of Neochartalism, our focus on potential financial and market instability, money prices and money income as a focus of analysis rather than relative prices and “real variables'' reflect our Neochartalist lens. Our focus on the legal construction of markets also adds to Neochartalism’s emphasis on the legal construction of a monetary production economy in general. Our focus on inherent and irreducible mediated social interdependence also accords with the scholarly perspective that Neochartalist humanities scholars bring to Neochartalism e.g. SCOTT FERGUSON, DECLARATIONS OF DEPENDENCE: MONEY, AESTHETICS, AND THE POLITICS OF CARE (2018).

[End footnote 4]

Arriving at a theory of market governance requires rejecting economic common sense. Far too much economics scholarship--both among orthodox scholars and their critics--treats “perfect competition” as the analytical (and often normative) baseline for all markets, including labor markets. Under perfect competition, prices (including wages) are arrived at entirely via the uncoordinated matching of bids and asks, assumed to result in settled equilibriums represented by intersecting supply and demand curves. If all markets are perfectly competitive (and certain other conditions obtain), then each input and output has its proper price which sends “signals” throughout the economy and results in a perfectly “efficient” allocation of resources. From this perspective, coordination, especially coordination over prices (again, including wages), appears as an unnatural intervention, a way for those acting collectively to collect “rents” above the “real” value of their contribution to society. If coordination is to be justified, it is usually to correct for some other deviation from perfect competition: workers might bargain collectively to capture some of a monopsonist's rents, for example. And, indeed, many of those trained in economics who advocate for collective bargaining or other worker-empowerment measures appeal to one or more “market failures”.5 In doing so, they reproduce the idea— intentionally or not—that if competition were finally left to do its work it would reveal the prices that reflect the allocation of goods and services that perfectly matches relative scarcity, that markets would work “better” if they were moved “closer” to (or to “resemble” or “approximate”) the “competitive” ideal.6 Collective bargaining is a distortion, but it is the best we can do in our distorted world.

But here's the rub: collective bargaining is not a distortion of a preexisting “labor market”. More generally, coordination between market participants (over price or other matters) is not in itself a distortion of any market. There is not and has never been a market without coordination, including over prices.

#### Neoclassical paradigm will destroy humanity and the biosphere.

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If the main starting point of this book is the severe environmental crisis we are facing and the natural planet-wide collapse toward which we are heading, today’s ecological reality is powerfully connected to other issues such as growing socioeconomic inequalities, the erosion of democratic institutions, the organized apathy of citizens, the loss of power of nation-states in favor of corporations, the progressive disappearance of the notion of common good, and the economic colonization of the social, cultural, and political life by economic objectives. The global ecological crisis reveals these interlinked disasters caused by the core components of capitalism that include: an excessive exploitation of nature, the rise of industrialism, the self-destructive over- confidence in human-technical power, the arrogant anthropocentric mind- set, and denial of ecological limits, as well as the narrow rationalism and materialism that develop within a reductionist predominant form of science.

Neoliberalism as a ‘global system’ threatens societies as a whole and more especially the core values of social communities and democracy, such as justice, ‘common decency,’ civic virtue, or citizenship. In neoliberal patterns, economic efficiency, market values, employability, consumer freedom, and instrumental rationality are favored over democratic participation, civic values, personal autonomy, active citizenship, intellectual development (‘enlightenment’1), and moral rationality (reasonability2). Institutions dedicated to the common good are systematically turned into competitive structures to satisfy the interests of markets and greedy elites. Pluralism is disappearing under the assault of a one-dimensional consumer pattern which treats humans and non-humans as commodities under the hegemony of private interests. Civil society, an essential element of the agonistic and critical democracy defended in this book, is losing out to ‘spectator democracy.’ Indeed, citizens are more and more passive and self-centered in part because existing political and democratic structures leave them with few opportunities to participate and make collective decisions. As a consequence, the link between democratic politics and citizens is being critically weakened. Neoliberal individuals end up being overtaken by lassitude and resignation, indifference, and loss of interest for the shared common world. What defines neoliberal society is, indeed, a widespread disaffection for democracy and social bonds entailed by the loss of political agency and self-determination. In such a system, propaganda is necessary to manufacture consent3 and to shape the fundamental values to ensure that individuals see themselves as consumers, workers, or owners of capital, rather than citizens, spiritual or relational individuals, friends, or members of social and ecological communities. In order to be fully operational, such a system must also rely on high doses of cynicism and the value of relativism cultivated by deconstructive postmodern views.

Neoliberal competitive market-state systems have colonized all aspects of life, but mainly, they have subjugated nature and used it as an ‘unlimited’ spring of profit and resources intended to feed the logic of growth. The globalized neoliberal framework behaves as if nature were only a neutral background for profit-seeking and economic development. In order to push back the ecological limits that are more and more visible, neoliberals argue that those limits can be transcended through decoupling and technological innovations (Chapter 5). Indeed, constructivist neoliberal governments act as if the biosphere were a mere component of the socioeconomic sphere. As an anti-ecological ideology, neoliberalism denies the existence of natural limits and promotes unlimited material wants vs. limited resources, a cult of endless consumption (consumerism), and techno-fixes (techno-optimism) as the solution to social and ecological problems. The appropriation and commodification of nature undertaken by this form of economic ideology and the freedom it enshrines—understood mainly as the legitimate exercise of extractive power—entail that the environment is viewed only as an instrumental source of raw material and sinks of fossil fuels rather than as an ethically valuable physical, biological, and chemical context of life. Inevitably, this type of economy has supported an insatiable extraction that is today overwhelming ecosystemic capacities. Neoclassical economics is certainly the instrumental form of rationality ‘that most actively opposes the ethical valuation of the environment’ (Smith, 2001: 26).

The neoliberal capitalist agenda, associated with an arrogant anthropocentrism and the technological optimism of many political leaders, experts, techno-scientists, academics, and citizens, has transformed nature and people into raw materials (‘natural’ and ‘human resources’). It has replaced democratic and republican institutions—defined by their concern for the common good—by structures aiming at facilitating the activities and profits of corporations and markets. It has deprived Western political structures of substantial democratic energy by turning citizens of wealthy liberal nations into demoralized and nihilist homo oeconomicus (‘neoliberal citizens’), that is, passive consumers as opposed to active citizens. More than that, neoliberalism, through mass media, entertainment, information, and educational systems, has incrementally converted all the spheres, activities, and dimen- sions of life into economic ones (‘economization’ or ‘marketization’ of life). Private and public institutions are used as ways to transmit the values of capitalism.4 As an unethical and unsustainable model of commercialization, ultraliberal capitalism supports crass commodification, intensifies ine-ualities and transforms everything in its way—from non-human nature to human beings—into replaceable, dispensable and disposable products. As a global threat, neoliberalism leads to ‘environmental stresses (water shortages, deforestation, soil erosion or climate change), food and energy insecurity, peak oil, rising poverty and inequalities within and between societies, increasing passivity of citizens within democracies and the inexorable rise of corporate power within and over the democratic state’ (Barry, 2008: 3).

The price we, humans, are socially, politically and ecologically paying and will continue to pay in the future for the triumph of the neoliberal ideology is disproportionate with anything humankind has experienced so far (see Fig. 1.2). However, human relatively recent history already shows that the popular passivity and political apathy (mentioned above) fostered by cynical and disempowering systems of ideas have the potential to favour the rise of dictatorial regimes in which a father figure or ‘strong man’ could take upon the conduct of public affairs. At a time when chauvinistic, racist, anti-elitist, and macho-ist parties are dangerously rising in all Western countries, this fear is taking a serious turn, which includes the risk of an authoritarian ecology.

#### We should use the framework of challenge-driven political economy instead of a competitiveness framework. Using the power of the state to make and shape markets is key to direct policy to solve inequality and climate change.

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Twenty-first-century policymaking is increasingly defined by the need to respond to major social, environmental, and economic challenges. Sometimes referred to as ‘grand challenges’, these include threats like climate change, demographic, health, and well-being concerns, as well as the difficulties of generating sustainable and inclusive growth. Against this background, policymakers are increasingly embracing the idea of using industrial and innovation policy to tackle these ‘grand challenges’. Examples of challenge-led policy frameworks include the United Nation’s Sustainable Development Goals (SDGs; Borras,­­ 2019), the European Union’s Horizon Europe research and development programme (Mazzucato, 2018a), and the UK’s 2017 Industrial Strategy White Paper (HM Government, 2018).

Challenge-driven policy frameworks are emerging in parallel to well-established modernization and competitiveness frameworks**.** While 1 2 modernization, and in particular competitiveness frameworks, rely on the idea that government should first and foremost fix market failures,3 a challenge-driven agenda does not have such clearly defined theoretical origins and analytical lenses. As Richard Nelson argued in 1977 in his seminal book The Moon and the Ghetto, getting man to the moon and back is not the same as solving the problem of ghettos in American cities. Put differently, the nature of our knowledge about socio-economic challenges differs from our perception of strictly technical challenges. We can discover answers to technical puzzles; socio-economic issues do not have a single correct discoverable solution. Such issues require continuous discussion, experimentation, and learning.

We believe challenge-led growth requires a new conceptual and analytical framework that has at its core the idea of confronting the direction of growth with growth that is, for example, more inclusive and sustainable. Such a framework should focus on market shaping and market co-creating (Mazzucato, 2016). This is a question of both theory and policy practice. In theory, challenge-driven innovation policy questions both established neoclassical and evolutionary concepts (Schot and Steinmueller, 2018). In policy practice, directed policies require rethinking what is meant by ‘vertical policies’.

Industrial policies have always been composed of both a horizontal and a vertical element. Horizontal policies have historically been focused on skills, infrastructure, and education, while vertical policies have focused on sectors like transport, health, energy, or technologies. These two traditional approaches roughly embody differing schools of economics: neoclassical economics-inspired horizontal policies focusing on supply-side factors and inputs; and evolutionary economics-inspired policies putting emphasis on demand-side factors and systemic interactions (Nelson and Winter, 1974; Hausmann and Rodrik, 2006 for a synthesis). Although certain sectors might be more suited to sectorspecific vertical strategies, the ‘grand challenges’ expressed in SDGs are cross-sectoral by nature and hence we cannot simply apply a vertical approach to them. Both neoclassical and evolutionary approaches to industrial policy have relied on the idea that the best policy outcome is economy-wide development, without specifying its nature. In policy this has led to managing economies according to GDP growth rates, competitiveness indices and rankings, or other macro indicators (e.g. exports, patents) (Drechsler, 2019). Yet, many SDGs are only indirectly related to the economy and hence many of the key issues around SDGs have not been theorized in the context of innovation and industrial policy (see, e.g., Zehavi and Brenzitz, 2017).

In this chapter we argue that through well-defined goals, or more specifically ‘missions’, that are focused on solving important societal challenges, policymakers have the opportunity to determine the direction of growth by making strategic investments, coordinating actions across many different sectors, and nurturing new industrial landscapes that the private sector can develop further (Mazzucato, 2017; Mazzucato and Penna, 2016). The result would be an increase in cross-sectoral learning and macroeconomic stability. This ‘mission-oriented’ approach to industrial policy is not about top-down planning by an overbearing state; it is about providing a direction for growth, increasing business expectations about future growth areas, and catalysing activity—self-discovery by firms (Hausmann and Rodrik, 2003)—that otherwise would not happen (Mazzucato and Perez, 2015). It is not about de-risking and levelling the playing field, nor about supporting more competitive sectors over less (Aghion et al., 2015), since the market does not always know best, but about tilting the playing field in the direction of the desired societal goals, such as the SDGs. However, we argue, to achieve this requires a new analytical framework based on the idea of public value and a policymaking framework aimed at shaping markets in addition to fixing various existing failures. Indeed, we argue that if we want to take grand challenges such as the SDGs seriously as policy goals, market shaping should become the overarching approach followed in various policy fields.

### da – econ

#### Waivers key to prevent meritless class litigation – that’s an existential threat for US business growth.

STEPHEN A. FOGDALL Counsel of Record ARLEIGH P. HELFER III SCHNADER HARRISON SEGAL & LEWIS LLP, ’17, BRIEF OF AMICI CURIAE MORTGAGE BANKERS ASSOCIATION AND STATE MORTGAGE LENDING ASSOCIATIONS SUPPORTING PETITIONERS AND REVERSAL IN NOS. 16-285 AND 16-300, AND SUPPORTING RESPONDENTS AND AFFIRMANCE IN NO. 16-307 [Ableism modified]

First, there is the obvious justification that such waivers allow the parties to avoid the potentially ~~crippling~~ [devastating] costs of class and collective litigation. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001). These costs are further enhanced in the employment context by statutes that allow for a damages multiplier. One example is the FLSA, which provides not only for an award of attorney’s fees but an additional award of “liquidated damages” equal to the amount of actual damages recovered. 29 U.S.C. § 216(b). While such liquidated damages are also available to a single employee proceeding individually, the exposure to the employer is far greater when magnified across its current and former workforce. For an employer “owned and operated by a single individual or small number of owners whose personal net worth is fully invested in the company,”8 such costs can easily constitute an existential threat. “Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.” AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350 (2011). There is ample justification for class and collective action waivers based on these considerations of cost and risk avoidance alone. No one benefits from liability exposure so extreme that operating a business becomes unviable. Certainly, employees suffer. And in the case of the real estate finance industry, which Amici represent, home mortgage consumers are harmed as well.

#### Meritless class action crushes innovation and growth.

Elisabeth Kempf, Professor @ Booth, and Oliver Spalt, Oliver Spalt at Tilburg University and CentER, ’18, "The Hidden Cost of Meritless Class Action Lawsuits," No Publication, https://clsbluesky.law.columbia.edu/2018/04/30/the-hidden-cost-of-meritless-class-action-lawsuits/

Securities class action lawsuits can be socially beneficial if they deter wrongdoing, curb managerial rent extraction, and compensate injured shareholders. However, class actions have a widely discussed dark side: law firms have an incentive to bring weak lawsuits in the hope of securing a large settlement (e.g., [1], [2]). Faced with the prospect of entering a long and resource-intensive legal dispute, and faced with the risks of an imperfect judicial process, firms may be willing to settle cases even if the allegations are untrue. This type of meritless litigation is socially wasteful: It does not punish wrongdoing, it hurts corporate shareholders, it may distract managers from running their companies, and it is a burden on the judicial system.

The aim of our paper is to provide novel, large-scale evidence on the economic costs of meritless class action litigation. Such evidence is important: Without a good understanding of these costs, it is impossible to design optimal policy and to accurately evaluate the trade-offs inherent in any piece of regulation meant to curb meritless litigation. So far, large-scale evidence on the economic costs of meritless class action litigation is surprisingly scarce, and our results indicate that such costs may be substantially higher than commonly thought.

We find that meritless securities class action lawsuits disproportionately target firms that generate valuable innovations. This is an important finding, because ex post punishment for successful innovators creates disincentives for all firms to innovate ex ante, according to most standard models. Given that successful innovation is a key driver of economic growth, meritless class action litigation is potentially a hidden tax on innovation and may distort firms’ incentives to invest in it.

A key empirical challenge is identifying firms that create valuable innovation. To overcome this challenge, we build on recent work by Kogan et al. (2017) ([3], KPSS). KPSS propose a new firm-level measure of the quality of innovation (“innovation success”). The measure is derived from st3ock-market reactions to new patent grants and captures the private economic value of innovations. Another challenge is to measure lawsuit merit, which is inherently unobservable. We address this challenge by showing that our results are robust to a variety of proxies for lawsuit merit that have been proposed in the literature.

The core finding in our paper is that successful innovators (measured using the KPSS innovation success measure) are substantially more likely to be the target of a meritless class action lawsuit than other firms in the same industry and year. Hence, meritless lawsuits fall disproportionately on successful innovators. We also find that, on top of making a lawsuit more likely, innovation success is associated with greater losses to shareholders from a meritless class action filing. While the average successful innovator loses about 3.0 percent of its market capitalization in the seven days around such a filing, the average non-successful innovator loses only 1.9 percent. This shows that meritless litigation is especially costly for firms with valuable future growth opportunities. If successful innovators were smaller than their peers, higher percentage losses would not necessarily translate into higher dollar losses. In fact, however, successful innovators are generally much larger, and the corresponding dollar losses in the seven days around a filing are $148 million for the average successful innovator but only $12 million for the average non-successful innovator.

Combined, these findings suggest that more successful innovation is associated with both a greater probability of being subject to a meritless class action lawsuit and a greater loss from being sued. The expected costs of meritless class actions are thus particularly high for the most innovative firms. To the best of our knowledge, our paper is the first to establish this fact.

We address potential endogeneity concerns using a range of different approaches (see our complete paper for details), including (i) a rich set of control variables, (ii) alternative proxies for lawsuit merit, (iii) exploiting the timing of patent grants and lawsuit filings, (iv) different sets of fixed effects, and (v) instrumental variable regressions. Our regressions make sure that general trends in variables such as innovation intensity, litigation propensity, and dismissal standards, across both time and industries, are not causing our results. While we do find a positive link between meritless lawsuits and innovation success, we do not find a statistically significant link for meritorious cases, which suggests that there is no relation between successful innovation and class action lawsuits more broadly. In sum, our findings suggest that the U.S. securities class action system imposes a substantial implicit tax on innovative firms in the form of meritless litigation.

We estimate the incremental cost of successful innovation, measured as a loss in shareholder value due to increased meritless class action litigation for a one-standard-deviation change in innovation success, to be around $1.1 million per year for the average firm in our sample. (We believe our estimates are, if anything, conservative, and likely to underestimate the true costs of meritless litigation following successful innovation.) To put this number in perspective, it represents 3.6 percent of the increase in profits due to the innovation over the next five years. Interpreted as a tax on profits, this number is economically significant.

An important implication of our results is that this implicit tax decreases the marginal benefit of producing successful technological innovation ex ante, which may lead firms to innovate less than they optimally would. Less investment in innovative activities leads to reduced firm growth and reduced growth in aggregate productivity, as well as less knowledge spillovers, which further slows economic growth (e.g., [4]).

As a final step in our paper, we examine why successful innovators have an elevated risk of being targeted. The answer, we propose, is that firms that innovate successfully become more profitable, make additional investments in capital and labor, and generate additional sales. Importantly, all three features make a firm more attractive as a litigation target. First, higher profits imply that firms have deeper pockets. Second, managers who invest in capital and labor, and are therefore busy growing their firm, cannot afford to waste time. Finally, firms who are about to launch new products are particularly vulnerable to bad publicity stemming from a lawsuit.

We also propose, test, and find evidence for an additional reason: successful innovators use more optimistic language in their annual reports and more forward-looking statements in the MD&A section of their annual reports after a successful patent is granted. This is intuitive, given that successful innovations are expected to generate substantial value during the 10 years of a patent’s protection, and given that managers will speak more, and more optimistically, about innovations expected to add substantial value to the firm. Unfortunately, for innovating firms, forward-looking and optimistic statements are likely to increase litigation risk. First, relative to statements about current events, forward-looking statements, even if made in good faith, are more likely to be proven wrong ex post, and may therefore be easier to attack. Second, Rogers et al. (2011) ([5]) provide direct evidence of a link between optimistic language and subsequent litigation.

We consider additional explanations, but find less support for them in the data. In particular, we do not find evidence that firms that innovate successfully are more likely to experience events that tend to prompt litigation, such as large stock drops or missed earnings targets.

In sum, we contribute novel evidence to show that meritless securities class action lawsuits impose substantial economic costs on innovative U.S. firms. The resulting distortions in firms’ incentives to innovate may have important implications for economic growth and the competitiveness of the U.S. economy.

#### American innovation key to tech supremacy – “extinction.”

Jain ’20 [Ash; 2020; Senior fellow with the Scowcroft Center for Strategy and Security; Strategic Studies Quarterly; “Present at the Re-Creation: A Global Strategy for Revitalizing, Adapting, and Defending a Rules-Based International System,” <https://www.atlanticcouncil.org/wp-content/uploads/2019/10/Present-at-the-Recreation.pdf>]

The system must also be adapted to deal with new issues that were not envisioned when the existing order was designed. Foremost among these issues is emerging and disruptive technology, including AI, additive manufacturing (or 3D printing), quantum computing, genetic engineering, robotics, directed energy, the Internet of things (IOT), 5G, space, cyber, and many others.

Like other disruptive technologies before them, these innovations promise great benefits, but also carry serious downside risks. For example, AI is already resulting in massive efficiencies and cost savings in the private sector. Routine tasks and other more complicated jobs, such as radiology, are already being automated. In the future, autonomous weapons systems may go to war against each other as human soldiers remain out of harm’s way.

Yet, AI is also transforming economies and societies, and generating new security challenges. Automation will lead to widespread unemployment. The final realization of driverless cars, for example, will put out of work millions of taxi, Uber, and long-haul truck drivers. Populist movements in the West have been driven by those disaffected by globalization and technology, and mass unemployment caused by automation will further grow those ranks and provide new fuel to grievance politics. Moreover, some fear that autonomous weapons systems will become “killer robots” that select and engage targets without human input, and could eventually turn on their creators, resulting in human extinction.

The other technologies on this list similarly balance great potential upside with great downside risk. 3D printing, for example, can be used to “make anything anywhere,” reducing costs for a wide range of manufactured goods and encouraging a return of local manufacturing industries.61 At the same time, advanced 3D printers can also be used by revisionist and rogue states to print component parts for advanced weapons systems or even WMD programs, spurring arms races and weapons proliferation.62 Genetic engineering can wipe out entire classes of disease through improved medicine, or wipe out entire classes of people through genetically engineered superbugs. Directed-energy missile defenses may defend against incoming missile attacks, while also undermining global strategic stability.

Perhaps the greatest risk to global strategic stability from new technology, however, comes from the risk that revisionist autocracies may win the new tech arms race. Throughout history, states that have dominated the commanding heights of technological progress have also dominated international relations. The United States has been the world’s innovation leader from Edison’s light bulb to nuclear weapons and the Internet. Accordingly, stability has been maintained in Europe and Asia for decades because the United States and its democratic allies possessed a favorable economic and military balance of power in those key regions. Many believe, however, that China may now have the lead in the new technologies of the twenty-first century, including AI, quantum, 5G, hypersonic missiles, and others. If China succeeds in mastering the technologies of the future before the democratic core, then this could lead to a drastic and rapid shift in the balance of power, upsetting global strategic stability, and the call for a democratic- led, rules-based system outlined in these pages.63

The United States and its democratic allies need to work with other major powers to develop a framework for harnessing emerging technology in a way that maximizes its upside potential, while mitigating against its downside risks, and also contributing to the maintenance of global stability. The existing international order contains a wide range of agreements for harnessing the technologies of the twentieth century, but they need to be updated for the twenty-first century. The world needs an entire new set of arms-control, nonproliferation, export-control, and other agreements to exploit new technology while mitigating downside risk. These agreements should seek to maintain global strategic stability among the major powers, and prevent the proliferation of dangerous weapons systems to hostile and revisionist states.

### da – clog

#### Courts are innovating and adapting to backlogs – they’re controlled now.

Nekritz ‘12/15 [Alyssa; 12/15/21; “A look at pandemic backlog in court proceedings and resources”; <https://www.ncsc.org/information-and-resources/info-and-res-page-card-navigation/trending-topics/trending-topics-landing-pg/the-pandemic-caused-delays-in-many-court-proceedings.-what-are-states-doing-about-backlog>; NCSC; TV]

About one third of U.S. courts saw an increase of over 5% in backlogs. This increase would have been larger had courts not adapted quickly to online operations. Several types of court proceedings, particularly trials, were delayed. Some court professionals are optimistic that the existing backlogs will be resolved quickly. Others are worried backlogs will continue.

In order to avert for a growing backlog, some states have or are dropping non-violent criminal cases when courts reopen . Other prosecutors are prioritizing repeat offenders. Although it is important for the court system to manage the cases timely, there are staunch critics who believe dismissal is a bad idea. Critics argue adjournments and the associated delay can create access to justice concerns, placing courts in a tough position.

Other state courts, like Florida and Washington, have requested more retired judges to assist pulled judges out of retirement and temporarily increased staffing to help with backlogs. Some jurisdictions continue to look for effective ways of addressing their backlogs.

NCSC’s Effective Criminal Case Management Project conducted extensive data collection on felony and misdemeanor cases. The project built resources on case flow management to help courts process cases efficiently.

Courts continue to innovate and NCSC is tracking pandemic related backlogs. More data will be necessary to draw conclusions about future impacts. Revisit the 2020 CCJ/COSCA Pandemic Backlog Report for more resources on dealing with a surge in civil cases. Additionally, courts can access the ECCM’s Cost of Delay Calculator (PDF and Excel) to compute a simple estimate revealing how quickly and significantly the costs of delay accumulate across a court.

#### Antitrust litigation consumes vast judicial resources – causes backlogs.

Fitch et al. ’21 [Lynn Fitch, Krissy C. Nobile, Justin L. Matheny; Attorney General of Mississippi; Deputy Solicitor General for Mississippi; Assistant Solicitor General; 3/1/21; “BRIEF FOR THE STATES OF MISSISSIPPI, ALABAMA, ARIZONA, ARKANSAS, CONNECTICUT, FLORIDA, GEORGIA, IDAHO, INDIANA, IOWA, KENTUCKY, LOUISIANA, MAINE, MICHIGAN, MINNESOTA, MONTANA, NEW JERSEY, OREGON, SOUTH CAROLINA, TEXAS, UTAH, VIRGINIA, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER”; <https://www.supremecourt.gov/DocketPDF/20/20-1018/170601/20210301174920932_pdf>; Louisiana Real Estate Appraisers Board v. United States Federal Trade Commission; accessed 9/6/21; TV]

The financial costs and burdens of defending antitrust litigation are also extraordinarily high. To mitigate those costs and burdens, which ultimately are borne by state taxpayers and citizens, States and their political subdivisions have a significant interest in dismissal of antitrust claims at the earliest stage possible whenever dismissal is legally appropriate. “Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government.” Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009).

Immediate appellate review of a denial of a claim of state-action immunity is also efficient. Antitrust litigation is costly for litigants and the judicial system. Antitrust cases are complex and can easily consume judicial time and resources. Fully resolving state-action immunity on the front-end of litigation focuses on a narrow, outcome-determinative issue and can prevent the waste of judicial resources expended in a trial that, at the end, proves to be unwarranted. Courts therefore have a vested interest in early-stage dismissal of antitrust claims that cannot lead to redress.

An appeal from a final judgment cannot adequately safeguard these important state and judicial interests or adequately protect against financial burdens needlessly imposed by forcing a state entity entitled to state-action immunity to litigate antitrust cases to a final judgment. See Commuter Transp. Sys., 801 F.2d at 1289 (“The purpose of the state action doctrine is to avoid needless waste of public time and money.”). Allowing an immediate appeal to avoid an unnecessary trial when a State or state entity is in fact immune will protect significant public interests; obviate, or at least diminish, unnecessary financial expenditure; foster efficiency; and conserve judicial resources.

B. It is widely recognized that antitrust litigation is particularly costly. Indeed, this Court’s decision in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) is predicated in good measure on the fact that antitrust litigation is notoriously expensive. The complex and protracted discovery inherent in the early stages of antitrust litigation accounts for much of that expense. Id. at 558. In fact, that is why Twombly admonished courts not “to forget that proceeding to antitrust discovery can be expensive.” Id. at 558-59 (citing, inter alia, Note, Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation, 78 N.Y.U. L. REV. 1887, 1898-99 (2003) (discussing the unusually high cost of discovery in antitrust cases); Manual for Complex Litigation, Fourth, § 30, p. 519 (2004) (describing extensive scope of discovery in antitrust cases); and Memorandum from Hon. Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000) (reporting that discovery accounts for as much as 90 percent of litigation costs when discovery is actively employed)).

Twombly stands for the general proposition that, when allegations in a complaint, however true, fail to state a claim for relief, the claim should be dealt with “at the point of minimum expenditure of time and money by the parties and the court.” Twombly, 550 U.S. at 558 (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, at 233-234 (3d ed. 2004)). The point of minimum expenditure in an antitrust case, in particular, comes before the case proceeds to discovery. Twombly, 550 U.S. at 568 (citing Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984) (“[T]he costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint.”)).

If a state entity defendant in an antitrust case is entitled to state-action immunity—whether that immunity is deemed immunity from suit or from liability— there is no reasonable likelihood that a plaintiff can raise a claim of entitlement to relief or recovery. There is thus every reason to allow the state-action immunity issue to be appealed before the parties and the court are faced with the costs of discovery and trial—i.e., to deal with the issue “at the point of minimum expenditure of time and money by the parties and the court.”

Antitrust litigation is legally and factually complex, inevitably requires massive discovery, cannot be conducted without a battery of expert witnesses, and is of protracted duration. See, e.g., Corr Wireless Commc’ns v. AT&T, Inc., 893 F. Supp. 2d 789, 809-10 (N.D. Miss. 2012); Nepresso USA, Inc. v. Ethical Coffee Co. SA, 263 F. Supp. 3d 498, 508 (D. Del. 2017) (highlighting “the financial burden of the discovery process in general, but particularly in antitrust cases”). Those concerns counsel in favor of application of the collateral-order doctrine to allow interlocutory appeals of the denial of claims of state-action immunity in antitrust cases.

#### Court clog produces patent delays.

Ball & Kesan ’10 [Gwendolyn G. & Jay P; Research Fellow Business, Economics and Law Group Institute for Genomic Biology and Information Trust Institute University of Illinois; Professor and Mildred Van.Voorhis Jones Faculty Scholar College of Law Business, Economics and Law Group Institute of Genomic Biology University of Illinois; 4/30/10; “Judges, Courts and Economic Development: the Impact of Judicial Human Capital on the Efficiency and Accuracy of the Court System”; <https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=ALEA2010&paper_id=380>; accessed 9/7/21; TV]

While most economic scholarship analyzing the importance of the courts has focused on disputes over real property, the relationship between the court system and investment is no less strong for intellectual property. And to a large extent, the relationship between the courts and the patent system depends on the quality of “judicial human capital.”

In the United States, as in many countries, the courts are a crucial part of the patent system to the extent that the patent system is can be termed a two-stage process. In the first stage, the U.S. Patent and Trademark Office grants property rights to inventors. In the second stage, inventors can protect those rights through patent infringement suits in the courts and alleged infringers have the right to challenge improvidently granted patents and have them declared invalid. As a consequence, some authors have referred to patent rights as being “probabilistic,” depending not only on whether the innovation embodied in the patent has commercial value, but also on the refinement of that patent property right after litigation.15

Just as with real property, the management of the court system has an impact on both patenting behavior and on investment in research and development. While the majority of all patents are not litigated, those that are disputed in the courts are among the most valuable.16 The rules governing the court system may even “feed back” into patenting behavior; some authors have found evidence that the increasingly “patent friendly” rules17 adopted by the courts are a major factor in the surge in patenting since the 1980s.18 Moreover, the ability to define the “probabilistic” property rights is an important element in determining whether patents fulfill their purpose of promoting innovation.19 Finally, the costs associated with the patent systems can be reduced by an efficient court system; firms may hesitate to invest in new products and technologies which may infringe on existing patents, so any additional delay or cost in clarifying existent rights may slow the process of innovation. The more quickly and cheaply these rights are defined, the more beneficial the patent system will be in promoting and not inhibiting innovation and investment.

However, in the United States this second phase in the patent system is managed by a District Court system in which judges with a general legal background preside over cases ranging from drug trials to anti-trust actions. Under such circumstances, patent infringement suites can pose particular challenges. Patent litigation is officially classified by the U.S. Administrative Office of the District Courts as one of several types of “complex litigation” which place special burdens on judges and other court personnel. Not only are technical issues involved, but there are also procedures and rules that are unique to patent law. For example, since the “Markman” ruling of 1995 on “claim construction,” judges in patent cases have been required to examine the claims stated in the patent document, thereby defining the boundaries of the technology.20 This procedure is a potentially lengthy process involving briefs from the plaintiff and defendant, expert opinions and a special claims construction hearing. Such procedures can create difficulties for judges who are not familiar with the intricacies of patent law. And there is evidence suggesting dissatisfaction with the performance of district courts in patent cases at the District level. Approximately 10% of judgments in other areas of the law are appealed, whereas 50% of the judgments in patent cases are appealed.21 As a consequence, intellectual property disputes are included as one of the topical areas warranting a special section in the Federal Judicial Center (FJC)22 Manual for Complex Litigation (2004), along with anti-trust cases, securities cases, employment discrimination, CERCLA (Superfund) and civil RICO. Moreover, in the FJC’s 2003-04 study of the amount of work required for District Court cases, while an “average” case is assigned a weight of 1, patent cases received a weight of 4.72. Only environmental cases (4.79) and death penalty cases (12.89) received higher weights.23 Thus, lack of familiarity with patent law can be a barrier to efficient resolution of patent disputes, and has led to observations like the following24:

#### Undermines biotech innovation.

Gregory ’18 [Adam; Associate Patent Attorney at Mewburn Ellis LLP; 11/26/18; “The Importance Of Patents To Biotech Start-Ups”; <https://www.biotechconnection-sg.org/the-importance-of-patents-to-biotech-start-ups/>; Biotech Connection; accessed 9/7/21; TV]

Early-stage biotech companies are often founded based on the exciting results of pre-clinical research relating to a new product or treatment. However, due to the need for refinement/development, as well as the extensive work required to demonstrate safety and efficacy in order to obtain regulatory approval, early-stage biotech companies are often a long way away from bringing a new drug or therapy to market.

Unlike in many industries where a new company will have a product/service that can be readily commercialised to generate revenue, early stage biotech companies often find that they have a concept for a new product/treatment that could ultimately generate billions of dollars in sales annually, but have no obvious way to commercialise or finance the technology in the short-term.

This problem is compounded by the very large amount of capital required to advance a new drug or therapy from the pre-clinical stage to treating patients in the clinic. The Tufts Center for the Study of Drug Development (CSDD) estimates that it now costs more than USD 2.5 billion to bring a new drug to market.

The ability to attract investment is therefore critical for an early stage biotech company to thrive. In the absence of a tangible product, would-be investors will look at the potential future commercial revenue if the product or treatment makes it to market. The decision of whether or not to invest, and the scale of any investment, is based on how well the technologies that form the core of a company have been protected. This is where patents come in.

As the actual and potential scope of commercial exclusivity is the basis for the value proposition, investors look very closely at patent portfolios. Essentially, potential investors ask ‘what can this company do that no other company can do without their permission?’ Any serious investor will usually undertake thorough due diligence of the patent portfolio, looking not only the granted patents, but also at the pending patent applications, to understand what protection the company already has, and what they are seeking protection for.

Patents can also be useful for generating revenue in the short-term. Patents and patent applications can be sold, or licensed to other parties that wish to use the invention. Licensing agreements can also form the basis of collaborations with other companies or research institutions, which can in turn lead to improvements to the technology.

Having patent protection, or the opportunity to obtain patent protection, covering the core technology of the company, and being able to present a plan for generating future IP, can be key to the success of a biotech start-up.

#### Otherwise, ABR causes extinction.

Sachs ’14 (Jeffery; Professor of Sustainable Development, Health Policy and Management at Columbia University, Director of the Earth Institute at Columbia University and Special adviser to the United Nations Secretary-General on the Millennium Development Goals; 8/17/14; “Important lessons from Ebola outbreak”; http://tinyurl.com/kjgvyro; Business World Online)

Ebola **is the latest of many** recent **epidemics**, also **including** AIDS, SARS, H1N1 **flu, H7N9 flu**, and others. AIDS is the deadliest of these killers, claiming nearly 36 million lives since 1981. Of course, even larger **and more** sudden epidemics are possible, such as the 1918 influenza during World War I, which claimed50-100 million lives (far more than the war itself). And, though the 2003 SARS outbreak was contained, causing fewer than 1,000 deaths, the disease was on the verge of deeply disrupting several East Asian economies including China’s. **There are four crucial facts to understand about** Ebola and the other **epidemics**. First, **most emerging infectious diseases** are zoonoses, meaning that they **start in animal populations**, sometimes **with a genetic mutation that enables the jump to humans**. Ebola may have been transmitted from bats; HIV/AIDS emerged from chimpanzees; SARS most likely came from civets traded in animal markets in southern China; and influenza strains such as H1N1 and H7N9 arose from genetic re-combinations of viruses among wild and farm animals. New zoonotic diseases are inevitable as humanity pushes into new ecosystems (such as formerly remote forest regions); th**e** food industry creates **more** conditions for genetic recombination; and climate change scrambles natural habitats **and species interactions**. Second, **once a new infectious disease appears, its** spread through airlines, ships, megacities, and trade in animal products is likely to be extremely rapid. **These epidemic diseases are new markers of globalization, revealing** through their chain of death how **vulnerable the world has become** from the pervasive movement of people and goods. Third, the poor are **the first to suffer and** the worst affected. **The** rural **poor live closest to the infected animals that first transmit the disease**. They often hunt and eat bushmeat, leaving them vulnerable to infection. **Poor**, often illiterate, **individuals are generally unaware of how infectious diseases** -- especially unfamiliar diseases -- are transmitted, making them much more likely to become infected and to infect others. Moreover, given poor nutrition and lack of **access to basic** health services, their weakened **immune** systems are **easily** overcome by infections **that better nourished** and treated individuals **can survive**. And “de-medicalized” conditions -- with few if any professional health workers to ensure an appropriate public-health response to an epidemic (such as isolation of infected individuals, tracing of contacts, surveillance, and so forth) -- make initial outbreaks more severe. Finally, **the required** medicalresponses, including diagnostic tools and effective medications and vaccines, inevitably lag behind the emerging diseases. In any event, such tools must be continually replenished. This requires cutting-edge biotech**nology, immunology, and** ultimately **bioengineering** to create **large-scale** industrial responses (such as millions of doses of vaccines or medicines in the case of large epidemics). The AIDS crisis, for example, called forth tens of billions of dollars for research and development -- and similarly substantial commitments by the pharmaceutical industry -- to produce lifesaving antiretroviral drugs at global scale. Yet each breakthrough **inevitably** leads to **the** pathogen’s mutation, rendering previous treatments less effective. There is no ultimate victory, only a constant arms race **between humanity and disease-causing agents**.

## solvency

### arbitration frontline – 1nc

#### Mandating arbitration is bad for cartels. Arbitration results higher worker win rates and awards.

DEBORAH J. LA FETRA, Counsel of Record, Pacific Legal Foundation, ’17, “BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER” https://www.scotusblog.com/wp-content/uploads/2017/07/16-285-tsac-PLF.pdf

Suspicion against an arbitral forum is unwarranted on the mere basis that arbitration operates under procedures that differ from court rules. 14 Penn Plaza, 556 U.S. at 269 (“[T]he recognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate; the relative informality of arbitration is one of the chief reasons that parties select arbitration.”). There is, moreover, no evidence that arbitration is worse than litigation at achieving just results. In fact, arbitrators decide cases much as judges do, and without the distortions common in cases tried to juries. Steven J. Burton, The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate, 2006 J. Disp. Res. 469, 480 n.86 (citing Christopher R. Drahozal, A Behavioral Analysis of Private Judging, 67 Law & Contemp. Probs. 105, 107 (2004)).4

Studies show that “plaintiffs do not fare significantly better in litigation, that arbitration provides a quicker resolution than litigation, and that available data do not indicate whether damages are fairer under either system.” Id. at 480-81 n.87 (citing David Sherwyn, et al., Assessing the Case for Employment Arbitration: A New Path for Empirical Research, 57 Stan. L. Rev. 1557, 1564 (2005)). Multiple studies have found that workers who pursue their claims in arbitration prevail more frequently than those who pursue their claims in court. See Rutledge, Whither Arbitration?, 6 Georgetown J. of L. and Pub. Poly at 551 (“arbitration generally results in higher win rates and higher awards for employees than litigation”); Michael H. LeRoy & Peter Feuille, Happily Never After: When Final and Binding Arbitration Has No Fairy Tale Ending, 13 Harv. Negot. L. Rev. 167, 184 (2008).

One study found that female employees prevailed in arbitration much more often than similarly situated women in litigation, though the amounts of the awards were lower. Michael H. LeRoy, Getting Nothing for Something: When Women Prevail in Employment Arbitration Awards, 16 Stan. L. & Pol’y Rev. 573, 589-90 (2005). Another study of construction industry arbitration found that “[w]hen it came to perceived fairness in decisionmaking, arbitrators generally compared favorably with judges and juries. On average, moreover, arbitration was a speedier means of dispute resolution than either jury trial or bench trial, and somewhat less costly overall.” Thomas J. Stipanowich, The Multi-Door Contract and Other Possibilities, 13 Ohio St. J. on Disp. Resol. 303, 339 (1998) (internal citations omitted)). Thus, employees reasonably may prefer to resolve their claims in arbitration. See Michael Z. Green, Tackling Employment Discrimination with ADR: Does Mediation Offer a Shield for the Haves or Real Opportunity for the Have-Nots?, 26 Berkeley J. Emp. & Lab. L. 321, 327-30 (2005) (noting potential benefits for employees in pursuing arbitration given the harsh results presented by the court system).

When arbitration is equally likely to end in a just result as a lawsuit, it cannot be deemed “unfair” for employees to arbitrate employment disputes on an individual basis.5 Therefore, it is not “unfair” for employees and employers to contract for that specific, individual method of arbitration.

#### Antitrust class actions insufficient to deter cartels – Lande’s study overstates.

SHARON K. ROBERTSON, AMERICAN ANTITRUST INSTITUTE Counsel of Record , ’20, “IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ PUTNAM BANK, ET AL., PLAINTIFFS-APPELLANTS, V. INTERCONTINENTAL EXCHANGE, INC., ET AL., DEFENDANTS-APPELLEES \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, NO. 19-CV-439 HON. GEORGE B. DANIELS https://www.antitrustinstitute.org/wp-content/uploads/2020/08/2020-08-18-AAI-Amicus-Brief-FILED.pdf

This Circuit’s pleading standard for antitrust conspiracy claims is a question of exceptional importance for the U.S. economy, which is besieged by cartels. See, e.g., DOJ, Sherman Act Violations Resulting in Criminal Fines & Penalties of $10 Million or More (last updated July 24, 2020) (showing over $13 billion in fines since 1995), available at https://www.justice.gov/atr/sherman-act-violationsyielding-corporate-fine-10-million-or-more. Despite the policing efforts of the DOJ and numerous private attorneys general, cartel behavior in the United States remains heavily under-deterred Optimal cartel deterrence requires penalties that exceed ill-gotten profits, adjusted for the likelihood of getting caught. See William M. Landes, Optimal Sanctions for Antitrust Violations, 50 U. CHI. L. REV. 652, 656 (1983) (antitrust damages should be equal to violation’s expected net harm to others divided by probability of detection and proof of violation); Frank Easterbrook, Detrebling Antitrust Damages, 28 J.L. & ECON. 445, 454 (1985) (“Multiplication is essential to create optimal incentives for would-be violators when unlawful acts are not certain to be prosecuted successfully.”).

However, the collective efforts of the government and private plaintiffs do not come close to achieving this level of deterrence. Indeed, studies show that the median overcharge imposed by U.S. cartels amounts to 19% of the conspirators’ sales, yet the median combined sanctions amount to 17% of sales, for an expected value of only 4% of sales when adjusted for the low likelihood of detection. See John M. Connor & Robert H. Lande, Cartels as Rational Business Strategy: Crime Pays, 34 CARDOZO L. REV. 427, 478 (2012). In other words, despite the Clayton Act’s treble damages remedy, cartel behavior has proven to be a sound investment for aspiring white collar criminals. It is often profitable even if they are caught.

#### Most class actions are meritless copycat filings – they benefit greedy counsel, not the public interest.

William P. Barnett, Prof of Business @ Stanford, ’21, There Is No Conservative Case for Class Actions, The Federalist Society Law Review, Vol 22.

Fitzpatrick essentially concedes Redish’s point, but he posits that we should rely on judges and legislatures to control plaintiffs’ class counsel.21 Conspicuously absent from Fitzpatrick’s analysis is the apparently old-fashioned notion of the client controlling his lawyer, which is the typical model in traditional litigation and is the basis for our ethical rules governing attorney conduct. Doing away with the fig leaf that real plaintiffs are actually in control of class actions is to be commended. But the recommended fix of relying on judges to control them has not been shown to be effective. Needless to say, judges can only exert meaningful control after a case is filed, which is simply too late to limit unnecessary or abusive filings in the first place. And indeed, the number of class filings, many questionable at best, continues to increase year after year.22

The disconnect between the nominal plaintiff and the counsel driving the litigation is significant because it distorts the profit motive, which leads to more litigation overall and more filing of marginal claims. Unlike a regulator, class counsel is interested in theories that will lead to or at least threaten certification, which in turn creates pressure on defendants to settle, which then generates a fee for class counsel. The bottom line is that we regularly see private class actions filed based on theories that a government regulator would never pursue. The underlying merits of any individual claim—and frequently even the merits of the class’s claims in the aggregate—are often an afterthought. So, for example, many consumer class actions are based on nothing more than novel theories concocted by plaintiff’s counsel that are divorced from the realities of how a business actually operates. Or class actions may be based on weak merits claims that, even if true, would be exceptions to company policy, rather than uniform practices susceptible to class treatment. Despite their relative weakness, these cases keep getting filed. Why?

Because if plaintiffs’ counsel succeeds in forcing a settlement, the merits of such marginal claims are never litigated. As Judge Posner noted twenty-five years ago, even a defendant with strong defenses “may not wish to roll [the] dice” when certification puts a sufficient number of claims at issue; instead, the defendant often succumbs to the “intense pressure” to settle.23 Twenty years earlier, Judge Henry Friendly characterized as “blackmail settlements” those resulting from the small risk of a crushing class action judgment.24

The decades since have done nothing to lessen those risks; on the contrary, over time the stakes for defendants have grown higher and higher, as recent settlements demonstrate. For instance, a proposed settlement recently announced in the opioids litigation is valued at $26 billion.25 Private antitrust class actions likewise resulted in over $24 billion in settlements between 2009 and 2019,26 not including Blue Cross’s recently announced $2.7 billion class settlement.27 Similarly, securities class settlements cumulatively cost defendants over a billion dollars annually.28 In addition to the risks presented by class actions, another major concern for defendants is simply the cost of litigating. These costs, particularly those surrounding discovery, are asymmetrical and borne almost entirely by the defendant. For example, in a typical consumer class case, the plaintiff will possess relatively few relevant materials, while the defendant can easily be required to produce millions of pages of documents, including emails, texts, and other electronic data. Likewise, key employees, including the defendant’s senior executives, will have to prepare for and give depositions, with the attendant disruption to normal business operations that entails. In many circumstances, imposing that cost and disruption upon the business defendant is in fact the point. The potential for harassment through discovery favors plaintiffs and plays a key role in driving settlements of class litigation, regardless of the merits of the claims.

More fundamentally, incentives again are skewed in the sense that meritless cases are not punished or even meaningfully discouraged. Unlike most of the world, the American system does not employ two-way cost-shifting, under which the loser of a suit pays the winner’s attorney’s fees. The majority rule creates an obvious incentive for plaintiffs’ counsel to carefully consider and evaluate their cases before they file, knowing that their client may have to pay the other side’s fees if he loses.

But the American rule does not require the loser to pay.29 Thus, there is no market discipline involved in the decision to file cases. As a result, the entrepreneurial spirit and creativity of class counsel are unleashed, which has led to both an increase in the filing of class litigation and the pursuit of more marginal claims. If class action litigation operated in an efficient market, as Fitzpatrick contends,30 we would expect to see one or a few filings per dispute and not redundant, copycat filings. But that is not what happens. Any major company that is sued in a class action all too frequently receives numerous similar, indeed essentially identical, follow-on suits. Plaintiffs’ counsel is incentivized to file a slew of cases. Some will be copycats while others will explore different, and sometimes conflicting, theories. If only one of these cases hits, class counsel will get a significant return on their investment. And no matter what, plaintiffs won’t have to pay the defendants’ costs for their losses. Thus, the profit motive driving class counsel does not lead to efficiency, but rather abuse.

To give a real-life example of this dynamic, one major retailer I represented faced a series of class actions challenging the sale of damage waivers in connection with its tool rental business. Plaintiffs’ original theory was that the damage waivers were misrepresented as mandatory instead of optional. These claims inevitably failed on a class basis due to the inherently individualized liability issues underlying the transactions (e.g., what the customers were told regarding the damage waiver, whether the customers saw signs disclosing the damage waiver as optional, etc.).31 Class counsel then shifted theories to allege that the waivers were worthless and should not have been offered for sale at all. These claims likewise failed.32 So at the end of the litigation, defendant had defeated 17 class actions alleging seriatim counsel-created theories, none of which had merit, but which were nevertheless alleged and copied in cases across the country. This total “victory” cost the defendant several million dollars in defense costs, but the various class counsel essentially nothing, other than wasted time and effort.

The problem of copycat filings has been exacerbated by the increasing prevalence in the federal system of Multi-District Litigation (“MDL”) proceedings,33 where similar cases are consolidated in front of one judge for pretrial proceedings. Indeed, one side effect of a 2005 law that expanded federal jurisdiction over class actions, the Class Action Fairness Act (“CAFA”), has been an increase in just such filings.34 As a result, post-CAFA MDL practice in the federal courts has blossomed. In fact, cases in MDLs now account for more than half of the federal docket; many of these are class actions where jurisdiction is based on CAFA.35

Because of the sheer number of claims and the level of associated risk to defendants, MDLs typically function as massive settlement claims processing proceedings, rather than true litigation. So-called “steering” or “leadership” committees, typically consisting of ten or more plaintiffs’ firms, are appointed by the court to manage the litigation and in essence function as full employment acts for plaintiffs’ lawyers. Enterprising class counsel do not want to be left out of any potential settlement, thus incentivizing the filing of copycat class actions which are then consolidated in the MDL. For example, in two recent data breaches involving Target and Home Depot, more than fifty class actions were consolidated against each company in MDLs.36

This redundant litigation, which is a typical occurrence, does not scream market efficiency. On the contrary, marginal claims proliferate. In the Chinese Drywall MDL, for instance, my client was sued in eight different class actions despite there being no evidence that it ever sourced or sold any of the relevant drywall.37 Indeed, several of the plaintiffs there alleged they bought the drywall at the address for the defendant’s corporate headquarters, an impossibility given that location, not surprisingly, does not sell products at retail.

#### Class action allows cartels use litigation costs to discourage small claims restitution. The majority of employee claims are below the cost of litigation.

ANDREW J. PINCUS, Counsel of Record EVAN M. TAGER ARCHIS A. PARASHARAMI MATTHEW A. WARING Mayer Brown LLP, ’17, “BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING PETITIONERS IN NOS. 16-285 AND 16-300 AND RESPONDENTS IN NO. 16-307” https://www.scotusblog.com/wp-content/uploads/2017/07/16-285-16-300-16-307-tsac-us-chamber-of-commerce.pdf

The Court’s decision in this case turns upon statutory text, not policy arguments. But opponents of arbitration consistently assert that arbitration disadvantages employees. These policy arguments provide no basis for disregarding Congress’s decision to codify in law a federal policy favoring arbitration. But they are also wrong: Bilateral arbitration provides significant benefits to employers and employees alike.

For many employees with individualized complaints against their employer—whether involving wrongful discharge, unlawful discrimination, or other grievances—arbitration is the only viable means of recovery, because the employees’ claims are too small to justify the expense of court litigation or to attract a contingency-fee lawyer. This Court has recognized that “[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts.” Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001) (emphasis added); see also Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995) (“[A]rbitration’s advantages often would seem helpful to individuals \* \* \* who need a less expensive alternative to litigation.”). Empirical analyses bear out this Court’s assessment. A leading study of employment arbitration in 2003 concluded that employees whose income or legal claim was less than $60,000 would not be able to afford litigation but would be able to proceed in arbitration. See Elizabeth Hill, AAA Employment Arbitration: A Fair Forum at Low Cost, 58-JUL Disp. Resol. J. 9, 10-11 (May-July 2003).6 A small claim is more viable in arbitration because costs in arbitration are lower—and because in an arbitral forum, “it is feasible for employees to represent themselves or use the help of a fellow layperson or a totally inexperienced young lawyer.” Theodore J. St. Antoine, Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?, 32 Ohio St. J. on Disp. Resol. 1, 15 (2017). In short, the empirical evidence shows that “a substantial number of nonunion employees, particularly those with small financial claims, have a realistic opportunity to pursue their rights through mandatory arbitration that otherwise would not exist.”

#### No internal link to class actions. Waivers are not commonly used and employees who don’t like them will work for competitors.

DEBORAH J. LA FETRA, Counsel of Record, Pacific Legal Foundation, ’17, “BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER” https://www.scotusblog.com/wp-content/uploads/2017/07/16-285-tsac-PLF.pdf

While the FAA demands that courts apply a neutral view of the availability of arbitral remedies, individual job applicants may perceive arbitration (or other alternative dispute resolution procedures) favorably or unfavorably. See Ellis B. Murov & Beverly A. Aloisio, Arbitration of Employment Disputes Before and After Circuit City, 17 Lab. Law. 327, 343 n.151 (2001) (noting questions of bias where employers are repeat players in arbitration, and further noting that unions also are repeat players, representing workers under collective bargaining agreements). In this way, an arbitration requirement is no different than many other job requirements that affect individual preferences, and even legally protected rights.

When contemplating where to work, job-seekers contemplate all manner of trade-offs. Some employers offer shifts that start very early in the morning, on weekends, or extend quite late at night.6 Employers may require workers to wear uniforms7 or costumes,8 refrain from certain personal adornments,9 or stick to a script when speaking to customers.10 Some employers demand a heavy travel schedule11 or require workers to report for duty on holidays.12 Potential workers weigh the trade-offs of various places of employment every day, accepting some offers and declining others.

A job applicant who disdains arbitration as a dispute resolution mechanism can look for work with employers who do not require arbitration as a condition of employment. See National Union Fire Ins. Co. of Pittsburgh, Pennsylvania v. Guardtronic, Inc., 76 Ark. App. 313, 320 (2002) (party to a contract may voluntarily accept even non-negotiable provisions because the party remains free to take his business elsewhere); Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc., 89 Cal. App. 4th 1042, 1056 (2001) (noting, in discussion of procedural unconscionability, that plaintiff could take his business elsewhere if he did not like the contract terms one vendor provided). Class action arbitration waivers have been adopted by some companies, but they are far from universal. See Theodore Eisenberg & Geoffrey P. Miller, The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in The Contracts of Publicly Held Companies, 56 DePaul L. Rev. 335, 348 (2007). Professors Eisenberg and Miller studied contracts made by 2,858 publicly held companies during a seven-month period in 2002, including 111 specifically identified “employment contracts.” About 63% of the employment contracts did not mandate arbitration. Id. 13 Another study of employment contracts for senior executives found about 58% did not mandate arbitration of workplace disputes. Stewart J. Schwab & Randall S. Thomas, An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?, 63 Wash. & Lee L. Rev. 231, 234 (2006).

Employers may require a particular type of dispute resolution, but as a practical matter, this is no different than other aspects of employment that are not open to negotiation. For example, employers may offer a particular 401(k) matching plan, or a specific type of health insurance. These aspects of employment are determined unilaterally by the employer and a potential employee who is looking for a particular benefits package may have to shop around or may simply conclude that the ideal package is unavailable in his market. In viewing the wide variety of trade-offs that exists in the acceptance of any job, an individual who highly values class-based dispute resolution, or who does not want to arbitrate workplace disputes at all should not apply to work for a company that requires it.

## advantage – class action

### AT: econ – 1nc

#### econ impact empirically disproven—COVID, 08—AND, no internal link between econ and heg—defense cuts in the 90s disprove.

#### Countries will exercise restraint.

Christina L. Davis & Krzysztof J. Pelc 17. \*Professor of Politics and International Affairs at Princeton. \*\*Associate Professor of Political Science at McGill University. “Cooperation in Hard Times: Self-restraint of Trade Protection.” *Journal of Conflict Resolution* 61(2): 398-429. Emory Libraries.

Conclusion Political economy theory would lead us to expect rising trade protection during hard times. Yet empirical evidence on this count has been mixed. Some studies find a correlation between poor macroeconomic conditions and protection, but the worst recession since the Great Depression has generated surprisingly moderate levels of protection. We explain this apparent contradiction. Our statistical findings show that under conditions of pervasive economic crisis at the international level, states exercise more restraint than they would when facing crisis alone. These results throw light on behavior not only during the crisis, but throughout the WTO period, from 1995 to the present. One concern may be that the restraint we observe during widespread crises is actually the result of a decrease in aggregate demand and that domestic pressure for import relief is lessened by the decline of world trade. By controlling for product-level imports, we show that the restraint on remedy use is not a byproduct of declining imports. We also take into account the ability of some countries to manipulate their currency and demonstrate that the relationship between crisis and trade protection holds independent of exchange rate policies. Government decisions to impose costs on their trade partners by taking advantage of their legal right to use flexibility measures are driven not only by the domestic situation but also by circumstances abroad. This can give rise to an individual incentive for strategic self-restraint toward trade partners in similar economic trouble. Under conditions of widespread crisis, government leaders fear the repercussions that their own use of trade protection may have on the behavior of trade partners at a time when they cannot afford the economic cost of a trade war. Institutions provide monitoring and a venue for leader interaction that facilitates coordination among states. Here the key function is to reinforce expectations that any move to protect industries will trigger similar moves in other countries. Such coordination often draws on shared historical analogies, such as the Smoot–Hawley lesson, which form a focal point to shape beliefs about appropriate state behavior. Much of the literature has focused on the more visible action of legal enforcement through dispute settlement, but this only captures part of the story. Our research suggests that tools of informal governance such as leader pledges, guidance from the Director General, trade policy reviews, and plenary meetings play a real role within the trade regime. In the absence of sufficiently stringent rules over flexibility measures, compliance alone is insufficient during a global economic crisis. These circumstances trigger informal mechanisms that complement legal rules to support cooperation. During widespread crisis, legal enforcement would be inadequate, and informal governance helps to bolster the system. Informal coordination is by nature difficult to observe, and we are unable to directly measure this process. Instead, we examine the variation in responses across crises of varying severity, within the context of the same formal setting of the WTO. Yet by focusing on discretionary tools of protection—trade remedies and tariff hikes within the bound rate—we can offer conclusions about how systemic crises shape country restraint independent of formal institutional constraints. Insofar as institutions are generating such restraint, we offer that it is by facilitating informal coordination, since all these instruments of trade protection fall within the letter of the law. Future research should explore trade policy at the micro level to identify which pathway is the most important for coordination. Research at a more macro-historical scope could compare how countries respond to crises under fundamentally different institutional contexts. In sum, the determinants of protection include economic downturns not only at home but also abroad. Rather than reinforcing pressure for protection, pervasive crisis in the global economy is shown to generate countervailing pressure for restraint in response to domestic crisis. In some cases, hard times bring more, not less, international cooperation.

### AT: chem – 1nc

#### no internal between arbitration and chem sector—no evidence says the key to innovation there is contract law.

#### don't solve resources impact which is their internal link—regenerable chemicals will help but can’t resolve emissions, REM shortages, semicondutors, supply chain issues, nor water shortages—card is highlighted like a pollock painting.

## advantage – private antitrust

### AT: healthcare – 1nr

#### Antitrust law in healthcare bad – causes high prices.

E. John Steren, Health Care & Life Sciences and Litigation & Business @ Epstein Becker & Green, P.C., Patricia M. Wagner, Health Care and Life Sciences and Litigation practices @ Epstein Becker & Green, P.C., ’19, “Will Price Transparency Benefit Consumers or Facilitate Antitrust Violations?,” https://www.natlawreview.com/article/will-price-transparency-benefit-consumers-or-facilitate-antitrust-violations

“Will Price Transparency Benefit Consumers or Facilitate Antitrust Violations?”

This past June, President Trump issued an Executive Order on Improving Price and Quality Transparency in American Healthcare to Put Patients First (“Order”), intending to increase price and quality transparency for American health care consumers. According to the Order,

patients often lack both access to useful price and quality information and the incentives to find low-cost, high-quality care. Opaque pricing structures may benefit powerful special interest groups, such as large hospital systems and insurance companies, but they generally leave patients and taxpayers worse off than would a more transparent system.

But whether greater transparency has any beneficial effect on consumer choices is equivocal at best. In fact, a recent study concluded that “[t]here is minimal evidence that making prices more transparent for consumers will drive healthcare value.”

On the other hand, and as the Federal Trade Commission (“FTC”) previously concluded, “[t]oo much transparency can harm competition in any market, including in health care markets.” This is because “some types of information are not particularly useful to consumers, but are of great interest to competitors.” In particular, when competitors have knowledge of what their rivals are charging, it both decreases the incentive to offer a lower price and increases the likelihood of coordinated behavior leading to higher prices.

Furthermore, health care providers typically compete against each other to be included on a health plan’s list of preferred providers. According to the FTC, “When networks are selective, providers are more likely to bid aggressively, offering lower prices to ensure their inclusion in the network. But when providers know who the other bidders are and what they have bid in the past, they may bid less aggressively, leading to higher overall prices.”

While the high cost of health care continues to be an issue, “transparency” may not offer much of a solution—and perhaps might exacerbate the problem.

#### Alt causes to healthcare prices and lack of innovation – market concentration not even in the top five.

Joseph L. Dieleman, PhD1; Ellen Squires, MPH1; Anthony L. Bui, MPH2; et al, ’17, "Factors Associated With Increases in US Health Care Spending, 1996-2013," No Publication, https://jamanetwork.com/journals/jama/fullarticle/2661579

Figure 5 shows that the 5 factors were related to the individual health conditions in distinct ways. Within diabetes, which experienced the largest spending increase, increases were concentrated within retail pharmaceuticals ($44.4 [UI, $38.7 to $49.6] billion). Within retail pharmaceuticals, all 5 factors were associated with spending growth: there were more people, the people were generally older, age-standardized diabetes prevalence increased, there were more retail pharmaceuticals prescribed per prevalent case, and the mean spending per pharmaceutical increased. Across these 5 factors, service price and intensity was associated with the largest increase ($20.0 [UI, $12.1 to $27.5] billion). All 5 factors were also associated with increased diabetes spending in ambulatory care settings.

The health condition with the second largest increase in annual spending was low back and neck pain. Within this condition, the largest increases were for ambulatory care ($31.5 [UI, $22.1 to $38.3] billion) and inpatient care ($18.9 [UI, $15.7 to $20.9] billion). Service utilization increases were associated with spending increase within ambulatory care ($22.2 [UI, $15.8 to $27.3] billion), while service price and intensity was associated with spending increases on inpatient care ($21.1 [UI, $18.0 to $23.4] billion) for low back and neck pain.

The other 4 panels of Figure 5 show a diverse set of factors related to increases in spending on different health conditions. Increases in depressive disorder spending was most strongly associated with increases in spending on ambulatory care and retail pharmaceuticals, and all 5 factors were related to increases in spending for each type of care. Increases in spending on other neurologic disorders were most strongly associated with increases in the utilization of ambulatory care. Despite reductions in prevalence, there were still net increases in spending on retail pharmaceuticals for hyperlipidemia. In addition, increases in utilization were associated with increases in spending on ambulatory care and retail pharmaceuticals for the treatment of hypertension. The relationship of the 5 factors with spending for each type of care for each of the 150 conditions is reported in the eResults in the Supplement.

Figure 6 demonstrates that patterns in spending changes and the factors associated with these changes differed by broad age category. Service utilization was associated with much larger increases in the 65 years and older age group ($42.1 [UI, $33.5 to $51.6] billion of the $74.3 [UI, $70.9 to $77.5] billion increase in pharmaceutical spending), compared with ages younger than 65 years ($33.9 [UI, $20.4 to $47.2] billion of the $100.4 [UI, $97.2 to $103.7] billion increase). Service utilization was also associated with the largest spending increases within ambulatory care among people 65 years and older ($50.6 [UI, $38.1 to $63.0] billion of the $101.6 [UI, $95.9 to $107.6] billion increase in ambulatory spending) compared with the younger age group ($64.8 [UI, $34.8 to $97.7] billion of the $222.7 (UI, $216.9 to $228.4) billion increase). Spending on nursing facility care was more strongly related to overall spending changes for the older age group, whereas emergency care and dental care were more strongly related to overall spending changes for the younger age group.

Figure 7 shows how the 5 factors were associated with spending within each type of care over different periods. From 1996 to 2002 and from 2002 to 2008, spending increases were most associated with growth in service price and intensity ($259.1 [UI, $201.5 to $311.1] billion and $198.9 [UI, $169.6 to $229.7] billion, respectively). The relationships between the 5 factors and spending within different types of care changed somewhat from 2008 to 2013. Service price and intensity was negatively associated with spending on ambulatory care ($23.1 [UI, −$41.2 to +$1.6] billion), nursing facility care ($6.7 [UI, $1.5 to $18.7] billion), and prescribed retail pharmaceuticals ($4.4 [−$15.6 to +$6.6] billion).

Discussion

This study measured how 5 fundamental factors were collectively associated with a $933.5 billion increase in annual US health care spending between 1996 through 2013. Although population size and age were associated with increased spending for most health conditions and types of care, the other 3 factors had varying relationships with spending, depending on the health condition and type of care. Across all types of care and health conditions, increases in service price and intensity had the strongest associations with the total spending increase. Service utilization was associated with increases in spending on ambulatory care and retail pharmaceuticals but with reductions in spending on inpatient care. The association of disease incidence and prevalence with spending growth was minor overall but varied by condition. For example, the increasing prevalence of diabetes was associated with more health care spending on this condition, while reductions in the prevalence of cardiovascular diseases were associated with decreased health care spending.

This study adds to existing literature that has measured factors leading to increases in health care spending.23 These existing studies, which typically focus on 1 or 2 factors,24 have reached varying conclusions about which factors are associated with increases in health care spending.5,6,8,25 Some studies have suggested that spending increases are primarily attributable to changes in the spending per treated case,5,7,26 often pointing to technology changes as a significant contributor to spending increases. The research presented here tests and affirms these findings, demonstrating that service price and intensity have had the strongest association with increasing health care spending between 1996 and 2013 of the factors examined, associated with to a 50.0% (UI, 45.0% to 55.0%) increase overall. This increase was greatest in inpatient care and was an especially large contributor to increases in spending on retail pharmaceuticals for diabetes and on inpatient care for low back and neck, among others. The present study differs from prior studies in its ability to separate increases in service utilization from service price and intensity and to assess these relationships independently for each health condition and type of care.

### AT: misinfo – 1nc

#### misinfo nuq—millions of americans think trump won the election and are moving to platforms like parler—ZERO evidence connects google worker contracts to their content moderation policies. antitrust key card is not about the aff.

### AT: AI – 1nc

#### there are twenty two thousand shrunk words in this internal link card—obvi no connection between where this book talks about antitrust and the like four words they’ve highlighted about extinction.

#### No AI impact

Michael Shermer 17. Publisher of Skeptic magazine, a monthly columnist for Scientific American, and a Presidential Fellow at Chapman University. “Why Artificial Intelligence Is Not an Existential Threat” April 2017. Skeptic. Vol. 22, no. 2, pp. 29-35.

Why AI is not an Existential Threat First, most AI doomsday prophecies are grounded in the false analogy between human nature and computer nature, or natural intelligence and artificial intelligence. We are thinking machines, but natural selection also designed into us emotions to shortcut the thinking process because natural intelligences are limited in speed and capacity by the number of neurons that can be crammed into a skull that has to pass through a pelvic opening at birth, whereas artificial intelligence need not be so restricted. We don't need to compute the caloric value of foods, for example, we just feel hungry. We don't need to calculate the waist-to-hip ratio of women or the shoulder-to-waist ratio of men in our quest for genetically healthy potential mates; we just feel attracted to someone and mate with them. We don't need to work out the genetic cost of raising someone else's offspring if our mate is unfaithful; we just feel jealous. We don't need to figure the damage of an unfair or non-reciprocal exchange with someone else; we just feel injustice and desire revenge. Emotions are proxies for getting us to act in ways that lead to an increase in reproductive success, particularly in response to threats faced by our Paleolithic ancestors. Anger leads us to strike out, fight back, and defend ourselves against danger. Fear causes us to pull back, retreat, and escape from risks. Disgust directs us to push out, eject, and expel that which is bad for us. Computing the odds of danger in any given situation takes too long. We need to react instantly. Emotions shortcut the information processing power needed by brains that would otherwise become bogged down with all the computations necessary for survival. Their purpose, in an ultimate causal sense, is to drive behaviors toward goals selected by evolution to enhance survival and reproduction. AIs -- even AGIs and ASIs -- will have no need of such emotions and so there would be no reason to program them in unless, say, terrorists chose to do so for their own evil purposes. But that's a human nature problem, not a computer nature issue. To believe that an ASI would be "evil" in any emotional sense is to assume a computer cognition that includes such psychological traits as acquisitiveness, competitiveness, vengeance, and bellicosity, which seem to be projections coming from the mostly male writers who concoct such dystopias, not features any programmer would bother including, assuming that it could even be done. What would it mean to program an emotion into a computer? When IBM's Deep Blue defeated chess master Garry Kasparov in 1997, did it feel triumphant, vengeful, or bellicose? Of course not. It wasn't even "aware" -- in the human sense of self-conscious knowledge -- that it was playing chess, much less feeling nervous about possibly losing to the reigning world champion (which it did in the first tournament played in 1996). In fact, toward the end of the first game of the second tournament, on the 44th move, Deep Blue made a legal but incomprehensible move of pushing its rook all the way to the last row of the opposition side. It accomplished nothing offensively or defensively, leading Kasparov to puzzle over it out of concern that he was missing something in the computer's strategy. It turned out to be an error in Deep Blue's programming that led to this fail-safe default move. It was a bug that Kasparov mistook as a feature, and as a result some chess experts contend it led him to be less confident in his strategizing and to second-guess his responses in the subsequent games. It even led him to suspect foul play and human intervention behind Deep Blue, and this paranoia ultimately cost him the tournamentt.[ 13] Computers don't get paranoid, the HAL 9000 computer in 2001 notwithstanding. Or consider Watson, the IBM computer built by David Ferrucci and his team of IBM research scientists tasked with designing an AI that could rival human champions at the game of Jeopardy! This was a far more formidable challenge than Deep Blue faced because of the prerequisite to understand language and the often multiple meanings of words, not to mention needing an encyclopedic knowledge of trivia (Watson had access to Wikipedia for this). After beating the all-time greatest Jeopardy! champions Ken Jennings and Brad Rutter in 2011, did Watson feel flushed with pride after its victory? Did Watson even know that it won Jeopardy!? I put the question to none other than Ferrucci himself at a dinner party in New York in conjunction with the 2011 Singularity Summit. His answer surprised me: "Yes, Watson knows it won Jeopardy!" I was skeptical. How could that be, since such self-awareness is not yet possible in computers? "Because I told it that it won," he replied with a wry smile. Sure, and you could even program Watson or Deep Blue to vocalize a Howard Dean-like victory scream when it wins, but that is still a far cry from a computer feeling triumphant. This brings to mind the "hard problem" of consciousness -- if we don't understand how this happens in humans, how could we program it into computers? As Steven Pinker elucidated in his answer to the 2015 Edge Question on what to think about machines that think, "AI dystopias project a parochial alpha-male psychology onto the concept of intelligence. They assume that superhumanly intelligent robots would develop goals like deposing their masters or taking over the world." It is equally possible, Pinker suggests, that "artificial intelligence will naturally develop along female lines: fully capable of solving problems, but with no desire to annihilate innocents or dominate the civilization."[ 14] So the fear that computers will become emotionally evil are unfounded, because without the suite of these evolved emotions it will never occur to AIs to take such actions against us. What about an ASI inadvertently causing our extinction by turning us into paperclips, or tiling the entire Earth's surface with solar panels? Such scenarios imply yet another emotion -- the feeling of valuing or wanting something. As the science writer Michael Chorost adroitly notes, when humans resist an AI from undertaking any form of global tiling, it "will have to be able to imagine counteractions and want to carry them out." Yet, "until an AI has feelings, it's going to be unable to want to do anything at all, let alone act counter to humanity's interests and fight off human resistance." Further, Chorost notes, "the minute an A.I. wants anything, it will live in a universe with rewards and punishments -- including punishments from us for behaving badly. In order to survive in a world dominated by humans, a nascent A.I. will have to develop a humanlike moral sense that certain things are right and others are wrong. By the time it's in a position to imagine tiling the Earth with solar panels, it'll know that it would be morally wrong to do so."[ 15] From here Chorost builds on an argument made by Peter Singer in The Expanding Circle (and Steven Pinker in The Better Angels of Our Nature[ 16] that I also developed in The Moral Arc[ 17] and Robert Wright explored in Nonzero[ 18]), and that is the propensity for natural intelligence to evolve moral emotions that include reciprocity, cooperativeness, and even altruism. Natural intelligences such as ours also includes the capacity to reason, and once you are on Singer's metaphor of the "escalator of reason" it can carry you upward to genuine morality and concerns about harming others. "Reasoning is inherently expansionist. It seeks universal application," Singer notes.[ 19] Chorost draws the implication: "AIs will have to step on the escalator of reason just like humans have, because they will need to bargain for goods in a human-dominated economy and they will face human resistance to bad behavior."[ 20] Finally, for an AI to get around this problem it would need to evolve emotions on its own, but the only way for this to happen in a world dominated by the natural intelligence called humans would be for us to allow it to happen, which we wouldn't because there's time enough to see it coming. Bostrom's "treacherous turn" will come with road signs ahead warning us that there's a sharp bend in the highway with enough time for us to grab the wheel. Incremental progress is what we see in most technologies, including and especially AI, which will continue to serve us in the manner we desire and need. Instead of Great Leap Forward or Giant Fall Backward, think Small Steps Upward. As I proposed in The Moral Arc, instead of Utopia or dystopia, think protopia, a term coined by the futurist Kevin Kelly, who described it in an Edge conversation this way: "I call myself a protopian, not a Utopian. I believe in progress in an incremental way where every year it's better than the year before but not by very much -- just a micro amount."[ 21] Almost all progress in science and technology, including computers and AI, is of a protopian nature. Rarely, if ever, do technologies lead to either Utopian or dystopian societies. Pinker agrees that there is plenty of time to plan for all conceivable contingencies and build safeguards into our AI systems. "They would not need any ponderous 'rules of robotics' or some newfangled moral philosophy to do this, just the same common sense that went into the design of food processors, table saws, space heaters, and automobiles." Sure, an ASI would be many orders of magnitude smarter than these machines, but Pinker reminds us of the AI hyperbole we've been fed for decades: "The worry that an AI system would be so clever at attaining one of the goals programmed into it (like commandeering energy) that it would run roughshod over the others (like human safety) assumes that AI will descend upon us faster than we can design fail-safe precautions. The reality is that progress in AI is hype-defyingly slow, and there will be plenty of time for feedback from incremental implementations, with humans wielding the screwdriver at every stage."[ 22] Former Google CEO Eric Schmidt agrees, responding to the fears expressed by Hawking and Musk this way: "Don't you think the humans would notice this, and start turning off the computers?" He also noted the irony in the fact that Musk has invested $1 billion into a company called OpenAI that is "promoting precisely AI of the kind we are describing."[ 23] Google's own DeepMind has developed the concept of an AI off-switch, playfully described as a "big red button" to be pushed in the event of an attempted AI takeover. "We have proposed a framework to allow a human operator to repeatedly safely interrupt a reinforcement learning agent while making sure the agent will not learn to prevent or induce these interruptions," write the authors Laurent Orseau from DeepMind and Stuart Armstrong from the Future of Humanity Institute, in a paper titled "Safely Interruptible Agents." They even suggest a precautionary scheduled shutdown every night at 2 AM for an hour so that both humans and AI are accustomed to the idea. "Safe interruptibility can be useful to take control of a robot that is misbehaving and may lead to irreversible consequences, or to take it out of a delicate situation, or even to temporarily use it to achieve a task it did not learn to perform or would not normally receive rewards for this."[ 24] As well, it is good to keep in mind that artificial intelligence is not the same as artificial consciousness. Thinking machines may not be sentient machines. Finally, Andrew Ng of Baidu responded to Elon Musk's ASI concerns by noting (in a jab at the entrepreneur's ambitions for colonizing the red planet) it would be "like worrying about overpopulation on Mars when we have not even set foot on the planet yet."[ 25] Both Utopian and dystopian visions of AI are based on a projection of the future quite unlike anything history has given us. Yet, even Ray Kurzweil's "law of accelerating returns," as remarkable as it has been has nevertheless advanced at a pace that has allowed for considerable ethical deliberation with appropriate checks and balances applied to various technologies along the way. With time, even if an unforeseen motive somehow began to emerge in an AI we would have the time to reprogram it before it got out of control. That is also the judgment of Alan Winfield, an engineering professor and co-author of the Principles of Robotics, a list of rules for regulating robots in the real world that goes far beyond Isaac Asimov's famous three laws of robotics (which were, in any case, designed to fail as plot devices for science fictional narratives).26 Winfield points out that all of these doomsday scenarios depend on a long sequence of big ifs to unroll sequentially: "If we succeed in building human equivalent AI and if that AI acquires a full understanding of how it works, and if it then succeeds in improving itself to produce super-intelligent AI, and if that super-AI, accidentally or maliciously, starts to consume resources, and if we fail to pull the plug, then, yes, we may well have a problem. The risk, while not impossible, is improbable."[ 27]

# 2NC

### Impact

#### Inequality controls uniqueness for every impact – causes economic collapse, environmental disaster, and inflames every nuclear dyad .

Mathew Maavak 21, Author at Atlas Institute for International Affairs, external researcher (PLATBIDAFO) at the Kazimieras Simonavicius University in Vilnius, Lithuania, “Horizon 2030: Will Emerging Risks Unravel Our Global Systems?,” Salus Journal, Vol. 9, No. 1, April 2021, pp 2-17

But what exactly is a global system? Our planet itself is an autonomous and selfsustaining mega-system, marked by periodic cycles and elemental vagaries. Human activities within however are not system isolates as our banking, utility, farming, healthcare and retail sectors etc. are increasingly entwined. Risks accrued in one system may cascade into an unforeseen crisis within and/or without (Choo, Smith & McCusker, 2007). Scholars call this phenomenon “emergence”; one where the behaviour of intersecting systems is determined by complex and largely invisible interactions at the substratum (Goldstein, 1999; Holland, 1998).

The ongoing COVID-19 pandemic is a case in point. While experts remain divided over the source and morphology of the virus, the contagion has ramified into a global health crisis and supply chain nightmare. It is also tilting the geopolitical balance. China is the largest exporter of intermediate products, and had generated nearly 20% of global imports in 2015 alone (Cousin, 2020). The pharmaceutical sector is particularly vulnerable. Nearly “85% of medicines in the U.S. strategic national stockpile” sources components from China (Owens, 2020).

An initial run on respiratory masks has now been eclipsed by rowdy queues at supermarkets and the bankruptcy of small businesses. The entire global population – save for major pockets such as Sweden, Belarus, Taiwan and Japan – have been subjected to cyclical lockdowns and quarantines. Never before in history have humans faced such a systemic, borderless calamity.

COVID-19 represents a classic emergent crisis that necessitates real-time response and adaptivity in a real-time world, particularly since the global Just-in-Time (JIT) production and delivery system serves as both an enabler and vector for transboundary risks. From a systems thinking perspective, emerging risk management should therefore address a whole spectrum of activity across the economic, environmental, geopolitical, societal and technological (EEGST) taxonomy. Every emerging threat can be slotted into this taxonomy – a reason why it is used by the World Economic Forum (WEF) for its annual global risk exercises (Maavak, 2019a).

As traditional forces of globalization unravel, security professionals should take cognizance of emerging threats through a systems thinking approach.

METHODOLOGY

An EEGST sectional breakdown was adopted to illustrate a sampling of extreme risks facing the world for the 2020-2030 decade. The transcendental quality of emerging risks, as outlined on Figure 1, below, was primarily informed by the following pillars of systems thinking (Rickards, 2020):

• Diminishing diversity (or increasing homogeneity) of actors in the global system (Boli & Thomas, 1997; Meyer, 2000; Young et al, 2006);

• Interconnections in the global system (Homer-Dixon et al, 2015; Lee & Preston, 2012);

• Interactions of actors, events and components in the global system (Buldyrev et al, 2010; Bashan et al, 2013; Homer-Dixon et al, 2015); and

• Adaptive qualities in particular systems (Bodin & Norberg, 2005; Scheffer et al, 2012)

Since scholastic material on this topic remains somewhat inchoate, this paper buttresses many of its contentions through secondary (i.e. news/institutional) sources.

ECONOMY

According to Professor Stanislaw Drozdz (2018) of the Polish Academy of Sciences, “a global financial crash of a previously unprecedented scale is highly probable” by the mid-2020s. This will lead to a trickle-down meltdown, impacting all areas of human activity.

The economist John Mauldin (2018) similarly warns that the “2020s might be the worst decade in US history” and may lead to a Second Great Depression. Other forecasts are equally alarming. According to the International Institute of Finance, global debt may have surpassed $255 trillion by 2020 (IIF, 2019). Yet another study revealed that global debts and liabilities amounted to a staggering $2.5 quadrillion (Ausman, 2018). The reader should note that these figures were tabulated before the COVID-19 outbreak.

The IMF singles out widening income inequality as the trigger for the next Great Depression (Georgieva, 2020). The wealthiest 1% now own more than twice as much wealth as 6.9 billion people (Coffey et al, 2020) and this chasm is widening with each passing month. COVID-19 had, in fact, boosted global billionaire wealth to an unprecedented $10.2 trillion by July 2020 (UBS-PWC, 2020). Global GDP, worth $88 trillion in 2019, may have contracted by 5.2% in 2020 (World Bank, 2020).

As the Greek historian Plutarch warned in the 1st century AD: “An imbalance between rich and poor is the oldest and most fatal ailment of all republics” (Mauldin, 2014). The stability of a society, as Aristotle argued even earlier, depends on a robust middle element or middle class. At the rate the global middle class is facing catastrophic debt and unemployment levels, widespread social disaffection may morph into outright anarchy (Maavak, 2012; DCDC, 2007).

Economic stressors, in transcendent VUCA fashion, may also induce radical geopolitical realignments. Bullions now carry more weight than NATO’s security guarantees in Eastern Europe. After Poland repatriated 100 tons of gold from the Bank of England in 2019, Slovakia, Serbia and Hungary quickly followed suit.

According to former Slovak Premier Robert Fico, this erosion in regional trust was based on historical precedents – in particular the 1938 Munich Agreement which ceded Czechoslovakia’s Sudetenland to Nazi Germany. As Fico reiterated (Dudik & Tomek, 2019):

“You can hardly trust even the closest allies after the Munich Agreement… I guarantee that if something happens, we won’t see a single gram of this (offshore-held) gold. Let’s do it (repatriation) as quickly as possible.” (Parenthesis added by author).

President Aleksandar Vucic of Serbia (a non-NATO nation) justified his central bank’s gold-repatriation program by hinting at economic headwinds ahead: “We see in which direction the crisis in the world is moving” (Dudik & Tomek, 2019). Indeed, with two global Titanics – the United States and China – set on a collision course with a quadrillions-denominated iceberg in the middle, and a viral outbreak on its tip, the seismic ripples will be felt far, wide and for a considerable period.

A reality check is nonetheless needed here: Can additional bullions realistically circumvallate the economies of 80 million plus peoples in these Eastern European nations, worth a collective $1.8 trillion by purchasing power parity? Gold however is a potent psychological symbol as it represents national sovereignty and economic reassurance in a potentially hyperinflationary world. The portents are clear: The current global economic system will be weakened by rising nationalism and autarkic demands. Much uncertainty remains ahead. Mauldin (2018) proposes the introduction of Old Testament-style debt jubilees to facilitate gradual national recoveries. The World Economic Forum, on the other hand, has long proposed a “Great Reset” by 2030; a socialist utopia where “you’ll own nothing and you’ll be happy” (WEF, 2016).

In the final analysis, COVID-19 is not the root cause of the current global economic turmoil; it is merely an accelerant to a burning house of cards that was left smouldering since the 2008 Great Recession (Maavak, 2020a). We also see how the four main pillars of systems thinking (diversity, interconnectivity, interactivity and “adaptivity”) form the mise en scene in a VUCA decade.

ENVIRONMENTAL

What happens to the environment when our economies implode? Think of a debt-laden workforce at sensitive nuclear and chemical plants, along with a concomitant surge in industrial accidents? Economic stressors, workforce demoralization and rampant profiteering – rather than manmade climate change – arguably pose the biggest threats to the environment. In a WEF report, Buehler et al (2017) made the following pre-COVID-19 observation:

The ILO estimates that the annual cost to the global economy from accidents and work-related diseases alone is a staggering $3 trillion. Moreover, a recent report suggests the world’s 3.2 billion workers are increasingly unwell, with the vast majority facing significant economic insecurity: 77% work in part-time, temporary, “vulnerable” or unpaid jobs.

Shouldn’t this phenomenon be better categorized as a societal or economic risk rather than an environmental one? In line with the systems thinking approach, however, global risks can no longer be boxed into a taxonomical silo. Frazzled workforces may precipitate another Bhopal (1984), Chernobyl (1986), Deepwater Horizon (2010) or Flint water crisis (2014). These disasters were notably not the result of manmade climate change. Neither was the Fukushima nuclear disaster (2011) nor the Indian Ocean tsunami (2004). Indeed, the combustion of a long-overlooked cargo of 2,750 tonnes of ammonium nitrate had nearly levelled the city of Beirut, Lebanon, on Aug 4 2020. The explosion left 204 dead; 7,500 injured; US$15 billion in property damages; and an estimated 300,000 people homeless (Urbina, 2020). The environmental costs have yet to be adequately tabulated.

Environmental disasters are more attributable to Black Swan events, systems breakdowns and corporate greed rather than to mundane human activity.

Our JIT world aggravates the cascading potential of risks (Korowicz, 2012). Production and delivery delays, caused by the COVID-19 outbreak, will eventually require industrial overcompensation. This will further stress senior executives, workers, machines and a variety of computerized systems. The trickle-down effects will likely include substandard products, contaminated food and a general lowering in health and safety standards (Maavak, 2019a). Unpaid or demoralized sanitation workers may also resort to indiscriminate waste dumping. Many cities across the United States (and elsewhere in the world) are no longer recycling wastes due to prohibitive costs in the global corona-economy (Liacko, 2021).

Even in good times, strict protocols on waste disposals were routinely ignored. While Sweden championed the global climate change narrative, its clothing flagship H&M was busy covering up toxic effluences disgorged by vendors along the Citarum River in Java, Indonesia. As a result, countless children among 14 million Indonesians straddling the “world’s most polluted river” began to suffer from dermatitis, intestinal problems, developmental disorders, renal failure, chronic bronchitis and cancer (DW, 2020). It is also in cauldrons like the Citarum River where pathogens may mutate with emergent ramifications.

On an equally alarming note, depressed economic conditions have traditionally provided a waste disposal boon for organized crime elements. Throughout 1980s, the Calabria-based ‘Ndrangheta mafia – in collusion with governments in Europe and North America – began to dump radioactive wastes along the coast of Somalia. Reeling from pollution and revenue loss, Somali fisherman eventually resorted to mass piracy (Knaup, 2008).

The coast of Somalia is now a maritime hotspot, and exemplifies an entwined form of economic-environmental-geopolitical-societal emergence. In a VUCA world, indiscriminate waste dumping can unexpectedly morph into a Black Hawk Down incident. The laws of unintended consequences are governed by actors, interconnections, interactions and adaptations in a system under study – as outlined in the methodology section.

Environmentally-devastating industrial sabotages – whether by disgruntled workers, industrial competitors, ideological maniacs or terrorist groups – cannot be discounted in a VUCA world. Immiserated societies, in stark defiance of climate change diktats, may resort to dirty coal plants and wood stoves for survival. Interlinked ecosystems, particularly water resources, may be hijacked by nationalist sentiments. The environmental fallouts of critical infrastructure (CI) breakdowns loom like a Sword of Damocles over this decade.

GEOPOLITICAL

The primary catalyst behind WWII was the Great Depression. Since history often repeats itself, expect familiar bogeymen to reappear in societies roiling with impoverishment and ideological clefts. Anti-Semitism – a societal risk on its own – may reach alarming proportions in the West (Reuters, 2019), possibly forcing Israel to undertake reprisal operations inside allied nations. If that happens, how will affected nations react? Will security resources be reallocated to protect certain minorities (or the Top 1%) while larger segments of society are exposed to restive forces? Balloon effects like these present a classic VUCA problematic.

Contemporary geopolitical risks include a possible Iran-Israel war; US-China military confrontation over Taiwan or the South China Sea; North Korean proliferation of nuclear and missile technologies; an India-Pakistan nuclear war; an Iranian closure of the Straits of Hormuz; fundamentalist-driven implosion in the Islamic world; or a nuclear confrontation between NATO and Russia. Fears that the Jan 3 2020 assassination of Iranian Maj. Gen. Qasem Soleimani might lead to WWIII were grossly overblown. From a systems perspective, the killing of Soleimani did not fundamentally change the actor-interconnection-interactionadaptivity equation in the Middle East. Soleimani was simply a cog who got replaced.

### 2NC – AT: Do Both

#### The counterplan and the plan are mutually exclusive. The plan nullifies the application of the counterplan because unconscionability is only applicable in instances where a contract remains valid.

Curtis E. A. Karnow, Judge of the California Superior Court (county of San Francisco), ’21, . 1. Curtis Karnow, Litigating California Contracts, 17 HASTINGS"The Internet and Contract Formation," Berkeley Business Law Journal 18, no. 2 (2021): 135-156

But the classic unconscionability factors do not reach the issues raised by earlier portions of this section for a far more basic reason. This sort of unconscionability has nothing to do with contract formation. Indeed, this unconscionability assumes the existence of a valid contract. Unconscionability cannot be used to argue that, for example, there was no mutual intent; it cannot be wielded to defeat the making of the contract. "The doctrine of unconscionability is a defense to the enforcement of a contract or a term thereof.1 26 *No such defense arises without a contract."*127 The party seeking to prove the existence of a contract, or to enforce it, does not have to prove the deal is conscionable. This is true even though unconscionability looks at "contract formation."12 8 The circumstances of formation are simply some of the circumstances-and there can be many, many relevant circumstances 12 9 -which pertain to unconscionability, but not to whether there is a contract in the first instance.

#### The perm limits the counterplans deterring effect. Including antitrust damages and criminal charges shifts the counterplan from penalty to nonenforcement, because antitrust law includes antitrust remedies. To create norms and deterrence, unconscionability must be applied affirmatively, not defensively.

Brady Williams, J.D., University of California, Berkeley, School of Law, ’19, "Unconscionability as a Sword: The Case for an Affirmative Cause of Action," California Law Review 107, no. 6 (December 2019): 2015-2070

Numerous scholars have noted the limited deterring effect of nonenforcement. As Professor W. David Slawson explained in his book Binding Promises: The Late 20th-Century Reformation of Contract Law, nonenforcement provides an important safeguard against oppressive contracts, but it provides little disincentive for businesses to refrain from contractual overreaching in the first place:

Unconscionability has been a valuable defense against egregious unfairness, judging from the frequency with which it has been used, but it has had no discernible effect on business conduct. There is no evidence that producers against whom unconscionability defenses have been successful have removed the offending provisions from their contracts as a result. The reason, presumably, is that including possibly unconscionable provisions in a contract is a no-lose gamble. The producer gains the advantages the provisions provide if the consumer does not contest them or if the consumer does contest them but the court disagrees, and the producer is no worse off than it would have been if it had not included the provisions if the consumer contests them and the court agrees. The burden is on the consumer to recognize the unconscionability and to convince the court that it is the case, and the producer loses nothing for having tried to enforce the provisions in the first place.63

And as Professor Margaret J. Radin similarly put it in her book Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law:

[E]ven if a firm is less than confident that a court would enforce its clauses if they were challenged, it might reason that the attempt was worth trying: 'It can't hurt to stick this in. It might prevent someone from suing us, if indeed someone were to read it. And nothing bad is going to happen to us if we use an unenforceable term. At worst, some court will declare it unenforceable, but it will still probably work against other recipients. Might as well give it a try.'"

Conversely, if firms knew that consumers could recover payments already made under unconscionable contracts by asserting the doctrine affirmatively, businesses would be disinclined to overreach in their contract to begin with.65

#### At the least the perm generates uncertainty, which deters plaintiffs from asserting their rights under the doctrine.

Brady Williams, J.D., University of California, Berkeley, School of Law, ’19, "Unconscionability as a Sword: The Case for an Affirmative Cause of Action," California Law Review 107, no. 6 (December 2019): 2015-2070

An exclusively defensive unconscionability doctrine also fosters inefficiency and perverse incentives. For example, the district court in Williams v. Enterprise Holdings, Inc. explained its denial of an affirmative unconscionability claim by writing, "to prevail in this manner Plaintiff would have needed to refuse payment, breached the contract, and then asserted unconscionability as a defense if sued ... for refusing payment." 7 Yet, forcing consumers into such a precarious position for the mere chance to petition a court for relief is fundamentally unfair. For example, while debtors refuse payment and wait to be sued, they may face adverse credit reporting and continued accrual of interest and fees. Even worse, consumers may even lose their homes while waiting to assert the doctrine defensively. 58 And those who intentionally breach to risk this "wait-and-see" strategy 59 will still face the high burden60 of proving their unconscionability claim if and when they are ultimately sued. Such uncertainty is sure to dissuade many from bothering to challenge their contracts as unconscionable in the first place. It is wholly unreasonable to expect consumers to bear such significant risks to simply participate in a remedial system that is already largely stacked in favor of opponents who, if they are repeat players, likely have economies of scale and a larger incentive to seek a favorable ruling on the specific issue.6 1

Limiting the doctrine of unconscionability to nonenforcement also fails to adequately deter unconscionable conduct in the marketplace.6 2 Many consumers simply do not have the time, energy, or resources to defend themselves against firms' countless devices of contractual abuse. The defensive-only interpretation of the doctrine assures businesses that they will be free from liability under a theory of unconscionability as soon as the firm procures payment or performance from the consumer. This produces perverse incentives for businesses to draft and quickly execute unconscionable contracts.

#### The permutation makes unconscionability prudentially moot.

Federal Courts, ‘07, "Mootness: An Explanation of the Justiciability Doctrine," No Publication, https://www.everycrsreport.com/reports/RS22599.html

Prudential Mootness

Equitable, or prudential mootness, has been referred to as the "cousin of the mootness doctrine" and described as relating to the court's discretion in matters of remedy and judicial administration. Unlike Article III mootness, [it] address[es] not the power to grant relief but the court's discretion in the exercise of that power. In some circumstances, a controversy, not actually moot, is so attenuated that considerations of prudence and comity for coordinate branches of government counsel the court to stay its hand, and to withhold relief it has the power to grant.16

Thus, while a case may not be moot for failure to meet Article III's requirements, a court may nevertheless "treat [the case] as moot for prudential reasons" and decline to exercise judicial power in the case.17

The doctrine of prudential mootness is often applied in cases where the federal court declines to grant the plaintiff's request for declaratory judgment or injunctive relief because the defendant "has already changed or is in the process of changing its policies or where it appears that any repeat of the actions in question is otherwise highly unlikely."18 The Supreme Court has explained that the burden on the party asking the court to dismiss a case on prudential mootness grounds is a "heavy one," as the movant (usually the defendant) must "demonstrate that there is no reasonable expectation that the wrong will be repeated."19

#### Applying the counterplan’s remedy for unconscionable contracts is key. Ruling the CP illegal but not applying the unconscionability doctrine’s remedy makes it too difficult to send a signal.

Brady Williams, J.D., University of California, Berkeley, School of Law, ’19, "Unconscionability as a Sword: The Case for an Affirmative Cause of Action," California Law Review 107, no. 6 (December 2019): 2015-2070

It is vital that courts and legislatures equip consumers with an arsenal of effective remedies to deter and rectify unconscionable contractual overreach. Indeed, courts have long professed a commitment to the universal maxim that "[f]or every wrong there is a remedy" 3 0 -and for good reason. Remedies breathe life and meaning into otherwise abstract and unrealized rights. Remedies hold us to our ideals. A right without a remedy is simply a statement of our values. But the sincerity of those values is in doubt unless we provide an effective means to realize those rights. By providing a vehicle through which we vindicate our substantive rights, remedies form a foundational element of the rule of law.3 1 But as Dean Roscoe Pound pointed out over 100 years ago, "with respect to the everyday rights and wrongs of the great majority of an urban community, the machinery whereby rights are secured practically defeats rights by making it impracticable to assert them when they are infringed."3 2 Despite many calls over the years to expand consumers' access to private remedies, 33 there is still much work to be done. Reviving the unconscionability doctrine is a good place to start.3 4

UNCONSCIONABILITY AS A SHIELD: THE INADEQUACY OF NONENFORCEMENT

Unconscionability has been widely invoked as a social safety net to protect consumers from the inequities of rigid, formalist contract enforcement. 35 By providing the defensive remedy of nonenforcement, unconscionability equips courts with a tool to "catch cases of contractual injustice that slip by formulaic contract defenses." 36

But the prevailing view of unconscionability as solely a defense unjustly enriches wrongdoers and cripples the doctrine's remedial potential.3 7 This unwarranted denial of affirmative unconscionability claims defies logic, violates basic principles of fairness and moral responsibility, promotes inefficiency, and fails to adequately deter contractual overreach.

Justice Benjamin Cardozo wrote in The Nature of the Judicial Process that "the principle that no man should profit from his own inequity or take advantage of his own wrong" is a principle with "roots deeply fastened in universal sentiments of justice."38 But such unjust enrichment is precisely what occurs when the state denies an affirmative unconscionability claim.

Indeed, numerous restitution scholars have observed the link between the doctrines of unconscionability and unjust enrichment.39 Many have suggested that, if an unconscionable contract is fully executed, unjust enrichment necessarily results.4 0 In such cases, scholars argue, an affirmative restitution claim may remedy the unjust enrichment.4 1 For example, in his essay Unconscionable Enrichment?, Professor Prince Saprai argues that "unconscionability and its cognate exploitation may offer a very plausible moral explanation of the duty to make restitution, in at least some cases of unjust enrichment."42 Under Saprai's analysis, the inherent exploitation of unconscionable contracts constitutes a "wrongdoing" that, in certain cases, triggers a duty to make restitution for unjust enrichment.43 Professor Michael Lobban similarly described how the action of unjust enrichment in English common law historically allowed restitution "when a plaintiff's case fell within one of the situations in which the common law judges determined that the retention of money was unconscionable."44 Thus, there is ample support, both in the common law and in scholarship, for allowing affirmative unconscionability claims.

By denying such claims, the state grants firms an entitlement to be free from liability for unconscionable contracts, 45 despite simultaneously declaring such contracts unlawful. 46 This paradoxical regime calls into question courts' fidelity to the prohibition against unconscionable contracts in the first place. When the state declares unconscionable contracts illegal, it confers a duty upon drafters to avoid imposing such contracts. 47 As Wesley Hohfeld noted long ago, the failure to fulfill one's duty to another confers upon the victim a right to an affirmative claim against the offending party.48 But when a court denies an affirmative unconscionability claim, it immunizes overreaching drafters from this duty and denies consumers their right to be free from unconscionable obligations. 4 9

### 2NC – AT: Do Counterplan

#### There are three federal “core antitrust laws” – the counterplan expands none. Prefer contextual evidence defining conjunctive phrases.

Sonia Kuester Pfaffenroth et al, Justin Hedge and Monique N. Boyce Arnold & Porter, ‘21 “ A Comparison Of Proposed Antitrust Legislation In 2021: Federal And New York State”

At the federal level, there are three core antitrust laws: (1) the Sherman Act, in which Section 1 outlaws "every contract, combination, or conspiracy in [unreasonable] restraint of trade," and Section 2 outlaws any "monopolization, attempted monopolization, or conspiracy or combination to monopolize";1 (2) the Federal Trade Commission Act, which prohibits "unfair methods of competition" and "unfair or deceptive acts or practices";2 and (3) Section 7 of the Clayton Act, which prohibits mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly."3 Criminal violations of the Sherman Act carry a maximum penalty of a $100 million fine for corporations, and a maximum penalty of 10 years in prison and a $1 million fine for individuals. A prevailing plaintiff in a civil suit can recover treble damages and attorneys' fees. But federal law currently does not provide for civil penalties when the government brings an antitrust case, only injunctive relief.

#### “Scope” –

#### (A) The scope of law refers to written law, not its implementation by other statutes.

Nicholson, Michael W.,\* Bureau of Economics, Federal Trade Commission, ‘4, Quantifying Antitrust Regimes (February 5, 2004). FTC Bureau of Economics Working Papers No. 267, Available at SSRN: https://ssrn.com/abstract=531124. or http://dx.doi.org/10.2139/ssrn.531124

4 Quantifying Antitrust Laws

A means of quantification of antitrust regimes that has proven useful for other forms of governance, including intellectual property rights, is based on an index of national laws for that policy. In this section, I introduce an Antitrust Law Index that maps the presence of laws on the book into a measure of competition regimes. The methodology employed for the Antitrust Law Index follows similar indices that measure the relative value of intellectual property rights. 24 The practice involves assigning binomial scores for the presence of particular laws in a jurisdiction. I determine a set of criteria for laws, and then register the presence of each criterion for a selection of countries. Summing the individual components yields a total score.

The analysis focuses on the determinants of the written law, and less on the actual implementation of the law. 25 A quantifiable description of laws is a first step towards understanding the impact of those laws. Moreover, the motivation for adoption of the laws is an interesting question in itself. Most countries in Latin America passed antitrust laws in the early 1960’s, and Venezuela as early as 1919, but did not actively enforce those laws until the early 1990’s. What was the push in the 1960’s to adopt the laws? Countries are currently drafting antitrust legislation by the score, but very little analytical research investigates their effectiveness. What are the conditions currently in place to encourage this legislation? This expansion could be due to influence from multilateral organizations like the WTO, the pressures of an integrating global economy, regional political economy trends, or any number of other explanations. The Antitrust Law Index can be applied to discerning these trends.26

Criteria

The analysis focuses on the causes of the written law and the legal process, and less on the actual implementation of the law. Three broad dimensions of competition policy are incorporated – Regime Structure, Merger Policy, and Anticompetitive Practices. Each of the dimensions breaks down into multiple subcategories, with each subcategory assigned a point value. Some of the subcategories are mutually exclusive, such as mandatory versus voluntary notification requirements for mergers. Table 5 displays these criteria and the unit scale.

The Regime Structure includes the categories of scope, structure, and available remedies. This dimension gives an indication of the political and legal capacity for the antitrust regime. Merger Policy includes notification, assessment criteria, and rights of private enforcement. Dominance and Restrictive Trade Practices include related aspects of anticompetitive practices. These categories intend to describe a wide breadth of competition policy, with an ensuing index that captures the strength of national laws. The first three categories in Table 5 relate to the Regime Structure. The scope indicates the breadth to which the laws apply. In particular, this covers whether the laws empower coverage for activities by foreign firms with activity that affects consumers in the domestic market. The criteria for a threshold for a response may also indicate the scope of laws, but currently it appears not to be directly comparable across countries. Stronger competition policy could also be indicated by the nature of the remedies or sanctions available. Units are awarded for the power to fine, to imprison, and to force divestiture.

#### (B) The scope of antitrust law is different than the scope of antitrust – the former refers to the substantive provisions of law.

Spencer Weber Waller, John Paul Stevens Chair in Competition Law, Loyola University Chicago School of Law, ’20, “The Omega Man or the Isolation of U.S. Antitrust Law,” https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1682&context=facpubs

The United States defines the antitrust laws as the substantive provisions of the Sherman, Clayton, and Federal Trade Commission acts along with a small number of subsidiary statutes. This limits the scope of antitrust law to agreements between competitors, monopolization law, and the review of potentially harmful mergers and acquisitions. In contrast, the EU and other jurisdictions have led the world to a broader understanding of the meaning and reach of competition law that is only partially understood or appreciated in the United States.245 This Section explores that broader vision of competition including market studies and investigations; prohibitions against public anticompetitive conduct; state aids; and the use of public interest factors normally not part of the U.S. vision of the antitrust enterprise.

### 2NC – AT: Intrinsic Perm [Plan + “Define Unconscionable Behavior”]

#### Unconscionability must be applied with specificity – the supreme court agrees.

Jonathan L. Serafini, JD Candidate @ Wash U, ’13, ‘"The Deception of Conception: Saving Unconscionability after AT&T Mobility LLC v. Conception," Gonzaga Law Review 48, no. 1 (2012-2013): 187-[vi]

In Rent-A-Center,67 the Supreme Court outlined how unconscionability must be pleaded in order to establish a prima facie case.6 s Unconscionability must be pleaded with specificity69 because an arbitration agreement can be separately enforced even in cases where the entire contract or provisions therein have been found separately unconscionable.7 ° In 2007, Antonio Jackson filed an employment discrimination lawsuit against Rent-A-Center, his former employer. 71 Rent-A-Center filed a motion under the FAA to dismiss the lawsuit and to compel arbitration based on a 72 clause called the Mutual Agreement to Arbitrate Claims (Agreement). In addition to compelling arbitration, the Agreement provided that: The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.73

Jackson argued that the Agreement was unconscionable. 74 Rent-A-Center countered that the issue of unconscionability was an issue for the arbitrator, not the court.75 The Supreme Court held that an agreement to arbitrate a gateway issue, such as unconscionability, is an additional agreement that is enforceable under the FAA.76 The Court found that the delegation provision within the Agreement must still be valid under Section 2 of the FAA.77 According to the Court, two types of challenges are valid under Section 2. First, challenges to the validity of the 78 arbitration agreement itself are valid. Second, challenges to the entire contract are valid, "either on a ground that directly affects the entire agreement (e.g., the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid., 79 In regards to the second permissible challenge, the Court reasoned that "[Section] 2 states that a 'written provision' 'to settle by arbitration a controversy' is 'valid, irrevocable, and enforceable' without mention of the validity of the contract in which it is contained." 80 Therefore, the unconscionability of an arbitration agreement cannot be challenged based on the unconscionability of the contract as a whole, or another provision of the contract, because a court can separately enforce an agreement to arbitrate. 81 Unconscionability must be pled with specificity as to the specific arbitration agreement at issue.82 Since Jackson failed to challenge the delegation provision within the Agreement with specificity, the Supreme Court found for Rent-ACenter.

#### Establishing a specific instance of vulnerability is key to generate certainty – impacted above on “do both.”

Jodi Gardner, Lecturer,Cambridge Law Faculty, ’21, r. The Modern Law Review published by John Wiley & Sons Ltd (2021) 84(4) MLR 874–885

The joint decision by Abella and Rowe JJ holds that inequality can be sufficient, provided it (a) arises from a weakness and (b) means that the weaker party ‘may be vulnerable to exploitation in the contracting process’.40 This creates a circular argument; the vulnerability required for a finding of unconscionability arises from the inequality of power, which then creates a vulnerability to exploitation. In rejecting the majority decision,Brown J emphasises that inequality, even substantial inequality, is not sufficient for a finding of unconscionability as a specific vulnerability is necessary.41 Côté J shared this concern, stating that a focus on inequality of power ‘would undermine private ordering and commercial certainty’.42

#### The court needs to point to a specific instance of unequal bargaining power where terms are one sided to set a precedent.

Thomas J. Stipanowich, Professor of Law @ Pepperdine, ’11, “THE THIRD ARBITRATION TRILOGY: STOLT-NIELSEN, RENT-A-CENTER, CONCEPCION AND THE FUTURE OF AMERICAN ARBITRATION” THE AMERICAN REVIEW OF INTERNATIONAL ARBITRATION [Vol. 22 2011] http://arbitrateatlanta.org/wp-content/uploads/2012/04/Stipanowich-Third-Arbiration-Trilogy-Jan-24-2012.pdf

The district court supported its decision with the conclusion that, even if the court were to have examined Jackson’s assertion of unconscionability on the merits, the argument would probably fail for lack of evidence under applicable state law.222 Like many states, Nevada requires an agreement to be “both procedurally and substantively unconscionable” – that is, combining (1) circumstances where a “party lacks a meaningful opportunity to agree to the terms because of unequal bargaining power or because the effect of the agreement is not readily understandable” with (2) “terms which are unfairly one-sided.”223 Jackson’s assertion that the plaintiff might “have to unfairly pay burdensome arbitration costs” was, the court concluded, a mere supposition that would not be substantively unconscionable and would be insufficient to invalidate an agreement.224

### 2NC – AT: No Spillover

#### Market norms and judicial follow on. 1NC Keren says that the establishment of a clear and general message would deter market participants from exploitation and encourage other courts to intervene.

#### One instance is sufficient. Instantaneous application actually improves the quality of the norm.

HiLA KEREN, Irving D. & Florence Rosenberg Professor of Law, Southwestern Law School, ’15, “LAW AND ECONOMIC EXPLOITATION IN AN ANTI-CLASSIFICATION AGE” [Vol. 42:313, 2015]

First and foremost, utilizing contract law and its existing doctrines to invalidate the contractual exploitation of vulnerability is both a natural and feasible legal response and can be instantaneously applied.20 3 As such, it would efficiently establish an explicit norm,with expressive powers, against such market behavior. 20 4 Once clearly established it can have a significant impact: many would simply obey the law for moral and/or economic reasons and the explicit existence of a legal norm would further support the already existing social norm against such behavior. 2 0

#### Using unconscionability galvanizes follow on through social cues.

Hila Keren, Professor of Law, Southwestern Law School, ’16, Guilt-Free Markets? Unconscionability, Conscience, and Emotions, 2016 BYU L. Rev. 427 (2016). Available at: https://digitalcommons.law.byu.edu/lawreview/vol2016/iss2/5

Having framed those new questions, the Article responds to them by proposing that judicial decisions condemning exploitative bargaining practices have important, unrecognized potential: to galvanize self-restraint by participating in the social cueing of conscience. The Article conceptualizes conscience as a metaphor for the dynamic interaction between changing social norms and shifting individual beliefs. It is here that we form personal normative judgments.29 Within this framework the Article envisions law as an important mediator between society and the self. If conscience is perceived “[a]s a voice straddling the inner and the outer,”30 law can operate to amplify this voice. It can assist market actors in exercising self-restraint in the face of temptation to profit from exploitation.31 As argued in this Article, the law can, for example, discourage transgression by a clear articulation of the relevant social norm, thereby reminding us that misbehavior may come with a price: the painful experience of guilt. Such a legal reminder of the prospect of guilt draws on the deep connection between conscience and the moral emotions. To appeal to the conscience is by definition not merely or even mainly a cognitive exercise. Rather, conscience, as an inner judge, reflects a dialog with our environment in which emotions are the leading form of communication. To use the words of the second epigraph, “[r]ightness and wrongness . . . are things we feel.”32

#### A small but significant success revitalizes unconscionability claims.

Babette E. Boliek, Professor of Law @ Pepperdine, ’21, “UPGRADING UNCONSCIONABILITY: A COMMONLAW ALLY FOR A DIGITAL WORLD” Maryland Law Review, Forthcoming, Available at SSRN: https://ssrn.com/abstract=3821199

As argued above, a small but significant success rate of unconscionability claims involving certain online contract terms could be a powerful ally in the protection of privacy and the defense against arbitrary and capricious changes or denial of service. Moreover, the conclusions drawn from the data set demonstrate two key points. First, use of unconscionability may be more successful in some jurisdictions than others. Second, courts may be more skeptical of certain contract terms—like arbitration clauses—than of others. To revitalize unconscionability for the digital era, it may be necessary to revitalize and refocus unconscionability for particularized concerns. And that may require legislative action.

#### The specificity of the counterplan’s mechanism to the aff generates spillover. The Court has a unique opportunity to apply unconscionability to Arbitration agreements for the first time.

Thomas J. Stipanowich, Professor of Law @ Pepperdine, ’11, “THE THIRD ARBITRATION TRILOGY: STOLT-NIELSEN, RENT-A-CENTER, CONCEPCION AND THE FUTURE OF AMERICAN ARBITRATION” THE AMERICAN REVIEW OF INTERNATIONAL ARBITRATION [Vol. 22 2011] http://arbitrateatlanta.org/wp-content/uploads/2012/04/Stipanowich-Third-Arbiration-Trilogy-Jan-24-2012.pdf

Unconscionability is the key doctrine used by courts to address due process concerns growing out of arbitration agreements in contracts of “adhesion.”168 The doctrine evolved as a means of permitting courts to police contracts for “gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party.”169 Proving unconscionability normally requires a showing of circumstances indicating an “adhesive” bargain (so-called “procedural unconscionability”) as well as unfair contract terms (“substantive unconscionability”).170 As formulated in Article 2 of the Uniform Commercial Code and the Restatement (Second) of Contracts, unconscionability affords courts considerable discretion in tailoring appropriate remedies – from invalidating a contract to narrow blue-penciling.171

Until fairly recently, judicial decisions grounded on unconscionability doctrine were few and far between.172 With the expanded use of binding arbitration provisions in consumer and employment contracts, however, unconscionability doctrine came into vogue as a means of curtailing perceived abuses of corporate power aimed at denying fundamentally fair procedures to other parties in contracts of adhesion.173 Unconscionability has been a relatively important mode174 of judicially challenging the enforceability of arbitration agreements containing unilateral arbitration clauses,175 limitations of remedies,176 class-action waivers,177 confidential arbitration requirements,178 and fee-splitting and “loser pays” schemes.179 While some courts have employed unconscionability to strike down entire arbitration agreements, others have taken a “surgical” approach, excising or reforming problematic provisions and sustaining the arbitration agreement.180 Predictably, the courts of some states, notably California, have been considerably more energetic in developing unconscionability doctrine than others.181 [\*\*Start Footnote 181\*\*181 California courts have employed unconscionability to deny enforcement to arbitration agreements on numerous occasions. In the seminal decision of Armendariz, 6 P.3d 669, the California Supreme Court used unconscionability doctrine as the basis for considering what procedural protections would be essential requisites for the arbitration of statutory discrimination claims under an employment agreement. Such elements included \*\*End Footnote 181\*\*]

Significantly, before this year the U.S. Supreme Court has never applied, or specifically addressed in a holding, the doctrine of unconscionability or similar policy grounds in the arbitration context. Aside from general hortatory dicta, it has avoided pronouncements singling out arbitration provisions in “adhesion” contracts for special treatment.

The Court has stated repeatedly that “courts should remain attuned to wellsupported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds ‘for the revocation of any contract,’”182 and has enumerated unconscionability as among the “generally applicable contract defenses” that may invalidate an arbitration agreement.183 On the other hand, the Court has never actually affirmed the denial or limited enforcement of an arbitration agreement on such grounds. Regardless of the transactional setting, the votes of a majority of justices have regularly been mustered in support of the presumption that binding arbitration is an effective surrogate for public judicial resolution of statute-based claims as well as actions at common law in the absence of clear and specific evidence to the contrary.184 In the same vein, Court majorities have repeatedly postponed a ruling on a contested issue where the matter might be deferred to initial consideration by the arbitrator(s).185 In such cases the practical result is to put off judicial consideration until after arbitration hearings, at which time the relevant issues will be addressed within the relatively narrow confines of the statutory grounds for vacatur of award.186 These and other realities raise legitimate concerns about the Court’s willingness to embrace unconscionability doctrine to any meaningful degree.187

### AT Democracy

#### Inequality spurs populist backlash.

Flaherty & Rogowski ’21 [Thomas; PhD Candidate and NSF Graduate Fellow @ University of California – San Diego; and Ronald; Distinguished Professor of Political Science @ University of California – Los Angeles, Weatherhead Scholar @ Harvard University; “Rising Inequality as a Threat to the Liberal International Order,” *International Organization* 75(2), p. 495-523; AS]

Presiding over the November 2016 meeting of the International Political Economy Society, which followed that year’s US presidential election by only three days, David Lake began by saying, “To our theories, this result unfortunately comes as no surprise.” And indeed the field at large has believed that the growing “populist”1 backlash against the Liberal International Order (LIO)—not just the Trump victory but Brexit, the election of illiberal governments in Hungary, Poland, Turkey, the Philippines, and Brazil (to name only a few), and growing support for anti-immigrant and illiberal parties and candidates in many other democracies—has followed almost inevitably from the very changes the LIO has wrought, including of course increased trade and migration but also one major concomitant, rising economic inequality within states. According to our traditional economic theories,2 advanced and even middle-income countries are abundantly endowed with human capital, and poorly endowed with low-skill labor. And it is a rudimentary implication of international economics that, in those countries, expanded trade—or, even more, immigration of low-skill workers—will benefit the highly skilled and harm the less educated. Inequality will rise, and—perhaps the most prescient conclusion of the traditional analysis—partisanship will correlate increasingly with possession of human capital: opposition to the LIO will be strongest among the least educated and will decrease monotonically with more years of schooling.

The evidence, which we survey briefly, admits of no doubt that in almost all of the wealthier (and not a few semiwealthy) countries, inequality has risen, often quite sharply; returns on education3 have risen markedly; and education, even more than occupational status, has emerged as one of the most important predictors of electoral support for antiglobalization parties. What our theories however did not anticipate, and so far cannot explain, may well prove to have been even more important:

1. Not all who are well endowed in human capital, but chiefly a very thin upper layer—the top 1 percent, or even 0.1 percent—have harvested most of the gains from globalization.

2. The antiglobalization movements we observe • adopt a populist rhetoric that often excoriates not just globalization or immigration but also allegedly nefarious elites, who conspire, both domestically and across borders, to enrich each other at the expense of their fellow citizens;4 • benefit chiefly parties of the radical Right; and • have in important cases attracted non-negligible support among university-educated segments of the electorate, albeit far less than among the less skilled.5

We suggest that the extreme inequality and the anomalies are related, and that some insights from recent work in international economics may help explain them. Three advances in trade theory predict extreme inequality. “New new” trade theory (NNTT), with its emphasis on superstar firms, offers a natural framework. So too does an “enriched” neo-H-O-S-S (Heckscher-Ohlin-Stolper-Samuelson) perspective that explores how superstar workers arise in the context of heterogeneous talent.6 Finally, economic geography, explored thoroughly by Broz, Frieden, and Weymouth in this issue, shows how globalization gives rise to superstar cities.7 These three trade theories predict top-heavy inequality primarily by allowing for unit heterogeneity—an assumption that the actors our traditional theories treated as identical actually differ in important ways. Firms within sectors differ in productivity, workers within a factor class differ in innate talents, and regions within countries differ in agglomeration economies.

None of this suggests, of course, that rising inequality is the only, or even necessarily the most important, cause of the growing popular backlash against the LIO. Skill-biased technological innovation and resistance to cultural change also matter, as we discuss more fully later. We do find, however, at least from a cursory analysis of European elections, that backlash against shocks from immigration and imports is conditional on high inequality, disappearing where inequality is low; and we suspect that rising “top-heavy” inequality is related to a particularly prominent strain, within the antiglobalization movements, of anti-elite and anti-expert sentiment.

We go on to suggest why rising inequality matters, not only as a source of opposition to the LIO but as an impediment to economic growth and an exacerbant of domestic polarization and international conflict.

We assess the implications of top-heavy inequality for the LIO. What remedies have been proposed? And if they lack sufficient political support, what sources of resilience can sustain the LIO under top-heavy inequality? Relatedly, we return to the question of why antiglobalization sentiment has benefited the political Right more than the Left. Finally, we chart a course for future research on models of top-heavy inequality, and discuss how they illuminate “blind spots” in the literature on international political economy.

First, however, we survey briefly the extent of growing economic inequality in advanced economies and its seeming relation, chiefly through a human-capital channel, to antiglobalization and anti-elite attitudes and voting.

Convergence Across Countries, Divergence Within Them

The triumph of the LIO in the 1980s and 1990s—the collapse of Communism, the dismantling of trade barriers, the strengthening of institutions of international governance—coupled with, and facilitated by, breakthrough innovations in transport, communication, and finance, affected economic inequality in two ways that standard factor-endowment theories predicted: inequality declined significantly between countries, thus beginning to erode three centuries of the Great Divergence between rich and poor nations; but inequality within countries, especially among the advanced economies, increased almost as sharply.

• Between countries. As late as 1990, the richest 10 percent of the world’s population earned on average over ninety times what the poorest decile received; only twenty years later, that ratio had fallen to sixty-five times,8 or only slightly more than the within-country ratio of Brazil, where in 2008 the average income of the richest decile was about fifty times that of the poorest.9

• Within countries. Beginning even earlier, inequality of incomes, whether measured as the Gini index or the share of total income accruing to the top decile, has risen in virtually all of the advanced economies,10 and indeed in many of the middle-income ones.11 Bourguignon notes that the collapse of the Soviet empire and the opening of China, India, and Latin America injected roughly “a billion workers, for the most part unskilled, into international competition.”12 That will have drastically lowered the global capital-labor ratio and hence further raised returns on human and physical capital, while reducing those on low-skill labor, in virtually all but the poorest, most labor-abundant countries. In short, across much of the globe, the enormous overall gains from trade have benefited the highly skilled, the inventive entrepreneurs, and the owners of capital; the incomes of the less skilled and the capital-poor have risen more slowly, stagnated, or actually declined—exactly the development whose early manifestations alarmed Dani Rodrik two decades ago.13

Surely not all of the rise in inequality stems from globalization.14 Many analyses attribute much of the widening within-country gap—in the US, perhaps as much as four-fifths15—not to globalization but to skill-biased technological innovation.16 Bourguignon contends, to be sure, that innovation has been largely endogenous to globalization: wider markets and intensified competition have raised the returns on cost-reducing innovation.17 Cheaper labor, however, whether from offshoring or the competition of low-wage imports, might be expected to curtail the demand for labor-saving technologies, not to increase it.18 A stronger case is implied by “new new” trade theory: if managerial pay correlates closely with firm size, and if the most successful firms in a globalized economy tend to be the largest, it follows that globalization contributes directly to the rise in top incomes.19 Perhaps most importantly, however, whatever skill-biased innovation may have contributed to the gains of the top quintile or decile, it can say little about the gains of the top 1, or 0.1, percent of the distribution.20 Trade, as we argue, can more readily explain those disproportionate gains.

Rising Skills Premia

Also consistent with mainstream theory were the rising returns on education and the widening gap between high- and low-skill workers’ attitudes toward trade and migration. Exactly as theory would lead us to expect, antiglobalization sentiment rose sharply, and was increasingly concentrated, among voters with the least human capital—that is, the less educated.

Returns on education have indeed risen sharply. In the US in the 1970s, workers with a college degree earned only about a quarter more than ones of comparable ethnicity and age who had completed only high school; by 2010, that gap had risen to almost 50 percent.21 The “raw” difference in annual earnings (i.e., without controlling for ethnicity and age) between college graduates and those who have completed only high school is now 64 percent in the US, and on average in the OECD economies 45 percent.22

At the same time, less educated voters have mobilized strongly against globalization in almost all of the advanced economies. In the US, whites with less than a college education, having up to the year 2000 differed little in their partisanship from whites with university degrees, began to tilt Republican in the early 2000s23 and supported Trump in 2016 by a margin of more than two to one (64 to 28 percent).24 In the Brexit referendum, similarly, 70 percent of voters with only a General Certificate of Secondary Education, roughly equivalent to a US high-school diploma, supported leaving the European Union, while those with university degrees voted by almost the same margin (68 percent) to remain.25 And a recent International Monetary Fund working paper finds that since 2002 tertiary (i.e., university or equivalent) education has correlated, more than any other single variable, with not voting for a populist party in European parliamentary elections—an effect that has grown only stronger since 2012.26

The Riddle of the 1 Percent

In many ways, then, a standard factor-proportions picture of globalization’s distributional and political effects holds up. What it cannot explain, as economists have by now noted repeatedly,27 is why so much of the bounty has gone to the top 1 percent and why even the remainder of the top decile, let alone the highly educated generally, have benefited comparatively little. This pattern is reflected in average real income trends since 1991 across five advanced economies (Figure 1). Much of the real income growth of the top 10 percent owes to gains by the top 1 percent (compare panels 1 and 2); the next 9 percent (i.e., the remainder of the top decile) have seen a comparatively paltry increase. At the same time, the incomes of next 9 percent, which stagnate or even decline after about 2000, mirror those of the middle 40 percent (compare panels 2 and 3). Taken together, the three panels demonstrate the extent to which a narrow elite has risen above the rest of society’s otherwise skilled workers.

Haskel and colleagues more vividly make this case in the US with data on returns on education, finding that the median income of the top 1 percent had risen by 60 percent between 1990 and 2010, while the returns on university education, even for holders of advanced degrees, had declined in real terms after about 2000, virtually erasing their modest gains from the previous decade.28

The seemingly inexorable rise of the 1 percent, when contrasted with the relative stagnation of the rest of the top decile, and of owners of human capital in the middle 40 percent, raises at least three questions. Can our standard theories be modified to explain this “top-heavy” form of inequality? Would such a modified theory still provide a plausible link to globalization? And does such a theory help us understand the simultaneously anti-elitist and antiglobalization character of recent populist movements?

Heterogeneous Workers, Firms, and Regions: Three Ways Globalization Affects Top-Heavy Inequality

We argue that the top-heavy inequality we observe is consistent with three recent advances in trade theory. Each highlights how the bulk of globalization’s gains concentrate in a narrow subset of superstar workers, superstar firms, or superstar cities. An “enriched” H-O-S-S model shows how globalization concentrates wages in a small share of highly talented workers. New new trade theory implies that globalization concentrates profits in a few multinational corporations. Finally, economic geography, extensively reviewed by Broz, Frieden, and Weymouth (in this issue), predicts that globalization concentrates economic growth in a few metropolitan regions.29 By producing far more extreme inequality than traditional models suggest, these theories may help explain the puzzling composition of antiglobalization interests and why these movements adopt a populist tone that demonizes elites.

In presenting these advances, we spare the reader their mathematical exposition and instead focus on their sometimes subtle intuitions. We then explore their similarities and differences, as well as how they illuminate the puzzles of LIO backlash.

Neo-H-O-S-S

The first advance injects new life into the increasingly disesteemed, yet still heavily used, factor-endowments framework of Heckscher-Ohlin and Stolper-Samuelson. It turns out that modest enhancements introduced by Haskel and colleagues yield productive insights into the puzzles of LIO backlash.30 The key amendment introduces heterogeneous workers with varying degrees of innate talent. To state briefly the salient and surprising implications of that model, a drop in the relative price of labor-intensive goods, whether induced by globalization or by technology, can not only reduce the wages of low-skill workers, as in traditional models, but also distribute almost all of the resultant gains to a thin layer of highly talented people—and, at least as importantly, induce stagnation, or actual decline, in the earnings of highly skilled but less talented workers.31 And, once we observe that such a shift is both quite recent and plausibly linked to globalization, we may have shed some light on (a) the rabidly anti-elitist and antiglobalization tinge of the populist movements, (b) why such movements have recently peaked, and (c) why they gain (and may well continue to gain) support not only from the “usual suspects” among low-skill workers but also from those with moderate or even relatively high endowments of human capital.32

For those who appreciate a more rigorous introduction, we offer a graphical exposition of the “richer” H-O-S-S model in online Appendix A2. More intuitively, the key to understanding that model is what happens to high-skill workers when the relative price of capital rises.33 First consider the unsurprising fact that within most firms, sectors, and professions, some workers possess natural talent while the majority are perfectly average. Naturally, the most talented employees are far more productive than their average colleagues, even when everyone works with the same amount of capital. In Hollywood, for example, all actors may read the same script, but only A-list talent like Meryl Streep, Denzel Washington, or Tom Hanks can turn that script into an Oscar-winning performance.

In the classic model, trade lowers wages and raises the relative cost of capital; in the enriched model, the owners of capital make up for that higher cost by lowering the wages of mediocre employees and raising the wages of superstars. Capital owners become less able to afford mediocre workers whose productivity cannot keep up with rising capital costs. Instead, they hire the superstars, whose superior productivity can more than cover the increased costs of capital.

Consider the Hollywood example that Haskel and colleagues used, where film scripts represent intellectual capital, indeed the most important form of capital for the entertainment industry. As the world’s tastes and purchasing power increase demand for Hollywood entertainment, the price of scripts rises—those of stellar scripts, most of all. As that price rises, studios or streaming services become less and less likely to hire actors of only middling quality to perform such a script. The studios’ investment in a high-quality script will pay off, and bring their film the requisite audience, only if it stars actors of extremely high talent: Robert Downey Jr., Scarlett Johansson, or Samuel L. Jackson (or all three in the same film!).34

Admittedly, this analysis assumes, rather than explains, that we can attribute the rise of the top 1 percent to differences in talent but a lot of evidence supports the thesis. For one thing, in almost all countries—including such improbable cases as France and Spain—half to two-thirds of the income of the top 1 percent consists of salaries (compensation for work). Rarely, in any present-day advanced economy, do returns on capital constitute more than a quarter of the incomes of the top 1 percent (in the US, it is less than 15 percent), Thomas Piketty’s arguments notwithstanding.35 As one observer notes, “The fact that so many of [today’s] top earners work for a living is striking,”36 given that a century ago the great majority of elite incomes came from investments in property, bonds, or equities. For another, the model accurately predicts the kind of “fractal” inequality that so far has seemed to prevail almost everywhere in advanced and semi-advanced economies.37 That is, inequality seems to have grown not only between, but within firms and occupations: the top lawyers, academics, physicians, middle managers, and even shop floor workers, have begun to earn far more than the median member of their profession, or even the median co-worker of equal qualifications in their firm.

Once we grant that such differences in talent can become important, the model suggests that any globalization-induced rise in the relative price of capital-intensive goods (or, equivalently, decline in the relative price of labor-intensive products) in advanced economies will depress (or threaten to depress) the wages not only of low-skill workers but also of high-skill ones of less than superlative talent. It thus raises the prospect that the growing resistance to global markets may be embraced, sooner rather than later, not only by low-skill workers but by a growing segment of those with higher education or advanced training.

New New Trade Theory

“New new” trade theory (NNTT) offers an alternative firm-centric view of top-heavy inequality.38 Whereas neo-H-O-S-S focuses on how workers of different talents select into different sectors, NNTT focuses on how firms of different productivity levels sort into import-export activities. One of its salient implications is that increases in foreign trade concentrate the distribution of profits into the largest and most productive firms in each sector.39

The intuition is simple: import and export activities require large upfront costs, such as setting up global logistics networks and investing overseas—costs that only the largest firms can afford. The benefits of trade, access to larger markets, for example, then make these large firms even larger, which subsequently allows them to out-compete their smaller domestic rivals. Armed with global economies of scale, superstars like Walmart and Amazon flood the domestic market with lowcost goods and services. This squeezes out the smallest firms, for example, local mom-and-pop establishments, while reducing the profits of the midsize firms, whose middling productivity permits them to sell only domestically. In sum, NNTT implies, and offers evidence to show, that superstar firms in each sector reap the lion’s share of the gains from globalization.

In its earliest formulation, NNTT implied no wage inequality, because it assumed workers to be homogeneous. Recent advances draw implications for wage inequality by allowing some profits to pass through to workers—what the literature calls rentsharing. One modification allows firms to screen, and bargain over quasi-rents with, workers of varying abilities.40 More productive exporting firms pay higher wages to attract higher-ability talent. In the end, rent-sharing allows inequality in firm profits to spill over into inequality in workers’ wages.41

NNTT implies that globalization-induced inequality should manifest itself principally at the level of the firm, pulling up the compensation of all workers in the larger and more successful firms, and leaving behind all of those employed in smaller, domestically oriented firms (or those unemployed through the demise of the smallest firms). This is exactly what Helpman and colleagues find in Brazil, where 70 percent of overall inequality occurs within sectors and occupational categories; similar results were obtained by Akerman and co-authors in an analysis of wage inequality in Sweden from 2000 to 2007.42

Economic Geography

Economic geography explores the origins and effects of one of society’s most readily observable features: the unequal distribution of economic activity across space, a phenomenon commonly called agglomeration.43 Broz, Frieden, and Weymouth (in this issue) document how globalization’s effects appear most clearly at the level of communities, and operate through the mechanisms specified by economic geography.44 Here we complement their account by situating economic geography within only the broader set of trade models that contribute to extreme inequality. Globalization, we contend, exacerbates regional inequality by inflicting economic stagnation and decline on all but a handful of superstar cities. The mechanism works through the joint effect of agglomeration forces and trade costs. Globalization facilitates the lowering of trade costs (not just those of transportation and communication, but also costs imposed by tariff policies), and this frees up firms to locate in the places that confer the greatest advantage.

The literature identifies many advantages to urban agglomerations. Large cities increase access to suppliers of intermediate inputs, as well as to transportation infrastructure, large pools of specialized talent, and diverse consumers. Moreover, they facilitate the exchange of information about changes in competition, technology, and consumer tastes.45 Some locations also offer a fixed advantage such as access to deep ports or natural resources. Overall, large cities exist and continue to grow because they confer some large basket of benefits on those who locate there.46 The link to globalization seems obvious: the cheaper transportation becomes, and the farther tariff barriers fall, the easier it is for firms and workers to realize the benefits of agglomeration.

For regional inequality to speak to the puzzle of earnings inequality, it must be true that changes in regional growth both reflect and pass through to the wages of resident workers. We find this plausible and consistent with evidence of the stark spatial inequality in returns on skills. A growing literature documents the “end of spatial wage convergence” since 1980, with the bulk of wage gains going to high-skill workers concentrating in just a handful of large cities.47 However, enormous wage inequality within the largest cities suggests that between-region inequality provides only a partial picture. In reality, heterogeneity among workers and firms likely overlaps with, and is accentuated by, the effects of large cities.

Notable Similarities and Differences

All three advances in trade theory point to the same pessimistic outcome, that globalization produces extreme inequality, where a narrow segment of society benefits to the exclusion of the rest. Each theory identifies a different set of “superstars” within this narrow segment: workers with superlative talents, extraordinarily productive firms, or urban agglomerations. Despite varying mechanisms, each arrives at the conclusion of extreme inequality by introducing some form of unit heterogeneity—an assumption that the actors we once treated as identical actually differ from one another in important ways. Workers of similar education differ in innate talent; firms in the same sector vary in productivity; and regions in the same country vary in their advantages of agglomeration. This heterogeneity suggests a radically different perspective on the politics of globalization, one where we should not be surprised that populist protectionist movements arise; that they vilify elites; or that, despite finding their base constituency among lowskill workers, they enjoy nontrivial support from high-skill workers across many sectors.

We highlight two differences among these theories. First, they arrive at the implication of extreme inequality by varying degrees of theoretical complexity. In this regard, neo-H-O-S-S offers a clear advantage: its general framework requires no added assumptions about heterogeneous firms, economies of scale, locational mobility, or rent sharing.

Second, and at least as important, is the empirical accuracy of key theoretical assumptions. In the case of NNTT, evidence for the crucial rent-sharing assumption is decidedly mixed.48 For economic geography, countries almost certainly differ in the degree to which factors are spatially mobile. The neo-H-O-S-S model of differently talented workers will enjoy the most traction in longer-run analyses of wage outcomes, where factors are fully mobile across sectors and regions. Overall, the evident variance in empirical support for different modeling assumptions should caution users to validate these assumptions in their particular research contexts.

Finally, these unit heterogeneity models are not mutually exclusive—they likely reinforce one another in interesting ways. The most talented workers can earn the highest wage by working for the largest firms that can afford them. Regional agglomeration facilitates this advantageous match by locating these superstar workers and superstar firms in the same city. Thus, the top-heavy inequality we observe may very well arise at the intersection of heterogeneous workers, firms, and regions.

Hypothesis

Under any of the three trade theories described here, globalization produces topheavy inequality, wherein a thin margin of workers benefits while the rest are left behind. This drives a populist strain of backlash that views globalization as a struggle of the masses versus the elites. To our mind, this casts a different light on recent research that sees the backlash as a response to shocks from immigration or imports. To state our key hypothesis:

H: when top-heavy inequality is high, shocks from trade, whether in goods, services, or factors of production, increase public support for populist parties.49 In the absence of top-heavy inequality, however, such shocks have no effect on support for populism.50

This assumes that inequality reflects the long-run wage effects of trade and migration. That is, if our trade theories accurately predict wage outcomes, then we should observe extreme, or top-heavy, inequality. As previously discussed, even though much of the inequality we observe does reflect trade patterns, inequality also derives from other sources, such as technological change.51

Inequality and Antiglobalization: Evidence from European Elections

We offer a very preliminary test of this hypothesis in the context of two recent studies of populist far-right vote shares in Europe. Their wide empirical coverage, spanning between them twenty-eight countries over twenty-six years (1988 to 2014), affords a high degree of external validity, at least among economically developed nations in recent decades. Also, the two studies focus on different aspects of globalizationrelated shocks, one on immigration and the other on imports. Finally, both papers offer rigorous research designs. In further examining and extending their findings, we introduce as few modifications as possible to the original designs.

Immigration and Inequality

The study by Georgiadou, Rori, and Roumanias (hereafter GRR) requires the least modification.52 It explores the role of immigration shocks and inequality in all national and European Parliament elections in the twenty-eight member states of the European Union between 2000 and 2014. In particular, the authors study, at the level of Eurostat’s NUTS-2 regions,53 the vote shares obtained by “populist radical right” parties,54 which rose dramatically in the wake of the 2008–09 financial crisis (from 0.05 to 0.15 mean vote share across all countries).

In their original analysis, GRR find a positive association between right-populist vote share and both inequality and immigration, controlling for unemployment, immigration, and economic growth.55 Figure 2 replicates this result under the model labeled GRR2018.56

IO2020 extends that model simply by interacting their measures of inequality and immigration. We report the coefficients in standardized units for visual comparability and ease of interpretation. These models are also posted in Table A2 in the online appendix. Two findings follow from our analysis. First, GRR’s original finding remains intact: an increase of one standard deviation in national-level inequality, all else equal, is associated with a 2.8-percentage-point increase in populist vote shares (p < .01). Since this exercise holds immigration constant, it suggests that inequality independently undermines support for the LIO. This likely reflects, as we discuss later in the paper, inequality’s well-known effects on economic growth, polarization, and external conflict.

Second, our interaction model produces strong evidence for our key hypothesis, that surges in populist support from immigration shocks (which GRR found to have a modest and imprecisely estimated effect) are important but highly conditional on the level of inequality: magnifying backlash at extreme levels and nullifying backlash at lower levels. We visualize this result in a marginal effects plot in Figure 3. The differences in magnitudes are impressive. A one-standard-deviation (0.3 percentage point) increase in the share of migrants in the local population is associated with precisely zero change in vote shares for populist parties at even moderate levels of inequality (Gini < 0.29). At high levels of inequality (Gini > 0.34), the same one-standard-deviation increase in the share of migrants relates to a twenty-point increase in vote share for populist parties. These magnitudes are striking, given that the average NUTS-2 vote share for these parties is 6 percent, with a maximum of 54 percent. Rising immigration, it seems, poses a populist threat to the LIO only when paired with an income distribution that is, or has become, highly unequal.

Imports and Inequality

That inequality mediates shocks from immigration raises the obvious parallel question: does it similarly mediate import-related shocks? To this end, we repeat the earlier analysis, this time employing the data set from Colantone and Stanig (hereafter CS), who examine “China trade shocks” in the European context: fifteen Western European countries over the years 1988 to 2007.57 They report strong effects of Chinese imports on vote shares for radical Right parties58 at the level of the electoral district.59 We replicate their principal results, including their two-stage least squares estimators,60 in specifications 1 and 2 of Table A3 (in the online appendix).

The CS data set does not include a measure of income inequality. To test our interactive hypothesis, we employ inequality measures from the World Inequality Database.61 We report top 1 percent shares of post-tax income at the country level.62 We also apply logarithmic transformations to address issues of fit resulting from extreme outliers.63 Finally, we adopt a multilevel estimator that serves our particular data needs.64 The results rely on this preferred hierarchical estimator.65 Table A3 (in the online appendix) documents how these modifications affect the original CS findings.66

The results for import shocks closely mirror those for immigration. Figure 4 plots the coefficients of our preferred model (IO2020) alongside a baseline model in CS (CS2018). As expected, the positive association between Chinese imports and populist vote shares is highly conditioned by inequality. The coefficient on the China shock remains significant only when interacted with top-1-percent income shares. The marginal effects plot in Figure 5 translates this into real-world terms. At low to medium top-heavy inequality (top 1 percent shares < 0.09), a one-standard deviation increase in imports (approximately 170 EUR per NUTS-2 worker) relates to no statistically significant change in district vote shares for populist parties—that is, no populist backlash from rising imports. However, in countries where the top 1 percent earns approximately 10 percent or more of national income, the same magnitude of imports is associated with a 25-to-50-percent increase in district vote shares, on average, for right-populist parties.

In combination with the results from immigration shocks, this analysis provides strong support for our hypothesis that the politics of LIO backlash are best understood from the perspective of the three recent advances in trade theory that predict topheavy inequality. Trade in goods, or in factors of production, in the context of heterogeneous firms, workers, and regions, produces top-heavy inequality that, we argue, sets the stage for a particularly populist form of backlash. We provide suggestive evidence from European elections that is largely consistent with this; migration and imports drive support for populist parties only where we observe high inequality.

Possible Remedies and Sources of Resilience

An optimistic reading of this analysis is that national redistribution provides an effective remedy against right-populist backlashes. This finding is consistent with the “compensation hypothesis,” that government redistribution to globalization’s losers increases public support for trade.67 Our paper contributes to this literature by suggesting that redistribution targeted at top-heavy inequality (superstar earners, regions, and firms) to the benefit of otherwise skilled workers in smaller firms and cities would be especially effective.

However, democracies famously fail to address rising inequality with redistribution.68 This leads us to a more pessimistic conclusion that, even though lower inequality increases support for globalization, there is little evidence that governments will redistribute in countries with already high top-heavy inequality. We therefore agree with Atkinson that more redistribution of the large gains from globalization would be both possible and effective; but mass support for it, paradoxically, is weak.69 There is hope for other policy suggestions, as well. Investment in education, even if it could achieve the requisite political support, would fail to address the central problem: outsized gains from “superstar” talent, cities, and firms. Global forms of redistribution, such as the world “Tobin tax” on cross-border financial transactions, promise to tax capital without encouraging capital flight. However, such visions have been dismissed as “utopian.”70 They would also raise the substantial issues of global governance that Rodrik’s “globalization trilemma” has highlighted: who would enact such a tax, and to whom would the revenues flow?71

Instead, governments are far more likely to enact protection—restrictions on imports and immigration that reduce welfare but undeniably also reduce inequality. Williamson shows that the choking-off of US immigration from the 1920s to the 1960s contributed significantly to the “great leveling” of American inequality, including the Great Migration of African Americans out of the US South, as Northern employers began to substitute Black for immigrant labor.72 Restricting low-wage imports would of course have a similar effect. These options offer the losers from globalization only a larger slice of a (likely much) smaller pie.

If governments under pressure from top-heavy inequality continue to substitute protectionism for redistribution, can the LIO that stands for globalization nonetheless be sustained? We see two possible sources of resilience. First, powerful interests in the LIO can be expected to defend it.73 Second, international institutions still matter. The retreat of the US, as a principal guarantor of the LIO, poses an undeniable threat to its institutions and to the peace and cooperation they foster. However, IR research cautions against premature reports of its demise. Despite declining US support, international institutions will continue to serve vital functions for their members—functions that make these institutions “sticky” in the face of shocks.74 More recent scholarship in this vein suggests that the international institutions that were hardest to create, and whose rules are flexible, are the most likely to weather the shock of declining US support.75 To the extent that other institutions were created with less effort and exhibit less flexibility, however, other powerful states will seek to install alternatives that better serve them.

Limitations and Future Research

Future research in this area will need to address at least three shortcomings of our analysis: imprecise measurement, identification, and external validity. First, our nationallevel measures of inequality cannot discriminate among the three possible trade theories, since all predict top-heavy inequality. One solution would require decomposition of earnings into worker, firm, and region heterogeneity.76 Future measures should also be mindful of several indirect routes by which inequality undermines the LIO, independent of globalization shocks. It slows economic growth,77 probably by restricting the formation of human capital.78 It exacerbates domestic polarization79 and, seemingly, induces aggressiveness in foreign policy, especially among less welloff voters.80 And, to the extent that it installs governments of the Right, it further increases inequality.

Second, the lack of a careful identification strategy leaves much for future research, which must isolate the variation in top-heavy inequality that is independent of technological change (as discussed earlier), institutions, and redistributive politics, among other sources of endogeneity. Instrumental variable approaches, such as those featured by Enamorado and colleagues, offer one promising direction.81

Future research will also need to account for non-economic aspects of globalization and inequality. Our analysis assumes that inequality operates narrowly through economic mechanisms. We doubt that material interests alone explain the variance in attitudes to globalization.82 Surely status anxiety and cultural threats matter too in ways not reflected in the theory here.83 We know that some voters do not consider trade salient enough,84 or find it too complicated,85 for economics alone to determine vote preferences. Relatedly, attitudes on trade and migration partially reflect sociotropism and out-group anxieties.86 Nonetheless, an at least equally large literature confirms that economic shocks accurately predict election outcomes,87 and our own analysis shows that these economic shocks especially drive voting where inequality is high. Clearly, both economic and cultural factors matter, probably in mutually reinforcing ways. To know for sure, future research will need to test our three trade theories with individual-level data.88 What we contribute to this important debate is a way to sharpen the way international political economy thinks about the economic side of globalization politics.

Third, future research will need to investigate whether these results extend, as recent research suggests,89 to low- and middle-income countries.90 We also expect, although we lack the data to prove it, that our analysis does not extend to support for left-populist parties.

Why does rising inequality move many voters toward right-wing populism rather than left-wing populism? Put simply, the Left’s failure to enact adequate redistribution91 has pushed many of its own voters to support right-wing parties whose protectionist policies offer a plausible alternative to redistribution.92 In the US, the pattern of “Obama-toTrump” voters, particularly among less educated workers, is well documented.93 In Germany, the right-populist Alternative für Deutschland received about 15 percent of its support from traditional left-wing parties in 2017, and similar patterns seem to have driven support both for France’s Le Pen and for the right-populist FPÖ (Freedom Party) in Austria.94 In all three cases, manual workers demonstrably form the core of right-populist support.95 These shifts from redistributive to protectionist parties, we suspect, are exacerbated by the Left’s growing association with elitism, expertise, and globalization: all things that those farther down in the income distribution have come to distrust, or even to despise.

Conclusion

The openness to trade in goods, services, and factors of production the LIO has so effectively advanced over decades has concentrated real income growth in a very thin layer of workers. While this rise in top-heavy inequality doubtless has other causes, chief among them skill-biased technological innovation, trade openness has contributed mightily, particularly since the “China shock” of 2001;96 and certainly the populist movements that reject the LIO cast openness to trade and migration as the chief villain.

The ways in which rising inequality has threatened the LIO expose lacunae in international political economy’s intellectual apparatus—“blind spots” that require remediation. Most importantly, our basic economics are, if not wrong, at least outdated. The field’s adherence to classical trade models blinds us to the distributional effects revealed by top-heavy inequality: far more people lost from globalization, and fewer gained, than traditional theories (factor proportions and specific factors) suggested. While economists rapidly updated their trade models to account for the emerging reality of extreme inequality, political science largely stayed the course —and ran the danger, now realized, of misapprehending the domestic politics of globalization.

The trade literature offers three explanations for top-heavy inequality. The “enriched” Heckscher-Ohlin model of Haskel and colleagues shows how only a thin layer of extraordinarily talented individuals within the larger set of high-skill workers unambiguously benefits from a rise in the relative price of a skill-intensive product; the wages of both the less talented high-skill and the low-skill workers stagnate or fall.97 New new trade theory shows how a similarly narrow subset of very large and productive firms, and their employees, absorb the bulk of trade’s gains at the expense of all other firms. Finally, economic geography suggests that trade concentrates economic growth in a few large metropolitan regions while inflicting stagnation and decline elsewhere. Each offers a pessimistic view of the politics of globalization in which variously defined superstars gain a far larger share than the society at large.

We validate these theories of top-heavy inequality with data on local election outcomes from as many as twenty-eight countries over twenty-six years. We find that public support for right-populist parties rises dramatically with exposure to imports and immigration, but only in those countries with high top-heavy inequality. The fact that the huge gains from trade and technology have flowed to such a small elite, while earnings in other categories have stagnated, may go far to explain why the antiglobalization movements blame not only crucial elements of the LIO, but increasingly a small and nefarious global elite, for what one politician luridly portrayed as the “carnage” among many regions and sectors of the advanced economies.

That these movements, with rare exceptions, seek relief in restrictions on trade and migration from populist movements of the Right, rather than in redistribution or training, probably owes much to the failure of the political Left to redistribute sufficiently.98 That so much of these parties’ electoral support, both in Europe and in the US, comes from manual workers and former supporters of the political Left lends credence to this conjecture.

The ill effects of rising inequality, however, extend well beyond the rising tide of antiglobalization movements and politicians. They extend to slower economic growth (bound to exacerbate existing resentments), increased political polarization, and even a heightened risk of international conflict.

While eminent scholars have advanced quite plausible and growth-enhancing remedies for rising inequality, none elicits, or seems likely to elicit, sufficient political support. Tragically, inequality will likely be reduced, in any serious way, only by what Scheidel has accurately counted as one of history’s “great levelers,” our current high-mortality pandemic.99 While COVID-19 mercifully inflicts nothing approaching the death toll of history’s worst plagues, in the long run its combined effects of labor shortage, capital abundance, and panicky deglobalization will likely result—despite short-term unemployment and recession—in greater equality (but also less prosperity) in the advanced economies, greater inequality in the less developed countries, and greater between-nation inequality. Those developments may partially reduce developed-country hostility to the LIO; but, to survive, the LIO will have to find stronger sources of resilience among business elites and political leaders.

We thus conclude by disagreeing with Lake’s morning-after observation about the 2016 election. While it seemed that the populist backlash came as “no surprise” to the field of international political economy, some of its most important aspects, including the link to top-heavy inequality and the rejection of elites and expertise, were neither foreseen nor understood by our conventional theories. As Abraham Lincoln said during an earlier time of trial, “As our case is new, we must think anew and act anew.”100

#### Populism magnifies all existential risk.

Andrew Leigh 21, Australian member of Parliament, former professor of economics at the Australian National University, 2021, What's the Worst That Could Happen?: Existential Risk and Extreme Politics, unpaginated ebook version

How likely is it that humanity could end? Experts working on catastrophic risk have estimated the chances of disaster for a wide range of the hazards that our species faces. Adding up the threats, philosopher Toby Ord estimates the odds that humanity could become extinct over the next century at one in six, with an out-of-control superintelligence, bioterrorism, and totalitarianism among the largest risks. He argues that most of the risks have arisen because technology has advanced more rapidly than safeguards to keep it in check. To encapsulate the situation facing humanity, Ord titled his book The Precipice.

A one in six chance of going the way of dodos and dinosaurs effectively means we are playing a game of Russian roulette with humanity’s future. Six chambers. One bullet. Even the most foolhardy soldier usually finds an excuse not to play Russian roulette. And that’s when just their own life is at stake. In considering extinction risk, we’re contemplating not one fatality but the death of billions or possibly trillions of people—not to mention countless animals.

It can seem impossible to imagine our species becoming extinct due to a catastrophe such as nuclear war, asteroids, or a pandemic. But in reality, the danger surpasses plenty of perils we already worry about. One way to put catastrophic risk into perspective is to compare it with more familiar risks. If extinction risk poses a one in six risk to our species over the next century, then it means that it is far more hazardous than many everyday risks. Specifically, it suggests that the typical US resident is fifteen times more likely to die from a catastrophic risk—such as nuclear war or bioterrorism—than in car crash.2

Extinction risk outstrips other dangers too. Ask people about their greatest fears, and you’ll get answers like “street violence,” “snakes,” “heights,” and “terrorism."4 But in reality, these are much less hazardous than catastrophic risks. People in the United States are 31 times more likely to die from a catastrophic risk than from homicide. Catastrophic risk is 3,519 times likelier to kill than falls from a height, and 6,194 times more likely to kill than venomous plants and animals. If you have ever worried about any of these threats, you should be more fearful about cata- strophic risk. Extinction risks aren’t just more dangerous than any of them; they are more hazardous than all of them put together. Catastrophic risk poses a greater danger to the life of the typical US resident than car accidents, murder, drowning, high falls, electrocution, and rattlesnakes put together.

A one in six risk is just the danger in a single century. Suppose that the risk of extinction remains at one in six for each century. That means there’s a five in six chance humanity makes it to the end of the twenty-first century, but less than an even chance we survive to the end of the twenty-fourth century. The odds that we survive all the way to the year 3000 are just one in six. In other words, if we continue playing Russian roulette once a century, it’s probable that we blow our brains out before the millennium is halfway through, and there’s only a small chance that we make it to the end of the millennium.

Part of the reason humans undervalue the future is that it’s hard to get our heads around the idea that our genetic code could live on for millions of years. At present, the best estimates are that our species, Homo sapiens, evolved around three hundred thousand years ago.1 That means we have existed for about ten thousand generations. But we have another one billion years before the increasing heat of our sun brings most plant life to an end.1 That’s plenty of time to figure out how to become an interstellar species and move to a more suitable solar system. Humans could live to enjoy another thirty million generations on earth.

Thinking about the mind-boggling scale of these numbers, I’m reminded of the Total Perspective Vortex machine, created by Douglas Adams in The Restaurant at the End of the Universe. Anyone brave enough to enter sees a scale model of the entire universe, with an arrow indicating their current position. As a result, their brain explodes. As Adams reflects, the machine proves that “if life is going to exist in a universe of this size, then the one thing it cannot afford to have is a sense of proportion.”

Still, let’s try. Imagine your ancestors a hundred generations ago. They are your great-great-great-great-great-great-great- great-great-great-great-great-great-great-great-great-great-great- great-great-great-great-great-great-great-great-great-great-great- great-great-great-great-great-great-great-great-great-great-great- great-great-great-great-great-great-great-great-great-great-great- great-great-great-great-great-great-great-great-great-great-great- great-great-great-great-great-great-great-great-great-great-great- great-great-great-great-great-great-great-great-great-great-great- great-great-great-great-great-great-great-great-great-great-great- great-great-great-grandparents. These people lived around 1000 BCE, at the start of the Iron Age. They might have been part of Homeric Greece, ancient Egypt, Vedic age India, the preclassic Maya, or Zhou Dynasty China.

Contemplate for a moment about what the hundred genera- tions between our Iron Age ancestors and today have achieved. They built the Taj Mahal and Sistine Chapel, the Angkor Wat and Empire State Building. Thanks to them, we can relish the poetry of Maya Angelou, novels of Leo Tolstoy, and music of Ludwig van Beethoven. An abundance of inventions has delivered us deli- cious food, homes that are comfortable year-round, and technol- ogy that provides online access to a bottomless well of entertain- ment. If time machines existed, we might pop in to visit our great100 grandparents, but few would volunteer to stay in the Iron Age.

Yet humanity is really just getting started. If things go well, it’s ten thousand generations down, thirty million to go. Imagine what those future generations could do, and how much time they have to enjoy. Here’s one way to think about what it means to have thirty million generations ahead. Suppose humanity’s potential time on the planet was shrunk down to a single eighty- year life span. In that event, we would now be a newborn baby— just nine days old. Homo sapiens is a mere 0.03 percent through all we could experience on earth.

We won’t meet most of those who follow us on the planet, but we should cherish future generations all the same. If you value humanity’s past achievements—the Aztec and Roman civiliza- tions, art of the Renaissance, and breakthroughs of the Industrial Revolution—then the generations to come are just as worthy. This is what political philosopher Edmund Burke meant when he described society as “a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born.’- To appreciate the past is akin to admiring the achievements of distant places. Like geography, his- tory helps us better understand the way of the world.

Politicians like me like to speak fondly about looking after "our children and our grandchildren.” But it usually stops after a generation or two. Policy pays little heed to the many generations that will follow. For my own part, it took a coronavirus-induced shutdown to have the time to spend reflecting deeply about the long term. This book had been rattling around in my head for years, but it was only when all my meetings, events, and travel were canceled that I had the time to write it. Pandemics are one of the threats to humanity that I’ll discuss in this book, but in this instance, it provided a chance to reflect on the long term. It’s tempting to ignore the distant future. It’s easier to love the grandchildren whom we hug than the great-great-great-grand- children whom we’ll never get to smile on. But that doesn’t make those far-flung generations any less important. Via my wife, our children can trace their lineage to Benjamin Franklin, but I’m more excited about the potential achievements of the generations yet to be born.

For companies and governments, a major impediment to long- term thinking is the idea of discounting the future. When investing money, this is a reasonable approach. A dollar in a decade’s time is less valuable than a dollar today for the simple reason that a dollar today could be invested and earn a real return. Share markets have good and bad years, but based on returns from the past 120 years, someone who put $1,000 into the US stock market for an average year could expect it to be worth $1,065 after twelve months (accounting for dividends and inflation).2 Approximating these returns, when governments contemplate making investments, they often apply a discount rate of around 5 percent, while companies use rates that are higher still.2

When it comes to growing your greenbacks, this makes perfect sense. If Kanesha offered you $ 1,000 today, and Jane offered you $ 1,000 in a year’s time, most of us would think that Kanesha was making the more generous offer. Kanesha’s cash can be put to productive use and would be worth more than Jane’s when the year is out.

But what if we’re talking about Kanesha and Jane themselves? Suppose Kanesha is alive today, and Jane is yet to be born. When discounting is applied to lives, it suggests that Kanesha’s life to- day is worth twice as much as Jane’s life in fifteen years’ time. It implies that Kanesha today is worth 132 times as much as Jane in a century’s time. So if we’re spending money to keep them safe, a 5 percent discount rate indicates that we should spend more than a hundred times as much to protect Kanesha today than to pro- tect Jane in a century’s time.

The further we stretch the time period, the more ridiculous the results become. Discounting at a rate of 5 percent implies that Christopher Columbus is worth more than all eight billion people on the planet today.— Naturally, it also implies that your life is worth more than eight billion lives in five hundred years’ time. Even if you value the hug of a loved one over the unseen successes of next century’s generations, is it fair to ruthlessly dis- miss the distant future? Discounting is the enemy of the long term.

As philosopher Will MacAskill points out, there is something morally repugnant about concluding that the happiness of those who will be alive in the 2100s is inconsequential simply because they live in the future. MacAskill coined the term “presentism” to refer to prejudice against people who are yet unborn.” Just like racism, sexism, or other forms of bigotry, he argues that mis- treating those who live a long way in the future is unfair. To dis- criminate in favor of Kanesha against unborn Jane is a form of presentism. If you traveled back in time to the 1500s and met someone who claimed that they were worth more than everyone alive in the 2000s, you’d rightly regard them as an egomaniac. Isn’t it equally narcissistic to ignore the happiness of people in the 2500s?

Some have contended that we should favor the living over the unborn for the same reason that philanthropy favors the down- trodden over the wealthy. If incomes rise over time, the argument goes, then asking today’s citizens to help those in the future is like taking from the poor to give to the rich.— But this reasoning ignores the fact that we are talking about the survival of future generations. Theoretical riches won’t do them any good if they are practically dead—or if planetary apocalypse snuffs out their chance to be born. Similarly, it misses the possibility that future pandemics, wars, or climate disasters could make coming genera- tions significantly poorer.—

Insights from behavioral science help explain why humans aren’t good at understanding extinction risk.— Our thinking about dangers is skewed by an “availability bias”: a tendency to focus on familiar risks. Like the traders who failed to forecast the collapse of the securitized housing debt market, we are lousy at judging the probability of rare but catastrophic events. Most important, our instincts fail us as the magnitudes grow larger. In research titled "The More Who Die, the Less We Care,” psychologists Paul Slovic and Daniel Vastfjall argue that we become numb to suffering as the body count grows.— Humans’ compassionate instincts are aroused by stories, not statistics. Indeed, one study found that people were more likely to donate to help a single victim than they were to assist eight victims. This may help explain why the international community has been so slow to respond to genocide, including recent incidents in Rwanda, Darfur, and Myanmar. As artificial intelligence researcher Eliezer Yudkowsky notes, human neurotransmitters are unable to feel sorrow that is thousands of times stronger than a single funeral.— The problem is starker still when it comes to extinction risk. Our emotional brains cannot multiply by billions.

Add to this a media cycle that has become a media cyclone, in which stories explode in a matter of minutes, and “outrage porn” seems to drive the news choices of many outlets. In the 2016 US election, researchers found that for every piece of professional news shared on Twitter, there was one piece of “junk news.’’— Conflict fueled by social media keeps us in a primal state of rage and retaliation. And this isn’t the only force that makes politics myopic. Campaign contributions tend to come from donors who have an immediate interest in a “today” issue rather than from people aiming to solve long-term problems. This kind of “instant noodle” politics prioritizes quick results and sidelines fundamental challenges.

In this environment, a special style of politics has thrived: populism. The term “populist" gets thrown around a lot—typically as an insult—so it’s worth taking a moment to define it precisely.— Populists see politics as a conflict between crooked elites and the pure mass of people. Many candidates trying to defeat an incumbent will criticize “insiders,” but populists make a stronger attack on elites, claiming that they are dishonest or corrupt. Populists then claim that they—and only they—represent the “real people.” Populists combine a fierce critique of elites and personal appeal to the “silent majority.”

The political strategy of populists involves critiquing intellectuals, institutions, and internationalism. The political style of populists tends to be fierce. They do not strive for unity and calm consensus. Populists share with revolutionaries a desire for sudden and dramatic change. They have little respect for experts and the systems of government. Populists’ priorities tend to be immediate issues such as crime, migration, jobs, and taxes. Consequently, the electoral success of populists has served to sideline work on long-term dangers such as climate change and nuclear war.

Donald Trump may have lost his presidential reelection bid, but he has transformed the Republican Party, which has jettisoned its longstanding commitment to free trade, immigration, and global alliances. Many moderate Republicans, who might have served comfortably under Ronald Reagan or George H. W. Bush, have quit the party or been defeated by Trump-supporting populists. The Republican Party, which holds nearly half the seats in Congress and controls a majority of state legislatures, has embraced populism to a degree that was unimaginable when it was led by George W. Bush, John McCain, or Mitt Romney. After four years under President Trump, the Republican Party is now more cynical and isolationist, focused on immediate grievances rather than long-term challenges.

Yet while the strength of populism threatened to sideline issues of catastrophic risk, coronavirus did the opposite. The worst pandemic in a century led to the most severe economic crisis since the Great Depression. Churches and concert halls fell silent. International travel collapsed. The Summer Olympics were postponed. Stocks plunged, and for a brief moment, the price of a barrel of oil went negative. Globally, millions lost their jobs, and millions more faced famine.

COVID-19 never threatened to extinguish humanity, but it highlighted our vulnerability to infectious diseases. More than at any time in living memory, people focused on the dangers of pandemics. The popularity of Geraldine Brooks’s Year of Wonders, Stephen King’s The Stand, Emily St. John Mandel’s Station Eleven, and Albert Camus’s The Plague vividly illustrates the way in which fear of pandemics has become more acute.

We know that disasters can remake society. The black death helped usher in the Renaissance.— The Great Depression made a generation of investors more risk averse.— World War II spawned the United Nations and formed the modern welfare state. In autocracies, droughts and floods can topple dictators.—

Coronavirus is reshaping the world in numerous ways.— Handwashing is in. Cheek kissing is out. The rise of big cities is slowing as people consider the downsides of density. Firms that automated their production systems to deal with physical dis- tancing requirements and stay-at-home orders are discovering that they can get by permanently with fewer staff. More tele- working and less business travel is leading to a drop in demand for receptionists, bus drivers, office cleaners, and security guards. When it comes to our use of technology, coronavirus suddenly accelerated the world to 2030. When it comes to globalization, the pandemic took us back to 2010.

But it’s still an open question as to how COVID-19 will affect humanity’s ability to think about the long term. Most of the examples I’ve listed are instances in which crises affected societies organically: the shock came, and it changed our behavior. But accentuating the long term requires taking risk more seriously and placing greater emphasis on saving our species. Linebackers are swift to respond when an offensive player suddenly takes a step to the right. But it takes longer to recognize that a team’s offensive plays are skewed to the right and modify the defensive formation accordingly.

Like a football team that adapts its tactics, this book argues that we should lengthen our thinking. At minimal cost, society can massively reduce the odds of catastrophe. By ensuring that the big threats get the attention and resources they need, we can safeguard the future of our species. As insurance policies go, this one is a bargain.

In the chapters that follow, I’ll outline the biggest risks facing humanity. I’ll begin in chapter 2 with pandemics, such as the possibility that the next virus might combine the infectiousness of COVID-19 with the deadliness of Ebola. What can we do to shut down exotic animal markets, speed up vaccine develop- ment, and create surge capacity in hospitals? I’ll then delve into bioterrorism, and the danger of extremists developing their own versions of smallpox or the bubonic plague. How difficult is it for them to create these devilish diseases, and what can we do to prevent it?

In chapter 3, I’ll then explore climate change—perhaps the in- tergenerational issue that has received the most public attention in recent years. While much of the modeling looks at how global warming could be bad, my focus is on the chances that it’s catastrophic. This isn’t about climate change shortening the ski season; it’s about the possibility of temperatures rising by 18°F (10°C), rendering large sections of the planet uninhabitable. What does the risk of cataclysmic climate change mean for energy policy?

Next, I’ll turn to nukes. As a child in the 1980s, I vividly re- member watching The Day After. My classmates and I agreed that a nuclear war was inevitable. When the Cold War ended, the world seemed safer, but in the three decades since, the threat from new nuclear powers has made the problem less predictable. As I discuss in chapter 4, what we used to call an arms race now looks more like a bar fight, with hazards coming from unexpected directions, including terrorist groups. Yet just as there are practical ways to avoid pub brawls (don’t drink past midnight, avoid the stairs, look out for the glass), so too are there sensible strategies that can reduce the odds of nuclear catastrophe (adopt a “no first use" policy, reduce the stockpiles, control loose nukes).

A superintelligence has been dubbed the “last invention” we’ll ever make. An artificial intelligence machine whose abilities exceed our own could turbocharge productivity and living stan- dards. But it could also spell disaster. If we program our artificial intelligence to maximize human happiness, it could fulfill our wishes literally by immobilizing everyone and attaching electrodes to the pleasure centers of our brains. As chapter 5 notes, what makes artificial intelligence different from every other risky technology is its runaway potential. Once a superintelligence can improve itself, it is unstoppable. So we need to build the guardrails before the highway.

What are the odds? In chapter 6,1 complete the discussion of catastrophic danger by examining less risky risks, including asteroids and supervolcanoes. I also consider the prospect of “unknown unknowns.” For example, prior to the first atomic bomb test, some scientists thought there was a chance it could set the atmosphere on fire, destroying the planet. When the Large Hadron Collider was being built, critics warned that the particle collisions inside it could create micro black holes. Although neither situation eventuated, they raise the question of what other doomsday scenarios could be lurking around the corner. How should the prospect of these unexpected risks change our approach to cutting-edge science? Drawing together these dangers with the major hazards, I report the likely probability of each, benchmarking existential risks such as nuclear war and pandemics against individual risks such as being struck by lightning or dying on the battlefield.

Ultimately, tackling existential risks is a political problem. Private citizens can achieve many things, but preventing nuclear war, averting bioterrorism, and curbing greenhouse emissions are fundamentally problems of government. Governments control the military, levy taxes, and provide public goods. So the values of those who run the country will determine how much of a priority the nation places on averting catastrophe.

That’s why the rise of populists is crucial to humanity’s long- term survival. In chapter 7,1 discuss the factors that have led to the electoral success of populists during recent decades, and why populists tend to be uninterested in dealing with long-term threats. Populists’ focus on the short term means that—like a driver distracted by a back seat squabble—we’re in danger of missing the threats that could kill us. I’ll explore why populists around the world struggled to respond to COVID-19, and what this says about the dangers that populism poses to our species. Most critics of populism have concentrated on the present day. They’re missing the bigger picture. Populists are primarily endangering the unborn.

Bad politics doesn’t just exacerbate other dangers; it represents a risk factor in itself through the possibility of a totalitarian turn —in which democracy is replaced by an enduring autocracy. The road to democracy is not a one-way street. Over the centuries, dozens of countries have backslid from democracy into autocracy —abandoning the institutions of fair elections, protection for minorities, and free expression. Such an outcome could be deadly for dissenters and miserable for the multitudes. Chapter 8 explores why democracy dies and identifies the signs that institutions are being undermined. Chapter 9 suggests how we might strengthen democracies to allow citizens to have a greater say, and lower the chances of the few taking over from the many. Chapter 10 concludes the book.

When COVID-19 hit, many rushed out to buy life insurance.— In our personal lives, we know that spending a small amount on insurance can guard against financial ruin. Societies can take a similar approach: implementing modest measures today to safe- guard the immense future of our species. For each of the existential risks we face, there are sensible approaches that could curtail the dangers. For all the risks we face, a better politics will lead to a safer world.

Because of its focus on the urgent over the important, populist politics should perhaps bear the label, “Warning: populism can harm your children." But what is the alternative? In the conclusion, I argue that the answer lies in the ancient philosophy of stoicism. A stoic approach to politics isn’t about favoring one side of the ideological fence over another. Instead, it’s about the temperament of good political leadership. Stoicism emphasizes that character matters and holds that virtue is the only good. Decisions are based on empirical evidence, not emotion. Anger has no place in effective leadership. Strength comes from civility, courage, and endurance. Stoics make a sharp distinction between the things they can change and those they cannot.

### AT Growth

#### Growing economic inequality drives diversionary nationalism and makes war inevitable.

Frederick Solt 11. Ph.D. in Political Science from University of North Carolina at Chapel Hill, currently Associate Professor of Political Science at the University of Iowa, Assistant Professor, Departments of Political Science and Sociology, Southern Illinois at the time of publication. “Diversionary Nationalism: Economic Inequality and the Formation of National Pride.” The Journal of Politics, Vol. 73, No. 3, pgs. 821-830, July 2011.

One of the oldest theories of nationalism is that states instill the nationalist myth in their citizens to divert their attention from great economic inequality and so forestall pervasive unrest. Because the very concept of nationalism obscures the extent of inequality and is a potent tool for delegitimizing calls for redistribution, it is a perfect diversion, and states should be expected to engage in more nationalist mythmaking when inequality increases. The evidence presented by this study supports this theory: across the countries and over time, where economic inequality is greater, nationalist sentiments are substantially more widespread.

This result adds considerably to our understanding of nationalism. To date, many scholars have focused on the international environment as the principal source of threats that prompt states to generate nationalism; the importance of the domestic threat posed by economic inequality has been largely overlooked. However, at least in recent years, domestic inequality is a far more important stimulus for the generation of nationalist sentiments than the international context. Given that nuclear weapons—either their own or their allies’—rather than the mass army now serve as the primary defense of many countries against being overrun by their enemies, perhaps this is not surprising: nationalism-inspired mass mobilization is simply no longer as necessary for protection as it once was (see Mearsheimer 1990, 21; Posen 1993, 122–24).

Another important implication of the analyses presented above is that growing economic inequality may increase ethnic conflict. States may foment national pride to stem discontent with increasing inequality, but this pride can also lead to more hostility towards immigrants and minorities. Though pride in the nation is distinct from chauvinism and outgroup hostility, it is nevertheless closely related to these phenomena, and recent experimental research has shown that members of majority groups who express high levels of national pride can be nudged into intolerant and xenophobic responses quite easily (Li and Brewer 2004). This finding suggests that, by leading to the creation of more national pride, higher levels of inequality produce environments favorable to those who would inflame ethnic animosities.

Another and perhaps even more worrisome implication regards the likelihood of war. Nationalism is frequently suggested as a cause of war, and more national pride has been found to result in a much greater demand for national security even at the expense of civil liberties (Davis and Silver 2004, 36–37) as well as preferences for “a more militaristic foreign affairs posture and a more interventionist role in world politics” (Conover and Feldman 1987, 3). To the extent that these preferences influence policymaking, the growth in economic inequality over the last quarter century should be expected to lead to more aggressive foreign policies and more international conflict. If economic inequality prompts states to generate diversionary nationalism as the results presented above suggest, then rising inequality could make for a more dangerous world.

The results of this work also contribute to our still limited knowledge of the relationship between economic inequality and democratic politics. In particular, it helps explain the fact that, contrary to median-voter models of redistribution (e.g., Meltzer and Richard 1981), democracies with higher levels of inequality do not consistently respond with more redistribution (e.g., Bénabou 1996). Rather than allowing redistribution to be decided through the democratic process suggested by such models, this work suggests that states often respond to higher levels of inequality with more nationalism. Nationalism then works to divert attention from inequality, so many citizens neither realize the extent of inequality nor demand redistributive policies. By prompting states to promote nationalism, greater economic inequality removes the issue of redistribution from debate and therefore narrows the scope of democratic politics.

#### Labor market inequities create slow and unstable growth---COVID proves.

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Why It Matters

It should be fairly obvious why these imperfections in the labor market matter so much: one of the most disturbing aspects of growth in the United States in recent decades is the growing inequality (see, e.g., Ostry, Berg, and Tsangarides 2019; Stiglitz 2012, 2019; and a rash of other books on the topic). Most of the gains in the economy have gone to the top 10 percent, the top 1 percent, and the top 0.1 percent. Some of the growing inequality has to do with increases in wage disparity—known as labor market polarization. But much of it has to do with the decreasing share of national income going to workers.8 This is where the decreasing market power of workers and the increasing market power of corporations comes in. This decreasing market power is more than just changes in technology or even globalization: it is also the broader changes in our economy, society, and politics—and especially the changes described earlier in this introduction and elsewhere in this volume—that have led to this growing imbalance of market power.

Research at the International Monetary Fund (Ostry, Berg, and Tsangarides 2014) and elsewhere (Ostry, Berg, and Tsangarides 2019) has highlighted the broader consequences of this growing inequality, even on economic performance. Economies that are more unequal are less stable and grow more slowly. In The Price of Inequality I explain the reasons that we pay such a high price for inequality.

The COVID-19 crisis has provided a dramatic illustration: inequalities in income translate into inequalities in health, especially in a society, like that of the United States, that relies on markets to dispense healthcare. The virus is not an equal opportunity virus—it appears to have the most devastating effects on people who have underlying health conditions. Our health inequalities are undoubtedly one of the reasons that the United States led the world in COVID-19 deaths.

Short-sighted employers did not provide sick leave and government did not require it—even when Congress seemed to recognize that workers without sick leave, who live paycheck to paycheck with virtually no money in the bank, would go to work even when they were sick. They had to work in order to survive, but that meant they helped to spread the disease. After lobbying by the large corporations, Congress decided that employers with more than 500 employees—almost half of the private labor force— were exempt from providing sick leave. With so few workers unionized, employees simply did not have the bargaining power to demand paid sick leave, personal protective equipment, or COVID-19 tests. Government should have required all these things, of course, and it had the power to do so under OSHA, but chose not to. Workers were desperate for the protection, but lacked the bargaining power to get it.

#### Monopsonies are key---inequality hollows out economics resilience---shocks are inevitable, only worker stability makes recovery possible.

Kate Bahn 21. Washington Center for Equitable Growth Testimony before the Joint Economic Committee, "Kate Bahn testimony before the Joint Economic Committee on monopsony, workers, and corporate power". Equitable Growth. 7-14-2021. https://equitablegrowth.org/kate-bahn-testimony-before-the-joint-economic-committee-on-monopsony-workers-and-corporate-power/

Thank you Chair Beyer, Ranking Member Lee, and members of the Joint Economic Committee for inviting me to testify today. My name is Kate Bahn and I am the Director of Labor Market Policy and the interim Chief Economist at the Washington Center for Equitable Growth. We seek to advance evidence-backed ideas and policies that promote strong, stable and broad-based growth. Core to this mission is understanding the ways in which inequality has distorted, subverted and obstructed economic growth in recent decades.

Mounting evidence, which I will review today, demonstrates how the rising concentration of corporate power has increased economic inequality and made the U.S. economy less efficient. Reversing the trends that have led to a “second gilded age” is critical to encouraging a resilient economic recovery following the pandemic-induced economic crisis of 2020 and encouraging a healthy, competitive economy for the future.

Introduction

The United States boasts one of the wealthiest economies in the world, but decades of increasing income inequality, job polarization, and stagnant wages for most Americans has plagued our labor market and demonstrated that a rising tide does not lift all boats. Furthermore, economic evidence demonstrates how inequality results in an inefficient allocation of talent and resources while increasing corporate concentration that enriches the few while holding back the entire economy from its potential. Understanding the causes and consequences of the concentration of corporate power will guide policymaking in order to ensure that the economic recovery in the next phase of the pandemic will be broadly shared and ensure a more resilient economy.

“Monopsony” is a key economic concept to understand in this discussion. Monopsony is the labor market equivalent of the better-known phenomenon of “monopoly,” but instead of having only one producer of a good or service, there is effectively only one buyer of a good or service, such as only one employer hiring people’s labor in a company town. Like in monopoly, this phenomenon is not limited to when a firm is strictly the only buyer of labor. Today I will explain the circumstances and effects of employers having significant monopsony power over the market and over workers.

When employers have outsized power in employment relationships, they are able to set wages for their workers, rather than wages being determined by competitive market forces. Given this monopsony power, employers undercut workers. This means paying them less than the value they contribute to production. One recent survey of all the economic research on monopsony finds that, on average across studies, employers have the power to keep wages over one-third less than they would be in a perfectly competitive market. Put another way, in a theoretical competitive market, if an employer cut wages then all workers would quit. But in reality, these estimates are the equivalent of a firm cutting wages by 5 percent yet only losing 10 percent to 20 percent of their workers, thus growing their profits without significantly impacting their business.

It is not only important for workers to earn a fair share so they can support themselves and their families, but also critical to ensure that our economy rebuilds to be stronger and more resilient. Prior to the current public health crisis and resulting recession, earnings inequality had been growing since at least the 1980s while the labor share of national income has been declining in same period. This is cause for concern as recent evidence suggests that the labor share of income has a positive impact on GDP growth in the long-run.

The unprecedented economic shock caused by the coronavirus pandemic revealed how economic inequality leads to a fragile economy, where those with the least are hit the hardest, amplifying recessions since lower-income workers typically spend more of their income in the economy. But the crisis also demonstrated how economic policy targeted toward workers and families can provide a foundation for growth. This is because workers are the economy, and pushing back against the concentration corporate power by providing resources to workers is the foundation for strong, stable and broadly shared growth.

The Causes of Monopsony

The concept of monopsony was initially developed by the early 20th century economist Joan Robinson, who examined how lack of competition led to unfair and inefficient economic outcomes. The prototypical example of monopsony is a company town, where there is one very dominant employer and workers have no choice but to accept low wages since they have no outside options. This is the most extreme case, but it is important to note that firms have monopsony power in any circumstance where workers aren’t moving between jobs seamlessly in search of the highest wages they can get.

Firms can use monopsony power to lower workers’ wages any time workers:

* Have few potential employers
* Face job mobility constraints
* Can only gather imperfect information about employers and jobs
* Have divergent preferences for job attributes
* Lack the ability to bargain over those offers

I will go through each of these factors in turn and demonstrate how labor markets are unique compared to other markets in dealing with competitive forces.

While concentrated labor markets are not the norm, they are pervasive across the United States, especially within certain sectors or locations. When markets are very concentrated, employers can give workers smaller yearly raises or make working conditions worse, knowing that their workers have nowhere to go to find a better job with better pay. (See Figure 1.)

A study published in the journal Labour Economics by economists Jose Azar, Ioana Marinescu, and Marshall Steinbaum finds that 60 percent of U.S. local labor markets are highly concentrated as defined by U.S. antitrust authorities’ 2010 horizontal merger guidelines. This accounts for 20 percent of employment in the United States. Research by economists Gregor Schubert, Anna Stansbury, and Bledi Tsaka goes further by estimating workers’ outside options, or the likelihood a worker is able to change into a different occupation or industry. This study finds that even with a more expansive definition of job opportunities more than 10 percent of the U.S. workforce is in local labor markets where pay is being suppressed by employer concentration by at least 2 percent, and a significant proportion of these workers facing few outside options are facing pay suppression of 5 percent or more. As study co-author Anna Stansbury noted, “for a typical full-time workers making $50,000 a year, a 2 percent pay reduction is equivalent to losing $1,000 per year and a 5 percent pay reduction is equivalent to losing $2,500 per year.”

Certain sectors are now very concentrated, such as the healthcare industry. In a paper by the economists Elena Prager and Matt Schmitt, they find that hospital mergers led to negative wage growth among skilled workers such as nurses or pharmacy workers. Consolidation and outsized employer power, alongside other phenomenon such as the fissuring of the workplace, may have broader impacts on the structure of the U.S. labor market when it affects the overall structure of the labor market, including the hollowing out of middle class jobs that have historically been a pathway for upward mobility.

#### It’s the key internal link to growth---wage depression constrains worker supply, constrains output, and decreases investment.

Sharon Block & Benjamin Elga 21. Sharon Block is the former executive director of the Labor and Worklife Program at Harvard Law School, where she also teaches. She currently serves as the Associate Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget. Benjamin Elga is the founding executive director of Justice Catalyst and Justice Catalyst Law. “The Legal Case for Reform”. Inequality and the Labor Market: The Case for Greater Competition. Brookings Institution Press. (2021) https://www.jstor.org/stable/10.7864/j.ctv13vdhvm.7

Intuitively, it seems likely that less expensive inputs or lower wages would mean savings for firms to pass on to the consumers. But it turns out that inefficiencies and lack of competition in upstream markets have ripple effects that can harm everyone. In a competitive market, employers pay the market wage; when there are vacancies, a marginal increase in pay will follow so employers can fill those vacancies. Labor monopsonists have different incentives. If they raise pay to fill a marginal vacancy, they might also have to raise pay for their existing employees. The small increase in pay needed to attract one more worker could mean a massive swing in overall labor cost (Krueger 2017). So even if growth would generally be good for the company, they might not be able to add the workers they need specifically because of the special dynamics of controlling too much of the market.

This is an extreme example, but the same general principle applies when employers have the market power to depress wages below competitive levels. When the marginal cost of filling vacancies and growing one’s business to efficient levels diverges from the firm’s individual incentives for doing so, firms are constricted and leave jobs unfilled. Constraining inputs like labor leads to constrained outputs, and if firms are producing less of the products that consumers want, then prices for those products go up. After all, supply constraints and price increases are two sides of the same coin, economically. Fewer workers ultimately means fewer goods, and fewer goods means higher prices for the limited amount of goods available.4 Over time, this problem is magnified because fewer workers are incentivized to enter the field at all. The supply of qualified workers will go down, further reducing the firm’s ultimate output below efficient levels. In the end, everyone suffers except the firm with market power, which captures outsized profits.

Think: Why does America have a chronic undersupply of nurses or teachers, as well as stagnant wages (Council of Economic Advisers 2016)? In a competitive market, undersupply would lead to higher wages and increased entry to the field. If wages are inefficiently underpriced, we end up without enough nurses and ballooning healthcare costs. (Not to mention that, in the case of nurses, we end up with worse health outcomes for consumers!) This is part of the reason it is so problematic to interpret the consumer welfare standard to mean that short-term consumer prices are increased: presumed price effects could be irrelevant or misleading as to the overall effect on consumers.

Antitrust enforcement is supposed to be dynamic and to be able to keep up with the state of economic theory.5 But this cross-pollination is not in evidence. For example, even though inefficiency anywhere in the supply chain leads to worse outcomes for consumers, product market cases outnumber labor market cases by a factor of nearly 15, and in mergers by closer to 35. Moreover, no recent merger has been blocked on the basis of labor market effects alone (Levi 1948, 540, fn10). A quick foray into how antitrust law has developed follows.

# 1NR

## Case

### XT 1NC 1: Arbitration Bad for Cartels

#### Arbitration empirically results in higher win rates and awards. More cartels will be let off the hook after the plan allows them to go into litigation. Pincus cites a consensus of studies which is better than Lande’s measly 50 case sample size.

#### Arbitration win rates are higher – empirical evidence is on our side.

ANDREW J. PINCUS, Counsel of Record EVAN M. TAGER ARCHIS A. PARASHARAMI MATTHEW A. WARING Mayer Brown LLP, ’17, “BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING PETITIONERS IN NOS. 16-285 AND 16-300 AND RESPONDENTS IN NO. 16-307” https://www.scotusblog.com/wp-content/uploads/2017/07/16-285-16-300-16-307-tsac-us-chamber-of-commerce.pdf

Moreover, the arbitral forum is just as fair to employees as litigation in court. As one commentator explains, “most employment arbitration cases are today conducted under rules like those of the American Arbitration Association, which mandate a fair procedure.” Laura J. Cooper, Employment Arbitration 2011: A Realist’s View, 87 Ind. L.J. 317, 320 (2012)

Specifically, the AAA’s employment-arbitration rules (1) cap an employee’s filing fee in a case against an employer at $200 and require the employer to pay the other costs and expenses of arbitration; (2) provide that arbitrators must be mutually acceptable to both parties; (3) require arbitrators to disclose any circumstance that might raise doubt about their impartiality; and (4) ensure both sides “discovery \* \* \* necessary to a full and fair exploration of the issues in dispute.” See generally AAA Rules.

As a consequence, “there is no evidence that plaintiffs fare significantly better in litigation. In fact, the opposite may be true.” David Sherwyn et al., Assessing the Case for Employment Arbitration: A New Path for Empirical Research, 57 Stan. L. Rev. 1557, 1578 (2005); see also, e.g., St. Antoine, supra, at 16 (endorsing this conclusion).

For example, one study of employment arbitration in the securities industry found that employees who arbitrated were 12% more likely to win their disputes than were employees who litigated in the Southern District of New York. See Michael Delikat & Morris M. Kleiner, An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?, 58-JAN Disp. Resol. J. 56, 58 (Nov. 2003-Jan. 2004). And the arbitral awards that the employees obtained were typically the same as, or larger than, the court awards. See ibid. (comparing median awards).

#### The class aspect of class action is bad. It causes delays in aff solvency well beyond the timeline of their impacts. Arbitrations are streamlined and efficient, class actions are procedural nightmares.

DEBORAH J. LA FETRA, Counsel of Record, Pacific Legal Foundation, ’17, “BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER” https://www.scotusblog.com/wp-content/uploads/2017/07/16-285-tsac-PLF.pdf

Class arbitration simply did not exist until very recently, AT&T Mobility, 563 U.S. at 348, and is generally considered an awkward hybrid procedure. “Courts addressing the concept of class actions in arbitration have largely contemplated a continued, significant judicial role in overseeing key aspects of the class arbitration under a hybrid approach, in order to protect the rights of the absent members.” See Maureen A. Weston, Universes Colliding: The Constitutional Implications of Arbitral Class Actions, 47 Wm. & Mary L. Rev. 1711, 1764 n.224 (2006) (acknowledging a hybrid class arbitration procedure whereby a court certifies a class and then orders an arbitration to proceed on a class-wide basis, citing Izzi v. Mesquite Country Club, 186 Cal. App. 3d 1309 (1986)); Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860 (Pa. Super. Ct. 1991) (“[W]e find that this class action, if properly certified, may continue through arbitration on a class-wide basis. We therefore remand to the trial court for class certification proceedings. After this ruling, the trial court must compel arbitration.”). In response to this new hybrid procedure, this Court issued important guidance to lower tribunals as to how class arbitration procedures should be viewed in relation to traditional, individual arbitration. Where parties have contracted for individual arbitration, imposing class arbitration effects a “fundamental change” to the parties’ agreement. Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., 559 U.S. 662, 686 (2010). Class arbitration “no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties,” including absent parties. Id. The parties’ expectations about privacy and confidentiality in individual arbitration are also “potentially frustrat[ed]” when disputes are litigated on a class-wide basis. Id. Perhaps most critically, class arbitration drastically raises the stakes “even though the scope of judicial review is much more limited.” Id.; see also Linsday R. Androski, A Contested Merger: The Intersection of Class Actions and Mandatory Arbitration Clauses, 2003 U. Chi. Legal F. 631, 649 (class procedure “subjects arbitration to the very judicial burden that the contracting parties sought to avoid through arbitration”).

In AT&T Mobility, 563 U.S. at 344, the Court held that “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” This Court distinguished class arbitration from individual arbitration on both structural and policy grounds. As a structural matter, [c]lasswide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties.

Id. at 348. The Court then identified three policy reasons why class arbitration should not be imposed upon non-consenting parties, and why class arbitration in general is an inferior method of dispute resolution than individual arbitration: First, class arbitration is “slower, more costly, and more likely to generate procedural morass.” Id. Second, class arbitration requires procedural formality if members of the class are to be bound by the result. These procedural formalities would have to include requirements that “class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class.” Id. at 349 (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 (1985)). Third, class arbitration greatly increases risks to defendants because the absence of multilayered review makes it more likely that errors will go uncorrected. AT&T Mobility, 563 U.S. at 350. That is, if an arbitrator errs in the resolution of an individual employee’s claim, defendant companies can accept that potential cost; but if the error occurs in a case involving potentially tens of thousands of employees with aggregated claims, the defendant companies will be pressured into settling questionable claims rather than bet the company on the outcome of the essentially unreviewable arbitration. Id. (citing Kohen v. Pac. Inv. Mgmt. Co. LLC & PIMCO Funds, 571 F.3d 672, 677-78 (7th Cir. 2009)) (describing the risk of “in terrorem” settlements in class actions). Parties to a contract may reasonably decide to avoid these pitfalls in favor of individual arbitration, and the courts should respect that freedom of choice.

### XT 1NC 2: Class Action Insufficient

#### Class action is insufficient to solve. 1NC Robertson is five years more recent, directly cites Lande, and says that even accounting for treble damages in a class action antitrust suit, cartelization still has positive expected utility so it will continue.

#### Class actions are pyrrhic victories. They don’t deter cartelization, they benefit litigious plaintiffs making meritless claims.

William P. Barnett, Prof of Business @ Stanford, ’21, There Is No Conservative Case for Class Actions, The Federalist Society Law Review, Vol 22.

Then there are the cases that, while victories for the defense, tend to be of the pyrrhic nature. For instance, in an employment class action challenging a meal break policy, the defendant sought to moot plaintiff’s claim through an unaccepted offer of judgment. Because the offer if accepted would have fully satisfied the plaintiff’s individual claim, Justice Clarence Thomas for the Court held that the case had to be dismissed for lack of standing.64 So far, so good. But in dissent, Justice Kagan argued that the case was not moot because despite being made whole, the plaintiff should have had the opportunity to seek class certification as well—that is, it should have been the plaintiff’s “choice, and not the defendant’s or the court’s, whether satisfaction of her individual claim, without redress of her viable classwide allegations, is sufficient to bring the lawsuit to an end.”65 The determination of standing, needless to say, should never be left to the plaintiff’s subjective “choice,” as opposed to the existence of an objective, concrete injury; otherwise, no case would ever be dismissed on such grounds.

Over time, however, the dissent’s position has proved persuasive. Three years later, the Court reversed itself and held that an unaccepted offer of judgment does not render the class representative’s claim moot.66 Long-standing precedent establishes that a class representative must have individual standing, i.e., must have his own injury, and cannot rely on the standing of absent class members.67 Thus, if the offer of judgment mooted the class representative’s claim, one would think the class claim would have to be dismissed as well, as in Genesis Healthcare. To get around the possibility of what it called “picking off” the class claims, the Court accepted the questionable notion that a plaintiff who sues for a statutory penalty amount, is then offered that exact amount by the defendant, and rejects the offer, still has a concrete injury allowing him to pursue . . . the exact amount he just rejected. In effect, the Court sanctioned a litigation-for-litigation’s-sake approach that benefits no one aside from class counsel. The result is that defendants can no longer offer judgment to defeat class certification, which is not the kind of outcome a Court supposedly hell-bent on killing off all class actions would reach.

#### Class actions do not prevent collusion or protect public interest, they line the pockets of creative lawyers.

William P. Barnett, Prof of Business @ Stanford, ’21, There Is No Conservative Case for Class Actions, The Federalist Society Law Review, Vol 22.

To begin, it is simply not the case that regulation of corporations is currently performed solely or even largely by the government to the exclusion of the plaintiffs’ bar. Rather, we now get the worst of both worlds. If there is a real issue, like a data breach or the Volkswagen emissions scandal, there is over-enforcement. Every possible regulator will investigate and prosecute, from the alphabet soup of federal agencies—DOJ, SEC, EPA, FTC—to state attorneys general. There will also be numerous pile-on private class actions filed. So we end up with situations like Volkswagen or the Puerto Rican Cabotage antitrust matter, where on the regulatory side company executives face jail time, and the company still must pay out millions or even billions of dollars in private class action settlements.74 But more frequently, action is taken solely on the private enforcement side: cases are filed that government regulators would never pursue because there is no “there” there. Instead, the claims are simply class counsel’s novel theories. Thus, more emphasis on regulation through private class actions, as Fitzpatrick champions, would simply result in more class filings where they are not needed to curb bad behavior. It is hard to see how that would benefit conservatives, or anyone else aside from class counsel.

### XT 1NC 3: Greedy Lawyers

#### Class action is meritless – lawyers launch suits expecting defendants to settle. The aff assumes that plaintiffs are in charge of litigation when counsel actually runs the show and is guided by the profit motive. Law firms have no restrictions on duplications and no cost shifting which turns defenders of public interest into profit seeking bounty hunters. Lawyers file dozens of redundant cases that a public antitrust enforcer would never pursue. 1NC Barnett is super long and cites a literal “slew” of examples to demonstrate our point.

#### If we win any of the above, it logically eliminates the case. Class actions help no one but the wealthy, corporations will settle and pay off counsel – the aff does not improve market efficiency.

William P. Barnett, Prof of Business @ Stanford, ’21, There Is No Conservative Case for Class Actions, The Federalist Society Law Review, Vol 22.

Ultimately, Fitzpatrick’s thesis fails on perhaps the most fundamental conservative principle of all—seeing the world as it is, instead of how we wish it to be. Class actions are not on the verge of disappearing, because of arbitration or any other aspect of Supreme Court jurisprudence. Class actions vastly increase the regulatory burden on companies, creating issues that government enforcers would never bother to pursue. Class actions typically do not meaningfully benefit class members, but they do enrich class counsel. Class actions are not driven by market forces, but rather the profit motive has been distorted to incentivize copycat, abusive filings. Finally, class actions as currently practiced have no basis in this country’s legal tradition, have effected a radical change in the risk defendants face for many types of claims, and promote collectivization at the expense of individual liberty. Aside from the plaintiffs’ bar, no one should be happy with how class actions are litigated in the country today, least of all conservatives.

#### Greedy lawyers will get settlements that favor the law firm, not the litigants; they will sue for outrageous settlements that benefit the firm and solve nothing.

A Michael Weber, Shareholder/Partner @ Littler, JD NYU, ’17, “Mandatory Arbitration Agreements: To Be or Not to Be” https://www.littler.com/publication-press/press/mandatory-arbitration-agreements-be-or-not-be

The surge in arbitration agreements is not surprising, as arbitration presents some benefits over traditional litigation. As the cost of defending employment claims has skyrocketed, particularly given the length and formality of the litigation process and the broad scope of permissible discovery and potential class-wide relief, employers often agree to pay out settlements for even the most meritless claims, simply to avoid the higher cost of defending themselves and exposure, as well as the significant costs associated with e-discovery.

Many employers view arbitration as a quicker and more cost-efficient way of resolving employment disputes, especially avoiding the significant cost burden and risk associated with defending class actions, which allow a single employee to file suit on behalf of many, causing an employer to consider settlement even when the underlying claim is dubious. Employers also are attracted to arbitration's increased predictability; in arbitration, the parties rely on a trained legal professional to decide employment disputes rather than rolling the dice with a jury.

In addition, because arbitrations are private, the proceedings and ultimate outcome ordinarily are confidential, reducing both the risk of copycat plaintiffs and damage to the company's brand and reputation. Arbitration also has its advantages for employees. It provides a cost-effective and accessible way for an employee to address a dispute with his or her employer. Generally, individual arbitrations are likely to reach resolution more quickly than litigation. Further, while arbitration may not, in the eyes of the plaintiffs' bar, as frequently produce windfall damage awards that juries sometimes render, the expeditious and informal nature of arbitration gives more employees an opportunity to effectively resolve their workplace disputes. In addition, individual arbitration affords the employee the right to decide when and for what amount the case may be settled instead of allowing plaintiffs' class action attorneys to settle for pennies on the dollar when the underlying claim for an individual plaintiff may be valued at a greater amount.

Many judges also favor arbitration, as it helps relieve an already overburdened court system. Of course, the increased use of arbitration agreements is not without controversy. Detractors may claim that damages awarded to successful employees at arbitration are substantially lower than jury awards, but these claims cannot be fully evaluated; given the privacy of most arbitration proceedings, hard and comprehensive data are not readily available. Likewise, arbitrators may be less likely to grant dispositive motions than their judicial counterparts and more likely to present "split the baby" outcomes.

### XT 1NC 4: Small Claims

#### Mandatory arbitration is good for workers – key to small claims compensation. The vast majority of employee actions are too small to arbitrate because the attorneys fees are greater than the damage they incurred. After the plan, companies will refuse to arbitrate, effectively forcing litigation while knowing full well that those that they wronged cannot afford to go to court.

#### Instead of litigation, mandatory arbitration forces companies into small claims court. Those courts exclude attorneys and avoid attorney’s fees.

William P. Barnett, Prof of Business @ Stanford, ’21, There Is No Conservative Case for Class Actions, The Federalist Society Law Review, Vol 22.

Significantly, decentralization underlies subsidiarity, a fundamental conservative principle that gives life to federalism. Pursuant to subsidiarity, “a central authority should . . . perform only those tasks which cannot be performed at a more local level.”78 It is hard to see how collectivizing the claims of thousands or even millions of class members on a state-wide or national basis before a single judge comports with this principle, particularly when compared to alternative modes of dispute resolution. The oft-cited prototypical example of a necessary class action is the so-called small value or negative value claim. As Fitzpatrick puts it, “private enforcement of small harms is not possible without the class action device,” so it’s either “the class action or no private enforcement at all.”79 But that is simply not true. Every state has small claims courts that are specifically designed to resolve individual low-dollar disputes. Some states, like California, prohibit parties from being represented by attorneys in small claims proceedings.80 Thus, in those states, the lack of an attorney prosecuting a small value claim—thereby lowering the cost—is a feature, not a bug.

Indeed, one senses that the repeated incantations from the plaintiffs’ side that without class actions small value claims wouldn’t be litigated is in reality an acknowledgement that the real parties in interest are the class counsel. As Redish puts it in Wholesale Justice, “uninjured plaintiff attorneys . . . act as private enforcers of substantive legal restraints.”81 Further, the fact that people often choose not to resort to small claims court to resolve minor disputes does not justify class proceedings; if anything, that simply again shows that life is short and the real parties in interest in many class actions are the attorneys who file the cases. That is, an individual’s lack of interest in pursuing a claim should not somehow justify a third party pursuing the claim on his behalf. And indeed, the previously noted abysmal claims rates in class settlements further confirm the issue with small value claims is largely a lack of interest, not the lack of an attorney.

Fitzpatrick tries to enlist Judge Posner in support of his argument here, quoting Posner’s statement that only “a lunatic or a fanatic sues for $30.”82 But in a later case, Posner more carefully noted that the denial of class certification “does not mean that the class members are remediless, but they will have to seek their remedies in small claims courts.”83 Subsidiarity would be better served by moving away from massive class actions and towards enforcement of individual small dollar disputes in small claims courts, where local judges can pass on claims brought by their citizens who are actually invested in pursing them.

## DA

### overview – 1nr

#### DA turns the case – innovation in tech is key to global competitiveness and outpacing China – absent that, escalation inev cuz upends balance of power and strategic stability.

#### Flip try or die – innovation turns every impact and lack of innovation makes every aff scenario inevitable. The existential risks of tech leadership outweigh all other categories of risk.

GCSA, United Kingdom’s Government Chief Scientific Adviser, ’14, “INNOVATION: MANAGING RISK, NOT AVOIDING IT” https://www.fhi.ox.ac.uk/wp-content/uploads/Managing-existential-risks-from-Emerging-Technologies.pdf

Historically, the risks that have arisen from emerging technologies have been small when compared with their benefits. The potential exceptions are unprecedented risks that could threaten large parts of the globe, or even our very survival1 .

Technology has significantly improved lives in the United Kingdom and the rest of the world. Over the past 150 years, we have become much more prosperous. During this time, the UK average income rose by more than a factor of seven in real terms, much of this driven by improving technology. This increased prosperity has taken millions of people out of absolute poverty and has given everyone many more freedoms in their lives. The past 150 years also saw historically unprecedented improvements in health, with life expectancy in the United Kingdom steadily increasing by two to three years each decade. From a starting point of about 40 years, it has doubled to 80 years2 .

These improvements are not entirely due to technological advances, of course, but a large fraction of them are. We have seen the cost of goods fall dramatically due to mass production, domestic time freed up via labour saving machines at home, and people connected by automobiles, railroads, airplanes, telephones, television, and the Internet. Health has improved through widespread improvements in sanitation, vaccines, antibiotics, blood transfusions, pharmaceuticals, and surgical techniques.

These benefits significantly outweigh many kinds of risks that emerging technologies bring, such as those that could threaten workers in industry, local communities, consumers, or the environment. After all, the dramatic improvements in prosperity and health already include all the economic and health costs of accidents and inadvertent consequences during technological development and deployment, and the balance is still overwhelmingly positive.

This is not to say that governance does or should ignore mundane risks from new technologies in the future. Good governance may have substantially decreased the risks that we faced over the previous two centuries, and if through careful policy choices we can reduce future risks without much negative impact on these emerging technologies, then we certainly should do so.

However, we may not yet have seen the effects of the most important risks from technological innovation. Over the next few decades, certain technological advances may pose significant and unprecedented global risks. Advances in the biosciences and biotechnology may make it possible to create bioweapons more dangerous than any disease humanity has faced so far; geoengineering technologies could give individual countries the ability to unilaterally alter the global climate (see case study); rapid advances in artificial intelligence could give a single country a decisive strategic advantage. These scenarios are extreme, but they are recognized as potential low-probability highimpact events by relevant experts. To safely navigate these risks, and harness the potentially great benefits of these new technologies, we must continue to develop our understanding of them and ensure that the institutions responsible for monitoring them and developing policy responses are fit for purpose. This chapter explores the high-consequence risks that we can already anticipate; explains market and political challenges to adequately managing these risks; and discusses what we can do today to ensure that we achieve the potential of these technologies while keeping catastrophic threats to an acceptably low level. We need to be on our guard to ensure we are equipped to deal with these risks, have the regulatory vocabulary to manage them appropriately, and continue to develop the adaptive institutions necessary for mounting reasonable responses.

Anthropogenic existential risks vs. natural existential risks

An existential risk is defined as a risk that threatens the premature extinction of humanity, or the permanent and drastic destruction of its potential for desirable future development. These risks could originate in nature (as in a large asteroid impact, gamma-ray burst, supernova, supervolcano eruption, or pandemic) or through human action (as in a nuclear war, or in other cases we discuss below). This chapter focuses on anthropogenic existential risks because — as we will now argue — the probability of these risks appears significantly greater.

Historical evidence shows that species like ours are not destroyed by natural catastrophes very often. Humans have existed for 200,000 years. Our closest ancestor, Homo erectus, survived for about 1.8 million years. The median mammalian species lasts for about 2.2 million years3 . Assuming that the distribution of natural existential catastrophes has not changed, we would have been unlikely to survive as long as we have if the chance of natural extinction in a given century were greater than 1 in 500 or 1 in 5,000 (since (1 – 1/500)2,000 and (1 – 1/5,000)18,000 are both less than 2%). Consistent with this general argument, all natural existential risks are believed to have very small probabilities of destroying humanity in the coming century4 .

In contrast, the tentative historical evidence we do have points in the opposite direction for anthropogenic risks. The development of nuclear fission, and the atomic bomb, was the first time in history that a technology created the possibility of destroying most or all of the world’s population. Fortunately we have not yet seen a global nuclear catastrophe, but we have come extremely close.

#### Turns case – every impact about international conflict and internal about innovation – BUT outweighs on timeframe because hinders short-term innovation but requires long-term breaking up market power.

#### Link takes out solvency – if we win on the case that the cases brought by the aff are lawyers looking for a quick cash settlement and not actually effectively driven by worker abuses, bringing more sham cases doesn’t solve. Members of a class do not have any idea what’s happening and won’t bring suit for actual worker abuses. AND, that causes arbitration because lawyers bring tiny suits to cash out on settlement not litigation, which ends workers up back where they started negotiating with the company internally.

SAM S. SHAULSON Counsel of Record MORGAN, LEWIS & BOCKIUS LLP, ’17, “BRIEF OF HR POLICY ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF EMPLOYER PETITIONERS AND RESPONDENT “ https://www.scotusblog.com/wp-content/uploads/2017/07/16-285-16-300-tsac-16-307-bsac-HR-Policy-Association.pdf

Further, even if one incorrectly assumed that class litigation eventually results in some type of concerted activity, one still needs to consider the practical realities of class- and collective-action litigation. The costs and distractions begin from the moment a class or collective action is filed—companies are forced to spend considerable sums and divert significant human capital in mere preparation for litigation and throughout class certification proceedings. In many cases, the mere filing of class litigation or the expense involved in class discovery will force a settlement and such “settlement” may be adverse to, or not fully address, the interests of other employees—again, contrary to the concept of protected concerted activity. This further illustrates why the “concerted activity” must be measured from the moment a suit is filed rather than some future time when the court’s procedures could possibly manufacture some actual concerted activity. In sum, the simple act of filing a class- or collective-action lawsuit—in an attempt to use judicial processes to troll for possible co-plaintiffs—cannot qualify as concerted activity under the Act. Thus the arbitration clauses at issue here should be enforced

### AT davis from case – 1nr

#### On the case, mostly, but here are more links –

#### Multiplier effect – class actions are uniquely dangerous because lawyers can combine the damages. 1NC evidence says that is an existential threat for most businesses.

#### Chilling effect – companies will be forced to settle regardless of the merits, functionally making every allegation a fait accompli. The plan unleashes corporate bounty hunters.

William P. Barnett, Prof of Business @ Stanford, ’21, There Is No Conservative Case for Class Actions, The Federalist Society Law Review, Vol 22.

It is difficult to square an unprecedented invention that has caused radical changes in the risks attendant to litigation with any conservative notion of prescription or adherence to tradition. Indeed, Burke believed that prescription should result in “pursu[ing] change carefully, preferring changes to substance over changes to form where possible, and incremental over radical reform where necessary.”91 Federal law, in the Rules Enabling Act, similarly holds that procedural rules may not affect substantive rights.92 Crucially, however, modern class counsel’s “bounty hunter” role is “not created by the substantive law itself.”93 Thus, by permitting a radical change in procedure, i.e., form, to effect a tremendous change in substance, i.e., in how the merits of disputes are collectivized and resolved, the move to class over bilateral litigation fails the prescription standard on all counts.94 Further, increasing reliance on the class action device has also contributed to another loss of tradition, that of the jury trial.

It is no secret that jury trials—the fundamental basis of dispute resolution in the American system of litigation—have long been in decline, to the point that numerous articles and studies have been published on the “vanishing trial” phenomenon for even ordinary cases. Class actions by design collectivize claims and consequently result in such significant risk for defendants that, even more so than regular cases, they almost always are too risky to try. As a result, settlements frequently occur, whatever the merits of the claims.

Even when defendants are willing to roll the dice, class actions are simply too large and unwieldy to try in a fair and appropriate manner. In this regard, Redish correctly notes that the class action device creates no substantive rights, nor could it without violating the Rules Enabling Act. Rather, it simply allows for the aggregation of “pre-existing individual private rights created by substantive law.”95 Invariably, however, we end up with corners being cut and substantive law being altered to accommodate the procedural class action device, particularly in those rare instances in which class trials have been attempted.96 For example, the Fourth Circuit has noted the problem of the “perfect plaintiff” approach to trying class claims, where class counsel is allowed to piece together various bits of evidence from members of the amorphous class that in reality affected no single, real individual.97

#### Their evidence doesn’t assume the ubiquity of class waivers. The plan would open up massive suits against almost every major company in America.

EDWARD F. BERBARIE Counsel of Record ROBERT F. FRIEDMAN SEAN M. MCCRORY LITTLER MENDELSON, ’16, “BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE COALITION FOR A DEMOCRATIC WORKPLACE AND THE NATIONAL RETAIL FEDERATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS “ https://www.scotusblog.com/wp-content/uploads/2016/10/16-285-16-300-cert-amici-NAM.pdf

FAA-governed arbitration agreements with class waivers are widespread in the American workplace and offer a valuable alternative to class litigation. In 2015 alone, there were 8,954 Fair Labor Standard Act, 29 U.S.C. § 201 et seq. (“FLSA”) cases filed, many of which were filed as collective actions.4 A survey of approximately 350 companies5 shows class actions in the employment context cost those employers approximately $462.8 million in 2014.6 In addition to the enormous costs involved in defending against class claims, there is also “the risk of ‘in terrorem’ settlements that class actions entail.” AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350 (2011). As this Court has recognized, it is no surprise that employers, even when faced with just “a small chance of a devastating loss…will be pressured into settling questionable claims.” Id.; see also Murphy Oil USA, Inc., 361 N.L.R.B. No. 72, slip op., at p. 46 (2014) (Johnson, dissenting) (“...[C]laims aggregation poses an increased risk of liability even for meritless claims, due to the simple mathematics of aggregating hundreds or thousands of claims (that would not otherwise exist) into one unitary claim. That aggregated claim will pose a greater risk than any individual claim, regardless of whether it is merited or not.”)

#### Class litigation threatens industrial peace – arbitration key.

Benjamin G. Robbins Counsel of Record, ’17, Martin J. Newhouse, President New England Legal Foundation“BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF THE EMPLOYER PARTIES” https://www.scotusblog.com/wp-content/uploads/2017/07/16-285-16-300-16-307-tsac-New-England-Legal-Foundation.pdf

It is unlikely that Congress intended the NLRA to apply to litigation of any kind, let alone group litigation, because “the underlying purpose of this statute is industrial peace,” achieved through negotiation and compromise in the workplace. Brooks v. NLRB, 348 U.S. 96, 103 (1954). See also Auciello Iron Works, Inc. v. NLRB, 517 U.S. 781, 785 (1996) (“The object of the National Labor Relations Act is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employers.”) (emphasis added).

The NLRA was intended to protect employees’ right of association in the workplace, not in a courtroom or in arbitration, so that employees could negotiate their differences with their employer, not litigate over them. See Charles J. Morris, NLRB Protection in the Nonunion Workplace: A Glimpse at A General Theory of Section 7 Conduct, 137 U. Pa. L. Rev. 1673, 1683, 1685 (1989) (“The purpose of the Wagner Act, and therefore the purpose of . . . section 7, was to bring to the workplace a legally protected right of association . . . [which] . . . would be comparable to the rights of freedom of speech and association the first amendment guaranteed to workers in their political lives.”) (emphasis added); Robert A. Gorman and Matthew W. Finkin, The Individual and the Requirement of “Concert” Under the National Labor Relations Act, 130 U. Pa. L. Rev. 286, 343 (1981) (discussing NLRA’s purpose to establish “civil rights at the workplace”) (emphasis added).

Group litigation, then, is far removed from the NLRA’s purpose of protecting group negotiation in the workplace. It is inherently coercive, and it is hardly the cooperative process that Congress had in mind to promote industrial peace. See Morris, NLRB Protection in the Nonunion Workplace, 137 U. Pa. L. Rev. at 1682 (discussing statement of Senator Wagner that NLRA was intended to establish “a cooperative relationship between workers and employers,” achieved through “equality of bargaining power.”). In particular, a class action is at odds with the NLRA’s purposes because it creates “the risk of ‘in terrorem’ settlements,” Concepcion, 563 U.S. at 350, due to the sheer size of the plaintiff class and the potential damages at stake, quite apart from the merits of the underlying dispute. See id. It is doubtful, then, that a class action is the “strength in numbers” that Congress had in mind when it declared its intent to protect employees’ “full freedom of association” for the purpose of “negotiating” and “bargaining” their differences with their employer. 29 U.S.C. § 151. And “we resolve doubts in favor of arbitration.” CompuCredit, 565 U.S. at 109

### AT innovation low – 1nr

#### Begs Q of internal link – dropped incents suits against most innovative firms.

#### U.S. innovation is high and globally dominant – big business is key.

Wolf ’21 [Martin; April 27; Chief Economics Commentator, M.A. in Economics from Oxford University; Financial Times, “China is wrong to think the US faces inevitable decline,” <https://www.ft.com/content/8336169e-d1a8-4be8-b143-308e5b52e355>]

The Chinese elite are convinced that the US is in irreversible decline. So reports Jude Blanchette of the Center for Strategic and International Studies, a respected Washington-based think-tank. What has been happening in the US in recent years, particularly in politics, supports this perspective. A stable liberal democracy would not elect Donald Trump — a man lacking all necessary qualities and abilities — to national leadership. Nevertheless, the notion of US decline is exaggerated. The US retains big assets, notably in economics.

For one and half centuries, the US has been the world’s most innovative economy. That has been the basis of its global power and influence. So how does its innovative power look today? The answer is: rather good, despite competition from China.

Stock markets are imperfect. But the value investors put on companies is at least a relatively impartial assessment of their prospects. At the end of last week, 7 of the 10 most valuable companies in the world and 14 of the top 20, were headquartered in the US.

If it were not for Saudi Arabian oil, the five most valuable companies in the world would be US technology giants: Apple, Microsoft, Amazon, Alphabet and Facebook. China has two valuable technology companies: Tencent (at seventh position) and Alibaba (at ninth). But those are China’s only companies in the top 20. The most valuable European company is LVMH at 17th. Yet LVMH is just a collection of established luxury brands. That ought to worry Europeans.

When we look only at technology companies, the US has 12 of the top 20; China (with Hong Kong but excluding Taiwan) has three; and there are two Dutch companies, one of which, ASML, is the largest manufacturer of machines that make integrated circuits. Taiwan has the Taiwan Semiconductor Manufacturing Company, the world’s biggest contract computer chipmaker, and South Korea has Samsung Electronics.

Life sciences are another crucial sector for future prosperity. Here there are seven European companies (with Switzerland and the UK included) in the top 20. But the US has seven of the top 10, and 11 of the top 20. There is also one Australian and one Japanese company, but no Chinese businesses.

In sum, US companies are globally dominant and nearly all the most valuable non-US firms are headquartered in allied countries.

#### China 2025 and semiconductor dominance are far off – the U.S. is maintaining its lead.

Yang ’21 [Xiangfeng; March 23; Associate Professor, Yonsei University, PhD in Political Science and International Relations from the University of Southern California (USC); The Washington Quarterly, “US-China Crossroads Ahead: Perils and Opportunities for Biden,” vol. 44 no. 1; KP]

Huawei and the ever longer roster of Chinese companies on the US Commerce Department’s “entity list” are in crisis mode. Their Achilles’ heel is the supply of high-tech chips. Even though Huawei has been able to design advanced computer chips of its own, it still depends on outside manufacturers, particularly TSMC, to produce them. In 2019 alone, China imported US$300 billion worth of foreign-made chips, while home-made ones only met about 15 percent of market demand.63 Following three successive rounds of sanctions that forced TSMC and other manufacturers to stop working with Huawei, in October the United States started to curb the supply of certain equipment, accessories, and raw materials that affected China’s Semiconductor Manufacturing International Corporation (SMIC), the country’s best hope for breaking its dependence on foreign suppliers.64 After claiming the top spot in the smartphone market in the second quarter of 2020, Huawei has had to give up on developing its high-end smartphone and sell its low-end brand in order to protect the more core business of 5G equipment. Shortage of chips is a clear and present danger for Huawei as much as for China’s high-tech sector overall.

China has tried to stave off a situation such as this. The “Made in China 2025” program broadly mandated that at least two-thirds of China’s needs should be met by domestic chips, and the state-owned National Integrated Circuit Industry Investment Fund spent US$20.8 billion on chip projects in 2014 and raised another US$30 billion in 2019.65 One of the beneficiaries was Fujian Jinhua, a joint private and public venture, once billed as an industry pioneer for memory chips in China.66 Only months after the trade war became a reality in July 2018, it was battered by US sanctions and an indictment that immediately threw the multibillion-dollar project into turmoil. Be that as it may, Jinhua’s setback did not deter others from joining the fray. Huawei, for one, is building a dedicated chip plant in Shanghai. The allure of government subsidies incentivized a mad dash for thousands of enterprises to register as semiconductor companies, most of which lacked the requisite experience, technologies, talents, and deep pockets to succeed and ended up saddled with debts. Even the better ones are bedeviled by various problems—in November, Tsinghua Unigroup, the second-largest chipmaker, defaulted on a domestic bond worth about US$200 million.

Experts concur that it will take years, if not decades, for China to break into the exclusive club of cutting-edge semiconductor manufacturers.67 Worse still, the chip industry is but a microcosm of China’s technological vulnerability. Future American sanctions might even wreck its plan to roll out the COMAC passenger jet, which besides billions in sunk costs and repeated delays, relies on key American-made components and technologies such as jet engines. Nevertheless, the imperative of de-Americanizing its reliance on imported tech products will only motivate China’s government to expedite plans to obtain technological self-sufficiency and supremacy in critical areas. Consequently, all is fair game, industrial espionage included. When the Party’s 300-member Central Committee met in October to deliberate on the 14th Five-Year Plan, due to be formally unveiled in spring 2021, technological advancement was high on the agenda. While more funding will be poured into those areas of strategic import, it is expected that the central government will play a bigger role in coordinating and supervising to improve efficiency. Educational and research institutions will also need to step up, undoubtedly in collaboration with government authorities and the industry.

The chip industry is a microcosm of China’s technological vulnerability

To sum up, how the new US government will address the problems of Taiwan and tech competition with China will have far-reaching implications for not only regional stability and the global tech scene, respectively, but also for the future contour of the Sino-US relations. As the Biden administration has hit the ground running, the world is holding its breath.

#### Innovation is migrating, NOT slowing.

Kennedy ’20 [Joe; November 9; former chief economist for the U.S. Department of Commerce, Economics PhD from George Washington University, J.D. from the University of Minnesota; Information Technology and Innovation Foundation, “Monopoly Myths: Is Big Tech Creating “Kill Zones”?” https://itif.org/publications/2020/11/09/monopoly-myths-big-tech-creating-kill-zones]

Data on Venture Investments Suggests Tech Acquisitions and High Market Share Do Not Hurt Start-Ups

The right measure of the effect of killer zones is not the trend in the specific market wherein large tech firms operate, but in the overall tech innovation ecosystem. Even Hathaway acknowledged that the relative declines he observed in the narrow markets where the big firms are strongest could be offset by investments moving to other, more promising, markets. In fact, that appears to be exactly what has happened. From 2006 to 2019, venture capital investments in IT deals increased steadily and significantly. Although it leveled off in 2019, tech funding was still 54 percent above the 2017 level.

Figure 1. U.S. deal value in total and in tech (2006–2019)51

Figure 2 shows the number of technology angel and seed deals as well as the number of early stage deals. The number of angel and seed deals rose by almost six-fold between 2006 and 2019, peaking in 2015. The number of early deals rose by 2.4 times. It is hard to see any sign of investor activity slowing down.

Figure 2. U.S. deal volume in tech (2006–2019)52

### AT small firms – 1nr

#### Didn’t say big firms good! Targets startups who are innovating!

#### 1NC internal link evidence is the gold standard – it is the first study of its kind with a massive sample size and the authors explicitly connect our link to impact – more litigation targets the most innovative firms and reduces the quality and quantity of their outputs. Lawyers will target innovative firms because they are uniquely profitable and need to preserve their reputation, making them likely to settle and pay large sums.

#### Meritless litigation uniquely harms the most innovative firms – prefer gold standard of business research.

Alex Verkhivker, Chicago Booth Review, ‘18, "Class Action Lawsuits Hit Innovative Companies the Hardest," University of Chicago Booth School of Business, https://www.chicagobooth.edu/review/class-action-lawsuits-hit-innovative-companies-hardest

Corporate America has long complained that many class action suits are frivolous and an unfair tax on business. Lawyers have a financial incentive to file meritless suits because companies are often willing to settle—even when allegations are false—to save time, money, and public image. Lawmakers in Congress have wrestled with this issue for years without resolution.

But research suggests more reason to address it: the costs of such litigation weigh disproportionately on the most innovative US corporations, according to Chicago Booth’s Elisabeth Kempf and Tilburg University’s Oliver Spalt. Using data on more than 40,000 lawsuits filed between 1996 and 2011 against 6,111 companies, the researchers find that frivolous lawsuits tended to focus on highly innovative businesses, which represented juicy targets—and cost the average company in this group $1.1 million a year, or about 4 percent of annual profit gains.

To sort companies by innovation level, the researchers used a scale developed by MIT’s Leonid Kogan, Northwestern University’s Dimitris Papanikolaou, Stanford’s Amit Seru, and Indiana University’s Noah Stoffman. It measures how a company’s stock responds in the days following a patent grant, a gauge of how valuable the innovation of the company is.

Kempf and Spalt counted a lawsuit as meritless if it was dismissed by a federal court and wasn’t settled. Their study finds that when such a lawsuit was filed, the targeted company experienced a 2 percent drop in market value from three trading days before to three trading days after the filing. While this is a significant drop, Kempf and Spalt argue that it understates the true cost of a frivolous suit because a company’s stock often started to fall in advance of a lawsuit filing. Expanding the window to 30 days before and 30 days after a suit was filed, the researchers find an even greater average share-price drop: 18 percent.

These results are for the average company in the study’s sample. When the researchers broke out businesses that ranked in the top third of their industry peer group based on the corporate-innovativeness gauge, the results were even more dramatic. “The corresponding dollar losses in the seven days around a meritless lawsuit filing are $148 million for the average successful innovator, but only $12 million for the average nonsuccessful innovator,” the researchers write.

And as frivolous suits target the most advanced companies, the resulting costs may affect corporate decisions about whether to innovate and list their shares. The current US securities class action system, they argue, poses a threat to economic growth and competitiveness.

### AT low growth – 1nr

#### There’s a raft of positive indicators that are keeping the economy afloat.

Ramirez ’11-4 [Kelsey; November 4; Business analyst; Fox Business, “Mortgage rates rising amid uptick in US economic confidence: Freddie Mac,” <https://www.foxbusiness.com/personal-finance/mortgage-rates-rising-optimistic-economy-freddie-mac>]

Mortgage interest rates rose once again, hitting 3.14% for the average 30-year fixed-rate loan as confidence in today’s economy and recovery from the COVID-19 pandemic increases, [according to the latest Primary Mortgage Market Survey](http://www.freddiemac.com/pmms/) from Freddie Mac.

"The yield on the 10-year Treasury note has been trending up due to the decline in new COVID cases, increasing consumer optimism, as well as broadening inflation and persistent shortages," Freddie Mac Chief Economist Sam Khater said. "Mortgage rates are also rising, but purchase demand remains firm, showing that latent purchase demand exists among consumers."

[Mortgage ad omitted].

Economic recovery remains strong, pushing up rates

The 30-year mortgage increased to 3.14% annual percentage rate (APR) for the week ending Oct 28, up from 3.09% the week before. This was down from 2.81% last year. The 15-year mortgage also grew from 2.33% to 2.37% during that same period, but remained higher than last year’s 2.32%.

The average rate for a five-year Treasury-indexed hybrid adjustable-rate mortgage increased slightly, from 2.54% to 2.56%, but remained below last year’s 2.88%.

"Investors sent mortgage rates higher following this week’s raft of positive economic indicators, including a solid rebound in consumer confidence, rising new home sales and strong earnings reports," said George Ratiu, Realtor.com manager of economic research. "The advance estimate for third quarter gross domestic product showed the economy expanded, even though the gain came in below expectations.

"Consumer confidence is at the core of these economic gains, and as the number of COVID cases continues to drop, the outlook for the upcoming holiday retail season looks brighter, as long as U.S. ports can manage to offload a long line of cargo ships," Ratiu said. "And this positive economic outlook usually means higher mortgage rates for consumers."

#### Growth is surging due to corporate gains and favorable fed policy.

Lerman ’10-22 [David; October 22; Editor of Budget Tracker, a daily compendium of all issues related to federal spending and the budget, B.A. in Political Science and International Relations from Brown University; Roll Call, “Economic growth helps cut fiscal 2021 deficit to $2.8 trillion,” <https://www.rollcall.com/2021/10/22/economic-growth-helps-cut-fiscal-2021-deficit-to-2-8-trillion/>]

Surging tax revenues as the U.S. economy rebounded from the coronavirus-driven downturn helped reduce the budget deficit for the fiscal year that ended Sept. 30, the Treasury Department and White House budget office announced Friday.

The fiscal 2021 deficit clocked in at a still-massive $2.8 trillion, although that’s down $360 billion from the previous year’s shortfall and it’s $897 billion less than the Biden administration predicted in February.

Before the COVID-19 pandemic, a $2.8 trillion deficit would have sent shock waves through Capitol Hill, where fiscal hawks had expressed alarm at trillion-dollar shortfalls. But the modest decline from a $3.1 trillion fiscal 2020 deficit reflects renewed optimism that the worst days of the pandemic are in the rearview mirror.

“Today’s joint budget statement is further evidence that America’s economy is in the midst of a recovery,” Treasury Secretary Janet L. Yellen said in a statement, calling the better-than-expected numbers “a direct result” of the administration’s COVID-19 management

and a big aid package enacted in March.

The decline from the previous year’s shortfall was due partly to a surge in federal revenues. Tax receipts, which swelled past $4 trillion, reached their highest level as a share of the economy in 20 years. Revenue exceeded White House budget estimates by $465 billion.

And corporate tax revenue surged to almost $372 billion, topping the previous high reached in fiscal 2007. Officials attributed the overall revenue gains to increases in business and personal income from a rebounding economy, pandemic relief and the vaccination rollout.

#### Business confidence is powering growth to full-blown recovery by 2022.

Dodd ’11-9 [David; November 9; Market strategist and analyst; Customer Think, “Economic Forecasters Predict a Strong 2022 . . . Mostly,” <https://customerthink.com/economic-forecasters-predict-a-strong-2022-mostly/>]

Several organizations have recently released economic forecasts that cover all or part of 2022, and I'll describe some of these predictions in this post. All of the forecasts discussed here are regularly updated, so marketers should check them often to ensure they are working with the latest economic outlooks.

Real GDP Growth

Most economists and other forecasters now expect the overall U.S. economy to experience above-average growth in 2022. In September, U.S. Federal Reserve Board members and Federal Reserve Bank presidents predicted that U.S. real GDP will increase by 3.8% next year (mean of individual forecasts). In October, The Conference Board also estimated that real GDP will grow 3.8% in 2022.

Several Wall Street economists tracked by CNBC and Moody's Analytics are predicting GDP growth of 3.9% in 2022 (average of individual forecasts).

To put these forecasts in perspective, many economists believe that the maximum sustainable growth rate of the U.S. economy (measured by real GDP) is 2% - 3%.

Unemployment

The U.S. unemployment rate has fallen dramatically since the pandemic high of 14.7% in April 2020. Last month, it stood at 4.6, according to the U.S. Bureau of Labor Statistics.

Most economists expect the unemployment rate to continue declining in 2022. For example, the Federal Reserve is now estimating that the average unemployment rate in the fourth quarter of 2022 will be 3.8%. The Conference Board is forecasting that the unemployment rate will fall from 4.8% in the fourth quarter of this year to 4.1% in the second quarter of next year.

Consumer Spending

Consumer sentiment declined sharply in August of this year and remained low in September and October, according to the University of Michigan's [Index of Consumer Sentiment](http://www.sca.isr.umich.edu/). Many economists have attributed this decline in consumer confidence to the summer-early fall surge of COVID-19 cases fueled by the Delta variant. In the October report, the University of Michigan researchers noted that the continuing low level of consumer optimism was primarily due to growing concerns about inflation.

Despite these downbeat readings on consumer confidence, most forecasters expect consumer spending to be strong next year. For example, The Conference Board expects real consumer spending to increase at annualized rates of 4.2% in the first quarter and 3.5% in the second quarter of 2022. And [Deloitte](https://www2.deloitte.com/us/en/insights/economy/us-economic-forecast/united-states-outlook-analysis.html) predicts that real consumer spending will increase by 3.5% over all of 2022.

Business Investment

Historically, business investment levels have been closely correlated with CEO confidence about future economic and business conditions. This relationship bodes well for business investment in 2022. In the latest McKinsey Global Survey of business executives, 51% of North American respondents said they expect economic conditions in their home country to improve over the next six months.

The Conference Board is estimating that "nonresidential investment" will increase at annual rates of 5.0% in the first quarter and 5.2% in the second quarter of next year. For all of 2022, [Deloitte](https://www2.deloitte.com/us/en/insights/economy/us-economic-forecast/united-states-outlook-analysis.html) is forecasting that "real fixed business investment" will grow 3.2%.

Inflation

Taken together, these forecasts suggest that the overall U.S. economy will continue to be in full-blown recovery mode in 2022. If these forecasts are accurate, most B2B companies should be operating next year under business conditions that are generally favorable.