# 1nc – fullertown 6

## off

### t – prohibit

#### Prohibitions must be certain bans. The plan prohibits *nothing* because every business practice can still occur – the plan just says the courts have to consider other factors when evaluating the practice.

Justice White, ’87, California v. Cabazon Band of Mission Indians, 480 US 202 - Supreme Court 1987

Following its earlier decision in Barona Group of Capitan Grande Band of Mission Indians, San Diego County, Cal. v. Duffy, 694 F. 2d 1185 (1982), cert. denied, 461 U. S. 929 (1983), which also involved the applicability of § 326.5 of the California Penal Code to Indian reservations, the Court of Appeals rejected this submission. 783 F. 2d, at 901-903. In Barona, applying what it thought to be the civil/criminal dichotomy drawn in Bryan v. Itasca County, the Court of Appeals drew a distinction between state "criminal/prohibitory" laws and state "civil/regulatory" laws: if the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the State's public policy. Inquiring into the nature of § 326.5, the Court of Appeals held that it was regulatory rather than prohibitory.[8] This was the analysis employed, with similar results, 210\*210 by the Court of Appeals for the Fifth Circuit in Seminole Tribe of Florida v. Butterworth, 658 F. 2d 310 (1981), cert. denied, 455 U. S. 1020 (1982), which the Ninth Circuit found persuasive.[9]

We are persuaded that the prohibitory/regulatory distinction is consistent with Bryan's construction of Pub. L. 280. It is not a bright-line rule, however; and as the Ninth Circuit itself observed, an argument of some weight may be made that the bingo statute is prohibitory rather than regulatory. But in the present case, the court reexamined the state law and reaffirmed its holding in Barona, and we are reluctant to disagree with that court's view of the nature and intent of the state law at issue here.

There is surely a fair basis for its conclusion. California does not prohibit all forms of gambling. California itself operates a state lottery, Cal. Govt. Code Ann. § 8880 et seq. (West Supp. 1987), and daily encourages its citizens to participate in this state-run gambling. California also permits parimutuel horse-race betting. Cal. Bus. & Prof. Code Ann. §§ 19400-19667 (West 1964 and Supp. 1987). Although certain enumerated gambling games are prohibited under Cal. Penal Code Ann. § 330 (West Supp. 1987), games not enumerated, including the card games played in the Cabazon card club, are permissible. The Tribes assert that more than 400 card rooms similar to the Cabazon card club flourish in California, and the State does not dispute this fact. Brief for 211\*211 Appellees 47-48. Also, as the Court of Appeals noted, bingo is legally sponsored by many different organizations and is widely played in California. There is no effort to forbid the playing of bingo by any member of the public over the age of 18. Indeed, the permitted bingo games must be open to the general public. Nor is there any limit on the number of games which eligible organizations may operate, the receipts which they may obtain from the games, the number of games which a participant may play, or the amount of money which a participant may spend, either per game or in total. In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular.[10]

#### Violation – aff changes the balancing test, which is *not* a prohibition.

AARON M . LEVINE, associate at Sullivan & Cromwell, JD Yale, & JOSHUA C . MACEY, Clerk for Judge Harvey Wilkinson, JD Yale, ’18, “Dodd-Frank Is a Pigouvian Regulation” The Yale Law Journal 127:1336

A. Command-and-Control Regulations

In a command-and-control regulatory scheme, the regulator—which can be an administrative agency, a judicial body, an executive, or a legislature—either prohibits or requires a certain action. Prohibitions—often called bans23 —pervade the American regulatory system and address a variety of problems, such as drug use24 and speeding.25 Mandates are also prevalent and cover diverse regulatory areas, such as minimum wage26 and seatbelt requirements.27 Dodd-Frank is replete with both prohibitions and commands.28 The most obvious benefit of command-and-control regulations is that they are a direct way for the government to prohibit or mandate behavior. Some regulatory goals are better served when the government does not need to engage in a complicated cost-benefit analysis to determine how much of a behavior should be permitted. Instead, a blanket prohibition or requirement is preferable. For instance, when implementing Dodd-Frank, Congress decided that most swaps should be traded on exchanges29 and that companies should report certain information about swap deals.30 Rather than charging financial institutions for refusing to report swaps or trade on an exchange, Dodd-Frank simply requires banks to abide by these rules.31 There was no need for the government to give parties the option not to report swaps since its aim was to force companies to report information on swap deals in every situation in order to promote pretrade price transparency.32 In situations like this, when the government is certain that an action should be required or prohibited, it need not waste resources implementing a complicated market-based scheme in order to accomplish its regulatory goal. Command-and-control regulations can also be optimal even when the government is not entirely sure that the relevant activity is worthy of indiscriminate prohibition or promotion. If the government lacks information about the private value a company places on an activity, but knows that the social costs of that activity are exorbitant, it may be advantageous to ban the activity entirely rather than to embrace an incentive-based regime that risks under-deterrence. Some have found SIFI regulations flawed for just this reason. For instance, the President of the Federal Reserve Bank of Minneapolis, Neel Kashkari, announced a plan to raise capital requirements dramatically in large part to force SIFIs to reduce dramatically the scope and scale of their operations.33 The idea is that capital requirements are currently not sufficiently onerous to incentivize banks to downsize. Recognizing that too big to fail firms remain a problem, Kashkari proposed increasing SIFI capital requirements to 23.5% in order to reduce the risks posed by these kinds of financial institutions.34 Although Kashkari grounds this position in the desire to ensure that banks have sufficient capital to withstand an economic downturn without resorting to bail outs,35 he acknowledges that his proposal would have the side benefit of forcing banks to restructure themselves.36 The compliance costs would be so onerous that they would effectively amount to a hard cap on bank size because banks would be forced to take immediate corrective actions and shrink dramatically.37 According to Kashkari, current capital rules do not provide a strong enough incentive for banks to downsize and simplify of their own accord, but more onerous capital requirements would.38 B. Market-Based Incentives In contrast with command-and-control regulations, market-based solutions neither prohibit nor require activities; instead, they influence behavior by changing the costs associated with certain actions. The government uses market-based incentives to regulate all sorts of behavior. Section 163(h) of the Tax Code, for example, provides a tax deduction for interest paid on home mortgages.39 The purpose of this provision is to incentivize people to buy homes—to give them “a stake in society and induce[] them to care about their neighborhoods and towns” by providing them a financial bonus when they do so.40 In this vein, the Tax Code has also been used to incentivize, among other things, the use of green energy,41 employer-provided health insurance,42 and charitable donations.43 As discussed in greater detail in Parts II and III, one of Dodd-Frank’s more onerous market-based regulations is the SIFI designation.44 Although the purpose of the SIFI designation is ostensibly to force banks to take steps toward becoming more resilient to economic downturns,45 the regulations also effectively charge financial institutions for being large. Banks are automatically subject to SIFI regulations if they have assets exceeding $50 billion.46 As soon as a bank crosses that threshold, it must pay a capital surcharge, conduct annual stress tests, and abide by certain liquidity requirements.47 And SIFI requirements get more onerous as banks get bigger.48 In short, these costs deter banks from growing larger. There are significant advantages to market-based solutions.49 In fact, most economists regard “Pigouvian taxes”—a classic form of market-based incentives in which the government imposes a tax on a private activity equal to the social costs created by that private activity—as generally preferable to other forms of regulation in most market conditions.50 One scholar framed the tension between the academic exuberance for Pigouvian taxes and the reluctance of policymakers to implement them in the following terms: “To many economists, the basic argument for increased use of Pigouvian taxes is so straightforward as to be obvious. But as George Orwell once put it, ‘We have now sunk to a depth where the restatement of the obvious is the first duty of intelligent men.’”51

#### 1. Limits– allowing their aff opens the explodes the topic by allowing any new theory of harm.

Greenfield et al , Leon B. comparative competition law @ Georgetown Law Center ; Lange, Perry A. vice-chair of the ABA Antitrust Section’s Joint Conduct Committe; Callan, Nicole. ice chair of the Civil Practice and Procedure Committee of the American Bar Association (ABA)'s Section of Antitrust Law, vice chair of the Civil Practice and Procedure Committee of the American Bar Association (ABA)'s Section of Antitrust Law, ’20,“ANTITRUST POPULISM AND THE CONSUMER WELFARE STANDARD: WHAT ARE WE ACTUALLY DEBATING? “ Antitrust Law Journal; Chicago Vol. 83, Iss. 2, (2020): 393-428.

C. Proposals Outside the Existing Consumer Welfare Framework

Some populist proposals would replace or supplement the consumer welfare standard, for example, by introducing no-fault monopoly rules, limits on vertical integration, or a "public interest" standard for merger reviews. Others have called for special rules for online platforms that would depart significantly from existing antitrust doctrine or establish entirely separate regulatory regimes.

Many of these proposals have received more attention and critical response than proposals to improve antitrust enforcement within the existing frame164 work. But these proposals in fact are less common and less developed than proposals that are consistent with the consumer welfare standard.

1.Public Interest Considerations in Merger Review

Under a "public interest" standard, mergers could be prohibited for reasons going beyond competitive harm, such as reduced wages, job cuts, or harm to small business. Critics of a public interest test argue that it would unconstructively inject social and political concerns into enforcement. For example, Diana Moss of the American Antitrust institute (which generally advocates for aggressive antitrust enforcement) has warned that a public interest standard would introduce uncertainty into the antitrust laws and "could include everything that is affected by a merger or abusive conduct: employment, health and safety, and even environmental concerns."168

But proposals to use public interest as the actual rule of decision are rare.169 Rather, antitrust populists typically argue that as a descriptive matter, antitrust under-enforcement harms the public interest (for example, by increasing income inequality, depressing wages, and reducing economic opportunities for workers), without advocating for public interest as a decisional benchmark.170

Applying public-interest considerations in merger reviews would represent a dramatic departure from existing antitrust enforcement, and could sacrifice consumer welfare, including long-term consumer welfare, to pursue other, non-market, performance-based goals. insofar as antitrust populists advance a public interest test, they must devise objective standards to ensure that the test does not transform into a broad power to regulate the economy for political ends and that the test proves predictable and administrable in practice. Those arguing for such a test must also respond to criticism that they are seeking to overextend antitrust law to address public-policy gaps and regulatory failures in other regimes.171 And they must explain why using antitrust for this purpose is preferable to employing sector-specific regulation or other mechanisms to address concerns outside the consumer welfare realm.

2.Special Rules for Online Platforms

Populists frequently argue that current antitrust rules are too rigid to address concerns that arise in the tech industry, such as potential competitive effects relating to aggregation of data, undue advantages based on economies of scale or scope, or erosion of consumer privacy. As discussed above, some of the concerns that populists raise-to the extent grounded in harm to market performance-could be addressed under the consumer welfare standard. Other proposals, however, plainly go beyond the current ambit of antitrust; these include populists' calls to limit firms' use of big data and to regulate online platforms as public utilities.

For example, one proposal would limit online platforms' use of cross-market data-i.e., prevent firms like Google and Amazon from using data acquired from one line of business to enhance another line of business.172 Populists argue that these limits could help prevent harm to smaller, rival businesses.173 Other proposals include restrictions on platforms' use of consumers' data to prevent "regressive wealth transfers" through "information asymmetries" and price discrimination.174 If these proposals aimed to prevent noncompetitive prices or reduced output, quality, or innovation, they might be consistent with the consumer welfare framework. Advocates of these proposals, however, appear to have other aims in mind: addressing "bigness," denials of opportunities to other businesses, first-degree price discrimination, and racial discrimination, not harms to market performance.

Other proposals would regulate the platforms as public utilities, for example, by imposing duties to charge fair and reasonable prices and to serve all users equally and without discrimination, or by prohibiting dominant firms from owning any other lines of business.175 These proposals look to railroad and early telecom regulations as a model to address the concentration of digital platforms.176

In their most aggressive form, these proposals call for halting all acquisitions by certain large tech companies. The open Markets institute argued in 2017 that the FTC should use its existing authority to block any transactions between Facebook and other "new and promising products and services . . . until the American people, working through our government, determine how to ensure that Facebook's power does not harm our nation's security, democratic institutions, or the political rights and commercial freedoms of individual citizens."177 The organization cited revelations about Russia's use of Facebook to influence the 2016 elections as grounds for the FTC to "move now to restrain and reduce Facebook's power."178

In some instances-but not all-populists who have called for new rules that are outside the bounds of antitrust acknowledge the departure and address the consequences of a wholesale change to the current regulatory regime. For example, in Amazon's Antitrust Paradox, Lina Kahn notes that "a public utility regime aims at eliminating competition: it accepts the benefits of monopoly and chooses instead to limit how a monopoly may use its power."179 K. sabeel Rahman has similarly identified public-utility proposals and ance rules a complement to antitrust, and in the case of tech companies, explained that "the very idea of capping size or breaking up these firms eliminates much of the social and economic value of the firms themselves."180

3.Rules Against "Bigness"

Another critique is that antitrust currently condemns only monopolies that are obtained or maintained through exclusionary conduct. some critics contend that antitrust should also address monopolies that simply exploit economic power-e.g., by extracting monopoly rents as sellers or depressing prices as buyers-or that result in "stagnant" markets with insufficient innovation and entry.181 Several populists have called for a new law that would permit the breakup of large firms, or use of section 2 to challenge non-exclu 176 sionary exercises of monopoly power. Senator Charles Schumer adopted this view in a New York Times op-ed announcing the Democrats' Better Deal, promising: "We are going to fight to allow regulators to break up big companies if they're hurting consumers."182 As a precedent, populists often cite the government's case against AT&T in the 1980s, which ultimately separated the phone company's local phone business from its long-distance and equipment business.183 They argue that the breakup of AT&T led to a substantial rise in competition in the telecom industry and paved the way for today's internet economy.184

Several antitrust populists have advocated for a "break up" rule as one tool that should be available in the anti-monopoly toolbox. They argue that monopoly power can harm the public through exploitative conduct that does not violate U.S. antitrust laws. For example, Matt Stoller argues that "Amazon has forced publishers to offer it steep discounts on books, Monsanto is organizing the genetics behind much of our food supply, and the Cleveland Clinic exerts power over doctors throughout northeast Ohio."185 Khan and Vaheesan cite two more examples: Mylan's increases in the price of the EpiPen to more than $600, and energy companies' alleged use of artificial shortages to drive up the price of electricity during California's electricity crisis.186

To address these types of harm, populists argue that antitrust needs to shift from its current focus on exclusion toward a focus on market structure.187 In their view, the antitrust agencies should be empowered to challenge possession of lasting monopoly and oligopoly power, even absent "bad acts" by the company possessing market power, unless the company can justify its market power on operational grounds such as economies of scale.188 If practicable, enduring monopolies and oligopolies would be broken up.189

Section 2 applies only to exclusionary conduct, so proposals to eliminate this requirement for antitrust enforcement would require legislative action.190 if one were to set that obstacle aside, challenges to exploitative conduct, and remedies such as breaking up monopolies not created or maintained through exclusionary conduct, could theoretically be brought under a consumer welfare framework-if the standard for showing harm were based on harm to consumers (or to suppliers in cases involving monopsony power). But to the extent the standard would be based on advancing other societal interests, the proposals would fall outside the consumer welfare framework.

4.Curtailing Vertical Integration

Some populists criticize the current approach to antitrust for allowing harmful vertical integration, for example, by permitting firms to use dominance in one product area to capture market share in another.191 To address this perceived inadequacy, some populists have proposed a ban on vertical integration by "dominant" firms (including through internal expansion).192 This proposal often targets platform companies that compete in their own marketplaces, such as Amazon and Google.193 The ban would, for example, prohibit Amazon from both running its own retail platform and the Amazon Marketplace (a retail platform for third-party sellers), and thereby prevent the company from using data collected as a third-party platform to advance its own retail sales.

One question that many of the populists' critiques leave unanswered is whether current antitrust standards and tools could address the putative harms of vertical integration. In the United States, agencies already consider vertical issues in the merger review process194, and Section 2 of the Sherman Act prohibits single-firm conduct that illegally obtains or maintains a monopoly. If populists believe that existing laws cannot address harms associated with vertical integration, they should be clear when their proposed solutions depart from antitrust law entirely-i.e., are grounded in considerations other than protecting the competitive process. For example, Khan argues that her proposed limit on vertical integration has a rich history in U.S. law. She points to the Glass-Steagall Act's separation of commercial and investment banking as a prominent example.195 But the rationale for the Glass-Steagall Act was not to protect competition. Instead, the law was designed to protect the safety of bank deposits from speculative investment activity.196

#### 2. Ground – avoids all topic DAs by claiming they ban nothing by *only* expanding existing grounds.

### cp – regulate

#### The United States federal government should substantially increase its economic regulations aimed at protecting the competitive process, including at least:

#### more robust labor protections,

#### data portability requirements,

#### coordinating economic regulation with the European Union through the Trade Technology Council, and

#### establishing a cybersecurity duty of care for the private sector.

#### Non-antitrust enforcement is sufficient

Rill 2 – was an Assistant Attorney General for the Antitrust Division in the Department of Justice (James, "The Evolution of Modern Antitrust among Federal Agencies." George Mason Law Review, vol. 11, no. 1, Fall 2002, p. 135-142. HeinOnline)//gcd

Multiple federal enforcement agencies with competition-related authority, broadly defined, have evolved from several different roots. From the outset, these agencies were not uniformly consumer-welfare impelled or oriented, nor have they altogether evolved in that direction. Their focus has been as much on social and political, non-consumer-welfare concerns-a continuing condition more prevalent before the mid-1970s than today. Federal economic concerns with market power brought about the establishment of regulatory agencies prior to enactment of the Sherman Act.' The patriarch, the Interstate Commerce Act of 1887,2 was a congressional response to concerns with the alleged monopoly and political power of the nation's railroads. Over the ensuing years, numerous other non-antitrust agencies were vested with power to regulate competition. Evolving from concerns with "bigness" as a threat to markets and, indeed, to the political system, legislation was enacted to address particular industries. This legislation afforded specialized agencies authority to regulate competition, to some extent in the same vein as that vested in the traditional antitrust agenciese.g., the Packers and Stockyards Act of 19213 and the Public Utility Holding Company Act of 1935.' Specialized agencies were also created to deal with the competitive functioning of industries in markets which were believed to embrace public assets, for example, air space and airlines and, initially, spectrum and broadcast communications. Part of the concern with "bigness" derived from fear of "excessive" competition, leading to statutory and regulatory restrictions on low-level pricing and limitations on market entry. The antitrust statutes were not immune from infection by this concern, as evidenced by enactment of the Robinson-Patman Act in 1936.' While the jurisdiction of sectoral agencies over competition and the relevant industries was often expressed in the governing statues as antitrust concerns, the overarching mandate was, and is, to protect and advance "the public interest." This ambiguous standard continues to provide sectoral agencies with more latitude to address industry competitive and other attributes beyond consumer welfare. The unfortunate ambiguity of this standard is brilliantly illuminated in an address by Judge Henry Friendly in the 1962 Oliver Wendell Holmes lectures at Harvard Law School and in a subsequent article in the Harvard Law Review.

#### Duty of care standard solves big tech cybersecurity

Wheeler 21 – Tom Wheeler, visiting fellow in governance studies at Brookings, “Protecting the cybersecurity of America’s networks,” 2/11/21, https://www.brookings.edu/blog/techtank/2021/02/11/protecting-the-cybersecurity-of-americas-networks/

Build Back Better means thinking anew. The industry standard-setting process that produced the cyber option for 5G networks can be a model for how the FCC manages its cyber responsibilities. Old style regulation with its detailed compliance instructions can be replaced by applying to cyber the centuries-old common law duty of care. Such a duty of care holds that it is the responsibility of a provider of a commercial service to anticipate and mitigate the potential harmful effects of that service (e.g., negligence is an implementation of the duty of care). Failure to do so becomes an enforceable event.

Simply establishing a cyber duty of care standard at the FCC would open the door to new cybersecurity engagements between the agency and the providers. The regulatory question would evolve from strict “thou shalt” micromanagement to a more agile oversight of whether an effective duty of care had been realized.

### da – econ

#### Moving away from the consumer welfare standard in antitrust destroys growth

Auer 18 – Dick Auer, Senior Fellow, International Center for Law & Economics, “Comments of the International Center for Law & Economics: Topic 4: Antitrust law and the consumer welfare standard,” FTC Hearings on Competition & Consumer Protection in the 21st Century, https://www.ftc.gov/system/files/documents/public\_comments/2018/10/ftc-2018-0074-d-0071-155999.pdf

The adoption of the consumer welfare standard was an enormous improvement over what came before it. Yet no one would assert that every aspect of antitrust policy in furtherance of the consumer welfare standard is perfect and should remain unchanged. There will always be grounds for critique and improvement of specific policy decisions and processes. But none of these arguments undercuts the basic merits of the standard and its supremacy over alternatives.

Antitrust enforcers and courts have a difficult time as it is ensuring that their decisions actually benefit consumers. As Robert Pitofsky once said, “antitrust enforcement along economic lines al-ready incorporates large doses of hunch, faith, and intuition.”40 But the existence of imperfections does not justify intervention that would move us further away from economic objectives. Indeed, such intervention would more than likely make the imperfections worse.

When antitrust policy is unmoored from economic analysis, it exhibits fundamental and highly problematic contradictions, as Herbert Hovenkamp highlighted in a recent paper:

As a movement, antitrust often succeeds at capturing political attention and engaging at least some voters, but it fails at making effective or even coherent policy. The result is goals that are unmeasurable and fundamentally inconsistent, although with their contra-dictions rarely exposed. Among the most problematic contradictions is the one between small business protection and consumer welfare. In a nutshell, consumers benefit from low prices, high output and high quality and variety of products and services. But when a firm or a technology is able to offer these things they invariably injure rivals, typically those who are smaller or heavily invested in older technologies. Although movement antitrust rhetoric is often opaque about specifics, its general effect is invariably to encourage higher prices or reduced output or innovation, mainly for the protection of small business or those whose technology or other investments have become obsolete.41

Even with careful economic analysis, it will not always be clear how to resolve the inevitable tensions between consumer welfare and other policy preferences. In 1978, then-FTC-Chairman Michael Pertschuk laid out his vision for a “new competition policy” at the FTC. In it, he asserted that anti-trust policy must consider

the social and environmental harms produced as unwelcome by-products of the market-place: resource depletion, energy waste, environmental contamination, worker alienation, the psychological and social consequences of market-stimulated demands.”42

It is not clear what it would mean to take account of these things in the context of anything approaching a rigorous policy framework. But even more troublingly, many, if not all of them call for a rejection of the core, competition-focused objective of antitrust.

For instance, Jonathan Adler has described the collision between antitrust and environmental protection in cases where, precisely because of reduced output, collusion might lead to better environ-mental outcomes, such as improved conservation of wild fish and other common pool resources.43 How would a court or enforcer conceivably evaluate that trade-off? It is difficult enough to evaluate the procompetitive justifications for certain conduct already — including in somewhat similar circumstances where intrabrand price or distribution constraints, for example, may be aimed at pre-serving the “common pool resource” of brand value or consumer goodwill. But that difficulty is only magnified where the trade-off is between incommensurate benefits, distributed over entirely different populations, and without any operational connection between them within the firm undertaking the conduct in question.

Whatever benefits might conceivably come from giving weight to non-economic values, even just at the margin, they would inevitably come at the expense of the core, competitive values of modern antitrust. As Ernest Gellhorn noted in his masterful critique of Pertschuk’s “socially conscious” vision for the FTC:

Competitive values must be sacrificed if social values are to be given primacy — or else the new policy is nothing more than rhetoric and official deception. The second and equally important point is that the new chairman’s “humanistic model” for antitrust is formless, shapeless, and unpredictable. There simply are no generally accepted “democratic and social norms” for applying the antitrust laws — and some of the new chairman’s announced values are worrisome, at least to the extent they are offered as the basis for determining the shape and operation of much of our economy.

The problem is that unless antitrust law has an objective and principled foundation, antitrust enforcement can become the personal plaything of enforcement personnel, or the stock in trade of lobbyists and influence-peddlers.44

While it is perfectly reasonable to care about political corruption, worker welfare, and income ine-quality, it is not at all reasonable to try to shoehorn goals based on these political concerns into antitrust — a body of legal doctrine whose tools are wholly inappropriate for achieving those ends. As Carl Shapiro has noted, “The fundamental danger that 21st century populism poses to antitrust is that populism will cause us to abandon this core principle and thereby undermine economic growth and deprive consumers of many of the benefits of vigorous but fair competition.”45

#### Extended COVID economic decline causes multilateral meltdown – causes nuclear war, climate change, Arctic and space war.

McLennan 21 – Strategic Partners Marsh McLennan SK Group Zurich Insurance Group, Academic Advisers National University of Singapore Oxford Martin School, University of Oxford Wharton Risk Management and Decision Processes Center, University of Pennsylvania, “The Global Risks Report 2021 16th Edition” “http://www3.weforum.org/docs/WEF\_The\_Global\_Risks\_Report\_2021.pdf

Forced to choose sides, governments may face economic or diplomatic consequences, as proxy disputes play out in control over economic or geographic resources. The deepening of geopolitical fault lines and the lack of viable middle power alternatives make it harder for countries to cultivate connective tissue with a diverse set of partner countries based on mutual values and maximizing efficiencies. Instead, networks will become thick in some directions and non-existent in others. The COVID-19 crisis has amplified this dynamic, as digital interactions represent a “huge loss in efficiency for diplomacy” compared with face-to-face discussions.23 With some alliances weakening, diplomatic relationships will become more unstable at points where superpower tectonic plates meet or withdraw.

At the same time, without superpower referees or middle power enforcement, global norms may no longer govern state behaviour. Some governments will thus see the solidification of rival blocs as an opportunity to engage in regional posturing, which will have destabilizing effects.24 Across societies, domestic discord and economic crises will increase the risk of autocracy, with corresponding censorship, surveillance, restriction of movement and abrogation of rights.25 Economic crises will also amplify the challenges for middle powers as they navigate geopolitical competition. ASEAN countries, for example, had offered a potential new manufacturing base as the United States and China decouple, but the pandemic has left these countries strapped for cash to invest in the necessary infrastructure and productive capacity.26 Economic fallout is pushing many countries to debt distress (see Chapter 1, Global Risks 2021). While G20 countries are supporting debt restructure for poorer nations,27 larger economies too may be at risk of default in the longer term;28 this would leave them further stranded—and unable to exercise leadership—on the global stage.

Multilateral meltdown Middle power weaknesses will be reinforced in weakened institutions, which may translate to more uncertainty and lagging progress on shared global challenges such as climate change, health, poverty reduction and technology governance. In the absence of strong regulating institutions, the Arctic and space represent new realms for potential conflict as the superpowers and middle powers alike compete to extract resources and secure strategic advantage.29 If the global superpowers continue to accumulate economic, military and technological power in a zero-sum playing field, some middle powers could increasingly fall behind. Without cooperation nor access to important innovations, middle powers will struggle to define solutions to the world’s problems. In the long term, GRPS respondents forecasted “weapons of mass destruction” and “state collapse” as the two top critical threats: in the absence of strong institutions or clear rules, clashes— such as those in Nagorno-Karabakh or the Galwan Valley—may more frequently flare into full-fledged interstate conflicts,30 which is particularly worrisome where unresolved tensions among nuclear powers are concerned. These conflicts may lead to state collapse, with weakened middle powers less willing or less able to step in to find a peaceful solution.

### 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.

Nathan **TANKUS** Research Director Modern Monetary Network **AND** Luke **HERRINE** PhD Candidate @ Yale Law, JD NYU & Former Clerk Second Circuit of Appeals **’21** “Competition Law as Collective Bargaining Law” <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3847377> p. 1-3

­ “[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.

#### Destructive innovation is normatively destructive. Law and Economics investment in the “new” to cause productivity results in social instability and unjust innovations.

Pasquale 17 – Law Prof at Brooklyn Law School (Frank, 11-15-2017, "Entrepreneurship Can Be Unproductive or Destructive," LPE Project, https://lpeproject.org/blog/entrepreneurship-can-be-unproductive-or-destructive/)//gcd

Professional Responsibility courses also tend to adopt a similarly reverential attitude toward the business client, instilling an ethic of “zealous advocacy” in generations of students. Few question whether the near-evacuation of ethical self-reflection from advocacy roles systematically advantages dubious (or worse) business propositions.

This emphasis on the disruptive and new is jarring in law, because legal systems’ internal values so often prize stability, regularity, precedent, and tradition. Pressed to justify it, partisans of disruptive innovation often turn to economics—a discipline all too happy to oblige with just-so stories of creative destruction. As William Baumol has [observed](http://www.colorado.edu/ibs/es/alston/econ4504/readings/Baumol%201990.pdf), where economic growth has slowed, it is often “implied that a decline in entrepreneurship was partly to blame (perhaps because the culture’s ‘need for achievement’ has atrophied). At another time and place, it is said, the flowering of entrepreneurship accounts for unprecedented expansion.” Both policymakers and mainstream legal scholars tiptoe through the tulips of entrepreneurship, wary of disrupting the business plans of the disruptive innovators they admire.

However, as Baumol went on to wisely observe, there is no obvious connection between entrepreneurship and genuine productivity. Productivity, defined from a properly politico-economic perspective, reflects society’s ability to meet real needs, [create capabilities](https://plato.stanford.edu/entries/capability-approach/), and to promote human flourishing. Some entrepreneurs contribute to it, but others do not. As Baumol observes, there are unproductive entrepreneurial activities, and at “times the entrepreneur may even lead a parasitical existence that is actually damaging to the economy.”  Baumol also argues that the relative balance of productive, unproductive, and destructive entrepreneurs is not dictated by technology or culture. “Changes in the rules and other attendant circumstances can, of course, modify the composition of the class of entrepreneurs,” he reminds us, insisting on the intertwining of political and economic reality.

Law students tend to hear little to nothing about Baumol’s distinctions here, despite his status as one of the greatest economists of the 20th century. That is because the epistemological appeal of many dominant law and economics approaches is grounded in an ostensibly value-free and scientific assessment of the costs and benefits of different sets of legal rules. Describing certain economic activity as useless or parasitical is a value judgment. Better instead, in the eyes of the old law and economics, to stick to more quantitative assessments of value, or abstract descriptions of optimal legal rules that “neutrally” apply trans-substantively, without respect to the nature of the business they are affecting.

The problems with such an approach are readily apparent. First, there are obvious instances of entrepreneurship that leaves everyone (except the entrepreneur) worse off.  In [later work](https://yalebooks.yale.edu/book/9780300198157/cost-disease), Baumol described the international arms trade as one clear example: rapidly cheapening implements of destruction, and making them more readily available, is not a form of efficiency to be celebrated unproblematically. There may be cases where this arms trade enables a scrappy band of rebels to overcome an oppressive tyranny. But far more common are other dynamics: consolidation of power by tyrannical regimes; arms races among factions within a nation, and nations themselves; out-of-control armaments easily snapped up by terrorist forces.

Similarly, in banking, all too often legislators and regulators rush to promote “financial innovation” without fully understanding its consequences. For example, at present, the Office of the Comptroller of the Currency (via its proposed “fintech charters”) and the Consumer Financial Protection Bureau (via its Project Catalyst) are promoting financial technology (fintech) firms. Fintech may promote competition and create new options for consumers. But we should ensure that it is fair competition, and that these options don’t have hidden pitfalls. In my research on the finance and internet sectors, I have [explored](https://balkin.blogspot.com/2014/09/interview-on-black-box-society_19.html) patterns of regulatory arbitrage and opaque business practices that sparked the mortgage crisis of 2008. I see similar themes emerging today.

In the run-up to the crisis, federal authorities preempted state law meant to protect consumer borrowers. Their stated aim was to ensure financial inclusion and innovation, but the unintended consequences were disastrous. Federal authorities were not adequately staffed to monitor, let alone deter or punish, widespread fraudulent practices. They also flattened diverse state policies into a one-size-fits-all, cookie-cutter approach. We all know the results. Millions of families lost their homes to foreclosure, and the economy suffered a permanent output gap that undermines our nation’s strength to this day.

In short: entrepreneurship and innovation are not good in themselves. The toxic assets at the core of the financial crisis were innovative in many ways, but ultimately posed [unacceptable risks](http://www.jennifertaub.com/books/other-peoples-houses/). Entrepreneurial arms dealers could easily provide massively destructive weapons to terrorists. Many less troubling products and services have shadow sides that outweigh their ostensible benefits. Until law and economics places such concerns at the core of its inquiry—rather than relegating them to backwater arenas of externality correction and transfers—it will fail to account for core economic dynamics. Law and political economy addresses these issues directly, as an intersecting realm of monetary value and social values.

#### This economic model results in anti-Black authoritarianism that drives forward climate crisis and social inequality, which combines to cause existential risk. We must reject the neutral baseline of the market to allocate the goods for human survival.

Harris and Varellas 20 – Angela P. Harris, School of Law, UC Davis James J. (“Jay”) Varellas III, Department of Political Science, UC Berkeley (Law and Political Economy in a Time of Accelerating Crises, Journal of Law and Political Economy, 1(1) 2020 https://escholarship.org/uc/item/8p8284sh)//gcd

In the United States and around the world, we are facing intertwined crises: skyrocketing economic inequality, an increasingly destabilizing and extractive system of global finance, dramatic shifts in the character of work and economic production, a crisis of social reproduction, the ongoing disregard of Black and brown lives, the rise of new authoritarianisms, a global pandemic, and, of course, looming above all, the existential threat of global climate change. From the vantage point of mid-2020, it is impossible to avoid the sense that these crises, like Mike’s bankruptcy, have emerged both suddenly and as the result of problems long in the making. It is also clear that these interlocking crises are accelerating as they collide with societies whose capacities to respond have been hollowed out by decades of neoliberalism. With the launch of the Journal of Law and Political Economy (JLPE), we—mostly legal scholars, but joined by economists, sociologists, political scientists, geographers, historians, and Indigenous and ethnic studies scholars—leap into the interdisciplinary fray, as so many others have done before us. JLPE is motivated by the belief that any attempts to understand the roots of the numerous crises facing us, much less assemble collective projects to address them, must contend with issues of law and political economy. In this Editors’ Introduction to Volume 1 of JLPE, we explain our own sense of what “Law and Political Economy” is, both as an intellectual enterprise and as a network of scholars, policymakers, students, and advocates. We reflect on our current historical moment, identify genealogies of the Law and Political Economy (LPE) project, articulate some of the intellectual foundations of the work, and finally discuss the Journal’s institutional history and context. The accelerating crises that pose a challenge to our systems of governance are also a reason why we write, and why we believe our enterprise to be a timely one. II. The Challenges of the Current Moment The COVID-19 pandemic has brought into public consciousness a series of issues that we consider central to the Law and Political Economy mission. Financialization. Among the most striking developments in recent decades is the increasing dominance of finance and financial logics over human needs and even production, and the pandemic has thrown this problem into sharp relief. As one economist put it in March, while economic time stopped across many domains as the result of the pandemic and the efforts to mitigate it, financial time largely did not (Coy 2020). More than two decades of work across the social sciences has identified and criticized “financialization” as a driver of economic inequality and instability (Krippner 2011; Lazonick 2013; Nesvetailova and Palan 2020; Epstein 2005; Arrighi 1994), and policy responses to the pandemic have supercharged these dynamics. Consider, for instance, that after an initial drop, major American stock indices have set new highs as the pandemic rages. As of this writing, although the US has experienced record declines in employment and gross domestic product, as well as a looming eviction crisis, the aggregate wealth of American billionaires has increased by $850 billion, and global billionaires have seen their wealth increase by $1.5 trillion since the start of the pandemic (Americans for Tax Fairness and Institute for Policy Studies 2020). From our vantage point, a particularly troubling result of the more than $10 trillion in bailouts and extraordinary central bank actions in the United States since the onset of the COVID-19 pandemic (Brenner 2020) has been the extension of the shareholder-centric orientation of American political economy, to the point that shareholders are now among the most insulated from losses of any group in society. Worker Precarity. While financial time races on and profits to the owners of capital increase, workers and their families are caught in economic predicaments ranging from difficult to dire. The pandemic exposed the precarity of “essential workers”: not only hospital employees (janitors as well as doctors and nurses), but also nursing home aides, truck drivers and gig drivers, convenience store clerks, and workers throughout the food system, from those in the fields to those in meat-processing facilities to those delivering for restaurants and grocery stores. Though hailed as heroes, many of these workers, especially those with the lowest pay and benefits, continue to face a grim choice between going to work and risking illness and death, or staying home with mounting bills and the threat of hunger and homelessness. Many of these workers are immigrants, some undocumented, meaning that they both lack access to government support and that they are frequently responsible for supporting families outside the US through remittances. These workers are also disproportionately non-white, and their economic precarity is contributing to their disproportionate representation among those dying of COVID-19. Even workers not faced with a choice between the risk of illness and the risk of economic ruin are dealing with unprecedented threats. Like Mike’s bankruptcy, this sudden labor crisis is also a manifestation of a much slower one. Beginning in the 1970s, large corporations faced increasing pressure from the financial sector to divest themselves of labor expenses. One response was the offshoring of production facilitated by the neoliberalization of international trade (Varellas 2009; Adkins and Grewal 2016; Thomas 2000). Another was the shedding of full-time employees, resulting in a “fissured workplace” (Weil 2017) heavily reliant on part-time workers, independent contractors, franchisees, and gig workers (Dubal 2017). Once the pandemic began, many of these workers relied on federal paycheck support to avoid bankruptcy and eviction, and even to put food on the table, while policymakers fretted about the supposed “moral hazard” of bailing them out. New Geographies of Production. While the pandemic has caused immediate problems in domestic manufacturing (including plant closures and outbreaks within cramped factories in industries such as meatpacking), one of its more lasting effects may be on the international organization of production. The just-in-time approach to logistics and the global supply chains created during the neoliberal era of so-called “free trade” have buckled and broken, raising questions about whether production will ever return to pre-pandemic levels of globalization, particularly in light of increasing tensions between the US and China (Aggarwal and Reddie 2019). The uncertainty also extends domestically to the delivery of services essential for human flourishing. For example, as predicted by Law and Political Economy scholars (Pasquale 2014), under neoliberalism the organization and delivery of health care, both in the US and globally, has proven dangerously fragile (Moudud 2020). Monopolization. The pandemic has made even clearer the importance of the resurgent interest in the anti-monopoly tradition in academia and beyond (Khan 2017; Paul 2020; Wu 2018; Vaheesan 2019; Teachout 2020; Novak 2010). The timeliness of this revival is underscored by rising super-profits for technology monopolists, such as the so-called “FAANG” companies (Facebook, Apple, Amazon, Netflix, and Google, as well as similarly situated firms such as Microsoft). Companies in other highly concentrated industries—including, since the start of the pandemic, retail giants such as Walmart, Kroger, and Target—are also experiencing blowout profits as much of the rest of the economy sinks into depression. Digital Surveillance and the Algorithmic Intermediation of Life. In addition to their economic dominance, companies such as the FAANGs are also key drivers of unprecedented and intensifying shifts in the nature of governance. These and other powerful companies located at the nexus of cutting-edge government-funded research, billionaire financiers, and the military and security state (Mazzucato 2013; Weiss 2014; Block and Keller 2011) are constantly pushing their data harvesting operations and algorithms into additional areas of life (Zuboff 2018; Pasquale 2015; O’Neil 2016; Cohen 2019; Kapczynski 2020). As a result, nearly every aspect of human experience, whether economic, political, social, cultural, psychological, or even spiritual, is now increasingly under pervasive surveillance, intermediated and steered into often dangerous directions by unaccountable algorithms and artificial intelligence networks so complex their architects often cannot even understand them (Rahimi and Recht 2017). The full extent of the social, political, and governance effects of this surveillance are yet unknown, but what we have become aware of so far is troubling. Neoliberal Family Policy. The pandemic has exposed the fact that wage labor, and “the economy” as a whole, depend on processes of social reproduction that are deeply gendered, and defined as peripheral to or outside the sphere of the market (Folbre 2001; Fraser 2017; Eichner 2020). It has largely fallen on mothers to take on the burdens of homeschooling and the supervision of children and teenagers subject to remote instruction. The under-compensation of nursing home aides (driven not only by a gendered undervaluation of care work, but also the economics of health care) can be directly tied to needless deaths in rehabilitation facilities (Gonsalves and Kapcyznski 2020). The pressure to “open the economy” places special stress on K-12 teachers, as well as threatens to deepen the fissure between wealthy families able to hire private tutors for “pods” of children and poor and middle-class families forced to rely on under-resourced public schools. Meanwhile, as Melinda Cooper (2017) has pointed out, neoliberal economic governance also leans hard on the family as a mechanism for facilitating and legitimating upward distribution. Using the moralized discourse of personal and family responsibility, family policy in recent decades has sought to shift economic and social risk onto individual households (Hacker 2019), slashing the social safety net and expanding private credit. The language of “family values” legitimates household accumulation of wealth and privilege at the top (Markovits 2019), and—intertwined with the carceral state— legitimates state surveillance and discipline at the bottom (Gustafson 2011). Racialized State Power. The pandemic has seen the maturation of the largest racial justice movement since the 1960s, as issues of police violence touch off massive and sustained protests across the United States and around the world. Notably, this movement has targeted the political-economic, organizational, and legal bases of unaccountable law enforcement power. Acutely aware of the role of the criminal legal system in suppressing Black, brown, Indigenous, and immigrant communities, many racial justice advocates have adopted policy stances ranging from outright abolition of the police to redirecting resources away from “violence workers” and toward helping professions and community organizations (Davis 2003; Vitale 2017). Movement organizers have taken aim at the legal and policy pillars of the criminal legal system, including the political power of police unions, statutes and judicial decisions that create impunity for police violence (including the legal doctrine of qualified immunity), and the harassment and punishment apparatus that brands people in poor Black and brown communities as second-class citizens, including stop and frisk policies, money bail, and mandatory minimum sentences (Roberts 2019). The movement for Black lives is also calling attention to the deep connections between the criminal justice system and our financial system under contemporary capitalism. A particularly salient example is the civil lawsuit recently filed in Louisville, Kentucky in the wake of the police killing of Breonna Taylor as she slept in her bed. Attorneys for Taylor’s estate sought to connect the dots between state violence and policies promoting gentrification in her community (Bailey and Duvall 2020). Meanwhile, the president has turned from “dog whistles” (Haney López 2013) to bullhorns in attempting to incite white fear and hostility against nonwhites, including immigrants as well as Black people. New Authoritarianisms. State responses to these crises have been alarming. The US notoriously has a president willing to encourage right-wing conspiracy theories, ignore science, stoke white nationalism, and even encourage violence against his political opponents. His hold on power is supported by party leaders and a base that seems gleefully willing to abandon democratic norms and institutions (Kuhner 2017). But the turn to authoritarianism is not limited to the US. Leaders in nominally democratic countries around the world are taking up similar projects to crush dissent and encourage division. Anti-immigrant and anti-Muslim sentiments, couched in old languages of civilization, caste, and racial and religious identity, flourish even while the call that “Black lives matter” echoes around the globe. Meanwhile, China and Russia are embracing technology-enhanced efforts both to control their own citizens and to influence foreign events. One cannot help but see parallels to the present situation in Karl Polanyi’s account of the collapse of classical liberalism and the rise of fascism, the American New Deal, and European socialism as contending frameworks promising to protect society from the ravages of the market during the first half of the twentieth century (Polanyi 2001 [1944]). Ecological and Climate Crises. Finally, the pandemic has provided an illustration of the relevance of political ecology to political economy. In 1976, the ecologist Barry Commoner argued that three apparently separate crises then besetting the United States—a crisis of environmental pollution, the “energy crisis,” and an economic crisis of simultaneous recession and inflation (“stagflation”)—could be traced to a single basic defect: a social design under which financial relations determined economic relations and economic relations determined ecological relations, even though the precarity of life on Earth demanded the reverse (Commoner 1976). Today, as climate change produces another set of cascading crises that are both gradual and sudden, political ecologists are drawing connections between “natural disasters” and the political economies of agribusiness, international development, and urbanization under neoliberal governance. This work illuminates the role of law in facilitating patterns of economic extraction and human settlement that disturb critical ecosystems, making far more likely the emergence of new pathogens such as the novel coronavirus (Davis 2020; Wallace et al. 2020; Foster and Suwandi 2020). Of course, these paragraphs barely scratch the surface of the myriad crises facing us. Our account, however, indicates the scope of the Law and Political Economy framework. By founding JLPE, we hope to deepen a range of connections. First and foremost, we wish to broaden discussions of the legal regulation of economic matters beyond the narrow bounds of “Law and Economics.” As others have argued (Polinsky 1974; Harris 2003; Britton-Purdy et al. 2020), Law and Economics—still the regnant discourse on economic issues in law schools—resists history, sociology, and the humanities, and reduces law to a tool with which to maximize wealth, typically for the few (in practice if not in theory). Our view is nearly the opposite. Markets and their constituents, including corporations, trade relations, contracts, property, and money itself are creatures of law and politics, crafted by the state. Markets are also social institutions embedded in histories of colonialism, slavery, and exploitation. Their ultimate purpose is to promote human flourishing, not only to allocate scarce resources in a way that purportedly maximizes a particular conception of efficiency. Accordingly, we invite sociologists, political scientists and theorists, geographers, economists, anthropologists, literary scholars, historians, scholars in cultural and ethnic studies, Indigenous scholars, and others into the conversation as we rethink state and market governance in the ashes of neoliberal ideology (see Brown 2019). Second, and relatedly, we aim to reconnect legal scholarship with the longstanding, broad, and deep literatures of political economy. As we note in the section that follows, while legal scholars have been entranced with Law and Economics, scholars in other fields have continued to analyze markets within their social and political contexts. Too often, however, these scholars have ignored or misunderstood the role of legal institutions and doctrines. Just as legal scholars must engage with political economy, political economists must engage with the law. We hope to establish JLPE as a site for these richer conversations. Third, we hope to trouble the conventional boundaries of “the economic” itself. As we elaborate below, neoliberalism’s separation of the state from the market was preceded by domesticity’s evacuation of social production from the sphere of economic relations. Similarly, the conventional history of capitalism frames land dispossession and the forcible incorporation of subsistence economies into wage-based economies as “primitive accumulation,” something that happened in the past, before capitalism proper (Ince 2014; Harvey 2004). And, as the new literature on racial capitalism has begun to explore, the carceral state is connected in intricate ways to economic production, distribution, and extraction, as well as to the moral ideologies of discipline and punishment that underpin discourses of work, public assistance, and crime (Wacquant 2009; Soss, Fording, and Schram 2011; Gustafson 2011; Gilmore 2007). Finally, while JLPE is a US-based journal, we think international, comparative, and global South perspectives are an essential part of developing a full picture and analysis of contemporary Law and Political Economy. Despite the myth of American exceptionalism, the US is rooted in a transnational history of empire that has shaped its foreign policy, its constitutional and immigration law, and international law itself (Anghie 2007; Rana 2010). Accordingly, at JLPE we welcome transnational and comparative analyses at all levels of scale, from the micropolitics of a single community to the entire capitalist world system. We recognize that these attempts to topple conventional intellectual silos come with a set of risks. An insight may be novel in one intellectual tradition and considered banal in another. Scholars trained in one discipline may disdain the methods of another. And even seemingly basic terms like “capitalism” or “law” may be used in very different ways in different fields, leading to misunderstanding or conflict. Nevertheless, we believe that in this time of multiple and interlocking crises, such boundary-pushing endeavors are necessary if we are to meet our historic moment. III. Genealogies of Law and Political Economy As four of our LPE colleagues note in a recent article (Britton-Purdy et al. 2020), the legal scholarship of the last half-century has withdrawn from “questions of economic distribution and structural coercion” (ibid., 1806). In legal fields designated as politics-regarding (such as constitutional or administrative law), great deference is paid to existing economic and political distributions, which are treated as neutral baselines from which courts should not stray without a compelling rationale (Sunstein 1987). In fields designated as market-regarding (such as corporate or property law), “[w]ealth maximization, transaction costs, and externalities have served as ‘linking theories’ that connect analysis of legal rules and institutions with the general equilibrium model of neoclassical economics” (BrittonPurdy et al. 2020, 1800). Thus, in keeping with what Wendy Brown describes as neoliberalism’s form of “rationality” (Brown 2015; see also Blalock 2014), both “public” and “private” law have come to depend on the idealization of efficient and free markets that respond nimbly to rational preferences and maximize social wealth for all. In embracing the term “political economy” rather than “economics,” we signal our rejection of this approach to markets, politics, and law. In this section, we briefly take note of the intellectual resources on which the movement, and this journal, draws—literatures that constitute our “invisible college” (Varellas 2018).

#### 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.

Mariana **MAZZUCATO** Inst. for Innovation & Public Purpose @ University College (London) **AND** Rainer **KATTEL** Inst. for Innovation & Public Purpose @ University College (London) **’20** “Grand Challenges, Industrial Policy, and Public Value” Non-paginated

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 – ftc

#### FTC’s increasing enforcement in privacy now---it’s focused on algorithmic bias.

James V. Fazio 21. Special counsel in the Intellectual Property Practice Group at Sheppard, Mullin, Richter & Hampton LLP, with Liisa M. Thomas, 3/11. “What Is FTC’s Course Under Biden?” https://www.natlawreview.com/article/what-ftc-s-course-under-biden

The new acting FTC chair, Rebecca Kelly Slaughter, recently signaled that the FTC may increase enforcement and penalties in the privacy and data security realm. Slaughter pointed to several areas of focus for the FTC this year, which companies will want to keep in mind: Notifying Consumers About FTC Allegations: Slaughter referred favorably to two recent cases: (1) the Everalbum biometric settlement from earlier this year (which we wrote about at the time); and (2) the Flo Health settlement over alleged deceptive data sharing practices (which we also wrote about at the time). In drawing on these two cases, Slaughter indicated that in future cases the FTC intends to include as part of any settlement a requirement to notify customers of any FTC allegations. This, she said, would allow consumers to “vote with their feet” and help them decide whether to recommend their services to others. FTC Intent to Plead All Relevant Violations: According to Slaughter, another lesson the FTC is taking from the Flo case is to include in the cases it brings all potentially applicable violations of all relevant privacy-related laws. In the Flo case, Slaughter said the FTC should have pleaded a violation of the Health Breach Notification Rule, which requires that vendors of personal health records notify consumers of data breaches. Focus on Ed Tech and COPPA: Given the explosive growth of education technology during COVID-19, the FTC is conducting an industry sweep of the industry. Related to this, the FTC is reviewing its Children’s Online Privacy Protection Act Rule. This goes beyond the refresh the agency did of their FAQs earlier in the pandemic (which we wrote about at the time). For now, Slaughter reminds companies that parental consent is needed before collecting information online from children under the age of 13. Examination of Health Apps: The FTC will take a closer look at health apps, including telehealth and contact tracing apps, as more and more consumers are relying on such apps to manage their health during the pandemic. Overlap Between Competition and Privacy: Slaughter also indicated that it is worth looking at situations where there may be not only privacy concerns, but antitrust as well. Because the FTC has a dual mission (consumer protection and competition) she notes that it has a “structural advantage” over other regulators in that it can look at these issues, especially since -she states- “many of the largest players in digital markets are as powerful as they are because of the breadth of their access to and control over consumer data.” Racial Equality and AI/Biometrics/Geotracking: Slaughter noted that COVID-19 is exacerbating racial inequities. She pointed to the unequal access to technology, as well as algorithmic discrimination (the idea that discrimination offline becomes embedded into algorithmic system logic). The FTC intends to focus on algorithmic discrimination, as well as on the discrimination potentially embedded into facial recognition technologies. (This mirrors concerns that gave rise to the recent Portland facial recognition law, which we recently wrote about). Finally, Slaughter commented on the use of location data to identify characteristics of Black Lives Matter protesters, and said she is concerned about the misuse of location data to track Americans engaged in constitutionally protected speech. Putting it Into Practice: Companies that operate health apps, that are in the education technology space, or that use algorithms or facial recognition tools will want to keep in mind that these are areas of focus for the FTC. And for everyone, keep in mind that the FTC has indicated it will beef up privacy law penalties and will ask for more notification to injured consumers.

#### Antitrust enforcement saps up FTC resources and personnel, which are finite.

Tara L. Reinhart, et al. 21. \*\*Head of Skadden, Arps, Slate, Meagher & Flom LLP’s Antitrust/Competition Group. \*\*Steven C. Sunshine, Co-head of Skadden, Arps, Slat, Meagher & Flom LLP’s Antitrust/Competition Group. \*\*David P. Whales, antitrust lawyer with over 25 years of experience in both private and public sectors. \*\*Julia Y. York, partner at Skadden, Arps, Slat, Meagher & Flom LLP. \*\*Bre Jordan, associate at Skadden, Arps, Slat, Meagher & Flom LLP focusing on antitrust law. “Lina Khan’s Appointment as FTC Chair Reflects Biden Administration’s Aggressive Stance on Antitrust Enforcement.” 6/18/21. https://www.skadden.com/insights/publications/2021/06/lina-khans-appointment-as-ftc-chair

Second, like all antitrust enforcers, Ms. Khan and the FTC will face resource constraints. Bringing antitrust litigation is an expensive and laborious process, often requiring millions of dollars for expert fees and a large army of FTC staff attorneys and taking many months or even years to accomplish. Typically, the FTC can only litigate a handful of antitrust matters at a time. It seems likely that Congress will provide more funding to the FTC in the current environment, but even with these extra resources, the FTC will still have to pick its cases carefully and cannot challenge every deal or every instance of alleged unlawful conduct.

#### That trades off with the necessary resources for privacy enforcement.

John O. McGinnis\* and Linda Sun\*\* 20. \*George C. Dix Professor, Northwestern University, and Associate-Designate, Wilmer Pickering Hale & Dorr LLP. “Unifying Antitrust Enforcement for the Digital Age.” Northwestern Public Law Research Paper No. 20-20. https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3669087

The FTC needs more resources to adequately address the nation’s growing privacy concerns. Currently, the FTC oversees both consumer protection—encompassing privacy—and antitrust,249 making the FTC the chief federal agency on privacy policy and enforcement250 and the nation’s de-facto privacy agency.251 The agency has long-standing experience in enforcing privacy statutes252 and also has special privacy assets, such as an internet lab capable of high-quality tech forensics to track invasions of privacy.253 The FTC, however, has failed to keep pace with the massive growth of privacy concerns—a phenomenon also driven by modern technology. Very few Americans feel conﬁdent in the privacy of their information in the digital age.254 According to a 2019 study, over 80% of Americans feel that they have little to no control over the data collected on them by companies and the government.255 To adequately address privacy concerns, the FTC needs more resources.256 The agency has been explicit that it needs more manpower to police tech companies. In requesting increased funding from Congress, FTC Director Joseph Simons said the money would allow the agency to hire additional staff and bring more privacy cases.257 A former director of the FTC’s Bureau of Consumer Protection, which houses the privacy unit, has called the FTC “woefully understaffed.”258 As of the spring of 2019, the FTC had only forty employees dedicated to privacy and data security, compared to 500 and 110 employees at comparable agencies in the UK. and Ireland, respectively.259 Without more lawyers, investigators, and technologists, the FTC will be forced to conduct privacy investigations less thoroughly, and in some cases, forgo them altogether.260 Currently, the FT C’s resources are spread thin across multiple missions, to the detriment of its privacy efforts. Removing the agency’s antitrust responsibilities would reallocate resources from the antitrust department to its privacy unit and other areas of consumer protection. Further, it would free up the scarce time of the commissioners to oversee this essential effort.261

#### Unchecked algorithmic bias risks massive inequality and extinction.

Mike Thomas 20. Quoting AI experts including MIT Physics Professors, Senior Features Writer for BuiltIn. THE FUTURE OF ARTIFICIAL INTELLIGENCE: 7 ways AI can change the world for better ... or worse, Updated: April 20, 2020, <https://builtin.com/artificial-intelligence/artificial-intelligence-future>

Klabjan also puts little stock in extreme scenarios — the type involving, say, murderous cyborgs that turn the earth into a smoldering hellscape. He’s much more concerned with machines — war robots, for instance — being fed faulty “incentives” by nefarious humans. As MIT physics professors and leading AI researcher Max Tegmark put it in a 2018 TED Talk, “The real threat from AI isn’t malice, like in silly Hollywood movies, but competence — AI accomplishing goals that just aren’t aligned with ours.” That’s Laird’s take, too. “I definitely don’t see the scenario where something wakes up and decides it wants to take over the world,” he says. “I think that’s science fiction and not the way it’s going to play out.” What Laird worries most about isn’t evil AI, per se, but “evil humans using AI as a sort of false force multiplier” for things like bank robbery and credit card fraud, among many other crimes. And so, while he’s often frustrated with the pace of progress, AI’s slow burn may actually be a blessing. “Time to understand what we’re creating and how we’re going to incorporate it into society,” Laird says, “might be exactly what we need.” But no one knows for sure. “There are several major breakthroughs that have to occur, and those could come very quickly,” Russell said during his Westminster talk. Referencing the rapid transformational effect of nuclear fission (atom splitting) by British physicist Ernest Rutherford in 1917, he added, “It’s very, very hard to predict when these conceptual breakthroughs are going to happen.” But whenever they do, if they do, he emphasized the importance of preparation. That means starting or continuing discussions about the ethical use of A.G.I. and whether it should be regulated. That means working to eliminate data bias, which has a corrupting effect on algorithms and is currently a fat fly in the AI ointment. That means working to invent and augment security measures capable of keeping the technology in check. And it means having the humility to realize that just because we can doesn’t mean we should. “Our situation with technology is complicated, but the big picture is rather simple,” Tegmark said during his TED Talk. “Most AGI researchers expect AGI within decades, and if we just bumble into this unprepared, it will probably be the biggest mistake in human history. It could enable brutal global dictatorship with unprecedented inequality, surveillance, suffering and maybe even human extinction. But if we steer carefully, we could end up in a fantastic future where everybody’s better off—the poor are richer, the rich are richer, everybody’s healthy and free to live out their dreams.”

## advantage – mkt power

### circumvention – 1nc

#### The plan’s rule of reason standard gets circumvented – vague standards strongly favor the defendant.

Wright 19 – Joshua D. Wright, University Professor and Executive Director of the Global Antitrust Institute at George Mason University, “Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust,” *Arizona State Law Journal*, 2019, 51 Ariz. St. L.J. 293

Replacing the well-defined consumer welfare model with a vague, new standard that has no unifying objective based in objective economic evidence would dramatically increase the ability and likelihood of interested industry participants to engage in rent seeking when appearing before the federal antitrust authorities. 2 4 Today, the well-established definitions and boundaries of the consumer welfare standard allow courts to hold enforcers (and private parties) accountable and prevent misuse of the antitrust laws and political influence in antitrust enforcement decisions. Unlike sister agencies prone to capture, the FTC and DOJ are relatively well insulated from such influence by the need to apply objective economic principles to a clearly articulate consumer welfare standard.

A new "public interest" or "citizen interest" standard would take years to deploy and even longer before meaningful guidance could be issued similar to that which the consumer welfare standard offers today. In the meantime, firms could use the new standard as leverage over the Antitrust Agencies—something that is not possible today because the consumer welfare standard offers a well-defined framework. By substituting in a vague new standard, Hipster Antitrust proponents ironically would grant large, powerful corporations with the ability to exert undue influence over the Antitrust Agencies' decision-making process. Moreover, once allowed to influence agency enforcement practices during the initial period when no framework exists, it will be difficult to establish guidelines that do not leave room for such manipulation to continue.

Calls to abandon the consumer welfare framework thus would exacerbate concerns about corporate influence by providing firms with a new ill-defined standard to manipulate. As a result, contrary to the purported objectives of consumer welfare critics, abandoning the consumer welfare model would revert the antitrust laws to a rent-seeking regime that increases-rather than reduces-corporate welfare.

### turn – innovation – 1nc

#### **Antitrust worse for innovation**

Abbott et al. '21 [Alden; 3/10/21; Senior Research Fellow, formerly served on the Federal Trade Commission’s General Counsel, J.D. from Harvard Law School, M.A. in Economics from Georgetown University; "Aligning Intellectual Property, Antitrust, and National Security Policy," https://regproject.org/wp-content/uploads/Paper-Aligning-Intellectual-Property-Antitrust-and-National-Security-Policy.pdf/]

The U.S. government has recognized that “5G is a critical strategic technology [such that] nations that master advanced communications technologies and ubiquitous connectivity will have a long-term economic and military advantage.”8 The U.S. has had a substantial technological edge over our military and intelligence rivals in foundational R&D for 5G and other next-generation technologies. U.S. companies have long been leaders in the development of previous generations of core mobile standards (2G, 3G, 4G, and LTE). This technological leadership has made it possible for U.S. companies to ensure the security and integrity of the hardware and software products that make up the backbone of the U.S. telecommunication systems. This leadership must continue for the U.S. government to more effectively anticipate potential security risks and take the necessary steps to protect national security.9

Despite this history of clear technological leadership, there are causes for concern. First, a very small number of U.S. companies have made the investments in the overwhelming majority of the R&D necessary to develop 5G.10 Historically, U.S. companies have heavily invested in R&D, which has propelled the U.S. into leadership positions in critical standard development organizations working on foundational next-generation technologies like 5G.11 U.S. companies like Qualcomm play a significant and important role in this process through innovation, patenting, and standard setting, but they are not alone in the global community of high-tech companies.12 Backed by their nations’ leadership, Chinese and Korean companies have also invested heavily in developing the core technologies for 5G.13

The willingness of U.S. companies to invest in R&D is threatened, however. The development of 5G is a bit like a race, with the companies who develop the best technology coming out ahead. While U.S. companies are savvy and talented competitors in this race, aggressive and unwarranted use of antitrust law by U.S. regulators, as well as by foreign antitrust authorities, threatens to put obstacles in these companies’ paths and hinder their ability to lead.

III. Overly Aggressive Antitrust Enforcement Hinders American Technological Leadership and Threatens National Security

As companies from around the world develop the technology and standards for 5G mobile devices and networks, American companies are under threat by aggressive antitrust enforcement that ultimately redounds to the benefit of these foreign companies, which are economic competitors in countries that are also military competitors of the U.S. Over the past five years, foreign governments, particularly in Asia, have subjected U.S. companies to antitrust investigations that failed to follow basic norms of the rule of law, such as providing basic due process protections.14 These antitrust investigations were a thinly-disguised effort by these countries to force the transfer of U.S. patented technology to their own domestic companies, or to insulate their domestic companies from American competition. In recent years, Chinese, Korean, and Taiwanese antitrust authorities have brought nearly 30 investigations against 60 foreign companies across a range of industries, including manufacturing, life sciences, and technology.15

Antitrust challenges undermine intellectual property rights by forcing companies to license their products on non-market-based terms. One prominent example in U.S. history is when the Department of Justice wrung a concession from AT&T to license royalty-free the entire portfolio of 8,600 patents held by Bell Labs in a 1956 antitrust consent decree with the company.16 Today, the White House Office of Trade and Manufacturing Policy has observed that “China uses the Antimonopoly Law of the People’s Republic of China not just to foster competition but also to force foreign companies to make concessions such as reduced prices and below-market royalty rates for licensed technology.”17 Companies have also complained about poor policy guidance and procedural protections under China’s competition laws.18 Others have complained about China’s use of its competition laws to promote policy objectives rather than protect competition and advance consumer welfare.19 In one example, companies raised concerns with Article 7 of China’s State Administration of Industry Commerce (SAIC) 2015 Rules on the Prohibition of Conduct Eliminating or Restricting Competition by Abusing Intellectual Property Rights.20 Under this provision, intellectual property constitutes an “essential facility,” which could allow parties to raise abuse of intellectual property rights claims against patent owners for a unilateral refusal to license their patents.21

Predatory antitrust enforcement actions threaten the ability of U.S. companies to continue to be leaders in 5G technological development. China and other nations with similarly restrictive regulatory frameworks can weaken the ability of the United States to compete in global markets by exacting high monetary penalties from U.S. intellectual property owners or forcing the transfer of their intellectual property to domestic commercial rivals. As a penalty for violations of its competition laws, China can impose exorbitant fines that range up to 10% of a foreign company’s entire revenue in the prior year.22 This is not a legal rule observed in the breach; it has already resulted in fines just shy of $1 billion.23

### AT: innovation impact – 1nc

#### Innovation impact just says disease – no reason market innovation key and no other scenarios – AND, burnout checks – deadly-enough viruses can’t spread

### turn – monocultures good – 1nc

#### Big Tech companies are driving increased cybersecurity now

Page 21 – Carly Page, writer at TechCrunch, “Big Tech pledges billions to bolster US cybersecurity defenses,” 8/26/21, https://techcrunch.com/2021/08/26/big-tech-pledges-billions-to-bolster-u-s-cybersecurity-defenses/

Tech giants Apple, Google and Microsoft have pledged billions to bolster U.S. cybersecurity following a meeting with President Joe Biden at the White House on Wednesday.

The meeting, which also included attendees from the financial and education sectors, was held following months of high-profile cyberattacks against critical infrastructure and several U.S. government agencies, along with a glaring cybersecurity skills gap; according to data from CyberSeek, there are currently almost 500,000 cybersecurity jobs across the U.S that remain unfilled.

“Most of our critical infrastructure is owned and operated by the private sector, and the federal government can’t meet this challenge alone,” Biden said at the start of the meeting. “I’ve invited you all here today because you have the power, the capacity and the responsibility, I believe, to raise the bar on cybersecurity.”

In order to help the U.S. in its fight against a growing number of cyberattacks, Big Tech pledged to invest billions of dollars to strengthen cybersecurity defenses and to train skilled cybersecurity workers.

Apple has vowed to work with its 9,000-plus suppliers in the U.S. to drive “mass adoption” of multi-factor authentication and security training, according to the White House, as well as to establish a new program to drive continuous security improvements throughout the technology supply chain.

Google said it will invest more than $10 billion over the next five years to expand zero-trust programs, help secure the software supply chain and enhance open-source security. The search and ads giant has also pledged to train 100,000 Americans in fields like IT support and data analytics, learning in-demand skills including data privacy and security.

“Robust cybersecurity ultimately depends on having the people to implement it,” said Kent Walker, Google’s global affairs chief. “That includes people with digital skills capable of designing and executing cybersecurity solutions, as well as promoting awareness of cybersecurity risks and protocols among the broader population.”

And, Microsoft said it’s committing $20 billion to integrate cybersecurity by design and deliver “advanced security solutions.” It also announced that it will immediately make available $150 million in technical services to help federal, state and local governments with upgrading security protection, and will expand partnerships with community colleges and nonprofits for cybersecurity training.

Other attendees included Amazon Web Services (AWS), Amazon’s cloud computing arm, and IBM. The former has said it will make its security awareness training available to the public and equip all AWS customers with hardware multi-factor authentication devices, while IBM said it will help to train more than 150,000 people in cybersecurity skills over the next five years.

#### The plan destroys cybersecurity – only digital monocultures have the money to invest in advanced cybersecurity tech

Longe 20 – Edward Longe, policy manager at the American Consumer Institute, “A Serious Casualty of Antitrust Legislation: Cybersecurity,” 9/24/20, https://www.theamericanconsumer.org/2020/09/a-serious-casualty-of-antitrust-legislation-cybersecurity/

When advocates of antitrust legislation discuss reigning in large technology companies such as Apple, Facebook, or Google, they often do not fully consider the implications more stringent antitrust legislation will have on cybersecurity and the protection of consumer data.

Proposals to break up large technology companies would be profoundly damaging to consumer privacy and cybersecurity as smaller technology companies and startups lack the resource capabilities of making substantial capital investments required to ensure consumer data is protected or deal with the newly emerging cyberthreats associated with new technology devices such as the Internet of Things (IoT).

Every year, Microsoft faces about 7 trillion cyberthreats, many of which are becoming increasingly sophisticated. To combat these cyberattacks, Microsoft invests “over $1 billion to cybersecurity” and recently created a dedicated Cyber Defense Operations Center that is staffed around the clock to ensure its consumer data is protected.

Microsoft is not the only major tech corporation to invest significant amounts into protecting its consumer data. In 2018, Apple reported it would invest $10 billion dollars over the next few years on new U.S. Data Centers that are responsible for ensuring the protection of consumer data. These data centers do not just hold the companies’ sophisticated cybersecurity technology, but also employ those who are responsible for monitoring emerging threats and ensure that the company can provide superior cybersecurity to its consumers.

Outside of this direct investment in cybersecurity and cybersecurity facilities, big tech companies like Facebook, Amazon, Google, Apple, invested approximately $2.5 billion dollars into supporting cybersecurity companies that develop products which protect everything from login credentials, credit card information and social security numbers.

Without the significant investment large technology companies make in protecting consumer data and deterring cybercrime, consumers would have significantly fewer protections. Some smaller technology companies simply do not have the sources to invest in sophisticated cybersecurity technology, leaving their data vulnerable to cyberattacks and crime. Breaking up the large technology companies would therefore weaken cybersecurity and increase the vulnerability of consumer data.

As communication technology becomes more advanced, significant investment in cybersecurity will also be needed to ensure it is protected. While IoT technology allows the interconnection various internet of computing devices (cameras, smart appliances, and smart home gadgets) and enables them to receive and send to your home computer and smartphone, they could be vulnerable to a number of threats. Mobile Network Mapping is one threat that home networks could face and is where “attackers can create maps of devices connected to a network, identify each device and link it to a specific person.”

To meet these and other cyberthreats, networks and network devices will require significant investment in security that will undoubtedly run into the billions of dollars and require collaboration between industry and government. Given the billions that will be required to protect against online threats, it is clear that currently larger tech companies will have the means to invest and meet the demands for cybersecurity.

The protection of consumer data and cybersecurity is undoubtedly one of the biggest challenges the technology industry faces and one that should be of paramount concern to every consumer. Within the realm of cybersecurity and protecting consumer data, it is apparent that limiting the size of technology companies on the false “Big is Bad” assumption could have significant repercussions that would leave consumers worse off and their important information more vulnerable.

### AT: critical infrastructure impact – 1nc

#### No widespread blackouts – That's not how the grid works.

Koerth 18 – Maggie, senior science writer for FiveThirtyEight, citing Bill Lawrence, vice president and chief security officer at the North American Electric Reliability Corporation and Candace Suh-Lee, who leads a cybersecurity research team at the Electric Power Research Institute, a nonprofit research and development lab, " Hacking The Electric Grid Is Damned Hard", *FiveThirtyEight*, 8/13/2018, <https://fivethirtyeight.com/features/hacking-the-electric-grid-is-damned-hard/> JHW

The nightmare is easy enough to imagine. Nefarious baddies sit in a dark room, illuminated by the green glow of a computer screen. Meanwhile, technicians watch in horror from somewhere in the Midwest as they lose control of their electrical systems. And, suddenly, hundreds of thousands, even millions of Americans are plunged into darkness. That scene was evoked in recent weeks as federal security experts at the Department of Homeland Security warned that state-sponsored hackers have targeted more than American elections — they’re after the electric grid, too. They’ve gotten “to the point where they could have thrown switches,” a DHS official told The Wall Street Journal. Both DHS and the FBI have linked these attacks to Russia — which was already pinned as the culprit in two attacks that shut down power to hundreds of thousands of people in Ukraine two Decembers in a row, in 2015 and 2016. It’s all very urgent — a high-risk crisis that must be solved immediately. But, surprisingly, some electrical system experts are thinking about it in a different way. Cyberattacks on the grid are a real risk, they told me. But the worst-case scenarios we’re imagining aren’t that likely. Nor is this a short-term crisis, with risks that can be permanently solved. Bringing down the grid is a lot harder than just flicking a switch, but the danger is real — and it may never go away. Representatives from two nonprofit organizations — both of which play large roles in how the electric grid is regulated and maintained — said it is easier to imagine disaster scenarios than create one. “There’ve been some very sensational books out there about the grid going dark because someone’s got their finger ready over a mouse and everything is going to turn off at the same time,” said Bill Lawrence, vice president and chief security officer at the North American Electric Reliability Corporation, the regulatory authority that sets and enforces technological standards for utility companies across the continent. “The grid does not work that way.” Our electric infrastructure is chock-full of both redundancies and regional variations — two things that impede widespread sabotage. That’s not to say that the grid isn’t under attack. Lawrence acknowledged that there is interest in “trying to hurt us from a distance.” But he emphasized there have not yet been any successful attacks — meaning hackers haven’t caused any blackouts. The division of Homeland Security that collects reports of cyberattacks on critical infrastructure has not yet published its incident report numbers for 2017. Organizations report incidents on a voluntary basis, so these numbers may not reflect all incidents. They’ve been poking at our critical infrastructure for a long while. Incident reports published by the Industrial Control Systems Cyber Emergency Response Team — a division of Homeland Security that does training and responds to cyberattacks on critical infrastructure — suggest that electricity, oil and natural gas infrastructure have been routinely targeted for years.1 There are dozens of these attacks reported to ICS-CERTS annually. However, it would be difficult for these attacks to lead to wide-scale blackouts, according to Lawrence and Candace Suh-Lee, who leads a cybersecurity research team at the Electric Power Research Institute, a nonprofit research and development lab. And that’s true even if hackers do eventually succeed in taking control of some electric systems. It helps that the North American electric grid is both diverse in its engineering and redundant in its design. For instance, the Ukrainian attacks are often cited as evidence that hundreds of thousands of Americans could suddenly find themselves in the dark because of hackers. But Lawrence considers the Ukrainian grid a lot easier to infiltrate than the North American one. That’s because Ukraine’s infrastructure is more homogeneous, the result of electrification happening under the standardizing eye of the former Soviet Union, he told me. The North American grid, in contrast, began as a patchwork of unconnected electric islands, each designed and built by companies that weren’t coordinating with one another. Even today, he said, the enforceable standards set by NERC don’t tell you exactly what to buy or how to build. “So taking down one utility and going right next door and doing the same thing to that neighboring utility would be an extremely difficult challenge,” he said. Meanwhile, the electric grid already contains a lot of redundancies that are built in to prevent blackouts caused by common problems like broken tree limbs or heat waves — and those redundancies would also help to prevent a successful cyberattack from affecting a large number of people. Suh-Lee pointed to an August 2003 blackout that turned the lights off on 50 million people on the east coast of the U.S. and Canada. “When we analyzed it, there was about 17 different things lined up that went wrong. Then it happened,” she said. Hackers wouldn’t necessarily have control over all the things that would have to go wrong to create a blackout like that. In contrast, Suh-Lee said, scenarios that sound like they should lead to major blackouts … haven’t. Take the 2013 Metcalf incident, where snipers physically attacked 17 electric transformers in Silicon Valley. Surrounding neighborhoods temporarily lost power, but despite huge energy demand in the region, “the big users weren’t even aware Metcalf had happened,” she said. Difficult isn’t the same as impossible, Suh-Lee told me. Depending on where an attack happened and how people responded, you could get the stuff of our nightmares. Lawrence repeatedly invoked the phrase “knock on wood” as he talked about the possibility of infiltrations of electric infrastructure turning into real-world blackouts. That’s why there’s a lot of effort going into research, monitoring and preparation for cyberattacks. Lawrence’s team, for instance, is gearing up for an event that’s held every other year and is sort of like war games for the electric grid. And the Department of Energy is planning a similar event, focused on figuring out what it takes to reboot after a hacker-caused blackout. But that preparation doesn’t mean we’ll eventually solve this problem, either, Suh-Lee said. If the chances of a cinematic disaster are low, the chances of a theatrical hero on a white horse riding in to save the day are even lower. Making the grid stronger and more resilient also means making it more digital — the work that’s being done to improve the infrastructure has also created new opportunities for hackers to break in. And the risk of attack is here to stay. Security improvements are “never going to completely eliminate the risk,” she said. “The risk is out there and people will find a new way to attack.” We’ll be living with cyber threats to the grid for the rest of our lives.

## advantage – europe

### convergence now – 1nc

#### Convergence with EU now – aff authors run the Biden administration.

Michaels & Kendall ’21 [Daniel; 7/15/21; Brussels Bureau Chief @ The Wall Street Journal; and Brent; Legal Affairs Reporter in the Washington Bureau @ The Wall Street Journal “U.S. Competition Policy Is Aligning With Europe, and Deeper Cooperation Could Follow”; https://www.wsj.com/articles/u-s-competition-policy-is-aligning-with-europe-and-deeper-cooperation-could-follow-11626334844; AS]

The European Union’s top antitrust regulator foresees greater alignment with the U.S. on competition enforcement, particularly in the tech sector, amid a broader policy reorientation under the Biden administration.

EU Executive Vice President Margrethe Vestager, the bloc’s competition commissioner, said she expects “much more intense work when it comes to technology and the digitized market” between her team and Washington.

President Biden’s policy statements and appointments, plus legislative proposals from Congress, indicate the U.S. is moving closer to positions long held in the EU regarding internet giants, pharmaceutical firms and other industries with diminishing competition.

As the world’s two most powerful antitrust regulators, the U.S. and the EU can shape global competition discourse and rein in many of the world’s largest companies, so greater cooperation could have significant impact.

For supporters of aggressive enforcement, “it will certainly be a marriage made in heaven,” said Jeffrey Jacobovitz, a Washington-based antitrust lawyer with Arnall Golden Gregory LLP. “I think they’ll work hand in hand. Increased coordination makes enforcement stronger.”

That alignment will make it even more incumbent on companies in the crosshairs to develop broad, cross-Atlantic strategies on how to respond to that scrutiny, Mr. Jacobovitz said.

While tech companies say similar policies in multiple jurisdictions can simplify operations, some worry about the U.S. adopting some of Europe’s more aggressive positions.

“The U.S. should be wary of copying EU-style experimental regulation,” said Christian Borggreen, vice president and head of the Brussels office at the Computer & Communications Industry Association, which represents companies including Amazon.com Inc., Facebook Inc. and Google. “As a leader in tech innovation, the U.S. would have much more to lose if they get it wrong.”

Mr. Biden’s appointments of high-profile U.S. progressives who have criticized tech giants—Lina Khan to run the Federal Trade Commission, and Tim Wu to the White House Economic Council—have been widely seen as indicating that Mr. Biden plans to turn up the heat on internet conglomerates. Companies such as Microsoft Corp. , Apple Inc. and Google parent Alphabet Inc. previously felt little pressure from Democrats, including former President Barack Obama, who criticized past EU efforts to restrain U.S. tech companies.

Ms. Vestager held an initial meeting with Ms. Khan by videoconference on July 2. Mr. Biden has yet to appoint someone to lead antitrust enforcement at the Justice Department. That nomination could provide further clues to his administration’s approach.

In parallel, House Democrats recently introduced a package of bills with bipartisan support that target big tech companies’ practices considered by critics as anticompetitive. The proposed legislation could go as far as breaking up, or at least shrinking, Amazon and other top tech companies.

New York state could go a step further with proposed antitrust legislation that would forbid companies from abusing a dominant market position—a prohibition central to EU competition regulation that is much stricter than U.S. federal antitrust rules.

Mr. Biden last week issued an executive order seeking to curb the power of companies across the U.S. economy that dominate their markets.

The jockeying for new policy approaches comes as officials on both continents have faced enforcement challenges in limiting digital giants’ activities. Ms. Vestager has imposed billions of dollars in penalties on U.S. tech companies but had little impact on their ability to control markets, according to critics including consumer advocates and some smaller competitors.

In the U.S., a federal judge last month dismissed cases brought by the FTC and most U.S. states against Facebook, though the FTC is expected to try again with an amended lawsuit.

“I believe there is a greater consensus that competition enforcement has not always delivered on its promise,” said University of Oxford law professor Ariel Ezrachi, who is director of Oxford’s Centre for Competition Law and Policy. He said the new U.S. approach is “a real tectonic shift.”

### AT: internet – 1nc

#### Net neutrality thumps Internet openness.

Kilovaty ’17 [Ido; Research Scholar in Law, a Cyber Fellow at the Center for Global Legal Challenges, and a Resident Fellow at the Information Society Project at Yale Law School. “Repealing Net Neutrality, National Security, and the Road to a Dictatorial Internet”. Harvard Law Review Blog. Dec 22 2017. https://blog.harvardlawreview.org/repealing-net-neutrality-national-security-and-the-road-to-a-dictatorial-internet/]

On Thursday, December 15, 2017, the Federal Communications Commission (FCC) voted to repeal the Open Internet Order, often referred to as “net neutrality.” This should be no less than a bombshell, as the Internet was originally conceived as a free and open platform, not governed by economic interests, where service providers are neutral as to the data packets flowing through their infrastructure. To solidify that notion, Obama administration rules prohibited internet service providers from discriminating between different websites or services based on whom they wish to promote for financial, ideological, or other reasons. But this net neutrality concept is now being reversed, and we should be thinking about it as no less than a regime change, leading us towards a dictatorial, and potentially not so safe, Internet.

This is not a moment to herald the passing of the Internet entirely. The Internet is still going to be a significant part of our daily lives. However, we are about to witness a true regime change of the Internet. With the FCC’s repeal of net neutrality, the United States, being the leader and proponent of a free and global Internet for at least two decades, is about to create a dictatorial Internet.

This significant Internet regime change could have two important implications, both less intuitive than the commonly discussed consumer-focused concerns. First, internet giants will further consolidate their power, thus increasing our dependence on their services. Subsequently, it could increase their susceptibility to foreign information operations, and potentially pressure them to increase censorship and restrictions on speech, stemming from this national security concern. Second, this will result in an Internet that is less global, encouraging authoritarian regimes to further restrict their own internet, for ideological and political ends.

Consolidation of Power and National Security

Internet giants such as Facebook, Twitter, Amazon, YouTube, and Google, are already in control of a substantial portion of our content consumption, communication, and data hosting activities. It is already difficult for new players to successfully compete against these established Internet players. Without net neutrality, we are about to become even more dependent on these platforms, because they are the ones who will be able to afford more bandwidth and thus be able to block new players from competing under the same rules. This could lead to serious impediments to free speech, but more importantly – new speech and innovation.

But this particular problem goes even further. Consider the Russian meddling in the U.S. presidential election of 2016. The reason why the Russians have been so successful in achieving their goal is due to our already existing dependence on these platforms. Facebook, Google, and Twitter recently came under fire for not acting on the Russian disinformation campaigns on their respective platforms that directly flows from their influence on large groups of people.

Consider this – the Russian disinformation and meddling campaigns took place when net neutrality was still the rule. Whereas repealing net neutrality will result in these Internet giants potentially consolidating their power, which would mean that even more Internet users would be dependent on their almost exclusive services and content, given the convenience of ISP prioritization allowed by the repeal. A post-net neutrality reality will amplify the effects of foreign governments who would attempt to interfere with U.S. internal affairs. Such a scenario could pressure these leading tech giants into censoring and limiting speech allegedly to protect national security interests, to prevent additional foreign meddling.

Such restriction would be in addition to the more intuitive adverse impact on speech with the repealing of net neutrality. This intuitive impact is due to the anticipated prioritization of certain platforms of speech, following the repeal of net neutrality, meaning that no speech will be created equal online. Thinking about the non-intuitive national security implications of the net neutrality repeal described in this section should raise the concern and opposition of other agencies and departments responsible for cybersecurity and national security.

Finally, FCC Chairman, Ajit Pai, has previously claimed that net neutrality provides an excuse for authoritarian states to further isolate their Internet from the global grid. However, repealing net neutrality, and backing off from promoting the Internet as a global and free platform of ideas, will lead to the same. In fact, it will serve as a model for these regimes, whether for commercial or ideological reasons. The result is the same – certain portions of the Internet will be effectively censored.

“Balkanized” Internet

Balkanization of the Internet is a phenomenon that has been discussed over the years, particularly in the context of China, and its approach to Internet governance. The Chinese government has been consistently working on ensuring that the flow of information is heavily controlled, and that the Internet in China is regulated in line with ideological and economic interests. Other countries, like Brazil, have followed suit, particularly in the aftermath of the Snowden revelations. When certain governments are interventionist and paternalistic, the Internet varies from country to country, meaning that transnational communications and information exchanges could be significantly restricted.

With net neutrality about to become a thing of the past, the role of the U.S. as a champion of a free and global internet, where information is flowing across borders and free expression is a central aspect, is diminishing. This should alarm every single one of us, because there is potentially no equivalent leader to assume the role of the champion of a free and global Internet. In Canada, for example, recent Supreme Court decision could have far-reaching implications on the freedom of the Internet. The Court ruled that Google is under obligation to remove search results globally if they hold information pertaining to an ongoing patent infringement trial. Similarly, the European Court of Justice is considering whether EU’s right to be forgotten could apply to search results outside of EU borders. This shows that states are pushing for their conflicting Internet narratives, with potential global implications, while the U.S. is repealing its net neutrality principles, which would remove it from its role of leading the idea of a free and open internet across the globe. This gap in value-driven leadership could reshape the Internet for the decades to come, with voices to regulate and balkanize the Internet becoming louder throughout the world.

#### No internet impact

Lewis 15—Senior Fellow and Director of the Strategic Technologies Program at the CSIS and a PhD from the University of Chicago [James A, “Managing Risk for the Internet of Things,” *CSIS*, December, p. iv-v, <https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/151201_Lewis_ManagingRiskIoT_Web.pdf>]

The majority of Internet “users” are machines, not people. The devices that make up “the Internet of Things” (IoT) connect to the Internet, take action, and create immense amounts of data. These devices will perform progressively more functions, creating new risks for safety and security, but we need more than anecdotes to assess risk and devise useful policies. An initial conclusion about security and the Internet of Things is that popular portrayals significantly exaggerate and misrepresent risk.

• The Internet of Things will be no more secure than the conventional Internet and may be more vulnerable, since many IoT devices will use simple computers with limited functionality

• Increased vulnerability, however, does not mean an increased risk. The benefits of IoT outweigh the potential for harm, and one risk usually not considered is that premature or overreaching measures for security or privacy will stifle economic growth and innovation.

• IoT devices allow hackers to produce physical effects. Researchers have demonstrated many vulnerabilities in IoT devices, but the consequences of these vulnerabilities largely qualify as malicious pranks. Only IoT devices that perform sensitive functions or where disruption can produce mass effect will increase risk. This means most IoT devices pose little risk.

• The state of online privacy is so dreadful it is unlikely that IoT will make it worse.

• The same problems that keep us from making cyberspace more secure will slow progress in IoT security: technological uncertainty, limited international cooperation, lack of incentives for improvement, limited regulatory authority, weak online identities, and an Internet business model based on exploitation of personal data

• We can accelerate risk reduction with the same approaches we use for general cybersecurity: research, liability, international cooperation, and regulation. The White House could repeat its approach to critical infrastructure and task sector-specific agencies to work with companies to improve the security of IoT devices they use or sell.

• Autonomy will be a key determinant for IoT risk. Limiting device autonomy or providing a way to override autonomy reduces risk. IoT standards should require a higher degree of human intervention and control for sensitive functions.

• A secure device connecting to an unsecured network does little to reduce risk. Given the weak state of security on most networks, making IoT more secure requires better use of encryption, strong authentication, and increased resilience for both devices and networks.

• We can use three metrics—the value of data, the criticality of a function, and scalability of failure—to assess IoT risk. Devices that create valuable data, perform crucial functions, or can produce mass effect need to be held to higher standards. Those that do not can be left to market forces and the courts to correct

• Risk is dynamic. It decreases as technology matures and as familiarity and experience grow. As we gain experience with IoT, risk will decrease.

### AT: tech stack – 1nc

#### Digital authoritarianism’s a double turn – China trying to spread digital authoritarianism’s inevitable cuz it’s central to their foreign policy, AND the Manstead card says if it fails, they’ll perceive that their regime is brittle and that causes lashout and war – means trying to stop it is what causes their impact. Reinserted what *they read*!

While digital authoritarianism can enhance regime durability and national power, it also introduces deep-seated vulnerabilities, eight of which are considered below. Significantly, digital authoritarians may find themselves in a state of constant contest with other regime types, trapped in cycles of overreach and backlash, and prone to strategic miscalculations that pull them into interstate conflict. The current turn to digital authoritarianism therefore also has broader implications for international peace and stability.

Brittle Legitimacy

Reliance on information control makes authoritarians brittle. Small chinks in their information control armor could have existential consequences, particularly during political or economic crises (i.e. when the regime needs to rely on control for legitimacy because it is not delivering for citizens). The information and ideas most dangerous to authoritarians include:

#### US-EU not key to AI safety – officials aren’t experts and can’t comprehensively regulate global labs.

#### Megacity collapse impact is stupid – Cribb has no qualifications and it just says “they will consume a lot” which is inevitable – no reason the aff solves.

## advantage – populism

### AT: populism internal – 1nr

#### Populism thumped by Trump, Le Pen, and January 6 – obviously.

#### AND, people are overwhelmingly mad that they can’t get jobs or that consumer good prices are rising, BUT millions of Americans who don’t read the news or have degrees obvi don’t know it’s *because of antitrust* – internal link is about political elites.

### AT: populism impact – 1nr

#### Populism is structurally inevitable

Daron Acemoglu 11/6/20. Institute Professor at MIT. Trump Won’t Be the Last American Populist The Conditions That Produced Him Need to Be Understood to Be Addressed https://www.foreignaffairs.com/articles/united-states/2020-11-06/trump-wont-be-last-american-populist

Together with economic resentment has come a distrust of all kinds of elites. Much of the American public and many politicians now express a mounting hostility toward policymaking based on expertise. Trust in American institutions, including the judiciary, Congress, the Federal Reserve, and various law enforcement agencies, has collapsed. Neither Trump nor recent party polarization can be held solely to blame for this anti-technocratic shift. The almost complete rejection of scientific facts and competent, objective policymaking among many in the electorate and the Republican Party predates Trump and has parallels in other countries—Brazil, the Philippines, and Turkey to name a few. Without more deeply understanding the root of such suspicion, American policymakers can have little hope of convincing millions of people that better policies, designed by experts, will improve their lives enormously and reverse decades of decline. Nor can policymakers hope to put a lid on the discontent that fueled Trump’s rise.

POISONOUS SEEDS

Populist movements thrive on inequality and on resentment of elites. Yet these conditions alone don’t explain why American voters in 2016 turned right rather than left as inequality rose and the very wealthy benefited at ordinary people’s expense. In the United States, a right-wing populist movement stood ready to make itself the vehicle for the grievances of regular people and to marry those grievances to a stance that was anti-elite, nationalist, and often authoritarian.

Right-wing populism did not emerge in the United States because of Trump’s deranged charisma. Nor did it begin with the news media’s infatuation with his outrageous statements, or with Russian meddling, or with social media. Rather, right-wing populism resurged as a potent political force at least two decades before Trump’s takeover of the Republican Party—remember Pat Buchanan? And it has analogs all over the world, not just in mature democracies reeling from the loss of manufacturing jobs but in countries that have benefited economically from globalization, including Brazil, Hungary, India, the Philippines, Poland, and Turkey.

That the Republican Party would give itself over to such a movement—and to Donald Trump as its standard-bearer—was never a foregone conclusion. One can argue that Republicans supported Trump because he was willing to execute their agenda: cutting taxes, fighting regulation, and appointing conservative judges. Alas, this is only a small part of the story. Trump’s popularity surged based on positions diametrically opposed to Republican orthodoxy: restricting trade, increasing spending on infrastructure, helping and interfering with manufacturing firms, and weakening the country’s international role. One can point to skyrocketing rates of polarization before Trump or chide the role of money in politics. Yet these factors hardly explain the wholesale abandonment of many of the key policy tenets of a 150-year-old party. Before 2016, few would have believed that the Republican Party would try to dismiss and cover up meddling by a hostile government in a presidential election.

A GLOBAL UNRAVELING

Trump and Trumpism are American phenomena, but they arose within a context that is undeniably global. Under Boris Johnson in the United Kingdom, the Tory Party is transforming in a manner similar, if more benign, to that of the Republican Party. The French right has fallen behind the National Rally (the new name for the far-right National Front). And the Turkish right has remade itself in the image of a strongman, Recep Tayyip Erdogan. Together, these and other cases demonstrate not just polarization but a complete unraveling of the old political order.

How and why this unraveling has happened is not self-evident. The first place to look for an answer is in the major, crosscutting economic trends of the present era: globalization and the rise of digital and automation technologies, both of which have induced rapid social changes coupled with unshared gains and economic disruptions. As institutions proved unable or unwilling to protect those suffering from these transformations, they also destroyed public trust in establishment parties, the experts claiming to understand and better the world, and the politicians who appear complicit in the most disruptive changes and in cahoots with those who have stealthily benefited from them.

From this perspective, it isn’t sufficient to decry the collapse of civic behavior or even to defeat toxic populists and authoritarian strongmen. Those who seek to shore up democratic institutions must build new ones that can better regulate globalization and digital technology, altering their direction and rules so that the economic growth they foster benefits more people (and is perhaps faster and of a higher quality overall). Building trust in public institutions and experts requires proving that they work for the people and with the people.

#### No impact to populism---institutional checks

Nicola Mai & Peder Beck-Friis 19, 2-13-2019, Nicola Mai is an executive vice president in the London office and a sovereign credit analyst in the portfolio management group; Dr. Peder Beck-Friis is a vice president and portfolio manager in the London office, "EU Elections: Populism’s Threat May Be Overstated," Pacific Investment Management Company LLC, https://www.pimco.com/en-us/insights/viewpoints/eu-elections-populisms-threat-may-be-overstated/

It is unlikely that the eurosceptic parties will form a united anti-establishment front. The eurosceptic parties are heterogeneous, ranging from extreme left to extreme right, and they have diverging views on how Europe should be reformed. We think the probability that these parties coalesce into one political group is low.

Support for eurosceptic parties should remain well below 50%. This is important because even if these parties manage to form a united front, they will face the opposition of moderate parties, which will likely coalesce against them in parliamentary votes and obstruct radical proposals that could involve the dismantling or weakening of the European infrastructure.

The key decision-making process in the EU remains inter-governmental. All key European decisions need the approval of the European Parliament as well as the Council, with the most important decisions requiring unanimity of the Council. It is true that the parliament could block key initiatives set out by the Commission. But that would require the support of moderate parties, given the minority representation of the eurosceptic parties. Finally, in emergency situations, the Council has the ability to make decisions on a purely inter-governmental basis, bypassing the need to change EU law.

Nominations of key EU positions remain ultimately in the hands of the Council. Even in the unlikely event that a populist coalition emerges as the largest group in the parliament, it does not necessarily follow that the European Council will propose a populist candidate for president of the Commission. The Spitzenkandidat process is only a convention; the European Council could in principle nominate any candidate, and importantly, the nominee will still need to be approved by the parliament as a whole.

# 2NC

### FWK

#### These debates are the core of antitrust. The economic concepts and worldviews embedded in antitrust advocacy should be evaluated upstream of specific cost-benefit comparison of implementation.

Sabel **RAHMAN** Law @ Brooklyn **’20** “Structuralist Regulation” Prepared for NYU Law School Public Law Colloquium, September 2020

Second, this concept of structuralist regulation helps provide a policy framework for understanding and engaging some of the structuralist claims made by grassroots reform movements especially in this moment. We are in a unique moment of resurgent grassroots activism, and as scholars of social movements have argued, many of these movements are advancing structural, transformative visions of public policy and legal-institutional change.20 But these claims are often seen as outside the scope of more traditional modes of policy debate and analysis. Building a conceptual framework of what we mean by ‘structural’ reform can help bridge the reform ideas being generated by grassroots movements on the one hand, and those arising from policymakers and academics on the other. More broadly, we might even say we are on the cusp of a revival of interest in structuralist policy solutions in response to the deeper problems of economic inequality,21 racial subordination,22 power in public law,23 and political economy approaches to law and public policy.24 A clearer understanding of structuralist policy design will be important to inform the kind of inclusionary policy agenda needed to remedy these inequities.

The rest of the paper proceeds as follows. Part I provides a conceptualization of ‘structuralist’ policymaking, identifying the underlying assumptions that animate structuralism as a regulatory strategy. This Part also notes that this concept of regulatory strategy (or what I call “regulatory logic”, as defined below) should be understood as a distinct way of unpacking and analyzing the patterns of policymaking judgment distinct from other modes of analysis like cost-benefit analysis or the rules-versus-standards debate. Part II then looks at examples of structuralist policy proposals in recent economic policy debates: the debate over tech platforms, the debate over too-big-to-fail financial firms and systemic risk, and the renewed interest in anti-trust and anti-monopoly law. These examples help illustrate structuralist regulatory logics in action, and their distinctive assumptions and potential benefits over more conventional regulatory approaches. The purpose of this Part is not to offer a full-throated defense of structuralist policies in each of these sectors (although I am perhaps unsurprisingly sympathetic to the arguments on the merits); rather the purpose here is simply to illustrate structuralism as a distinct mode of thinking about policymaking. Part III articulates some broader implications for how to implement and institutionalize structuralist policies. Part IV concludes with some closing thoughts on how structuralism as a way of thinking about regulation connects to this broader moment of intense political and scholarly interest in inequality and racial (in)justice.

I. Structure as regulatory subject and strategy

Regulatory logics

The task of creating an effective and responsive regulatory system is often thought of in terms of questions of institutional design the balance of responsibilities between legislatures, agencies, and judges; how agencies should be structured; how agency heads should be appointed; how agencies can generate sufficient expertise to regulate effectively without falling prey to industry capture. But part of the challenge in ensuring effective and responsive regulation lies within the ways in which regulators and policymakers more broadly think about their task—the concepts and worldviews that operate within the ‘black box’ of policy decisionmaking and judgment.

However stringently we might read the external legal constraints on regulatory action— whether through judicial review or command—the fact of regulator discretion and judgment is inescapable.25 So how then should we think about the analytical methods or frameworks employed by regulators themselves? Regulators and legislators are not merely technical automatons executing the public will or legislative command. Nor are they simply political ideologues. Rather, policymakers are necessarily making decisions that involve degrees of subjective, normative, and policy judgments. The ways in which that judgment is exercised has an impact on the dynamics of regulatory policy.

Embedded in these judgments are a range of assumptions, values, and concerns. How are policymakers understanding the purposes of regulation in a given domain? Do they see their enterprise as complementary to existing private parties and practices? Or as fundamentally critical and oppositional? How do regulators view their own capacities and institutional competency—particularly relative to other private or governmental actors? Do they see themselves as outgunned and undermanned? Or well-informed and capable? What is their analysis of the systems and causes that drive the problems they are trying to solve—and which of those causes are, in their view, most amenable to the tools they have on hand? These are the kinds of underlying questions that operate upstream from a discrete policy issue or costbenefit analysis inquiry.

These questions often aggregate into distinctive patterns of judgment, consistent regulatory strategies, or what I call in this paper “regulatory logics”. Regulatory logics live squarely in the midst of the black box of regulatory judgment; they are more reasoned and grounded in understandings of the empirical nature of the world than pure political ideology, but at the same time they also share some degree of normative, subjective judgment beyond merely technical calculations of risk, costs, and benefits. We can think of “regulatory logics” as analogous to canons and methods of statutory interpretation in the judiciary. Just as canons offer a conceptual framework and method of reasoning forjudges seeking to fill in the gaps between statutory text and a new fact situation, regulatory logics can be thought of as a bundle of presumptions about the social goals of regulation, about the relative institutional competency of regulators in comparison to private actors, and about the appropriate methods of analysis required in formulating rules responding to new circumstances. And, like modes of interpretive reasoning, regulatory logics do not predetermine a specific outcome—though they may shade in some directions making some policy determinations and outcomes more likely than others. Nor are the same logics necessarily appropriate in all circumstances; different conditions may demand different regulatory logics.

### Perm

#### Combining new norms for antitrust with the baseline of competition co-opts transformation.

Sanjukta **PAUL** Law @ Wayne State **’19** “Antitrust as Allocator of Coordination Rights” https://www.gwern.net/docs/economics/2019-paul.pdf p. 3-4

The reigning antitrust paradigm authorizes large, powerful firms as the primary mechanisms of economic and market coordination, while largely undermining all others: from workers’ organizations to small business cooperation to democratic regulation of markets. This paper argues that rather than promoting competition, as conventionally understood, antitrust’s basic function is to allocate coordination rights. While deploying the notion of competition to undermine its disfavored forms of economic coordination, antitrust law also relies upon conceptually unrelated “efficiencies” to quietly underwrite a major exception to its principles of competition: the business firm itself. By surfacing what I call antitrust’s firm exemption, I reveal the contingency of the law’s choices about permissible economic coordination—and bring the possibility of making different choices closer.

Proposals to reform antitrust have generally stopped short of questioning the basic understanding that its primary function is to promote competition. To be sure, many posit that antitrust performs this stated function badly.1 And some have begun the critical work of re-introducing other, older normative benchmarks to antitrust analysis,2 whose memory a minor strain of earlier scholars had kept alive.3 To varying degrees, this work still regards antitrust primarily in terms of promoting competition. Meanwhile, more mainstream antitrust scholarship’s official consensus position is that the ideal competitive market is the only appropriate normative benchmark for decision-making.4 At least officially, if increasingly uneasily, competition is still king.

#### Even ambitious reforms relying on the normative framework of competition as the baseline for economic coordination should be rejected.

Sanjukta **PAUL** Law @ Wayne State **’19** “Fissuring and the Firm Exemption” *Law and Contemporary Problems* 82:65 p. 85-87

Instead, we might consider allocating coordination rights on the basis of power and social benefit. Importantly, to guide the application of these concepts, we must first discard the ideal-state competitive order as the default normative framework for antitrust and for economic regulation more generally. This is not to say that competition as a social process, referring to healthy business rivalry, is not important to antitrust law: it is, and ought to be balanced with appropriate and socially beneficial coordination. However, once we realize that the idealstate concept of competition that is currently presumed to form the basis for antitrust law is contributing very little—except as a smokescreen for other normative choices—then we need no longer view economic coordination as a special exception to the order of things. Thus, we need not look for conditions of deprivation, or powerlessness, as constituting the sole basis—aside from the firm exemption—for the appropriate exercise of coordination rights because they are an exception to an otherwise perfect order. That is what our current framework does, and it is also the assumption on which even the most ambitious reform proposals proceed.77

### 2NC – AT: Cap Good

#### 1. Alternative isn’t anti-capitalist, it’s anti neoclassical. Starting from the premise of political-economy means we should choose between varieties of market design. All of their impact turns presume that our alternative is anti-growth or anti-market. Our kritik of the assumptions of perfect competition, the transaction costs justification for firms, and efficient allocation based soley on the price mechanism requires changing the organization of markets, not eliminating them. The varieties of capitalism, firm governance, and economic framework all prove that they should have to draw specific links to our alternative, not generally indict anti-capitalism. That’s Mazzucato.

#### 2. Impact turns based on the core assumptions that we’ve criticized should be disregarded. The neoclassical models give us zero basis for robust economic assessment.

Michael **BERNSTEIN** John Christie Barr Prf. of History and Economics @ Tulane **’18** “Reconstructing a public economics: markets, states and societies” *Real-World Economics Review* 84 p. 2-3

Liberating contemporary economic analysis from the straitjacket of mainstream neoclassical theory is the animating theme of the essays assembled in this special number of the Real-World Economics Review (RWER). The authors of the works assembled here are all committed to the idea that what is regarded by traditional economic theory as a set of exogenous forces framed and deployed from outside the market mechanisms that are the focus of the discipline – namely, the public sector – is in fact an integral agent that directly affects the very issues and phenomena neoclassical theory claims to explain. Indeed, it is the very failure of traditional economic thinking to account for the “public economy” in any systematic and meaningful fashion that prevents it from explaining how societies actually produce goods and services and, in compensation, constructs inapt and futile framings, such as “market failures,” to explain why governments exist.

In contradistinction to prevailing doctrine, the following articles strive to reconstruct a public economics by embedding the public sector intrinsically within economic models. Rather than separate the “public sector” from economics, understanding collective action as something distinct from the economy, a public economics views the entire economic system – the “macroeconomy” as a whole – as comprised of multiple economic systems: of markets, of public activities, and of domestic interactions. As Neva Goodwin explains (“There is More Than One Economy”), human economies may be understand as a construction of the market or “private business economy,” a “public purpose economy,” and a “core economy.” The market is the focus of virtually all of mainstream economic thinking today. Public purpose economy is defined by Goodwin as government, non-profit, and non-governmental entities that focus on a broader array of goals not simply defined by profit-maximization. In the core economy, one finds the domestic activities of consumption, distribution, and resource management that are focused on the survival, nurturing, and welfare of its constituents.

Simply understood as venues within which rational agents pursue optimization goals, markets cannot account for public purpose articulated and projected within collective-action dynamics, domestic and intimate goals framed by affective and cultural behaviors, and ecological and environmental contexts imposed by the physical and biological realms within which all human activities occur. That being the case, an economics that only accounts for the workings of “perfect” markets, understood to exist separately from domestic, public, and ecological frameworks, is not even remotely useful in explaining how economies actually function, let alone how they might be improved. If, for example, government is understood simply as a remedial instrument to rectify “market failure,” its essential role in the economic mechanisms of consumption, production, and distribution is obscured. Similarly, if both the domestic sphere (of family and human relationships) and the environment are grasped as dimensions external to, and non-constitutive of the economy, it becomes impossible to analyze and predict economic behaviors and outcomes in reliable ways.

Reframing how economic theory accounts for the public and domestic realms of social life is uniquely tied to the manner by which we understand government action. As June Sekera demonstrates (“The Public Economy: Understanding Government as a Producer”), by viewing governments as essentially economic “operating systems,” that function according to a non-market economic logic and within the constraints of biophysical realities, we gain a far more effective understanding and appreciation of society, markets, and the environmental impacts of economic activity. This not only allows for more accurate analyses of proposed policies; it also animates a deeper and more genuine understanding of the ways in which public goals and purposes may in fact be effectively conceptualized and achieved. There is no better historical demonstration of this fact than in the twentieth century experience in the United States.

# 1NR

## k lpe

#### 2. Impact turns based on the core assumptions that we’ve criticized should be disregarded. The neoclassical models give us zero basis for robust economic assessment.

Michael **BERNSTEIN** John Christie Barr Prf. of History and Economics @ Tulane **’18** “Reconstructing a public economics: markets, states and societies” *Real-World Economics Review* 84 p. 2-3

Liberating contemporary economic analysis from the straitjacket of mainstream neoclassical theory is the animating theme of the essays assembled in this special number of the Real-World Economics Review (RWER). The authors of the works assembled here are all committed to the idea that what is regarded by traditional economic theory as a set of exogenous forces framed and deployed from outside the market mechanisms that are the focus of the discipline – namely, the public sector – is in fact an integral agent that directly affects the very issues and phenomena neoclassical theory claims to explain. Indeed, it is the very failure of traditional economic thinking to account for the “public economy” in any systematic and meaningful fashion that prevents it from explaining how societies actually produce goods and services and, in compensation, constructs inapt and futile framings, such as “market failures,” to explain why governments exist.

In contradistinction to prevailing doctrine, the following articles strive to reconstruct a public economics by embedding the public sector intrinsically within economic models. Rather than separate the “public sector” from economics, understanding collective action as something distinct from the economy, a public economics views the entire economic system – the “macroeconomy” as a whole – as comprised of multiple economic systems: of markets, of public activities, and of domestic interactions. As Neva Goodwin explains (“There is More Than One Economy”), human economies may be understand as a construction of the market or “private business economy,” a “public purpose economy,” and a “core economy.” The market is the focus of virtually all of mainstream economic thinking today. Public purpose economy is defined by Goodwin as government, non-profit, and non-governmental entities that focus on a broader array of goals not simply defined by profit-maximization. In the core economy, one finds the domestic activities of consumption, distribution, and resource management that are focused on the survival, nurturing, and welfare of its constituents.

Simply understood as venues within which rational agents pursue optimization goals, markets cannot account for public purpose articulated and projected within collective-action dynamics, domestic and intimate goals framed by affective and cultural behaviors, and ecological and environmental contexts imposed by the physical and biological realms within which all human activities occur. That being the case, an economics that only accounts for the workings of “perfect” markets, understood to exist separately from domestic, public, and ecological frameworks, is not even remotely useful in explaining how economies actually function, let alone how they might be improved. If, for example, government is understood simply as a remedial instrument to rectify “market failure,” its essential role in the economic mechanisms of consumption, production, and distribution is obscured. Similarly, if both the domestic sphere (of family and human relationships) and the environment are grasped as dimensions external to, and non-constitutive of the economy, it becomes impossible to analyze and predict economic behaviors and outcomes in reliable ways.

Reframing how economic theory accounts for the public and domestic realms of social life is uniquely tied to the manner by which we understand government action. As June Sekera demonstrates (“The Public Economy: Understanding Government as a Producer”), by viewing governments as essentially economic “operating systems,” that function according to a non-market economic logic and within the constraints of biophysical realities, we gain a far more effective understanding and appreciation of society, markets, and the environmental impacts of economic activity. This not only allows for more accurate analyses of proposed policies; it also animates a deeper and more genuine understanding of the ways in which public goals and purposes may in fact be effectively conceptualized and achieved. There is no better historical demonstration of this fact than in the twentieth century experience in the United States.

## advantage – mkt pwr

### circumvention – 1nr

#### Waving the magic wand of fiat to dismiss implementation questions side-lines technical details which is precisely why antitrust reforms tend to fail – these are essential questions in antitrust discussions that the aff should be forced to debate

Jones 20 – Alison Jones, Professor of Law at King's College London and solicitor at Freshfields Bruckhaus Deringer LLP, “Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy,” *The Antitrust Bulletin*, Volume 65, Number 2, 2020, pp. 227-255

In this article, we do not debate the condition of competition in the U.S. economy, nor do we assess the substantive merits of the respective measures proposed to correct the market and policy deficiencies identified. Instead, we focus on a less noticed issue—the policy implementation challenges that stand between the soaring reform aspirations and their effective realization in practice. We thus take the reform recommendations—presented in scholarly papers, blue-ribbon studies, and in popular essays—at face value, and ask what legislators and policy makers must do to land them. For example, assuming that more aggressive antitrust enforcement is required, how can an effective program actually be delivered—through winning antitrust cases and securing positive change—and how can it be delivered well?

In our view, these “implementation” issues have tended to be overlooked in the modern critique and to have been too quickly side-lined as technical details to be (easily) addressed once the high-level concepts of a bold antitrust program have been settled.21 Implementation is not, however, a simple matter that will necessarily sort itself out once the intellectual architecture is in place. Rather, inattention to implementation challenges invites serious disappointment by creating a chasm between elevated policy commitments and the capacity of responsible public institutions (competition agencies, new regulators, and the courts) to produce expected outcomes. This is the implementation blindside. Unless the blindside is acknowledged and addressed, there is a significant risk that a major reform program will engage considerable resources, public and private, in initiatives that fall well short of their goals. Instead of restoring confidence in the ability of government agencies to enforce antitrust laws effectively, a failed effort might merely reinforce doubts, and cynicism, about the quality of public administration.

This article analyzes important impediments that are likely, if not carefully addressed, to hamper the delivery of the current proposals to expand competition policy significantly and propose ways to overcome them. It commences in Part II by introducing the principal flaws that modern commentary attributes to U.S. antitrust policy (the “crisis in antirust”), before describing some of the proposals offered to bolster competition, strengthen antitrust policy, and restore its centrality as a tool of economic control. It also sketches how the federal and state agencies are responding to demands for more extensive intervention. As already explained, the purpose of this section is not to address the (respective) merits of these policy proposals but to identify the magnitude of the implementation challenges that the proposals for a major expansion of the U.S. antitrust program create.

Part III sets out the chief implementation obstacles that confront efforts to execute bolder antitrust programs, including tougher scrutiny of mergers and dominant firm conduct. We draw parallels between current debates and past ones, including those that influenced enhanced antitrust enforcement (especially by the FTC) in the 1960s and early 1970s and use historical examples to show what might happen if these hurdles are underestimated or ignored in the formulation of bold new initiatives.

#### New antitrust is circumvented and watered down – durable fiat doesn’t solve judicial disregard and congressional inaction

Crane 21 – Frederick Paul Furth Sr. Professor of Law at UMich (Daniel, Antitrust Antitextualism, 96 Notre Dame L. Rev. 1205 (2021). Available at: <https://scholarship.law.nd.edu/ndlr/vol96/iss3/7>

As first the antitrust agencies through their merger guidelines and then the courts through endorsement of the agencies’ approach systematically shifted merger policy away from the incipiency standard and began requiring formal market definition and probability of adverse price effects, Congress acquiesced through inaction. Whatever else it said in 1950, Congress has thus far shown itself willing to let the courts and antitrust agencies reshape merger law in a form far more favorable to business consolidation. \* \* \* In sum, from the courts’ earliest forays into interpreting the Sherman Act up through contemporary antitrust jurisprudence, the courts have manifested a systematic tendency to interpret the substantive antitrust statutes contrary to their texts, legislative histories, and often their spirit.236 Sometimes, as with the rule of reason and labor exemption, the judicial disregard of text and purpose has occurred fairly immediately

. In other cases, as with the Robinson-Patman and Celler-Kefauver Acts, an initial period of statutory fidelity has slipped gradually into a period of statutory infidelity. In some cases, as with respect to section 5 of the FTC Act and section 3 of the Clayton ct, the courts continue to proclaim their fidelity after they functionally move to infidelity. In many cases, the courts stop pretending after a while and admit quite candidly that they are taking liberties with the statute. If this antitrust antitextualism is merely the product of common-law methodology, one would expect to see movement away from the statute’s text in both permissive and restrictive directions, or, to put it more crassly, both in favor of big capital and against it. But the movement has all been in one direction: loosening a congressional check on big capital. Thus, the rule of reason allowed courts to bless large combinations of capital that the courts deemed reasonable; narrowing the labor exemption frustrated labor’s ability to countervail capital’s power; restricting the private right of action for treble damages significantly curtailed the private-litigation check on business; judicial narrowing of the Clayton Act’s exclusive dealing and tying restrictions allowed (mostly big) firms to exploit market power; reading “unfair” out of the FTC Act eliminated section 5 as a check on business morality; eviscerating the Robinson-Patman Act protections for small and independent businesses favored large and powerful businesses; and requiring proof of likely price increases and technical relevant market definition in merger cases immunized many large-scale mergers from legal challenge. Throughout the history of American antitrust law, the courts have shown a systematic tendency to read down the antitrust statutes in favor of big capital. But the story of antitrust antitextualism is not simply one of conservative/progressive ideological struggle between Congress and the courts. Much of the action away from statutory text and purpose was accomplished by, or with the support of, judges of the political left. Unlike in other fields, Congress has not responded with statutory overrides. And far from buttressing its atextual statutory readings of the antitrust laws through veiled constitutional warnings about congressional overreaching, the Court has repeatedly pulled in the opposite direction, asserting quasi-constitutional reverence for antitrust law.237 Despite ample opportunity to do so, the Court has not removed antitrust law from the reach of congressional reconsideration by constitutionalizing its atextual readings. Antitrust antitextualism does not follow a conventional left/right ideological pattern. Its actual pattern is more subtle III. THE IDEALISTIC CONGRESS, PRAGMATIC COURTS THESIS AND ITS IMPLICATIONS Thus far, this Article has made an empirical observation—that, from the beginning of antitrust history, the courts have atextually read down the antitrust statutes in favor of big business and considered and rejected a potential explanation: that this phenomenon primarily represents an ideological tugof-war between a progressive Congress and more conservative courts. This final Part searches for an alternative understanding, one that is perhaps less obvious but more fitting, and then considers its systemic implications for the antitrust enterprise. A. The Idealistic/Pragmatic Thesis Congress writes expansive statutes reining in business power, the courts (either immediately or over time) disregard the plain text of the statutes and trim them down in favor of capital, and Congress acquiesces through inaction. Why? The best-fitting explanation is this: the antitrust laws reside in perennial tension between two fundamental impulses of the American political psyche—the romantic and idealistic attachment to smallness over bigness, and the pragmatic and often grudging realization that large-scale organization may be necessary to achieve material advantages. The romanticism and idealism of the anti-bigness impulse pushes it to the fore in the popular political arena. Congress legislates on the popular aspiration for an egalitarian economy organized around small proprietors and independent local businesses and freedom from economic dominance. When the statutes come to the courts or antitrust agencies, judges and antitrust enforcers play the pragmatic role of balancing those popular aspirations against the contending impulse for efficiency and material benefit. This balancing act induces them to give less effect to the statutes than the broad statutory texts suggest. So long as the judicial decisions achieve results that strike a politically acceptable outcome between the aspirational and pragmatic impulses, Congress is content to leave the judicial and enforcement decisions alone.

#### Give the aff less than 5% solvency. The plan is woefully insufficient – it just enables rule of reason analysis, but those cases are overwhelming won by defendants.

Sandeep Vaheesan 17, Regulations Counsel, Consumer Financial Protections Bureau, “Resurrecting “A Comprehensive Charter of Economic Liberty”: The Latent Power of the Federal Trade Commission,” University of Pennsylvania Journal of Business Law, Vol. 19, Iss. 3, pp 645-699

In adopting the rule of reason, the FTC practically guaranteed that it would be able to bring few, if any, Section 5 cases. The statistics demonstrate, in practice, that the rule of reason means that the plaintiff almost always loses. A leading study found that, between 2000 and 2009, defendants received a favorable court ruling in more than ninety-five percent of antitrust cases implicating the rule of reason.146

## t – prohibit

### overview – 1nr

#### The list of new ideas perpetually being published is endless – we must do something to preserve limits.

Greenfield et al , Leon B. comparative competition law @ Georgetown Law Center ; Lange, Perry A. vice-chair of the ABA Antitrust Section’s Joint Conduct Committe; Callan, Nicole. ice chair of the Civil Practice and Procedure Committee of the American Bar Association (ABA)'s Section of Antitrust Law, vice chair of the Civil Practice and Procedure Committee of the American Bar Association (ABA)'s Section of Antitrust Law, ’20,“ANTITRUST POPULISM AND THE CONSUMER WELFARE STANDARD: WHAT ARE WE ACTUALLY DEBATING? “ Antitrust Law Journal; Chicago Vol. 83, Iss. 2, (2020): 393-428.

B. Proposals to Improve Existing Antitrust Enforcement

Antitrust populists have advanced many proposals that, properly construed, would result in more aggressive antitrust enforcement while remaining within the consumer welfare framework. These proposals range from simple fixes, such as giving the agencies resources to bring more cases, to more substantial rule changes, such as altering current burden-of-proof allocations. The proposals are motivated by a concern that existing antitrust enforcement has led to consumer harm by erring too much on the side of under-enforcement.

1.Dedicate Additional Resources for Antitrust Enforcement

Antitrust populists have called for providing the FTC and DOJ with increasing funding and resources and for appointing more aggressively enforcement-minded leaders.121 They argue that expanded resources are necessary for the agencies to keep up with increased merger activity, technological changes, and newer and more nuanced anticompetitive practices in the economy.122

This position is consistent with mainstream antitrust views and efforts to reinvigorate antitrust enforcement during the obama and Trump administrations. For example, in 2016, President Obama issued an executive order requiring executive agencies and departments to take steps to address competition concerns, including by referring anticompetitive practices to the DOJ and FTC.123 In its fiscal year 2017 budget submission to Congress, the Antitrust Division highlighted the need for additional resources, requesting an additional $15.5 million in funding for civil merger enforcement and criminal cartel enforcement, including funding for 98 additional attorneys.124 And in its submission to Congress for fiscal year 2021, the Division requested an additional $21.8 million to administer its caseload, including funding for 87 additional positions.125

2.Improve Agency Transparency and Accountability

Antitrust populists also advocate various measures to increase agency transparency. For example, the Center for American Progress has proposed that the FTC and DOJ employ a network of experts to help assess proposed mergers, similar to the network that the Food and Drug Administration employs to help review new medical devices.126 The Center argues that a network of experts would democratize what is currently a closed process, allowing outside experts to help assess mergers and provide public comment.127 The Democrats' Better Deal proposed a new consumer competition advocate, who would proactively recommend investigations to the antitrust agencies.128 The Better Deal would also require the agencies publicly to explain decisions not to pursue a recommended investigation.129

Another common proposal is to strengthen retrospective reviews of consummated transactions. Although the agencies periodically conduct retrospective reviews, many antitrust populists have called for measures to institutionalize such efforts. For example, the Center for American Progress has proposed that the DOJ and FTC require merging companies to submit data for a three- to four-year period after a transaction, which could be an input for assessing the effectiveness of the agencies' merger-enforcement programs.130 Lina Khan and Sandeep Vaheesan argued that the President should appoint an antitrust inspector general, who would independently assess how predictions about merger effects have actually played out, and whether merger remedies have succeeded.131

calls for more agency transparency and accountability is another area where antitrust populism and the mainstream are largely in agreement. For example, at his confirmation hearing to become FTc chairman, Joseph Simons told the Senate commerce committee that the FTc needed to devote substantial resources to determining whether the agencies have been too permissive of mergers.132 Simons identified the possibility of overly lax merger enforcement as one of the top three challenges facing the FTc, and advocated systematic evaluation of the agency's work through retrospective studies of enforcement actions.133 And in September 2020, the FTC's Bureau of Economics announced a program to expand and formalize its efforts regarding merger retrospectives, including by dedicating additional resources and "maintaining a website devoted to research on retrospectives."134

3.Pursue More Creative Theories of Competitive Harm

A common populist theme is that the enforcement agencies systematically under-enforce the antitrust laws by failing to pursue novel or creative theories of competitive harm. These critiques often focus on specific industries in which or types of conduct against which critics contend the agencies' enforcement efforts have fallen short.

For example, critics frequently argue that the antitrust authorities have failed adequately to account for network effects, or that other scale advantages are imposing "insurmountable barrier[s] to entry."135 Lina Khan and others have used Amazon as a case study. Khan argues that Amazon exploits data that it receives as the owner of the Amazon Marketplace to undermine challenges from rival suppliers, e.g., by using information about its rivals' sales to target their customers.136 Khan claims that existing antitrust laws could address this type of data exploitation by more vigorously policing information transfers.137 Khan has also contended that the consumer welfare standard's emphasis on consumers "has largely blinded enforcers to many of the harms caused by undue market power, including on workers, suppliers, innovators, and independent entrepreneurs."138

Although critics may claim that the consumer welfare standard neglects network effects, scale advantages, harm to innovation, or monopsony power (including in labor markets), the standard can and does address these issues- at least where they threaten to harm market performance.139 Indeed, the current FTC and DOJ Horizontal Merger Guidelines contemplate consideration of these issues,140 which have engendered recent antitrust enforcement actions. For example, the DOJ based its action against American Express on a theory of market power reinforced and protected by network effects.141 And the agencies have challenged mergers based on theories of monopsony harm142 and harm to innovation.143 Stripped of rhetoric and properly understood, populist critiques focused on these issues do not reject the consumer welfare standard, but call for more aggressive intervention under that standard.

4.Adopt Presumptions that Favor Enforcement

a. Presumptions that Mergers Are Anticompetitive

One common populist critique is that current antitrust enforcement is too permissive of consolidation. Populists often cite John Kwoka's retrospective study of merger outcomes. That study concluded that mergers on average result in nontrivial price increases, and that the U.S. agencies have consistently permitted anticompetitive mergers.144 To overcome this perceived failing, many populists would replace today's focus on nuanced, fact-intensive assessment of competitive effects with a stricter application of the Philadelphia National Bank framework to create a presumption of illegality for mergers that result in highly concentrated markets.145 For example, the Democrats' Better Deal promised: "[U]nder our new standards, the largest mergers would be presumed to be anticompetitive and would be blocked unless the merging firms could establish the benefits of the deal."146

Populists also argue that the current presumptions fail to account for serial acquisitions of nascent competitors, particularly in the tech industry.147 As American Antitrust Institute President Diana Moss explains, the DOJ and FTc may be reluctant to challenge acquisitions of smaller, potential, or nascent competitors because regulators' decisions are driven by an error-cost analysis, under which the regulators "compare the costs of mistakenly chal lenging benign or pro-competitive deals to the cost of mistakenly not challenging anticompetitive deals."148

According to some populists, a strong presumption of illegality would result in a simpler and more predictable merger-review process and combat under-enforcement:

While agencies would still have to define relevant markets under the Philadelphia National Bank rule, the complexity of merger reviews would be greatly diminished. For one, these reviews would be significantly shortened and be much less dependent on competing speculations about the future development of markets. Armed with a simple rule rather than a standard that demands an exhaustive industry study and impossible projections of the future, the antitrust agencies, for example, would not have to spend more than a year investigating mergers in highly concentrated markets-as they routinely do now.149

Like the presumption that now exists in the Horizontal Merger Guidelines, the presumption proposed above would be generally subject to the merging firms' rebuttal: firms triggering the presumption could still merge if they could show that the merger would be unlikely to create or enhance market power.150

This proposal may well be flawed because it would sacrifice accuracy in enforcement decisions and deter too many procompetitive transactions. But it is not inconsistent with the consumer welfare standard: under the proposal as stated, agencies and courts would continue to evaluate whether transactions would result in increased prices or reduced output, quality, or innovation, rather than inquire into broader potential societal harms.151

b. Presumptions of illegal Monopolization

Antitrust populists have also advocated presumptions that Section 2 has been violated when a dominant or near-dominant firm engages in exclusive dealing, refusals to deal, or below-cost pricing.152 For example, Lina Khan argues that the current law requiring below-cost pricing and a probability of loss recoupment for predatory pricing claims fails properly to account for the economics of online-platform markets.153 Khan claims that network effects and control over data entrench early dominance, creating incentives for online platforms to price below cost to pursue growth, behavior that the current law assumes is rarely rational.154 She also argues that recoupment is difficult to detect among online platforms, which may raise prices years later, or raise prices on different products or through finely tuned price discrimination.155 To combat predatory pricing, Khan would replace Brooke Group's recoupment test156 with a presumption of predation whenever a dominant online platform prices its products below cost.157

Monopolization presumptions can be consistent with the consumer welfare standard.158 The challenge for populists is to present well-developed arguments to support their view that presumptions protect consumer welfare better than do existing enforcement approaches, and that presumptions will not overdeter procompetitive conduct, unduly sacrifice accuracy of adjudications, or prove unduly difficult to administer.

For example, enforcement agencies would need a principled way to determine which firms are dominant or near-dominant and therefore subject to the presumption. in addition, courts and enforcement agencies would need a reliable and practical method to measure whether a price is below cost, which is often very challenging to determine and can depend on the particulars of the industry and the particular firm's cost structure. Presumptions of illegality for exclusive dealing, refusals to deal, and below-cost pricing risk condemning conduct that is neutral or beneficial to the market. For instance, a presumption of predation risks punishing a firm that lowers its price to match its competition or offers a low price to introduce a new product. To address this risk, Khan suggests that the law permit a business-justification defense.159 Even so, a predation presumption may deter firms from engaging in aggressive price cutting or other procompetitive conduct. Firms engaging in such conduct would run the risk that the presumption would apply and that they would be forced into long and expensive litigation in which they would bear the potentially heavy burden of establishing a business justification (under possibly amorphous standards).

5.Addressing Potential Exclusionary Conduct by Online Platforms

Populists have focused many of their critiques of antitrust enforcement on digital platforms.160 Although some populist concerns and proposed solutions regarding platforms are outside mainstream antitrust, some are not. specifically, concerns that online platforms use data or influence the transmission of information in ways that actually harm rivals and reduce competition can be addressed under current doctrine.161

For example, advocates argue that control over data can create substantial barriers to entry, entrench dominant players, and give firms an undue advantage in entering adjacent markets that rivals cannot match.162 Although Sally Hubbard of the Open Markets Institute has criticized the consumer welfare standard, she also appears to argue that competition issues involving information platforms could be subject to enforcement under the Sherman and Clayton Acts as they are construed today.163 Hubbard takes aim at Facebook for allegedly prioritizing news content that either is native to Facebook's platform or can be viewed without taking the user to another site. Hubbard contends that Facebook's practices often bias results toward "fake news" or legitimate news housed on Facebook, harming other news outlets that both compete with Facebook and rely on the platform for distribution.164 If these alleged practices actually result in noncompetitive prices or reduced output in advertising markets or quality in content markets, they could be addressed under a consumer welfare approach.165

Some populists also argue that the antitrust laws fail adequately to address non-price harms in the tech space, including harms relating to consumer privacy.166 But the consumer welfare standard and agency practice do account for non-price harm to consumers. For example, in the Google/DoubleClick transaction, the FTC issued a closing statement explaining that it had "investigated the possibility that this transaction could adversely affect non-price attributes of competition, such as consumer privacy" and concluded that the transaction would not; rather, privacy concerns "extend[ed] to the entire online advertising marketplace."167 And most recently, the investigations into digital markets opened by the FTC, the DOJ, Congress, and state attorneys general suggest that they believe that existing antitrust tools might address many of the nonprice harms to which populists point.

### 1 – AT: we meet – 1nr

#### Resolved means certain. The plan doesn’t certainly ban anything – it just says the courts must consider symmetric competition more weight.

Random House Unabridged 6 (http://dictionary.reference.com/search?q=resolved&r=66)

re·solved Audio Help /rɪˈzɒlvd/ Pronunciation Key - Show Spelled Pronunciation[ri-zolvd] –adjective firm in purpose or intent; determined.

#### Should

Summers ‘94 (Justice – Oklahoma Supreme Court, “Kelsey v. Dollarsaver Food Warehouse of Durant”, 1994 OK 123, 11-8, http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker3fn13)

¶4 The legal question to be resolved by the court is whether the word "should"[13](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker3fn13) in the May 18 order connotes futurity or may be deemed a ruling in praesenti.14 The answer to this query is not to be divined from rules of grammar;[15](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker3fn15) it must be governed by the age-old practice culture of legal professionals and its immemorial language usage. To determine if the omission (from the critical May 18 entry) of the turgid phrase, "and the same hereby is", (1) makes it an in futuro ruling - i.e., an expression of what the judge will or would do at a later stage - or (2) constitutes an in in praesenti resolution of a disputed law issue, the trial judge's intent must be garnered from the four corners of the entire record.16 [CONTINUES – TO FOOTNOTE] [13](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker2fn13) "*Should*" not only is used as a "present indicative" synonymous with *ought* but also is the past tense of "shall" with various shades of meaning not always easy to analyze. See 57 C.J. Shall § 9, Judgments § 121 (1932). O. JESPERSEN, GROWTH AND STRUCTURE OF THE ENGLISH LANGUAGE (1984); St. Louis & S.F.R. Co. v. Brown, 45 Okl. 143, 144 P. 1075, 1080-81 (1914). For a more detailed explanation, see the Partridge quotation infra note 15. Certain contexts mandate a construction of the term "should" as more than merely indicating preference or desirability. Brown, supra at 1080-81 (jury instructions stating that jurors "should" reduce the amount of damages in proportion to the amount of contributory negligence of the plaintiff was held to imply an *obligation* *and to be more than advisory*); Carrigan v. California Horse Racing Board, 60 Wash. App. 79, 802 P.2d 813 (1990) (one of the Rules of Appellate Procedure requiring that a party "should devote a section of the brief to the request for the fee or expenses" was interpreted to mean that a party is under an *obligation* to include the requested segment); State v. Rack, 318 S.W.2d 211, 215 (Mo. 1958) ("should" would mean the same as "shall" or "must" when used in an instruction to the jury which tells the triers they "should disregard false testimony"). [14](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker2fn14) *In* praesenti means literally "at the present time." BLACK'S LAW DICTIONARY 792 (6th Ed. 1990). In legal parlance the phrase denotes that which in law is *presently* or immediately effective, as opposed to something that will or would become effective in the future *[in futurol*]. See Van Wyck v. Knevals, 106 U.S. 360, 365, 1 S.Ct. 336, 337, 27 L.Ed. 201 (1882).

### 3 – AT: c/i – 1nr

#### Prefer the legal context of the US – making something more difficult or adding a hurdle is not a prohibition.

AARON M . LEVINE, associate at Sullivan & Cromwell, JD Yale, & JOSHUA C . MACEY, Clerk for Judge Harvey Wilkinson, JD Yale, ’18, “Dodd-Frank Is a Pigouvian Regulation” The Yale Law Journal 127:1336

Finally, these results are distinctively Pigouvian in nature. Unlike traditional command-and-control regulations, Dodd-Frank did not bar SIFIs from remaining active in these markets: there is no prohibition on commodities trading. Instead, the Act has simply made it more expensive for banks to be active in these spaces by requiring that they hold more capital and abide by expensive position limits. The critical point is not simply that divestitures occurred. Indeed, every regulation is costly, and it is unsurprising that such costs would affect a bank’s business structure. Instead, what is unique to Dodd-Frank, and in particular its reporting and capital requirements, is that its compliance costs are not mere ancillary effects. They are the direct mechanism by which financial regulators incentivize firms to divest business units that regulators regard as risky. In doing so, regulators have used the costs of complying with Dodd-Frank to serve the law’s core regulatory purpose

#### They must disallow outright to meet our interpretation. The aff subjects it to a test. Subjecting it to some kind of test or economic analysis is not a prohibition.

Martin G. Vallespinos 20, LLM, University of Michigan Law School; Manager at Ernst & Young Detroit, “Can the WTO Stop the Race to the Bottom? Tax Competition and the WTO,” 40 Va. Tax Rev. 93, Lexis

Prohibited subsidies, as described in Article 3 of the SCM Agreement, are disallowed outright, and WTO members can unilaterally impose countervailing measures against the country sponsoring them. This category [\*146] includes (i) subsidies that are contingent, in law 237or in fact 238upon export performance 239and (ii) subsidies that are contingent upon the use of domestic over imported goods.

Export contingency can be "de jure" or "de facto." De jure export contingency derives from "the very words of the relevant legislation, regulation[,] or other legal instrument constituting the measure." 240De facto export contingency is met when "the facts demonstrate that the granting of a subsidy ... is in fact tied to actual or anticipated exportation or export earnings." 241The WTO jurisprudence regarding "de facto" contingency, however, is not uniform and WTO panels have set forth various alternative tests. In Australia-Automotive Leather II, the Panel established a standard of "close connection" between the grant of a subsidy and export performance. 242In Canada-Aircraft, the Panel and the Appellate Body ("AB") implemented the so called but-for test, which interprets the "tied to" language to be equivalent to a relationship of "conditionality" between the grant of a subsidy and export performance. 243Therefore, de facto contingency is met when "the facts demonstrate that the tax benefit would not have been granted ... but for anticipated exportation or export earnings." 244In the same case, the AB clarified that "it does not suffice to demonstrate solely that a government granting a subsidy anticipated that exports would result." 245This means that, in the AB's view, the granting authority's expectations on exports may not be sufficient to meet the standard, so the subsidy must be objectively contingent upon export [\*147] performance. 246In pursuit of a more objective criteria, the AB suggested that, "where relevant evidence exists, the assessment could be based on a comparison between, on the one hand, the ratio of anticipated export and domestic sales of the subsidized product ... and on the other hand, the situation in the absence of the subsidy." 247But both the Panel and AB further clarified that an assessment based on ratios is incapable by itself of establishing that a given subsidy is de facto contingent on export performance "in the absence of any meaningful analysis regarding how a subsidy's design and structure contributes to the presence of an incentive for a recipient to [favor] export sales over domestic sales." 248

With respect to domestic use contingency, Article 3.1(b) contains no reference to contingency in law or in fact. Nevertheless, the AB has found that Article 3.1(b)'s scope covers both de jure and de facto contingency. 249Also, both the Panel and the AB have concluded that the general guidance regarding evaluations of de facto export contingency should be applicable to de facto domestic use contingency. Finally, it should be mentioned that the Panel and AB decisions are not binding precedential authority but rather can be only strongly persuasive authority. Therefore, countries should be aware of all these alternative tests when designing their tax policies, as there is no certainty as to which criteria WTO decision makers may apply in the event of a dispute (e.g. but-for test, close connection test, assessments based on ratios, etc.).

A subsidy that is not considered "prohibited" can still satisfy the specificity criteria and become an actionable subsidy if it meets the two following requirements:

(1) Specificity: an actionable subsidy is considered specific when the eligibility to receive the benefits is limited to certain enterprises, industries, or areas; 250and

(2) Adverse effect: an actionable subsidy is considered adverse when it produces a serious prejudice to the interests of another member, an injury to its domestic industry, or a nullification or impairment of benefits accruing directly or indirectly to other members under the GATT. 251