# Wiki Doc – Northwestern R4

# 1NC

## Regs CP

#### The United States federal government should ban drug patent settlements that include any considerations that would not have been available as a direct consequence of showing that the patent was invalid through non-antitrust regulations.

#### The CP PICs out of anti-trust legislation and the FTC and DOJ as enforcers---other agencies’ regulations solve.

Lawrence Fullerton et al. 08. Joel M Mitnick, William V Reiss, George C Karamanos and Owen H Smith. Sidley Austin LLP. Vertical Agreements The regulation of distribution practices in 34 jurisdictions worldwide. “United States.” https://www.sidley.com/-/media/files/publications/2008/03/getting-the-deal-through--vertical-agreements-2008/files/view-united-states-chapter/fileattachment/united-states-21.pdf

5 What entity or agency is responsible for enforcing prohibitions on anticompetitive vertical restraints? Do governments or ministers have a role?

The Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DoJ) are the two federal agencies responsible for the enforcement of federal antitrust laws. The FTC and the DoJ have jurisdiction to investigate many of the same types of conduct, and therefore have adopted a clearance procedure pursuant to which matters are handled by whichever agency has the most expertise in a particular area.

Additionally, other agencies, such as the Securities and Exchange Commission and Federal Communications Commission, maintain oversight authority over regulated industries pursuant to various federal statutes, and therefore may review vertical restraints for anti-competitive effects.

## States CP

#### The 50 states, DC, and all relevant territories should uniformly:

#### ---Expand the scope and enforcement of antitrust laws by banning drug patent settlements that include any considerations that would not have been available as a direct consequence of showing that the patent was invalid.

#### ---Grant jurisdiction to attorney generals to investigate and enforce bans on drug patent settlements that include any considerations that would not have been available as a direct consequence of showing that the patent was invalid.

#### ---Set aside funds to their attorney general’s office for the purpose of enforcing bans on drug patent settlements that include any considerations that would not have been available as a direct consequence of showing that the patent was invalid.

#### States can act uniformly to reign in Big Pharma – drug pricing bills prove

Steven Findlay, 19. Writer for Kaiser Health News. “A bipartisan effort: States pass record number of laws to reel in drug prices.” September 5, 2019. https://www.usatoday.com/story/news/health/2019/09/05/drug-prices-how-states-like-colorado-florida-fighting-big-pharma/2213573001/

Whether Congress will act this year to address the affordability of prescription drugs – a high priority among voters – remains uncertain. But states aren’t waiting. So far this year, 33 states have enacted a record 51 laws to address drug prices, affordability and access. That tops the previous record of 45 laws enacted in 28 states set just last year, according to the National Academy for State Health Policy, a nonprofit advocacy group that develops model legislation and promotes such laws. Among the new measures are those that authorize importing prescription drugs, screen for excessive price increases by drug companies and establish oversight boards to set the prices states will pay for drugs. “Legislative activity in this area is escalating," said Trish Riley, NASHP’s executive director. "This year, some states moved to launch programs that directly impact what they and consumers pay for high-cost drugs.” And more laws could be coming before year’s end. Of the handful of states still in legislative session – including California, Massachusetts, Michigan, New Jersey, Ohio and Pennsylvania – debate continues on dozens of prescription drug bills. In New Jersey alone, some 20 proposed laws are under consideration.

## Notice + Comment CP

#### Text: The United States federal government should delegate antitrust rulemaking authority to a new expert agency. The agency should begin notice-and-comment rulemaking to ban drug patent settlements that include any considerations that would not have been available as a direct consequence of showing that the patent was invalid.

#### Solves the case + engages notice and comment

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Without the informational benefits of expertise and notice-and-comment rulemaking, the Court may be a poor choice to define the broad proscriptions of the Sherman Act. Framed this way, the problem has an obvious solution: give the power to interpret the Act to an expert agency.240 This idea has academic support already, 241 and the case for it is strengthened by this Article's observation that the Court has tried to approximate administrative decision making by relying on amicus briefs. The obvious candidates for reallocation are the two existing antitrust agencies: the Department of Justice's Antitrust Division and the FTC.

A. The Agency Solution

Using agencies to give specific meaning to American antitrust's most important statute means avoiding the problems with the Court's current quasi-administrative process for rulemaking. As adjudicators, agency experts would know what kind of economic evidence is necessary for an efficient solution and would be better able to understand it when it is presented by the parties. Repeat exposure to antitrust cases would only reinforce this advantage, while also giving the administrative judges a broader perspective on what kinds of conflicts commonly arise in competition law, a perspective necessary for efficient policy making in the first instance. A Supreme Court Justice hears about one antitrust case a year, hardly the cross section of controversies necessary to make efficient economic policy writ large.

Agencies could take policy making a step further using notice-and-comment rulemaking. Unlike in adjudication, regulation by rulemaking can be initiated without the formal requirements of a case or controversy and a proper appeal to the Supreme Court. Informal letters of complaint could spark an investigation. A rule-making agency could announce its intention to regulate publicly and provide a convenient venue for, or even solicit, expert opinions on the economic impact of the proposed rule. Not only would it have the benefit of these numerous perspectives, but it would also have the obligation to respond to them in a reasoned manner. Its rule would be subject to judicial review, affording an opportunity to catch mistakes 242 or invalidate rules that do nothing but deliver rents to special interests.

Another advantage of rulemaking, an option for agencies but not for the Court, since it only operates through adjudication, is that rulemaking regulates behavior ex ante, while resolution of economic policy through cases is necessarily ex post. Antitrust courts worry obsessively about "chill"--deterring procompetitive behavior with overly broad rules for liability.2 43 In fact, the overruling of Dr. Miles in Leegin implies that the entire twentieth century was a period of inefficient business practices and stunted innovation in distribution because of an early misunderstanding of RPM. Only after a long and expensive period of litigation was Leegin redeemed for breaking the law by effecting a change in the law, and only after Leegin was issued were similar firms, perhaps walking the Colgate line better than Leegin, redeemed for wanting some control over their product's ultimate retail price.24 4 The problem of ex post rulemaking is made worse by the treble damages afforded successful plaintiffs suing under the Sherman Act.2 4 5 To create a new form of liability, the Court has to punish a firm threefold for complying with standing antitrust norms. Thus Supreme Court lawmaking in antitrust is a kind of one-way ratchet.246

The result of the current ex post scheme is that "antitrust law leaves considerable gaps between what is permissible and what is optimal." 2 47 With judges making the rules one case at a time, this gap is justifiable. As discussed above, when judges are not economically sophisticated enough to know where "optimal" lies, 24 8 laissez-faire is a very inexpensive regulatory regime for courts to follow, and raising the level of regulation would effect a kind of taking of property from firms operating under the status quo. So if the Court is making antitrust policy, laissez-faire may be the only sensible approach. But that is not to say that it is the most sensible approach. An agency could provide firms with the necessary clarity-ex ante-that they need when conducting business in a world where competitive behavior so closely resembles anticompetitive conduct. The current state of affairs is that much more is illegal on the books than antitrust lawyers think is actually likely to be struck down in a court.24 9 Lawyers thrive in such a legally uncertain world, but firm efficiency suffers.

#### Key to democracy ---notice and comment engages participants and creates deference.

Harry First and Spencer Weber Waller 13. Harry First, New York University School of Law. Spencer Weber Waller, Loyola University Chicago School of Law. “Antitrust’s Democracy Deficit”. Fordham Law Review, Volume 81 Issue 5 Article 13. https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4890&context=flr

Redressing antitrust’s democracy deficit on the procedural side can be done with the tools of administrative law. Administrative law is the body of law that controls the procedures of governmental decision making.151 It allows interested persons to participate in decisions that affect their interests. Normally, it requires appropriate notice, the right to be heard, fair procedures, protection of fundamental rights, and judicial review of the resulting decision. These basic features are present in the administrative laws of most foreign legal systems and are part of a growing international consensus.152 The tradeoff is that the decisions of administrative agencies that properly follow these strictures normally are granted a degree of deference as to the interpretation of the laws they enforce.153 Frequently, but not inevitably, private parties also have the right to proceed with actions for damages against private parties who violate their regulatory obligations and even against the government itself when it acts unlawfully, either substantively or procedurally. These tools of administrative law are available to make antitrust enforcement decisions more transparent and more responsive to the interests that the antitrust laws were meant to serve, thereby promoting both better decision making and greater democratic legitimacy.

CONCLUSION

Free markets and free people cannot be assured by the efforts of technocrats. Ultimately, both come about through the workings of democratic institutions, respectful of the legislature’s goals and constrained from engaging in arbitrary action. Antitrust has moved too far from democratic institutions and toward technocratic control, in service to a laissez-faire approach to antitrust enforcement. We need to move the needle back. Doing so will strengthen the institutions of antitrust, the market economy, and the democratic branches of government themselves.

#### Democracy solves war

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Despite Churchill’s famous quip—“Democracy is the worst form of government, except for all those other forms that have been tried from time to time”2—democracy is seen as a source of both domestic and international flourishing. Democracy, understood roughly for now as a political system with wide suffrage in which power is allocated to officials by popular election, can solve or help solve a host of problems with stunning success. It can solve the problem of revolutionary violence that condemns autocratic regimes, because mass politics can work at the ballot box rather than the streets. It can help solve the problem of famine, because the systems of free public communication and discussion that are essential to democratic politics are the backbone of the markets that have made democratic societies far richer than their competitors. It can help solve the problem of environmental despoliation, which occurs when those operating polluting factories (whether private citizens or the state) do not need to answer for harms visited upon a broad public. And democracy has been famously thought to help solve the problem of war, in the guise of the idea of the “peace amongst democratic nations”—an idea emerging with Immanuel Kant in the Age of Enlightenment and given new energy with the wave of democratization at the end of the twentieth century.

## Cap K

#### Capitalism is terminally unsustainable – failure to embrace an alternative guarantees imminent collapse into fascism

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When the economy in a democratic but capitalist country fails, there are two alternatives. You can modify the economic system. Or, you can modify the political system. When you modify the economic system (capitalism) but retain the political system (democracy), you have the arrangement the U.S. has lived under since capitalism failed in the 1930s, in the Great Depression. The other alternative is where the economic system (capitalism) is retained but the political system (democracy) is discarded and replaced with authoritarianism. This is fascism and is what happened in Germany, also in the 1930s. The battle between capitalism and democracy is the conflict that is being fought out in the U.S. right now. The epic thrash we’re witnessing is because the forces of capitalism, seeing a terminal economic crash approaching, are attempting to preemptively replace democracy with authoritarianism—fascism—so that they can control the outcome. A quick look at history shows us the pattern. In the 1930s, the U.S. experienced the greatest economic collapse in its history, the Great Depression. GDP fell by 25%. Bread lines became an iconic feature of the urban American landscape. Franklin D. Roosevelt put in place economic policies to mitigate the damage and prevent future collapses. He put tens of millions of people to work through “alphabetical agencies” such as the Civilian Conservation Corps, the National Industrial Recovery Act, and the Works Progress Administration. He imposed FDIC requirements on banks and insured investor’ deposits. He separated commercial banking from investment banking and created unemployment insurance and Social Security. The sum of Roosevelt’s policies saved capitalism from its own inadvertently attempted suicide. But not everybody was happy with Roosevelt’s reforms. A cabal of disgruntled bankers attempted a fascist coup d’ etat. It failed, because the man they had recruited to lead the coup, retired Marine General Smedley Butler, ratted them out to Congress. But the very fact of the attempted coup showed just how far capitalists will go to avoid constraints put on them by democracy. Clearly, Roosevelt’s reforms worked. He modified the economy from a purely capitalistic orientation, giving it “guard rails” that would prevent another collapse. But he kept the country’s small-d democratic political institutions intact. The result was one of the most buoyant periods of both economic and political progress the world has ever seen. The other model of what happens when a capitalist economy fails is Weimar Germany, also in the 1930s. Germany had suffered three economic debacles in just over a decade. Those were the loss in World War I, the Great Inflation of the 1920s, and the Great Depression, the same Great Depression Roosevelt confronted. But the German response could not have been more different than Roosevelt’s. Where Roosevelt had kept the political system intact but modified the economic system, Germany did the opposite. In January 1933, just 32 days before FDR was inaugurated, German president Paul von Hindenburg appointed Adolph Hitler Chancellor. Hitler had promised German elites that he would crush the civil unrest that had been borne of economic collapse. He kept his promise. Hitler kept the capitalist system intact, funneling tens of billions of dollars to weapons makers, financiers, and industrialists. But he dismantled German democracy. He banned competing political parties, suspended civil liberties, outlawed trade unions, had thousands of political opponents murdered, and imposed martial law. This was fascism—the operation of government for the benefit of corporations and the wealthy. We all know what happened next. What can these two polar responses to capitalist economic collapse tell us about the situation in the U.S. today? The U.S. economy has been in a four-decades long engineered decline, which is now accelerating. The owners of capital have intentionally de-industrialized the economy in order to get their money out. This has put tens of millions of formerly high paid workers out of work. At the same time, they engineered a massive transfer of wealth from the working and middle classes to the very wealthiest. This was Reagan’s supply-side economics. The data tell the story. A 2020 study by the RAND Corporation shows that between 1975 and 2018, $50 TRILLION of combined income was transferred from the lowest 90% of income earners to the top 1%. It’s the greatest episode of internal looting from one class to another within the same society, ever recorded. This is the root cause of the widespread, blistering rage that manifests today as Trumpism. The immediate problem with this scheme was that it didn’t leave enough income and purchasing power in the hands of people to clear the markets. Unless something was done to restore the lost liquidity, the economy would fall into prolonged recession, or depression. The work-around was that the government began borrowing money at a prodigious rate to plug the holes in aggregate demand that its income transfers had created. Again, the data tell the story. In 1981, when Ronald Reagan took power, the national debt stood at $1 trillion. In its first 204 years, that was the total amount the country had needed to borrow. Twelve years later, when Reagan’s Vice President, George H.W. Bush left office, the debt had quadrupled to $4 trillion. This is the amount that was needed to offset the transfers and the loss of tax payments to the government that resulted from Reagan’s upward redistributive policies. But that was only the beginning. By 2001, when George W. Bush took office, the debt had reached $5.7 trillion, a large but still manageable sum. Like Reagan, Bush cut taxes on the wealthy, not once but twice. The result was that when he left office, the debt had essentially doubled, reaching $11 trillion. Since then, it has more than doubled again, to more than $27 trillion today. It’s unfathomable, but it is the measure of the degree of damage that Reagan’s policies inflicted and continue to inflict on the economy. This year alone, the government has had to borrow more than $4 trillion just to keep the ship of the economy afloat. That is four times what the country had had to borrow in its first 204 years, combined. It’s almost $11 billion every day. To put that into perspective, a few years ago, the Chinese government made a one-time investment of $10 billion to build a national quantum computing research center. It has produced a computer that appears to be a trillion times more powerful than any existing supercomputer in the world. If successful, it will be game over for all other countries using conventional computers to run their economies, or militaries. Again, the amount invested to accomplish this was less than one day’s borrowing by the U.S. government today. But even $11 billion of borrowing a day is not enough to keep the economy aright. More than 30 million Americans are out of work today. Last week, an additional 1.4 million filed for unemployment insurance. More than 8 million have been added to the poverty roles since the COVID crisis began. As many as 15 million households with 40 million people face potential eviction when January rent comes due. Almost half of all small businesses—48%—fear they may have to shut down permanently. Miles-long bread lines (now in cars) have returned as an iconic scar on the American urban landscape. When the whole thing finally collapses nobody can precisely say, but it cannot be far off. The U.S. is actuarially bankrupt, meaning that there is no plausible scenario under which these debts can possibly be paid. At some point, lenders will stop lending. When that happens, the government will be unable to deliver essential services and will have to impose martial law to contain the resulting disorder. The COVID lockdowns we’re now living under are a dry run for that time. Remember, Donald Trump knew in great detail in January just how deadly the virus was, and just how easily transmissible it is. He intentionally kept this information from the public while relentlessly undermining any competent public health response. To put this into perspective, Japan has had a total of 2,462 COVID deaths since the pandemic started. The U.S. is having more than that number EVERY DAY and the rate is increasing. This is not an accident. It is not even simply incompetence. It is intentional. The wealthy know all of this. That’s why they’ve taken their money out of the U.S. economy and stashed it in Swiss bank accounts, in tax havens in the Cayman islands, in new factories and shopping malls and tilt-up cities in east Asia, and in hedge funds investing in anything except the rehabilitation of the U.S. economy and its workforce. Anywhere where their money is out of reach of the U.S. government and its ability to tax. It’s why they have sponsored Donald Trump and his swelling legions of brownshirts and traitorous Republican congressmen to try to overturn the 2020 presidential election. For decades, they were able to carry out their suppression of democracy through such pedestrian means as gerrymandering, purging of voter rolls, closing polling places in minority neighborhoods, voter intimidation, and more. But even those devices are no longer sufficient. They can see the awakening consciousness of the masses and know that as long as democracy is still functioning there remains the possibility that their decades-long heist could be reversed. They are intent that that will not happen. They will happily destroy the country—meaning democracy—in favor of fascism rather than have to surrender their ill-gotten gains. And we should be clear, this is not simply a 2020 phenomenon. They are playing a long game where, even if they don’t win this year, they will continue their assault until their end is achieved: democracy is destroyed. They will be back in 2022 and 2024 more savvy than ever. They’ve learned the weak points of our system and will attack at the level of county registrars of voters, state Secretaries of State, state legislatures, and any other weak points they can manipulate or intimidate to destroy functioning democracy. The truly insidious goal is to destroy the public’s faith in democracy itself, so that that selfsame public will not defend the core institution on which the very country is premised. They have been remarkably successful at this, with some 70 million people believing that the election was rigged and that Donald Trump should be installed as an effective dictator, despite the fact that he conspicuously lost the popular vote by over 7 million votes, and the electoral college by 74 votes, a “landslide” as he called the exact same tally in 2016. The mainstream media have been the central actors selling this decades-long campaign of dispossession, deceit, and destruction. Every day for 40+ years, while $50 trillion was being covertly, systematically sluiced from the 90% to the 1%, they’ve served as cultural pacifiers, agents of diversion, happy chatterers, cooing to the populace that everything was fine, just as it was supposed to be, that America is the Exceptional country, and any doubt about that reflected not political or economic insight, certainly not moral courage, but moral failing, perhaps even treason, on the part of the doubter. The media remains the primary agent of deception and deflection still today. They locate all of the impetus for the democratic overthrow now underway in the person of Donald Trump himself. This is an easy sale because Trump is so palpably repellent, so pathetically insecure and in need of constant attention, and so psychotically disturbed in his vehement insistence that he won the election and that democracy must be overturned so that that “fact” can be actualized. Trump is the political roadside wreck that we can’t stop rubbernecking and the media milk this for all it’s worth. In truth, however, the impetus to overturn the democracy is decades old, is very deeply rooted, is vastly more sophisticated than Trump, and is only now coming to its apotheosis. It originates in the owners of great wealth, just as it did in the Great Depression, whether in the U.S. or in Germany. They are the ones who own the media and hire buffoons like Trump for their ability to deflect rage from the failed economic system, and redirect it onto manufactured targets like the “deep state,” race, “socialist liberals” and other imaginary but useful boogie men. The 126 quisling congressmen who have pushed Trump’s failed Texas lawsuit are not mainly afraid of Trump, as the media would have us believe. Trump will soon (we can only hope) be in jail where he will be deprived of his Twitter megaphone. The bootlickers are afraid of losing the campaign contributions of these “malefactors of great wealth,” as Roosevelt called them. They have been called to do what they have been bought to do and they must comply. They are cowards, traitors, truly moral midgets, but they can count. The coup d’ etat to replace democracy with fascism is undeniably underway and will not relent until it has succeeded. It will be decided by which side can turn out more people onto the streets once the announcement is made. Right now, it looks like the right, the fascists, with their stormtrooper thugs and gun-toting goons, armed with rage over reason and resentment over reality, have the momentum. They certainly have the agitation, don’t they. We’ll soon find out how much the rest of the country really loves it when we see whether they will fight to save it.

#### Anti-trust is a psy op to pacify the working class, mystify accumulation, and reinvigorate belief in capitalist competition

Lebow 19 [David Lebow – Lecturer on Social Studies at Harvard University and lawyer, “Trumpism and the Dialectic of Neoliberal Reason,” Perspectives on Politics 18(2):380-398, doi:10.1017/S1537592719000434]

I. Neoliberal Reason

As Michel Foucault and others have argued, neoliberalism entails far more than an economic doctrine favoring deregulated markets.4 It is a novel form of governmentality—a rationality linked to technologies of power that govern conduct, not just through direct state action but through liberty itself.5 Not isolated to the traditionally demarcated sphere of economics, neoliberal society entails a whole economic-juridical order.

The central program of neoliberal governmentality is the absolute generalization of competition as a universal behavioral norm. Whereas in liberal thought, the root principle of capitalism was exchange of equivalents, for neoliberal reason it is competition entailing inequality. The key result of market processes goes from specialization to selection. The competitive market is the exclusive site of rationality. It processes information, indicated by price, and is the only mechanism of producing knowledge, defined as what is profitably utilizable. Because consumers are free to refuse inferior goods or services, the price mechanism of the market system ensures optimal solutions and maximal satisfaction of preferences.

Liberal capitalism, as Karl Polanyi argued, required the construction of “fictitious” commodities like land and labor.6 These abstract, exchangeable factors of production had to be disembedded from concrete non-market social relations, norms, and values. Instead of merely disembedding commodities, neoliberalism intervenes to make competitive mechanisms regulate every moment and point in society. It strives to build an empire of market choice that invades every domain of life, and deposes all other social, political and solidaristic institutions and values.

Neoliberalism does not allege that markets are natural; competition must be constructed. Rather than endorsing laissez-faire overseen by a night watchman, it stipulates a strong state engaged in permanent vigilance, activity, and intervention to maintain artificial competition. It must not plan outcomes, which would upset the market’s innate rationality, and must be insulated from political disturbances. Economic interventionism leads down the road to serfdom; fascism and unlimited state power are its necessary results. A “minimum of economic interventionism” on the “mechanisms of the market” must be accompanied by “maximum legal interventionism” on the “conditions of the market.”7 Fixed, formal rules make up an economic constitution that inhibits planning, repulses political disruptions, and impartially safeguards competition. The state is the executor of the market and growth is the basis of public legitimacy. Governance depoliticizes public power, promotes ostensibly post-ideological technical problem-solving by experts, and relies on “best-practices” that dissolve the distinction between public and private organization.8

Unlimited generalization of competition yields an enterprise society in which calculations of supply/demand and cost/benefit become the model of all social relations. Neoliberal reason renders homo economicus, based on this model of the enterprise, the exhaustive figuration of human subjectivity. The center of economic thought shifts from labor and processes of production, exchange, and consumption to human capital and rational decision-making under conditions of scarcity. Capital is everything that can generate future income; wages are reconceived as income from capital. Labor is no longer comprehended as a commodity exchanged for a wage, but as a combination of human capital (the worker’s education and abilities) and the income stream it generates. This neoliberal subject is an aggregate of human capital who invests in his own income-generating abilities.

Neoliberalism replaces the invariant identity of the moral person as a rights-bearing citizen with a formally empty receptacle filled up through enterprising choices. It brushes aside models of freedom as self-rule achieved through moral autonomy or popular sovereignty.9 In the neoliberal “democracy of consumers,” individual consumers together constitute the sovereign that monopolizes the issuance of legitimate commands.10 Sovereign will is expressed not through political channels, but by choices in the “plebiscite of prices.”11 Whereas producers have particular interests like protectionism, consumers have a consensual and common interest; all favor the impartial functioning of market processes. In the neoliberal free society, consumers exercise their right to choose in complete independence.

II. From Keynesian State Capitalism to Neoliberal Deregulation

Situating the 2008 crisis in a historical account of American political and economic development clarifies its broader significance. The early twentieth-century Progressives were disdainful of what they took to be the chaos and waste of fin de siècle laissez-faire society. They strove to build a new American state that would replace the structural and rights-based formalisms of the nineteenth century with direct democracy and expert administration. It took the Great Depression and New Deal to bring into full bloom the Progressive commitment to pragmatic rationality. Thereafter, the “policy state” was authorized to pursue designated social goals and develop the means to accomplish them.12 The slew of New Deal innovations included state oversight of labor negotiations, invigorated antitrust, Keynesian countercyclical deficits to stimulate demand and increase purchasing power, an expansive public sector sheltered from the business cycle, aggressive banking regulation, and social insurance. Regulation and redistribution ensured the conditions necessary for an economic system based on capital accumulation, private property, and corporate profit to endure.

To many, the differences between the New Deal and Nazi political economies appeared less significant than their common response to monopoly capitalism. Both erased boundaries between state and society by politicizing the private sphere and authorizing public bureaucracies to rationalize crisis-prone economies. Frankfurt School member Friedrich Pollock suggested that this common “state capitalism” had solved the contradiction between the forces and relations of production, and thus overcome the economy’s crisis tendencies. It seemed to him that management had become merely technical and “nothing essential” had been “left to the laws of the market.”13 Worries abounded that the private law sphere of property and contract was necessary for individual freedom. Despite salient differences between Nazi and New Deal state capitalism, many feared that intervention into society was a waystation to domination. Unease about the specter of American despotism motivated development of mechanisms to ensure that interventionism did not devolve into arbitrary rule.14 Expertise was one justification and limitation of the policy state. Authority could be safely delegated to a new corps of public-spirited administrators because their scientific knowledge would not only make them effective, but also counsel restraint. Enduring misgivings led later to new laws of administrative process. The procedural state was legitimated by its defenders as being a substantively value-neutral and instrumentally rational machine serving goals set by society. Regulatory decision-making was shunted into the abstruse procedures of courtrooms and bureaucracies. Defenders of the state emphasized that its processes of allocating authority were neutral, impartial, and open to all. The balanced accommodation of all interest groups seeking to exercise influence would yield an equilibrium corresponding to the public interest.15

The intermeshing of state and society through interest groups, agencies, and professionalized parties marginalized the public. The sovereign public opinion that Progressives had hoped would rationalize government gave way to the rationality supposedly inherent in processes of public law, public-private negotiation, and regulated markets. The state was endowed with a diffuse legitimacy in exchange for a growing economy, broad distribution, and ongoing household capacity to consume.16 The Keynesian welfare settlement pacified the working class, protecting the market economy from more radical political pressures. Newly available, mass-produced commodities encouraged leveled-down notions of citizenship as welfare clientelism and privatistic consumption. As the state expanded and routinized, the initial politicization of private property relations through public intervention developed into depoliticized economic management by lawyers and social scientists organized by administrative and judicial processes.

The terms of the social contract preserving the coexistence of capitalism and democracy had been set. In exchange for a pacified citizenry and depoliticized regulatory authority, the policy state promised to deploy instrumental reason to sustain both capital accumulation and widely distributed capacity to consume (supported, always, by the exclusion of African Americans). During the decades of postwar growth, these twin responsibilities seemed attainable and compatible. Capitalism functioned smoothly enough and potentially delegitimating inequality was clipped by inflation, tax-based welfare, and collectively negotiated wages. But in the late 1960s and early 1970s, weakening growth, stagflation, trade deficits, and the collapse of Bretton Woods revealed that state capitalism had not solved the problems of economics. As the Great Depression had enabled construction of the instrumentally rational policy state, economic disturbances in the 1970s opened the breach into which neoliberal reason entered to reconfigure the political economy. Rather than shielding rational policy-making from political pressure and assuring broadly distributed welfare, neoliberalism promised growth driven by depoliticized markets freed from regulation and downwards redistribution. Believing in the optimal rationality of competitive markets, neoliberals sought to reinvigorate capital accumulation through deregulation, lowered taxes, financialization, privatization, and market expansion.

Liberating accumulation from the restrictions and obligations incurred under state capitalism might have imperiled capitalism’s peace treaty with democracy. For deregulation to proceed without impairing the system’s legitimacy, the quid pro quo—depoliticization for consumption—had to continue. Over the ensuing decades, as Wolfgang Streeck explains, the state “bought time” by finding new ways to generate illusions of widely distributed prosperity that prolonged the capacity of the lower and middle classes to consume.17 Each successive attempt exhausted itself, leading to new and escalating disturbances. In the 1970s, inflation safeguarded social peace by compensating workers for inadequate growth until stagflation ended this mode of buying time. A subsequent reliance on public debt enabled the government to pacify conflict with borrowed money. Rising debt and balking creditors delimited this phase, which was brought to a definitive close with the Clinton administration’s social spending cuts and balanced budgets. In a final stage that dawned in the 1980s but grew increasingly paramount over time, debt-based support of purchasing power was privatized. Household spending was financed through mortgages, student loans, and credit cards. This “privatized Keynesianism” buoyed consumption up through 2008, despite cuts to social spending, falling wages, and tightening employment markets.18

Each device for upholding spending maintained the legitimacy of the depoliticized political economy, even as liberalization continued to strip the wage-dependent population of regulatory and redistributive safeguards. The end of the inflation era brought structural unemployment and weakened trade unions. The passing of the public debt regime meant cuts to social rights, privatization of social services, and a trimmed public sector. Growing private debt enabled people to hold on despite lost savings, and rising under- and unemployment. At every step, the neoliberal project was “dressed up” as a consumption project.19 Continuing consumption ensured legitimacy long enough to enact total transformation of the political economy.

The state could not buy time indefinitely. The 1970s had already witnessed the beginning of the transition from a manufacturing, production-oriented economy that exported surpluses to an import-based, finance and services economy focused on consumption. As the United States went from creditor to debtor, a system of “balanced disequilibrium” took hold.20 With impunity granted as the world’s reserve currency, the United States ran mounting budget and trade deficits. To finance them, it absorbed surplus capital from abroad, much of which wended its way to Wall Street. Banks used these profits to extend credit to the working- and middle- classes. Household debt funded consumption of imported goods, returning the surplus capital abroad, and completing the circuit of global trade. This system depended on the unsustainable condition of ever-increasing debt-based consumption. Consumption was notoriously reinforced by secondary markets in what was essentially private money (securitized derivatives and collateralized debt obligation) that was much riskier than assumed. Because increasingly irresponsible lending was integral to continuing the consumption that stabilized the macroeconomic system, it became a sort of vicious collective good that progressively magnified the scale of the inevitable crash.21 When in 2008 the debt finally proved unserviceable and the housing bubble burst, the private money disappeared and the disequilibrated global economic system fell into crisis.

Consumption based on private debt had provided an unstable bridge over the yawning inequality brought about by deregulation, financialization, globalization, and the diminished welfare state. When the 2008 crisis dried up credit, it revealed a divided “dual economy.”22 On one side is the primary sector of elite, highly-educated professionals who are collected in coastal urban centers and tied in to corporate management, technological innovation and oversight of global capital flows. On the other is the secondary sector of low-skilled workers primarily fixed in the heartland, for whom deregulated competition has brought under- or unemployment, job instability, depressed wages, exploding debt, and diminished prospects.

Unable to buy more time, the state’s breach of the postwar social contract has been exposed. The neoliberal system of capital accumulation was entrenched at the expense of broad and sustainable consumption. The results have been the politicization of defrauded citizens and a political economy plunged into legitimation crisis. Time has belied the premature conclusion that contradiction and crisis potential had been overcome by state capitalism. Contradiction was relocated into cross-cutting imperatives for the state to enable capital accumulation and distribute consumption. In hindsight, we find only a window of stabilization of an enduring crisis potential built into capitalist political economy. As Nancy Fraser puts it “on the one hand, legitimate, efficacious public power is a condition of possibility for sustained capital accumulation; on the other hand, capitalism’s drive to endless accumulations tends to destabilize the very public power on which it relies.”23 The political fallout from the 2008 crisis marks the end of the postwar social contract that had established conditions ensuring the continued coexistence of capitalism and democracy.

#### Capitalism drives extinction and structural violence

Allinson et al 21 [Jamie Allinson is Senior Lecturer in Politics and International Relations at Edinburgh University and author of The Age of Counter-revolution. China Miéville is the author of a number of highly acclaimed and prize-winning novels including October: The History of the Russian Revolution. Richard Seymour is the author of numerous works of non-fiction, His writing appears in the New York Times, London Review of Books, Guardian, Prospect, Jacobin. Rosie Warren is an Editor at Verso and the Editor-in-Chief of Salvage. All are writing for the Salvage Collective. “The Tragedy of the Worker: Toward the Proletarocene.” Introduction. July 2021. Verso EBook. ISBN: 9781839762963 //shree]

This is the question that vexed us as we set out to write The Tragedy of the Worker. From the vantage point of the present, the history of capitalist development is, as Marx expected, the history of the development of a global working class, the proletarianisation of the majority of the world’s population. But the very same process of that development has brought us to the precipice of climate disaster. Our position, to recall Trotsky’s rationalisation of War Communism in 1920, is in the highest degree tragic.

It is now clear that we will pass what scientists have long warned will be a tipping point of global warming, accelerating the already catastrophic consequences of capitalist emissions. How do we imagine emancipation on an at best partially habitable planet? Where once communists imagined seizing the means of production, taking the unprecedented capacities of capitalist infrastructures and using them to build a world of plenty, what must we imagine after the apocalypse has befallen us? What does it mean that as capitalism has become truly global, the gravediggers it has created dig not only capitalism’s grave, but also that of much organic life on earth?

Our answers to these questions remain rooted in the politics of revolutionary communism. Our stance is not based on the fantasy of a homeostatic nature that must be defended but on the critique of the capitalist metabolism – the Stoffwechsel- that must be overthrown. Earth scientists are accustomed to speak in terms of ‘cycles’ by which substances circulate in different forms: the water cycle, the rock cycle, the nitrogen cycle, the glacial-interglacial cycle, the carbon cycle, and others. One way of registering the catastrophe of climate change is to see these cycles – most of all, but not solely, the carbon cycle – as disordered, under- or over-accumulating. But this is to ignore the more fundamental circuit of which these now form epicycles, like Ptolemy’s sub-orbits of the heavenly bodies: the circuit of capital accumulation, M-C-M′.

This circuit accumulates profit and produces death. Neither is accidental. It is for this reason that the debates that capitalist ruling classes permit among themselves on ‘adaptation’ versus ‘mitigation’ take place on false premises. What is to be mitigated is the impact of climate change on accumulation, rendered through the ideology of ‘growth’ as something that benefits everyone. What we are to adapt to are the parameters of accumulation, sacrificing just enough islands, eco-systems, indigenous – and non-indigenous – cultures to maintain its imperatives for a period of time until new thresholds must be crossed, and new life sacrificed to the pagan idol of capital. Already, capitalist petro-modernity builds a certain quantum of acceptable death into its predicates: at the very least, the 8.7 million killed by fossil fuels each year according to Harvard University are considered a price worth paying for the stupendous advantages of fossil capital. And the sky can only keep going up, as deforestation, polar melt, ocean acidification, soil de-fertilisation and more intense wildfires and storms tear the web of life into patches. If the necropolitical calculus of the Covid-19 pandemic appears crass, just wait until its premises are applied to climate catastrophe.

#### Vote neg for anti-capitalist commons – collectives should refuse commitments to competitive principles and the straitjacket of what’s “realistic”

Rose 21 [Nick. PhD in Political Ecology from RMIT University. Executive Director of Sustain: The Australian Food Network. From the Cancer Stage of Capitalism to the Political Principle of the Common: The Social Immune Response of “Food as Commons.” Int J Health Policy Manag 2021. 3-31-21. DOI: 10.34172/ijhpm.2021.20 //shree]

Silvia Federici provides a longer historical perspective, noting that ‘commoning is the principle by which human beings have organised their existence for thousands of years;’ and that to ‘speak of the principle of the common’ is to speak ‘not only of small-scale experiments [but] of large-scale social formations that in the past were continent-wide.’87 Hence a commons-based society is neither a utopia or reducible to fringe projects, and the commons have persisted despite the many and continuing enclosures, ‘feeding the radical imagination as well as the bodies of many commoners.’87 Federici acknowledges that commons and practices of commoning are diverse, that many are susceptible to cooptation and many are consistent with the persistence of capitalism; indeed some, such as charities providing social services (including foodbanks) during the years of austerity budgets in the United Kingdom (2010-2015), reinforce and stabilise capitalism.87 What matters to Federici is the character and intentionality of the commons as anti-capitalist, as ‘a means to the creation of an egalitarian and cooperative society…no longer built on a competitive principle, but on the principle of collective solidarity [and commitments] to the creation of collective subjects [and] fostering common interests in every aspect of our lives.’87

Federici’s analysis resonates with the political thought and proposals developed by Dardot and Laval in their 2018 work, ‘On Common: Revolution in the 21st century.’11 For Dardot and Laval, the common is likewise understood as a principle of political struggle, a demand for ‘real democracy’ and a major driving force behind the emerging articulation of a political vision and programme that transcends and overcomes the straitjacket logic of neoliberal ideological hegemony and its ‘policy grammar’ which appears to foreclose all alternatives and lock us forever into a capitalist realism in which ‘it is easier to imagine the end of the world than it is to imagine the end of capitalism.’89 Eschewing Bollier’s ‘triarchy’ of a market/state/ commons coexistence, Dardot and Laval argue for a politics of the common based on an engaged citizenry that directly participates and deliberates in all decisions which impact it, and in the process not merely transforms the institutions responsible for the management of services and allocation of resources, but creates new institutions and new ways of being in the world.11

Dardot and Laval describe this form of politics as ‘instituent praxis’: the common, they argue, is ‘not produced but instituted.’11 This acknowledges the conventional understanding of Ostrom, Bollier and others of ‘the commons’ as residing in the rules – the laws – that a community establishes for the collective management and use of shared resources, but extends it much further and in a more radical direction. The essence of the commons, they argue, is not in the goods per se such as land or a forest or a seed bank ‘held in common,’ but rather in the process of their establishment as well as the ongoing negotiation that will surround their use and governance. Hence, Dardot and Laval distinguish the commons from the ‘rights’ tradition of property, arguing that ‘the commons are above all else matters of institution and government…the use of the commons is inseparable from the right of deciding and governing. The practice that institutes the commons is the practice that maintains them and keeps them alive and takes full responsibility for their conflictuality through the coproduction of rules.’90 To ‘institute’ in this context should not be misunderstood as ‘to institutionalise [or] render official;’ rather it is ‘to recreate with, or on the basis of, what already exists.’ 90 This messy, conflictual and evolving process is what Dardot and Laval insist will ultimately bring about a revolution, not in the form of a violent uprising or insurrection, but rather through the ‘reinstitution of society’ via the transformation of politics and economy from its current state of ‘representative oligarchy’ to full participatory and deliberative democracy.11 Such a vision is premised on a mass politicisation of society; in effect a return of mass popular political contestation and a turn away from the postpolitical era of the neoliberal consumer.91-92

## FTC DA

#### 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.”

## Japan DA

#### New antitrust is applied globally---offends allies

Herbert Hovenkamp 03. Ben V. & Dorothy Willie Professor of Law and History, University of Iowa. “Antitrust as Extraterritorial Regulatory Policy,” 48 Antitrust BULL. 629 (2003).

Today few of us are sympathetic with the view that the common law exists apart from and somehow transcends the jurisdiction of the courts that make it. Nevertheless, there is a powerful sense in which the rules of antitrust law are regarded as "natural," while explicitly regulatory rules are considered to be purely local, territorial, or political. This view is given considerable support by a powerful neoclassical economic model that views markets as natural, in the sense that they exist separate and apart from state policy making. 32

Within this model antitrust law is a kind of background umpire that does not make first instance choices about price, quantity, quality, new entry and the like, but that does limit the anticompetitive exercise of market power. Antitrust operates as a kind of "macro" version of contract law. The common law of contracts is designed to facilitate and protect the utility of individual private bargains; antitrust is designed to do much the same thing, but for markets as a whole. Under this conception a well defined set of antitrust principles always operates in the background, so to speak, permitting private bargaining to proceed without interference in the great majority of instances, but intervening when competitive processes go awry. Further, widespread agreement exists both inside and outside the United States on a set of core principles pertaining to such things as naked price fixing, market division agreements, and the like. Within this core, problems of extraterritoriality have largely been limited to the technical ones of devising appropriate jurisdictional rules and remedies.

In contrast, the power to regulate is different. Under the traditional view of regulation the power to set price, quantity, quality, or the right to enter a market emanates in the first instance from the government. Further, although there is widespread economic agreement on fundamental principles, regulatory design is much more specific to the sovereign-more likely to reflect the demographics, industrial or employment base, or politics of the particular state imposing the regulation.

For example, nearly all of the 50 states of the United States have an antitrust law. With relatively few exceptions, however, the substantive coverage of these antitrust laws is the same, and mimics federal law. Many states have court decisions or even legislative enactments stating that federal antitrust law should govern the interpretation of that particular state's antitrust law as well. 33 The result is that the coverage of state antitrust law is remarkably similar from one state to the next. But one can hardly say the same thing about each state's regulation of land use, power generation and distribution, taxicabs, liquor pricing, and the like. Whatever homogeneity regulatory theory might produce, the politics of regulation virtually guarantees jurisdiction-specific outcomes.

But homogeneity in antitrust policy also begins to break down when antitrust law moves beyond its fundamental neoclassical concern with cartels or well-defined exclusionary practices, and into areas where its role is more controversial or marginal. This is often the case when the antitrust laws are applied in recently deregulated markets. For example, a common antitrust problem that arises in deregulated industries falls under the general rubric of unilateral refusals to deal. In order to encourage competition, newly deregulated firms may be forced to share their facilities, information, intellectual property, or other assets with new rivals. Devising reasonable "nonregulatory" rules governing refusals to deal in such markets has always extended the antitrust laws to the margin of their competence.

Increasingly, American courts seem willing to apply antitrust law to markets regulated by foreign nations under circumstances where regulatory laws themselves would never reach. For example, neither Congress nor a state legislature would very likely attempt to regulate the customer service or information provision practices of a foreign national's telephone company. But both federal and state courts have done precisely that under the guise of antitrust enforcement.3 4

Antitrust policy makes this thinkable as a result of the confluence of two sets of doctrines. First is the expansive reach of our antitrust laws to practices that have a substantial effect on United States commerce. Second is the very narrow conception of comity that applies in antitrust cases.

As a general matter, comity concerns in the international conflict of laws requires the court to consider the competing interests of domestic and foreign sovereigns. 35 After a half century of debate over the meaning of comity in international Sherman Act adjudication, the Supreme Court gave the doctrine an extraordinarily narrow meaning in the Hartford Fire case.36 That case involved an alleged insurance boycott in which Lloyd's of London participated as reinsurer. Lloyd's conduct-agreeing with some United States insurers not to write reinsurance policies for other United States insurers who wanted to write policies with broader coverage-was neither forbidden nor compelled by British law. To the defendant's claim of comity the Supreme Court replied that the provisions of the Sherman Act governing jurisdiction over transactions in foreign commerce were mandatory. As a result, a federal court could not simply decline jurisdiction on the basis of some general balancing of interests. 37 Rather, "comity" permits a federal court to decline jurisdiction only when there was a "conflict" between the law of the foreign sovereign and United States law. Further, "conflict" was defined not under choice of law principles, but more absolutely, as occurring only when the foreign law compelled the conduct at issue. 38

Perhaps significantly, the activity of the London reinsurers was very likely reachable under United States antitrust law even under ordinary interest analysis principles. British law was found by the Supreme Court to be indifferent to what the London reinsurers were doing. Further, what they were doing was agreeing not to insure against liability for particular toxic pollution risks in the United States, and risk of liability is of course measured in relation to the physical environment and legal regime in which the injury occurs. 39 As a result, the London reinsurers were selling a product especially targeted for United States markets and allegedly participating in a boycott designed to keep broader coverage insurance policies out of that market.

But Hartford Fire's definition of comity is significantly problematic under deregulation. To the extent a foreign sovereign deregulates a public utility or common carrier, that firm enjoys greater discretion to make its own decisions. As a result, considerations of comity may no longer preclude a Sherman Act suit. What makes this especially problematic is the way that the Sherman Act has been used in the United States as a kind of replacement for the regulatory agency. Under comprehensive agency regulation a filed tariff plus regulatory oversight would have governed numerous acts by regulated firms, including pricing, entry into new markets, interconnection obligations and other duties to deal.40 Government relaxation of regulatory restrictions has given firms some discretion over these things but in the process has substituted the antitrust courts as governmental supervisor. In some situations this causes little difficulty because regulation may have been misapplied to a competitively structured industry to begin with.41 In other situations, such as long-distance telecommunication, a competitive environment has developed because of changes in technology, and topto-bottom price and product regulation is no longer necessary.42

But in a third class of situations the application of the antitrust laws is much more "regulatory" and more difficult to defend. These are the cases where unilateral conduct of the kind that was historically supervised by the regulatory agency now comes under antitrust jurisdiction. For example, under the essential facility doctrine a federal court of general jurisdiction may be asked to apply antitrust law to determine the scope of a formerly regulated firm's duty to interconnect with rivals. The circuit courts have applied the doctrine frequently in the telecommunications industry,43 but also to railroads" and natural gas pipelines.4 5 Problematically, supervising interconnection requirements involves the court in highly technical questions about the scope of the duty to deal and perhaps even about the price at which the deal must be made. In these cases we have not really "deregulated" at all; rather, we have simply substituted regulation by a government agency for regulation by a court, often through the highly inefficient and uncertain process of a jury trial. To do that in a purely domestic situation is ill-advised enough, but to do it abroad by taking advantage of the expansive jurisdictional reach of the Sherman Act is completely unjustified.

IV. Extraterritorial antitrust and foreign deregulation

As expansive as the regulatory power asserted by the United States sometimes becomes, it does not generally interfere directly into foreign governments' regulation of their own highly regulated industries. But to a large extent modem antitrust has inherited the regulatory attitude expressed by the Western Union decision discussed above. For several reasons, the idea that the United States Antitrust laws are jurisdictionally exceptional can produce overreaching that is offensive to foreign prerogatives. First, the United States antitrust laws are extremely general and make no distinction between ordinary competitive firms and public utilities or common carriers; the same rules purport to apply to all business firms. Second, the jurisdictional language of the antitrust laws is both mandatory and general to the same extent-that is, the "affecting foreign commerce" language of the basic Sherman Act and the export commerce language of the Foreign Trade Antitrust Improvement Act 6 do not distinguish between regulated and ordinary competitive firms. And third, the limiting doctrines of international law-namely Act of State, foreign sovereign compulsion, foreign sovereign immunity, and comity-do not distinguish among types of firms or types of antitrust complaints. They apply equally to both price fixing, which is at the core of antitrust concern, and to the essential facility doctrine, which lies at or outside its margin.

#### Ends the Japan economic alliance---they respond with diplomatic protest to new extraterritorial antitrust.

Takaaki Kojima 02. Fellow, Weatherhead Center for International Affairs, 2001-2002. “International Conflicts over the Extraterritorial Application of Competition Law in a Borderless Economy”. https://datascience.iq.harvard.edu/files/fellows/files/kojima.pdf

We are witnessing increasingly widespread and penetrating economic globalization today. As a result of trade liberalization, import restrictions or regulations on trade and investment have decreased substantially, and trans-border business activities face less barrier. At the same time, the role of trans-border business activities, especially those by so-called multinational or global enterprises, have become increasingly important and even dominant in some sectors.

As far as the territorial scope of business activities are concerned, state borders are more or less diminishing to become almost borderless; as for legal regimes, however, sovereign states retain in principle exclusive jurisdiction over their territories and nationals under international law. Business activities are regulated by the domestic laws of sovereign states or by international agreements concluded among sovereign states. The pertinent question is how to coordinate “borderless” business activities within the existing legal regimes governed by sovereign states. In the field of trade law, the measures of each state are restricted by international agreements, in particular under the GATT/WTO regime. In the field of competition law, such an international regime is lacking and the domestic laws of each state regulate private restraints of trade in the relevant markets.

Serious jurisdictional conflicts have transpired in the last several decades between the United States and other states over the so-called extraterritorial application of U.S. antitrust laws on anticompetitive conducts abroad. This problem has also caused diplomatic frictions between the United States and other states, as it concerns state sovereignty. In this essay, the author will review the historical development of international conflicts caused by the extraterritorial application of competition law and attempt to examine the options available to circumvent or solve these conflicts. The main focus will be U.S. antitrust law and its relation with other jurisdictions, mainly the European Union and Japan, considering the grave implications to competition law and policy as well as to the world economy. 2

II. Extraterritorial Application of U.S. Antitrust Laws

Problems concerning the extraterritorial application of U.S. antitrust laws have been discussed in many publications. Of the U.S. antitrust laws, the Sherman Act applies to “commerce … with foreign nations ” (Section 1) without qualifying provisions concerning its territorial scope as “within the United States” (Section 2) or “in any section of the country” (Section 3) as specified in the Clayton Act. In the past, U.S. courts interpreting the Sherman Act of 1890 and other antitrust laws commonly followed the traditional territorial principle with regard to its jurisdictional reach. In the American Banana case (213 U.S. 347 (1909)), where all the acts complained of were committed outside the territory of the United States, including the defendant’s alleged inducements of the Costa Rican government to monopolize the banana trade, the U.S. Supreme Court dismissed the complaint on the ground, inter alia, that acts committed outside of the United States are not governed by the Sherman Act. In this case, the territorial principle in the classic sense was applied.

In later decisions such as the American Tobacco case (221 U.S. 106 (1911)) and the Sisal case (274 U.S. 268 (1927)), jurisdiction was exercised over the defendants on the ground that although the agreements in question were concluded by foreigners outside the United States, jurisdiction was limited to what was performed and intended to be performed within the territory of the United States. In these cases, the territorial principle was applied more flexibly, but it has been observed that this application cannot be argued other than as a sensible and reasonable deployment of the objective territorial theory. 3

An entirely different approach was taken in the Alcoa case (148 F.2d. 416 (1944)), in which foreign companies outside the United States had concluded the agreements. The Court of Appeal for the Second Circuit held it settled law that any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders. It went on further to state that the agreements, although made abroad, were unlawful if they were intended to affect imports and did affect them.

This theory of the intended effect (the effects doctrine) elaborated in the Alcoa case was criticized by many as an excess of jurisdiction under public international law. For instance, R.Y. Jennings noted that “in this new guise it apparently comprehends the exercise of jurisdiction over agreements made abroad, by foreigners with foreigners provided only that the agreement was intended to have repercussions upon American imports or exports,” 4 while F.A. Mann argued that “the type of effect within the meaning of the Alcoa ruling has nothing in common with the effect which by virtue of established principles of international jurisdiction confers that right of regulation.” 5 Neverthele ss, since the Alcoa case, U.S. courts have continued to follow the new jurisdictional formula of the effects doctrine.

In response to excessive application of U.S. antitrust laws, especially with respect to courts’ orders to produce documents such as subpoena duces tecum located abroad, a considerable number of states have issued diplomatic protests. Australia, France, the United Kingdom, the Netherlands, and New Zealand have even enacted blocking legislation. 6 The protesting states maintain that taking evidence abroad, including an order to produce documents, is an exercise of extraterritorial enforcement of jurisdiction that, under international law, requires the consent of the state where the evidence is located. The United Kingdom has been one of the strongest opponents to U.S. claims of extraterritorial jurisdiction. The U.K. government stated for instance that “HM Government considers that in the present state of international law there is no basis for the extension of one country’s antitrust jurisdiction to activities outside of that country of the foreign national.” 7 The Protection of Trading Interest law was enacted in 1980, which provides to extensively thwart the extraterritorial application of U.S. antitrust laws. The U.K. government invoked the provisions in the Laker Airways case (1983 W.L.R. 413) in 1983.

Having faced the antagonistic reactions of other states, U.S. courts began to show some restraint in assuming extraterritorial jurisdiction. In the Timberlane case (549 F.2d. 9 th Cir. (1976)), the court concluded that it had jurisdiction over alleged anticompetitive conducts in Honduras but refrained from asserting extraterritorial jurisdiction after having applied three tests: first, whether the challenged conduct had had some effect on the commerce of the United States; second, whether the conduct in question imposed a burden on U.S. commerce; and third, whether the complaint’s interests of and links to the United States were sufficiently strong vis-à-vis those of other nations to justify an assertion of extraterritorial authority. The Foreign Trade Antitrust Improvements Act enacted in 1976 applies to foreign conduct that has a direct, substantial and reasonably foreseeable effect on U.S. commerce, The U.S. enforcement agencies, the Department of Justice (DOJ) and the Federal Trade Commission (FTC), have adopted this jurisdictional rule of reason formula since the Enforcement Guidelines for International Operations of 1988. However, divergent views exist as to whether the third test of balancing the interests of other states is a rule of international law or just a comity. 8 Furthermore, not all U.S. courts have consistently applied the test of balancing interests. 9

In 1993, the Supreme Court decision in the Hartford Fire Insurance case (113 S. Ct. 2891 (1993)) reaffirmed the effects doctrine, stating that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States. The Court then took a restrictive view on the test of balancing interests, stating that the only substantial question is whether there is a true conflict between domestic and foreign law, and held that no such conflict seemed to exist because British law did not require defendants to act in a manner prohibited by U.S. law. 10

Japan maintains the territorial principle and rejects the effects doctrine, stating that the effects doctrine cannot be regarded as an established rule of international law. In the view of the Government of Japan, the extraterritorial application of U.S. domestic laws (including U.S. antitrust laws) based on the effects doctrine is not allowed under general international law. 11 In the Nippon Paper case, where a Japanese company was prosecuted under the Sherman Act, the Japanese government submitted a brief of amicus curiae where it stated, inter alia, that the extraterritorial application of the Sherman Act to a conduct of a Japanese company engaged in business in Japan is unlawful under international law. 12 Nonetheless, the U.S. Supreme Court affirmed the Court of Appeal decision, which assumed the extraterritorial application of the Sherman Act to a criminal case for the first time (118 S. Ct. 685 (1998)).

#### Japan economic alliance is key to prevent Chinese challenges to the ILO

Shihoko Goto 21. deputy director for geoeconomics and senior associate for Northeast Asia at the Wilson Center. "When Trade No Longer Hampers U.S.-Japan Ties". 4-20-2021. https://www.wilsoncenter.org/blog-post/when-trade-no-longer-hampers-us-japan-ties

The April 16th meeting between President Joe Biden and Japanese Prime Minister Yoshihide Suga marked several milestones: not only was it the first foreign leader’s visit to the Biden White House, but it was also the first visit to the United States by Yoshihide Suga as the Japanese prime minister. It was also the first in-person summit meeting between the United States and Japan since the outbreak of a global pandemic. It marked a number of firsts in terms of content too, not least that it was the first time since the 1980s in which trade was not a sore point of contention between the two sides. Instead, trade relations projected as a way forward for further bilateral cooperation in confronting the China threat.

That isn’t to say trade relations between Japan and the United States are now smooth sailing. The U.S. trade deficit with the world’s third-largest economy runs to nearly $68 billion, and although the two sides signed a merchandise trade deal in 2019, the Japanese auto industry remains a point of contention for the United States. Indeed, Japan’s auto exports account for about $54 billion, or close to 80 percent, of the overall trade deficit. Meanwhile, the Biden administration is not expected to lift tariffs on steel and aluminum anytime soon, nor is it expected to make efforts to join the CPTPP in the near future, much to the frustration of Tokyo.

Yet instead of trying to negotiate a breakthrough on the trade front, the Biden-Suga meeting focused on bilateral economic relations based on their shared threat of dealing with China’s ambitions to challenge the regional status quo. Until recent months, Tokyo had aspired to maintain solid relations with China whilst furthering ties with the United States, most notably by endeavoring to decouple economic interests with Beijing from the security threat that China has increasingly been posing upon Tokyo. After the joint 2+2 joint security meeting in Tokyo in March, however, the two countries declared that China’s behavior is “inconsistent with the existing international order, presents political, economic, military, and technological challenges to the Alliance and to the international community.”

Since then, Tokyo has moved even closer to Washington publicly in pushing back against China, as the bilateral statement noted “the importance of peace and stability across the Taiwan Strait,” marking the first time since 1969 that Japan and the United States publicly referred to Taiwan which remains a core interest for China. In short, Japan’s hedging against the United States and maintaining a balancing act between China and the United States is now over. Not only is its security interests even more closely aligned with that of the United States, Japan’s economic interests are now more intertwined with that of the United States than ever.

Rather than focusing on the trade balance, Tokyo and Washington’s economic relations will concentrate more on economic resilience and maintaining free and fair economic rules of engagement in the Indo-Pacific. At the same time, the two countries are expected to work more closely together on competing against China in emerging technologies, from 5G to AI and information sciences.

For Japan, one of the biggest takeaways from the Biden-Suga meeting will be that the days of Japan posing an economic threat to the United States are now over. It will also be putting increasing pressure not only for Tokyo to be prepared to fight back against China on the economic as well as security fronts together with Washington, but it will also push Tokyo to step up its own efforts to compete in the innovation economy that goes beyond manufacturing.

## Access

#### Cartels are irrelevant

Stewart 17 (Scott, Stratfor analyst of terrorism and security issues “Mexico's Cartels Will Continue to Splinter in 2017”, https://worldview.stratfor.com/article/mexicos-cartels-will-continue-splinter-2017)

Stratfor has tracked Mexico's drug cartels for over a decade. For most of that time, our annual forecasts focused on the fortunes and prospects of each trafficking organization. But as Mexican organized crime groups have gradually fractured and fallen apart — a process we refer to as balkanization — we have had to refine the way we think about them. The cartels are no longer a handful of large groups carving out territory across Mexico, but a collection of many different smaller, regionally based networks. So, rather than exploring the outlook of every individual faction, we now take them as loose gatherings centered on certain core areas of operation: Tamaulipas, Tierra Caliente and Sinaloa.

#### They can’t solve opiate demand – it’s a result of addiction, not monopolies - their Kim evidence doesn’t say the word “monopolies”

#### Even completely unchecked deforestation takes 200 years and won’t cause extinction

Hannah Voak 16, Assistant Ecologist, Nurture Ecology Ltd., 4/22/16, “A world without trees,” <http://www.scienceinschool.org/content/world-without-trees>

There are approximately 3.04 trillion trees on planet Earth (Crowther et al 15), covering 31% of the world’s land surfacew1. Today, for Earth day, we’re taking a look at trees. Around 15 billion trees are cut down each year. So, hypothetically speaking, it would take just over 200 years for the world’s forests to completely disappear. While this scenario is unlikely, what would be the consequences of a tree-free planet? Let’s start with perhaps the most obvious difference – oxygen concentration. A lack of oxygen? Oxygen makes up roughly 21% of the Earth’s atmosphere, but you probably know that already. What you might be surprised to find out, however, is that only half of this oxygen is produced through photosynthesis in trees and other plants on land. The other half is produced in oceans, by microscopic marine organisms called phytoplankton. The environment would not be devoid of oxygen if all trees were lost but the oxygen level would be lower. Would it be sufficient for humans to survive? In one year, a mature leafy tree produces as much oxygen as ten people breathe. If phytoplankton provides us with half our required oxygen, at current population levels we could survive on Earth for at least 4000 years before the oxygen store ran empty. However, that’s not considering a number of other factors: increasing population size, for example, would reduce the amount of oxygen available, whilst phytoplankton blooms due to an abundance of carbon dioxide could increase oxygen levels. Suffocating smog Whilst there may be enough oxygen for humans to survive on Earth, at least to begin with, the air we breathe could still be responsible for our demise. Like giant filters, trees help to cut down on pollution levels. Leaves intercept airborne particles and ozone, carbon monoxide, sulfur dioxide and other greenhouse gases are absorbed through the leaves stomata. In 2012, outdoor air pollution was estimated to cause 3.7 million premature deaths worldwidew2. Imagine the impact removing these environmental sieves would have on humankind. Air-pollution masks would become a necessity and bottled ‘clean air’ could come at a premium. Full of hot air? Armed with pollution masks, would the climate and temperature still be suitable for us? One important consideration is carbon dioxide. In one year, an acre of mature trees soaks up the same amount of carbon dioxide that we produce by driving the average car 26 000 miles. Since human activities like this increase the normal level of carbon dioxide in the atmosphere, cutting down trees would tip the balance even further, not to mention the enormous amount of stored carbon that would be released from doing so. Deforestation is already responsible for up to 15% of global greenhouse gas emissions and you might think that an overwhelming increase in carbon dioxide would result in a much warmer planet. However, the relationship between trees and global temperature is much more complicated. Energy and water fluxes between trees and the atmosphere also play a role and a tree’s colour, for example, can affect the amount of the Sun’s energy that is absorbed or reflected. Studies have shown that Europe’s trees have actually caused a slight increase in regional temperatures since 1750w3, while transpiration from plants in tropical forests cools the surface temperature. Therefore, whether the temperature becomes too hot to handle could depend on many factors, although a recent study concluded that reducing forest size increases average air surface temperatures in all climate zones (Alkama & Cescatti 16).

#### Deforestation alt causes – companies clear rainforests for resources or to build houses

## Econ

#### Big Pharma consolidation doesn’t cause high drug prices

Angus Liu, 21. Senior Staff Writer in FierceMarkets’ Life Sciences group. He earned his Master’s at Northwestern University’s Medill School of Journalism. “Do pharma buyouts hurt innovation and lead to higher prices? Analyst hits back at FTC's push for tougher reviews.” Apr 26, 2021. https://www.fiercepharma.com/pharma/large-pharma-m-as-hurt-innovation-drug-price-analyst-counter-ftc-s-arguments-for-stricter

In recent years, Democratic commissioners at the U.S. Federal Trade Commission (FTC) have clashed with their Republican counterparts over the agency's standards for large biopharma transactions. Now that they’ve come into power under the Biden administration, the Democrats have launched a sweeping review that threatens to clamp down on industry deal-making. One influential biopharma analyst disagrees with the FTC's stated reasoning for implementing tougher reviews. In fact, the new stance could be counterproductive, he argued. Large pharma consolidation can hurt R&D and lead to higher drug prices, Democratic commissioners have said. But **those concerns are unfounded**, SVB Leerink analyst Geoffrey Porges countered in a recent note to clients. “[I]n fact, many of their arguments, if turned into industrial or FTC policy, would result in less innovation, less competition, and less choice for consumers,” Porges wrote. Does M&A bring higher prices? There’s simply no evidence that larger companies raise drug prices faster than small companies do, Porges wrote. Instead, small companies often have few options in their toolbox and therefore tend to resort to price increases to invigorate performance. Large firms have more “skin in the game” in the overall healthcare system and have been more careful, he argued.

#### Too many alt causes to drug pricing

Danial E. Baker, 17. PharmD, FASHP, FASCP. "High Drug Prices: So Who Is to Blame?." Hosp Pharm. 2017 Jan; 52(1): 5–6. 2017. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5278914/>

The noise level in the news regarding drug prices (eg, EpiPen, generics) has been high. So who's to blame? How about everyone! It is easy to point the finger at few greedy people and the pharmaceutical industry, but the whole system is the problem. This includes patients, the insurance industry, employers, legislators, the board of directors of pharmaceutical companies, CEOs of pharmaceutical companies, and the stockholders of any company associated with the production and pricing of the pharmaceuticals. Each of these has contributed to the problem and is negatively affected, directly and indirectly. The person most impacted by the high cost of some of the pharmaceuticals is the person who pays cash for medications. The next to be impacted is every taxpayer and business. If the cost of a medication goes up, that increase directly influences the cost of health care for individuals covered by Medicaid, Medicare, other federally assisted programs, and federal employees; but the money to pay for those program does not come from a magic money tree or genie, it comes from money raised by taxes paid by individuals and businesses. The next group to be affected is companies that offer their employees a medical benefit that includes drug coverage. The cost of providing these programs goes up when medication costs go up. The company needs to use more of its income to offset the increased cost. It may shift some or all the increased burden to their employees by decreasing the amount of coverage their program provides, increasing the employees' contribution to offset the expense of the program, or increasing deductibles and/or copays. Also affected are patients who need these medications for the prevention or treatment of various medical conditions. Some of us are insulated from the true cost of our health care and the cost of medications. The majority of the costs for these health care programs has been covered by our employer or federal programs. For decades, the copay for most medications was relatively low compared to their acquisition cost, therefore the majority of the public did not know the true cost of medications. This trend has been changing through the use of tiered copay systems and formulary placements that are based on cost of the pharmaceutical and its perceived value to the care of the patient. Another group affected by these higher prices is the health insurance companies, self-insured companies, and managed care organizations. Each of these companies and organizations has to cover the increase in cost somehow. Some of the obvious ways to do this are to increase the price of their insurance plans, decrease the level of service offered by their plans, introduce plans with a higher deductible, and increase copays. Actually, the person most affected by these higher prices, no matter the reason, is the patient or their agent who decided not to fill the prescription because of its price. Even more examples could be identified, but I think I have made my point – high drug prices affect everyone in some manner. So how do we solve this problem? There is no one answer, because the source of the problem does not come from any one area of the industry. New drugs have almost always come with a higher price to help offset the cost of their research and development and all the others that don't make it to market. Federal price controls could be a possible answer, but that is difficult to implement in a country that prides itself on a free market economy. The insurance industry, pharmacy benefit management companies, and managed care organizations have attempted to control or decrease costs by using formularies, contracting, rebates, and other mechanisms. Even these companies and organizations are negatively impacted by the high inflationary cost of some older medications, especially for those drugs where there is minimal competition, and the high price of some of the new drugs that are not intended for small patient populations (eg, hepatitis C). I am assuming that the answer will not come from the legislative arena. There will be hearings, speeches, and noise in various media outlets, but in the end there will be no solution. The attention of the news media on the subject waxes and wanes. They pay attention during an election year or when a particular product (eg, EpiPen) or company (eg, Turing Pharmaceuticals) is in the spotlight. But then media coverage fades and the spotlight shifts to a different subject. Maybe at least one of the answers to this problem will come from a nonprofit organization (eg, Institute for Clinical and Economic Review [ICER]), health care plans that implement value-based formularies (eg, Premera Blue Cross), or another country (eg, National Institute for Health and Care Excellence [NICE]), but only time will tell. No matter what, this problem needs to be addressed sooner, rather than later!

## Innovation

#### Breaking up Big Pharma doesn’t solve innovation

Thomas Grennes, 21. Professor of Economics and Professor of Agricultural and Resource Economics at North Carolina State University. "Antitrust and 'Big Pharma'." *Regulation* 44 (2021): 5-6.

Conclusion

Research is essential to developing new technology that raises living standards around the world. New technology can also prevent negative shocks like COVID from destroying lives and reducing health. Avoiding damages from new viruses will require new vaccines. Weakening intellectual property rights would reduce the research and technological innovation that would produce new vaccines, not to mention other goods. Bigness of companies is not a reliable measure of monopoly power and allowing regulators to impose size limits on firms could be economically wasteful. **Breaking up large firms** and blocking vertical mergers could prevent firms from reaching economically optimal size. Free trade would be a much more effective antitrust policy than punishing firms for their size.

# 2NC

## Cap K

#### Cap turns bioD – profit motive consumes ecologies as “externalities”

Pigott 18 [Anna, Postdoctoral Research Fellow in Environmental Humanities, Swansea University. Capitalism is killing the world's wildlife populations, not 'humanity'. Conversation. 11-1-2018. https://theconversation.com/capitalism-is-killing-the-worlds-wildlife-populations-not-humanity-106125

The latest Living Planet report from the WWF makes for grim reading: a 60% decline in wild animal populations since 1970, collapsing ecosystems, and a distinct possibility that the human species will not be far behind. The report repeatedly stresses that humanity’s consumption is to blame for this mass extinction, and journalists have been quick to amplify the message. The Guardian headline reads “Humanity has wiped out 60% of animal populations”, while the BBC runs with “Mass wildlife loss caused by human consumption”. No wonder: in the 148-page report, the word “humanity” appears 14 times, and “consumption” an impressive 54 times.

There is one word, however, that fails to make a single appearance: capitalism. It might seem, when 83% of the world’s freshwater ecosystems are collapsing (another horrifying statistic from the report), that this is no time to quibble over semantics. And yet, as the ecologist Robin Wall Kimmerer has written, “finding the words is another step in learning to see”.

Although the WWF report comes close to finding the words by identifying culture, economics, and unsustainable production models as the key problems, it fails to name capitalism as the crucial (and often causal) link between these things. It therefore prevents us from seeing the true nature of the problem. If we don’t name it, we can’t tackle it: it’s like aiming at an invisible target.

Why capitalism?

The WWF report is right to highlight “exploding human consumption”, not population growth, as the main cause of mass extinction, and it goes to great lengths to illustrate the link between levels of consumption and biodiversity loss. But it stops short of pointing out that capitalism is what compels such reckless consumption. Capitalism – particularly in its neoliberal form – is an ideology founded on a principle of endless economic growth driven by consumption, a proposition that is simply impossible.

Industrial agriculture, an activity that the report identifies as the biggest single contributor to species loss, is profoundly shaped by capitalism, not least because only a handful of “commodity” species are deemed to have any value, and because, in the sole pursuit of profit and growth, “externalities” such as pollution and biodiversity loss are ignored. And yet instead of calling the irrationality of capitalism out for the ways in which it renders most of life worthless, the WWF report actually extends a capitalist logic by using terms such as “natural assets” and “ecosystem services” to refer to the living world.

By obscuring capitalism with a term that is merely one of its symptoms – “consumption” – there is also a risk that blame and responsibility for species loss is disproportionately shifted onto individual lifestyle choices, while the larger and more powerful systems and institutions that are compelling individuals to consume are, worryingly, let off the hook.

#### Profit motive net increases new disease – empirics

Broughton 20. [Alan, Active Member of the Organic Agriculture Association and is a co-author of Sustainable Agriculture vs Corporate Greed. Capitalist greed and biodiversity loss is spawning new deadly diseases. Green Left. 05-16-2020. https://www.greenleft.org.au/content/capitalist-greed-and-biodiversity-loss-spawning-new-deadly-diseases]

Diseases such as COVID-19 have been predicted by various disease ecologists.

In Spillover: Animal Infections and the Next Human Pandemic, David Quammen wrote in 2012 about the likelihood of virulent infectious diseases because of urban sprawl, pesticides and international trade, which has altered ecosystems and damaged biodiversity, letting loose the viruses that were once confined to wildlife.

Dr Peter Daszak, a contributor to the World Health Organization Register of Priority Diseases, called it Disease X in 2018, well before COVID-19 broke out.

The number of new infectious diseases has tripled each decade since the 1980s: there have been at least 300 in the past 50 years, 72% of which originated in wildlife.

Ebola arrived via a chimpanzee that was caught and consumed in Gabon; it killed 90% of infected people. It is suspected to have been passed on to chimpanzees from bats, forced to inhabit the same ecosystems and compete for the same food sources by deforestation.

Middle East Respiratory Syndrome (MERS) passed from bats to camels and then to the camel handlers. Hendra virus came from fruit bats, urbanised because of loss of habitat, and was passed on to horses and people.

Kyasanur Forest Disease in India spread from monkeys to humans via ticks as monkeys invaded human territory when theirs was lost through deforestation.

Nipah virus in Malaysia spread from fruit bats driven from the forest by clearing on to mango trees, into pigs via bat droppings and saliva, and then on to the farmers. HIV-AIDS, Zika, Severe acute respiratory syndrome (SARS), bird flu and West Nile viruses all came from wild animals.

COVID-19 is likely to have passed by bats to another animal, possibly a pangolin, then on to humans trading in wild animals.

Disrupted ecosytems

David Quammen said: “We cut the trees, we kill the animals or cage them and send them to markets. We disrupt ecosystems, and we shake loose viruses from their natural hosts. When that happens, they need a new host. Often, we are it.”

As Joachim Spangenberg from the Sustainable Europe Research Institute wrote: “We are creating this situation, not the animals”.

Ending the trade in wildlife sounds like a simple solution but suppression could drive it underground where hygiene is likely to be worse. Many people are dependent on the trade for their income and sustenance.

The issues of poverty, unemployment and food insecurity need to be addressed at the same time. Simply blaming bush meat, which has been consumed since the start of human history, does not address the key issue — biodiversity loss.

The extent tropical forests has been halved in the past century. When animals at the top of the food chain disappear, those at the bottom, such as rats and mice that normally carry more pathogens, take up the space.

Habitat loss forces animals and their diseases to go elsewhere. Species in degraded ecosystems carry more disease.

Natural animal habitats are being destroyed for monocultural agricultural production by corporations — soy, corn and palm oil — and for logging, mining, roads and urbanisation. The consequences of this practice are not factored into the extracted profits.

Climate change

Climate change is another factor. As climatic zones are altered wildlife migrates to new areas and interacts with species it never did before, passing on its diseases.

COVID-19 has a low mortality rate — about 1% — but is highly infectious.

The Ebola mortality rate is 90%, but infection does not spread easily. A new disease with the mortality rate of Ebola and the infection rate of COVID-19, or the flu, would be far more devastating than either alone.

If the world continues to allow the unrestricted greed of profit to destroy the world’s natural and agricultural ecosystems, such an outcome becomes more likely. We live in a world where profits are privatised, but the ecological consequences are paid for by everybody.

Indian agroecologist Vandana Shiva says that the profit motive separates humans from the ecosystems that life, including us, depends on: “As forests are destroyed, as our farms become industrial monocultures to produce toxic, nutritionally empty commodities, and our diets become degraded through industrial processing with synthetic chemicals and genetic engineering in labs, we become connected through disease.”

COVID-19 was predicted, and inevitable, because of how nature is treated. As well as treating the epidemic, and preparing for the next one, we have to address the root cause, restoring the broken link between humans and the environment.

#### Feasibility concerns are capitalist propaganda – imagination and testing of alternatives are key to break out of squo repression

McCarraher 19 [Eugene; 11/12/19; Associate Professor of Humanities at Villanova University, PhD in US Cultural and Intellectual History from Rutgers University; The Enchantments of Mammon: How Capitalism Became the Religion of Modernity, p. 15-18]

Words such as “paradise” or “love” or “communion” are certainly absent from our political vernacular, excluded on account of their “utopian” connotations or their lack of steely-eyed “realism.” Although this is a book about the past, I have always kept before me its larger contemporary religious, philosophical, and political implications. The book should make these clear enough; I will only say here that one of my broader intentions is to challenge the canons of “realism,” especially as defined in the “science” of economics. As the master science of desire in advanced capitalist nations, economics and its acolytes define the parameters of our moral and political imaginations, patrolling the boundaries of possibility and censoring any more generous conception of human affairs. Under the regime of neoliberalism, it has been the chief weapon in the arsenal of what David Graeber has characterized as “a war on the imagination,” a relentless assault on our capacity to envision an end to the despotism of money.24 Insistent, in Margaret Thatcher’s ominous ukase, that “there is no alternative” to capitalism, our corporate plutocracy has been busy imposing its own beatific vision on the world: the empire of capital, with an imperial aristocracy enriched by the labor of a fearful, overburdened, and cheerfully servile population of human resources. Every avenue of escape from accumulation and wage servitude must be closed, or better yet, rendered inconceivable; any map of the world that includes utopia must be burned before it can be glanced at. Better to follow Miller’s wisdom: we already inhabit paradise, and we can never make ourselves fit to live in it if we obey the avaricious and punitive sophistry professed in the dismal pseudoscience.

The grotesque ontology of scarcity and money, the tawdry humanism of acquisitiveness and conflict, the reduction of rationality to the mercenary principles of pecuniary reason—this ensemble of falsehoods that comprise the foundation of economics must be resisted and supplanted. Economics must be challenged, not only as a sanction for injustice but also as a specious portrayal of human beings and a fictional account of their history. As a legion of anthropologists and historians have repeatedly demonstrated, economics, in Graeber’s forthright dismissal, has “little to do with anything we observe when we examine how economic life is actually conducted.” From its historically illiterate “myth of barter” to its shabby and degrading claims about human nature, economics is not just a dismal but a fundamentally fraudulent science as well, akin, as Ruskin wrote in Unto This Last, to “alchemy, astrology, witchcraft, and other such popular creeds.”25

Ruskin’s courageous and bracing indictment of economics arose from his Romantic imagination, and this book partakes unashamedly of his sacramental Romanticism. “Imagination” was, to the Romantics, primarily a form of vision, a mode of realism, an insight into the nature of reality that was irreducible to, but not contradictory of, the knowledge provided by scientific investigation. Romantic social criticism did not claim the imprimatur of science as did Marxism and other modern social theories, yet the Romantic lineage of opposition to “disenchantment” and capitalism has proved to be more resilient and humane than Marxism, “progressivism,” or social democracy. Indeed, it is more urgently relevant to a world hurtling ever faster to barbarism and ecological calamity. I wrote this book in part out of a belief that many on the “left” continue to share far too much with their antagonists: an ideology of “progress” defined as unlimited economic growth and technological development, as well as an acceptance of the myth of disenchantment that underwrites the pursuit of such expansion. The Romantic antipathy to capitalism, mechanization, and disenchantment stemmed not from a facile and nostalgic desire to return to the past, but from a view that much of what passed for “progress” was in fact inimical to human flourishing: a specious productivity that required the acceptance of venality, injustice, and despoliation; a technological and organizational efficiency that entailed the industrialization of human beings; and the primacy of the production of goods over the cultivation and nurturance of men and women. This train of iniquities followed inevitably from the chauvinism of what William Blake called “single vision,” a blindness to the enormity of reality that led to a “Babylon builded in the waste.”26

Romantics redefined rather than rejected “realism” and “progress,” drawing on the premodern customs and traditions of peasants, artisans, and artists: craftsmanship, mutual aid, and a conception of property that harkened back to the medieval practices of “the commons.” Whether they believed in some traditional form of religion or translated it into secular idioms of enchantment, such as “art” or “beauty” or “organism,” Romantic anticapitalists tended to favor direct workers’ control of production; the restoration of a human scale in technics and social relations; a sensitivity to the natural world that precluded its reduction to mere instrumental value; and an apotheosis of pleasure in making sometimes referred to as poesis, a union of reason, imagination, and creativity, an ideal of labor as a poetry of everyday life, and a form of human divinity. In work free of alienation and toil, we receive “the reward of creation,” as William Morris described it through a character in News from Nowhere (1890), “the wages that God gets, as people might have said time agone.”27

Rendered gaudy and impoverished by the tyranny of economics and the enchantment of neoliberal capitalism, our sensibilities need replenishment from the sacramental imagination. As Americans begin to experience the initial stages of imperial sclerosis and decline, and as the advanced capitalist world in general discovers the reality of ecological limits, we may find in what Marx called the “prehistory” of our species a perennial and redemptive wisdom. We will not be saved by our money, our weapons, or our technological virtuosity; we might be rescued by the joyful and unprofitable pursuits of love, beauty, and contemplation. No doubt this will all seem foolish to the shamans and magicians of pecuniary enchantment. But there are more things in heaven and earth than are dreamt of on Wall Street or in Silicon Valley.

#### Any combo poisons the well

Curran 16 [William J. Curran Ill. Editor for the Antitrust Bulletin. Commitment and betrayal: Contradictions in american democracy, capitalism, and antitrust laws. Antitrust Bulletin. 2016. 61(2): 246]

Scholars now link antitrust with distributional values. 11 Professor Anthony B. Atkinson wants antitrust to value the individual,1 12 recognizing as Hand did in Alcoa1 13 that "among the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them." 1 14 And it is the individual-rich and poor, but especially the poor-whom Atkinson wants to protect from the inequities of the marketplace.115 Atkinson sees as Senator John Sherman did in 1890 that the "problems that may disturb [the] social order ... none is more threatening than the inequality of condition of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade to break down competition." 11 6 Sherman's and Hand's worries were certainly not Bork's. Hand said it best in Alcoa, "[W]e have been speaking only of the economic reasons which forbid monopoly ... [but] there are others, based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic results.",1 1 7 Bork-regardless of destructive results to democracy-would never find efficient economic results inherently undesirable. Bork would likely find democracy a "cornucopia of social values, all rather vague and undefined but infinitely attractive."iiS A definition that was surely meant to disparage, fails. What makes democracy attractive is its socially related values. 11 9 What makes it infinitely attractive are its regenerative capacities and potential for self-definition. 120 Bork blocked democracy's values so as not to tempt liberal judges. He worried needlessly. An antitrust solution to wealth's severe inequality is simply not plausible. 121 Antitrust has always been the heart of capitalism's ideology. 122 In truth, antitrust's distribution of wealth for the wealthy is more than ideology-it is heartless reality. So was Bork right? Are the fates of capitalism and antitrust intertwined? 123 And if antitrust were repealed? Professor Atkinson wants antitrust saved and used for citizens.124 But like Professors Stiglitz, Krugman, and Reich, he has fallen headfirst into antitrust's heartless ideological trap. And like the other three he would resurrect TR's trust-busting for the twenty-first century. Piketty avoids ideological traps. He learns the facts of history-unencumbered by ideologies like Bork's-and has an unobstructed vision 125 of the unequal and democratically destructive wealth of capitalism. Bork's antitrust is the wrong policy tool for a nation presumed to be dedicated to serving citizens equitably. 126

#### The prioritization of competition via antitrust law creates new forms of market concentration---frames of efficiency justify vertical coordination that expands the corporate world.

Jedediah Britton-Purdy et. al. 20. William S. Beinecke Professor of Law at Columbia Law School. David Singh Grewal, Professor of Law at Berkeley Law School. Amy Kapczynski, Professor of Law at Yale Law School. K. Sabeel Rahman, Associate Professor of Law at Brooldyn Law School and President, Demos. Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis. The Yale Law Journal. April 2020. 129(6): 1801-1802

The many criticisms of this way of reasoning did not halt the influence of modern law and economics in legal thought. Law and economics spanned substantive areas of law, delivering a simplicity and method that any first-year student could learn and that a wave of dedicated scholarship on alternative field- specific idioms did little to displace. The result was far from a comprehensive defense of market ordering, much less one that overcame the many telling criti- cisms of the normative case for law and economics that issued in the 198os.59 Nonetheless, adherents of law and economics reorganized an array of legal fields. They did so using a variety of argument types, sometimes shifting among them. Arguments that idealize a version of market ordering as neutral and "good for us all," which would characterize the elevation of consumer welfare in antitrust law or efficiency reasoning in intellectual property, are market fundamentalist. Arguments to the effect that the state simply cannot be trusted to make substantive judgments about value and distribution on account of the dynamics revealed by public-choice theory take the form of market tragedy. Here, market-modeled in- sight reveals that the market is the best we can do, perhaps regrettably but ineluctably nonetheless. This style of argument persistently accompanied the more optimistic market-fundamentalist moves, enabling scholars and advocates to in- sist without fear of contradiction that economic policy deviating from market models would invite rent seeking. The combination of the first two supported a third, subtler style of argument: market hegemony simply assumed that "serious" law and policy thinking would adhere to market models, as in environmental law's focus on cost engineering to the exclusion of infrastructure investment and political engagement. The latter kinds of proposals simply have no place at the table, and raising them suggests the discrediting failure to understand that market reasoning provides the authoritative and exclusive way of engaging urgent questions.

Antitrust law, our first example, was remade to address a drastically narrowed conception of the problem of monopoly.60 Market power was to be disciplined only when it interfered with consumer welfare, and sometimes, still more narrowly, only when it increased prices. 61 Historically, antitrust law and scholar- ship took a broader view: it emerged from a concern about the power of large corporate entities to influence politics and not just prices, and imposed structural limits and bright-line rules to guard against an array of possible political-eco- nomic implications of firm dominance.6 2 Replacing this political-economic version of antitrust, the field came to target a much narrower conception of market collusion. The result is a regime that privileges firms as favored instances of (vertical) coordination but repudiates certain forms of (horizontal) coordination among market participants and certain workers (such as independent contractors).63 In the name of supposed efficiency, antitrust now blesses mergers and big firms but restrains cooperation among Uber drivers and church organists.64 This remade antitrust law has in turn helped to remake the corporate world, facilitating the substantial new forms of market concentration and priority for capital over labor that we previewed above.

#### Neoliberal hegemony makes domestic fascist resurgence and collapse inevitable

Jackson 2021 (Van Jackson, American professor of international relations at Victoria University of Wellington, an adjunct senior fellow at the Center for a New American Security, and a distinguished fellow with the Asia Pacific Foundation of Canada, “THE LIBERAL INTERNATIONALIST ORIGINS OF RIGHT-WING INSURRECTION” <https://inkstickmedia.com/the-liberal-internationalist-origins-of-right-wing-insurrection/>, January 11, 2021)

Violence in the periphery always comes back to the center, eventually. On January 6, the world saw Trump-supporting protestors and conspiracy theorists coalesce in Capitol Hill before storming America’s legislative branch in open insurrection. Whatever we call it, the question is why it happened, and there are many partial answers. A leader-obsessed analyst will point to Trump’s acts of sedition; he played a unique role in encouraging the protestors toward violence and willful disorder. Some might draw our attention to polarization trends in American politics. Others might rightly point to structural racism or oligarchic capitalism — causes that are far upstream of Trump or any singular event. Each of these takes has part of the story but misses other crucial aspects. The Trump-centric explanation, for instance, is true but uninteresting, raising more questions than it answers. How was Trump possible? How could Trump command the violent loyalty of so many citizens when other presidents could not and would not? Polarization is a real thing, but not only reeks of whataboutism between right and left; it doesn’t tell us why violence and insurrection is limited to Trump supporters with nothing comparable on the left. White supremacy, meanwhile, is unfortunately a constant in American politics, which raises the question of why now if it’s the underlying cause of an insurrectionist moment. And it’s true that extreme inequality deprives working-class conservatives of any material claim to American identity, leaving them open to radicalization because of their near total reliance on culture-war symbolism. But what, then, accounts for their material deprivation? These answers all lay partial claim to the truth, but we should understand that what took place on Capitol Hill was a longstanding risk built into how the national security establishment thinks about foreign policy. There is a way in which we were long warned that America’s grand strategic commitment to an overmilitarized form of deep engagement abroad was always going to culminate in a direct affront to democracy. This is bitter medicine for me, because I came up in the national security establishment before becoming a scholar and am still part of the tribe. I even believe in deep engagement, just a less militarized version that’s impossible to realize as long as Washington collectively fails to see how militarized foreign policy decisions over the decades contributed to the shock on Capitol Hill. If policymakers continue to overlook the connections between what happens at home and what we do abroad, we’ll see much worse than what happened on January 6. A grand strategy of deep engagement sometimes gets described as “liberal internationalism” or “liberal hegemony.” It’s basically US military superiority over all conceivable adversaries, forward positioned in key regions to preserve a favorable balance of power — in turn necessitating US alliances to host US military presence — and a global economic order structured to promote the free movement of goods and capital as well as human rights (in theory). Washington’s foreign policy mandarins have long believed that this collection of policies produces international security. For a time, it helped deter great-power wars, eschew arms-racing pressures, and incentivize prioritizing trade and diplomacy over conflict. To an extent, it arguably still does. But this distinctly muscular way of engaging the world has a massive, costly blind spot — overreliance on the threat and use of force. The idea that “We will fight them over there so we do not have to face them in the United States” wasn’t just a Bush-era war on terror slogan; it echoes the logic of Washington grand strategy before and since the Bush days — forward military everything is the best way to keep regions we care about stable. Yet one of the classical insights from post-colonial studies and research on imperialism is that militaristic foreign policies breed militarism at home. Scholars have been writing about this for a hundred years. W.E.B. Du Bois lectured that European and American imperialism caused World War I; the perfection of killing techniques and norms of domination in far flung lands eventually made its way back home to ravage Europe, the metropole. John Hobson explained that instead of political enfranchisement and attending to inequality at home, governments used foreign threats and jingoistic foreign policy “to bemuse the popular mind and divert rising resentment against domestic abuses.” Distraction over progress could be the theme of the past four years. More recently, the essayist Pankaj Mishra noted how “It was always an illusion to suppose that ‘civilized’ peoples could remain immune, at home, to the destruction of morality and law in their wars against barbarians abroad.” We’ve been told in a million different poetic ways that it’s simply not possible to keep the destructiveness of war and its preparations quarantined overseas. But this singularly important takeaway from the age of empires is utterly incompatible with a grand strategy of militarized liberal internationalism. US foreign policy betrays a jaundiced reading of history that skips over its most inconvenient lesson. It has given us this insurrectionist moment in unintentional but specific ways that are not hard to see if you comprehend how literal and structural violence abroad molests democracy at home. Speaking against the Vietnam War in 1967, Dr. Martin Luther King, Jr. intoned, “A nation that continues year after year to invest more money on military defense than on programs of social uplift is approaching spiritual death.” Only a peoples experiencing spiritual death can think storming Capitol Hill is any kind of answer to their problems. Dr. King witnessed anti-poverty programs in the early 1960s — which were making a difference in the lives of Black people — displaced by the need to pay for the escalating Vietnam War. As Michael Brenes has shown in a recent book, what King saw was the prevailing pattern of political economy in the Cold War, not an anomaly. Today, the massive cost associated with maintaining a dominant military and keeping up a horizon-less war on terrorism comes at the expense of domestic investment in programs capable of deflating anti-democratic attitudes and preventing right-wing radicalization in the first place — public education, poverty reduction, public works, and realistic living wages for workers. We can’t know how many of the Capitol insurrectionists were unemployed or otherwise disenfranchised, but we know that running perpetual deficits for the sake of the military apparatus rather than for national investment amounts to slow violence against civil society itself. The Cold War made a conventional wisdom of impoverishing the welfare state by substituting the warfare state. Fast forward to 2020, when the only thing Democrats and Republicans could agree on was ensuring that the National Defense Authorization Act overcame a presidential veto to commit $740 billion to defense spending. In the middle of a pandemic and great-depression economy, that kind of money could be spent giving people a brighter future than one where they believe insurrection is the only option. War is also a powerful influence on culture, especially on masculinity. Kathleen Belew’s research, to take a directly salient example, exposed the Vietnam War as a wellspring for the white power movement of the 1990s, and by extension today’s alt-right. So we should hardly be surprised that foreign policy would fuel a willingness to storm and occupy the Capitol in more subversive ways, like the “bro culture” born of endless wars. In the ecosystem of bro culture, sharing common referents like Joe Rogan and Jordan Peterson means you’re likely to know more about the unverified miracle benefits of CBD oil or the latest conspiracy theory than what’s in the Constitution. But most people who identify with bro culture aren’t right-wing radicals. They simply seek something — personal betterment, brotherhood, or to measure themselves against prevailing standards of masculinity. I’m part of this world. I train in jiu-jitsu. I served in the military. I’m a self-improvement junkie. I listened to Rogan for years. So I’m not ready to condemn anyone simply for being part of a culture in which many men find fulfillment and constructive ways to channel their energy. The problem is this way of living is capable of incubating fascism. And sometimes it does. I’ve seen friends I train with go down the MAGA rabbit hole. Look at any photos of the insurrectionists at the Capitol and you’re bound to see Punisher logos, camouflage fatigues, flak jackets, and any number of other accouterments of militarism even beyond the guns aplenty. Such garb accompanies the “tactical life” — time at the shooting range, survival tactics, motivational YouTube videos by Navy SEALs, and depending on their information diet, a large dose of propaganda. The “coolest” parts of the culture glamorize prepping for violence and disaster without any specific purpose or intent. It’s an outgrowth of a generation of (mostly) men that have lived in the ambient glow of continuous war amid everyday life. Many are veterans, and even those who aren’t still valorize soldiers fighting something, anything — for most of my life it’s been terrorists and “rogue” states, but it’s quickly becoming China. Being immersed in bro culture means being ready to be activated for the “right” cause. A disturbing enough number of folks who live this way clearly thought storming the Capitol was the cause they’d been waiting for. And then there’s the promise of social cohesion and healing that a culture of endless wars deprives us of. I’m haunted by Adam Serwer’s observation that “War nationalism always turns inward, but in the past, wars ended.” America is missing out on the boost to national unity in the civic sphere that normally follows recovery from wars — because the logic of the war on terror has no end. How can we expect anything but national fracture when politicians agree on military superiority and endless war but little else? You can dress up militarism abroad with rhetoric about liberty and freedom, but you can’t escape the consequence that doing so poisons your own polity. To borrow again from Dr. King, “there is a very obvious and almost facile connection” between the war-centricity of American foreign policy and a degradation of democracy at home so great that waves of US citizens believe they need to launch an insurrection. The real shock is that we who make national security do not see how this nightmare was a risk built into our designs from the beginning.

#### Ag collapse – short term

Allinson et al ‘21 [Jamie Allinson is Senior Lecturer in Politics and International Relations at Edinburgh University and author of The Age of Counter-revolution. China Miéville is the author of a number of highly acclaimed and prize-winning novels including October: The History of the Russian Revolution. Richard Seymour is the author of numerous works of non-fiction, His writing appears in the New York Times, London Review of Books, Guardian, Prospect, Jacobin. Rosie Warren is an Editor at Verso and the Editor-in-Chief of Salvage. All are writing for the Salvage Collective. “The Tragedy of the Worker: Toward the Proletarocene.” Chapter 1: M-C-M’ and the Death Cult. July 2021. Verso EBook. ISBN: 9781839762963 //shree]

The Triassic-Permian ‘great dying’ was a megaphase change taking place through pulses lasting for tens of thousands of years, separated by interludes of hundreds of thousands of years, if not millions. The current mass extinction event is a megaphase change taking place in microphase time.

Mass extinction is punctuated by the production of what the environmentalist Jonathan Lymbery calls ‘dead zones’: the conversion of wild ecosystems into dead monocultures. In Sumatra, these dead zones are made by burning rainforest and, amid the stench of death, planting palm crop. The palm oil is used in foods and household items, while the nut is used in animal feed. It is secured with barbed wire, and treated with poison, to prevent the crop from being eaten. Surviving animal life, and surrounding human communities, are pushed to the edges, to the brink of extinction. Agricultural workers are abused, underpaid, even enslaved. This is an example of what Moore would call ‘cheap food’, where the ‘value composition’ of the goods, the amount of waged labour necessary to produce each item is ‘below the systemwide average for all commodities’. In this case, a ‘cheap nature’ is produced by a distinctly capitalist form of territorialisation, wherein forestry is converted through deforestation into palm monoculture, while ‘cheap labour’ is secured partly through the dispossession of neighbouring human communities. More calories with less socially-necessary labour-time is cheap food.

Cheap is not, of course, the same thing as efficient. Food production is, alongside fuel, a fulcrum of the capitalist organisation of work-energetics. It is one that, as with fossil fuels, wastes an incredible amount of the energy it extracts. According to the FAO (Food and Agriculture Organization of the United Nations), 30 per cent of cereals grown for human and animal consumption are wasted, along with almost half of all root crops, fruits and vegetables. To conclude from this grotesque squander that a ‘more efficient’ capitalism would ‘solve the problem’ of ‘the environment’ would be to fail to understand waste, capitalism and ecology: that the first is intrinsic to the second; that the second, whatever the degree to which it is inflected by the first, is inimical to the third.

Capitalism also directly undermines its own productivity, precisely through its industrially-produced biospheric destruction. According to the UN, for example, there are at most sixty harvests remaining before the world’s soils are too exhausted to feed the planet. This edaphic impoverishment is a product, not a byproduct. It is the predictable, and long-predicted, consequence of intensive agriculture, over-grazing and the destruction of natural features (such as trees) that prevent erosion. Likewise, the death-drop of insect biomass, the decline of pollinating bees, are hastened by the extensive use of pesticides and fertilisers. Capitalist food production can only evade the problem – a problem, in its terms, of accumulation – either by establishing new ‘cheap natures’ through such means as deforestation, or by extracting rent from competitor producers through such means as intellectual property rights. For instance, since 1994’s notorious TRIPS agreement (Trade-Related Aspects of Intellectual Property Rights), through the rules of UPOV (Union for the Protection of New Plant Varieties), particularly the notorious UPOV 1991, and in the face of local fightbacks from Guatemala to Ghana, the World Trade Organisation has enforced property agreements outlawing the saving of seeds from one season to the next, thus sharply raising costs for farmers producing 70 per cent of the global food supply.

#### Mineral cycles – that’s Allinson – copper, lithium, manganese hit bottlenecks

Ahmed 20 [Nafeez. M.A. in contemporary war & peace studies and a DPhil (April 2009) in international relations from the School of Global Studies at Sussex University. Capitalism Will Ruin the Earth By 2050, Scientists Say. Vice. 10-21-2020. https://www.vice.com/en/article/v7m48d/capitalism-will-ruin-the-earth-by-2050-scientists-say]

Endless growth will generate minerals scarcity within decades

The EV transition is, in short, a massive industrial project. Electrification of roads and rail will require upgraded smart grids, complex routes connected to high power lines, and regular battery-swap stations. The paper explores several scenarios to explore how such a transition would take place.

In a continuing GDP growth scenario, the authors note that the economy begins to stagnate “due to peak oil limits at around 2025-2040,” but GDP is able to continue growing thanks to the EV transition. This shows that the reduction in liquid fuels in transportation can play a powerful role in avoiding “energy shortages in the economy as a whole.”

But then the economy hits the limits of mineral and material production to sustain this electric transition—in just three decades. And this is even with high levels of minerals recycling.

By 2050, in this scenario, the EV transition will “require higher amounts of copper, lithium and manganese than current reserves. For the cases of copper and manganese the depletion is mainly due to the demand from the rest of the economy,” but most lithium demand “is for EV batteries,” and this alone “depletes its estimated global reserves.”

Mineral depletion takes place even with “a very high increase in recycling rates” in a continuing GDP growth scenario.

In one such scenario, the authors apply what they consider to be realistic upper level recycling rates of 57 percent, 30 percent and 74 percent to copper, lithium and manganese respectively. These are based on extremely optimistic projections of recycling capabilities relative to their costs.

But still they find that even these high recycling rates wouldn’t prevent depletion of all current estimated reserves by 2050. The conclusion corroborates findings of other studies, estimating an expected bottleneck for lithium by 2042-2045 and for manganese by 2038-2050.

Actual bottlenecks could come even earlier because existing studies—including the MEDEAS model—don’t account for material requirements needed for internal wiring, the EV motor, EV chargers, building and maintaining the grid to connect and charge EV batteries, the catenaries to electrify the railways, as well as inherent difficulties in recycling metals.

## Access

#### No Mexican cartels impact and DEA solves

Joshua Keating 14, staff writer at Slate focusing on international affairs [“‘El Qaida’: The Persistent, Baseless Claim That Terrorists Will Swarm the U.S. From Mexico,” http://www.slate.com/blogs/the\_world\_/2014/08/25/rick\_perry\_says\_isis\_could\_sneak\_into\_the\_u\_s\_from\_mexico\_the\_el\_qaida\_meme.html]

The Mexican government is expressing some irritation with Texas Gov. Rick Perry, who suggested last week that there’s a “very real possibility” that members of ISIS or other terrorist groups are entering the U.S. illegally via Mexico. As Perry acknowledged in his own remarks—and as the Pentagon confirmed—there’s “no clear evidence” that this is happening. But as is generally the case when fears of “El Qaida” periodically emerge, a lack of evidence is no barrier to bold sweeping claims.

Intelligence officials have warned for some time that there’s a possibility of terrorists entering the U.S. from Mexico, and there is indeed some evidence of groups like Hezbollah operating in South America. It would be foolish, then, to completely rule out the possibility that terrorists have crossed into the United States from down Mexico way. But the frequent claims that this is already a major problem are, well, ridiculous.

Last year, for instance, Texas Rep. Louie Gohmert declared on C-SPAN that "We know al-Qaida has camps over with the drug cartels on the other side of the Mexican border” and that the group’s operatives are being trained to “act Hispanic.” This claim appears to have been based on essentially nothing.

Also last year, Deroy Murdock of National Review argued that “there are at least 7,518 reasons to get the U.S./Mexican border under control.” That figure refers to the number of citizens of State Department-listed “state sponsors of terrorism” arrested entering the U.S.—not just at the Mexican border—in fiscal 2011. More than half of those were from Cuba, a country which is still on the State Department’s list for a variety of reasons but whose immigrant population in the U.S. is not known as a hotbed of jihadist sentiment. (This isn’t to imply that those entering the U.S. from Syria or Afghanistan are likely terrorists. More likely, they’re fleeing terrorism.)

In 2012, Breitbart.com and a number of other conservative sites claimed that Homeland Security Secretary Janet Napolitano had “admitted” that terrorists enter the U.S. from Mexico “from time to time.” The evidence for this supposed admission: what seems like a deliberate misreading of a garbled answer during congressional testimony. (Napolitano hasn’t always helped her own cause on this issue. In 2009 she had to walk back comments that seemed to suggest, falsely, that the 9/11 hijackers had entered the U.S. from Canada.)

The best-documented case of a connection between Middle Eastern terrorism and Mexican drug cartels was actually facilitated by the U.S. government. Mansour Arbabsiar, an Iranian-American car dealer in Texas, was arrested in 2011, and later convicted, after trying to recruit a Mexican drug cartel to assassinate the Saudi ambassador to the United States. The Obama administration’s allegations that senior Iranian officials were likely in on the plot were met with some skepticism at the time. Whether or not that part of it’s true, we do know that no actual Mexican gangs were involved: Arbabsiar’s contact was an undercover DEA agent.

The DEA also set up a 2009 bust involving a deal between alleged members of al-Qaida in the Islamic Maghreb and Colombia’s FARC to smuggle cocaine through West Africa to Europe. This was cited by the agency as evidence of the possibility of an “unholy alliance between South American narco-terrorists and Islamic extremists.” This despite the fact that there were never any actual South American narco-terrorists involved and DEA agents had set the whole thing up themselves. This case was also used in Congress to argue for tougher immigration rules—in this case, more scrutiny of travelers from Venezuela.

Again, it’s not outside the realm of possibility that someone planning an attack could sneak over the border. But the scant reports of terrorists trying to enter the U.S. illegally are far outnumbered by the numerous well-documented plots by native-born Americans, naturalized citizens, and foreigners entering the country with valid passports and visas.

# 1NR

## Econ

#### Antitrust doesn’t solve drug prices – empirics prove

Christine S. Wilson & David A. Hyman, 20. Wilson is commissioner of Federal Trade Commission. David A. Hyman is Scott K. Ginsburg Professor of Health Law & Policy at Georgetown University School of Law and the co-author of “Overcharged: Why Americans Pay Too Much For Health Care.” “Pharma pricing is a problem, but antitrust isn't the (only) solution.” July 10, 2020. https://thehill.com/blogs/congress-blog/healthcare/506763-pharma-pricing-is-a-problem-but-antitrust-isnt-the-only

A narrower approach entails banning nearly all pharmaceutical mergers, as [advocated by the Open Markets Institute](https://openmarketsinstitute.org/wp-content/uploads/2019/12/WhitePaper_DrugPrices_Bluhm.pdf). Two FTC commissioners seem amenable. Two months ago, they voted to reject AbbVie’s acquisition of Allergan, and one proposed to unleash the Inspector General on FTC staff for daring to recommend to the Commission that pharma mergers be permitted to proceed. A few months earlier, the same two commissioners voted to reject Bristol-Myers Squibb’s acquisition of Celgene, even though they acknowledged the proposed settlement, involving the biggest divestiture in merger review history, resolved every antitrust problem the FTC identified. As current and former FTC officials, we believe these proposals represent a flawed approach. The notion that the FTC should prevent mergers absent evidence of an antitrust violation is deeply misguided – and jeopardizes the FTC’s impressive winning streak based on the many cases it *has*brought. During the past five years, the Commission has challenged 14 pharmaceutical mergers and required companies to divest 131 drugs. Beyond mergers, in 2013 the FTC won a landmark victory at the Supreme Court in [FTC V. Actavis](https://www.supremecourt.gov/opinions/12pdf/12-416_m5n0.pdf), essentially eliminating anticompetitive patent litigation settlements. [And in January, the FTC sued Vyera Pharmaceuticals](https://www.ftc.gov/news-events/press-releases/2020/01/ftc-ny-attorney-general-charge-vyera-pharmaceuticals-martin#:~:text=The%20Federal%20Trade%20Commission%20has,life%2Dsaving%20drug%2C%20Daraprim.&text=%E2%80%9CVyera%20kept%20the%20price%20of,illegally%20boxing%20out%20the%20competition.%E2%80%9D) and “pharma bro” Martin Shkreli. These efforts result in massive savings for consumers and taxpayers; just ending reverse payments in patent litigation settlements [saves](https://www.ftc.gov/sites/default/files/documents/reports/pay-delay-how-drug-company-pay-offs-cost-consumers-billions-federal-trade-commission-staff-study/100112payfordelayrpt.pdf) $3.5 billion each year. Still, drug prices continue to rise, especially for new drugs debuting at prices once considered unimaginable. For example, Zolgensma, a gene therapy for treating spinal muscular atrophy, has a [list price of $2.1 million](https://www.npr.org/sections/health-shots/2019/05/24/725404168/at-2-125-million-new-gene-therapy-is-the-most-expensive-drug-ever). Cancer drugs are so expensive that oncologists talk about “[financial toxicity](https://www.cancer.gov/about-cancer/managing-care/track-care-costs/financial-toxicity-pdq)” as a side effect of treatment. This is a particularly knotty problem for the elderly who receive health care coverage through Medicare and have been hard hit by COVID-19. The government is prohibited from using competitive bidding or direct negotiation when sourcing drugs for Medicare Part B — those administered by medical professionals. So drugmakers name their price and the federal government must pay. Medicare Part D operates under a different model – companies use formularies to push down prices for outpatient drugs. Even that model falls short for drugs that do not yet face competition, and Part D is [projected](https://www.cbo.gov/system/files/2019-05/51302-2019-05-medicare_0.pdf) to cost more than $88 billion in 2020. Market exclusivity on so-called biologics like vaccines and insulin often outlasts patent protection, given the technological challenges in creating bioequivalent generics known as biosimilars. Incumbents often compound this problem by restricting distribution and withholding samples from potential competitors.

## Innovation

#### Capitalism hinders meaningful innovation – only a risk the alt solves

Bee 18 [Vanessa A. Bee. Senior Litigation Counsel at the Consumer Financial Protection Bureau with a JD from Harvard Law. Innovation Under Socialism. 10-24-2018. <https://www.currentaffairs.org/2018/10/innovation-under-socialism> ]

The profit motive and exclusive proprietary rights are central to capitalist innovation. By law, private firms must prioritize the interest of their shareholders, which tends to be interchangeable with making as much money as possible. Accordingly, investments in any stage of the innovative process must eventually produce profits. To maximize profit, private firms jealously guard the value of their invention through regulations and restrictive contracts. Statutes and regulations help protect their trade secrets. The U.S. Patent and Trademarks Office routinely grants them utility and design patents that “exclude others from making, using, offering for sale, or selling … or importing the invention” for 20 years after the patent is issued. They enforce licensing agreements that can limit the uses and dissemination of all or part of their inventions. To further frustrate efforts to innovate on the back of their inventions, private firms subject their former employees to non-compete agreements that can severely limit them from using their knowledge and skills on competing projects for a period following their departure. Breaches carry dire consequences like expensive lawsuits, big money judgments, and other enormous hassles.

## Notice + Comment CP

#### The cp solves 100% of the aff- Public engagement is key to prevent monopoly power---participation is the only way to promote competition and decenter dominant firms.

Rohit Chopra and Lina Khan 20. Rohit Chopra, Commissioner, Federal Trade Commission. And Lina M. Khan, Academic Fellow, Columbia Law School; Counsel, Subcommittee on Antitrust, Commercial, and Administrative Law, US House Committee on the Judiciary; former Legal Fellow, Federal Trade Commission. “The Case for "Unfair Methods of Competition" Rulemaking”. The University of Chicago Law Review , Vol. 87, No. 2 (March 2020), pp. 357-380. https://www.jstor.org/stable/10.2307/26892415

Lastly, the current approach deprives both the public and market participants of any real opportunity to participate in the creation of substantive antitrust rules.23 The exclusive reliance on case-by-case adjudication leaves broad swaths of market participants watching from the sidelines, lacking an opportunity to contribute their perspective, their analysis, or their expertise, except through one-off amicus briefs.24 Nascent firms and startups are especially likely to be left out—despite the vital role they play in the competition ecosystem—given that they do not comprise a significant portion of the parties represented in litigated matters, and they usually lack the resources to engage in amicus activity. Furthermore future entrants, whose interests should be carefully considered in all aspects of competition law and policy, have no voice.

Firms, entrepreneurs, workers, and consumers across our economy vary wildly in their experiences and perspectives on market conduct. Enforcement and regulation of business conduct can more successfully promote competition when it incorporates more voices and evidence from across the marketplace.

The ambiguity of the laws, the administrative and resource burdens of enforcing them, and the exclusivity of the current process tend to advantage incumbents and suppress market entry. For example, when courts disagree with one another on the legality of particular conduct, new entrants are likely to eschew the practice, since the threat of litigation could prove fatal at an early stage. Incumbents, by contrast, will be more likely to conduct a cost-benefit analysis of engaging in a potentially unlawful practice, since they are likely to have higher tolerance for protracted litigation and deeper pockets to fund it. Continued ambiguity and complexity also create business opportunities for lawyers, economists, and lobbyists, who effectively profit from the lack of clarity.

#### The turn outweighs solvency---process is more important than law.

Ganesh Sitaraman 18. the Co-founder and Director of Policy for the Great Democracy Initiative. He is also a professor of law at Vanderbilt University. Sitaraman served as policy director to Senator Elizabeth Warren during her Senate campaign, and then as her senior counsel in the U.S. Senate. “Taking Antitrust Away from the Courts: A Structural Approach to Reversing the Second Age of Monopoly Power”. https://ir.vanderbilt.edu/xmlui/bitstream/handle/1803/9447/Taking%20Antitrust%20Away%20from%20the%20Courts.pdf?sequence=1&isAllowed=y

Reversing the second age of monopoly power requires a complete re-thinking of both what antimonopoly law should achieve and how it should be enforced. This includes reforming the ideology that drives antimonopoly policy and the substance of the laws, as well as rethinking the structure of antitrust agencies and the role of other arms of government in promoting antimonopoly policy. There is an emerging body of work on the substance of antitrust laws, but little thought has been given to how the structure of antitrust policymaking and enforcement should change. Even the best antitrust laws will fail if we do not reverse the unaccountable and diffuse system of implementation and enforcement.

This report offers a blueprint for reforming the structural aspects of antitrust lawmaking. The central philosophy behind these reforms is to replace the common-law, court-centered process of making antitrust policy with a politically-accountable process that relies on expertise and transparent, reasoned decision-making through an agency. Taking antitrust away from the courts means reforming the structure of the antitrust agencies and clarifying the authorities those agencies have. Power and accountability should be aligned, as is the case in most other parts of the Executive Branch, and the agency that makes competition policy should have both the authority to act and should be held more readily accountable for its actions.

#### Participation must be prior and considered---its key to legitimacy of rules and participation.

Rohit Chopra and Lina Khan 20. Rohit Chopra, Commissioner, Federal Trade Commission. And Lina M. Khan, Academic Fellow, Columbia Law School; Counsel, Subcommittee on Antitrust, Commercial, and Administrative Law, US House Committee on the Judiciary; former Legal Fellow, Federal Trade Commission. “The Case for "Unfair Methods of Competition" Rulemaking”. The University of Chicago Law Review , Vol. 87, No. 2 (March 2020), pp. 357-380. https://www.jstor.org/stable/10.2307/26892415

And third, rulemaking would enable the Commission to establish rules through a transparent and participatory process, ensuring that everyone who may be affected by a new rule has the opportunity to weigh in on it, granting the rule greater legitimacy.49 APA procedures require that an agency provide the public with meaningful opportunity to comment on the rule’s content through the submission of written “data, views, or arguments.”50 The agency must then consider and address all submitted comments before issuing the final rule. If an agency adopts a rule without observing these procedures, a court may strike down the rule.51

This process is far more participatory than adjudication. Unlike judges, who are confined to the trial record when developing precedent-setting rules and standards, the Commission can put forth rules after considering a comprehensive set of information and analysis.52 Notably, this would also allow the FTC to draw on its own informational advantage—namely, its ability to collect and aggregate information and to study market trends and industry practices over the long term and outside the context of litigation.53 Drawing on this expertise to develop rules will help antitrust enforcement and policymaking better reflect empirical realities and better keep pace with evolving business practices.

#### Admin law is precedent setting---genuine consultation now becomes inalienable---the plan and perm signal nullification is legitimate.

Giulio Napolitano 14. Professor of Administrative Law, Law Department, University of Roma Tre. "Conflicts and strategies in administrative law". OUP Academic. 8-1-2014. https://academic.oup.com/icon/article/12/2/357/710357

Conflicts in administrative law are not a single-battle war. Every move of an actor responds to the moves made by others. That’s why administrative law is a repeated interactions game. Each move is incremental and path-dependent. Devices and mechanisms set up in the previous round cannot be easily and fully dismantled.

Let’s take the example of independent authorities. Once they are established in order to insulate the implementation of specific policies from the influence of the government or from the pressure from local interests, it becomes difficult to abolish them: even when the rule-making power comes back into the hands of national legislators or executives. As a consequence, reactions must be fine-tuned and sophisticated. The preferred solutions will be, for instance, the transfer of a specific power from the regulatory agency to the executive, or the submission of some sensible prerogatives of the independent body to ex ante directives or ex post approval by a political actor.36

Further, procedural rights are difficult to withdraw: even more than organizational devices. Once they have been recognized, even if sometimes for purely instrumental reasons of fire-alarm signaling, they become sanctified as inalienable rights.37 That’s why adjustments and reactions must be interstitial: the right to be heard and other prerogatives of private actors cannot be nullified. Changing time limit for comments, enlarging or restricting addressees of participatory rights, shifting the burden of proof from the acting agency to private parties, and vice-versa, are among the most preferred solutions.

#### Perms sever the mandate of the plan---counterplan doesn’t fiat antitrust law but recommends a rule---process could result in no change---makes the affirmative conditional and a moving target.

[IF NOT READ YET]

Justia 21. "Notice and Comment Process for Agency Rulemaking". Updated: May 2021. Accessed: 8/26/2021. https://www.justia.com/administrative-law/rulemaking-writing-agency-regulations/notice-and-comment/

Agencies must consider all “relevant matter presented” during the comment period, and they must respond in some form to all comments received. They are not, however, required to take any specific action with regard to the rule itself. The publication of the final rule must include analyses of any relevant data or other materials submitted by the public and a justification of the form of the final rule in light of the comments the agency received.

If opposition to the proposed rule is exceptionally large or strident, the agency may decide to make substantial modifications and start the process over by publishing a new notice and opening a new comment period. Otherwise, the agency will publish its final findings along with the rule, which is codified in the Code of Federal Regulations.

#### Severs certainty and immediacy

#### “Resolved”---means certain.

Webster’s Revised Dictionary 1996 ((1.) RESOLVED MEANS “HAVING A FIXED PURPOSE; DETERMINED; RESOLUTE”)

#### “Should”---mandates certainty and immediacy.

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](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker3fn14) 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](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker3fn16)  [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](http://www.oscn.net/applications/oscn/deliverdocument.asp?box1=802&box2=P.2D&box3=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](http://www.oscn.net/applications/oscn/deliverdocument.asp?box1=106&box2=U.S.&box3=360), 365, 1 S.Ct. 336, 337, 27 L.Ed. 201 (1882).

#### “Substantial”---means full not merely possible.

Words & Phrases 64 (40 W&P 759)

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

#### “Prohibitions”---eliminates all possibility that the activity is legal---the counterplan is a restriction.

PEDIAA 15. “Difference Between Prohibited and Restricted”. https://pediaa.com/difference-between-prohibited-and-restricted/

Main Difference – Prohibited vs. Restricted

Prohibited and Restricted are used in reference to limitations and prevention. However, they cannot be used interchangeably as there is a distinct difference between them. Prohibited is used when we are talking about an impossibility. Restricted is used when we are talking about something that has specific conditions. The main difference between prohibited and restricted is that prohibited means something is formally forbidden by law or authority whereas restricted means something is put under control or limits.

What Does Prohibited Mean

Prohibited is a variant of the verb prohibit. Prohibited can be taken as the past tense and past participle of prohibiting as well as an adjective. Prohibited means that something is formally forbidden by law or authority. When we say ‘smoking is prohibited’, it means that smoking is not allowed at all, there are no exceptions. Prohibit indicates an impossibility. This gives out the idea that it is not at all possible under any condition or circumstance. The term Prohibited goods is used to refer to items that are not allowed to enter or exit certain countries. For example, the government of South America lists Narcotic and habit-forming drugs in any form, Poison and other toxic substances, Fully automatic, military and unnumbered weapons, explosives and fireworks as prohibited goods. The following sentences will further explain the use of prohibited.

Inter-racial marriages were not prohibited by the government.

He was proved guilty of using prohibited substances.

No one was allowed to enter the grounds; entry was prohibited.

Prohibited imports are the items that are not allowed to enter a country.Difference Between Prohibited and Restricted

What Does Restricted Mean

Restrict means to put under limits or control. Restricted can be either used as the past tense of restrict or as an adjective meaning limited. When we say something is restricted, it means that limits or conditions have been added to it. It does not mean that it is completely impossible. For example, Restricted goods are allowed to enter or exit a country under certain circumstances. A written permission can help you to import or export that item. Likewise, a restricted area does not mean that people are not allowed to enter; it means that a special permission is required to enter the place. Restricted information refers to information that are not disclosed to the general public for security purposes.

The new regulations restricted the free movement of people.

The club was restricted to its members and their family members.

Only the highest military personnel had access to the restricted area.

American scientists had only restricted access to the area.Main difference - Prohibited vs Restricted

Difference Between Prohibited and Restricted

Meaning

Prohibited means banned or forbidden.

Restricted means limited in extent, number, scope, or action

Possibility

Prohibited means that there is no possibility of doing something.

Restricted means that something can be done under certain conditions.

Adjective

Prohibited functions as an adjective derived from prohibit.

Restricted functions as an adjective derived from restrict.

Past tense

Prohibited is the past tense and past participle of prohibit.

Restricted is the past tense and past participle of restrict.

#### “Anticompetitive”---competition policy doesn’t go through notice and comment.

Spencer Weber Waller 19. John Paul Stevens Chair in Competition Law and Director, Institute for Consumer Antitrust Studies, Loyola University Chicago School of Law. “Antitrust and Democracy”, 46 FLA. St. U. L. REV. 807 (2019).

The question of judicial deference to a FTC decision is a more complicated matter. The FTC is an independent regulatory agency established by Congress with powers over both consumer protection and competition matters. 2 00 The FTC Act prohibits both unfair methods of competition, and unfair and deceptive acts and practices. 2 0 1 The FTC also enforces a wide variety of other statutes that relate to consumer protection and privacy.202 The FTC engages in notice and comment rulemaking in consumer protection, but not in competition matters. 2 03

#### “Expansion” to “antitrust law” must be binding and immediate.

Anu Bradford and Adam Chilton 19. Anu Bradford, Henry L. Moses Professor of Law and International Organization, Columbia Law School. Adam S. Chilton, Assistant Professor of Law and Walter Mander Research Scholar. “Competition Law Gone Global: Introducing the Comparative Competition Law and Enforcement Datasets.” Codebook for Version 1. “Comparative Competition Law Dataset”. “CCL\_Law\_Data\_Ver1.dta”. Journal of Empirical Legal Studies 16(2): 411-443.

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| --- | --- |
| Threshold for a “law” that triggers coding | Code all laws, regulations, and constitutional provisions on competition that appear to be legally binding. Ask yourself whether the competition agency could rely on this particular document as a legal basis for bringing an enforcement action or reaching a certain decision. If the document is a mere notice of enforcement priorities, a white paper on planned (future) changes in remedies, or a guideline elaborating on how the agency approaches the questions of market definition, etc., exclude the document from the set of laws that you code. As the name of the document (Regulation v. Guideline) is not always conclusive in revealing its legal status, this may require you to read through the text of a document, or do some additional background investigation to determine whether it should be coded. If you are uncertain, reach out to Lead Coders for guidance – this can be very tricky to determine, particularly as you get used to the survey instrument and coding procedure. |

#### “Expand the scope”---doesn’t occur until a case is won.

Gibson Dunn 21. Lawfirm. Gibson Dunn partner Howard S. Hogan served as an expert witness for 1-800 Contacts. "Second Circuit Issues Important Ruling on Trademark Settlements and Antitrust/IP Interface". Gibson Dunn. 6-14-2021. https://www.gibsondunn.com/second-circuit-issues-important-ruling-on-trademark-settlements-and-antitrust-ip-interface/

Finally, the decision in 1-800 Contacts also serves as a reminder that, in an era in which commentators are encouraging more aggressive and novel antitrust enforcement, the federal judiciary remains the ultimate arbiter of federal antitrust policy. Enforcers seeking to expand the scope of U.S. antitrust law must do more than bring novel cases—they must also prove their cases with hard facts in a court of law.

#### Optimal policymaking---comparison of policymaking settings is key.

C. Scott Hemphill 09. Associate Professor and Milton Handler Fellow, Columbia Law School. “An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition”. Columbia Law Review. https://poseidon01.ssrn.com/delivery.php?ID=588125096113080096106002107108097121035031077054017013065114020077027104102087029081118107106002104019004112030074020109103121006086087059083005011081071001076076040034056104112070118104110067012020072022093015084126127025065066072121017026087065093&EXT=pdf&INDEX=TRUE

B. Antitrust Rulemaking

The previous section advocates a focused increase in the FTC’s “competition policy research and development.”174 If the FTC accepted the suggestion, it would eventually reach a firm, empirically grounded conclusion about the optimal policy for side deals, and thus either confirm or reject the conclusion reached in Part II. That conclusion could be deployed in a variety of policymaking settings, including litigation brought by the Agency, amicus practice, and advocacy for congressional legislation. This section considers a further possibility, that a comprehensive aggregate study of settlement practice could form the basis for substantive policymaking by the Agency in the form of rulemaking.

There is of course an enormous literature on the choice of courts versus agencies, adjudication versus rulemaking, and rules versus standards, and this Article does not engage the full complexity of those debates. My goal here is simply to suggest how the virtues of an aggregate perspective on settlement practice shift the balance in a way that favors agency rulemaking. In other words, the settlement issue highlights certain advantages of moving away from a court-centered model of antitrust law.

#### Literature---rulemaking is an enormous debate---deleting it is unpredictable and anti-educational.

Rohit Chopra and Lina Khan 20. Rohit Chopra, Commissioner, Federal Trade Commission. And Lina M. Khan, Academic Fellow, Columbia Law School; Counsel, Subcommittee on Antitrust, Commercial, and Administrative Law, US House Committee on the Judiciary; former Legal Fellow, Federal Trade Commission. “The Case for "Unfair Methods of Competition" Rulemaking”. The University of Chicago Law Review , Vol. 87, No. 2 (March 2020), pp. 357-380. https://www.jstor.org/stable/10.2307/26892415

We agree that relying solely on adjudication to define the substance of § 5 has generated persistent ambiguity. However, relying on courtroom battles to create precedents that set expectations for the marketplace is not the only vehicle through which the Commission can establish what conduct constitutes an “unfair method of competition.” The Commission has in its arsenal a far more effective tool that would provide greater notice to the marketplace and that is developed through a more transparent and participatory process: rulemaking. Through engaging in rulemaking, the Commission could define “unfair methods of competition” through processes established by the Administrative Procedure Act38 (APA).39

There is an enormous body of literature on the choice between adjudication and rulemaking, and this Essay does not seek to fully address the various trade-offs.40 Instead, our goal is to reflect on the current state of antitrust enforcement and consider ways to address the ambiguity, burdens, and democratic deficiency that we discuss above.

#### Topic Education---mechanism is the most important question---sidelining it ruins antitrust policy.

Alison Jones and William E. Kovacic 20. Alison Jones, King’s College London, London, United Kingdom. William E. Kovacic, King’s College London, George Washington University, and United Kingdom Competition and Markets Authority, "Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy". SAGE Journals. 3-20-2020. https://journals.sagepub.com/doi/10.1177/0003603X20912884 https://journals.sagepub.com/doi/10.1177/0003603X20912884

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.

#### 6---Ground---desirability of antitrust rulemaking is debated.

Rohit Chopra and Lina Khan 20. Rohit Chopra, Commissioner, Federal Trade Commission. And Lina M. Khan, Academic Fellow, Columbia Law School; Counsel, Subcommittee on Antitrust, Commercial, and Administrative Law, US House Committee on the Judiciary; former Legal Fellow, Federal Trade Commission. “The Case for "Unfair Methods of Competition" Rulemaking”. The University of Chicago Law Review , Vol. 87, No. 2 (March 2020), pp. 357-380. https://www.jstor.org/stable/10.2307/26892415

Given that the FTC has largely neglected this tool, some may question the Commission’s authority to issue competition rules and the legal status these rules would have.54 Indeed, a common misconception is that this authority is extremely limited because FTC rulemaking is subject to the extensive hurdles posed by the Magnuson-Moss Warranty–Federal Trade Commission Improvements Act55 (“Magnuson-Moss”). In reality, Magnuson-Moss governs only rulemakings interpreting “unfair or deceptive acts or practices.”56 For rules interpreting “unfair methods of competition,” the FTC has authority to engage in participatory rulemaking pursuant to the APA. Several antitrust scholars have affirmed this authority, and the Appendix lays out further background on and discussion of it.57

Others acknowledge the authority exists but assert that antitrust law is ill suited for rulemaking because antitrust is a common law enterprise. It is true that, as a descriptive matter, antitrust enforcement has proceeded almost exclusively through adjudication.58 But the idea that this approach is normatively desirable is neither clear nor persuasive. Indeed, relying solely on adjudication has certainly not delivered a system with sufficient clarity, efficiency, or transparency.59

#### Less than 60 days.

Prepared by the Office of the Federal Register. “A Guide to the Rulemaking Process”. https://www.federalregister.gov/uploads/2011/01/the\_rulemaking\_process.pdf

What is the time period for the public to submit comments?

In general, agencies will specify a comment period ranging from 30 to 60 days in the “Dates” Section of the Federal Register document, but the time period can vary. For complex rulemakings, agencies may provide for longer time periods, such as 180 days or more. Agencies may also use shorter comment periods when that can be justified.

#### Counterplan solves clarity and certainty.

Rohit Chopra and Lina Khan 20. Rohit Chopra, Commissioner, Federal Trade Commission. And Lina M. Khan, Academic Fellow, Columbia Law School; Counsel, Subcommittee on Antitrust, Commercial, and Administrative Law, US House Committee on the Judiciary; former Legal Fellow, Federal Trade Commission. “The Case for "Unfair Methods of Competition" Rulemaking”. The University of Chicago Law Review , Vol. 87, No. 2 (March 2020), pp. 357-380. https://www.jstor.org/stable/10.2307/26892415

Rulemaking would advance clarity and certainty about what types of conduct constitute—or do not constitute—an “unfair method of competition.”64 Commission studies of specific industries and business practices would guide which practices the FTC should use rulemaking to address. Indeed, as an enforcer and regulator across industries, the Commission is uniquely positioned to identify practices that it determines are anticompetitive. Below we offer two other considerations that could weigh in favor of FTC rulemaking.

#### AND The first plank of the counterplan creates deference.

Justin Hurwitz 14. Assistant Professor of Law, University of Nebraska College of Law. “Chevron and the Limits of Administrative Antitrust.” 76 U. PITT. L. REV. 209.

The argument for deference is even stronger when we consider outside references. The statutory history has consistently demonstrated a congressional intent to grant the FTC broad discretion to define the scope of Section 5 and, in particular, that the scope of Section 5 is broader than that of the antitrust laws. 7 E Section 5 was enacted in response to concerns that the courts had interpreted the antitrust laws too narrowly;' 73 it was deliberately drafted with language that had not previously been considered by the courts.174 When the Court imposed an overly narrow construction on the statute in the 1950s, Congress amended the statute to overcome that narrowing interpretation. 1 75

#### Means the courts must defer

Rebecca Haw 11. Climenko Fellow and Lecturer on Law, Harvard Law School. J.D., Harvard Law School, 2008; M. Phil, Cambridge University, 2005; B.A., Yale University, 2001."Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal." Texas Law Review, vol. 89, no. 6, May 2011, p. 1247-1292. HeinOnline.

A change in the FTC's statutory authority could change this. Congress could mandate Chevron deference for the agency's interpretation of antitrust norms by amending the Sherman Act to confer primary authority over its interpretation to the FTC. The shift in legal regime might seem subtle since the FTC already has antitrust rulemaking authority (if weak and interstitial) under a different statute. But giving the FTC dominion over the Sherman Act, American antitrust's constitution, would mean taking the task of largescale policy making out of the hands of an inexpert Court whose best access to economic arguments are amicus briefs and placing it in the hands of an institution designed to deal with technical scientific matters thoroughly and transparently.

#### Only the CP makes antitrust democratic---plan removes transparency and gets circumvented.

Spencer Weber Waller 19. John Paul Stevens Chair in Competition Law and Director, Institute for Consumer Antitrust Studies, Loyola University Chicago School of Law. “Antitrust and Democracy”, 46 FLA. St. U. L. REV. 807 (2019).

Democratic decision making also involves an open and transparent system where the parties and the public can determine what is occurring and participate as appropriate. In the United States, a complaint to either of the federal competition agencies has no legal significance. The agencies have complete discretion on how to proceed with the information and when, or if, to take any further action. 120 No agency response is required, and the complaining parties have no legal standing to participate in any resulting investigation or any right to challenge a decision not to proceed.

Similarly, the U.S. agencies have discretion on how to proceed if they choose to conduct an investigation. They must initially decide whether to open a preliminary investigation and whether to treat the matter as a potential civil or criminal offense. 121 They eventually may choose to bring a case in court or to close the investigation without taking any action.122 There is no requirement that the agency explain its decision to close a matter, although the agencies do so from time to time in varying degrees of detail. 1 23 Outside parties cannot challenge a decision not to proceed regardless of whether they were the complaining party, provided information to the agency, or were otherwise affected by the decision.

#### Democratic decision-making is key for long-term sustainability.

Kevin Casas-Zamora 21. Non-resident senior fellow with the Peter D. Bell Rule of Law Program at the Inter-American Dialogue, Secretary-General of the International Institute for Democracy and Electoral Assistance. “Why democracy is the key ingredient to battling climate change.” 6/29/21. <https://www.euronews.com/green/2021/06/29/why-democracy-is-the-key-ingredient-to-battling-climate-change>

What are the vices to democracy?

This narrative is not concocted out of thin air. Democracies do suffer from vices when it comes to slow-burning crises like global warming.

Voters and politicians have short attention spans. Balances of power mean reforms can be held hostage to obstinate US Senators or oil lobbyists. Science can play second fiddle to voters if it entails higher taxes - France’s yellow vest protests, sparked by fuel price rises, are a case in point.

And yet, despite all this, the facts are clear - 9 out of the 10 top performers in the 2021 Climate Change Performance Index are democracies.

Sweden tops the list of 57 countries. China is 30th.

The reasons for this are not hard to fathom. Democracies allow for the free flow of information that enables policy makers to debate and find solutions, and for civil society to mobilise.

It is no coincidence that youth campaigner Greta Thunberg helped spark a global movement from a lone street demonstration in Sweden, one of the world’s top performing democracies.

Democracies are more effective against climate change for the same reasons that they don’t experience famines, as Nobel Laureate Indian economist Amartya Sen suggested long ago - because in allowing freedom of expression, a vibrant civil society, regular elections and the workings of checks and balances, they increase the likelihood that crises will be met and destructive policies corrected.

Democracy is not simply elections - it is the often chaotic workings of myriad institutions and groups as well as a culture of open debate, where climate reform is nudged along by courts, free media, parliaments, and public protests. Democracy’s most powerful weapon against the challenges of this century is its ability to self-correct.

And then there is the capacity of democratic systems to forge the social consensus required for long-term transformations to be sustainable. We know this story - participatory decision-making may be slower than executive decrees, but almost always yields outcomes that are more legitimate and accepted by society, and hence more durable.

This is vital for climate change. Decarbonisation is not something governments do by fiat, though act they must - it is something societies as a whole must do by conviction. Consumer habits will need to change, from reducing air travel to adjusting diets. Trillions of dollars will have to be invested in transforming the sources of energy that fuel economies.

#### Authoritarianism causes global wars---multiple flashpoints escalate.

Shashank Joshi 18. Senior Policy Fellow for International Affairs. “Renewing the Centre Authoritarian Challenges to the Liberal Order”. 6-21-2018. https://institute.global/insight/renewing-centre/authoritarian-challenges-liberal-order

What does this mean for democracies? Autocracies present a series of individual challenges to their local rivals: Russia to the Baltic states, China to Taiwan and North Korea to South Korea, for instance. But the problem they pose to world order is larger than the sum of these issues. It is, rather, an ideological and systemic challenge that will reshape the norms of international relations. Will these norms reflect liberal principles such as openness, rule following and individual rights or competing authoritarian ones such as secrecy, arbitrariness and state power?

This competition over norms will influence not only Western liberal democracies but also the wider multipolar order that is emerging. In regions with weak political institutions or nascent democracies—parts of Africa, South and Southeast Asia, and East and Southeast Europe—the regional order is especially malleable. If authoritarian states can shape these regions in their own image, this bolsters their global standing and puts liberal democracy further on the back foot. This argument does not require an acceptance that democracies always act in liberal ways or adhere to a single and consistent set of norms. Authoritarian states also differ widely in levels of openness and repression, the balance between civilian and military authority, and civil versus political freedoms.11 Yet despite this variety, there remain systematic differences between democratic and authoritarian states in attitude, inclination and values—and this has important foreign policy implications.

TYPES OF AUTHORITARIAN CHALLENGE

The authoritarian challenge to liberal democracy can be broken down into six categories.

The Military Challenge

Authoritarian states represent the most serious military threat to the democracies of Europe and Asia. Russia has dissolved existing norms regarding the use of force, conducting in Europe the first annexation of territory and the first use of chemical weapons since the Second World War.12 Russia’s use of hybrid warfare, which prioritises secrecy, deception and political warfare, presents a particular danger to rule-bound open societies.13 China, though more cautious, has also demonstrated increasingly assertive behaviour in the South China Sea, including the militarisation of reclaimed islands, the rejection of arbitration efforts and an escalation of the country’s border dispute with India.14

The military challenge posed by authoritarian states is not a quirk of the past few years. Russian and Chinese behaviour is rooted in their resentment of the Western order, ambition for great power status and fear of Western power.15 All three of these drivers are shaped by these countries’ authoritarian political systems. The best available scholarship continues to show that democracies enjoy more peaceful relations with other democracies than with autocracies, suggesting that authoritarian states are intrinsically more likely to be threatening.16 Among states that ratify treaties governing the laws of war, democracies are also more likely to comply with these rules than autocracies are.17

The Coercion Challenge

Military threats are the most serious form of coercion, but more common is the use of broader, often more subtle, political and economic pressure to intimidate and cajole liberal democracies into changing their behaviour. Authoritarian countries use coercion to secure specific interests, such as China’s successful embargo and isolation of Norway after the Nobel Peace Prize was awarded to a dissident in 2010, or to influence a country’s strategic orientation, such as Russia’s use of intimidation to scare neutral countries, such as Sweden and Finland, away from the North Atlantic Treaty Organisation (NATO). All countries use coercion; consider Western sanctions on Iran and Russia. But autocrats typically do so to counter threats to their rule or to uphold spheres of influence abroad, both of which require confronting and undercutting democracy in other states.18

For instance, China’s use of its market power to coerce academic publishers into curbing access to scholarship and technology firms into censoring their products points to a gradual and insidious encroachment on free speech; so does the increasing frequency with which international firms feel compelled to apologise to China for ideological infractions, such as acknowledging Taiwan’s nationhood or publishing noncompliant maps.19 The growth of China’s strategic investments and Russia’s deepening control over energy supplies represent particular European vulnerabilities, both of which could be used for future coercion for a variety of purposes.20

Other examples of authoritarian coercion include Turkey’s campaign to put pressure on dissident groups abroad, Iran’s efforts to target the Iran-based families of critical foreign media outlets and Russia’s assassinations in Europe.21 Turkey has even threatened to conduct operations against Western rating agencies that have done as little as downgrade the country’s credit score.22 Such actions will all have similar long-term chilling effects, unless these campaigns are blunted.

The Influence Challenge

In addition to overt coercion, authoritarian states deploy more subtle means to reshape the intellectual climate of democracies in their favour. One tactic is to cultivate sympathetic intellectual and political networks through open or clandestine means, including the funding of educational or research institutes, and the intensive use of political lobbying to influence political leaders.23 Another is to suppress negative press while rewarding and encouraging more pliant coverage, through selective access and other means. Yet another is the development of alternative media channels to spread propaganda and sow confusion.24

Liberal democratic states are by definition open. This makes them especially vulnerable to authoritarian influence campaigns, which not only distort national debates about how to respond to that very challenge but also undermine the respect for information and faith in objective truth on which the proper functioning of democracy depends. Influence operations exploit and compound the problem of declining trust in news media, with levels of trust well below 50 per cent in the United Kingdom (UK), below 40 per cent in the United States (US) and at 30 per cent in France.25 Russia’s use of state-controlled print and broadcast media to spread disinformation around its military and covert actions is the starkest example.26 At times, Russia has leveraged its influence into direct intervention, notably in its attempted coup in Montenegro in 2016, demonstrating how these different types of challenges—physical and ideological—can meld together.27

China has pursued a less provocative, if no less troubling, approach.28 Beijing’s state-controlled media outlets are growing rapidly and increasing their footprint in Western democracies.29 There is mounting evidence of the growing propaganda and influence activity of China’s United Front Work Department, the large role of Beijing’s state-controlled Confucius Institutes on foreign university campuses, and the increasing penetration of paid-for pro-Chinese content such as editorial partnerships or advertorials in respectable print outlets in Europe and the United States.30 Authoritarian states in the Middle East have used similar strategies, through overt channels like Qatar’s Al Jazeera and more clandestine means.31Smaller regimes typically have fewer resources and narrower ambition, but can still have region-wide impact: allies of Hungarian President Viktor Orbán have invested in media outlets of nearby countries, like Slovenia, supporting like-minded candidates there.32

The Disruption Challenge

Military threats, coercion and influence tend to be aimed at changing behaviour in specific ways, often through particular policies. But authoritarian states also target liberal democracies in a broader, less purposeful way. Authoritarian powers seek to weaken democratic rivals and alliances to undermine the ideological appeal of open societies, in turn consolidating their own power.

This interference occurs on a spectrum ranging from broad propaganda to cyberattacks to full-blown political subversion.33 Russia’s assault on the 2016 US presidential election and support for extremist political movements in Europe are the most egregious examples of this challenge.34 This approach was in keeping with Russia’s long-standing practice of active measures—the deliberate effort to widen cracks in an adversary’s society.35 The purpose of these interventions is not only to elevate individual candidates or parties, or to bargain over a particular policy, but also to sap confidence in the health of democracy as a whole.

The Spread of Authoritarian Norms

The competition between authoritarian states and liberal democracies plays out not only through their direct interactions but also with respect to wider international norms.

This challenge to norms has two dimensions. One is negative, with authoritarian states arguing that the political and economic difficulties of the West, and the relatively slower growth of non-Western democracies like India, demonstrate the failure of the entire political model. They associate liberal democracy with stagnation, unpredictability and even chaos.

Alongside this attempt to discredit liberal democracy is a parallel effort to displace liberal norms—ones that hinder authoritarian states’ freedom of action, or even threaten their own legitimacy—with alternative ones. As authoritarian states grow more powerful, prosperous and confident, their principles are reflected in their broader foreign policy. These principles include majoritarianism, absolute sovereignty, boundless executive power, historical revisionism and personal rule.36 Authoritarian states become more comfortable with supporting repressive regimes, even in periods of intense violence, less willing to make cooperation conditional on human rights and rule-of-law concerns, and more likely to export the authoritarian behaviours and ideas they practise at home.

These norms can take hold across large areas. Authoritarian-led regional blocs, such as the Shanghai Cooperation Organisation (SCO) or the Eurasian Economic Union (EEU), create space for illiberal cooperation, for instance allowing the extradition of suspects on political grounds that would never be accepted in groupings such as the European Union (EU).37 The Russian-dominated Commonwealth of Independent States (CIS) and the Chinese-led SCO have both created spurious election-monitoring bodies “that endorse fraudulent elections with the aim of clouding the assessments made by established monitoring organizations”—a quintessential example of authoritarian norm setting.38

Authoritarian norm setting can spread through both political and economic projects. China’s Belt and Road Initiative, a flagship set of infrastructure and connectivity projects stretching from Asia to Europe, has empowered strongmen leaders, tilted the civil-military balance in Pakistan away from civilians, saddled low-capacity countries with unsustainable debt, favoured Chinese over local firms or transparent international tendering and paved the way for an expansion of China’s military footprint into new areas.39 The scheme has provoked a backlash from the US, Europe, India and Japan, among others, not only because it embodies unfair economic practices, but also because it squeezes liberal norms—such as transparency and multilateralism—in key regions like the Indian Ocean.

Internationally, at the United Nations (UN), Russia and China have systematically targeted human-rights advocacy by attempting to cut spending for human-rights posts on UN peacekeeping missions, attacking a human-rights cell in the office of the secretary general, and blocking a UN human-rights commissioner from addressing the UN Security Council on Syria.40 More broadly, authoritarian states export their norms not only by selling or transferring individual tools of surveillance, such as cameras and software, but also through entire systems of repression.41

Finally, authoritarian states offer the world an alternative political model to liberal democracy, capitalising on what they portray as the congenital shortcomings of open societies. At the 19th Party Congress of the Chinese Community Party, President Xi Jinping notably presented China as “a new option for nations who want to speed up their development while preserving their independence”.42 China’s model of authoritarian capitalism, contrasted to the low growth and political instability of its Western competitors, makes it harder for democracies to sell their norms to developing countries and can even reinforce disillusionment in the West. Russia’s model of personal rule, ultranationalism and purported defence of traditional Western civilisation appeals to would-be strongmen in Europe and beyond.43

The Cohesion Challenge

Democratic backsliding in the democratic congregation, or among its aspiring members, presents a different sort of challenge. In recent years, Poland and Hungary have exemplified this problem. Their governments have undermined the rule of law, weakened the free press, removed checks and balances, and vilified minorities.44 Among countries queuing up to join the EU, the trends are also worrying. In the Western Balkans, for instance, media freedom and governance have both been eroding.45 This is partly linked to the challenges described above, in the form of Russian disruption, such as a Russian-backed coup attempt in Montenegro, and influence operations, including the spread of Russian propaganda channels.46

This political regression has three major consequences for liberal democracies. First, it undercuts the EU’s claim—to its own citizens, to aspiring members and to the wider world—to embody liberal democratic values. Europe has less credibility in speaking to backsliding states in Asia, Africa or South America when its own members can violate core European values with impunity.

Second, democratic backsliders—particularly those of the populist-nationalist variety—are more likely to advance a view of international relations that prioritises competition and bargaining over liberal solidarity. This cuts at the ideological heart of the European project.

Third, illiberal-minded leaders in Poland and Hungary, as well as in Italy, Austria and even the United States, are more likely to demonstrate affinity for authoritarian powers like Russia.47 This frustrates a common European and Western response. Hungary, for instance, was the lone abstention from a European rebuke of China’s Belt and Road Initiative in late 2017, and blocked a statement on China’s conduct in the South China Sea in 2016.48

Summarising the Challenge

What can we draw from this breakdown of the authoritarian challenge?

First, this is not just a story of Russia and China. While Russian revanchism and China’s extraordinary economic ascendance make them two of the most significant authoritarian powers, it would be a mistake to consider the challenge in these narrow terms. Authoritarian middle powers can exert a larger influence on their region than more distant great powers; Turkey’s impact on the Western Balkans, the Levant and the Persian Gulf is in many respects larger than that of China.49

Second, while it is useful to disaggregate these challenges, they can also flow into one another. Influence operations that spread propaganda and false claims can disrupt national politics, undermine cohesion between allies and function as a coercive threat of more to come.

#### Democracy solves great power war.

Larry Diamond 19. PhD in Sociology, professor of Sociology and Political Science at Stanford University. “Ill Winds: Saving Democracy from Russian Rage, Chinese Ambition and American Complacency,” Kindle Edition

In such a near future, my fellow experts would no longer talk of “democratic erosion.” We would be spiraling downward into a time of democratic despair, recalling Daniel Patrick Moynihan’s grim observation from the 1970s that liberal democracy “is where the world was, not where it is going.” 5 The world pulled out of that downward spiral—but it took new, more purposeful American leadership. The planet was not so lucky in the 1930s, when the global implosion of democracy led to a catastrophic world war, between a rising axis of emboldened dictatorships and a shaken and economically depressed collection of selfdoubting democracies. These are the stakes. Expanding democracy—with its liberal norms and constitutional commitments—is a crucial foundation for world peace and security. Knock that away, and our most basic hopes and assumptions will be imperiled. The problem is not just that the ground is slipping. It is that we are perched on a global precipice. That ledge has been gradually giving way for a decade. If the erosion continues, we may well reach a tipping point where democracy goes bankrupt suddenly—plunging the world into depths of oppression and aggression that we have not seen since the end of World War II. As a political scientist, I know that our theories and tools are not nearly good enough to tell us just how close we are getting to that point—until it happens.